

*United States – Conditional Tax Incentives for Large Civil Aircraft*

**(AB-2016-8 / DS487)**

APPELLEE SUBMISSION OF THE UNITED STATES OF AMERICA

February 8, 2017

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**TABLE OF ABBREVIATIONS AND ACRONYMS**

<b>ACRONYM/SHORT FORM</b>	<b>FULL PHRASE</b>
B&O	Business & Occupation
DOR	Washington State Department of Revenue
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ESSB 5952	Washington State Engrossed Substitute Senate Bill 5952
GATT 1994	General Agreement on Tariffs and Trade 1994
LCA	Large Civil Aircraft
RCW	Revised Code of Washington
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SWS	Second Written Submission
US RPQ ##	Responses of the United States to the Panel’s Questions for the Parties, response to Question ##

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### I. INTRODUCTION

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 producers 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.<sup>1</sup> 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. In other words, 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).<sup>2</sup>

5. Here, Washington provided a subsidy contingent on the siting of a new large civil aircraft (“LCA”) production program within its territory. Washington defined such a program to include the manufacture of the airplane’s fuselage and wings. