WORLD TRADE ORGANIZATION

WT/DS487/AB/R

4 September 2017

(17-4695)

UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

AB-2016-8

Report of the Appellate Body

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Table of Contents

1 INTRODUCTION 5

2 ARGUMENTS OF THE PARTICIPANTS 8

3 ARGUMENTS OF THE THIRD PARTICIPANTS 9

4 ISSUES RAISED IN THIS APPEAL 9

5 ANALYSIS OF THE APPELLATE BODY 9

5.1 Interpretation of Article 3.1(b) of the SCM Agreement 10

5.2 Whether the Panel erred in its interpretation of Article 3.1(b) of the SCM Agreement 14

5.3 Whether the Panel erred in its application of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analysis in respect of the First Siting Provision 19

5.4 Whether the Panel erred in its application of Article 3.1(b) of the SCM Agreement, or under Article 11 of the DSU, in the context of its ***de jure*** contingency analysis in respect of the Second Siting Provision 21

5.5 Whether the Panel erred in its ***de facto*** contingency analysis under Article 3.1(b) of the SCM Agreement 25

6 FINDINGS AND CONCLUSIONS 33

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ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
aerospace tax measures	The B&O aerospace tax rate and a series of other tax credits or exemptions relating to product development activities, property and leasehold taxes, and sales and use taxes
B&O	business and occupation
B&O aerospace tax rate	B&O tax rate that applies to business activities concerning the manufacture and sale of commercial airplanes
BCI	business confidential information
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ESSB 5952	Engrossed Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2, codified in the ***Revised Code of Washington*** (Panel Exhibit EU-3)
First Siting Provision	ESSB 5952 (Panel Exhibit EU-3), Section 2
GATT 1994	General Agreement on Tariffs and Trade 1994
Panel Report	Panel Report, ***United States – Conditional Tax Incentives for Large Civil Aircraft***, WT/DS487/R
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Second Siting Provision	ESSB 5952 (Panel Exhibit EU-3), Sections 5-6(11)(e)(ii)
Washington	state of Washington
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Canada – Aircraft	Appellate Body Report, ***Canada – Measures Affecting the Export of Civilian Aircraft***, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, ***Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU***, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
Canada – Autos	Appellate Body Report, ***Canada – Certain Measures Affecting the Automotive Industry***, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985
EC and certain member States – Large Civil Aircraft	Appellate Body Report, ***European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft***, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	***European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States***, WT/DS316/RW and Add.1, circulated to WTO Members 22 September 2016 [Panel Report currently under appeal]
US – Anti-Dumping Measures on Oil Country Tubular Goods	Appellate Body Report, ***United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico***, WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, p. 10127

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Short Title	Full Case Title and Citation
US – Carbon Steel (India)	Appellate Body Report, ***United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India***, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Continued Zeroing	Appellate Body Report, ***United States – Continued Existence and Application of Zeroing Methodology***, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Superfund	GATT Panel Report, ***United States – Taxes on Petroleum and Certain Imported Substances***, L/6175, adopted 17 June 1987, BISD 34S, p. 136
US – Tax Incentives	Panel Report, ***United States – Conditional Tax Incentives for Large Civil Aircraft***, WT/DS487/R and Add.1, circulated to WTO Members 28 November 2016

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WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Conditional Tax Incentives for Large Civil Aircraft	AB-2016-8
United States, *Appellant/Appellee* European Union, *Other Appellant/Appellee*	Appellate Body Division:
Australia, *Third Participant* Brazil, *Third Participant* Canada, *Third Participant* China, *Third Participant* Japan, *Third Participant* Korea, *Third Participant* Russia, *Third Participant*	Graham, Presiding Member Servansing, Member Van den Bossche, Member

1 INTRODUCTION

1.1. The United States and the European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, ***United States – Conditional Tax Incentives for Large Civil Aircraft***[1] (Panel Report). The Panel was established on 23 February 2015 to consider a complaint by the European Union[2] with respect to measures taken by the United States concerning certain tax incentives for large civil aircraft.

1.2. Before the Panel, the European Union challenged certain tax-related measures provided by the state of Washington (Washington), as amended by Washington Engrossed Substitute Senate Bill 5952[3] (ESSB 5952), specifically: (i) a reduction in the business and occupation (B&O) tax rate that applies to business activities concerning the manufacture and sale of commercial airplanes (B&O aerospace tax rate); and (ii) a series of other tax credits or exemptions relating to product development activities, property and leasehold taxes, and sales and use taxes – collectively, the "aerospace tax measures".[4] The European Union claimed that these tax incentives are prohibited under Articles 3.1(b) and 3.2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) as subsidies contingent upon the use of domestic over imported goods.[5]

1.3. The European Union identified two "siting" provisions in ESSB 5952 that govern the availability of the challenged tax incentives.[6] The First Siting Provision pertains to all of the aerospace tax measures and states that the tax incentives will take effect "upon the siting of a significant commercial airplane manufacturing program" in Washington.[7] Both parties agreed that the First Siting Provision has been fulfilled in respect of Boeing's 777X aircraft program, and that the challenged tax incentives are therefore in effect.[8] The Second Siting Provision concerns the continued availability of the B&O aerospace tax rate only, and provides that the reduced tax rate will no longer apply if there is a determination by the Washington Department of Revenue "that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program" under the First Siting Provision has been sited outside of Washington.[9]

[1] WT/DS487/R, 28 November 2016.
[2] Request for the Establishment of a Panel by the European Union of 12 February 2015, WT/DS487/2.
[3] Engrossed Substitute Senate Bill 5952, Chapter 2, Laws of 2013 3rd Special Session, 2014 Wash. Sess. Laws 2, codified in the ***Revised Code of Washington*** (ESSB 5952) (Panel Exhibit EU-3). (Panel Report, paras. 2.1 and 7.15)
[4] Panel Report, section 7.3.1.
[5] Panel Report, paras. 7.1 and 7.3.
[6] Panel Report, section 7.3.2.
[7] Panel Report, para. 7.28 (quoting ESSB 5952 (Panel Exhibit EU-3), Section 2).
[8] Panel Report, paras. 7.31 and 7.33.
[9] Panel Report, para. 7.32 (quoting ESSB 5952 (Panel Exhibit EU-3), Sections 5-6(11)(e)(ii)), and para. 7.33.

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1.4. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 28 November 2016, the Panel found that each of the aerospace tax measures at issue constitutes a subsidy within the meaning of Article 1 of the SCM Agreement.[10] The Panel also found that, although the European Union had not demonstrated that any of the aerospace tax measures are ***de jure*** contingent upon the use of domestic over imported goods with respect to the First or Second Siting Provisions in ESSB 5952, whether considered jointly or separately[11], the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under Boeing's 777X aircraft program is a subsidy ***de facto*** contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.[12] Accordingly, the Panel also found that the United States had acted inconsistently with Article 3.2 of the SCM Agreement.[13]

1.5. On 5 December 2016, the Appellate Body received a letter from the European Union referring to an imminent appeal in this dispute, to the ongoing appeal in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** (DS316), and to the anticipated appeal in ***US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EC)*** (DS353). Referring to Rules 16(1) and 16(2) of the Working Procedures for Appellate Review[14] (Working Procedures) and Article 9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the European Union requested that the schedules for these three appeals be harmonized to the greatest extent possible and that the hearings be sufficiently proximate in time, so that a particular matter would not be effectively disposed of in one appeal before the related matter is heard in one of the other appeals. The Chair of the Appellate Body invited the other party in these disputes, the United States, and the third parties to submit comments by 9 December 2016. The United States argued that the European Union's request was not supported by the DSU or the Working Procedures, and would result in delays in the proceedings, but that it remained open to proposals to set deadlines for submissions and dates for oral hearings in a way that would allow the participants and third participants in each dispute to advocate effectively their positions on appeal, and for the Appellate Body to consider fully the issues raised.[15] The participants and third parties were invited to submit additional comments by 16 December 2016. The European Union reiterated its request that any oral hearings in these appeals be sufficiently proximate in time, but noted that it was content to leave it to the Appellate Body to determine what that would mean in practice.[16] By letter dated 22 December 2016, the Appellate Body indicated that it would bear in mind the European Union's request, as well as the comments received, during the appellate proceedings in these three disputes.

1.6. On 16 December 2016, the United States notified the Dispute Settlement Body (DSB), pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal[17] pursuant to Rule 20 of the Working Procedures.

1.7. Also on 16 December 2016, the Appellate Body received a joint letter from the European Union and the United States requesting the Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) in these appellate proceedings. In their letter, the European Union and the United States argued that BCI procedures are needed in these proceedings to avoid the undue risk of detrimental disclosure of particularly sensitive confidential information provided by the United States to the Panel, and proposed that the additional procedures adopted by the Appellate Body in the ongoing appeal in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** (DS316), with adjustments to remove references to highly sensitive business information, form the basis for any procedural ruling on confidentiality in these appellate proceedings.

1.8. On the same day, the Chair of the Appellate Body sent a letter to the participants and third parties indicating that the Division hearing this appeal had decided to suspend the deadlines that would otherwise apply under the Working Procedures for the filing of submissions and other documents in this appeal. On behalf of the Division, the Chair of the Appellate Body invited the

[10] Panel Report, paras. 7.165 and 8.1.a.
[11] Panel Report, paras. 7.297, 7.311, 7.317, and 8.1.b.
[12] Panel Report, paras. 7.369 and 8.1.c.
[13] Panel Report, para. 8.2.
[14] WT/AB/WP/6, 16 August 2010.
[15] Comments were also received from Canada, China, and Japan.
[16] Comments were also received from the United States and Australia.
[17] WT/DS487/6.

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third parties to comment in writing on the joint request by the European Union and the United States by 20 December 2016. Australia submitted written comments, indicating that it did not object to the joint request, provided that the proposed procedures were not implemented in a manner that unduly restricted the ability of third participants to gain reasonable access to information, or to engage in meaningful participation in the proceedings. Taking into account the arguments made by the participants and the comments by Australia, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, issued a Procedural Ruling on 22 December 2016 adopting additional procedures to protect the confidentiality of BCI in these appellate proceedings.[18] On the same day, the Division provided the participants and third parties with a Working Schedule for Appeal, setting out the dates for the filing of written submissions.

1.9. On 5 January 2017, the Chair of the Appellate Body received a communication from the United States requesting that the Division modify the deadline for the filing of the United States' appellant's submission. Relying on Rule 16(2) of the Working Procedures, the United States maintained that exceptional circumstances in these proceedings justified an extension of the deadline from 10 January to 17 January 2017. On the same day, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, invited the European Union and the third parties to comment in writing on the United States' request. The European Union indicated that it did not, in principle, oppose the United States' request, but observed that the United States had had more than five months since receipt of the final Panel Report to prepare its appellant's submission, and that the time periods in this dispute were subject to the expedited treatment required by Article 4.12 of the SCM Agreement. No comments were received from the third parties.

1.10. On 6 January 2017, the Chair of the Appellate Body, on behalf of the Division hearing this appeal, issued a Procedural Ruling[19] in which the Division observed that: (i) under normal circumstances – i.e. where the schedule had not been revised to allow for additional procedures to protect BCI – the United States would have already prepared and filed its appellant's submission on 16 December 2016; (ii) at the time of the request for additional procedures to protect BCI, the United States had not requested more time to prepare the contents of its appellant's submission; (iii) the scheduling of the deadlines for the United States' submissions in this appeal and in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** would not impede its ability to finalize the submissions; (iv) there had already been a delay in the deadline due to the WTO's end-of-year closure; and (v) the United States itself had indicated that its appellant's submission would not be exceptionally lengthy. For these reasons, the Division declined the United States' request, and affirmed the deadline for the filing of its appellant's submission for 10 January 2017.

1.11. On 17 January 2017, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU and Article 4.8 of the SCM Agreement, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Other Appeal[20] and an other appellant's submission pursuant to Rule 23 of the Working Procedures. On 8 February 2017, the European Union and the United States each filed an appellee's submission.[21] On 21 February 2017, Australia, Brazil, Canada, China, and Japan each filed a third participant's submission.[22] On the same day, Korea and Russia each notified its intention to appear at the oral hearing as a third participant.[23]

1.12. By letter of 3 March 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 30-day or 60-day period set out in Article 4.9 of the SCM Agreement.[24] The Chair of the Appellate Body explained that this was due to a number of factors, including the time needed for adopting and complying with additional procedures to protect BCI, the consequent extensions of the deadlines for filing submissions, overlapping issues identified by the participants in parallel proceedings, as

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[18] The Procedural Ruling of 22 December 2016 is contained in Annex D-1 of the Addendum to this Report, WT/DS487/AB/R/Add.1.

[19] The Procedural Ruling of 6 January 2017 is contained in Annex D-2 of the Addendum to this Report, WT/DS487/AB/R/Add.1.

[20] WT/DS487/7.

[21] Pursuant to Rules 22 and 23(4) of the Working Procedures.

[22] Pursuant to Rule 24(1) of the Working Procedures.

[23] Pursuant to Rules 24(4) and 24(2), respectively, of the Working Procedures. India is not a third participant in these appellate proceedings as it did not file a written submission pursuant to Rule 24(1) of the Working Procedures or appear at the oral hearing.

[24] WT/DS487/8/Rev.1.

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well as the substantial workload faced by the Appellate Body, the overlap in the composition of the Divisions hearing several concurrent appeals, and the shortage of staff in the Appellate Body Secretariat.

1.13. On 1 June 2017, the Division received a communication from the United States proposing additional procedures to protect BCI during the oral hearing and requesting public observation of the opening statements at the hearing. On the same day, the Division invited the European Union and the third participants to comment in writing on the United States' request. The European Union expressed its support for the United States' request, but noted that it should be for the Appellate Body to decide whether or not sufficient time remained to organize public observation of the opening statements. Australia supported the United States' request, indicating that it considered that the request helpfully provided transparency and appropriately protected BCI. Brazil expressed its concern regarding the timeliness of the request and what measures might be needed to comply with the request. China submitted that the United States' request to exclude non-BCI-Approved Persons of the third participants from the question-and-answer session would significantly constrain the ability of third participants to engage fully in the oral hearing. No comments were received from the remaining third participants.

1.14. On 2 June 2017, the Division issued a Procedural Ruling[25] regarding the United States' request. In that Ruling, the Division indicated that, as provided in its Procedural Ruling of 22 December 2016 on the protection of BCI, Third Participant BCI-Approved Persons were invited to attend the session of the oral hearing in which BCI may be discussed. The Division considered that this was sufficient to allow the third participants to be represented properly at the oral hearing. Regarding the United States' request concerning public observation of the opening statements at the oral hearing, the Division expressed its strong concern regarding the timeliness of that request. While deciding, by majority, to grant exceptionally the United States' request regarding public observation, as supported by the European Union, the Division also underscored the importance for participants wishing to request public observation of all or part of oral hearings in disputes to make such requests in a timely fashion, taking into account the due process rights of other participants and third participants and the burden on WTO Secretariat resources. The Division thus adopted in its Procedural Ruling additional procedures on the conduct of the oral hearing, including procedures pertaining to public observation of the opening statements of Member delegations that had agreed to have their statements made public.

1.15. The oral hearing in this appeal was held on 6 June 2017. The participants and third participants (with the exception of Russia) made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal. Delayed public broadcast of the opening statements of the participants and third participants (with the exception of Brazil and China) took place on 5 July 2017.

1.16. On 9 August 2017, the Division informed the participants and third participants that it had not found it necessary to include BCI in the Appellate Body Report in this appeal. On 28 August 2017, the Division provided a confidential advance copy of the Report to the participants, and the participants confirmed that no BCI had been inadvertently included in the Report. On 31 August 2017, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated on 4 September 2017.[26]

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.[27] The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS487/AB/R/Add.1.

[25] The Procedural Ruling of 2 June 2017 is contained in Annex D-3 of the Addendum to this Report, WT/DS487/AB/R/Add.1.

[26] WT/DS487/9.

[27] Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

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3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed written submissions are reflected in the executive summaries of those submissions provided to the Appellate Body[28], and are contained in Annex C of the Addendum to this Report, WT/DS487/AB/R/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

a. with respect to the Panel's interpretation of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analyses in respect of the First and Second Siting Provisions, and its ***de facto*** contingency analysis in respect of the First Siting Provision:

   i. whether the Panel erred in articulating a legal standard requiring the use of domestic goods to the complete exclusion of imported goods (raised by the European Union);

b. with respect to the Panel's application of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analysis in respect of the First Siting Provision:

   i. whether the Panel erred in finding that the First Siting Provision does not, expressly or by necessary implication from its words, require Boeing to use domestic over imported goods (raised by the European Union);

c. with respect to the Panel's application of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analysis in respect of the Second Siting Provision:

   i. whether the Panel erred in its application of Article 3.1(b) by unduly restricting the scope of the evidence from which it assessed ***de jure*** contingency in respect of the Second Siting Provision (raised by the European Union); and

   ii. whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU by providing an improper reading of the Second Siting Provision (raised by the European Union);

d. with respect to the Panel's ***de facto*** contingency analysis under Article 3.1(b) of the SCM Agreement:

   i. whether the Panel erred in its interpretation and application of Article 3.1(b) in finding that the measure, in particular the Second Siting Provision, reflects a condition requiring the use of domestic over imported goods (raised by the United States); and

   ii. whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in respect of various aspects of the Panel's reasoning (raised by the United States and the European Union).

5 ANALYSIS OF THE APPELLATE BODY

5.1. The European Union and the United States appeal different findings by the Panel.

5.2. In its appeal, the European Union challenges the Panel's findings that the European Union did not demonstrate that the First and Second Siting Provisions, considered separately or jointly, make the United States' aerospace tax measures ***de jure*** contingent, or that the First Siting Provision makes such measures ***de facto*** contingent, upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement. In particular, the European Union argues that the Panel erred: (i) in its interpretation and application of Article 3.1(b), in not finding that the

[28] Pursuant to the Appellate Body communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

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First Siting Provision makes the aerospace tax measures ***de jure*** contingent upon the use of domestic over imported goods; (ii) in its interpretation of Article 3.1(b), and in failing to conduct an objective assessment of the matter under Article 11 of the DSU, in not finding that the First Siting Provision makes the aerospace tax measures ***de facto*** contingent upon the use of domestic over imported goods; and (iii) in its interpretation and application of Article 3.1(b), and in failing to conduct an objective assessment of the matter under Article 11 of the DSU, in not finding that the Second Siting Provision makes the B&O aerospace tax rate ***de jure*** contingent upon the use of domestic over imported goods.

5.3. For its part, the United States appeals the Panel's finding that, with respect to the First and Second Siting Provisions, considered jointly, the B&O aerospace tax rate is a subsidy ***de facto*** contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement. In particular, the United States argues that the Panel erred: (i) in interpreting and applying Article 3.1(b) as if it prohibits subsidies conditional upon the domestic siting of production activities; (ii) in its interpretation and application of Article 3.1(b), in finding that the B&O aerospace tax rate for Boeing's 777X aircraft program is contingent upon the "use" of wings for the 777X because Boeing does not and will not "use" wings to produce the 777X; and (iii) in its interpretation and application of Article 3.1(b), in finding that the subsidy is contingent upon the use of "domestic" over "imported" wings because it did not address the meaning of the terms "domestic" and "imported", or examine whether wings resulting from wing assembly in Washington would necessarily be "domestic". Moreover, the United States claims that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.

5.4. We first set out our interpretation of Article 3.1(b) of the SCM Agreement before turning to the claims on appeal by the European Union and the United States.

5.1 Interpretation of Article 3.1(b) of the SCM Agreement

5.5. Article 3.1(b) of the SCM Agreement reads:

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

Article 3.2 adds that "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1."

5.6. The SCM Agreement distinguishes between two categories of subsidies: prohibited subsidies (Part II of the Agreement) and actionable subsidies (Part III of the Agreement). The granting of subsidies is not, in and of itself, prohibited under the SCM Agreement; nor does the granting of subsidies constitute, without more, an inconsistency with that Agreement.[29] Only subsidies contingent upon export performance within the meaning of Article 3.1(a) (commonly referred to as export subsidies), or contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) (commonly referred to as import substitution subsidies), are prohibited ***per se*** under Article 3 of the SCM Agreement.[30] In any event, subsidies, if specific, are disciplined under Part III of the SCM Agreement, but a complaining Member must demonstrate the existence of adverse effects under Article 5 of that Agreement.

5.7. Article 3.1(b) of the SCM Agreement prohibits subsidies the granting of which is "contingent … upon the use of domestic over imported goods". The Appellate Body has found that the legal standard for establishing the existence of "contingency" under Article 3.1(b) is the same

[29] See Appellate Body Report, ***Canada – Aircraft (Article 21.5 – Brazil)***, para. 47.

[30] In accordance with Article 2.3 of the SCM Agreement, any subsidy falling under the provisions of Article 3 shall be deemed to be specific. A complaining Member that is able to prove the existence of such a prohibited subsidy need not demonstrate that the subsidy also causes adverse effects to the interests of other Members within the meaning of Articles 5 and 6 of the SCM Agreement.

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as under Article 3.1(a) of the SCM Agreement.[31] Since the ordinary meaning of "contingent" is "conditional" or "dependent for its existence on something else", a subsidy would be prohibited under Article 3.1(b) if it is "conditional" or "dependent for its existence on" the use of domestic over imported goods.[32] Therefore, a subsidy would be "contingent" upon the use of domestic over imported goods if the use of those goods were a condition, in the sense of a requirement[33], for receiving the subsidy.[34]

5.8. The word "use" has been interpreted by the Appellate Body as referring to the action of using or employing something.[35] Article 3.1(b) does not elaborate on what constitutes "use of … goods"; nor do other provisions of the SCM Agreement or other covered agreements define this term.[36] In the absence of any further guidance, the term "use" may, depending on the particular circumstances, refer to consuming a good in the process of manufacturing, but may also refer to, for instance, incorporating a component into a separate good, or serving as a tool in the production of a good.

5.9. The term "goods" can be read as a synonym for "products".[37] Neither the text nor the context of Article 3.1(b) provides any clarification of the type or nature of the goods that are the subject of this provision.[38] Thus, this term may refer to any type of good that may be used by the subsidy recipient, including parts or components that are incorporated into another good, materials or substances that are consumed in the production process of another good, or tools or instruments that are used in the production process. In Article 3.1(b), the term "goods" is qualified by the adjectives "domestic" and "imported", which implies that the goods concerned should be at least potentially tradable. However, the broad scope of the terms "use" and "goods" supports the view that the meaning of the term "goods" is not confined to those goods that are actually traded.

5.10. The text of Article 3.1(b) does not qualify the terms "domestic" and "imported". The interpretation of these terms may be informed by Article III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994)[39], which applies to "products of the territory of any Member imported into the territory of any other Member" and requires that the imported products "be accorded treatment no less favourable than that accorded to like products of national origin".

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

[32] Appellate Body Report, ***Canada – Autos***, para. 123 (referring to Appellate Body Report, ***Canada – Aircraft***, para. 166).

[33] For instance, the Appellate Body observed in ***Canada – Autos*** that the measure at issue in that case would be inconsistent with Article 3.1(b) if "the use of domestic goods [was] a necessity and thus … required as a ***condition*** for eligibility" under the measure. (Appellate Body Report, ***Canada – Autos***, para. 130 (emphasis original))

[34] Appellate Body Report, ***Canada – Autos***, para. 126. The link between "contingency" and "conditionality" is also borne out by the text of Article 3.1(b), which states that import substitution contingency can be the sole or "one of several other ***conditions***". (Appellate Body Report, ***Canada – Aircraft***, para. 166 (emphasis added by the Appellate Body)) As with Article 3.1(a), this "relationship of conditionality or dependence" lies at the "very heart" of the legal standard in Article 3.1(b) of the SCM Agreement. (Appellate Body Reports, ***Canada – Aircraft***, para. 171; ***Canada – Aircraft (Article 21.5 – Brazil)***, para. 47)

[35] See Appellate Body Report, ***US – Carbon Steel (India)***, para. 4.374 and fn 1009 thereto (referring to ***Shorter Oxford English Dictionary***, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3484).

[36] The term "use" appears in different contexts in the covered agreements. For instance, footnote 61 of Annex II to the SCM Agreement defines "inputs consumed in the production process" as "inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are ***consumed in the course of their use*** to obtain the exported product", and paragraph II(3) of Annex II defines "physically incorporated" inputs as "inputs … ***used*** in the production process and … ***physically present*** in the product exported". (emphases added) Furthermore, Article 2 of the Agreement on Trade in Civil Aircraft requires signatories to eliminate customs duties and charges of products classified under the tariff headings in Annex I to that Agreement, "if such products are for ***use in a civil aircraft and incorporation therein***, in the course of its manufacture, repair, maintenance, rebuilding, modification or conversion". (emphasis added)

[37] This is also reflected in the other authentic language versions of the SCM Agreement: "***produits***" and "***productos***" in the French and Spanish texts, respectively.

[38] The terms "goods" and "products" appear in various provisions throughout the SCM Agreement and other covered agreements, and do not appear to be restricted in themselves to specific types of goods, unless qualified. Thus, e.g. Article 6.3(d) of the SCM Agreement refers to "subsidized ***primary*** product", and footnote 46 to Article 15 of the SCM Agreement defines "like product" as "a ***product which is identical***, i.e. alike in all respects ***to the product under consideration***". (emphases added) Articles III:2 and III:4 of the GATT 1994 also broadly refer to "[t]he products of the territory of any Member imported into the territory of any other Member".

[39] See Appellate Body Report, ***Canada – Autos***, para. 140.

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Thus, as a general matter, "domestic" goods can be understood as goods originating within the relevant Member's territory and "imported" goods as goods that cross the border into that Member's territory.

5.11. The term "over" in Article 3.1(b) is a preposition expressing a preference between two things.[40] This is also reflected in the other authentic language versions of the SCM Agreement, with the French text of Article 3.1(b) reading "***subventions subordonnées … à l'utilisation de produits nationaux <u>de préférence à</u> des produits importés***", and the Spanish text reading "***las subvenciones supeditadas al empleo de productos nacionales <u>con preferencia a</u> los importados***".[41] In the context of the phrase "contingent … upon the use of domestic over imported goods", the term "over" therefore refers to the use of domestic goods in preference to, or instead of, imported goods.

5.12. With regard to the term "contingency", the Appellate Body stated in ***Canada – Autos*** that Article 3.1(b) of the SCM Agreement covers contingency both in law and in fact.[42] The Appellate Body also noted in ***Canada – Aircraft*** that the legal standard expressed by the term "contingent" is the same for ***de jure*** and ***de facto*** contingency.[43] A subsidy will be ***de jure*** contingent upon the use of domestic over imported goods "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure", or can "be derived by necessary implication from the words actually used in the measure".[44] Proving ***de facto*** contingency "is a much more difficult task".[45] As the Appellate Body has indicated in the context of Article 3.1(a), the existence of ***de facto*** contingency "must be ***inferred*** from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case".[46] In ***EC and certain member States – Large Civil Aircraft***, the Appellate Body referred to a number of factors that may be relevant in this regard, including the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and the relevant factual circumstances surrounding the granting of the subsidy, that provide the context for understanding the measure's design, structure, and modalities of operation.[47] While the Appellate Body has relied on these factors in addressing ***de facto*** contingency under Article 3.1(a), we consider that they are also relevant to a ***de facto*** contingency analysis under Article 3.1(b).[48]

5.13. Thus, where an analysis of contingency does not yield a finding of inconsistency under Article 3.1(b) on the basis of the words actually used in the measure, or any necessary implication therefrom, the existence of a requirement to use domestic over imported goods may still be found on the basis of the above-mentioned factors and factual circumstances that form part of the total configuration of the facts constituting and surrounding the granting of the subsidy.[49] We understand the analysis of ***de jure*** and ***de facto*** contingency under Article 3.1(b) as a continuum, starting with the terms of the measure and their necessary implications, and continuing with factors including the measure's design and structure, its modalities of operation, and other

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[40] Relevant dictionary definitions of "over" include "[a]bove in degree, quality, or action; in preference to; more than". (***Shorter Oxford English Dictionary***, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2048)

[41] Underlining added.

[42] Appellate Body Report, ***Canada – Autos***, para. 143.

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

[44] Appellate Body Report, ***Canada – Autos***, paras. 100 and 123. In particular, the Appellate Body noted that the granting of a subsidy will be ***de jure*** contingent upon the use of domestic over imported goods also "where the condition … is clearly, though implicitly, in the instrument comprising the measure", so that even if the underlying legal instrument does not provide ***expressis verbis*** that the subsidy is available only upon fulfilment of the condition to use domestic over imported goods, "[s]uch conditionality can be derived by necessary implication from the words actually used in the measure." (Ibid., para. 123)

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

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

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

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

[49] For instance, factual circumstances potentially relevant to an assessment of whether a subsidy is ***de facto*** contingent may include the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry.

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relevant circumstances.[50] A panel should conduct a holistic assessment of all relevant elements and evidence on the record, and need not compartmentalize ***de jure*** and ***de facto*** analyses, in order to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods.

5.14. Accordingly, reading the terms of Article 3.1(b) of the SCM Agreement together, we understand the provision to prohibit those subsidies that are ***de jure*** or ***de facto*** contingent such that they require the use of domestic goods in preference to, or instead of, imported goods as a condition for receiving the subsidy. While the distinction between ***de jure*** and ***de facto*** contingency lies in the "evidence [that] may be employed to prove" that a subsidy is contingent upon the use of domestic over imported goods[51], in both its ***de jure*** and ***de facto*** analyses, a panel assesses the consistency of a subsidy under Article 3.1(b) with the same obligation and against a single legal standard of contingency. In each case, an assessment of whether a subsidy is contingent within the meaning of Article 3.1(b) requires a thorough analysis of whether the conditional relationship between the granting of the subsidy and the use of domestic over imported goods is objectively observable on the basis of a careful and rigorous scrutiny of all the relevant evidence. This is especially important when the alleged contingency is not clearly expressed in the language used in the relevant legal instrument.[52]

5.15. We recall that, by its terms, Article 3.1(b) does not prohibit the subsidization of domestic "production" ***per se*** but rather the granting of subsidies contingent upon the "use", by the subsidy recipient, of domestic over imported goods.[53] Subsidies that relate to domestic production are therefore not, for that reason alone, prohibited under Article 3 of the SCM Agreement.[54] We note in this respect that such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy.

5.16. We further note that Article III:8(b) of the GATT 1994 exempts from the national treatment obligation in Article III "the payment of subsidies exclusively to domestic producers". Article III:8(b) makes clear that the provision of subsidies to domestic producers only, and not to foreign ones, does not in itself constitute a breach of Article III. To the extent that "domestic producers" may generally be expected to manufacture a certain amount of "domestic goods" in a Member's territory, Article III:8(b) comports with our reading of Article 3.1(b) under which something more than mere subsidization of domestic production is required for finding an import substitution subsidy. That said, even if the granting of a subsidy is exempt from the GATT national treatment obligation by virtue of it being paid exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994, it may still be found to be contingent upon the use by those producers of domestic over imported goods under Article 3.1(b) of the SCM Agreement.

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[50] To the extent that both ***de jure*** and ***de facto*** claims have been raised. For instance, a ***de facto*** contingency analysis may take into account "the design and structure of the measure", which would encompass elements including the terms of the measure. Likewise, an analysis of "the modalities of operation" will involve those set out in the measure and how they may be applied and operate in practice. Finally, the "relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation" necessarily include those circumstances that inform one's understanding of the above-mentioned factors and their operation. (Appellate Body Report, ***EC and certain member States – Large Civil Aircraft***, para. 1046)

[51] Appellate Body Report, ***Canada – Aircraft (Article 21.5 – Brazil)***, fn 46 to para. 47 (quoting Appellate Body Report, ***Canada – Aircraft***, para. 167). We recall that one aim of the ***de facto*** assessment under Article 3.1(b) is to avoid "circumvention of obligations by Members", contrary to the object and purpose of the SCM Agreement. (Appellate Body Report, ***Canada – Autos***, para. 142)

[52] We recall the Appellate Body's statement that proving ***de facto*** contingency "is a much more difficult task" than establishing ***de jure*** contingency. (Appellate Body Report, ***Canada – Aircraft***, para. 167)

[53] Pursuant to Article 2.1 of the SCM Agreement, a subsidy covered under that Agreement should be specific to certain enterprises "within the jurisdiction of the granting authority", or, in other words, domestic producers. Although, pursuant to Article 2.3, prohibited subsidies are "deemed to be specific", they are still subsidies granted to domestic producers. Other provisions of the SCM Agreement also refer to the "territory" of a Member, as well as to "domestic producers" or "domestic production". (See e.g. Article 1.1(a)(1); Article 8.2(b), now lapsed, pursuant to Article 31; Article 10; Article 25; and Article 28 of the SCM Agreement)

[54] In ***Canada – Aircraft (Article 21.5 – Brazil)***, the Appellate Body found it "worth recalling that the granting of a subsidy is not, in and of itself, prohibited under the ***SCM Agreement***. Nor does granting a 'subsidy', without more, constitute an inconsistency with that Agreement. The universe of subsidies is vast. Not all subsidies are inconsistent with the ***SCM Agreement***. The only 'prohibited' subsidies are those identified in Article 3 of the ***SCM Agreement***". (Appellate Body Report, ***Canada – Aircraft (Article 21.5 – Brazil)***, para. 47)

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5.17. Additionally, we observe that the Appellate Body has found that ***de facto*** contingency under Article 3.1(a) of the SCM Agreement**, and in particular whether a subsidy is "in fact tied to …** anticipated exportation", can be determined by assessing whether "the granting of the subsidy [is] geared to induce the promotion of future export performance by the recipient" and "provides an incentive to skew anticipated sales towards exports", 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".[55] This test is based on the wording of Article 3.1(a) and footnote 4 thereto and, specifically, the terms "actual or anticipated" and "export performance".[56] Furthermore, similar trade distortions will also occur as a result of subsidies relating to domestic production, which are prohibited under Article 3.1(b) only when they are contingent upon the use of domestic over imported goods. Hence, a test based on an examination of whether a given measure is "geared to induce" the use of domestic products over imports does not answer the question of whether the measure requires the recipient to use domestic over imported goods as a condition for receiving the subsidy.

5.18. In conclusion, we note that, to the extent that no conditionality on the use of domestic over imported goods can be determined, but the effect of the subsidy is to displace or impede, or otherwise cause adverse effects to imports, those effects are disciplined under Part III of the SCM Agreement. In other words, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may ***result*** in the use of more domestic and fewer imported goods. Rather, the question is whether ***a condition requiring*** the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and the relevant factual circumstances constituting and surrounding the granting of the subsidy that provide context for understanding the operation of these factors.

5.2 Whether the Panel erred in its interpretation of Article 3.1(b) of the SCM Agreement

5.19. The European Union claims that, in its ***de jure*** assessment of the First and Second Siting Provisions, the Panel erroneously interpreted Article 3.1(b) of the SCM Agreement to mean that a prohibited contingency would exist only where the measure "***per se*** and necessarily exclude[s]" any use of imported goods.[57] According to the European Union, the Panel thereby confined the applicability of Article 3.1(b) "to those situations where the subsidy recipient is required under the terms of the subsidy measure, for a given good, to use domestic goods to the complete exclusion of imported goods."[58] The European Union further claims that, since the legal standard expressed in the word "contingent" is the same for both ***de jure*** and ***de facto*** contingency, the error in the Panel's interpretation of Article 3.1(b) in the context of its ***de jure*** assessment carries over to its ***de facto*** assessment of the First Siting Provision.[59]

5.20. The United States responds that both the First and Second Siting Provisions address the location of production activities and are silent as to the use of imported or domestic goods.[60] The United States characterizes the Panel statements with which the European Union takes issue as merely examples, or responses to arguments made by the European Union, instead of as interpretations by the Panel.[61] Also, the United States considers that the European Union's

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[55] Appellate Body Report, ***EC and certain member States – Large Civil Aircraft***, paras. 1044-1045 and 1047.

[56] See Appellate Body Report, ***EC and certain member States – Large Civil Aircraft***, para. 1043.

[57] European Union's other appellant's submission, para. 33 (quoting Panel Report, para. 7.291). See also paras. 37 and 103 (quoting Panel Report, paras. 7.291 and 7.306).

[58] European Union's other appellant's submission, para. 40. See also para. 103.

[59] European Union's other appellant's submission, paras. 70-71.

[60] United States' appellee's submission, paras. 44 and 82 (referring to Panel Report, paras. 7.290, 7.293, and 7.305). See also para. 83.

[61] In particular, the United States argues that the statement made in the context of the Panel's ***de jure*** analysis of the First Siting Provision "was explicitly an 'example'", and the formulation used in the context of its ***de jure*** analysis of the Second Siting Provision "appears to have its roots in the terms of the [European Union]'s argument to the Panel". (United States' appellee's submission, para. 43 (quoting European Union's other appellant's submission, para. 38) and para. 84 (referring to European Union's other appellant's submission, para. 103))

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argument in the context of the Panel's ***de facto*** analysis of the First Siting Provision is no different from its argument in the ***de jure*** context, and, accordingly, fails for the same reasons.[62]

5.21. We begin our analysis by noting that the European Union does not challenge the Panel's articulation of the legal standard under Article 3.1(b) of the SCM Agreement as developed in the interpretative sections of its Report.[63] Instead, the European Union takes issue with certain subsequent statements made by the Panel in the context of its ***de jure*** contingency analyses of the First and Second Siting Provisions, and its ***de facto*** contingency analysis of the First Siting Provision, all of which the European Union reads as articulating a legal standard requiring the use of domestic goods to the complete exclusion of imported goods.

5.22. We agree with the European Union's contention that the existence of contingency under Article 3.1(b) is not limited to cases where the measure requires the subsidy recipient to use domestic goods to the complete exclusion of imported goods. Article 3.1(b) requires establishing the existence of contingency upon the use of domestic over imported goods, but does not require demonstrating any particular quantity or level of displacement of imported goods by domestic goods in order to determine such contingency. The question before us, therefore, is whether in its analysis the Panel indeed articulated a legal standard requiring the use of domestic goods to the complete exclusion of imported goods.

5.23. We observe that, before the Panel, the European Union submitted that: (i) the terms of the First Siting Provision required Boeing to commit to use wings and fuselages produced or assembled in Washington in the final assembly of the 777X in Washington[64]; and (ii) under the Second Siting Provision, the B&O aerospace tax rate would continue to apply only if Boeing assembles the wings and the 777X exclusively in Washington.[65] However, the Panel's reading of these provisions was different. The Panel considered that, on its face, the First Siting Provision concerns the ***siting*** of a "significant commercial airplane manufacturing program", which "in turn requires that a producer commit to ***manufacture*** within the state of Washington" a model of a commercial airplane, as well as fuselages and wings for that model.[66] The Panel did not find anywhere "in the words used in the First Siting Provision … a requirement that makes the entry into force of the challenged measures contingent upon a determination that domestic goods will be used instead of imported products."[67] The Panel thus found that, by its words, "the First Siting Provision is silent as to the use of imported or domestic goods."[68] The Panel also found that "the Second Siting Provision is silent as to the use of imported or domestic goods".[69] For the Panel, there is "no express indication in the terms of the [Second Siting Provision] that the subsidy … would be lost by importing wings", and its words do not "expressly condition the receipt of a subsidy on the use of domestic over imported goods".[70]

5.24. The Panel then went on to examine, in respect of each of the First and Second Siting Provisions, whether a prohibited import substitution contingency could be derived "by necessary

[62] United States' appellee's submission, para. 69.

[63] The Panel observed that, "[i]n order to find contingency in the sense of Article 3.1(b), such contingency must be a necessary condition so that the recipient would not benefit from the subsidy unless domestic goods are used instead of, or in preference to, imported goods." (Panel Report, para. 7.274) In setting out the standard for determining the existence of ***de jure*** contingency under Article 3.1(b), the Panel observed that "a contingency that is not set out expressly in the relevant legislation may nevertheless be derived by necessary implication if such contingency results inevitably from the words actually used in the legislation, or if any other interpretation would be unreasonable." (Ibid., para. 7.273 (fn omitted)) In setting out the standard for determining the existence of ***de facto*** contingency under Article 3.1(b), the Panel noted that "the European Union will need to demonstrate that there is something about the design and structure of the challenged measures and their operation, in the circumstances in which the measures have been introduced and exist, that establishes the contingency, and does so with the requisite standard of certainty." (Ibid., para. 7.321)

[64] Panel Report, para. 7.288 (referring to European Union's first written submission to the Panel, para. 44).

[65] Panel Report, para. 7.304 (referring to European Union's first written submission to the Panel, para. 52).

[66] Panel Report, para. 7.287. (emphasis original) See also paras. 7.289 and 7.293.

[67] Panel Report, para. 7.290.

[68] Panel Report, para. 7.290.

[69] Panel Report, para. 7.305.

[70] Panel Report, para. 7.305. See also para. 7.308.

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implication" from the language of the provisions.[71] It was in this context that the Panel, first in respect of the First Siting Provision, made the statement with which the European Union takes issue:

> The Panel sees nothing in the language of the siting contingency contained in the First Siting Provision that would ***per se*** and necessarily exclude the possibility for the airplane manufacturer to use wings or fuselages from outside the state of Washington (if, for example, it continued manufacturing ***some*** fuselages and wings in the state of Washington, with the additional use of fuselages and wings that were manufactured separately elsewhere).[72]

5.25. Similarly, in respect of the Second Siting Provision, the Panel stated that:

> … the siting contingency contained in the Second Siting Provision would not ***per se*** and necessarily exclude the possibility for the airplane manufacturer to use wings from outside the state of Washington …, as long as it did not relocate the previously sited manufacturing of wings outside the state of Washington.[73]

5.26. We recognize that, if read in isolation, these statements could possibly be understood as suggesting a legal standard under Article 3.1(b) that requires the use of domestic goods to the complete exclusion of imported goods. However, when these words are considered in the context of the rest of the Panel's ***de jure*** contingency analyses of the First and Second Siting Provisions, it becomes clear that the Panel did not articulate such a legal standard.

5.27. To begin with, as the Panel found, by their terms, both the First and Second Siting Provisions speak of "siting" and a commitment to "manufacture" or "assemble" certain goods, and are silent as to the "use" of any imported or domestic goods. Turning to the "necessary implication" of the terms of the First and Second Siting Provisions, the Panel considered that a reading under which Boeing would be required to use domestic over imported goods was just one among several possible readings of these provisions. In the Panel's view, while the terms of the First Siting Provision could result in the use by Boeing of some wings and fuselages produced in Washington, this did not necessarily mean that the provision, by its terms, requires Boeing to use domestic over imported wings and fuselages.[74] Similarly, with respect to the Second Siting Provision, the Panel found that it does not inevitably result from the terms of the provision that the importation of wings would amount to the "siting" of production activities outside Washington, "even if such an outcome is not excluded by [its] text".[75] Having considered other possible readings of the terms of both provisions[76], the Panel concluded that "[t]he contingency on siting certain production activities within the state of Washington [under the First Siting Provision] does not entail any explicit, or any necessarily implied, requirement to use domestic goods"[77], and that "[n]o express or obvious contingency results from the terms used in the [Second Siting Provision], nor can one be derived inevitably from its terms."[78] Thus, the Panel found that the First and Second Siting Provisions do not, by their terms or by necessary implication therefrom, require the use of domestic over imported goods as a condition for receiving the subsidies.

5.28. When read in this context, we understand the Panel's statements challenged by the European Union – that nothing in the terms of the First and Second Siting Provisions would "***per se*** and necessarily exclude" the possibility for Boeing to use goods from outside Washington – as referring to the "implications" of those terms and merely recognizing that a condition requiring the

[71] Panel Report, paras. 7.291 and 7.306.

[72] European Union's other appellant's submission, para. 37 (quoting Panel Report, para. 7.291 (italics original; underlining added by the European Union)).

[73] Panel Report, para. 7.306. (underlining added)

[74] According to the Panel, while "[t]he terms actually used in the [First Siting Provision] do not preclude a scenario in which … wings and fuselages manufactured in the state of Washington were 'used' in the final assembly of 777X commercial airplanes in the state of Washington", the fact "[t]hat such a scenario may be possible on the basis of terms used in the First Siting Provision … is not the same as concluding that it is a requirement or condition for the subsidies that necessarily derives from those terms." (Panel Report, para. 7.293)

[75] Panel Report, para. 7.310. See also para. 7.306.

[76] Panel Report, paras. 7.294 and 7.309.

[77] Panel Report, para. 7.296.

[78] Panel Report, para. 7.310.

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use of domestic over imported goods could not be "necessarily" derived from the language of the First and Second Siting Provisions. In particular, in our view, the phrase "***per se*** and necessarily exclude" links back to the Panel's understanding of the words "necessary implication" as referring to contingency that must "result inevitably from the words actually used in the legislation", or that "any other interpretation would be unreasonable".[79] In this light, we understand the Panel to have simply recognized that, based on both the words actually used in the First and Second Siting Provisions and by the necessary implication from those words, no ***de jure*** requirement existed for Boeing to use domestic over imported goods.

5.29. Moreover, we recall the European Union's assertions before the Panel that, under the First Siting Provision, Boeing "commit[ted] to use wings and fuselages produced or assembled in Washington State" and "[i]f Boeing had not committed to using US-made wings and fuselages [it would have] thereby failed to satisfy the [First Siting Provision]".[80] Furthermore, the European Union argued before the Panel that, "under the Second Siting Provision, the B&O aerospace tax rate would only continue in force 'if Boeing assembles the wings and assembles the aircraft ***exclusively*** in Washington State'" and "if Boeing purchases ***any*** 777X wings from outside the state of Washington, it would lose the B&O aerospace tax rate for all revenue related to sales of the 777X aircraft."[81] In our view, it appears that, in making its statement that the First and Second Siting Provisions do not "***per se*** and necessarily exclude" the possibility for Boeing to use wings outside Washington, the Panel was not articulating a legal standard, but was rather addressing certain contentions advanced by the European Union. The European Union also takes issue with the Panel's statements that the Second Siting Provision "does not make the receipt or continued enjoyment of subsidies dependent on refraining from using imported products" and "does not require that the goods for that production (whether they be wings or anything else) need to be sourced ***only*** from within the state of Washington".[82] For the same reason as just explained, we do not consider that these statements reflect a legal standard requiring the use of domestic goods to the complete exclusion of imported goods.[83]

5.30. Finally, we also do not see that a legal standard requiring the complete exclusion of imports is reflected in the Panel's ultimate conclusions. The Panel found that the terms of the First Siting Provision "in no case condition, either explicitly or by necessary implication, the availability of subsidies on the use of domestic over imported goods by the manufacturer"[84] and that "the Second Siting Provision does not indicate on its face that the B&O aerospace tax rate would cease to apply if the aircraft manufacturer in question 'uses' imported products instead of domestic products."[85] Therefore, as we see it, the Panel's conclusions that the First and Second Siting Provisions are not ***de jure*** contingent under Article 3.1(b) were based on its findings that: (i) the contingencies set out in the terms of these provisions relate to the location of certain assembly operations within Washington; (ii) the provisions are silent as to the use of domestic or imported goods; and (iii) the terms of the provisions do not, by necessary implication, prevent the possibility of using imported goods. We therefore do not consider that the Panel, by stating that the terms of these provisions do not "***per se*** and necessarily exclude" the possibility of using imported wings and fuselages, was articulating a legal standard under Article 3.1(b) that requires the use of domestic goods to the complete exclusion of imported goods, but rather was casting doubt on the European Union's proposition that the terms of these provisions necessarily required Boeing to use wings and fuselages produced in Washington.

5.31. In connection with its argument regarding the Panel's ***de jure*** analysis of the First Siting Provision, the European Union advances several additional arguments by which it essentially maintains that, for various reasons, the legal standard under Article 3.1(b) should not be read as

[79] Panel Report, paras. 7.291 and 7.306.
[80] Panel Report, para. 7.288 (quoting European Union's first written submission to the Panel, para. 44; and opening statement at the first Panel meeting, para. 68).
[81] Panel Report, para. 7.304 (quoting European Union's first written submission to the Panel, para. 52). (emphasis added)
[82] Panel Report, para. 7.305. (emphasis original)
[83] We note, in particular, that these statements were made immediately after the Panel's summary of the European Union's arguments set out above.
[84] Panel Report, para. 7.295.
[85] Panel Report, para. 7.310.

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requiring the use of domestic goods to the complete exclusion of imported goods.[86] Since we have agreed with the European Union on that point, but have concluded that we do not understand the Panel to have articulated such a legal standard, we see no need to further address those arguments.

5.32. The European Union also argues that, since the Panel recognized that the legal standard reflected in the term "contingent" is the same for both ***de jure*** and ***de facto*** contingency, and having erred in its ***de jure*** contingency analysis under Article 3.1(b), the Panel also erred in its interpretation of Article 3.1(b) in the context of its ***de facto*** contingency analysis of the First Siting Provision.[87] We note that the Panel focused its analysis on the "actual operation" of the First Siting Provision as confirmed by "additional evidence" available regarding the satisfaction of this provision by the Boeing 777X aircraft program.[88] As we see it, the Panel's conclusion that the First Siting Provision does not demonstrate ***de facto*** contingency was based on the absence of any "factual evidence in the Department of Revenue's determination or in how Boeing will organize the sourcing for the production of the 777X indicating a ***de facto*** requirement to use any domestic goods, including wings or fuselages", and not on an understanding that, in order to establish a violation of Article 3.1(b), the First Siting Provision must require the use of domestic goods to the complete exclusion of imported goods.[89] Nowhere in its ***de facto*** analysis did the Panel express a legal standard requiring that the modalities of operation of the First Siting Provision "***per se*** and necessarily exclude" any possibility of importing wings and fuselages.[90] Accordingly, in our view, the legal standard articulated by the Panel in its ***de facto*** contingency analysis of the First Siting Provision is also in keeping with our interpretation of Article 3.1(b) of the SCM Agreement.

5.33. Furthermore, we do not consider that, as the European Union argues, the Panel's finding of "no indication that the activation of the First Siting Provision was the result of any other factor [besides the siting of the aircraft program], such as a commitment by the manufacturer to use domestic over imported goods"[91] was based on an erroneous interpretation of the words "use of domestic over imported goods".[92] Instead, the Panel's analysis is in line with its understanding that it was for the European Union "to demonstrate that there is something about the design and structure of the challenged measures and their operation, in the circumstances in which the measures have been introduced and exist, that establishes the contingency."[93] Therefore, as we see it, rather than articulating a legal standard that required the use of domestic goods to the complete exclusion of imported goods, the Panel simply found that the additional evidence before it confirmed its understanding of the First Siting Provision in the context of its ***de jure*** contingency analysis, and was insufficient to establish under Article 3.1(b) that the measure required the use of domestic over imported goods as a condition for granting the subsidy.

5.34. In sum, we consider that, in its ***de jure*** contingency analyses of the First and Second Siting Provisions, the Panel did not articulate a legal standard under Article 3.1(b) of the SCM Agreement

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[86] The European Union argues that a subsidy subject to the requirements that 50% of all inputs used be domestic and 50% of all inputs be imported would still be contingent upon the use of domestic over imported goods. Similarly, the European Union asserts that the Appellate Body's guidance in ***Canada – Autos*** supports the proposition that a measure conditioning receipt of a subsidy on the use of a particular domestic good, without requiring that 100% of the goods used are domestic, can give rise to an Article 3.1(b) violation. Furthermore, the European Union contends that the distortion envisaged by Article 3.1(b) arises "where a subsidy distorts the ratio between domestic and imported goods", so that the recipient would use "a larger proportion of domestic goods (and consequently a smaller proportion of imported goods) than it otherwise would have". The European Union also takes the view that the Appellate Body's interpretation of Article 3.1(a) of the SCM Agreement in ***EC and certain member States – Large Civil Aircraft*** developed in the course of its ***de facto*** contingency analysis is relevant to the interpretative question in the present case. Finally, the European Union argues that the case law under Article III:4 of the GATT 1994 supports "[t]he proposition that a measure requiring less than the ***per se*** exclusion of imported goods can give rise to the distortion envisaged by Article 3.1(b)." (European Union's other appellant's submission, paras. 41-51)

[87] European Union's other appellant's submission, para. 70.

[88] Panel Report, paras. 7.342-7.345. The Panel considered this evidence to constitute "the entire universe of relevant evidence regarding that provision's operation". (Ibid., para. 7.345)

[89] Panel Report, para. 7.344.

[90] For instance, the Panel speaks of conditioning "the availability of subsidies based on whether certain components are sourced from a foreign or domestic origin", or the existence of evidence indicating "a particular use of goods of specific origins", and "of any requirement to use domestic goods in respect of the triggering of that availability". (Panel Report, paras. 7.341, 7.344, and 7.346)

[91] Panel Report, para. 7.343.

[92] European Union's other appellant's submission, para. 71.

[93] Panel Report, para. 7.321.

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requiring the use of domestic goods to the complete exclusion of imported goods. Instead, the Panel found that, by their terms, the First and Second Siting Provisions relate to the location of certain assembly operations within Washington and are silent as to the use of domestic or imported goods. Therefore, in stating that these provisions do not "***per se*** and necessarily exclude" the possibility for the airplane manufacturer to use inputs from outside Washington, the Panel was not articulating a legal standard, but was rather recognizing that, based on the necessary implications of the provisions' terms, no ***de jure*** requirement existed for Boeing to use domestic over imported goods. Neither did the Panel articulate such a legal standard in assessing the ***de facto*** contingency of the First Siting Provision. Rather, the Panel found that the additional evidence before it confirmed its understanding of the First Siting Provision in the context of its ***de jure*** contingency analysis that the measure does not require the use of domestic over imported goods as a condition for granting the subsidy.

5.35. On the basis of the foregoing, we reject the European Union's claims that the Panel erred in its interpretation of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analyses of the First and Second Siting Provisions, as well as its ***de facto*** contingency analysis of the First Siting Provision.

5.3 Whether the Panel erred in its application of Article 3.1(b) of the SCM Agreement in the context of its *de jure* contingency analysis in respect of the First Siting Provision

5.36. The European Union claims that the Panel's finding that the First Siting Provision does not, expressly or by necessary implication, require the use of domestic over imported goods constitutes an error in the application of Article 3.1(b) of the SCM Agreement.[94] In the European Union's view, since the First Siting Provision requires Boeing "to establish the 777X production program in Washington State, '***in which***' the wings and fuselages are to be integrated", and since "at least some 777X wings and fuselages" have to be manufactured in Washington, the provision "appropriates Boeing's commercial decision-making, leaving it with precisely one option if it wants to benefit from billions of US dollars in subsidies – to use at least some of the wings and fuselages manufactured in Washington State, ***in*** the final assembly of the 777X in Washington State."[95]

5.37. The United States responds that "there is no plausible situation absent the alleged subsidies in which Boeing could have, and would have, imported 777X fuselages or wings."[96] Moreover, the United States submits that the First Siting Provision "was a one-time determination that was triggered by a ***decision*** to site an airplane program" before any manufacturing occurred, and "there was no mechanism to reverse the extension of the B&O aerospace tax rate taking effect even if in the end no manufacturing occurred."[97]

5.38. As we noted, the Panel considered several possible readings of the First Siting Provision. The Panel observed that "[t]he terms actually used in the provision do not preclude a scenario in which separately produced wings and fuselages were 'used' in the manner alleged by the European Union, i.e. that wings and fuselages manufactured in the state of Washington were 'used' in the final assembly of 777X commercial airplanes in the state of Washington."[98] However, according to the Panel, two other "possible and equally reasonable" readings of the terms of the First Siting Provision exist that "would allow the manufacturer to benefit from the subsidies" if it: (i) "used wings and fuselages manufactured outside the state of Washington in the final assembly of 777X commercial airplanes in the state of Washington, so long as it manufactured at least some wings and fuselages in the state of Washington"; or (ii) "stopped manufacturing fuselages, wings, and even commercial airplanes in the state of Washington, as the First Siting Provision involves a one-time decision on the initial establishment, but not the continuation, of certain manufacturing activities."[99]

5.39. In the European Union's view, under all scenarios examined by the Panel, the production requirements in the First Siting Provision leave Boeing with no choice but to use at least some

[94] European Union's other appellant's submission, para. 64.
[95] European Union's other appellant's submission, paras. 60-61. (emphases original)
[96] United States' appellee's submission, para. 53.
[97] United States' appellee's submission, paras. 63 (emphasis original) and 66.
[98] Panel Report, para. 7.293.
[99] Panel Report, para. 7.294.

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domestically produced wings and fuselages in its production of the 777X aircraft in Washington.[100] Thus, according to the European Union, "the express text of the First Siting Provision or alternatively, the necessary implications from that text, should have led the Panel to a finding of ***de jure*** contingency."[101]

5.40. We begin by observing that, as the European Union argues, the requirement to produce wings and fuselages in Washington would in all likelihood result in the use of at least some domestically produced wings and fuselages in the final assembly of the 777X. In this regard, we recall that the relevant question in determining the existence of contingency under Article 3.1(b) is not whether the eligibility requirements under a subsidy may ***result*** in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out ***a condition requiring*** the use of domestic over imported goods. Thus, in our view, whether any reading of the First Siting Provision "would allow the subsidy recipient to avail itself of the subsidy without the use of domestic over imported wings and fuselages, at least for some aircraft for some time"[102] does not directly address the issue of contingency under Article 3.1(b). Even if, under all scenarios discussed by the Panel, Boeing would likely use some amount of domestically produced wings and fuselages, this observation is not in itself sufficient to establish the existence of a condition, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods.

5.41. In this light, we note the Panel's finding that the condition set out in the terms of the First Siting Provision does not relate to the ***use*** of domestic or imported goods but rather to the ***siting*** of certain manufacturing activities in Washington.[103] In this respect, the Panel was correct in observing that the fact that the terms actually used in the First Siting Provision do not preclude a scenario in which "wings and fuselages manufactured in the state of Washington were 'used' in the final assembly of 777X commercial airplanes in the state of Washington … is not the same as concluding that it is a requirement or condition for the subsidies that necessarily derives from those terms."[104]

5.42. Moreover, the two "alternative" readings of the First Siting Provision by the Panel confirm that the conditionality established on the basis of its terms is linked to the ***manufacture*** of wings and fuselages, and that the ***use*** of those products in the final assembly of the 777X is not a condition for receiving the subsidy, but is rather a consequence of the requirement to manufacture them domestically.[105] It appears that the absence of any express language in the First Siting Provision, or any necessary implication therefrom, that would relate to a condition requiring the use of domestic over imported goods in the First Siting Provision, coupled with the fact that it "involves a one-time decision on the initial establishment, but not the continuation, of certain manufacturing activities"[106], were particularly relevant considerations for the Panel's ultimate conclusion that "[t]he contingency on siting certain production activities within the state of Washington does not entail any explicit, or any necessarily implied, requirement to use domestic goods."[107]

5.43. Likewise, we draw attention to the Panel's discussion of whether the First Siting Provision requires the same entity to manufacture both the commercial airplane and the fuselages and

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[100] According to the European Union, with regard to the first alternative scenario envisaged by the Panel, "[i]f ***all*** of the 777X wings and fuselages manufactured in Washington State were destroyed, discarded, or indefinitely stored, such that ***none of them*** would be used in the final assembly of the 777X produced in Washington State, it is impossible to understand in what sense there would be a 777X production program in Washington State '***in which***' 777X wings and fuselages would be integrated – which is what the terms actually used in the measure say and require." Under the second alternative scenario, the European Union argues, "there is a period of time during which the First Siting Provision obligates Boeing to establish the 777X production program in Washington State, '***in which***' the wings and fuselages are to be integrated." Therefore, according to the European Union, "it results from the very words used in the First Siting Provision that even if Boeing could import all of the wings and fuselages some of the time (***quod non***), and some of the wings and fuselages all of the time (***quod non***), <u>it certainly can't import all of the wings and fuselages all of the time</u>." (European Union's other appellant's submission, paras. 59, 60, and 62 (emphases original))

[101] European Union's other appellant's submission, para. 64.

[102] European Union's other appellant's submission, para. 62.

[103] Panel Report, para. 7.293.

[104] Panel Report, para. 7.293.

[105] Panel Report, para. 7.294.

[106] Panel Report, para. 7.294.

[107] Panel Report, para. 7.296.

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wings. The Panel observed that, in light of its reading of the terms of this provision, "even if [it] could have been satisfied by two different entities siting two different operations in the state of Washington, this situation would neither expressly require nor necessarily imply that domestic goods instead of imported goods would have to be used by either entity."[108] We therefore understand the Panel to have reasoned that, to the extent that no element in the terms of the provision "condition[s], either explicitly or by necessary implication, the availability of subsidies on the use of domestic over imported goods by the manufacturer or manufacturers involved"[109], the existence of such conditionality cannot be established, as the European Union contends, based solely on the fact that the First Siting Provision obliges the subsidy recipient to commence manufacture of both a commercial airplane and fuselages and wings as part of the same production program in Washington.[110]

5.44. In sum, the relevant question in determining the existence of ***de jure*** contingency under Article 3.1(b) is not whether the production requirements under the First Siting Provision may ***result*** in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out ***a condition requiring*** the use of domestic over imported goods. Therefore, even if, under the scenarios discussed by the Panel, Boeing would likely use some amount of domestically produced wings and fuselages, this observation is not in itself sufficient to establish the existence of a condition, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods.

5.45. We therefore reject the European Union's claim that the Panel erred in its application of Article 3.1(b) of the SCM Agreement in finding that the First Siting Provision does not make the aerospace tax measures ***de jure*** contingent upon the use of domestic over imported goods.

5.4 Whether the Panel erred in its application of Article 3.1(b) of the SCM Agreement, or under Article 11 of the DSU, in the context of its *de jure* contingency analysis in respect of the Second Siting Provision

5.46. The European Union further claims that the Panel erred in its application of Article 3.1(b) of the SCM Agreement by unduly restricting the scope of the evidence from which it assessed ***de jure*** contingency in respect of the Second Siting Provision, and in particular by failing to rely on the United States' "admission" that, "if the completed fuselages and wings were produced outside the United States and then imported, [the Washington Department of Revenue] would likely determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered".[111] According to the European Union, the United States' "admission" constitutes "an agreement between the parties" on the meaning of the Second Siting Provision and evidence as to the "relevant practices of administering agencies"[112] that should have been taken into account by the Panel in its ***de jure*** contingency analysis, insofar as "[a] ***de jure*** case is built upon the text of the municipal law measure and its meaning."[113]

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[108] Panel Report, para. 7.295.

[109] Panel Report, para. 7.295.

[110] European Union's other appellant's submission, paras. 60-62. The European Union also considers that "the conclusion that the measure is ***de jure*** contingent on the use of domestic over imported goods is confirmed and corroborated by the 'fact' that aircraft producers are rational commercial actors and would act in a rational manner (e.g., they would not agree to produce the 777X in Washington State and to manufacture 777X wings and fuselages in Washington State, only to destroy, discard, or indefinitely store the 777X wings and fuselages instead of using them in the 777X program established in Washington State)." (Ibid., para. 63) In our view, however, this observation does not alter the assessment as to whether the First Siting Provision, by its terms, makes the granting of the subsidy ***de jure*** contingent upon the use of domestic over imported goods. In particular, to the extent that this factor does not seem to relate to the terms of the First Siting Provision itself, or to any meaning derived by necessary implication from those terms, we do not see how Boeing's purported conduct as a rational economic actor would be relevant to an analysis of ***de jure*** contingency. Furthermore, the language of the First Siting Provision is general, and does not refer to specified addressees, but to an "airplane program" that, under certain conditions, may qualify for certain tax benefits. Therefore, we do not see the relevance of Boeing's conduct as a rational economic actor for assessing the meaning of the terms of the First Siting Provision.

[111] European Union's other appellant's submission, para. 109 (quoting United States' response to Panel question No. 80, para. 119; and referring to response to Panel question No. 43, para. 103).

[112] European Union's other appellant's submission, para. 113 (quoting Panel Report, para. 7.8).

[113] European Union's other appellant's submission, para. 116.

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5.47. The United States responds that "the supposed 'admission' … does not address the meaning of the terms used in the Second Siting Provision [but] predicts what [the Washington Department of Revenue] would likely do in a particular hypothetical factual scenario, based on a number of assumptions", and that its response "makes clear that the Second Siting Provision places conditions on the siting of production activity, not the domestic or imported character of any goods that are used."[114]

5.48. We recall that, whereas ***de jure*** contingency is demonstrated on the basis of the very words of the measure, or by necessary implication therefrom[115], the existence of ***de facto*** contingency is "***inferred*** from the total configuration of the facts constituting and surrounding the granting of the subsidy".[116] The factors relevant for establishing the existence of ***de facto*** contingency include the design and structure of the measure, its modalities of operation, as well as the relevant factual circumstances that provide the context for understanding the measure's design, structure, and modalities of operation.[117] However, the legal standard expressed by the word "contingent" is the same for both ***de jure*** and ***de facto*** contingency.[118] As we have observed, the relevant question under Article 3.1(b) is whether ***a condition requiring*** the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and relevant factual circumstances. The factual circumstances potentially relevant to an assessment of whether a subsidy is ***de facto*** contingent in the circumstances of this case could include, for example, the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry.

5.49. We further observe that both import substitution subsidies and other subsidies that relate to domestic production may have adverse effects in respect of imported goods. Subsidies contingent upon import substitution, by their nature, adversely affect competitive conditions of imported products. Yet, also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods downstream and adversely affecting imports. In the specific case of subsidies granted for the production of both an input and a final good, subsidy recipients would likely both "produce" and "use" the subsidized inputs in the production of the subsidized final good. Indeed, such subsidies would have consequences for the subsidized producers' input-sourcing decisions to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they would likely use at least some of these inputs in their downstream production activities. This is even more so in instances where the subsidized input is specialized in nature or where vertical integration between the upstream and downstream stages of the production chain exists. However, while such subsidies may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods.

5.50. At the same time, whether a subsidy is contingent upon the use of domestic over imported goods is to be "***inferred*** from the total configuration of the facts constituting and surrounding the granting of the subsidy".[119] In particular, factual circumstances, where relevant, may form part of the context for understanding the measure's design, structure, and modalities of operation in a particular market, all of which may assist in discerning whether or not a ***de facto*** contingency exists. The design and structure of a measure granting a subsidy may be adapted to factual circumstances – such as a multi-stage production process where specialized inputs and final goods are subsidized, or where the production chain is vertically integrated. The modalities of a measure so designed or structured may then operate, such that conditions for eligibility or access to the subsidy may entail a condition requiring the use of domestic over imported goods.[120] However, whether a subsidy is simply conditional upon the domestic production of certain goods, or upon the

[114] United States' appellee's submission, paras. 93-94.

[115] See Appellate Body Report, ***Canada – Autos***, para. 100. See also para. 123.

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

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

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

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

[120] We note, in this respect, that a subsidy could be contingent upon import substitution "solely or as one of several other conditions", and that therefore subsidies that are conditional upon the ***production*** of certain goods domestically may at the same time be contingent upon the ***use*** of domestic over imported goods.

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use by the subsidy recipient of domestic over imported goods, should be assessed on a case-by-case basis.

5.51. We have observed above that we understand the analysis of ***de jure*** and ***de facto*** contingency under Article 3.1(b) as a continuum, starting with the terms of the measure and their necessary implications, and continuing with factors including the measure's design and structure, its modalities of operation, and other relevant circumstances.[121] Ultimately, in determining the existence of contingency, a panel should conduct a holistic assessment of all relevant elements and evidence on the record, and need not compartmentalize ***de jure*** and ***de facto*** analyses in order to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods. A finding of contingency, whether made on a ***de jure*** or ***de facto*** basis, yields a finding of inconsistency with Article 3.1(b) of the SCM Agreement under the same legal standard of contingency, namely, whether the measure reflects a condition requiring the use of domestic over imported goods.

5.52. We recall that determining the meaning of domestic law by a panel calls for particular care, and that, in its ***de jure*** contingency analysis, the Panel in this case had to examine the meaning of the terms of the Second Siting Provision and the necessary implications that flow from those terms. The Panel found that the language of the Second Siting Provision concerns the "siting" of the assembly of certain goods in Washington, rather than the "use" of any goods as a condition for receiving the subsidy[122], and that several possible readings of its terms exist, such that "an import-substitution contingency [could not] be derived by necessary implication" from those terms.[123] The Panel then turned to analyse whether the Second Siting Provision entails a ***de facto*** contingency, and posed a series of questions to the United States in respect of certain counterfactual scenarios.[124] The European Union considers that, while the Panel found the United States' responses to these questions "to be of crucial importance, and in fact determinative, in its analysis of ***de facto*** contingency with respect to the Second Siting Provision", they "inexplicably find[] no mention in the Panel's ***de jure*** analysis", even though they reflect an "agreement between the parties on the meaning of [the] Second Siting Provision" and a clarification as to the "relevant practices of administering agencies".[125]

5.53. We note that the Panel considered the United States' responses to be "significant in understanding ***the modalities of operation*** of the conditions of the Second Siting Provision", which were subject to the Washington Department of Revenue's administrative discretion, and concluded that "the ***likely actions*** of the relevant administrative agency in response to possible factual scenarios are ***indicative*** of whether, in practice, a subsidy would remain available so long as a manufacturer used domestic goods, while that same subsidy would be terminated if a manufacturer used those same goods from a foreign source."[126] The Panel therefore conducted an analysis of, and relied upon, these responses in the context of its ***de facto*** contingency analysis. While it is conceivable that the United States' responses to the Panel's questions may have shed light on the necessary implication of the terms of the Second Siting Provision, they may have been equally relevant for understanding the measure's design, structure, and modalities of operation in the context of the relevant factual circumstances. We recognize that the Panel compartmentalized its ***de jure*** and ***de facto*** contingency analyses. It would have been preferable if it had conducted a more holistic assessment of all relevant elements and evidence on the record. However, we do not consider that the Panel erred in considering the United States' responses to its questions in the context of examining the design, structure, and modalities of operation of the Second Siting Provision in the context of the relevant factual circumstances.

5.54. The European Union also claims that, by adopting in the context of its ***de jure*** analysis an interpretation of the Second Siting Provision "devoid of any evidentiary basis", the Panel failed to make an objective assessment of the matter under Article 11 of the DSU.[127] The European Union takes issue with the Panel's statements that "the terms 'any final assembly or wing assembly' [in the Second Siting Provision] are explicitly tied, and arguably limited, to the specific assembly operations that were 'the basis of a siting' under the First Siting Provision", and therefore "the

[121] To the extent that both ***de jure*** and ***de facto*** claims have been raised.
[122] Panel Report, para. 7.308.
[123] Panel Report, para. 7.306. See also para. 7.309.
[124] Panel Report, para. 7.361.
[125] European Union's other appellant's submission, paras. 111 and 113.
[126] Panel Report, para. 7.365. (emphases added)
[127] European Union's other appellant's submission, para. 119.

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terms of the Second Siting Provision could rather be understood to address the situation in which production activities that had been previously sited in the state of Washington, and had been the basis of the determination by the Department of Revenue pursuant to the First Siting Provision, were subsequently sited outside the state of Washington."[128]

5.55. We agree with the European Union that the words of the Second Siting Provision do not appear to limit its scope of application to the relocation of specific assembly operations that were the basis of a siting under the First Siting Provision.[129] At the same time, since compliance with the First Siting Provision meant that the 777X wings should have at least been planned to "commence manufacture at a new or existing location within Washington", we consider it reasonable to conclude that ***one*** situation in which the Second Siting Provision would be triggered is where the production of wings, once sited in Washington pursuant to the First Siting Provision, has been subsequently sited outside of this state. In this regard, we note the Panel's statement that, "[b]ased purely on the wording of [the Second Siting Provision], the terms 'any final assembly or wing assembly' are explicitly tied, and ***arguably*** limited, to the specific assembly operations that were 'the basis of a siting' under the First Siting Provision."[130] The Panel also explicitly referred to the possibility of "[a]nother reading of the terms of the Second Siting Provision".[131] In this light, while we do not consider that the scope of application of the Second Siting Provision is limited to the relocation of specific assembly operations that have been previously sited in Washington, we do not see that, in making the statements with which the European Union takes issue, the Panel adopted such an understanding. Instead, the Panel merely described one possible situation under which the Second Siting Provision would be activated.

5.56. In any event, we do not see that the Panel's statements were critical for its ultimate conclusion that the contingency set out in the Second Siting Provision is not that products manufactured in Washington should be "used", but rather that the manufacturing of certain products should not be "sited" outside Washington.[132] The Panel's finding that the Second Siting Provision does not demonstrate ***de jure*** contingency upon the use of domestic over imported goods was based more generally on the words used in this provision which do not speak of "component sourcing decisions" and the necessary implication that might flow therefrom, rather than on the fact that the terms "any final assembly or wing assembly" may be limited to the relocation of specific assembly operations that have been previously sited in Washington.[133] We therefore disagree with the European Union's contention that the Panel's understanding of the Second Siting Provision is "devoid of any evidentiary basis".[134]

5.57. In sum, we do not consider that the Panel erred in its application of Article 3.1(b) by not examining the United States' responses to its questions in the context of its ***de jure*** contingency analysis of the Second Siting Provision. In determining the existence of contingency, a panel

[128] Panel Report, para. 7.305. See European Union's other appellant's submission, para. 120.

[129] In this regard, we recognize that, whereas the "siting" requirements under the First Siting Provision are that a new or existing model of a commercial airplane, as well as "[f]uselages and wings" of such model, should "commence manufacture" in Washington, the "siting" requirements under the Second Siting Provision concern any "final assembly or wing assembly" of the same model.

[130] Panel Report, para. 7.305. (emphasis added)

[131] Panel Report, para. 7.309.

[132] Panel Report, para. 7.308.

[133] Panel Report, paras. 7.305 and 7.315.

[134] European Union's other appellant's submission, para. 119. The European Union raises a number of additional arguments, all of which appear to focus on the same central concern that the Panel understood the Second Siting Provision as limited to the relocation of the assembly operations that were the basis of a siting under the First Siting Provision. In particular, the European Union contends that the Panel's interpretation is contradicted by the words of the First Siting Provision, and that nothing in this provision or in ESSB 5952 "requires the aircraft manufacturer to indicate to the [Washington Department of Revenue] which specific aircraft and wings within the given aircraft model, or how many such aircraft and wings, would be assembled in Washington". The European Union also argues that both parties understood the words of the Second Siting Provision as referring "to the aircraft model in respect of which the First Siting Provision was satisfied, the 777X, and not to '***specific*** assembly operations'". Furthermore, the European Union recalls its argument that "the Parties agreed that 'if the completed fuselages and wings were produced outside the United States and then imported', the [Second Siting Provision] would be triggered." Finally, according to the European Union, "the Panel's view that the Second Siting Provision does not '***per se*** and necessarily exclude the possibility for the airplane manufacturer to use wings from outside the state of Washington [...], as long as it did not relocate the previously sited manufacturing of wings outside the state of Washington'", is contradicted by certain statements made by the United States before the Panel. (Ibid., paras. 126, 127 (emphasis original), 130, and 131 (fn omitted))

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should conduct a holistic assessment of all relevant elements and evidence on the record, and need not compartmentalize its ***de jure*** and ***de facto*** analyses in order to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods. The United States' responses may have shed light on the necessary implication of the terms of the Second Siting Provision, but they may have been equally relevant for understanding the measure's design, structure, and modalities of operation in the context of the relevant factual circumstances. Therefore, we do not consider that the Panel erred by unduly restricting the scope of the evidence from which it assessed ***de jure*** contingency with respect to the Second Siting Provision. We also do not consider that the Panel understood the scope of application of the Second Siting Provision as limited to the relocation of specific assembly operations that were the basis of a siting under the First Siting Provision. Instead, the Panel was merely describing one possible situation under which the Second Siting Provision would be activated.

5.58. In view of the above, we reject the European Union's claim that the Panel erred in the application of Article 3.1(b) of the SCM Agreement in finding that the Second Siting Provision, considered separately or jointly with the First Siting Provision, does not make the B&O aerospace tax rate ***de jure*** contingent upon the use of domestic over imported goods. We also reject the European Union's claim that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in finding that the Second Siting Provision, considered separately or jointly with the First Siting Provision, does not make the B&O aerospace tax rate ***de jure*** contingent upon the use of domestic over imported goods.

5.5 Whether the Panel erred in its *de facto* contingency analysis under Article 3.1(b) of the SCM Agreement

5.59. The United States claims that the Panel erred in the interpretation and application of Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate is ***de facto*** contingent upon the use of domestic over imported goods. The United States argues that the Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement as if it prohibited subsidies conditional upon the domestic siting of production activities.[135] The United States further submits that, because Boeing does not and will not "use" wings to produce the 777X, the Panel erred in its interpretation and application of Article 3.1(b) in finding that the B&O aerospace tax rate for the 777X aircraft program is contingent upon the "use" of wings for the 777X.[136] Moreover, the United States argues that the Panel erred in the interpretation and application of Article 3.1(b) in finding that the subsidy is contingent upon the use of "domestic" over "imported" wings because it did not address the meaning of the terms "domestic" or "imported", and did not conduct "a meaningful analysis" as to whether wings resulting from wing assembly in Washington would necessarily be "domestic".[137] In addition, the United States claims that the manner in which the Panel used hypothetical scenarios to determine what would trigger the Second Siting Provision constitutes an error in the interpretation and application of Article 3.1(b) of the SCM Agreement, or, in the alternative, a failure to make an objective assessment of the matter under Article 11 of the DSU.[138]

5.60. In response, the European Union submits that the Panel did not find that a subsidy contingent solely upon domestic production, without more, would be inconsistent with Article 3.1(b). Rather, for the European Union, "the Panel found that the evidence before it demonstrated the subsidy at issue to be contingent on the use of domestic over imported goods, and in fact going even further, one which '***per se*** and necessarily exclude[s]' the possibility that any wing could be imported without the loss of the subsidy."[139] The European Union submits that, if the United States' argument that wings are not "used" in the production of the 777X were accepted, this would mean that Boeing itself could determine whether or not a challenged subsidy

[135] United States' appellant's submission, para. 99.

[136] United States' appellant's submission, para. 124. In this respect, the United States underscores that wings "do not come into existence until the finished airplane itself is completed through the final assembly process". (United States' appellant's submission, para. 115 (fn omitted))

[137] United States' appellant's submission, para. 126. The United States also contends that the Panel's failure to address the meaning of the terms "domestic" and "imported" constitutes a failure to provide a basic rationale for its findings as required under Article 12.7 of the DSU. (United States' appellant's submission, para. 133)

[138] United States' appellant's submission, para. 135.

[139] European Union's appellee's submission, para. 79 (quoting Panel Report, para. 7.367).

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would be consistent with Article 3.1(b) by the way it organized its production process.[140] The European Union argues that, even if currently Boeing does not "use" wings, it may do so in the future, but, nevertheless, the subsidy would act to prevent Boeing from using imported wings.[141] With respect to the United States' allegation that the Panel did not address the meaning of the terms "domestic" and "imported", the European Union contends that the Panel "revealed an interpretation of the word 'domestic'" in stating that wings sourced from Washington "by definition would be domestic wings".[142] Finally, the European Union submits that, in the present case, the use of hypothetical scenarios by the Panel was inevitable because the Panel was called upon to examine the relationship between the requirements of the Second Siting Provision and events that may occur in the future.[143]

5.61. As the Panel noted, the First and Second Siting Provisions are focused on the siting of assembly activities and do not contain any language requiring in explicit terms, or by necessary implication therefrom, the use of domestic over imported goods.[144] Above we have rejected the European Union's claims that the Panel erred in its interpretation and application of Article 3.1(b) in its analysis of ***de jure*** contingency. As we have noted, where an analysis of ***de jure*** contingency does not yield a finding of inconsistency under Article 3.1(b) on the basis of the terms of the measure, or any necessary implication therefrom, a panel may still make a determination that contingency exists on a ***de facto*** basis where a contingency to use domestic over imported goods can be inferred from the total configuration of the facts surrounding the granting of the subsidy. Analysis of ***de facto*** contingency may take into account the measure's design and structure, and modalities of operation, as well as the factual circumstances providing context for understanding the subsidy measure and its operation with a view to ascertaining whether a condition requiring the use of domestic over imported goods exists.

5.62. The participants, in their arguments relating to ***de facto*** contingency under Article 3.1(b), referred to factual circumstances that we consider potentially relevant to an assessment of whether the subsidy at issue is ***de facto*** contingent. These include the multi-stage nature of the production process, the level of integration of the subsidy recipient, and the degree of specialization of the subsidized inputs, to the extent that they inform and provide context for understanding the measure's design, structure, and modalities of operation. In respect of the Second Siting Provision, the question at issue is whether, notwithstanding that the measure itself expressly concerns only the siting of certain manufacturing and assembly operations, which was found not to demonstrate ***de jure*** contingency, a condition requiring the use of domestic over imported goods nevertheless exists on a ***de facto*** basis.

5.63. The Second Siting Provision provides that the B&O aerospace tax rate ceases to apply in a case where the Washington Department of Revenue "makes a determination that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program in [Washington pursuant to the First Siting Provision] has been sited outside the state of Washington."[145] By its express terms, the Second Siting Provision is triggered in the event of a future determination by the Washington Department of Revenue that final assembly or wing assembly "has been sited" outside Washington, and thus the condition contained in the measure concerns the siting or location of the relevant assembly activities. It is the Second Siting Provision's reference to wing assembly, rather than to final assembly, that the Panel considered most relevant to the European Union's claim of ***de facto*** contingency upon the use of domestic over imported wings.[146]

5.64. We recall the relevant aspects of the Panel's analysis of the European Union's claim of ***de facto*** contingency. The Panel started by noting that its ***de facto*** analysis "must go beyond the

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[140] European Union's appellee's submission, para. 94.

[141] European Union's appellee's submission, paras. 108-109.

[142] European Union's appellee's submission, para. 119 (quoting Panel Report, para. 7.364). The European Union points out that the Panel also revealed an interpretation of the terms "domestic" and "imported" by stating that "wings made in Washington State are domestic goods and any imported wings would by definition be made outside of Washington State". (Ibid. (quoting Panel Report, para. 7.367))

[143] European Union's appellee's submission, paras. 140-141.

[144] Panel Report, paras. 7.297, 7.311, and 7.317.

[145] Panel Report, para. 7.32 (quoting ESSB 5952 (Panel Exhibit EU-3), Sections 5-6(11)(e)(ii)).

[146] Panel Report, para. 7.349. This condition of the Second Siting Provision with respect to the siting of any wing assembly is in force for the entirety of the period during which the B&O aerospace tax rate is in effect under ESSB 5952. (Ibid.)

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text of the legislation and ... be based on a holistic examination of all the available evidence" pertaining to the design, structure, modalities of operation, and the relevant factual circumstances surrounding the granting of the subsidies.[147]

5.65. In its ***de facto*** analysis, the Panel evaluated relevant circumstances relating to the Second Siting Provision, in particular, the circumstances in which the provision would be triggered. The Panel distinguished the enforcement mechanism of the Second Siting Provision from that of the First Siting Provision. With respect to the First Siting Provision, the Panel noted that it contemplates "a one-time decision" by the Washington Department of Revenue and that there is "no legal mechanism under Washington State law that would allow the Department of Revenue to revoke that determination".[148] Thus, the Panel concluded that "the First Siting Provision is not a measure whose operation will occur in repeated instances over some (definite or indefinite) period."[149] By contrast, the Panel found that "the role of the Second Siting Provision is to establish conditions for the airplane manufacturing programme that had activated the First Siting Provision (and thus effected the extended availability of the tax benefits) to maintain that programme's access to one of those tax benefits, namely the B&O aerospace tax rate."[150] The Panel recalled that "the Second Siting Provision provides that the 'siting' of 'wing assembly' of the airplane model in question (the 777X) outside Washington State would result in the loss of the B&O aerospace tax rate for the manufacturing or sale of that airplane."[151] Noting that "the conditionality in the Second Siting Provision is phrased in the negative", the Panel understood the Second Siting Provision to set forth the factual circumstances that would, if they arose, cause Boeing's 777X aircraft program to lose access to the subsidy.[152] It was thus clear to the Panel that so long as such "siting" does not happen, the Second Siting Provision "remains dormant, operating passively as a deterrent to safeguard the ***status quo*** (or at least particular aspects thereof) that satisfied the First Siting Provision".[153] For the Panel, this "passive, deterrent nature of the measure" raised "the question as to what sorts of factual evidence could inform the analysis of whether ongoing access to the B&O aerospace tax rate ... is contingent ***de facto*** on the use of domestic over imported 777X wings."[154] At the time of the Panel's assessment of this claim, the Second Siting Provision had not been triggered, and therefore no evidence existed as to its actual operation and, in particular, as to what would trigger the Second Siting Provision.[155]

5.66. Because the Second Siting Provision had not been triggered, the Panel observed that it was "confronted by the counterfactual question of what would trigger the Second Siting Provision, that is, what action by Boeing would result in the Department of Revenue determining that 777X wing assembly 'has been sited' outside Washington State."[156] The Panel considered "particularly relevant the discretion granted ... to the Department of Revenue to terminate the availability of the **B&O aerospace tax rate ... if it determines that Boeing has 'sited' assembly of wings ... outside** of Washington State".[157] The Panel underscored that the exercise of discretion granted to the Washington Department of Revenue "would be inconsistent with Article 3.1(b) of the SCM Agreement **if, in practice, it resulted in the termination of the B&O aerospace tax rate for ...** the 777X programme on the basis of a determination that Boeing, by virtue of using imported 777X wings, had 'sited' 777X wing assembly outside Washington State."[158]

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[147] Panel Report, para. 7.327. The Panel observed that, since the First Siting Provision was satisfied by Boeing's 777X siting decision, the operation of the First and Second Siting Provisions could not be dissociated. The Panel thus considered "the manner in which the measures at issue are structured, designed, and operate, under the terms of ESSB 5952, and as a result of the First Siting Provision and the Second Siting Provision". (Ibid., para. 7.331)

[148] Panel Report, para. 7.345. (fn omitted)

[149] Panel Report, para. 7.345.

[150] Panel Report, para. 7.346.

[151] Panel Report, para. 7.358. The Panel recalled that the expression "has been sited" (used in the Second Siting Provision in the passive tense) is related to a manufacturer locating a manufacturing program in a particular place, which is consonant with the definition of "siting" in the First Siting Provision. (Ibid., fn 663 to para. 7.358 (referring to para. 7.304))

[152] Panel Report, para. 7.346.

[153] Panel Report, para. 7.358.

[154] Panel Report, para. 7.358.

[155] Panel Report, para. 7.358.

[156] Panel Report, para. 7.359.

[157] Panel Report, para. 7.360.

[158] Panel Report, para. 7.360.

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5.67. In an effort to understand what would trigger the Second Siting Provision, the Panel posed two questions to the United States (Panel questions Nos. 40 and 80) based on hypothetical scenarios. Under the first scenario, the Panel asked whether the Second Siting Provision would be triggered if, assuming ***arguendo*** that it was possible for Boeing to purchase completed wings, Boeing would continue manufacturing wings itself in Washington and, in addition, would purchase wings from another manufacturer in Washington.[159] With respect to the first hypothetical scenario, the United States stated the following:

> As alluded to in the Panel's question, and as noted elsewhere, it is not possible for Boeing to purchase completed 777X fuselages and wings. However, assuming ***arguendo*** that this was not the case, the wording of the question – in particular, the focus on Boeing rather than all taxpayers, and on Boeing "remain[ing] eligible" rather than becoming eligible – assumes that Boeing already fulfilled the First Siting Provision. Once that provision is fulfilled, it contains no legal mechanism for reversing course or otherwise affecting the tax treatment provided for in ESSB 5952. Therefore, assuming ***arguendo*** that Boeing could purchase completed 777X fuselages and wings, the First Siting Provision still would have no relevance to a decision by Boeing to make such purchases.
>
> Continuing with this same ***arguendo*** assumption, to determine whether the Second Siting Provision was triggered, DOR would have to evaluate whether Boeing had sited any wing assembly or final assembly outside Washington. The question implies that no such siting outside Washington would have taken place. Therefore, DOR likely would not determine that the Second Siting Provision had been triggered. This is no different than if Boeing cancelled the 777X program altogether. In short, unless DOR determines that 777X final assembly or wing assembly has been sited outside Washington, the Second Siting Provision is not triggered.[160]

5.68. Under the second hypothetical scenario, the Panel asked whether the Second Siting Provision would be triggered if Boeing would continue manufacturing wings in Washington and, in addition, would purchase them from another producer outside of Washington.[161] With respect to the second hypothetical scenario, the United States explained:

> Under the Second Siting Provision, the fact that fuselages and wings are imported is irrelevant. Rather, the Second Siting Provision is triggered only if DOR determines that any final assembly or wing assembly is sited outside Washington. It is the siting of that production activity, not the domestic or imported character of any goods, that is relevant.
>
> Thus, as the United States noted in response to Question 39 – and assuming ***arguendo***, contrary to fact, that it is possible for Boeing to import completed fuselages and wings for use in the production of the 777X – if the completed fuselages and wings were produced outside the United States and then imported, DOR would likely determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered. However, taking another hypothetical that ignores for the sake of argument what is realistic, and applying the EU's approach to "domestic" and "imported," if Boeing assembled completed fuselages and wings in Washington, sent them to a foreign company to conduct non-assembly operations (e.g. cosmetic painting of logos or testing), and then imported them, the Second Siting Provision would not be triggered, despite that under the EU's approach, Boeing was using imported goods.
>
> Again, the Second Siting Provision is focused on the siting of production activity – in particular, the siting of assembly operations. This is significant in light of the distinction drawn by the EU at the second Panel meeting between the use of goods within the meaning of Article 3.1(b), and what are "just assembly operations."[162]

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[159] Panel question No. 40.
[160] United States' response to Panel question No. 40, paras. 96-97. (emphasis original)
[161] Panel question No. 80.
[162] United States' response to Panel question No. 80, paras. 118-120. (emphasis original)

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5.69. In addition, we note that, in answering Panel question No. 7 as to whether the B&O aerospace tax rate would still apply if there were a single instance of assembly outside Washington, the United States responded:

> At the outset, it is important to note that there is no realistic scenario in which only a single instance of final assembly or wing assembly would take place outside of Washington. These are complex manufacturing activities that require large investments in sophisticated facilities and tools, a trained workforce, and integration into the larger production process. And as the United States has explained, the wing assembly for the 777X is only completed as part of the final assembly of the finished airplane. However assuming for the sake of argument that there was an isolated instance of final assembly or wing assembly outside Washington, such isolated assembly may not be a siting outside the state that would trigger the Second Siting Provision.
>
> The Second Siting Provision refers to a determination by DOR that any final assembly or wing assembly "has been ***sited*** outside the state of Washington." The word "sited," particularly in conjunction with a process like "assembly," connotes a decision not associated with a one-off exception. In essence, there is no such thing as a siting of a one-time final assembly or wing assembly. Thus, if such an exception did occur in a single instance, it is unlikely DOR would determine that Boeing had ***sited*** any final assembly or wing assembly outside of Washington. Accordingly, the 0.2904 percent B&O tax rate would continue to apply.[163]

5.70. The Panel considered the United States' responses to Panel questions Nos. 40 and 80 "significant in understanding the modalities of operation of the conditions of the Second Siting Provision".[164] On the basis of the United States' responses, the Panel concluded that "the Second Siting Provision is not only aimed at ensuring that [Boeing] itself assemble the 777X wings or conduct the final assembly of the 777X"[165]; rather, for the Panel, "[i]t also concerns the 'use' of certain goods [i.e. wings], and specifically the origin of those goods that enter into the production process for the 777X as a condition for the continued availability of a subsidy."[166] In the Panel's view, whether or not the Second Siting Provision would be triggered would be determined by the origin of the wings. The Panel concluded that "the ***only*** decision by Boeing to source wings which it would then 'use' in producing the 777X that ***would not*** trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings."[167] The Panel further considered that the United States' responses clarified that the term "or" in the Second Siting Provision "contemplates, and seeks to prevent ***inter alia***, any wings ... from being produced as separate products outside Washington **State ... that would** then be shipped to Washington State for incorporation in the final assembly process."[168] On this basis, the Panel found that no wings can "be sourced by Boeing from outside the state of Washington without the consequence of activating the Second Siting Provision".[169] Thus, the Panel based its conclusions on the United States' responses to Panel questions Nos. 40 and 80. We note that the Panel did not address in its analysis the relevance of the United States' response to Panel question No. 7 that a single instance of assembly outside Washington would not trigger the Second Siting Provision.

5.71. In evaluating the Panel's assessment of the Second Siting Provision, we take note of the Panel's key conclusion that the United States' responses clarify that the Second Siting Provision is "not only aimed at" preventing the siting of assembly operations outside of Washington, but "also concerns the 'use' of certain goods, and specifically the origin of those goods".[170] We do not consider that a statement by the Panel that a measure may "concern" the domestic or imported origin of goods is in itself sufficient to establish the existence of ***de facto*** contingency to use domestic over imported goods within the meaning of Article 3.1(b). As we have noted, the relevant question in determining the existence of contingency under Article 3.1(b) is not whether a condition for eligibility under a subsidy may ***result*** in the use of more domestic and fewer imported

[163] United States' response to Panel question No. 7, paras. 15-16. (fn omitted; emphasis original)
[164] Panel Report, para. 7.365.
[165] Panel Report, para. 7.364.
[166] Panel Report, para. 7.366.
[167] Panel Report, para. 7.364. (emphasis original)
[168] Panel Report, para. 7.366.
[169] Panel Report, para. 7.368.
[170] Panel Report, para. 7.366. See also para. 7.364.

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goods. Rather, the question is whether ***a condition requiring*** the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from the measure's design, structure, and modalities of operation, in light of the relevant factual circumstances that provide the context for understanding the measure and its operation.

5.72. Other statements by the Panel underscore its understanding that the operation of the siting condition under the measure at issue may relate only to certain ***consequences*** for the importation of goods. The Panel considered that "so long as this 'siting' does not happen", the Second Siting Provision "remains dormant", and that it was this "particular passive, deterrent nature of the measure" that raised the question "as to what sorts of factual evidence could inform the analysis of whether ongoing access to the B&O aerospace **tax rate …** under the 777X programme is contingent ***de facto*** on the use of domestic over imported 777X wings."[171] For the Panel, this made the question as to how the Washington Department of Revenue would exercise the discretion granted to it under the measure and, specifically, the Second Siting Provision "particularly relevant".[172] The Panel concluded that the responses provided by the United States regarding what might trigger the Second Siting Provision demonstrate that the language of this provision "contemplates, and seeks to prevent ***inter alia*, any wings … from being produced as separate products outside Washington State … that would then be shipped to Washington State for** incorporation in the final assembly process".[173]

5.73. While the Panel is correct to note that the measure may prevent assembly of completed wings abroad, in our view, this does not mean that the Second Siting Provision "contemplates" and "seeks to prevent" imports of completed wings. While it is not unusual that, in order to receive a subsidy, the recipient is required to meet certain conditions, it is not entirely clear how the Washington Department of Revenue would exercise its discretion and whether a loss of the subsidy by the recipient, if these conditions are not met, would demonstrate the existence of a requirement to use domestic over imported goods. In any event, it is the location of production, not the imported or domestic origin of the resulting product, that would trigger the loss of the B&O aerospace tax rate.

5.74. Thus, we do not consider that the Panel's analysis and reasoning is sufficient to establish that the way the Second Siting Provision operates with respect to the siting of production and assembly makes the B&O aerospace tax rate ***de facto*** contingent upon the use of domestic over imported goods. In addition, we do not understand how statements made by the Washington Governor "about the goal of keeping 777X wing production in Washington" are, in the Panel's words, "consistent" with its conclusion that the Second Siting Provision demonstrates ***de facto*** contingency.[174] If anything, these statements simply underscore that the Second Siting Provision relates to a requirement not to site certain production and assembly activities outside Washington.

5.75. We consider it significant that the Second Siting Provision is focused on the "siting" of assembly activities. As we have noted, although conditions for eligibility and access to a subsidy may entail certain consequences for a domestic producer's sourcing decisions between domestic and imported goods, this alone does not equate to ***a condition requiring*** the use of domestic over imported goods. The Panel itself appears to have recognized this when it stated that the focus of its assessment was "not whether the measures at issue have had an import substitution effect or a detrimental impact on imports, as this would [have] require[d] the Panel to trespass into an adverse effects analysis of the type that is not contemplated by Article 3.1."[175] Yet, by relying on the consequence that a domestic siting provision has for the importation of goods produced through assembly operations sited abroad, the Panel itself, in our view, built its reasoning on the very observations concerning any consequential "import substitution effect" and "detrimental impact on imports" that the Panel stated would be inappropriate in an Article 3.1(b) analysis.

5.76. We recall, in this respect, that a subsidy requiring the siting of certain production activities in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods in downstream production and adversely

[171] Panel Report, para. 7.358.
[172] Panel Report, para. 7.360.
[173] Panel Report, para. 7.366.
[174] Panel Report, para. 7.366.
[175] Panel Report, para. 7.357.

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affecting imports. In the specific case of subsidies granted for the production of inputs – e.g. wings and fuselages – the subsidy recipient would likely both "produce" and "use" the subsidized inputs in the production and assembly of the subsidized final good. Indeed, subsidies in these circumstances have consequences for the input-sourcing decisions of the subsidized producers to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they will likely use these inputs in their downstream production activities. This holds particularly true in circumstances where the subsidized inputs are very specialized in nature and the manufacturing and assembly stages of the production chain are highly integrated. However, while a subsidy may operate in such factual circumstances so as to foster the use of subsidized domestic inputs, and thereby result in adverse effects on imports within the meaning of Part III of the SCM Agreement, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods within the meaning of Article 3.1(b) of that Agreement.

5.77. We also take note of the United States' responses to Panel questions involving certain "counterfactual scenarios"[176] regarding what determination the Washington Department of Revenue would likely make if Boeing were to import completed fuselages and wings. At the outset, we wish to recall that using counterfactual or hypothetical scenarios is a permissible tool of legal analysis that may be particularly relevant in WTO dispute settlement, including in the context of the SCM Agreement.[177] Moreover, the absence of evidence pertaining to the actual application of a measure should not preclude the possibility for a Member to challenge a law that has not yet been applied.[178] Especially when the alleged contingency is not clearly expressed in the language of the relevant legal instrument, a thorough analysis of the relationship between the granting of the subsidy and the condition requiring the use of domestic over imported goods on the basis of a careful scrutiny of all relevant factors and factual circumstances is required. We emphasize, in this respect, that the manner in which the Washington Department of Revenue would exercise its discretion to terminate the availability of the B&O aerospace tax rate was "particularly relevant"[179] for the Panel. Thus, critical parts of the Panel's reasoning depended on whether the exercise of discretion by the Washington Department of Revenue would trigger the Second Siting Provision, and the United States' responses were, therefore, of central importance for the Panel's conclusion regarding ***de facto*** contingency. That said, we consider that panels should exercise caution in basing their findings of ***de facto*** inconsistency solely or primarily on hypothetical scenarios in situations where limited evidence exists as to a measure's operation.

5.78. With this in mind, we are concerned about the limited consideration that the Panel gave to the United States' responses to the Panel's questions and the conclusions that the Panel drew from them. While we do not take issue with the Panel's use of questions based on hypothetical scenarios, we question the conclusions the Panel drew from the United States' responses. The questions posed by the Panel were conjectural and based on ***arguendo*** assumptions. We also note the probabilistic nature of the United States' response about how the Washington Department of Revenue might exercise its discretion if certain hypothetical factual circumstances were to arise in the future. Because the Washington Department of Revenue has never made a determination as to what consequence would follow the importation by Boeing of completed 777X wings and fuselages, the Panel called upon the United States to hypothesize as to what determination the Washington Department of Revenue would make at some future point in time, and in respect of market circumstances that do not presently exist. In this regard, the United States limited itself to stating that the Washington Department of Revenue "would likely determine"[180] that importation of completed wings and fuselages would mean that some assembly had been sited outside

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[176] Panel Report, para. 7.361.

[177] For example, in examining whether there is a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, a panel must determine what revenue would have been "otherwise due", i.e. absent the alleged subsidy. (See Appellate Body Report, ***Canada – Autos***, para. 91) Similarly, in examining whether a "benefit" is conferred by a financial contribution within the meaning of Article 1.1(b) of the SCM Agreement, a panel must determine the position of the alleged subsidy recipient in the market absent the alleged subsidy. (See Appellate Body Report, ***Canada – Aircraft***, paras. 157-158) In addition, in the context of causation and non-attribution analyses under the Anti-Dumping Agreement, the Safeguards Agreement, and the SCM Agreement, panels are frequently called upon to assess "counterfactual scenarios" in reviewing domestic determinations as to whether injury to the domestic industry would exist in the absence of dumping, increased imports, or subsidized imports.

[178] See GATT Panel Report, ***US – Superfund***, para. 5.2.2.

[179] Panel Report, para. 7.360.

[180] United States' response to Panel question No. 80, para. 119.

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Washington, thereby triggering the Second Siting Provision. While this statement is no doubt relevant, it appears to have been almost the sole basis for the Panel's conclusion regarding the prospective modalities of operation of the Second Siting Provision.

5.79. We note certain other statements that the United States made in its responses to the Panel's questions. First, the United States emphasized that whether fuselages and wings are imported is "irrelevant" for purposes of the Second Siting Provision because it is the siting of production activities, not the domestic or imported character of goods, that determines whether or not the Second Siting Provision would be triggered.[181] This underscores our assessment that any requirement that is to be discerned in the Second Siting Provision relates to the location of assembly activities, and does not in itself demonstrate the existence of a ***de facto*** requirement to use domestic over imported goods. In our view, the circumstances present in this dispute – such as the existence of a multi-stage production process, the level of specialization of the subsidized inputs, and the level of integration of the manufacturing and assembly chain in the aircraft industry – should have received more careful consideration by the Panel. Second, as the United States also noted in its response to Panel question No. 80, even if importation of completed 777X wings and fuselages were technically possible, not all importation of such structures would carry the consequence that the United States outlined, for there could be a scenario in which assembly would still occur in Washington, but the export of such structures for non-assembly operations and the subsequent importation of those structures would not trigger the Second Siting Provision. Third, we recall that, in response to Panel question No. 7, the United States indicated that an isolated instance of final assembly or wing assembly outside Washington "may not be a siting outside the state that would trigger the Second Siting Provision".[182] This response by the United States calls into question the Panel's conclusion drawn on the basis of the United States' responses to Panel questions Nos. 40 and 80.

5.80. Read together, the above statements by the United States reflect important caveats that further attenuate the United States' response as to the Washington Department of Revenue's "likely" determination if Boeing were to import completed wings or fuselages. Importantly, we also note that the Panel did not refer in its Report to any of the statements set out in the preceding paragraph, either in its description of the United States' responses to the Panel's questions, or when it reasoned its finding of ***de facto*** contingency. Given the Panel's near sole reliance on the United States' responses to Panel questions Nos. 40 and 80, we would have expected the Panel to have conducted a more careful analysis and provided an explanation as to how it could justify its singular reliance on the United States' responses in light of the various caveats in those responses. We recall, in this connection, the Appellate Body's statement in ***Canada – Aircraft*** that, in examining the total configuration of facts constituting and surrounding the granting of the subsidy, no one factor "on its own is likely to be decisive in any given case".[183] In our view, the United States' responses to the Panel's questions do not seem to have indicated anything more than a consequence of not fulfilling the conditions for the granting of the subsidy. Such consequences, together with other possible consequences of the subsidy at issue that may have some bearing on Boeing's input-sourcing decisions, are not sufficient to demonstrate that the Second Siting Provision, which was found not to demonstrate ***de jure*** contingency, nevertheless entails a ***de facto*** requirement to use domestic over imported goods.

5.81. In sum, we do not see that the Panel properly established that the Second Siting Provision, in addition to the conditions relating to the siting of production activities, also entails a condition requiring the use of domestic over imported goods. The United States' response to Panel question No. 80 regarding the Washington Department of Revenue's "likely" determination in the event that completed fuselages and wings were imported clarifies that it is the location of production activities, not the imported or domestic character of the goods produced, that triggers the Second Siting Provision. In light of the various caveats to the United States' responses, the implications of which were neither mentioned nor reasoned in the Panel Report, we do not consider that the Panel's analysis and reasoning provided a sufficient basis for its finding that the Second Siting Provision makes the B&O aerospace tax rate ***de facto*** contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

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[181] United States' response to Panel question No. 80, para. 118.
[182] United States' response to Panel question No. 7, para. 15.
[183] Appellate Body Report, ***Canada – Aircraft***, para. 167.

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5.82. For the foregoing reasons, we reverse the Panel's finding, in paragraphs 7.369 and 8.1.c of its Report, that the B&O aerospace tax rate is ***de facto*** contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. Accordingly, we also reverse the Panel's finding, in paragraph 8.2 of its Report, that the United States has acted inconsistently with Article 3.2 of the SCM Agreement.

5.83. We note that the United States raised a number of additional claims concerning the Panel's interpretation and application of Article 3.1(b) of the SCM Agreement. In particular, the United States takes issue with the Panel's finding that Boeing "uses" wings to manufacture the 777X and argues that the Panel did not conduct "a meaningful analysis" as to whether wings resulting from wing assembly in Washington would necessarily be "domestic".[184] The United States also submits that the Panel's evaluation of the operation of the Second Siting Provision in the context of its ***de facto*** analysis is inconsistent with the Panel's duty under Article 11 of the DSU to make an objective assessment of the matter.[185] Having reversed the Panel's finding that the B&O aerospace tax rate is ***de facto*** contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, we do not consider it necessary to address further the United States' other claims and arguments.

5.84. We further note the European Union's claim that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU by treating as conclusive the language of the contingency described in the First Siting Provision and the Washington Department of Revenue's determination regarding Boeing's decision to locate "a significant commercial airplane manufacturing program" in Washington, and thereby "failing to properly consider the implications of that condition on Boeing's incentives to use domestic over imported 777X wings or 777X fuselages ***in*** its Washington State production of the 777X".[186] In light of our reversal of the Panel's finding that the B&O aerospace tax rate is ***de facto*** contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement, we do not consider it necessary to address the European Union's claim. Insofar as the Panel could not have relied on the mere implications of such a domestic siting condition for the importation of goods manufactured abroad, we do not consider that the European Union's argument could have altered the Panel's understanding that the activation of the First Siting Provision was based exclusively on Boeing's decision to locate a significant commercial airplane manufacturing program in Washington, and not on the particular use of goods of specific origins.[187]

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.2. With respect to the Panel's interpretation of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analyses of the First and Second Siting Provisions, we consider that the Panel did not articulate a legal standard under Article 3.1(b) requiring the use of domestic goods to the complete exclusion of imported goods. Instead, the Panel found that, by their terms, the First and Second Siting Provisions relate to the location of certain assembly operations within Washington and are silent as to the use of domestic or imported goods. Therefore, in stating that these provisions do not "***per se*** and necessarily exclude" the possibility for the airplane

[184] United States' appellant's submission, paras. 124 and 126.

[185] First, the United States argues that the Panel's findings, drawn primarily from the United States' answers to Panel questions Nos. 40 and 80, relied on a flawed understanding of how the Second Siting Provision would operate in hypothetical scenarios that had no basis in evidence. Second, the United States challenges the Panel's conclusion that the expression "or" in the Second Siting Provision "contemplates, and seeks to prevent ***inter alia*, any wings ... from being produced as separate products outside Washi**ngton State". Third, the United States challenges the weight that the Panel attributed to certain elements of evidence, in particular, to certain statements by the Governor of Washington. Finally, the United States points out that the Panel did not rely in its analysis on its own statement that Section 12 wing structures are not "wings". (United States' appellant's submission, paras. 165-191)

[186] European Union's other appellant's submission, para. 75. (emphasis original) For the European Union, the requirements for "Boeing to both (i) produce the 777X aircraft, and (ii) manufacture 777X wings and 777X fuselages, all in Washington State" "together ***necessarily imply*** that the 777X wings and 777X fuselages manufactured in Washington State were for use ***in*** the production of the 777X aircraft in Washington State." (Ibid., para. 76 (emphasis original; fn omitted))

[187] Panel Report, paras. 7.343-7.344.

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manufacturer to use inputs from outside Washington, the Panel was not articulating a legal standard, but was rather recognizing that, based on the necessary implications of the provisions' terms, no ***de jure*** requirement existed for Boeing to use domestic over imported goods. Neither did the Panel articulate such a legal standard in assessing the ***de facto*** contingency of the First Siting Provision. Rather, the Panel found that the additional evidence before it confirmed its understanding of the First Siting Provision in the context of its ***de jure*** contingency analysis that the measure does not require the use of domestic over imported goods as a condition for granting the subsidy.

a. We therefore reject the European Union's claims that the Panel erred in its interpretation of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analyses of the First and Second Siting Provisions, as well as its ***de facto*** contingency analysis of the First Siting Provision.

6.3. With respect to the Panel's application of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analysis of the First Siting Provision, we consider that the relevant question in determining the existence of ***de jure*** contingency under Article 3.1(b) is not whether the production requirements under the First Siting Provision may ***result*** in the use of more domestic and fewer imported goods, but whether the measure, by its terms or by necessary implication therefrom, sets out ***a condition requiring*** the use of domestic over imported goods. Therefore, even if, under the scenarios discussed by the Panel, Boeing would likely use some amount of domestically produced wings and fuselages, this observation is not in itself sufficient to establish the existence of a condition, reflected in the measure's terms or arising by necessary implication therefrom, requiring the use of domestic over imported goods.

a. We therefore reject the European Union's claim that the Panel erred in its application of Article 3.1(b) of the SCM Agreement in finding that the First Siting Provision does not make the aerospace tax measures ***de jure*** contingent upon the use of domestic over imported goods.

6.4. With respect to the Panel's application of Article 3.1(b) of the SCM Agreement in the context of its ***de jure*** contingency analysis of the Second Siting Provision, we do not consider that the Panel erred by not examining the United States' responses to its questions in the context of that analysis. In determining the existence of contingency, a panel should conduct a holistic assessment of all relevant elements and evidence on the record, and need not compartmentalize its ***de jure*** and ***de facto*** analyses in order to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods. The United States' responses may have shed light on the necessary implication of the terms of the Second Siting Provision, but they may have been equally relevant for understanding the measure's design, structure, and modalities of operation in the context of the relevant factual circumstances. Therefore, we do not consider that the Panel erred by unduly restricting the scope of the evidence from which it assessed ***de jure*** contingency with respect to the Second Siting Provision. We also do not consider that the Panel understood the scope of application of the Second Siting Provision as limited to the relocation of specific assembly operations that were the basis of a siting under the First Siting Provision. Instead, the Panel was merely describing one possible situation under which the Second Siting Provision would be activated.

a. We therefore reject the European Union's claim that the Panel erred in the application of Article 3.1(b) of the SCM Agreement in finding that the Second Siting Provision, considered separately or jointly with the First Siting Provision, does not make the B&O aerospace tax rate ***de jure*** contingent upon the use of domestic over imported goods.

b. We also reject the European Union's claim that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in finding that the Second Siting Provision, considered separately or jointly with the First Siting Provision, does not make the B&O aerospace tax rate ***de jure*** contingent upon the use of domestic over imported goods.

6.5. With respect to the Panel's ***de facto*** contingency analysis under Article 3.1(b) of the SCM Agreement, we do not see that the Panel properly established that the Second Siting

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Provision, in addition to the conditions relating to the siting of production activities, also entails a condition requiring the use of domestic over imported goods. The United States' response to Panel question No. 80 regarding the Washington Department of Revenue's "likely" determination in the event that completed fuselages and wings were imported clarifies that it is the location of production activities, not the imported or domestic character of the goods produced, that triggers the Second Siting Provision. In light of the various caveats to the United States' responses, the implications of which were neither mentioned nor reasoned in the Panel Report, we do not consider that the Panel's analysis and reasoning provided a sufficient basis for its finding that the Second Siting Provision makes the B&O aerospace tax rate *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

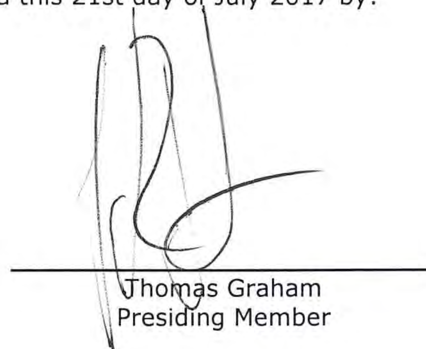
a. We therefore reverse the Panel's finding, in paragraphs 7.369 and 8.1.c of the Panel Report, that the B&O aerospace tax rate is *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

b. Accordingly, we also reverse the Panel's finding, in paragraph 8.2 of the Panel Report, that the United States has acted inconsistently with Article 3.2 of the SCM Agreement.

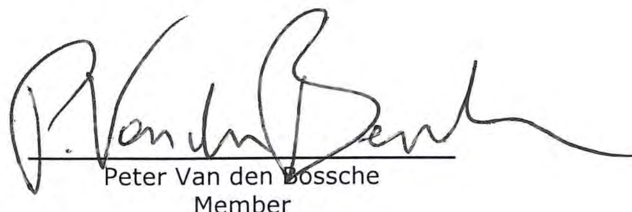
6.6. In light of our reversal of the Panel's finding that the B&O aerospace tax rate is *de facto* contingent upon the use of domestic over imported goods, we do not consider it necessary to address the remainder of the United States' claims and arguments relating to the Panel's analysis of *de facto* contingency in respect of the Second Siting Provision. We also do not consider it necessary to address the European Union's claim that the Panel failed to make an objective assessment of the matter under Article 11 of the DSU with regard to its analysis of *de facto* contingency in respect of the First Siting Provision.

6.7. Having reversed the Panel's finding of inconsistency under Article 3.1(b) of the SCM Agreement, the Appellate Body makes no recommendation in this dispute, and the Panel's recommendation pursuant to Article 4.7 of the SCM Agreement, in paragraph 8.6 of the Panel Report, cannot stand.

Signed in the original in Geneva this 21st day of July 2017 by:



Thomas Graham
Presiding Member



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WORLD TRADE ORGANIZATION

WT/DS487/AB/R/Add.1

4 September 2017

(17-4682)

UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

AB-2016-8

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS487/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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LIST OF ANNEXES

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	United States' Notice of Appeal	A-2
Annex A-2	European Union's Notice of Other Appeal	A-4

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of the United States' appellant's submission	B-2
Annex B-2	Executive summary of the European Union's other appellant's submission	B-5
Annex B-3	Executive summary of the European Union's appellee's submission	B-9
Annex B-4	Executive summary of the United States' appellee's submission	B-14

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-4
Annex C-3	Executive summary of Canada's third participant's submission	C-5
Annex C-4	Executive summary of China's third participant's submission	C-6
Annex C-5	Executive summary of Japan's third participant's submission	C-7

ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 22 December 2016 regarding additional procedures to protect business confidential information (BCI)	D-2
Annex D-2	Procedural Ruling of 6 January 2017 regarding the United States' request to modify the deadline for filing its appellant's submission	D-9
Annex D-3	Procedural Ruling of 2 June 2017 regarding public observation of the opening statements at the oral hearing	D-11

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	United States' Notice of Appeal	A-2
Annex A-2	European Union's Notice of Other Appeal	A-4

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ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

Pursuant to Article 16 of the ***Understanding on Rules and Procedures Governing the Settlement of Disputes*** ("DSU") and Rule 20 of the ***Working Procedures for Appellate Review***, the United States files this Notice of Appeal to the Appellate Body on certain issues of law covered in the Report of the Panel in ***United States – Conditional Tax Incentives for Large Civil Aircraft*** (WT/DS487/R & WT/DS487/R/Add.1) ("Panel Report") and certain legal interpretations developed by the Panel.

The United States seeks review by the Appellate Body of the Panel's finding and conclusion that the Washington State B&O aerospace tax rate for the manufacturing or sale of Boeing 777X airplanes (the "B&O aerospace tax rate") is inconsistent with Articles 3.1(b) and 3.2 of the ***Agreement on Subsidies and Countervailing Measures*** (the "SCM Agreement") because it is ***de facto*** contingent on the use of domestic over imported goods.[1] This finding is in error and is based on erroneous findings on issues of law and legal interpretations, including the Panel's failure to conduct an objective assessment of the matter as required by Article 11 of the DSU.

The Panel erred in finding that the B&O aerospace tax rate for the 777X program is contingent on the use of domestic over imported wings for the 777X. In particular:

a. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement as if it prohibited subsidies conditional on the domestic siting of production activities.[2]

b. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate for the 777X program is contingent on the "use" of wings for the 777X, even though Boeing does not and will not "use" wings to produce the 777X, and Boeing is nonetheless eligible to receive the B&O aerospace tax rate for the 777X program (and other programs).[3]

c. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate for the 777X program is contingent on the use of "domestic" over "imported" wings for the 777X, even though the Panel did not interpret the meaning of the terms "domestic" and "imported," did not provide sufficient analysis of what would make wings "domestic" or "imported," and did not assess whether the 777X wings are "domestic."[4] The Panel also failed to provide the basic rationale behind its finding as required by Article 12.7 of the DSU.

d. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement by relying on hypothetical scenarios with no evidentiary basis to evaluate whether the B&O aerospace tax rate for the 777X program is "contingent" in fact on the use of domestic over imported goods.[5] The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU because it used hypothetical scenarios involving Boeing's purchase of 777X wings from another Washington manufacturer and Boeing's importation of 777X wings from a foreign producer that were contrary to the evidence before it.[6]

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* This notification, dated 16 December 2016, was circulated to Members as document WT/DS487/6.

[1] See, e.g., Panel Report, paras. 7.369, 8.1(c), 8.2.
[2] See, e.g., Panel Report, paras. 7.360, 7.368-7.369, 8.1(c), 8.2.
[3] See, e.g., Panel Report, paras. 7.219-7.222, 7.353-7.356, 7.368.
[4] See, e.g., Panel Report, Section 7.5.4 (interpreting certain terms of Article 3.1(b), but not interpreting the terms "domestic" and "imported"), paras. 7.364, 7.367.
[5] See, e.g., Panel Report, paras. 7.355-7.356, 7.359, 7.363-7.369.
[6] See, e.g., Panel Report, paras. 7.355-7.356, 7.359, 7.363-7.369.

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e. The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU in finding that Boeing would lose the B&O aerospace tax rate for the 777X program if it used 777X wings produced outside Washington State, and in finding that it would not lose that tax rate if it sourced 777X wings from a Washington manufacturer.[7]

f. The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU in finding that the Second Siting Provision[8] concerns the use of certain goods, and specifically the origin of those goods that enter into the production process for the 777X, as a condition for the continued availability of the B&O aerospace tax rate for the 777X program.[9] Were the Appellate Body to consider the meaning and operation of the Second Siting Provision as an issue of law for purposes of the DSU, then the United States considers the Panel erred as a matter of law in its understanding or interpretation of the Second Siting Provision.

The United States respectfully requests that the Appellate Body reverse these findings by the Panel.

[7] See, e.g., Panel Report, paras. 7.363-7.367, 7.369.
[8] See Panel Report, Section 7.3.2.2.
[9] See, e.g., Panel Report, paras. 7.341, 7.348-7.356, 7.358-7.368.

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ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL*

Pursuant to Articles 16.4 and 17.1 of the ***DSU*** and Article 4.8 of the ***SCM Agreement***, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute ***United States – Conditional Tax Incentives for Large Civil Aircraft*** (WT/DS487). Pursuant to Rule 23(1) of the ***Working Procedures for Appellate Review***, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report[1]:

1. The Panel erred in the interpretation of Article 3.1(b) of the ***SCM Agreement*** by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the First Siting Provision,[2] set out in Section 2 of Washington State Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), does not make the subsidies subject to that condition ***de jure*** contingent on the use of domestic over imported goods.[3]

2. The Panel erred in the application of Article 3.1(b) of the ***SCM Agreement*** in finding that the First Siting Provision does not make the subsidies subject to that condition[4] ***de jure*** contingent on the use of domestic over imported goods.[5]

3. The Panel erred in the interpretation of Article 3.1(b) of the ***SCM Agreement*** by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the First Siting Provision, considered alone, does not make the subsidies subject to that condition[6] ***de facto*** contingent on the use of domestic over imported goods.[7] The European Union requests the Appellate Body to consider this appeal only if it does not find (in accordance with the appeals described in paragraph 1 or 2, above) that the First Siting Provision, considered alone, makes the subsidies subject to it ***de jure*** contingent on the use of domestic over imported goods in violation of Article 3.1(b).

4. The Panel failed to make an objective assessment under Article 11 of the DSU in finding that the First Siting Provision, considered alone, does not make the subsidies subject to that condition[8] ***de facto*** contingent on the use of domestic over imported goods, within the

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* This notification, dated 17 January 2017, was circulated to Members as document WT/DS487/7.

[1] Paragraph numbers provided in footnotes to the following description of the Panel's errors are intended to indicate the primary instance of the errors.

[2] See Panel Report, paras. 7.28-7.30 (defining "First Siting Provision").

[3] Panel Report, paras. 7.290, 7.291, 7.294, 7.296, 7.297, 8.1(1)(b)(i). The subsidies subject to the First Siting Provision are the following: (a) reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes; (b) B&O tax credit for pre-production development for commercial airplanes and components; (c) B&O tax credit for property taxes on commercial airplane manufacturing facilities; (d) exemption from sales and use taxes for certain computer hardware, software, and peripherals; (e) exemption from sales and use taxes for certain construction services and materials; (f) exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and (g) exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes. See Panel Report, paras. 7.15, 7.28.

[4] See footnote 3, above.

[5] Panel Report, paras. 7.294, 7.296, 7.297, 8.1(1)(b)(i).

[6] See footnote 3, above.

[7] Panel Report, paras. 7.291, 7.330, 7.342-7.345.

[8] See footnote 3, above.

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meaning of Article 3.1(b) of the ***SCM Agreement***.[9] The European Union requests the Appellate Body to consider this appeal only if it does not find (in accordance with the appeals described in paragraph 1 or 2, above) that the First Siting Provision, considered alone, makes the subsidies subject to it ***de jure*** contingent on the use of domestic over imported goods in violation of Article 3.1(b).

5. The Panel erred in the interpretation of Article 3.1(b) of the ***SCM Agreement*** by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the Second Siting Provision,[10] set out in Sections 5 and 6 of ESSB 5952, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) ***de jure*** contingent on the use of domestic over imported goods.[11]

6. The Panel erred in the application of Article 3.1(b) of the ***SCM Agreement*** in finding that the Second Siting Provision, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) ***de jure*** contingent on the use of domestic over imported goods.[12]

7. The Panel failed to make an objective assessment under Article 11 of the DSU, in finding that the Second Siting Provision, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) ***de jure*** contingent on the use of domestic over imported goods, within the meaning of Article 3.1(b) of the ***SCM Agreement***.[13] In particular, the Panel's findings lacked a sufficient evidentiary basis.

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[9] Panel Report, paras. 7.330, 7.342-7.345.
[10] See Panel Report, paras. 7.32-7.33 (defining "Second Siting Provision").
[11] Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).
[12] Panel Report, paras. 7.305-7.311,7.315-7.317, 8.1(b)(ii)-(iii).
[13] Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).

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ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of the United States' appellant's submission	B-2
Annex B-2	Executive summary of the European Union's other appellant's submission	B-5
Annex B-3	Executive summary of the European Union's appellee's submission	B-9
Annex B-4	Executive summary of the United States' appellee's submission	B-14

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ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

(Business confidential information redacted as marked "[BCI]")

1. The Panel correctly found that the Washington 0.2904 percent business and occupation ("B&O") tax rate for aerospace activities under Revised Code of Washington ("RCW") § 82.32.850, as extended under Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), is ***de jure*** contingent on the location of production activities in the state of Washington, and not on the use of domestic goods.[1] This finding is in line with the understanding of both parties and the third parties that Article 3.1(b) of the ***Agreement on Subsidies and Countervailing Measures*** ("SCM Agreement") does not prohibit a Member making the receipt of subsidies contingent on the location of production activities in its territory. This principle follows from Article III:8(b) of the ***General Agreement on Tariffs and Trade 1994*** ("GATT 1994"), under which national treatment disciplines do not prevent the payment of subsidies exclusively to "domestic producers".

2. However, under the Panel's erroneous ***de facto*** analysis, defining eligibility for a subsidy in terms that describe the necessary production process – or who qualifies as a domestic producer – will invariably lead to a finding of ***de facto*** contingency. Specifically, Washington made the entry into force of the B&O aerospace tax rate contingent on the siting in Washington of a significant commercial airplane manufacturing program, which was defined by the manufacture of a new airplane model, including its fuselage and wings.[2] (The Panel referred to this as the "First Siting Provision.") The legislation also specified that that tax rate would cease to apply to the airplane program that was sited in Washington (***i.e.***, Boeing's 777X) if Boeing sited 777X wing assembly or final assembly outside of Washington.[3] (The Panel referred to this as the "Second Siting Provision.") The Panel found that by making the 777X's continued eligibility for the B&O aerospace tax rate conditional on keeping production in Washington of the aircraft and its wings, the Second Siting Provision ***de facto*** required the use of domestic over imported wings. Thus, under the Panel's analysis, the very act of defining eligibility for the subsidy in terms of production activities – a mechanism expressly permissible under Article III:8(b) – led to the finding of a ***de facto*** requirement to use domestic over imported goods if the specified production activities could potentially result in intermediate goods.

3. That legal interpretation by the Panel was in error and vitiates its conclusion that the Second Siting Provision renders the 0.2904 percent B&O tax rate on the manufacture and sale of 777Xs inconsistent with Article 3.1(b). In addition, the Panel made multiple errors that led to this self-contradictory and erroneous conclusion. These fall into three groups.

4. First, although Article 3.1(b) prohibits a subsidy only if it is contingent on the "use" of domestic over imported goods, the Panel failed to evaluate whether Boeing's 777X process involves the "use" of wings to manufacture the 777X. The evidence showed that it does not. The ordinary meaning of "use" is the employment as an input or instrumentality in a productive process, or consumption of a good for its intended purpose by the end user. In Boeing's production of the 777X, the wing is none of these things – it is the output of Boeing's production process, and not an input or instrumentality. The wing never exists as a separate entity; it is only completed during and as part of final assembly. (In fact, a partial wing structure is joined with a partial fuselage structure before a fuselage or wing ever exists.)

5. In a related vein, the Panel did not evaluate whether the 777X wing, much of which consists of parts and components from outside Washington, including from foreign sources, is a "domestic good," another prerequisite legal element to establish an inconsistency with Article 3.1(b). Because Boeing is eligible for the tax treatment found to be a subsidy, if Boeing's 777X production process does not involve the use of wings at all, or if such wings are not domestic, then the

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[1] Panel Report, paras. 7.296, 7.308, and 7.315. The United States refers to the Panel Report in this dispute as "Panel Report," with no dispute short title following it.
[2] RCW § 82.32.850(1) and (2)(c).
[3] RCW § 82.323.85011(e)(ii).

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subsidy necessarily is not contingent on the use of domestic over imported wings. Thus, the Panel failed to correctly apply the legal standard set out in Article 3.1(b) to the facts of the case.

6. Second, the Panel used hypothetical scenarios devoid of grounding in the facts to analyze whether the Second Siting Provision was ***de facto*** contingent on the use of domestic over imported goods. The Panel recognized that "***{d}e facto*** contingency must be established from the total configuration of the facts constituting and surrounding the granting of the subsidy... ."[4]

7. However, the Panel based its evaluation of the operation of the Second Siting Provision on hypotheticals in which "Boeing in the future sourced some 777X wings from other entities, including foreign producers, rather than assembling all of them itself."[5] These hypotheticals relied on the assumption that **[BCI]**. It further assumed that Boeing's production process could be modified so as to feed in wings as discrete inputs. And finally, it assumed that it was possible to **[BCI]**. These assumptions were not only devoid of evidentiary support, but also contrary to the evidence. In performing the analysis in this way, the Panel erroneously interpreted or applied Article 3.1(b), failed to make an objective assessment of the matter under Article 11 of the DSU, and found a ***de facto*** breach before it could exist, even under the Panel's own reasoning.

8. Third, and finally, the Panel's evaluation of the operation of the Second Siting Provision relied on faulty interpretations of evidence that, when objectively considered, do not support the Panel's conclusion that the Second Siting Provision concerns the use and origin of certain goods. The Panel based this finding on three pieces of evidence: the U.S. responses to two questions from the Panel, the presence of the phrase "wing assembly ***or*** final assembly" in the Second Siting Provision, and two statements by the Governor of Washington. However, it misinterpreted each of these.

9. The U.S. responses to questions reflected the fact that eligibility for the B&O aerospace tax rate depends on the siting of production ***activities***, which does not necessitate, as the Panel believed, that the results of such activities would be "domestic goods" if the activities occurred in Washington, but "imported goods" if the activities occurred outside of the United States.

10. The "or" in "wing assembly or final assembly" indicates that these two processes are distinct, but contrary to the Panel's apparent view, it does not mean that they are mutually exclusive or necessarily sequential. In fact, in Boeing's current process for manufacturing the 777X, the wing never exists as a distinct component.

11. Lastly, of the two statements by the Governor of Washington, one deals with the siting of production activities, and the other addresses an earlier version of the legislation that framed the contingency in terms of "wing fabrication" in addition to "wing assembly," which was not true of the legislation that was ultimately enacted. Thus, neither is relevant to the question of whether conditioning the B&O aerospace tax rate on the location of wing assembly makes it contingent on the use of domestic over imported goods.

12. Below, Section II provides relevant background for the legal issues before the Appellate Body, including undisputed facts and Panel findings regarding the Washington aerospace industry, the elements of large civil aircraft (LCA), Boeing's development of the 777X and its 777X manufacturing operations in Washington, the B&O aerospace tax rate, and the Panel's findings.

13. Section III lays out the proper legal standard for assessing claims under Article 3.1(b) of the SCM Agreement.

14. Section IV explains that the Panel erroneously interpreted and applied Article 3.1(b) so as to effectively prohibit subsidies conditional on the domestic siting of production activities – even though it is clear from Article III:8(b) of the GATT 1994, ***inter alia***, that such subsidies are not in fact prohibited.

[4] Panel Report, para. 7.320 (citing Appellate Body Report, ***Canada – Aircraft***, para. 167; Appellate Body Report, ***EC – Large Civil Aircraft***, para. 1051).
[5] Panel Report, para. 7.362.

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15. Section V explains that the Panel erred in the interpretation and application of Article 3.1(b) by failing to evaluate whether Boeing uses domestic wings to manufacture the 777X.

16. Section VI explains that the Panel's reliance on hypothetical scenarios with no basis in fact constitutes an erroneous interpretation and application of Article 3.1(b), or in the alternative, a failure to make an objective assessment of the matter under Article 11 of the DSU.

17. Section VII explains that the Panel's finding regarding the operation of Washington law constitutes a failure to make an objective assessment of the matter before it under Article 11 of the DSU, as does the Panel's reliance on the word "or" in the Second Siting Provision and its reliance on two statements by the Governor of Washington.

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ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION

I. INTRODUCTION

1. Washington State enacted Engrossed Substitute Senate Bill 5952 ("ESSB 5952") in November 2013,[1] creating the largest targeted state tax break in United States history. This legislation amended aerospace tax incentives originally created in 2003, including incentives found to be WTO-inconsistent in the ***US – Large Civil Aircraft*** dispute, and extended them through fiscal year 2040.

2. The Panel found that each of the seven tax incentives, as amended and extended by ESSB 5952, constitutes a subsidy within the meaning of Article 1.1 of the ***Agreement on Subsidies and Countervailing Measures*** ("***SCM Agreement***"). These subsidy findings have not been appealed.

3. ESSB 5952 makes the amendment and extension of all of the subsidies contingent on satisfying a condition the Panel referred to as the "First Siting Provision".[2] Additionally, one of these subsidies – the B&O aerospace tax rate reduction, in respect of Boeing's 777X – is subject to a condition that the Panel referred to as the "Second Siting Provision".[3] The Panel found that the two Siting Provisions, together, make the B&O tax rate reduction for Boeing's 777X ***de facto*** contingent on the use of domestic over imported goods, in violation of Article 3.1(b) of the ***SCM Agreement***.

4. The European Union appeals the Panel's findings that the European Union failed to demonstrate that (i) the First Siting Provision, considered alone, makes the subsidies subject to it contingent on the use of domestic over imported goods, and (ii) the Second Siting Provision makes the B&O tax rate reduction for the 777X ***de jure*** contingent on the use of domestic over imported goods.

II. THE PANEL ERRED IN FINDING THAT THE FIRST SITING PROVISION DOES NOT MAKE THE CHALLENGED AEROSPACE TAX SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

5. Section 2 of ESSB 5952 provides that the entirety of the legislation, amending and extending (through the year 2040) billions of dollars in tax breaks to the aircraft industry, would take effect only upon Boeing's decision to locate a new commercial aircraft programme in Washington State, i.e., the First Siting Provision. ***In addition*** to the production of the aircraft itself in Washington, the First Siting Provision requires that ***wings*** and ***fuselages*** of the sited aircraft are manufactured in Washington State. The Washington State Department of Revenue ("DOR") determined in July 2014 that this First Siting Provision had been satisfied, based on Boeing's decision to produce the 777X in Washington State, and to also manufacture the wings and fuselages of that aircraft there.

6. The European Union details several legal errors made by the Panel in finding that the First Siting Provision, alone, does not make the tax incentives either ***de jure*** or ***de facto*** contingent on the use of domestic over imported goods.

[1] Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), Exhibit EU-03.
[2] ESSB 5952 § 2(1), Exhibit EU-03.
[3] ESSB 5952 (exhibit EU-3), Sections 5 and 6; Panel Report, para. 7.32.

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A. The Panel erred in the interpretation and application of Article 3.1(b) of the *SCM Agreement* in finding that the First Siting Provision does not make the subsidies *de jure* contingent on the use of domestic over imported goods

7. In rejecting the European Union's principal claim of ***de jure*** contingency, in respect of the First Siting Provision, the Panel erred in the interpretation and application of Article 3.1(b) of the *SCM Agreement*.

8. ***First***, the Panel interpreted Article 3.1(b) to mean that the relevant contingency would exist only where the measure "***per se*** and necessarily exclude{s}" any use of imported goods. Under the Panel's interpretation, to the extent that the subsidy recipient may use ***some*** imported goods ***in addition to*** domestic goods, and is nevertheless eligible for the subsidy, the subsidy is not contingent on the use of domestic over imported goods. Such an interpretation finds no support in Article 3.1(b), would defeat the object and purpose of that provision, and is contradicted by the relevant context provided by Article 3.1(a) of the *SCM Agreement*.

9. ***Second***, the Panel's finding that the First Siting Provision does not, by necessary implication, require the use of domestic over imported goods constitutes an error in the application of Article 3.1(b). The words in the First Siting Provision require the siting in Washington State of "an airplane program" "***in which***" the aircraft itself is produced in Washington State, and "***in which***" the wings and fuselages of that same aircraft type are likewise manufactured in Washington State. That is, according to the words and necessary implication of the First Siting Provision, the aircraft program would not only include production of an aircraft in Washington State, but would also integrate ***in*** that aircraft the wings and fuselages that must also be manufactured ***in*** Washington State.

10. In all possible interpretations envisaged by the Panel for the First Siting Provision, at least some production of the 777X must be undertaken in Washington State ***as a legal requirement***, and at least some 777X wings and fuselages must be, ***as a legal requirement***, manufactured in Washington State. These dual requirements necessarily imply that the aircraft produced in Washington State would use the wings and fuselages manufactured in Washington State. Thus, the Panel should have found the contingency by necessary implication. The Panel's finding to the contrary constitutes an error in the application of Article 3.1(b).

11. The European Union requests the Appellate Body to reverse the Panel's finding and complete the analysis to find that the First Siting Provision, considered alone, makes all of the subsidies amended and extended by ESSB 5952 ***de jure*** contingent on the use of domestic over imported goods.

B. Conditional appeal: The Panel erred in its interpretation of Article 3.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter before it under Article 11 of the DSU, in finding that the First Siting Provision, considered alone, does not make the subsidies *de facto* contingent on the use of domestic over imported goods

12. The European Union appeals the Panel's finding that the First Siting Provision does not make these subsidies ***de facto*** contingent on the use of domestic over imported goods. The European Union requests the Appellate Body to consider this appeal only if it does not find that the First Siting Provision, considered alone, makes all of the subsidies subject to it contingent on the use of domestic over imported goods.

13. ***First***, the Panel's finding of ***de facto*** contingency suffers from the same interpretative error that the European Union demonstrated above, in relation to ***de jure*** contingency.[4]

14. ***Second***, the Panel failed to make an objective assessment of the matter before it, under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). The Panel found that "the Department of Revenue's determination

[4] See paragraph 8, above.

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{that the First Siting Provision had been satisfied} was based exclusively on Boeing's decision to locate a significant commercial airplane manufacturing programme (as defined by the legislation) in the state of Washington".[5] The Panel also found that "{t}here {was} no indication that the activation of the First Siting Provision was the result of any other factor, such as a commitment by the manufacturer to use domestic over imported goods".[6]

15. In treating as conclusive the fact that Washington State law described the contingency as a decision to locate "a significant commercial airplane manufacturing programme", and that the DOR used those terms in its determination, and by failing to properly consider the implications of that contingency on Boeing's incentives to use domestic over imported 777X wings or 777X fuselages ***in*** its Washington State production of the 777X, the Panel failed to make an objective assessment of the matter before it.

16. The European Union explained that the dual requirements, under the First Siting Provision, of producing the 777X in Washington State, and of manufacturing the wings and fuselages of the same aircraft in Washington State, necessarily implied a requirement that domestic wings and fuselages be used on the 777X. Given that the only ***confirming*** fact, outside the text of the measure, that the Panel might have considered to arrive at that conclusion was that aircraft producers are economically rational entities, the European Union considered that a finding of ***de jure*** contingency was warranted. However, if the Panel considered that the assertion that aircraft manufacturers are rational economic actors somehow fell outside the purview of a ***de jure*** contingency claim, the Panel's analysis of the ***de facto*** contingency claim would have been the place to accommodate that assertion.

17. In light of the errors demonstrated above, the European Union seeks the reversal of the Panel's findings, and completion of the analysis to find that the First Siting Provision, considered alone, makes the subsidies subject to it ***de facto*** contingent on the use of domestic over imported goods, in violation of Article 3.1(b).

III. THE PANEL ERRED IN FINDING THAT THE SECOND SITING PROVISION, CONSIDERED ALONE OR TOGETHER WITH THE FIRST SITING PROVISION, DOES NOT MAKE THE B&O TAX RATE REDUCTION FOR THE 777X *DE JURE* CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

18. The Second Siting Provision provides that the B&O tax rate reduction subsidy would become unavailable in respect of the aircraft program satisfying the First Siting Provision – the 777X – if the DOR determines that "any final assembly or wing assembly" of the relevant aircraft model "has been sited outside the state of Washington".

19. The Panel's finding that the Second Siting Provision does not create, ***de jure***, a contingency on using domestic over imported goods, is the result of errors in the interpretation and application of Article 3.1(b), as well as a failure to make an objective assessment of the matter, under Article 11 of the DSU.

20. ***First***, as the European Union has already demonstrated above, in the context of the First Siting Provision, the Panel erred in the interpretation of Article 3.1(b).[7] The Panel's finding of lack of ***de jure*** contingency in respect of the Second Siting Provision was driven by this same interpretative error.

21. ***Second***, the United States admitted before the Panel that the Second Siting Provision, properly interpreted, would deprive Boeing of the B&O tax rate reduction if the wings for the 777X were imported. This confirmation by the United States played a key role in the Panel subsequently making a finding of ***de facto*** contingency. This evidence would have been critical in the assessment of ***de jure*** contingency, but the Panel entirely ignored it in its ***de jure*** analysis. By imposing undue restrictions on the scope of evidence that it considered permissible for the purpose of assessing ***de jure*** contingency, the Panel erred in the application of Article 3.1(b).

[5] Panel Report, para. 7.343 (underlining added).
[6] Panel Report, para. 7.343 (underlining added).
[7] See paragraph 8, above.

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22. ***Finally***, the Panel failed to make an objective assessment, under Article 11 of the DSU, in according to the Second Siting Provision an "interpretation" that neither Party advocated. That "interpretation" is contradicted by the words of ESSB 5952, the critical admission made by the United States, as well as the arguments put forth by both Parties. The Panel's finding thus suffers from the lack of an evidentiary basis.

23. In light of these errors, the European Union seeks reversal of the Panel's finding, and completion of the analysis to find that the Second Siting Provision, considered alone or together with the First Siting Provision, makes the B&O tax rate reduction for the 777X ***de jure*** contingent on the use of domestic over imported goods, in violation of Article 3.1(b).

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ANNEX B-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

I. INTRODUCTION

1. The Panel in the present dispute concluded that a subsidy (the B&O tax rate reduction for the 777X) which would be available to Boeing so long as Boeing uses wings manufactured in Washington State (including wings manufactured by third parties in Washington State), but would be lost if any imported 777X wings are used, is contingent on the use of domestic over imported wings. On that basis, the Panel correctly found that the subsidy is inconsistent with Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("***SCM Agreement***"). The Panel's finding was based not just on the words of the measure at issue, but also confirmed by other evidence that aided the Panel in interpreting those words (i.e., admissions by the United States confirming the proper interpretation under domestic law, and legislative history of the measure).[1]

2. In its Appellant's Submission, the United States expends significant effort and creativity to convert what is a textbook example of a subsidy contingent upon the use of domestic over imported goods (in this case, "wings"), within the meaning of Article 3.1(b), into a complex dispute requiring careful consideration of the peculiarities of the currently planned (but not yet active) manufacturing process of the primary subsidy recipient, Boeing. But the Panel correctly found that the focus in evaluating a claim under Article 3.1(b) of the ***SCM Agreement*** is "not on the production processes for the 777X", but the "design, structure, and modalities of operation" of the measure at issue.[2]

3. As detailed herein, however, a Member cannot defend a measure that, on its face (and in view of confirmatory admissions by that Member) is contingent upon the use of domestic over imported goods, by simply asserting that a subsidy recipient has not yet used those goods, whether domestic or imported, or does not currently have plans to use such goods in the future, whether domestic or imported. Indeed, it is the measure's contingency, itself, at the time the subsidy is granted, that can skew the subsidy recipients' incentives in a manner that shapes its current or future plans on whether or not to use imported goods.

4. Regardless of whether the United States' assertions about Boeing's plans for the production of the 777X are factually accurate, the entirety of the US appeal rests on a deeply flawed reading of the word "use". According to the United States, Boeing can be considered to "use" a wing only if it first fully assembles a wing, and then attaches that wing to the fuselage of the aircraft. Under the US' theory, if Boeing employs a slightly different process, such as attaching one part of the wing to the fuselage first, and then finishing the wing (regardless of how little additional work is required), then no "use" of a wing occurs. As the European Union details below, this interpretation of the term "use", which makes the WTO-consistency of a measure dependent on the sequence in which a subsidy recipient turns certain screws, is erroneous.

5. As for the United States' attempts throughout its Appellant's Submission to characterise the Panel's finding of ***de facto*** contingency as reflecting an interpretation of Article 3.1(b) prohibiting subsidies contingent on the location of production activities (regardless of whether they are contingent on the use of domestic over imported goods),[3] this is contradicted by the Panel's clear explanations to the contrary.

6. Before turning to the United States' allegations of error, the European Union notes that the United States dedicates 19 pages, of its 56-page Appellant's Submission, to a section entitled "Background".[4] This section is filled with numerous factual assertions that are

[1] Panel Report, paras. 7.361-7.367.
[2] Panel Report, para. 7.355.
[3] US Appellant's Submission, para. 2.
[4] US Appellant's Submission, pp. 4-23.

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neither factual findings by the Panel nor undisputed. Many of these factual assertions are also entirely irrelevant to the present appeal. This attempt at re-litigating, on appeal, purely factual matters on which the United States failed to convince the Panel, must fail.

7. Below, the European Union responds to each of the specific allegations of error that the United States raises in its Appellant's Submission.

II. THE UNITED STATES' ASSERTIONS RELATING TO "PRODUCTION SUBSIDIES" DO NOT REVEAL AN ERROR IN INTERPRETATION OR APPLICATION OF ARTICLE 3.1(B)

8. The United States argues that the Panel erroneously interpreted and applied Article 3.1(b) of the *SCM Agreement*, and characterises the Panel's application/interpretation as effectively prohibiting any subsidies conditional on domestic manufacturing.[5]

9. The European Union, and the Panel, agreed with the United States that a subsidy contingent solely on domestic production of goods, without more, is not disciplined by Article 3.1(b).[6] Specifically in the context of ***de facto*** contingency, the Panel clarified that "provision of subsidies exclusively to domestic producers, without more, is not in itself a breach of the obligations under the covered agreements".[7] Thus, the Panel made no error in interpretation.

10. As for application, the Panel examined whether the subsidy was contingent on the use of domestic over imported goods. Having reviewed the evidence before it, the Panel found that "the ***only*** decision by Boeing to source wings which it would then 'use' in producing the 777X that ***would not*** trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings".[8] Therefore, it was abundantly clear to the Panel that the subsidy was conditioned solely on the origin of the wings used on the 777X. In this context, the Panel was right in rejecting the United States' unilateral characterisation of the subsidy as a "production subsidy", and finding that the subsidy was inconsistent with Article 3.1(b).

III. THE UNITED STATES' ASSERTIONS REGARDING THE PLANNED 777X PRODUCTION PROCESS DO NOT REVEAL ANY ERROR IN THE PANEL'S FINDINGS

11. The United States alleges that the Panel failed to evaluate whether Boeing's intended production process for the 777X will involve the "use" of wings.[9] The United States begins this appeal with an allegation of error in application of Article 3.1(b), expands the allegation to include an error in interpretation of Article 3.1(b), and finally alleges error under Article 12.7 of the DSU. All of these allegations are baseless.

A. The US assertions about Boeing's intended production process are based on a flawed interpretation of "use", and are not dispositive of the "contingency" analysis

12. The focus of analysis in adjudicating a claim under Article 3.1(b) is the subsidy measure, not the recipient. In this context, the Panel was right in finding that "{t}he focus of the Panel's analysis, for the purpose of the current dispute, is not on the production processes for the 777X, in general or at any point in time, but rather on whether the measures at issue, in their design, structure, and modalities of operation, would limit access to existing subsidies if imported goods were to be used in any such processes".[10]

13. The United States repeatedly makes claims regarding the "current production process" for the 777X. Yet, it is entirely meaningless to speak of "Boeing's current 777X production process". It is undisputed that no 777X wing or 777X aircraft production even began during

[5] US Appellant's Submission, Section IV.
[6] Panel Report, paras. 7.201, 7.357.
[7] Panel Report, para. 7.357.
[8] Panel Report, para. 7.364.
[9] US Appellant's Submission, Section V.
[10] Panel Report, para. 7.355.

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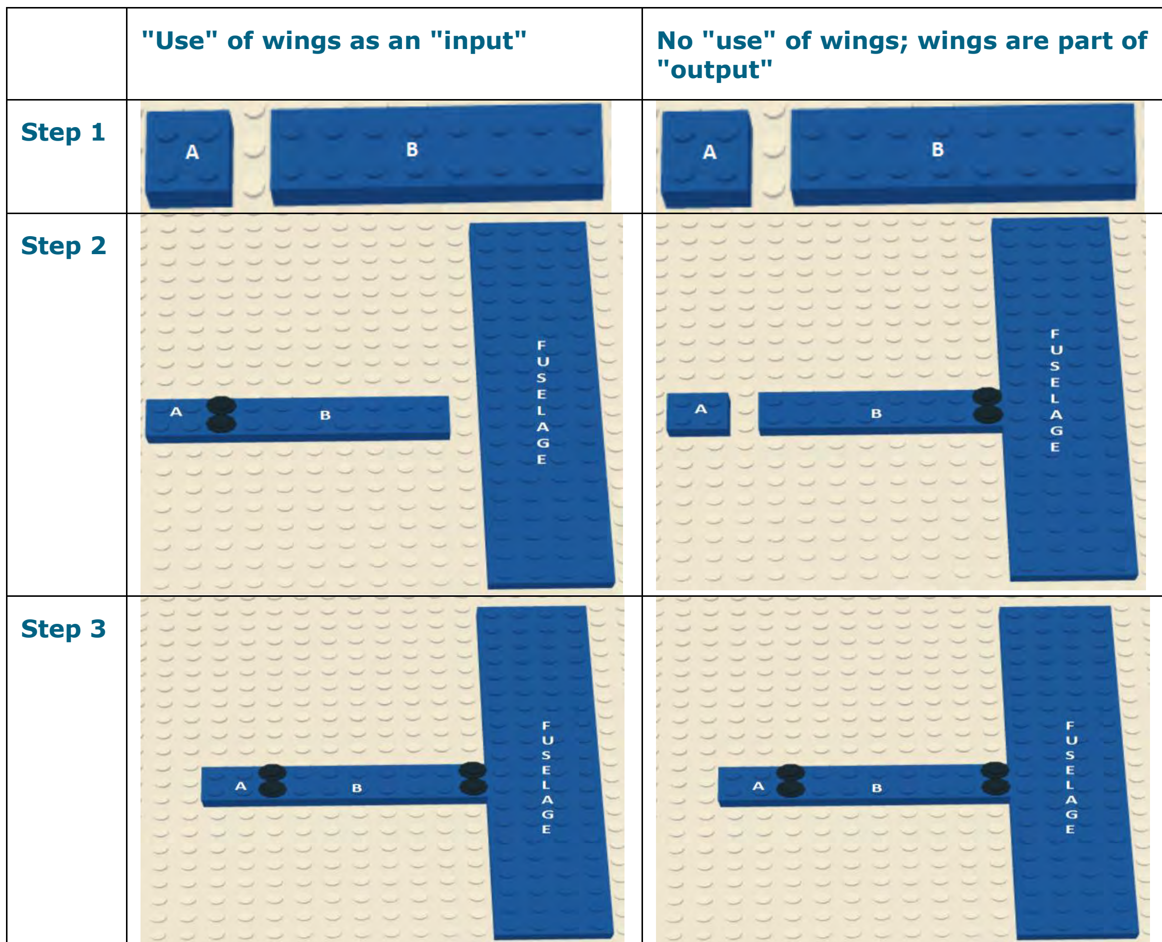
the course of the Panel proceedings. Thus, the US assertions must relate only to Boeing's alleged ***intentions*** regarding the production process.

14. The United States alleges that these ***intended*** production processes do not involve the "use" of a wing. The US' position translates into an assertion that Boeing would "use" wings within the meaning of Article 3.1(b) only if it first finishes the manufacture of complete wings, and then attaches them to the fuselage of the 777X.[11] If Boeing alters this production process such that one part of the wing is attached to the fuselage first, and then the remaining components of the wing (however small or insignificant) are attached to that first part, no "use" of a wing occurs.[12]

15. As illustrated in the figure below, imagine an aircraft wing consists of two rectangular pieces, A and B. If A and B are first screwed together, and then B (with A attached) is screwed on to the fuselage, the United States would consider this "use" of a wing. On the other hand, under the US position, if B is first screwed on to the fuselage, and then A is screwed on to B, no "use" of a wing occurs. In this way, the order in which these screws are turned would be "dispositive" as to whether a subsidy, which would become unavailable upon importation of any wings, is consistent with Article 3.1(b).



16. Nothing in the words of Article 3.1(b) supports the view that a good must be "use{d}", within the meaning of that provision, at a particular point of an overall production process. Such an interpretation, if accepted, would defeat the object and purpose of Article 3.1(b), making it easy for Members to circumvent the discipline. Under the US position, if a Member were found to have violated Article 3.1(b), achieving compliance would merely require convincing a subsidy recipient to alter the sequence in which it undertakes assembly activities.

[11] See US Appellant's Submission, para. 115.
[12] ***Ibid.***

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17. Additionally, the word "contingent" in Article 3.1(b) does not cover only those subsidies that are available exclusively to entities that use domestic over imported goods. When faced with a claim under that provision, the responding Member cannot defeat that claim by simply demonstrating that the subsidy is available to some entities that do not use domestic goods, or in some circumstances where such use does not occur.

18. Thus, the United States errs in asserting that Boeing's production plan does not involve the "use" of wings. Even if that assertion were true (***quod non***), it would not be "dispositive" on the question of contingency.

B. The Panel's finding that wings made in Washington State are "domestic" is not in error

19. The Panel interpreted and applied the word "domestic" in Article 3.1(b), in finding that wings manufactured in Washington State would be "domestic". The United States alleges error in the interpretation and application of Article 3.1(b), and under Article 12.7 of the DSU.

20. The United States fails to offer any legal arguments in support of its allegation of error in interpretation. This appeal therefore fails to meet the requirement in Rule 21(2)(b)(i) of the Working Procedures for Appellate Review, and must fail.

21. In any event, the words used in Article 3.1(b) support the interpretation that "domestic" means "not imported". Under this proper interpretation, any wings made in Washington State are domestic wings. Thus, the Panel did not err in the interpretation or application of Article 3.1(b).

22. The brevity of the Panel's treatment of this issue does not constitute error under Article 12.7 of the DSU. Nothing in Article 12.7 requires a panel to elaborate the reasons behind each of its intermediate findings. The requirement is that a panel should inform the responding Member about "(i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal".[13] Here, the Panel provided the United States adequate information for both implementation and appeal. The Panel's approach is consistent with practice of WTO panels and the Appellate Body. Not a single panel adjudicating claims under similar provisions, where "domestic" goods, "imported goods" or "products of the territory" of a Member are relevant, has ever identified specific goods and extensively examined the make-up of those goods in order to determine whether they were "domestic", "imported", or "products of the territory" of a specific Member. The Panel's approach was further justified by the United States' failure to allege that wings made in Washington State were not "domestic".

IV. THE PANEL'S USE OF HYPOTHETICAL SCENARIOS WAS APPROPRIATE

23. The United States takes issue with the Panel's use of hypothetical scenarios in assessment of *de facto* contingency.

24. The logical way for the Panel to test whether the Second Siting Provision includes a contingency on use of domestic over imported wings was to examine what would happen in a scenario where Boeing, in the future, chooses to use imported wings, rather than domestic wings. This enquiry is necessarily hypothetical in nature, because the production process of the 777X is yet to commence, and the Second Siting Provision is yet to be triggered.

25. Article 3.1(b) "protects competitive opportunities of imported products, rather than existing trade flows of such products".[14] In assessing a claim under a provision of that type, "the analysis … is not limited to an examination of the operation of the {subsidy} at issue within the confines of scenarios that are representative of current patterns of trade".[15]

26. The Panel's use of hypothetical scenarios was thus not only permissible, but also inevitable.

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[13] Appellate Body Report, ***Mexico – Corn Syrup (Article 21.5 – US)***, para. 107.
[14] Panel Report, para. 7.225.
[15] Appellate Body Reports, ***US – COOL (Article 21.5 – Canada and Mexico)***, para. 5.17.

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V. THE UNITED STATES DOES NOT DEMONSTRATE ANY FAILURE BY THE PANEL TO MAKE AN OBJECTIVE ASSESSMENT, UNDER ARTICLE 11 OF THE DSU

27. The United States alleges multiple errors under Article 11 of the DSU. Each of these is baseless.

28. The first appeal in this series[16] improperly seeks to modify or retract the US' confirmatory admissions made in response to Panel Questions 40 and 80. These admissions confirmed that the subsidy would continue to be available as long as Boeing uses domestic wings (including those manufactured by third parties), but would become unavailable if wings were imported. The US assertions on appeal are contradicted by the responses that the United States offered to the Panel.

29. The second appeal[17] is conditional on the Appellate Body finding that the Panel understood the word "or" in the Second Siting Provision to require the sequential undertaking of wing assembly and final assembly. The Panel made no such finding. Rather, the Panel found that none of the Siting Provisions "either explicitly or in their operation, binds Boeing to a specific process for manufacturing 777X aircraft".[18] Thus, there is no basis for the Appellate Body to consider the substance of this appeal.

30. In the third appeal in this series,[19] the United States takes issue with the Panel's appreciation of the Washington State Governor's statements. The United States seeks to simply re-litigate the meaning and relevance of the Governor's statements. These US disagreements with the Panel's factual findings do not evidence any error under Article 11. In any event, the Panel's finding of ***de facto*** contingency was only ***confirmed by***, not based on, the Governor's statements.

31. Finally, the United States' factual assertions about the "Section 12 Sub-Assemblies"[20] are irrelevant. In this section, the United States makes no allegation of error. As such there simply is no "appeal" for the Appellate Body to adjudicate.

[16] US Appellant's Submission, Section VII.A.
[17] US Appellant's Submission, Section VII.B.
[18] Panel Report, para. 7.355.
[19] US Appellant's Submission, Section VII.C.
[20] US Appellant's Submission, Section VII.D.

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ANNEX B-4

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

1. The Panel correctly found that neither the First Siting Provision nor the Second Siting Provision makes the 0.2904 percent Business and Occupation tax rate (the "B&O aerospace tax rate"), as extended into 2040, ***de jure*** contingent on the use of domestic over imported fuselages or wings. The Panel also correctly found that the First Siting Provision does not make the subsidy ***de facto*** contingent on the use of domestic over imported fuselages or wings.

2. The EU's appeal of these findings raises technical arguments, which themselves are meritless. But perhaps more importantly, in arguing that the two siting provisions create a prohibited import-substitution subsidy, the EU fundamentally misunderstands the nature of the measure at issue. The extension from 2024 to 2040 of the tax treatment that was found to be a subsidy was aimed at the employment and related economic activities associated with siting manufacturing activity in the grantor's territory. It simply did not concern the "use" of "goods," whether domestic or imported, within the meaning of Article 3.1(b) of the ***Agreement on Subsidies and Countervailing Measures*** ("SCM Agreement").

3. Article III:8(b) of the ***General Agreement on Tariffs and Trade 1994*** ("GATT 1994") establishes that production subsidies (***i.e.***, subsidies paid exclusively to producer of a good in the grantor's territory) are not inconsistent with the provisions of the GATT 1994 and the SCM Agreement that prohibit conditioning a subsidy on the use of domestic over imported goods as a condition for a subsidy. Just as the SCM Agreement, read together with Article III:8(b) of the GATT 1994, does not preclude production subsidies (assuming they do not cause adverse effects), it does not preclude a Member from defining the scope or extent of the production activity necessary to receive the subsidy, and thereby defining who qualifies as a domestic producer. If a Member provides subsidies to domestic airplane producers, it can define what it means to produce an airplane and, therefore, who qualifies as a domestic airplane producer. To find otherwise would be to severely limit the discretion protected by Members in Article III:8(b) of the GATT 1994 and which informs the interpretation of Article 3.1(b) of the SCM Agreement.

4. The panel in ***EC – Large Civil Aircraft (21.5)*** recognized as much when it found that subsidies requiring the production of A350 XWB components in the EU as well as production of the A350 XWB airplane in the EU did not breach Article 3.1(b).

5. The siting conditions in Engrossed Substitute Senate Bill 5952 ("ESSB 5952") aimed only at ensuring that the manufacturing activity Washington sought was indeed sited in Washington. As such, it falls squarely within Article III:8(b).

6. The basis for finding a breach of Article 3.1(b) of the SCM Agreement in this dispute is far weaker than in ***EC – Large Civil Aircraft (21.5)***, where the panel found that Article 3.1(b) did not prohibit the EU from requiring the production of certain A350 XWB parts – which were unquestionably inputs – along with the finished A350 XWB in the territory of the EU. Here, the measure at issue does not even require the production of parts in the grantor's territory.

7. The First Siting Provision ensured that the extension of the B&O aerospace tax rate would only take effect if a manufacturer sited a new commercial airplane program in Washington. The Second Siting Provision ensured that, as time progressed, the relevant manufacturer would not site the wing assembly and final assembly associated with that program somewhere else.

8. These conditions have nothing to do with disciplining the use of goods. There are millions of parts that go into an LCA, and this measure is silent with respect to the domestic or imported character of all of them.

9. Because fuselages and wings are structural elements that can be identified on a finished airplane, merely referring to fuselages and wings says nothing meaningful about how an airplane will be manufactured or what inputs will be used in that process. For the 777X, fuselages and

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wings are simply elements of the output of Boeing's production process. Again, the most fundamental way to describe the main elements of a commercial airplane is with reference to its fuselage and wings. Boeing remains free to have the millions of components or parts produced wherever it chooses.

10. Because the extended B&O aerospace tax rate with respect to the manufacture and sale of the 777X is conditioned only on the location of production activities, and not on the use of goods, it is not contingent on the use of domestic over imported goods within the meaning of Article 3.1(b). This is what the panel found in ***EC – Large Civil Aircraft (21.5)***, and this interpretation of Article 3.1(b) should be confirmed in this appeal.

11. The EU's arguments throughout its Other Appellant Submission erroneously assume the "use" of fuselages and wings. In Section II, the United States demonstrates that, under the proper interpretation of the term "use," airplane manufacturing does not necessarily involve the "use" of fuselages and wings. The United States further shows that there is nothing inherent to LCA manufacturing that requires that fuselages or wings be produced as separate articles and then used as inputs in downstream production of airplanes.

12. In Section III, the United States demonstrates that the Panel did not err in interpreting and applying Article 3.1(b) in finding that the First Siting Provision does not make the B&O aerospace tax rate for the 777X ***de jure*** contingent on the use of domestic over imported goods. The EU is also wrong that the Panel misapplied Article 3.1(b) because, according to the EU, under any scenario, domestic goods must be used for at least some period of time. As the Panel found, the First Siting Provision calls for a one-time determination regarding a decision to site manufacturing activities in Washington that occurred prior to the use of any goods. It placed no requirements on the use of goods.

13. In Section IV, the United States demonstrates that the Panel did not err in the interpretation of Article 3.1(b) or fail to make an objective assessment in finding that the First Siting Provision is not ***de facto*** contingent on the use of domestic over imported goods. There are no undisputed facts or Panel factual findings that even suggest that the First Siting Provision contains a prohibited contingency.

14. In Section V, the United States demonstrates that the Panel did not err in finding that the EU failed to establish that the Second Siting Provision contains a ***de jure*** prohibited import-substitution contingency. As the Panel found, the Second Siting Provision is silent as to the use of goods. It merely refers to the siting of production activities. Contrary to the EU's appeal, the Panel did not interpret Article 3.1(b) as requiring the use of exclusively domestic goods. Nor did the Panel improperly fail to consider a supposed U.S. "admission or to make an objective assessment in reaching its ***de jure*** finding. The EU's argument to the contrary merely re-packages its complaint that the erroneous conclusion reached in the Panel's ***de facto*** analysis should have informed the Panel's ***de jure*** analysis.

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ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-4
Annex C-3	Executive summary of Canada's third participant's submission	C-5
Annex C-4	Executive summary of China's third participant's submission	C-6
Annex C-5	Executive summary of Japan's third participant's submission	C-7

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ANNEX C-1

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION

1. This dispute addresses important distinctions between a subsidy which is prohibited for being issued contingent on the use of domestic over imported goods, and a subsidy which is issued to incentivise an activity taking place in a particular location.

2. Australia supports the Panel's finding that the first siting provision does not, of itself, make any subsidy contingent upon the use of domestic over imported goods.[1] Australia regards the second siting provision as one which may possibly be contingent upon the use of domestic over imported goods.

I. THE FIRST SITING PROVISION ONLY DESCRIBES AN ACTIVITY

3. Australia supports the Panel's description of the legal tests for ***de jure*** and ***de facto*** contingency. ***De jure*** contingency is to be found, according to the Appellate Body in ***Canada – Autos*** where the condition "is set out expressly, in so many words, on the face of the law, regulation or other legal instrument … [or] is clearly, though implicitly, in the instrument comprising the measure."[2] In Australia's view, the first siting provision does not make any subsidy contingent, ***de jure***, on the use of domestic over imported goods. All it does is incentivise an activity taking place in a particular location.

4. According to the Appellate Body in ***EC and certain member States – Large Civil Aircraft***, ***de facto*** contingency is to be "inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy."[3] In Australia's written submission to the Panel, Australia encouraged the Panel 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." As the Panel found, the total configuration of facts in this instance show that the recipient of the subsidy could relocate their manufacturing processes without losing access to the tax incentives under the first siting provision.[4]

5. Australia therefore regards the first siting provision as a description of an activity. It does not make a subsidy contingent on the use of domestic over imported goods. Subsidies which incentivise an activity, absent other elements, are permitted under the Agreement on Subsidies and Countervailing Duties (SCM). Article III(8) of GATT provides helpful guidance to interpreting the SCM, and makes it clear that subsidies which only encourage local activities are permitted. The effect of Articles 1, 8.2(b) and 25.2 of the SCM also help demonstrate that a subsidy which does nothing more than encourage an activity is permitted under the SCM. Where these subsidies cause adverse effects, a WTO Member could still challenge them, but it is appropriate to alter the distinction between a finding of adverse effects and contingency.[5]

II. THE SECOND SITING PROVISION MAKES A SUBSIDY CONTINGENT ON THE USE OF DOMESTIC OVER IMPORTED GOODS

6. In contrast, in Australia's view, the second siting provision may establish contingency of a subsidy upon the use of domestic goods. The US advised that if a wing was assembled outside of Washington State, the siting provision would be triggered, and a subsidy would be lost.[6] This could equate to prohibited contingency, but could also just acknowledge that

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[1] Panel Report, ***US – Conditional Tax Incentives For Large Civil Aircraft***, para. 7.311.
[2] Appellate Body Report, ***Canada – Autos***, para. 100.
[3] Appellate Body Report, ***EC – Large Civil Aircraft***, para. 1046, quoting Appellate Body Report, ***Canada – Aircraft***, para. 1038.
[4] Panel Report, ***US – Conditional Tax Incentives For Large Civil Aircraft***, para. 7.291.
[5] Appellate Body Report, ***EC and certain member States – Large Civil Aircraft***, para. 1054, has warned against blurring the lines between actionable and prohibited subsidies.
[6] Panel Report, ***US – Conditional Tax Incentives For Large Civil Aircraft***, para. 7.362.

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subsides are only paid to Boeing where it undertakes an activity – assembly of wings and aircraft in Washington State.

III. CONCLUSION

7. Australia notes that it is important to recognise the rights of WTO Members to provide certain subsidies to domestic manufacturing activities. In light of this, Australia agrees with the Panel that the first siting provision does not, of itself, offer subsidies contingent on the use of domestic over imported goods.[7] Rather, the first siting provision just incentivises an activity taking place in a particular place. With regards to the second siting provision, Australia considers that there are questions regarding whether there is a requirement to use domestic over imported goods.

[7] Panel Report, *US – Conditional Tax Incentives For Large Civil Aircraft*, para. 7.311.

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ANNEX C-2

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil's submission deals with three main issues: (i) the Panel's interpretation of prohibited import substitution subsidies under the SCM Agreement, (ii) the Panel's findings on that "by necessary implication" subsidies are ***de jure*** contingent on the use of domestic over imported goods, and (iii) the proper interpretation of the term "use" under Article 3.1(b) of the SCM Agreement.

2. With regard to the first issue, the SCM Agreement does not prevent a Member from conditioning the provision of a subsidy on the performance of production steps in the country granting the subsidy. It is not because a subsidy is granted upon a requirement to perform locally certain production steps related to different stages of the production chain that a subsidy should be considered ***ipso facto*** a subsidy contingent upon the use of domestic product.

3. On the second, the key question in order to assess the existence of ***de jure*** contingency is whether by necessary implication the requirements establish or create any condition favoring domestic or imported goods as the source of the components used in the production process. Just as in the distinction between production and product, the contingency under Article 3.1(b) of the ***SCM Agreement*** must be established upon the actual ***use*** of the domestic content to the detriment of the imported content, not in relation to "any domestic transaction" it may entail.

4. On the concept of "use", Brazil understands that the sourcing of the input rather than its production determines the import substitution contingency, which is made clear by the term "use". Article 3.1(b) prohibits the contingency upon the use of finished domestic products, even if they are inputs used in the production of final goods, not upon the production of domestic products.

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ANNEX C-3

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION[1]

1. In Canada's view, the Panel properly interpreted Article 3.1(b) of the SCM Agreement as not prohibiting subsidies contingent on the recipient siting manufacturing activities in the territory of the subsidizing Member. In addition, the Panel properly recognized that Article 3.1(b) does not prohibit subsidies that require the recipient to produce both intermediate goods (e.g. wings or fuselages) and finished goods (e.g. commercial airplanes). Even though the specialized nature of the intermediate goods at issue in this case made it likely that they would be used in the production of finished aircraft, the Panel did not equate a requirement to ***site*** the manufacturing of intermediate and finished goods in Washington with a requirement to ***use*** intermediate goods in the production of finished goods within the meaning of Article 3.1(b).

2. The ability of a Member to require a subsidy recipient to produce both intermediate and finished goods, even highly specialized goods, logically flows from that Member's ability to provide subsidies exclusively to domestic producers. If a Member may provide subsidies exclusively to domestic producers, it must also be able to condition receipt of the subsidy on the recipient producing both intermediate and finished goods. If this were not so, a Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed – it would only be able to condition the provision of a subsidy on the simple assembly of goods.

[1] Canada's Third-Participant Submission consists of 1,996 words. This Executive Summary consists of 235 words.

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ANNEX C-4

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. In the present dispute, China has a systemic interest in the interpretation and application of Article 3.1(b) of the SCM Agreement:

2. Firstly, the assessment of ***de jure*** contingency of prohibited subsidy under Article 3.1(b) of the SCM Agreement shall be made with caution. The Panel has established a test for "necessary implication", i.e., an implication is not the necessary implication as long as there are other interpretations available. China wishes to stress that an "implication" of a legal text shall be inevitable implication and shall not be mixed with the facts as to operation of the measure. Moreover, the "inevitable interpretation" can be rebutted if the defendant can show there are other interpretations available.

3. Secondly, Article III:8(b) of the GATT 1994 does not preclude a subsidy measure from being found inconsistent with Article 3.1(b) of the SCM Agreement. Even if a measure meets the requirements set by Article III:8(b) of the GATT 1994 and constitutes as a production subsidy, it is not exempted from the disciplines provided by Article 3.1(b) of the SCM Agreement.

4. Thirdly, uniqueness of certain input shall be an element to be considered in the assessment of ***de facto*** contingency under Article 3.1(b) of the SCM Agreement. China considers that the existence of ***de facto*** contingency in the present dispute might be partly due to the uniqueness of the input, i.e., wings and fuselage. China believes that whether a subsidy contingent on the location of input production constitutes a ***de facto*** prohibited subsidy***,*** shall be examined on a case-by-case basis.

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ANNEX C-5

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. Japan requests the Appellate Body to examine (i) whether the Panel found, with cogent reasons and appropriate evidence, that the measure was indeed ***de facto*** contingent upon the use of domestic over imported goods, (ii) without unnecessarily derogating from the ordinary meaning of the terms, "use", "domestic" and "good".

A. "Contingency"

2. Japan agrees with the Panel taking note of the Appellate Body's findings that "*contingency*" has the same meaning in Articles 3.1(a) and 3.1(b) of the SCM Agreement.[1]

3. In case of ***de facto*** contingency, the Appellate Body has concluded that the contingency must be established on the basis of objective evidence[2] and by assessing the subsidy itself[3], rather than by relying on subjective intent.[4]

4. Japan considers that if a subsidy-scheme has been designed not to be terminated as long as a long-term commitment of the subsidized investment is maintained regardless of the circumstances, including when imported goods are used in the production, then the local production requirement appears not to be contingent upon the use of domestic products.[5]

B. "Use" of a "domestic" "good"

5. The text of Article 3.1(b) refers to a contingency upon the "use" of domestic over imported goods. The position of the US appears unduly restrictive and confines the term "use" to the phrase "use of purchased products from another entity".

6. The Panel added that "... the goods in question must be at least potentially tradable". Japan has systemic concerns with this interpretation of "goods" by the Panel[6] not least because neither the words "potentially tradable" nor "tradable" form part of the text of the SCM Agreement whatsoever. Such interpretation limiting the meaning of a "good" would open up an easy path for circumvention of the disciplines under Article 3.1(b).

7. "{D}omestic over imported goods" in Article 3.1(b) suggests that the term "*domestic*" refers to any good that itself is not imported.

C. Irrelevance of GATT III:8(b) to this dispute

8. While Japan agrees that GATT Article III:8(b) could in some situations provide relevant context for the interpretation of Article 3.1(b)[7], this cannot diminish or curtail the prohibition contained in Article 3.1(b).

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[1] Panel Report, para. 7.212.
[2] Appellate Body Report, ***EC – Large Civil Aircraft***, para. 1050.
[3] Ibid, para. 1051.
[4] Ibid, para. 1050.
[5] US Appellant submission, para. 88.
[6] Panel Report, para. 7.225.
[7] Appellate Body Reports on ***US – Taxes on Petroleum and Labelling Practices on Imported Wines and Alcoholic Beverages***, para. 5.1.9, and ***Japan – Alcoholic Beverages II***, para. 109.

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ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 22 December 2016 regarding additional procedures to protect business confidential information (BCI)	D-2
Annex D-2	Procedural Ruling of 6 January 2017 regarding the United States' request to modify the deadline for filing its appellant's submission	D-9
Annex D-3	Procedural Ruling of 2 June 2017 regarding public observation of the opening statements at the oral hearing	D-11

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ANNEX D-1

PROCEDURAL RULING OF 22 DECEMBER 2016

1. On 16 December 2016, the Chair of the Appellate Body received a joint letter from the participants in these appellate proceedings, the European Union and the United States, requesting the Appellate Body Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) included in the record of this dispute. In their letter, the European Union and the United States proposed that the additional procedures adopted by the Appellate Body in the appeal in ***European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*** (DS316), with adjustments to remove references to highly sensitive business information (HSBI), form the basis for any procedural ruling on confidentiality in these appellate proceedings.

2. The European Union and the United States argued that BCI procedures are needed in these proceedings to avoid the undue risk of detrimental disclosure of particularly sensitive confidential information provided by the United States to the Panel. Such information pertains to The Boeing Company (Boeing), a US manufacturer of large civil aircraft, notably in relation to the production process and the selection of suppliers and a manufacturing site for Boeing's 777X program. Drawing an analogy with the types of confidential information included in the records in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft***, as well as in the original proceedings in ***United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*** (DS353), and which have been protected by BCI/HSBI procedures adopted at the appellate stage of these proceedings, the European Union and the United States submitted that additional procedures to protect BCI are required in this appeal because the disclosure of certain sensitive information on the Panel record to unauthorized persons not entitled to the information would be prejudicial to Boeing and to the United States. The European Union and the United States further noted the need to balance the risk of prejudicial disclosure of sensitive business information against the rights and interests of third participants and the WTO membership at large, taking into account due process and the need to preserve the Appellate Body's ability to discharge its mandate. They submitted that the proposed procedures would strike the appropriate balance in this regard.

3. Also on 16 December 2016, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the third parties in this dispute to comment in writing on the joint request of the European Union and the United States by 12 noon on Tuesday, 20 December 2016. The Chair also informed the participants and the third parties that the Division had decided to provide interim additional protection to all BCI transmitted to the Appellate Body in this dispute on the terms set out below:

a. Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to BCI contained in the Panel record pending a final decision on the joint request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI, or allow BCI to be disclosed to any person other than those identified in the preceding sentence.

b. BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and assigned Appellate Body Secretariat staff, all necessary precautions will be taken to protect the confidentiality of the BCI.

c. Pending a decision on the joint request for the protection of BCI in these proceedings, BCI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

4. On Tuesday, 20 December 2016, written comments were received from Australia. Noting that the additional procedures proposed by the European Union and the United States largely reflect those that were adopted to protect BCI in the appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, Australia indicated that it did not object to the joint request, provided that the proposed procedures are not implemented in a manner that unduly restricts the ability of third participants to gain reasonable access to information. Australia

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further requested the Appellate Body to take account of the complexity of this matter and to set the timetable for this appeal so as to enable meaningful participation by third participants in the proceedings.

5. The Division makes its ruling having considered the arguments made by the European Union and the United States in support of their request, and the comments received from Australia.

6. As an initial matter, we recall that the Appellate Body adopted additional procedures to protect the confidentiality of sensitive information in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and in the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***. In this appeal, the participants have suggested that the additional procedures adopted by the Appellate Body in the ongoing appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** should form the basis for any procedural ruling on confidentiality, with adjustments to remove references to HSBI, since neither party submitted HSBI to the Panel in this dispute. In the Procedural Rulings adopted in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***, the Appellate Body explained the considerations relevant to a decision on whether to provide additional protection to certain sensitive information.[1] We believe that similar considerations are relevant to our evaluation of the request made by the European Union and the United States in this appeal, and we briefly recall them before addressing the specific points raised in the joint request and in the comments of Australia.

7. The confidentiality requirements set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes[2] (Rules of Conduct) are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the Working Procedures for Appellate Review[3] (Working Procedures) that any such procedure may not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.

8. Additional confidentiality protection implicates the authority of the Appellate Body and the rights and duties of the participants, third participants, and the WTO membership at large. The determination of whether such protection is warranted and, if so, of the particular arrangements that are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, and the Working Procedures. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. Participants requesting particularized arrangements have the burden of justifying that such arrangements are needed in a given case to protect certain information adequately, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the Working Procedures. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

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[1] See Appellate Body Reports, ***EC and certain member States – Large Civil Aircraft***, WT/DS316/AB/R, Annex III – Procedural Ruling and Additional Procedures to Protect Sensitive Information, paras. 7-13, and ***United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)***, WT/DS353/AB/R, Annex III – Procedural Ruling and Additional Procedures to Protect Sensitive Information, paras. 8-9. See also ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, Procedural Ruling of the Appellate Body dated 25 October 2016, paras. 10-11.

[2] The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

[3] 16 August 2010, WT/AB/WP/6.

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9. In the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and in the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***, the Appellate Body adopted additional procedures that it considered struck an appropriate balance between the risks associated with the disclosure of sensitive information, on the one hand, and the adjudicative authority of the Appellate Body and the rights and duties of the participants, third participants, and the WTO membership at large, on the other hand. Similar considerations are relevant in these appellate proceedings.

10. We recall that it is for the adjudicator to decide whether certain information calls for additional confidentiality protection. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. We note that, in this dispute, and in contrast to the proceedings in ***EC and certain member States – Large Civil Aircraft*** and in ***US – Large Civil Aircraft (2nd complaint)***, neither party submitted HSBI to the Panel. This could suggest that the procedures to protect sensitive information in this appeal need not be as stringent as the procedures adopted in the prior appeals relied upon by the participants, which have accorded protection to both BCI and HSBI. Indeed, for this reason, the participants themselves have suggested that, in basing additional procedures in this appeal on those adopted in the appeal in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, we omit those aspects of the procedures that deal with HSBI. At the same time, if we compare the type of BCI at issue in this dispute with the BCI that has been accorded protection in these prior appeals, there are some similarities in the nature of the information, the industry concerned, and the risks associated with disclosure. Moreover, neither participant has appealed the Panel's decisions regarding the protection of BCI, and there are issues of practicality to consider. We will therefore proceed largely on the basis of how BCI was treated before the Panel. Nevertheless, we do not exclude revisiting whether a particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a disagreement on the classification of that information arise before us, or should we consider that we need to refer to that information in our report in order to give a sufficient exposition of our reasoning and findings.

11. Having reaffirmed the relevant considerations that guide our decision, we turn to the participants' proposed procedures, which essentially replicate the procedures adopted by the Appellate Body in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, insofar as they protect BCI.

12. The arrangements that the participants have jointly proposed do not appear unduly to affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. We have largely reflected the proposed arrangements in the additional procedures that we adopt below. These procedures ensure that Appellate Body Members and assigned Appellate Body Secretariat staff have sufficient access to the entirety of the Panel Report, the submissions, and the record of the dispute. They also limit the risk of inadvertent disclosure of BCI and set out an efficient process for correcting and transmitting BCI-redacted versions of submissions.

13. Finally, we note, as the Appellate Body did in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and in the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***, that we will make every effort to draft our report without including BCI. The additional procedures that we adopt below foresee that the participants will be provided in advance with a copy of the Appellate Body report intended for circulation to WTO Members, and will have an opportunity to request the removal of any BCI that is inadvertently included in the report. If we consider it necessary to include BCI in our report, the participants will be given an opportunity to comment. We will provide further guidance at a later point in these proceedings as to the modalities and details of such a procedure.

14. For these reasons, we have decided to provide additional confidentiality protection in this appeal. Accordingly, we adopt the following additional procedures:

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Additional Procedures to Protect Sensitive Information

General

i. These additional procedures shall apply to information that was treated as business confidential information (BCI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate BCI.

ii. To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide upon the treatment to be accorded to such information after hearing their views.

iii. Each participant may, at any time, request that information that it submitted, and that was previously treated as BCI, no longer be treated as such.

iv. The participants and third participants shall file their written submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission and/or an executive summary contains BCI, a redacted version of the submission and/or the executive summary (that is, a version without BCI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by a participant or third participant contain BCI, the redacted version of the executive summary will be annexed to the Appellate Body report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants are further regulated in the provisions below, which apply ***mutatis mutandis*** to executive summaries of written submissions.

Appellate Body Members and Appellate Body Secretariat Staff

v. Appellate Body Members and assigned staff of the Appellate Body Secretariat may have access to the BCI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI, or allow BCI to be disclosed, to any person other than those identified in the preceding sentence, or to those "BCI-Approved Persons" of the participants and third participants identified in accordance with paragraphs xii and xiv below. Appellate Body Members and assigned staff of the Appellate Body Secretariat shall ensure that, when it is not in use, BCI is stored in locked cabinets. Appellate Body Members and Appellate Body Secretariat staff are covered by the Rules of Conduct. As provided for in the Rules of Conduct, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

vi. Appellate Body Members may maintain a copy of documents containing BCI at their places of residence outside Geneva. When not in use, the documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets. Documents and materials containing BCI shall be sent to Appellate Body Members only by secure e-mail or courier.

vii. The participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

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viii. Subject to appropriate precautions, BCI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.

ix. Except as provided for in paragraph x, all documents and electronic files containing BCI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.

x. The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises.

Appellate Body Report

xi. The Division will make every effort to draft an Appellate Body report that does not disclose BCI. The Division will, in particular, endeavour to limit itself to making statements or drawing conclusions that, even when based on BCI, do not quote or reveal the substance of such BCI, to the extent that such an approach does not compromise the clarity of the reasoning. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date and in a manner to be specified by the Division. The participants will be provided with an opportunity to request the removal of any BCI that is inadvertently included in the report. The Division will also indicate to the participants if it finds it necessary to include in the Appellate Body report information that was treated by the Panel as BCI, and will provide the participants with an opportunity to comment. Comments on the inclusion of information previously treated as BCI and requests for removal of BCI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions on the report will be accepted. In coming to a decision on the need to include BCI to ensure that the final report is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other hand.

Participants

xii. The participants shall provide lists of persons who are "BCI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 5 p.m. on Wednesday, 4 January 2017, and shall be served on the other participant and the third participants. Participants may submit amendments to their list of BCI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the other participant and the third participants. A participant may object to the designation of an outside advisor as a BCI-Approved Person by the other participant. Any objection to the designation of such individual as a BCI-Approved Person must be filed with the Appellate Body Secretariat within two working days of the submission of the original or amended list and simultaneously served on the other participant and the third participants. Thus, any objections to the designation of an outside advisor as a BCI-Approved Person in the lists to be filed on 4 January 2017 must be filed with the Appellate Body Secretariat and served on the other participant and the third participants by 5 p.m. on Friday, 6 January 2017. The Division will reject a request for designation of an outside advisor as a BCI-Approved Person only upon a showing of compelling reasons, having regard to, ***inter alia***, the relevant principles reflected in the Rules of Conduct and the Illustrative List in Annex 2 thereto. BCI-Approved Persons shall not disclose BCI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons, and Third Participant BCI-Approved Persons.

xiii. Any participant referring in its written submissions to information that is classified as BCI shall clearly identify the information as such in those submissions. Each participant shall simultaneously provide a redacted version of its submissions to the other participant.

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Submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the other participant. The other participant shall have two working days to object to the inclusion of any information that it considers to be BCI, but that is not designated as such and/or is not redacted. If no objections are made, then the redacted version of the relevant submission shall be transmitted the following day to the third participants. If there are objections, the Division shall resolve the matter and instruct, as appropriate, the relevant participant to redact the information that was subject to the objection, unless the participant agrees to remove it, and to transmit a correctly redacted version of its submission to the Appellate Body Secretariat, the other participant, and the third participants. The electronic copy of the BCI version of the submission shall be corrected by the participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the other participant. The Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission and to replace the electronic copies with the corrected versions. The BCI version of all participants' submissions shall be transmitted to the third participants pursuant to paragraph xv below.

Third Participants

xiv. Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Wednesday, 4 January 2017. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. Third participants may submit amendments to their lists of BCI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the participants and the other third participants. A participant may object to the designation of an outside advisor as a Third Participant BCI-Approved Person by a third participant. Any objections must be filed with the Appellate Body Secretariat within two working days of the filing of the original or of an amended list of Third Participant BCI-Approved Persons, and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, ***inter alia***, the relevant principles in the Rules of Conduct and the Illustrative List in Annex 2 thereto. Third Participant BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

xv. The BCI version of all submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured, individually watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons for that third participant; and shall state that "This document is not to be copied". In addition, the cover page of each such document shall state that any handwritten BCI added to the document shall only be discussed or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure cabinet when not in use. These documents and handwritten notes must be

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returned to the Appellate Body Secretariat at the closing of the final session of the oral hearing held in this appeal.

xvi. Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.

xvii. Third participants making written submissions shall transmit their submissions to the Appellate Body Secretariat and the participants. If a third participant wishes to refer in its written submission to information that is classified as BCI, it shall clearly identify such information. A third participant referring to BCI in its submission shall also simultaneously provide the participants with a redacted version of that submission. Third participant's submissions containing BCI, and redacted versions of such submissions, shall be transmitted only to BCI-Approved Persons of the participants. The participants shall have two working days to object to the inclusion of any information in a third participant's submission that a participant considers to be BCI, but that is not designated as such and/or is not redacted. If no objections are made, then on the following day: (i) a third participant's submission that contains no BCI shall be transmitted to the other third participants; and (ii) if a third participant's submission contains BCI, the redacted submission shall be transmitted to the other third participants. If there are objections, the Division shall resolve the matter and instruct, as appropriate, the relevant third participant to redact the information that was subject to the objection, unless the third participant agrees to remove it, and to transmit a corrected BCI version of its submission to the Appellate Body Secretariat and the participants, and a correctly redacted version of its submission to the Appellate Body Secretariat, each of the participants, and the other third participants. The electronic copy of the BCI version of the submission shall be corrected by the third participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the participants; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission and to replace the electronic copies. Third participants shall transmit the BCI version of their submissions to the other third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room referred to in paragraph xv above.

Oral Hearing

xviii. Appropriate procedures shall be adopted to protect BCI from unauthorized disclosure at any oral hearing held in this appeal.

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ANNEX D-2

PROCEDURAL RULING OF 6 JANUARY 2017

1. On Thursday, 5 January 2017, the Chair of the Appellate Body received a communication from the United States requesting that the Division selected to hear this appeal modify the deadline for the filing of its appellant's submission. In its letter, the United States invokes Rule 16(2) of the Working Procedures for Appellate Review[1] (Working Procedures), and seeks to have this deadline extended from 10 January 2017 to 17 January 2017. According to the United States, there are exceptional circumstances present in these proceedings, such that "failing to grant such a request would result in manifest unfairness within the meaning of Rule 16(2)". We understand that the European Union and the third participants were served a copy of the United States' request. The United States also indicated, in its letter, that it had asked the European Union for its views on this request for an extension of time.

2. In support of its request, the United States highlighted that the deadline for the filing of its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** (WT/DS316) is Friday 13 January 2017. The United States submitted that the scheduling of the deadlines for the filing of the United States' appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** (WT/DS316) and its appellant's submission in the present dispute on 10 and 13 January, respectively, with only a three-day time difference, would impede the ability of its staff to finalize these submissions. In particular, the United States observed that in its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, the United States has to respond to a lengthy appellant's submission, and the inclusion of business confidential information (BCI) and possibly highly sensitive business information (HSBI) in the appellee's submission presents further difficulties. Moreover, the United States argued that its appellant's submission in this appeal, while shorter than its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, will still be lengthy, and that the United States' appellee's submission in that case is farther advanced than its appellant's submission in the present appeal.

3. Also on 5 January 2017, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the European Union and the third participants in this dispute to comment in writing on the communication from the United States by 1:00 p.m. on 6 January 2017. No comments were received from the third participants.

4. On Friday, 6 January 2017, written comments were received from the European Union. The European Union indicated that it did not, in principle, oppose the United States' request, if the Appellate Body considers that the reasons given by the United States constitute exceptional circumstances within the meaning of Rule 16(2) of the Working Procedures. However, the European Union observed that the United States has had more than five months, since receipt of the final Panel Report to prepare its appellant's submission, and that the time periods in this dispute are subject to the expedited treatment required by Article 4.12 of the Agreement on Subsidies and Countervailing Measures. According to the European Union, these considerations should also be taken into account when deciding whether the United States' request meets the burden of demonstrating exceptional circumstances within the meaning of Rule 16(2) of the Working Procedures. In its letter commenting on the United States' request, the European Union highlighted the "significant overlaps in the matters at issue" in this appeal and in the appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***. For reasons similar to those outlined in the United States' request in this dispute, the European Union requested a one-week extension for the filing of its appellee's submission in the appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, as well as a one-week extension for the filing of the United States' appellee's submission in that dispute.

5. We observe that the United States filed its appeal in the present dispute on 16 December 2016. Pursuant to Rule 21(1) of the Working Procedures, an appellant is required to file its appellant's submission on the same day as the date of the filing of the Notice of Appeal.

[1] WT/AB/WP/6, 16 August 2010.

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Therefore, under normal circumstances, the United States would already have prepared, and would have filed, its appellant's submission on 16 December 2016. In these appellate proceedings, however, on 16 December 2016, the European Union and the United States filed a joint letter requesting the adoption of additional procedures to protect sensitive information included in the record of this dispute. In response to that letter, the Division hearing this appeal suspended the deadline for the filing of the appellant's submission pending the adoption of additional procedures to protect sensitive information. On 22 December 2016, the Appellate Body adopted a procedural ruling to protect sensitive information, and communicated the filing date for the United States' appellant's submission to the participants and third participants.

6. We highlight that the reason for postponing the filing deadline for the United States' appellant's submission, otherwise due on 16 December 2016, was to enable proper procedures to be put in place to ensure adequate protection of BCI in that submission. The United States did not request more time to prepare the contents of its appellant's submission at that time. Indeed, in the joint letter by the European Union and the United States of 16 December 2016 requesting the adoption of BCI procedures, the United States sought "the Appellate Body's guidance on how to proceed with the filing of its appellant's submission consistent with the requirements of Rule 21(1), and in light of the particular confidentiality concerns", in the event that "the Appellate Body is not in a position to consider and adopt BCI procedures at this point in time". We understand from this statement that, on 16 December 2016, the United States was already prepared to file its appellant's submission consistently with Rule 21(1) of the Working Procedures. This, in turn, suggests that the filing date for the United States' appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, namely 13 January 2017, should not have affected the preparation of the United States' appellant's submission in the present case.

7. For this reason, we are not persuaded by the United States' argument that the current scheduling of the deadlines for its appellant's submission in the present dispute and its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** would impede the ability of its staff to finalize the submissions. We also recall, in this regard, that the European Union's appellant's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** was filed on 3 November 2016, and the United States' appellee's submission is due 71 days later, on 13 January 2017. In normal circumstances, under Rule 22(1) of the Working Procedures, an appellee's submission is to be filed 18 days after the date of the filing of the Notice of Appeal (and an appellant's submission filed pursuant to Rule 21).

8. We further observe that, in view of the WTO end-of-year closure, the deadline set for the filing of the United States' appellant's submission in the present dispute was delayed until the second working week of 2017. In addition, the Panel Report in the present dispute is relatively short and, in its letter, the United States itself indicates that its appellant's submission will not be exceptionally lengthy.

9. For the reasons above, we consider that strict adherence to the time periods set by the Division for the filing of the United States' appellant's submission will not result in manifest unfairness within the meaning of Rule 16(2) of the Working Procedures, and that it is not, therefore, necessary or appropriate to modify the deadline for the filing of the United States appellant's submission.

10. In these circumstances, the Division declines the United States' request for extension of the deadline for filing its appellant's submission in the present appeal, and, instead, affirms the deadline for filing the United States' appellant's submission set for Tuesday, 10 January 2017.

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ANNEX D-3

PROCEDURAL RULING OF 2 JUNE 2017

1. On 1 June 2017, we received a communication from the United States proposing additional procedures to protect Business Confidential Information (BCI) during the oral hearing in this appeal and requesting that we allow public observation of the opening statements at the oral hearing. The oral hearing is scheduled for 6-7 June 2017.

2. Specifically, the United States proposes that we adopt procedures similar to those adopted by the Appellate Body in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, pursuant to the Procedural Ruling dated 19 April 2017, with adjustments to remove references to highly sensitive business information given that such information does not form part of the record of the present dispute. They state that the reasons for their request and proposal are substantially the same as the reasons that were given in a joint letter of 11 April 2017 from the United States and the European Union, which contained a similar request.

3. On 1 June 2017, we issued a communication soliciting the views of the European Union and third participants on the United States' request. The European Union and third participants were given until the following day at noon on 2 June 2017 in order to respond.

4. The European Union expressed its support for the United States' request, but noted that it should be for the Appellate Body to decide whether or not in this particular instance sufficient time remained to organise an open hearing. Australia also supported the United States' request, indicating that it considered that the request helpfully provided transparency and appropriately protected BCI. Brazil noted that it had not received the United States' request, and therefore was not able to comment specifically on it, but expressed its concern with the timeliness of the request and what measures might be needed to comply with the request. Brazil indicated that it did not wish its opening statement to be broadcast. China submitted that the United States' request to exclude non-BCI-Approved persons of the third participants from the segment of the hearing dedicated to questions and answers would significantly constrain the ability of third participants to engage fully in the oral hearing. China added that, in the circumstances of this appeal, the need for protection of sensitive information cannot sufficiently justify a complete exclusion of non-BCI-Approved persons from the question and answer session. China also remarked that this appeal raises important interpretative issues that deserve the full participation of third participants. Finally, China indicated that it does not want to open to the public its statements and oral responses to the questions during the oral hearing. No comments were received from Canada, India, Japan, Korea, or the Russian Federation.

5. The request of the participants raises issues similar to those that were before the Appellate Body in ***EC and certain member States – Large Civil Aircraft***, ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, and in ***US – Large Civil Aircraft (2nd complaint)***.

6. In this appeal, we already adopted, in a Procedural Ruling dated 22 December 2016, additional procedures for the protection of sensitive information. Pursuant to that ruling, the participants have provided a list of persons who are authorized to have access to BCI. Therefore, only members of the participants' delegations who are BCI-Approved Persons are invited to attend the session of the oral hearing in which BCI may be discussed. Moreover, also pursuant to this Procedural Ruling, the third participants have been allowed to designate up to eight individuals as Third Participant BCI-Approved Persons. We consider this to be sufficient to allow the third participants to be represented properly at the oral hearing. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend the session of the oral hearing in which BCI may be discussed. Having carefully considered the comments provided by China, we do not consider that this will unduly impinge upon the rights of the third participants in this case.

7. Regarding the United States' request that we allow public observation of the opening statements at the oral hearing, we wish to express our strong concerns regarding the timeliness of that request. The request was filed on 1 June 2017, two working days before the oral hearing in

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this dispute. Given the time needed to solicit comments from the European Union and third participants, and the fact that the oral hearing follows a weekend and an official WTO holiday, there was less than one business day remaining in order to deliberate the United States' request together with the comments of the European Union and the third participants. As noted above, although the European Union expressed its support for the United States' request, it also noted that it should be for the Appellate Body to decide whether or not in this particular instance sufficient time remained to organise such an open hearing. Devising arrangements for public viewing of the opening statements at the oral hearing also entails a burden on a number WTO departments and services and causes budgetary expenditures, particularly when such requests are made at a very late stage. We note in this respect that the above-mentioned Procedural Ruling was issued on 22 December 2016 and the pre-hearing letter regarding the hearing arrangements was sent to participants on 18 May 2017. While we decide, by majority, to grant exceptionally the United States' request, as supported by the European Union, regarding public observation, we underscore the importance for participants wishing to request public observation of all or part of oral hearings in disputes to make such requests in a timely fashion, taking into account the due process rights of other participants and third participants and the burden on WTO Secretariat resources.

8. Notwithstanding the concerns we express above, for reasons similar to those adopted by the Appellate Body in prior such disputes, including, most recently, ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, we adopt below the Additional Procedures on the Conduct of the Oral Hearing in this appeal.

Additional Procedures on the Conduct of the Oral Hearing

i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the oral hearing that was treated as business confidential information (BCI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures for the Protection of Sensitive Information that we adopted in our Procedural Ruling of 22 December 2016.

ii. To the extent that information on the record is presented at the oral hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.

iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the oral hearing, including the session dedicated to the discussion of BCI.

iv. In addition to the persons indicated in paragraph iii above, BCI shall be disclosed during the oral hearing only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons, as designated in accordance with our Procedural Ruling of 22 December 2016.

v. The session of the oral hearing dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI in their opening statements.

vi. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the session of the oral hearing dedicated to questions and answers.

vii. During the session of the oral hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal will be made available. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of the oral hearing.

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viii. The parts of the transcript of the oral hearing containing BCI shall become part of the appellate record in this appeal and shall be kept in accordance with the Procedural Ruling of 22 December 2016.

Public observation of the oral hearing

ix. The first session of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph x below. The session of the oral hearing open to public observation shall be videotaped. Within two days of the completion of the oral hearing, either participant may request to review the videotape to verify that no BCI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participant(s) review the videotape. If the videotape contains BCI, a redacted version of the videotape shall be produced in which the BCI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening statements, the relevant portion will not be subject to public observation.

x. The opening statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests should be made as soon as possible, and no later than the beginning of the oral hearing at 9:30 a.m. Geneva time on Tuesday, 6 June 2017.

xi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The videotapes, or if applicable the redacted versions of the videotapes, shall be screened to WTO delegates and members of the public subject to the terms set out in paragraph ix above. The time and location of the videotape screening shall be announced in due course, and WTO delegates will be invited to indicate to the Appellate Body Secretariat whether they wish to have a reserved seat in the room where the videotape will be screened.

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WORLD TRADE ORGANIZATION

WT/DS487/AB/R/Add.1

4 September 2017

(17-4682)

UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

AB-2016-8

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS487/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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LIST OF ANNEXES

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	United States' Notice of Appeal	A-2
Annex A-2	European Union's Notice of Other Appeal	A-4

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of the United States' appellant's submission	B-2
Annex B-2	Executive summary of the European Union's other appellant's submission	B-5
Annex B-3	Executive summary of the European Union's appellee's submission	B-9
Annex B-4	Executive summary of the United States' appellee's submission	B-14

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-4
Annex C-3	Executive summary of Canada's third participant's submission	C-5
Annex C-4	Executive summary of China's third participant's submission	C-6
Annex C-5	Executive summary of Japan's third participant's submission	C-7

ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 22 December 2016 regarding additional procedures to protect business confidential information (BCI)	D-2
Annex D-2	Procedural Ruling of 6 January 2017 regarding the United States' request to modify the deadline for filing its appellant's submission	D-9
Annex D-3	Procedural Ruling of 2 June 2017 regarding public observation of the opening statements at the oral hearing	D-11

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

Contents		Page
Annex A-1	United States' Notice of Appeal	A-2
Annex A-2	European Union's Notice of Other Appeal	A-4

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ANNEX A-1

UNITED STATES' NOTICE OF APPEAL*

Pursuant to Article 16 of the ***Understanding on Rules and Procedures Governing the Settlement of Disputes*** ("DSU") and Rule 20 of the ***Working Procedures for Appellate Review***, the United States files this Notice of Appeal to the Appellate Body on certain issues of law covered in the Report of the Panel in ***United States – Conditional Tax Incentives for Large Civil Aircraft*** (WT/DS487/R & WT/DS487/R/Add.1) ("Panel Report") and certain legal interpretations developed by the Panel.

The United States seeks review by the Appellate Body of the Panel's finding and conclusion that the Washington State B&O aerospace tax rate for the manufacturing or sale of Boeing 777X airplanes (the "B&O aerospace tax rate") is inconsistent with Articles 3.1(b) and 3.2 of the ***Agreement on Subsidies and Countervailing Measures*** (the "SCM Agreement") because it is ***de facto*** contingent on the use of domestic over imported goods.[1] This finding is in error and is based on erroneous findings on issues of law and legal interpretations, including the Panel's failure to conduct an objective assessment of the matter as required by Article 11 of the DSU.

The Panel erred in finding that the B&O aerospace tax rate for the 777X program is contingent on the use of domestic over imported wings for the 777X. In particular:

a. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement as if it prohibited subsidies conditional on the domestic siting of production activities.[2]

b. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate for the 777X program is contingent on the "use" of wings for the 777X, even though Boeing does not and will not "use" wings to produce the 777X, and Boeing is nonetheless eligible to receive the B&O aerospace tax rate for the 777X program (and other programs).[3]

c. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate for the 777X program is contingent on the use of "domestic" over "imported" wings for the 777X, even though the Panel did not interpret the meaning of the terms "domestic" and "imported," did not provide sufficient analysis of what would make wings "domestic" or "imported," and did not assess whether the 777X wings are "domestic."[4] The Panel also failed to provide the basic rationale behind its finding as required by Article 12.7 of the DSU.

d. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement by relying on hypothetical scenarios with no evidentiary basis to evaluate whether the B&O aerospace tax rate for the 777X program is "contingent" in fact on the use of domestic over imported goods.[5] The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU because it used hypothetical scenarios involving Boeing's purchase of 777X wings from another Washington manufacturer and Boeing's importation of 777X wings from a foreign producer that were contrary to the evidence before it.[6]

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* This notification, dated 16 December 2016, was circulated to Members as document WT/DS487/6.

[1] See, e.g., Panel Report, paras. 7.369, 8.1(c), 8.2.
[2] See, e.g., Panel Report, paras. 7.360, 7.368-7.369, 8.1(c), 8.2.
[3] See, e.g., Panel Report, paras. 7.219-7.222, 7.353-7.356, 7.368.
[4] See, e.g., Panel Report, Section 7.5.4 (interpreting certain terms of Article 3.1(b), but not interpreting the terms "domestic" and "imported"), paras. 7.364, 7.367.
[5] See, e.g., Panel Report, paras. 7.355-7.356, 7.359, 7.363-7.369.
[6] See, e.g., Panel Report, paras. 7.355-7.356, 7.359, 7.363-7.369.

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e. The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU in finding that Boeing would lose the B&O aerospace tax rate for the 777X program if it used 777X wings produced outside Washington State, and in finding that it would not lose that tax rate if it sourced 777X wings from a Washington manufacturer.[7]

f. The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU in finding that the Second Siting Provision[8] concerns the use of certain goods, and specifically the origin of those goods that enter into the production process for the 777X, as a condition for the continued availability of the B&O aerospace tax rate for the 777X program.[9] Were the Appellate Body to consider the meaning and operation of the Second Siting Provision as an issue of law for purposes of the DSU, then the United States considers the Panel erred as a matter of law in its understanding or interpretation of the Second Siting Provision.

The United States respectfully requests that the Appellate Body reverse these findings by the Panel.

[7] See, e.g., Panel Report, paras. 7.363-7.367, 7.369.
[8] See Panel Report, Section 7.3.2.2.
[9] See, e.g., Panel Report, paras. 7.341, 7.348-7.356, 7.358-7.368.

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ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL*

Pursuant to Articles 16.4 and 17.1 of the ***DSU*** and Article 4.8 of the ***SCM Agreement***, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute ***United States – Conditional Tax Incentives for Large Civil Aircraft*** (WT/DS487). Pursuant to Rule 23(1) of the ***Working Procedures for Appellate Review***, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report[1]:

1. The Panel erred in the interpretation of Article 3.1(b) of the ***SCM Agreement*** by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the First Siting Provision,[2] set out in Section 2 of Washington State Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), does not make the subsidies subject to that condition ***de jure*** contingent on the use of domestic over imported goods.[3]

2. The Panel erred in the application of Article 3.1(b) of the ***SCM Agreement*** in finding that the First Siting Provision does not make the subsidies subject to that condition[4] ***de jure*** contingent on the use of domestic over imported goods.[5]

3. The Panel erred in the interpretation of Article 3.1(b) of the ***SCM Agreement*** by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the First Siting Provision, considered alone, does not make the subsidies subject to that condition[6] ***de facto*** contingent on the use of domestic over imported goods.[7] The European Union requests the Appellate Body to consider this appeal only if it does not find (in accordance with the appeals described in paragraph 1 or 2, above) that the First Siting Provision, considered alone, makes the subsidies subject to it ***de jure*** contingent on the use of domestic over imported goods in violation of Article 3.1(b).

4. The Panel failed to make an objective assessment under Article 11 of the DSU in finding that the First Siting Provision, considered alone, does not make the subsidies subject to that condition[8] ***de facto*** contingent on the use of domestic over imported goods, within the

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* This notification, dated 17 January 2017, was circulated to Members as document WT/DS487/7.

[1] Paragraph numbers provided in footnotes to the following description of the Panel's errors are intended to indicate the primary instance of the errors.

[2] See Panel Report, paras. 7.28-7.30 (defining "First Siting Provision").

[3] Panel Report, paras. 7.290, 7.291, 7.294, 7.296, 7.297, 8.1(1)(b)(i). The subsidies subject to the First Siting Provision are the following: (a) reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes; (b) B&O tax credit for pre-production development for commercial airplanes and components; (c) B&O tax credit for property taxes on commercial airplane manufacturing facilities; (d) exemption from sales and use taxes for certain computer hardware, software, and peripherals; (e) exemption from sales and use taxes for certain construction services and materials; (f) exemption from leasehold excise taxes on port district facilities used to manufacture superefficient airplanes; and (g) exemption from property taxes for the personal property of port district lessees used to manufacture superefficient airplanes. See Panel Report, paras. 7.15, 7.28.

[4] See footnote 3, above.

[5] Panel Report, paras. 7.294, 7.296, 7.297, 8.1(1)(b)(i).

[6] See footnote 3, above.

[7] Panel Report, paras. 7.291, 7.330, 7.342-7.345.

[8] See footnote 3, above.

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meaning of Article 3.1(b) of the ***SCM Agreement***.[9] The European Union requests the Appellate Body to consider this appeal only if it does not find (in accordance with the appeals described in paragraph 1 or 2, above) that the First Siting Provision, considered alone, makes the subsidies subject to it ***de jure*** contingent on the use of domestic over imported goods in violation of Article 3.1(b).

5. The Panel erred in the interpretation of Article 3.1(b) of the ***SCM Agreement*** by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the Second Siting Provision,[10] set out in Sections 5 and 6 of ESSB 5952, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) ***de jure*** contingent on the use of domestic over imported goods.[11]

6. The Panel erred in the application of Article 3.1(b) of the ***SCM Agreement*** in finding that the Second Siting Provision, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) ***de jure*** contingent on the use of domestic over imported goods.[12]

7. The Panel failed to make an objective assessment under Article 11 of the DSU, in finding that the Second Siting Provision, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) ***de jure*** contingent on the use of domestic over imported goods, within the meaning of Article 3.1(b) of the ***SCM Agreement***.[13] In particular, the Panel's findings lacked a sufficient evidentiary basis.

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[9] Panel Report, paras. 7.330, 7.342-7.345.
[10] See Panel Report, paras. 7.32-7.33 (defining "Second Siting Provision").
[11] Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).
[12] Panel Report, paras. 7.305-7.311,7.315-7.317, 8.1(b)(ii)-(iii).
[13] Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).

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ANNEX B

ARGUMENTS OF THE PARTICIPANTS

Contents		Page
Annex B-1	Executive summary of the United States' appellant's submission	B-2
Annex B-2	Executive summary of the European Union's other appellant's submission	B-5
Annex B-3	Executive summary of the European Union's appellee's submission	B-9
Annex B-4	Executive summary of the United States' appellee's submission	B-14

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ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION

(Business confidential information redacted as marked "[BCI]")

1. The Panel correctly found that the Washington 0.2904 percent business and occupation ("B&O") tax rate for aerospace activities under Revised Code of Washington ("RCW") § 82.32.850, as extended under Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), is ***de jure*** contingent on the location of production activities in the state of Washington, and not on the use of domestic goods.[1] This finding is in line with the understanding of both parties and the third parties that Article 3.1(b) of the ***Agreement on Subsidies and Countervailing Measures*** ("SCM Agreement") does not prohibit a Member making the receipt of subsidies contingent on the location of production activities in its territory. This principle follows from Article III:8(b) of the ***General Agreement on Tariffs and Trade 1994*** ("GATT 1994"), under which national treatment disciplines do not prevent the payment of subsidies exclusively to "domestic producers".

2. However, under the Panel's erroneous ***de facto*** analysis, defining eligibility for a subsidy in terms that describe the necessary production process – or who qualifies as a domestic producer – will invariably lead to a finding of ***de facto*** contingency. Specifically, Washington made the entry into force of the B&O aerospace tax rate contingent on the siting in Washington of a significant commercial airplane manufacturing program, which was defined by the manufacture of a new airplane model, including its fuselage and wings.[2] (The Panel referred to this as the "First Siting Provision.") The legislation also specified that that tax rate would cease to apply to the airplane program that was sited in Washington (***i.e.***, Boeing's 777X) if Boeing sited 777X wing assembly or final assembly outside of Washington.[3] (The Panel referred to this as the "Second Siting Provision.") The Panel found that by making the 777X's continued eligibility for the B&O aerospace tax rate conditional on keeping production in Washington of the aircraft and its wings, the Second Siting Provision ***de facto*** required the use of domestic over imported wings. Thus, under the Panel's analysis, the very act of defining eligibility for the subsidy in terms of production activities – a mechanism expressly permissible under Article III:8(b) – led to the finding of a ***de facto*** requirement to use domestic over imported goods if the specified production activities could potentially result in intermediate goods.

3. That legal interpretation by the Panel was in error and vitiates its conclusion that the Second Siting Provision renders the 0.2904 percent B&O tax rate on the manufacture and sale of 777Xs inconsistent with Article 3.1(b). In addition, the Panel made multiple errors that led to this self-contradictory and erroneous conclusion. These fall into three groups.

4. First, although Article 3.1(b) prohibits a subsidy only if it is contingent on the "use" of domestic over imported goods, the Panel failed to evaluate whether Boeing's 777X process involves the "use" of wings to manufacture the 777X. The evidence showed that it does not. The ordinary meaning of "use" is the employment as an input or instrumentality in a productive process, or consumption of a good for its intended purpose by the end user. In Boeing's production of the 777X, the wing is none of these things – it is the output of Boeing's production process, and not an input or instrumentality. The wing never exists as a separate entity; it is only completed during and as part of final assembly. (In fact, a partial wing structure is joined with a partial fuselage structure before a fuselage or wing ever exists.)

5. In a related vein, the Panel did not evaluate whether the 777X wing, much of which consists of parts and components from outside Washington, including from foreign sources, is a "domestic good," another prerequisite legal element to establish an inconsistency with Article 3.1(b). Because Boeing is eligible for the tax treatment found to be a subsidy, if Boeing's 777X production process does not involve the use of wings at all, or if such wings are not domestic, then the

[1] Panel Report, paras. 7.296, 7.308, and 7.315. The United States refers to the Panel Report in this dispute as "Panel Report," with no dispute short title following it.
[2] RCW § 82.32.850(1) and (2)(c).
[3] RCW § 82.323.85011(e)(ii).

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subsidy necessarily is not contingent on the use of domestic over imported wings. Thus, the Panel failed to correctly apply the legal standard set out in Article 3.1(b) to the facts of the case.

6. Second, the Panel used hypothetical scenarios devoid of grounding in the facts to analyze whether the Second Siting Provision was ***de facto*** contingent on the use of domestic over imported goods. The Panel recognized that "***{d}e facto*** contingency must be established from the total configuration of the facts constituting and surrounding the granting of the subsidy... ."[4]

7. However, the Panel based its evaluation of the operation of the Second Siting Provision on hypotheticals in which "Boeing in the future sourced some 777X wings from other entities, including foreign producers, rather than assembling all of them itself."[5] These hypotheticals relied on the assumption that **[BCI]**. It further assumed that Boeing's production process could be modified so as to feed in wings as discrete inputs. And finally, it assumed that it was possible to **[BCI]**. These assumptions were not only devoid of evidentiary support, but also contrary to the evidence. In performing the analysis in this way, the Panel erroneously interpreted or applied Article 3.1(b), failed to make an objective assessment of the matter under Article 11 of the DSU, and found a ***de facto*** breach before it could exist, even under the Panel's own reasoning.

8. Third, and finally, the Panel's evaluation of the operation of the Second Siting Provision relied on faulty interpretations of evidence that, when objectively considered, do not support the Panel's conclusion that the Second Siting Provision concerns the use and origin of certain goods. The Panel based this finding on three pieces of evidence: the U.S. responses to two questions from the Panel, the presence of the phrase "wing assembly ***or*** final assembly" in the Second Siting Provision, and two statements by the Governor of Washington. However, it misinterpreted each of these.

9. The U.S. responses to questions reflected the fact that eligibility for the B&O aerospace tax rate depends on the siting of production ***activities***, which does not necessitate, as the Panel believed, that the results of such activities would be "domestic goods" if the activities occurred in Washington, but "imported goods" if the activities occurred outside of the United States.

10. The "or" in "wing assembly or final assembly" indicates that these two processes are distinct, but contrary to the Panel's apparent view, it does not mean that they are mutually exclusive or necessarily sequential. In fact, in Boeing's current process for manufacturing the 777X, the wing never exists as a distinct component.

11. Lastly, of the two statements by the Governor of Washington, one deals with the siting of production activities, and the other addresses an earlier version of the legislation that framed the contingency in terms of "wing fabrication" in addition to "wing assembly," which was not true of the legislation that was ultimately enacted. Thus, neither is relevant to the question of whether conditioning the B&O aerospace tax rate on the location of wing assembly makes it contingent on the use of domestic over imported goods.

12. Below, Section II provides relevant background for the legal issues before the Appellate Body, including undisputed facts and Panel findings regarding the Washington aerospace industry, the elements of large civil aircraft (LCA), Boeing's development of the 777X and its 777X manufacturing operations in Washington, the B&O aerospace tax rate, and the Panel's findings.

13. Section III lays out the proper legal standard for assessing claims under Article 3.1(b) of the SCM Agreement.

14. Section IV explains that the Panel erroneously interpreted and applied Article 3.1(b) so as to effectively prohibit subsidies conditional on the domestic siting of production activities – even though it is clear from Article III:8(b) of the GATT 1994, ***inter alia***, that such subsidies are not in fact prohibited.

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[4] Panel Report, para. 7.320 (citing Appellate Body Report, ***Canada – Aircraft***, para. 167; Appellate Body Report, ***EC – Large Civil Aircraft***, para. 1051).

[5] Panel Report, para. 7.362.

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15. Section V explains that the Panel erred in the interpretation and application of Article 3.1(b) by failing to evaluate whether Boeing uses domestic wings to manufacture the 777X.

16. Section VI explains that the Panel's reliance on hypothetical scenarios with no basis in fact constitutes an erroneous interpretation and application of Article 3.1(b), or in the alternative, a failure to make an objective assessment of the matter under Article 11 of the DSU.

17. Section VII explains that the Panel's finding regarding the operation of Washington law constitutes a failure to make an objective assessment of the matter before it under Article 11 of the DSU, as does the Panel's reliance on the word "or" in the Second Siting Provision and its reliance on two statements by the Governor of Washington.

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ANNEX B-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION

I. INTRODUCTION

1. Washington State enacted Engrossed Substitute Senate Bill 5952 ("ESSB 5952") in November 2013,[1] creating the largest targeted state tax break in United States history. This legislation amended aerospace tax incentives originally created in 2003, including incentives found to be WTO-inconsistent in the ***US – Large Civil Aircraft*** dispute, and extended them through fiscal year 2040.

2. The Panel found that each of the seven tax incentives, as amended and extended by ESSB 5952, constitutes a subsidy within the meaning of Article 1.1 of the ***Agreement on Subsidies and Countervailing Measures*** ("***SCM Agreement***"). These subsidy findings have not been appealed.

3. ESSB 5952 makes the amendment and extension of all of the subsidies contingent on satisfying a condition the Panel referred to as the "First Siting Provision".[2] Additionally, one of these subsidies – the B&O aerospace tax rate reduction, in respect of Boeing's 777X – is subject to a condition that the Panel referred to as the "Second Siting Provision".[3] The Panel found that the two Siting Provisions, together, make the B&O tax rate reduction for Boeing's 777X ***de facto*** contingent on the use of domestic over imported goods, in violation of Article 3.1(b) of the ***SCM Agreement***.

4. The European Union appeals the Panel's findings that the European Union failed to demonstrate that (i) the First Siting Provision, considered alone, makes the subsidies subject to it contingent on the use of domestic over imported goods, and (ii) the Second Siting Provision makes the B&O tax rate reduction for the 777X ***de jure*** contingent on the use of domestic over imported goods.

II. THE PANEL ERRED IN FINDING THAT THE FIRST SITING PROVISION DOES NOT MAKE THE CHALLENGED AEROSPACE TAX SUBSIDIES CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

5. Section 2 of ESSB 5952 provides that the entirety of the legislation, amending and extending (through the year 2040) billions of dollars in tax breaks to the aircraft industry, would take effect only upon Boeing's decision to locate a new commercial aircraft programme in Washington State, i.e., the First Siting Provision. ***In addition*** to the production of the aircraft itself in Washington, the First Siting Provision requires that ***wings*** and ***fuselages*** of the sited aircraft are manufactured in Washington State. The Washington State Department of Revenue ("DOR") determined in July 2014 that this First Siting Provision had been satisfied, based on Boeing's decision to produce the 777X in Washington State, and to also manufacture the wings and fuselages of that aircraft there.

6. The European Union details several legal errors made by the Panel in finding that the First Siting Provision, alone, does not make the tax incentives either ***de jure*** or ***de facto*** contingent on the use of domestic over imported goods.

[1] Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), Exhibit EU-03.
[2] ESSB 5952 § 2(1), Exhibit EU-03.
[3] ESSB 5952 (exhibit EU-3), Sections 5 and 6; Panel Report, para. 7.32.

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A. The Panel erred in the interpretation and application of Article 3.1(b) of the *SCM Agreement* in finding that the First Siting Provision does not make the subsidies *de jure* contingent on the use of domestic over imported goods

7. In rejecting the European Union's principal claim of *de jure* contingency, in respect of the First Siting Provision, the Panel erred in the interpretation and application of Article 3.1(b) of the *SCM Agreement*.

8. ***First***, the Panel interpreted Article 3.1(b) to mean that the relevant contingency would exist only where the measure "***per se*** and necessarily exclude{s}" any use of imported goods. Under the Panel's interpretation, to the extent that the subsidy recipient may use ***some*** imported goods ***in addition to*** domestic goods, and is nevertheless eligible for the subsidy, the subsidy is not contingent on the use of domestic over imported goods. Such an interpretation finds no support in Article 3.1(b), would defeat the object and purpose of that provision, and is contradicted by the relevant context provided by Article 3.1(a) of the *SCM Agreement*.

9. ***Second***, the Panel's finding that the First Siting Provision does not, by necessary implication, require the use of domestic over imported goods constitutes an error in the application of Article 3.1(b). The words in the First Siting Provision require the siting in Washington State of "an airplane program" "***in which***" the aircraft itself is produced in Washington State, and "***in which***" the wings and fuselages of that same aircraft type are likewise manufactured in Washington State. That is, according to the words and necessary implication of the First Siting Provision, the aircraft program would not only include production of an aircraft in Washington State, but would also integrate ***in*** that aircraft the wings and fuselages that must also be manufactured ***in*** Washington State.

10. In all possible interpretations envisaged by the Panel for the First Siting Provision, at least some production of the 777X must be undertaken in Washington State ***as a legal requirement***, and at least some 777X wings and fuselages must be, ***as a legal requirement***, manufactured in Washington State. These dual requirements necessarily imply that the aircraft produced in Washington State would use the wings and fuselages manufactured in Washington State. Thus, the Panel should have found the contingency by necessary implication. The Panel's finding to the contrary constitutes an error in the application of Article 3.1(b).

11. The European Union requests the Appellate Body to reverse the Panel's finding and complete the analysis to find that the First Siting Provision, considered alone, makes all of the subsidies amended and extended by ESSB 5952 ***de jure*** contingent on the use of domestic over imported goods.

B. Conditional appeal: The Panel erred in its interpretation of Article 3.1(b) of the *SCM Agreement*, and failed to make an objective assessment of the matter before it under Article 11 of the DSU, in finding that the First Siting Provision, considered alone, does not make the subsidies *de facto* contingent on the use of domestic over imported goods

12. The European Union appeals the Panel's finding that the First Siting Provision does not make these subsidies ***de facto*** contingent on the use of domestic over imported goods. The European Union requests the Appellate Body to consider this appeal only if it does not find that the First Siting Provision, considered alone, makes all of the subsidies subject to it contingent on the use of domestic over imported goods.

13. ***First***, the Panel's finding of ***de facto*** contingency suffers from the same interpretative error that the European Union demonstrated above, in relation to ***de jure*** contingency.[4]

14. ***Second***, the Panel failed to make an objective assessment of the matter before it, under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). The Panel found that "the Department of Revenue's determination

[4] See paragraph 8, above.

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{that the First Siting Provision had been satisfied} was based exclusively on Boeing's decision to locate a significant commercial airplane manufacturing programme (as defined by the legislation) in the state of Washington".[5] The Panel also found that "{t}here {was} no indication that the activation of the First Siting Provision was the result of any other factor, such as a commitment by the manufacturer to use domestic over imported goods".[6]

15. In treating as conclusive the fact that Washington State law described the contingency as a decision to locate "a significant commercial airplane manufacturing programme", and that the DOR used those terms in its determination, and by failing to properly consider the implications of that contingency on Boeing's incentives to use domestic over imported 777X wings or 777X fuselages *in* its Washington State production of the 777X, the Panel failed to make an objective assessment of the matter before it.

16. The European Union explained that the dual requirements, under the First Siting Provision, of producing the 777X in Washington State, and of manufacturing the wings and fuselages of the same aircraft in Washington State, necessarily implied a requirement that domestic wings and fuselages be used on the 777X. Given that the only ***confirming*** fact, outside the text of the measure, that the Panel might have considered to arrive at that conclusion was that aircraft producers are economically rational entities, the European Union considered that a finding of ***de jure*** contingency was warranted. However, if the Panel considered that the assertion that aircraft manufacturers are rational economic actors somehow fell outside the purview of a ***de jure*** contingency claim, the Panel's analysis of the ***de facto*** contingency claim would have been the place to accommodate that assertion.

17. In light of the errors demonstrated above, the European Union seeks the reversal of the Panel's findings, and completion of the analysis to find that the First Siting Provision, considered alone, makes the subsidies subject to it ***de facto*** contingent on the use of domestic over imported goods, in violation of Article 3.1(b).

III. THE PANEL ERRED IN FINDING THAT THE SECOND SITING PROVISION, CONSIDERED ALONE OR TOGETHER WITH THE FIRST SITING PROVISION, DOES NOT MAKE THE B&O TAX RATE REDUCTION FOR THE 777X *DE JURE* CONTINGENT UPON THE USE OF DOMESTIC OVER IMPORTED GOODS

18. The Second Siting Provision provides that the B&O tax rate reduction subsidy would become unavailable in respect of the aircraft program satisfying the First Siting Provision – the 777X – if the DOR determines that "any final assembly or wing assembly" of the relevant aircraft model "has been sited outside the state of Washington".

19. The Panel's finding that the Second Siting Provision does not create, ***de jure***, a contingency on using domestic over imported goods, is the result of errors in the interpretation and application of Article 3.1(b), as well as a failure to make an objective assessment of the matter, under Article 11 of the DSU.

20. ***First***, as the European Union has already demonstrated above, in the context of the First Siting Provision, the Panel erred in the interpretation of Article 3.1(b).[7] The Panel's finding of lack of ***de jure*** contingency in respect of the Second Siting Provision was driven by this same interpretative error.

21. ***Second***, the United States admitted before the Panel that the Second Siting Provision, properly interpreted, would deprive Boeing of the B&O tax rate reduction if the wings for the 777X were imported. This confirmation by the United States played a key role in the Panel subsequently making a finding of ***de facto*** contingency. This evidence would have been critical in the assessment of ***de jure*** contingency, but the Panel entirely ignored it in its ***de jure*** analysis. By imposing undue restrictions on the scope of evidence that it considered permissible for the purpose of assessing ***de jure*** contingency, the Panel erred in the application of Article 3.1(b).

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[5] Panel Report, para. 7.343 (underlining added).
[6] Panel Report, para. 7.343 (underlining added).
[7] See paragraph 8, above.

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22. ***Finally***, the Panel failed to make an objective assessment, under Article 11 of the DSU, in according to the Second Siting Provision an "interpretation" that neither Party advocated. That "interpretation" is contradicted by the words of ESSB 5952, the critical admission made by the United States, as well as the arguments put forth by both Parties. The Panel's finding thus suffers from the lack of an evidentiary basis.

23. In light of these errors, the European Union seeks reversal of the Panel's finding, and completion of the analysis to find that the Second Siting Provision, considered alone or together with the First Siting Provision, makes the B&O tax rate reduction for the 777X ***de jure*** contingent on the use of domestic over imported goods, in violation of Article 3.1(b).

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ANNEX B-3

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

I. INTRODUCTION

1. The Panel in the present dispute concluded that a subsidy (the B&O tax rate reduction for the 777X) which would be available to Boeing so long as Boeing uses wings manufactured in Washington State (including wings manufactured by third parties in Washington State), but would be lost if any imported 777X wings are used, is contingent on the use of domestic over imported wings. On that basis, the Panel correctly found that the subsidy is inconsistent with Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("***SCM Agreement***"). The Panel's finding was based not just on the words of the measure at issue, but also confirmed by other evidence that aided the Panel in interpreting those words (i.e., admissions by the United States confirming the proper interpretation under domestic law, and legislative history of the measure).[1]

2. In its Appellant's Submission, the United States expends significant effort and creativity to convert what is a textbook example of a subsidy contingent upon the use of domestic over imported goods (in this case, "wings"), within the meaning of Article 3.1(b), into a complex dispute requiring careful consideration of the peculiarities of the currently planned (but not yet active) manufacturing process of the primary subsidy recipient, Boeing. But the Panel correctly found that the focus in evaluating a claim under Article 3.1(b) of the ***SCM Agreement*** is "not on the production processes for the 777X", but the "design, structure, and modalities of operation" of the measure at issue.[2]

3. As detailed herein, however, a Member cannot defend a measure that, on its face (and in view of confirmatory admissions by that Member) is contingent upon the use of domestic over imported goods, by simply asserting that a subsidy recipient has not yet used those goods, whether domestic or imported, or does not currently have plans to use such goods in the future, whether domestic or imported. Indeed, it is the measure's contingency, itself, at the time the subsidy is granted, that can skew the subsidy recipients' incentives in a manner that shapes its current or future plans on whether or not to use imported goods.

4. Regardless of whether the United States' assertions about Boeing's plans for the production of the 777X are factually accurate, the entirety of the US appeal rests on a deeply flawed reading of the word "use". According to the United States, Boeing can be considered to "use" a wing only if it first fully assembles a wing, and then attaches that wing to the fuselage of the aircraft. Under the US' theory, if Boeing employs a slightly different process, such as attaching one part of the wing to the fuselage first, and then finishing the wing (regardless of how little additional work is required), then no "use" of a wing occurs. As the European Union details below, this interpretation of the term "use", which makes the WTO-consistency of a measure dependent on the sequence in which a subsidy recipient turns certain screws, is erroneous.

5. As for the United States' attempts throughout its Appellant's Submission to characterise the Panel's finding of ***de facto*** contingency as reflecting an interpretation of Article 3.1(b) prohibiting subsidies contingent on the location of production activities (regardless of whether they are contingent on the use of domestic over imported goods),[3] this is contradicted by the Panel's clear explanations to the contrary.

6. Before turning to the United States' allegations of error, the European Union notes that the United States dedicates 19 pages, of its 56-page Appellant's Submission, to a section entitled "Background".[4] This section is filled with numerous factual assertions that are

[1] Panel Report, paras. 7.361-7.367.
[2] Panel Report, para. 7.355.
[3] US Appellant's Submission, para. 2.
[4] US Appellant's Submission, pp. 4-23.

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neither factual findings by the Panel nor undisputed. Many of these factual assertions are also entirely irrelevant to the present appeal. This attempt at re-litigating, on appeal, purely factual matters on which the United States failed to convince the Panel, must fail.

7. Below, the European Union responds to each of the specific allegations of error that the United States raises in its Appellant's Submission.

II. THE UNITED STATES' ASSERTIONS RELATING TO "PRODUCTION SUBSIDIES" DO NOT REVEAL AN ERROR IN INTERPRETATION OR APPLICATION OF ARTICLE 3.1(B)

8. The United States argues that the Panel erroneously interpreted and applied Article 3.1(b) of the *SCM Agreement*, and characterises the Panel's application/interpretation as effectively prohibiting any subsidies conditional on domestic manufacturing.[5]

9. The European Union, and the Panel, agreed with the United States that a subsidy contingent solely on domestic production of goods, without more, is not disciplined by Article 3.1(b).[6] Specifically in the context of *de facto* contingency, the Panel clarified that "provision of subsidies exclusively to domestic producers, without more, is not in itself a breach of the obligations under the covered agreements".[7] Thus, the Panel made no error in interpretation.

10. As for application, the Panel examined whether the subsidy was contingent on the use of domestic over imported goods. Having reviewed the evidence before it, the Panel found that "the ***only*** decision by Boeing to source wings which it would then 'use' in producing the 777X that ***would not*** trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings".[8] Therefore, it was abundantly clear to the Panel that the subsidy was conditioned solely on the origin of the wings used on the 777X. In this context, the Panel was right in rejecting the United States' unilateral characterisation of the subsidy as a "production subsidy", and finding that the subsidy was inconsistent with Article 3.1(b).

III. THE UNITED STATES' ASSERTIONS REGARDING THE PLANNED 777X PRODUCTION PROCESS DO NOT REVEAL ANY ERROR IN THE PANEL'S FINDINGS

11. The United States alleges that the Panel failed to evaluate whether Boeing's intended production process for the 777X will involve the "use" of wings.[9] The United States begins this appeal with an allegation of error in application of Article 3.1(b), expands the allegation to include an error in interpretation of Article 3.1(b), and finally alleges error under Article 12.7 of the DSU. All of these allegations are baseless.

A. The US assertions about Boeing's intended production process are based on a flawed interpretation of "use", and are not dispositive of the "contingency" analysis

12. The focus of analysis in adjudicating a claim under Article 3.1(b) is the subsidy measure, not the recipient. In this context, the Panel was right in finding that "{t}he focus of the Panel's analysis, for the purpose of the current dispute, is not on the production processes for the 777X, in general or at any point in time, but rather on whether the measures at issue, in their design, structure, and modalities of operation, would limit access to existing subsidies if imported goods were to be used in any such processes".[10]

13. The United States repeatedly makes claims regarding the "current production process" for the 777X. Yet, it is entirely meaningless to speak of "Boeing's current 777X production process". It is undisputed that no 777X wing or 777X aircraft production even began during

[5] US Appellant's Submission, Section IV.
[6] Panel Report, paras. 7.201, 7.357.
[7] Panel Report, para. 7.357.
[8] Panel Report, para. 7.364.
[9] US Appellant's Submission, Section V.
[10] Panel Report, para. 7.355.

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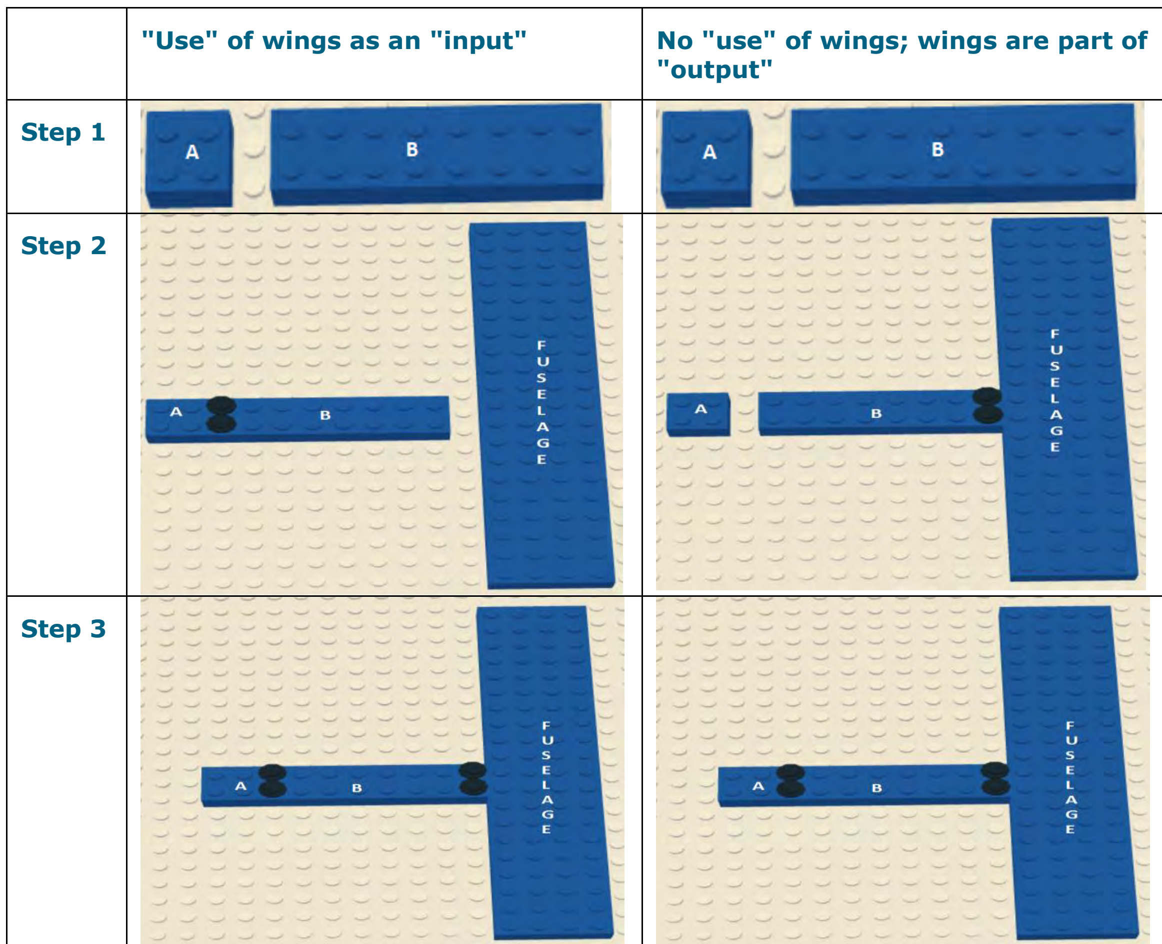
the course of the Panel proceedings. Thus, the US assertions must relate only to Boeing's alleged ***intentions*** regarding the production process.

14. The United States alleges that these ***intended*** production processes do not involve the "use" of a wing. The US' position translates into an assertion that Boeing would "use" wings within the meaning of Article 3.1(b) only if it first finishes the manufacture of complete wings, and then attaches them to the fuselage of the 777X.[11] If Boeing alters this production process such that one part of the wing is attached to the fuselage first, and then the remaining components of the wing (however small or insignificant) are attached to that first part, no "use" of a wing occurs.[12]

15. As illustrated in the figure below, imagine an aircraft wing consists of two rectangular pieces, A and B. If A and B are first screwed together, and then B (with A attached) is screwed on to the fuselage, the United States would consider this "use" of a wing. On the other hand, under the US position, if B is first screwed on to the fuselage, and then A is screwed on to B, no "use" of a wing occurs. In this way, the order in which these screws are turned would be "dispositive" as to whether a subsidy, which would become unavailable upon importation of any wings, is consistent with Article 3.1(b).



16. Nothing in the words of Article 3.1(b) supports the view that a good must be "use{d}", within the meaning of that provision, at a particular point of an overall production process. Such an interpretation, if accepted, would defeat the object and purpose of Article 3.1(b), making it easy for Members to circumvent the discipline. Under the US position, if a Member were found to have violated Article 3.1(b), achieving compliance would merely require convincing a subsidy recipient to alter the sequence in which it undertakes assembly activities.

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[11] See US Appellant's Submission, para. 115.
[12] *Ibid.*

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17. Additionally, the word "contingent" in Article 3.1(b) does not cover only those subsidies that are available exclusively to entities that use domestic over imported goods. When faced with a claim under that provision, the responding Member cannot defeat that claim by simply demonstrating that the subsidy is available to some entities that do not use domestic goods, or in some circumstances where such use does not occur.

18. Thus, the United States errs in asserting that Boeing's production plan does not involve the "use" of wings. Even if that assertion were true (***quod non***), it would not be "dispositive" on the question of contingency.

B. The Panel's finding that wings made in Washington State are "domestic" is not in error

19. The Panel interpreted and applied the word "domestic" in Article 3.1(b), in finding that wings manufactured in Washington State would be "domestic". The United States alleges error in the interpretation and application of Article 3.1(b), and under Article 12.7 of the DSU.

20. The United States fails to offer any legal arguments in support of its allegation of error in interpretation. This appeal therefore fails to meet the requirement in Rule 21(2)(b)(i) of the Working Procedures for Appellate Review, and must fail.

21. In any event, the words used in Article 3.1(b) support the interpretation that "domestic" means "not imported". Under this proper interpretation, any wings made in Washington State are domestic wings. Thus, the Panel did not err in the interpretation or application of Article 3.1(b).

22. The brevity of the Panel's treatment of this issue does not constitute error under Article 12.7 of the DSU. Nothing in Article 12.7 requires a panel to elaborate the reasons behind each of its intermediate findings. The requirement is that a panel should inform the responding Member about "(i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal".[13] Here, the Panel provided the United States adequate information for both implementation and appeal. The Panel's approach is consistent with practice of WTO panels and the Appellate Body. Not a single panel adjudicating claims under similar provisions, where "domestic" goods, "imported goods" or "products of the territory" of a Member are relevant, has ever identified specific goods and extensively examined the make-up of those goods in order to determine whether they were "domestic", "imported", or "products of the territory" of a specific Member. The Panel's approach was further justified by the United States' failure to allege that wings made in Washington State were not "domestic".

IV. THE PANEL'S USE OF HYPOTHETICAL SCENARIOS WAS APPROPRIATE

23. The United States takes issue with the Panel's use of hypothetical scenarios in assessment of ***de facto*** contingency.

24. The logical way for the Panel to test whether the Second Siting Provision includes a contingency on use of domestic over imported wings was to examine what would happen in a scenario where Boeing, in the future, chooses to use imported wings, rather than domestic wings. This enquiry is necessarily hypothetical in nature, because the production process of the 777X is yet to commence, and the Second Siting Provision is yet to be triggered.

25. Article 3.1(b) "protects competitive opportunities of imported products, rather than existing trade flows of such products".[14] In assessing a claim under a provision of that type, "the analysis … is not limited to an examination of the operation of the {subsidy} at issue within the confines of scenarios that are representative of current patterns of trade".[15]

26. The Panel's use of hypothetical scenarios was thus not only permissible, but also inevitable.

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[13] Appellate Body Report, ***Mexico – Corn Syrup (Article 21.5 – US)***, para. 107.
[14] Panel Report, para. 7.225.
[15] Appellate Body Reports, ***US – COOL (Article 21.5 – Canada and Mexico)***, para. 5.17.

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V. THE UNITED STATES DOES NOT DEMONSTRATE ANY FAILURE BY THE PANEL TO MAKE AN OBJECTIVE ASSESSMENT, UNDER ARTICLE 11 OF THE DSU

27. The United States alleges multiple errors under Article 11 of the DSU. Each of these is baseless.

28. The first appeal in this series[16] improperly seeks to modify or retract the US' confirmatory admissions made in response to Panel Questions 40 and 80. These admissions confirmed that the subsidy would continue to be available as long as Boeing uses domestic wings (including those manufactured by third parties), but would become unavailable if wings were imported. The US assertions on appeal are contradicted by the responses that the United States offered to the Panel.

29. The second appeal[17] is conditional on the Appellate Body finding that the Panel understood the word "or" in the Second Siting Provision to require the sequential undertaking of wing assembly and final assembly. The Panel made no such finding. Rather, the Panel found that none of the Siting Provisions "either explicitly or in their operation, binds Boeing to a specific process for manufacturing 777X aircraft".[18] Thus, there is no basis for the Appellate Body to consider the substance of this appeal.

30. In the third appeal in this series,[19] the United States takes issue with the Panel's appreciation of the Washington State Governor's statements. The United States seeks to simply re-litigate the meaning and relevance of the Governor's statements. These US disagreements with the Panel's factual findings do not evidence any error under Article 11. In any event, the Panel's finding of ***de facto*** contingency was only ***confirmed by***, not based on, the Governor's statements.

31. Finally, the United States' factual assertions about the "Section 12 Sub-Assemblies"[20] are irrelevant. In this section, the United States makes no allegation of error. As such there simply is no "appeal" for the Appellate Body to adjudicate.

[16] US Appellant's Submission, Section VII.A.
[17] US Appellant's Submission, Section VII.B.
[18] Panel Report, para. 7.355.
[19] US Appellant's Submission, Section VII.C.
[20] US Appellant's Submission, Section VII.D.

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ANNEX B-4

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION

1. The Panel correctly found that neither the First Siting Provision nor the Second Siting Provision makes the 0.2904 percent Business and Occupation tax rate (the "B&O aerospace tax rate"), as extended into 2040, ***de jure*** contingent on the use of domestic over imported fuselages or wings. The Panel also correctly found that the First Siting Provision does not make the subsidy ***de facto*** contingent on the use of domestic over imported fuselages or wings.

2. The EU's appeal of these findings raises technical arguments, which themselves are meritless. But perhaps more importantly, in arguing that the two siting provisions create a prohibited import-substitution subsidy, the EU fundamentally misunderstands the nature of the measure at issue. The extension from 2024 to 2040 of the tax treatment that was found to be a subsidy was aimed at the employment and related economic activities associated with siting manufacturing activity in the grantor's territory. It simply did not concern the "use" of "goods," whether domestic or imported, within the meaning of Article 3.1(b) of the ***Agreement on Subsidies and Countervailing Measures*** ("SCM Agreement").

3. Article III:8(b) of the ***General Agreement on Tariffs and Trade 1994*** ("GATT 1994") establishes that production subsidies (***i.e.***, subsidies paid exclusively to producer of a good in the grantor's territory) are not inconsistent with the provisions of the GATT 1994 and the SCM Agreement that prohibit conditioning a subsidy on the use of domestic over imported goods as a condition for a subsidy. Just as the SCM Agreement, read together with Article III:8(b) of the GATT 1994, does not preclude production subsidies (assuming they do not cause adverse effects), it does not preclude a Member from defining the scope or extent of the production activity necessary to receive the subsidy, and thereby defining who qualifies as a domestic producer. If a Member provides subsidies to domestic airplane producers, it can define what it means to produce an airplane and, therefore, who qualifies as a domestic airplane producer. To find otherwise would be to severely limit the discretion protected by Members in Article III:8(b) of the GATT 1994 and which informs the interpretation of Article 3.1(b) of the SCM Agreement.

4. The panel in ***EC – Large Civil Aircraft (21.5)*** recognized as much when it found that subsidies requiring the production of A350 XWB components in the EU as well as production of the A350 XWB airplane in the EU did not breach Article 3.1(b).

5. The siting conditions in Engrossed Substitute Senate Bill 5952 ("ESSB 5952") aimed only at ensuring that the manufacturing activity Washington sought was indeed sited in Washington. As such, it falls squarely within Article III:8(b).

6. The basis for finding a breach of Article 3.1(b) of the SCM Agreement in this dispute is far weaker than in ***EC – Large Civil Aircraft (21.5)***, where the panel found that Article 3.1(b) did not prohibit the EU from requiring the production of certain A350 XWB parts – which were unquestionably inputs – along with the finished A350 XWB in the territory of the EU. Here, the measure at issue does not even require the production of parts in the grantor's territory.

7. The First Siting Provision ensured that the extension of the B&O aerospace tax rate would only take effect if a manufacturer sited a new commercial airplane program in Washington. The Second Siting Provision ensured that, as time progressed, the relevant manufacturer would not site the wing assembly and final assembly associated with that program somewhere else.

8. These conditions have nothing to do with disciplining the use of goods. There are millions of parts that go into an LCA, and this measure is silent with respect to the domestic or imported character of all of them.

9. Because fuselages and wings are structural elements that can be identified on a finished airplane, merely referring to fuselages and wings says nothing meaningful about how an airplane will be manufactured or what inputs will be used in that process. For the 777X, fuselages and

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wings are simply elements of the output of Boeing's production process. Again, the most fundamental way to describe the main elements of a commercial airplane is with reference to its fuselage and wings. Boeing remains free to have the millions of components or parts produced wherever it chooses.

10. Because the extended B&O aerospace tax rate with respect to the manufacture and sale of the 777X is conditioned only on the location of production activities, and not on the use of goods, it is not contingent on the use of domestic over imported goods within the meaning of Article 3.1(b). This is what the panel found in ***EC – Large Civil Aircraft (21.5)***, and this interpretation of Article 3.1(b) should be confirmed in this appeal.

11. The EU's arguments throughout its Other Appellant Submission erroneously assume the "use" of fuselages and wings. In Section II, the United States demonstrates that, under the proper interpretation of the term "use," airplane manufacturing does not necessarily involve the "use" of fuselages and wings. The United States further shows that there is nothing inherent to LCA manufacturing that requires that fuselages or wings be produced as separate articles and then used as inputs in downstream production of airplanes.

12. In Section III, the United States demonstrates that the Panel did not err in interpreting and applying Article 3.1(b) in finding that the First Siting Provision does not make the B&O aerospace tax rate for the 777X ***de jure*** contingent on the use of domestic over imported goods. The EU is also wrong that the Panel misapplied Article 3.1(b) because, according to the EU, under any scenario, domestic goods must be used for at least some period of time. As the Panel found, the First Siting Provision calls for a one-time determination regarding a decision to site manufacturing activities in Washington that occurred prior to the use of any goods. It placed no requirements on the use of goods.

13. In Section IV, the United States demonstrates that the Panel did not err in the interpretation of Article 3.1(b) or fail to make an objective assessment in finding that the First Siting Provision is not ***de facto*** contingent on the use of domestic over imported goods. There are no undisputed facts or Panel factual findings that even suggest that the First Siting Provision contains a prohibited contingency.

14. In Section V, the United States demonstrates that the Panel did not err in finding that the EU failed to establish that the Second Siting Provision contains a ***de jure*** prohibited import-substitution contingency. As the Panel found, the Second Siting Provision is silent as to the use of goods. It merely refers to the siting of production activities. Contrary to the EU's appeal, the Panel did not interpret Article 3.1(b) as requiring the use of exclusively domestic goods. Nor did the Panel improperly fail to consider a supposed U.S. "admission or to make an objective assessment in reaching its ***de jure*** finding. The EU's argument to the contrary merely re-packages its complaint that the erroneous conclusion reached in the Panel's ***de facto*** analysis should have informed the Panel's ***de jure*** analysis.

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ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

Contents		Page
Annex C-1	Executive summary of Australia's third participant's submission	C-2
Annex C-2	Executive summary of Brazil's third participant's submission	C-4
Annex C-3	Executive summary of Canada's third participant's submission	C-5
Annex C-4	Executive summary of China's third participant's submission	C-6
Annex C-5	Executive summary of Japan's third participant's submission	C-7

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ANNEX C-1

EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION

1. This dispute addresses important distinctions between a subsidy which is prohibited for being issued contingent on the use of domestic over imported goods, and a subsidy which is issued to incentivise an activity taking place in a particular location.

2. Australia supports the Panel's finding that the first siting provision does not, of itself, make any subsidy contingent upon the use of domestic over imported goods.[1] Australia regards the second siting provision as one which may possibly be contingent upon the use of domestic over imported goods.

I. THE FIRST SITING PROVISION ONLY DESCRIBES AN ACTIVITY

3. Australia supports the Panel's description of the legal tests for ***de jure*** and ***de facto*** contingency. ***De jure*** contingency is to be found, according to the Appellate Body in ***Canada – Autos*** where the condition "is set out expressly, in so many words, on the face of the law, regulation or other legal instrument … [or] is clearly, though implicitly, in the instrument comprising the measure."[2] In Australia's view, the first siting provision does not make any subsidy contingent, ***de jure***, on the use of domestic over imported goods. All it does is incentivise an activity taking place in a particular location.

4. According to the Appellate Body in ***EC and certain member States – Large Civil Aircraft***, ***de facto*** contingency is to be "inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy."[3] In Australia's written submission to the Panel, Australia encouraged the Panel 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." As the Panel found, the total configuration of facts in this instance show that the recipient of the subsidy could relocate their manufacturing processes without losing access to the tax incentives under the first siting provision.[4]

5. Australia therefore regards the first siting provision as a description of an activity. It does not make a subsidy contingent on the use of domestic over imported goods. Subsidies which incentivise an activity, absent other elements, are permitted under the Agreement on Subsidies and Countervailing Duties (SCM). Article III(8) of GATT provides helpful guidance to interpreting the SCM, and makes it clear that subsidies which only encourage local activities are permitted. The effect of Articles 1, 8.2(b) and 25.2 of the SCM also help demonstrate that a subsidy which does nothing more than encourage an activity is permitted under the SCM. Where these subsidies cause adverse effects, a WTO Member could still challenge them, but it is appropriate to alter the distinction between a finding of adverse effects and contingency.[5]

II. THE SECOND SITING PROVISION MAKES A SUBSIDY CONTINGENT ON THE USE OF DOMESTIC OVER IMPORTED GOODS

6. In contrast, in Australia's view, the second siting provision may establish contingency of a subsidy upon the use of domestic goods. The US advised that if a wing was assembled outside of Washington State, the siting provision would be triggered, and a subsidy would be lost.[6] This could equate to prohibited contingency, but could also just acknowledge that

[1] Panel Report, ***US – Conditional Tax Incentives For Large Civil Aircraft***, para. 7.311.
[2] Appellate Body Report, ***Canada – Autos***, para. 100.
[3] Appellate Body Report, ***EC – Large Civil Aircraft***, para. 1046, quoting Appellate Body Report, ***Canada – Aircraft***, para. 1038.
[4] Panel Report, ***US – Conditional Tax Incentives For Large Civil Aircraft***, para. 7.291.
[5] Appellate Body Report, ***EC and certain member States – Large Civil Aircraft***, para. 1054, has warned against blurring the lines between actionable and prohibited subsidies.
[6] Panel Report, ***US – Conditional Tax Incentives For Large Civil Aircraft***, para. 7.362.

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subsides are only paid to Boeing where it undertakes an activity – assembly of wings and aircraft in Washington State.

III. CONCLUSION

7. Australia notes that it is important to recognise the rights of WTO Members to provide certain subsidies to domestic manufacturing activities. In light of this, Australia agrees with the Panel that the first siting provision does not, of itself, offer subsidies contingent on the use of domestic over imported goods.[7] Rather, the first siting provision just incentivises an activity taking place in a particular place. With regards to the second siting provision, Australia considers that there are questions regarding whether there is a requirement to use domestic over imported goods.

[7] Panel Report, *US – Conditional Tax Incentives For Large Civil Aircraft*, para. 7.311.

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ANNEX C-2

EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION

1. Brazil's submission deals with three main issues: (i) the Panel's interpretation of prohibited import substitution subsidies under the SCM Agreement, (ii) the Panel's findings on that "by necessary implication" subsidies are ***de jure*** contingent on the use of domestic over imported goods, and (iii) the proper interpretation of the term "use" under Article 3.1(b) of the SCM Agreement.

2. With regard to the first issue, the SCM Agreement does not prevent a Member from conditioning the provision of a subsidy on the performance of production steps in the country granting the subsidy. It is not because a subsidy is granted upon a requirement to perform locally certain production steps related to different stages of the production chain that a subsidy should be considered ***ipso facto*** a subsidy contingent upon the use of domestic product.

3. On the second, the key question in order to assess the existence of ***de jure*** contingency is whether by necessary implication the requirements establish or create any condition favoring domestic or imported goods as the source of the components used in the production process. Just as in the distinction between production and product, the contingency under Article 3.1(b) of the ***SCM Agreement*** must be established upon the actual ***use*** of the domestic content to the detriment of the imported content, not in relation to "any domestic transaction" it may entail.

4. On the concept of "use", Brazil understands that the sourcing of the input rather than its production determines the import substitution contingency, which is made clear by the term "use". Article 3.1(b) prohibits the contingency upon the use of finished domestic products, even if they are inputs used in the production of final goods, not upon the production of domestic products.

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ANNEX C-3

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION[1]

1. In Canada's view, the Panel properly interpreted Article 3.1(b) of the SCM Agreement as not prohibiting subsidies contingent on the recipient siting manufacturing activities in the territory of the subsidizing Member. In addition, the Panel properly recognized that Article 3.1(b) does not prohibit subsidies that require the recipient to produce both intermediate goods (e.g. wings or fuselages) and finished goods (e.g. commercial airplanes). Even though the specialized nature of the intermediate goods at issue in this case made it likely that they would be used in the production of finished aircraft, the Panel did not equate a requirement to ***site*** the manufacturing of intermediate and finished goods in Washington with a requirement to ***use*** intermediate goods in the production of finished goods within the meaning of Article 3.1(b).

2. The ability of a Member to require a subsidy recipient to produce both intermediate and finished goods, even highly specialized goods, logically flows from that Member's ability to provide subsidies exclusively to domestic producers. If a Member may provide subsidies exclusively to domestic producers, it must also be able to condition receipt of the subsidy on the recipient producing both intermediate and finished goods. If this were not so, a Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed – it would only be able to condition the provision of a subsidy on the simple assembly of goods.

[1] Canada's Third-Participant Submission consists of 1,996 words. This Executive Summary consists of 235 words.

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ANNEX C-4

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

1. In the present dispute, China has a systemic interest in the interpretation and application of Article 3.1(b) of the SCM Agreement:

2. Firstly, the assessment of ***de jure*** contingency of prohibited subsidy under Article 3.1(b) of the SCM Agreement shall be made with caution. The Panel has established a test for "necessary implication", i.e., an implication is not the necessary implication as long as there are other interpretations available. China wishes to stress that an "implication" of a legal text shall be inevitable implication and shall not be mixed with the facts as to operation of the measure. Moreover, the "inevitable interpretation" can be rebutted if the defendant can show there are other interpretations available.

3. Secondly, Article III:8(b) of the GATT 1994 does not preclude a subsidy measure from being found inconsistent with Article 3.1(b) of the SCM Agreement. Even if a measure meets the requirements set by Article III:8(b) of the GATT 1994 and constitutes as a production subsidy, it is not exempted from the disciplines provided by Article 3.1(b) of the SCM Agreement.

4. Thirdly, uniqueness of certain input shall be an element to be considered in the assessment of ***de facto*** contingency under Article 3.1(b) of the SCM Agreement. China considers that the existence of ***de facto*** contingency in the present dispute might be partly due to the uniqueness of the input, i.e., wings and fuselage. China believes that whether a subsidy contingent on the location of input production constitutes a ***de facto*** prohibited subsidy***,*** shall be examined on a case-by-case basis.

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ANNEX C-5

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

1. Japan requests the Appellate Body to examine (i) whether the Panel found, with cogent reasons and appropriate evidence, that the measure was indeed ***de facto*** contingent upon the use of domestic over imported goods, (ii) without unnecessarily derogating from the ordinary meaning of the terms, "use", "domestic" and "good".

A. "Contingency"

2. Japan agrees with the Panel taking note of the Appellate Body's findings that "***contingency***" has the same meaning in Articles 3.1(a) and 3.1(b) of the SCM Agreement.[1]

3. In case of ***de facto*** contingency, the Appellate Body has concluded that the contingency must be established on the basis of objective evidence[2] and by assessing the subsidy itself[3], rather than by relying on subjective intent.[4]

4. Japan considers that if a subsidy-scheme has been designed not to be terminated as long as a long-term commitment of the subsidized investment is maintained regardless of the circumstances, including when imported goods are used in the production, then the local production requirement appears not to be contingent upon the use of domestic products.[5]

B. "Use" of a "domestic" "good"

5. The text of Article 3.1(b) refers to a contingency upon the "use" of domestic over imported goods. The position of the US appears unduly restrictive and confines the term "use" to the phrase "use of purchased products from another entity".

6. The Panel added that "... the goods in question must be at least potentially tradable". Japan has systemic concerns with this interpretation of "goods" by the Panel[6] not least because neither the words "potentially tradable" nor "tradable" form part of the text of the SCM Agreement whatsoever. Such interpretation limiting the meaning of a "good" would open up an easy path for circumvention of the disciplines under Article 3.1(b).

7. "{D}omestic over imported goods" in Article 3.1(b) suggests that the term "***domestic***" refers to any good that itself is not imported.

C. Irrelevance of GATT III:8(b) to this dispute

8. While Japan agrees that GATT Article III:8(b) could in some situations provide relevant context for the interpretation of Article 3.1(b)[7], this cannot diminish or curtail the prohibition contained in Article 3.1(b).

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[1] Panel Report, para. 7.212.
[2] Appellate Body Report, ***EC – Large Civil Aircraft***, para. 1050.
[3] Ibid, para. 1051.
[4] Ibid, para. 1050.
[5] US Appellant submission, para. 88.
[6] Panel Report, para. 7.225.
[7] Appellate Body Reports on ***US – Taxes on Petroleum and Labelling Practices on Imported Wines and Alcoholic Beverages***, para. 5.1.9, and ***Japan – Alcoholic Beverages II***, para. 109.

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ANNEX D

PROCEDURAL RULINGS

Contents		Page
Annex D-1	Procedural Ruling of 22 December 2016 regarding additional procedures to protect business confidential information (BCI)	D-2
Annex D-2	Procedural Ruling of 6 January 2017 regarding the United States' request to modify the deadline for filing its appellant's submission	D-9
Annex D-3	Procedural Ruling of 2 June 2017 regarding public observation of the opening statements at the oral hearing	D-11

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ANNEX D-1

PROCEDURAL RULING OF 22 DECEMBER 2016

1. On 16 December 2016, the Chair of the Appellate Body received a joint letter from the participants in these appellate proceedings, the European Union and the United States, requesting the Appellate Body Division hearing this appeal to adopt additional procedures to protect business confidential information (BCI) included in the record of this dispute. In their letter, the European Union and the United States proposed that the additional procedures adopted by the Appellate Body in the appeal in ***European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States*** (DS316), with adjustments to remove references to highly sensitive business information (HSBI), form the basis for any procedural ruling on confidentiality in these appellate proceedings.

2. The European Union and the United States argued that BCI procedures are needed in these proceedings to avoid the undue risk of detrimental disclosure of particularly sensitive confidential information provided by the United States to the Panel. Such information pertains to The Boeing Company (Boeing), a US manufacturer of large civil aircraft, notably in relation to the production process and the selection of suppliers and a manufacturing site for Boeing's 777X program. Drawing an analogy with the types of confidential information included in the records in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft***, as well as in the original proceedings in ***United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*** (DS353), and which have been protected by BCI/HSBI procedures adopted at the appellate stage of these proceedings, the European Union and the United States submitted that additional procedures to protect BCI are required in this appeal because the disclosure of certain sensitive information on the Panel record to unauthorized persons not entitled to the information would be prejudicial to Boeing and to the United States. The European Union and the United States further noted the need to balance the risk of prejudicial disclosure of sensitive business information against the rights and interests of third participants and the WTO membership at large, taking into account due process and the need to preserve the Appellate Body's ability to discharge its mandate. They submitted that the proposed procedures would strike the appropriate balance in this regard.

3. Also on 16 December 2016, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the third parties in this dispute to comment in writing on the joint request of the European Union and the United States by 12 noon on Tuesday, 20 December 2016. The Chair also informed the participants and the third parties that the Division had decided to provide interim additional protection to all BCI transmitted to the Appellate Body in this dispute on the terms set out below:

a. Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to BCI contained in the Panel record pending a final decision on the joint request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI, or allow BCI to be disclosed to any person other than those identified in the preceding sentence.

b. BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and assigned Appellate Body Secretariat staff, all necessary precautions will be taken to protect the confidentiality of the BCI.

c. Pending a decision on the joint request for the protection of BCI in these proceedings, BCI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

4. On Tuesday, 20 December 2016, written comments were received from Australia. Noting that the additional procedures proposed by the European Union and the United States largely reflect those that were adopted to protect BCI in the appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, Australia indicated that it did not object to the joint request, provided that the proposed procedures are not implemented in a manner that unduly restricts the ability of third participants to gain reasonable access to information. Australia

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further requested the Appellate Body to take account of the complexity of this matter and to set the timetable for this appeal so as to enable meaningful participation by third participants in the proceedings.

5. The Division makes its ruling having considered the arguments made by the European Union and the United States in support of their request, and the comments received from Australia.

6. As an initial matter, we recall that the Appellate Body adopted additional procedures to protect the confidentiality of sensitive information in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and in the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***. In this appeal, the participants have suggested that the additional procedures adopted by the Appellate Body in the ongoing appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** should form the basis for any procedural ruling on confidentiality, with adjustments to remove references to HSBI, since neither party submitted HSBI to the Panel in this dispute. In the Procedural Rulings adopted in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***, the Appellate Body explained the considerations relevant to a decision on whether to provide additional protection to certain sensitive information.[1] We believe that similar considerations are relevant to our evaluation of the request made by the European Union and the United States in this appeal, and we briefly recall them before addressing the specific points raised in the joint request and in the comments of Australia.

7. The confidentiality requirements set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes[2] (Rules of Conduct) are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the Working Procedures for Appellate Review[3] (Working Procedures) that any such procedure may not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.

8. Additional confidentiality protection implicates the authority of the Appellate Body and the rights and duties of the participants, third participants, and the WTO membership at large. The determination of whether such protection is warranted and, if so, of the particular arrangements that are appropriate in a given case essentially involves a balancing exercise: the risks associated with the disclosure of the information sought to be protected must be weighed against the degree to which the particular arrangements affect the rights and duties established in the DSU, the other covered agreements, and the Working Procedures. Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. Participants requesting particularized arrangements have the burden of justifying that such arrangements are needed in a given case to protect certain information adequately, taking into account the rights and duties recognized in the DSU, the other covered agreements, and the Working Procedures. This burden of justification will increase the more the proposed arrangements affect the exercise by the Appellate Body of its adjudicative duties, the exercise by the participants of their rights to due process, the exercise by the third participants of their participatory rights, and the rights and systemic interests of the WTO membership at large.

[1] See Appellate Body Reports, ***EC and certain member States – Large Civil Aircraft***, WT/DS316/AB/R, Annex III – Procedural Ruling and Additional Procedures to Protect Sensitive Information, paras. 7-13, and ***United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)***, WT/DS353/AB/R, Annex III – Procedural Ruling and Additional Procedures to Protect Sensitive Information, paras. 8-9. See also ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, Procedural Ruling of the Appellate Body dated 25 October 2016, paras. 10-11.

[2] The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

[3] 16 August 2010, WT/AB/WP/6.

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9. In the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and in the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***, the Appellate Body adopted additional procedures that it considered struck an appropriate balance between the risks associated with the disclosure of sensitive information, on the one hand, and the adjudicative authority of the Appellate Body and the rights and duties of the participants, third participants, and the WTO membership at large, on the other hand. Similar considerations are relevant in these appellate proceedings.

10. We recall that it is for the adjudicator to decide whether certain information calls for additional confidentiality protection. Likewise, it is for the adjudicator to decide whether and to what extent specific arrangements are necessary, while safeguarding the various rights and duties that are implicated in any decision to adopt additional protection. We note that, in this dispute, and in contrast to the proceedings in ***EC and certain member States – Large Civil Aircraft*** and in ***US – Large Civil Aircraft (2nd complaint)***, neither party submitted HSBI to the Panel. This could suggest that the procedures to protect sensitive information in this appeal need not be as stringent as the procedures adopted in the prior appeals relied upon by the participants, which have accorded protection to both BCI and HSBI. Indeed, for this reason, the participants themselves have suggested that, in basing additional procedures in this appeal on those adopted in the appeal in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, we omit those aspects of the procedures that deal with HSBI. At the same time, if we compare the type of BCI at issue in this dispute with the BCI that has been accorded protection in these prior appeals, there are some similarities in the nature of the information, the industry concerned, and the risks associated with disclosure. Moreover, neither participant has appealed the Panel's decisions regarding the protection of BCI, and there are issues of practicality to consider. We will therefore proceed largely on the basis of how BCI was treated before the Panel. Nevertheless, we do not exclude revisiting whether a particular piece of information meets the objective criteria justifying additional protection, or the particular degree thereof, should a disagreement on the classification of that information arise before us, or should we consider that we need to refer to that information in our report in order to give a sufficient exposition of our reasoning and findings.

11. Having reaffirmed the relevant considerations that guide our decision, we turn to the participants' proposed procedures, which essentially replicate the procedures adopted by the Appellate Body in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, insofar as they protect BCI.

12. The arrangements that the participants have jointly proposed do not appear unduly to affect the Appellate Body's ability to adjudicate the dispute, the rights of the third participants to be heard, or the rights and interests of the WTO membership at large. We have largely reflected the proposed arrangements in the additional procedures that we adopt below. These procedures ensure that Appellate Body Members and assigned Appellate Body Secretariat staff have sufficient access to the entirety of the Panel Report, the submissions, and the record of the dispute. They also limit the risk of inadvertent disclosure of BCI and set out an efficient process for correcting and transmitting BCI-redacted versions of submissions.

13. Finally, we note, as the Appellate Body did in the original and compliance proceedings in ***EC and certain member States – Large Civil Aircraft*** and in the original proceedings in ***US – Large Civil Aircraft (2nd complaint)***, that we will make every effort to draft our report without including BCI. The additional procedures that we adopt below foresee that the participants will be provided in advance with a copy of the Appellate Body report intended for circulation to WTO Members, and will have an opportunity to request the removal of any BCI that is inadvertently included in the report. If we consider it necessary to include BCI in our report, the participants will be given an opportunity to comment. We will provide further guidance at a later point in these proceedings as to the modalities and details of such a procedure.

14. For these reasons, we have decided to provide additional confidentiality protection in this appeal. Accordingly, we adopt the following additional procedures:

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Additional Procedures to Protect Sensitive Information

General

i. These additional procedures shall apply to information that was treated as business confidential information (BCI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate BCI.

ii. To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide upon the treatment to be accorded to such information after hearing their views.

iii. Each participant may, at any time, request that information that it submitted, and that was previously treated as BCI, no longer be treated as such.

iv. The participants and third participants shall file their written submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission and/or an executive summary contains BCI, a redacted version of the submission and/or the executive summary (that is, a version without BCI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by a participant or third participant contain BCI, the redacted version of the executive summary will be annexed to the Appellate Body report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants are further regulated in the provisions below, which apply ***mutatis mutandis*** to executive summaries of written submissions.

Appellate Body Members and Appellate Body Secretariat Staff

v. Appellate Body Members and assigned staff of the Appellate Body Secretariat may have access to the BCI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI, or allow BCI to be disclosed, to any person other than those identified in the preceding sentence, or to those "BCI-Approved Persons" of the participants and third participants identified in accordance with paragraphs xii and xiv below. Appellate Body Members and assigned staff of the Appellate Body Secretariat shall ensure that, when it is not in use, BCI is stored in locked cabinets. Appellate Body Members and Appellate Body Secretariat staff are covered by the Rules of Conduct. As provided for in the Rules of Conduct, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.

vi. Appellate Body Members may maintain a copy of documents containing BCI at their places of residence outside Geneva. When not in use, the documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets. Documents and materials containing BCI shall be sent to Appellate Body Members only by secure e-mail or courier.

vii. The participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

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viii. Subject to appropriate precautions, BCI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.

ix. Except as provided for in paragraph x, all documents and electronic files containing BCI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.

x. The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises.

Appellate Body Report

xi. The Division will make every effort to draft an Appellate Body report that does not disclose BCI. The Division will, in particular, endeavour to limit itself to making statements or drawing conclusions that, even when based on BCI, do not quote or reveal the substance of such BCI, to the extent that such an approach does not compromise the clarity of the reasoning. A copy of the Appellate Body report intended for circulation to WTO Members will be provided in advance to the participants, at a date and in a manner to be specified by the Division. The participants will be provided with an opportunity to request the removal of any BCI that is inadvertently included in the report. The Division will also indicate to the participants if it finds it necessary to include in the Appellate Body report information that was treated by the Panel as BCI, and will provide the participants with an opportunity to comment. Comments on the inclusion of information previously treated as BCI and requests for removal of BCI inadvertently included in the report shall be filed with the Appellate Body Secretariat within a time period to be specified by the Division. No other comments or submissions on the report will be accepted. In coming to a decision on the need to include BCI to ensure that the final report is understandable, the Division will strike an appropriate balance between the rights of the WTO membership at large to obtain a report that gives a sufficient exposition of its reasoning and findings, on the one hand, and the legitimate concerns of the participants to protect sensitive information, on the other hand.

Participants

xii. The participants shall provide lists of persons who are "BCI-Approved Persons". These lists shall be provided to the Appellate Body Secretariat by 5 p.m. on Wednesday, 4 January 2017, and shall be served on the other participant and the third participants. Participants may submit amendments to their list of BCI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the other participant and the third participants. A participant may object to the designation of an outside advisor as a BCI-Approved Person by the other participant. Any objection to the designation of such individual as a BCI-Approved Person must be filed with the Appellate Body Secretariat within two working days of the submission of the original or amended list and simultaneously served on the other participant and the third participants. Thus, any objections to the designation of an outside advisor as a BCI-Approved Person in the lists to be filed on 4 January 2017 must be filed with the Appellate Body Secretariat and served on the other participant and the third participants by 5 p.m. on Friday, 6 January 2017. The Division will reject a request for designation of an outside advisor as a BCI-Approved Person only upon a showing of compelling reasons, having regard to, ***inter alia***, the relevant principles reflected in the Rules of Conduct and the Illustrative List in Annex 2 thereto. BCI-Approved Persons shall not disclose BCI, or allow either to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, other BCI-Approved Persons, and Third Participant BCI-Approved Persons.

xiii. Any participant referring in its written submissions to information that is classified as BCI shall clearly identify the information as such in those submissions. Each participant shall simultaneously provide a redacted version of its submissions to the other participant.

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Submissions containing BCI, and redacted versions of submissions, shall be transmitted only to BCI-Approved Persons of the other participant. The other participant shall have two working days to object to the inclusion of any information that it considers to be BCI, but that is not designated as such and/or is not redacted. If no objections are made, then the redacted version of the relevant submission shall be transmitted the following day to the third participants. If there are objections, the Division shall resolve the matter and instruct, as appropriate, the relevant participant to redact the information that was subject to the objection, unless the participant agrees to remove it, and to transmit a correctly redacted version of its submission to the Appellate Body Secretariat, the other participant, and the third participants. The electronic copy of the BCI version of the submission shall be corrected by the participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the other participant. The Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission and to replace the electronic copies with the corrected versions. The BCI version of all participants' submissions shall be transmitted to the third participants pursuant to paragraph xv below.

Third Participants

xiv. Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Wednesday, 4 January 2017. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. Third participants may submit amendments to their lists of BCI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the participants and the other third participants. A participant may object to the designation of an outside advisor as a Third Participant BCI-Approved Person by a third participant. Any objections must be filed with the Appellate Body Secretariat within two working days of the filing of the original or of an amended list of Third Participant BCI-Approved Persons, and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, ***inter alia***, the relevant principles in the Rules of Conduct and the Illustrative List in Annex 2 thereto. Third Participant BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.

xv. The BCI version of all submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured, individually watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons for that third participant; and shall state that "This document is not to be copied". In addition, the cover page of each such document shall state that any handwritten BCI added to the document shall only be discussed or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure cabinet when not in use. These documents and handwritten notes must be

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returned to the Appellate Body Secretariat at the closing of the final session of the oral hearing held in this appeal.

xvi. Each Third Participant BCI-Approved Person viewing the BCI version of the Panel Report and submissions in the designated reading room shall complete and sign a log. The Appellate Body Secretariat shall keep such log as part of the record of the appeal.

xvii. Third participants making written submissions shall transmit their submissions to the Appellate Body Secretariat and the participants. If a third participant wishes to refer in its written submission to information that is classified as BCI, it shall clearly identify such information. A third participant referring to BCI in its submission shall also simultaneously provide the participants with a redacted version of that submission. Third participant's submissions containing BCI, and redacted versions of such submissions, shall be transmitted only to BCI-Approved Persons of the participants. The participants shall have two working days to object to the inclusion of any information in a third participant's submission that a participant considers to be BCI, but that is not designated as such and/or is not redacted. If no objections are made, then on the following day: (i) a third participant's submission that contains no BCI shall be transmitted to the other third participants; and (ii) if a third participant's submission contains BCI, the redacted submission shall be transmitted to the other third participants. If there are objections, the Division shall resolve the matter and instruct, as appropriate, the relevant third participant to redact the information that was subject to the objection, unless the third participant agrees to remove it, and to transmit a corrected BCI version of its submission to the Appellate Body Secretariat and the participants, and a correctly redacted version of its submission to the Appellate Body Secretariat, each of the participants, and the other third participants. The electronic copy of the BCI version of the submission shall be corrected by the third participant according to the Division's resolution of the matter and re-transmitted to the Appellate Body Secretariat and the participants; the Appellate Body shall direct BCI-Approved Persons to implement modified confidentiality treatment in any paper copies of the submission and to replace the electronic copies. Third participants shall transmit the BCI version of their submissions to the other third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room referred to in paragraph xv above.

Oral Hearing

xviii. Appropriate procedures shall be adopted to protect BCI from unauthorized disclosure at any oral hearing held in this appeal.

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ANNEX D-2

PROCEDURAL RULING OF 6 JANUARY 2017

1. On Thursday, 5 January 2017, the Chair of the Appellate Body received a communication from the United States requesting that the Division selected to hear this appeal modify the deadline for the filing of its appellant's submission. In its letter, the United States invokes Rule 16(2) of the Working Procedures for Appellate Review[1] (Working Procedures), and seeks to have this deadline extended from 10 January 2017 to 17 January 2017. According to the United States, there are exceptional circumstances present in these proceedings, such that "failing to grant such a request would result in manifest unfairness within the meaning of Rule 16(2)". We understand that the European Union and the third participants were served a copy of the United States' request. The United States also indicated, in its letter, that it had asked the European Union for its views on this request for an extension of time.

2. In support of its request, the United States highlighted that the deadline for the filing of its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** (WT/DS316) is Friday 13 January 2017. The United States submitted that the scheduling of the deadlines for the filing of the United States' appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** (WT/DS316) and its appellant's submission in the present dispute on 10 and 13 January, respectively, with only a three-day time difference, would impede the ability of its staff to finalize these submissions. In particular, the United States observed that in its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, the United States has to respond to a lengthy appellant's submission, and the inclusion of business confidential information (BCI) and possibly highly sensitive business information (HSBI) in the appellee's submission presents further difficulties. Moreover, the United States argued that its appellant's submission in this appeal, while shorter than its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, will still be lengthy, and that the United States' appellee's submission in that case is farther advanced than its appellant's submission in the present appeal.

3. Also on 5 January 2017, and on behalf of the Division hearing this appeal, the Chair of the Appellate Body invited the European Union and the third participants in this dispute to comment in writing on the communication from the United States by 1:00 p.m. on 6 January 2017. No comments were received from the third participants.

4. On Friday, 6 January 2017, written comments were received from the European Union. The European Union indicated that it did not, in principle, oppose the United States' request, if the Appellate Body considers that the reasons given by the United States constitute exceptional circumstances within the meaning of Rule 16(2) of the Working Procedures. However, the European Union observed that the United States has had more than five months, since receipt of the final Panel Report to prepare its appellant's submission, and that the time periods in this dispute are subject to the expedited treatment required by Article 4.12 of the Agreement on Subsidies and Countervailing Measures. According to the European Union, these considerations should also be taken into account when deciding whether the United States' request meets the burden of demonstrating exceptional circumstances within the meaning of Rule 16(2) of the Working Procedures. In its letter commenting on the United States' request, the European Union highlighted the "significant overlaps in the matters at issue" in this appeal and in the appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***. For reasons similar to those outlined in the United States' request in this dispute, the European Union requested a one-week extension for the filing of its appellee's submission in the appellate proceedings in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, as well as a one-week extension for the filing of the United States' appellee's submission in that dispute.

5. We observe that the United States filed its appeal in the present dispute on 16 December 2016. Pursuant to Rule 21(1) of the Working Procedures, an appellant is required to file its appellant's submission on the same day as the date of the filing of the Notice of Appeal.

[1] WT/AB/WP/6, 16 August 2010.

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Therefore, under normal circumstances, the United States would already have prepared, and would have filed, its appellant's submission on 16 December 2016. In these appellate proceedings, however, on 16 December 2016, the European Union and the United States filed a joint letter requesting the adoption of additional procedures to protect sensitive information included in the record of this dispute. In response to that letter, the Division hearing this appeal suspended the deadline for the filing of the appellant's submission pending the adoption of additional procedures to protect sensitive information. On 22 December 2016, the Appellate Body adopted a procedural ruling to protect sensitive information, and communicated the filing date for the United States' appellant's submission to the participants and third participants.

6. We highlight that the reason for postponing the filing deadline for the United States' appellant's submission, otherwise due on 16 December 2016, was to enable proper procedures to be put in place to ensure adequate protection of BCI in that submission. The United States did not request more time to prepare the contents of its appellant's submission at that time. Indeed, in the joint letter by the European Union and the United States of 16 December 2016 requesting the adoption of BCI procedures, the United States sought "the Appellate Body's guidance on how to proceed with the filing of its appellant's submission consistent with the requirements of Rule 21(1), and in light of the particular confidentiality concerns", in the event that "the Appellate Body is not in a position to consider and adopt BCI procedures at this point in time". We understand from this statement that, on 16 December 2016, the United States was already prepared to file its appellant's submission consistently with Rule 21(1) of the Working Procedures. This, in turn, suggests that the filing date for the United States' appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, namely 13 January 2017, should not have affected the preparation of the United States' appellant's submission in the present case.

7. For this reason, we are not persuaded by the United States' argument that the current scheduling of the deadlines for its appellant's submission in the present dispute and its appellee's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** would impede the ability of its staff to finalize the submissions. We also recall, in this regard, that the European Union's appellant's submission in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*** was filed on 3 November 2016, and the United States' appellee's submission is due 71 days later, on 13 January 2017. In normal circumstances, under Rule 22(1) of the Working Procedures, an appellee's submission is to be filed 18 days after the date of the filing of the Notice of Appeal (and an appellant's submission filed pursuant to Rule 21).

8. We further observe that, in view of the WTO end-of-year closure, the deadline set for the filing of the United States' appellant's submission in the present dispute was delayed until the second working week of 2017. In addition, the Panel Report in the present dispute is relatively short and, in its letter, the United States itself indicates that its appellant's submission will not be exceptionally lengthy.

9. For the reasons above, we consider that strict adherence to the time periods set by the Division for the filing of the United States' appellant's submission will not result in manifest unfairness within the meaning of Rule 16(2) of the Working Procedures, and that it is not, therefore, necessary or appropriate to modify the deadline for the filing of the United States appellant's submission.

10. In these circumstances, the Division declines the United States' request for extension of the deadline for filing its appellant's submission in the present appeal, and, instead, affirms the deadline for filing the United States' appellant's submission set for Tuesday, 10 January 2017.

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ANNEX D-3

PROCEDURAL RULING OF 2 JUNE 2017

1. On 1 June 2017, we received a communication from the United States proposing additional procedures to protect Business Confidential Information (BCI) during the oral hearing in this appeal and requesting that we allow public observation of the opening statements at the oral hearing. The oral hearing is scheduled for 6-7 June 2017.

2. Specifically, the United States proposes that we adopt procedures similar to those adopted by the Appellate Body in ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, pursuant to the Procedural Ruling dated 19 April 2017, with adjustments to remove references to highly sensitive business information given that such information does not form part of the record of the present dispute. They state that the reasons for their request and proposal are substantially the same as the reasons that were given in a joint letter of 11 April 2017 from the United States and the European Union, which contained a similar request.

3. On 1 June 2017, we issued a communication soliciting the views of the European Union and third participants on the United States' request. The European Union and third participants were given until the following day at noon on 2 June 2017 in order to respond.

4. The European Union expressed its support for the United States' request, but noted that it should be for the Appellate Body to decide whether or not in this particular instance sufficient time remained to organise an open hearing. Australia also supported the United States' request, indicating that it considered that the request helpfully provided transparency and appropriately protected BCI. Brazil noted that it had not received the United States' request, and therefore was not able to comment specifically on it, but expressed its concern with the timeliness of the request and what measures might be needed to comply with the request. Brazil indicated that it did not wish its opening statement to be broadcast. China submitted that the United States' request to exclude non-BCI-Approved persons of the third participants from the segment of the hearing dedicated to questions and answers would significantly constrain the ability of third participants to engage fully in the oral hearing. China added that, in the circumstances of this appeal, the need for protection of sensitive information cannot sufficiently justify a complete exclusion of non-BCI-Approved persons from the question and answer session. China also remarked that this appeal raises important interpretative issues that deserve the full participation of third participants. Finally, China indicated that it does not want to open to the public its statements and oral responses to the questions during the oral hearing. No comments were received from Canada, India, Japan, Korea, or the Russian Federation.

5. The request of the participants raises issues similar to those that were before the Appellate Body in ***EC and certain member States – Large Civil Aircraft***, ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, and in ***US – Large Civil Aircraft (2nd complaint)***.

6. In this appeal, we already adopted, in a Procedural Ruling dated 22 December 2016, additional procedures for the protection of sensitive information. Pursuant to that ruling, the participants have provided a list of persons who are authorized to have access to BCI. Therefore, only members of the participants' delegations who are BCI-Approved Persons are invited to attend the session of the oral hearing in which BCI may be discussed. Moreover, also pursuant to this Procedural Ruling, the third participants have been allowed to designate up to eight individuals as Third Participant BCI-Approved Persons. We consider this to be sufficient to allow the third participants to be represented properly at the oral hearing. In view of the need to provide additional protection to BCI, only Third Participant BCI-Approved Persons are invited to attend the session of the oral hearing in which BCI may be discussed. Having carefully considered the comments provided by China, we do not consider that this will unduly impinge upon the rights of the third participants in this case.

7. Regarding the United States' request that we allow public observation of the opening statements at the oral hearing, we wish to express our strong concerns regarding the timeliness of that request. The request was filed on 1 June 2017, two working days before the oral hearing in

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this dispute. Given the time needed to solicit comments from the European Union and third participants, and the fact that the oral hearing follows a weekend and an official WTO holiday, there was less than one business day remaining in order to deliberate the United States' request together with the comments of the European Union and the third participants. As noted above, although the European Union expressed its support for the United States' request, it also noted that it should be for the Appellate Body to decide whether or not in this particular instance sufficient time remained to organise such an open hearing. Devising arrangements for public viewing of the opening statements at the oral hearing also entails a burden on a number WTO departments and services and causes budgetary expenditures, particularly when such requests are made at a very late stage. We note in this respect that the above-mentioned Procedural Ruling was issued on 22 December 2016 and the pre-hearing letter regarding the hearing arrangements was sent to participants on 18 May 2017. While we decide, by majority, to grant exceptionally the United States' request, as supported by the European Union, regarding public observation, we underscore the importance for participants wishing to request public observation of all or part of oral hearings in disputes to make such requests in a timely fashion, taking into account the due process rights of other participants and third participants and the burden on WTO Secretariat resources.

8. Notwithstanding the concerns we express above, for reasons similar to those adopted by the Appellate Body in prior such disputes, including, most recently, ***EC and certain member States – Large Civil Aircraft (Article 21.5 – US)***, we adopt below the Additional Procedures on the Conduct of the Oral Hearing in this appeal.

Additional Procedures on the Conduct of the Oral Hearing

i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the oral hearing that was treated as business confidential information (BCI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures for the Protection of Sensitive Information that we adopted in our Procedural Ruling of 22 December 2016.

ii. To the extent that information on the record is presented at the oral hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.

iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the oral hearing, including the session dedicated to the discussion of BCI.

iv. In addition to the persons indicated in paragraph iii above, BCI shall be disclosed during the oral hearing only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons, as designated in accordance with our Procedural Ruling of 22 December 2016.

v. The session of the oral hearing dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI in their opening statements.

vi. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the session of the oral hearing dedicated to questions and answers.

vii. During the session of the oral hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal will be made available. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of the oral hearing.

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viii. The parts of the transcript of the oral hearing containing BCI shall become part of the appellate record in this appeal and shall be kept in accordance with the Procedural Ruling of 22 December 2016.

Public observation of the oral hearing

ix. The first session of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph x below. The session of the oral hearing open to public observation shall be videotaped. Within two days of the completion of the oral hearing, either participant may request to review the videotape to verify that no BCI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participant(s) review the videotape. If the videotape contains BCI, a redacted version of the videotape shall be produced in which the BCI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening statements, the relevant portion will not be subject to public observation.

x. The opening statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests should be made as soon as possible, and no later than the beginning of the oral hearing at 9:30 a.m. Geneva time on Tuesday, 6 June 2017.

xi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The videotapes, or if applicable the redacted versions of the videotapes, shall be screened to WTO delegates and members of the public subject to the terms set out in paragraph ix above. The time and location of the videotape screening shall be announced in due course, and WTO delegates will be invited to indicate to the Appellate Body Secretariat whether they wish to have a reserved seat in the room where the videotape will be screened.

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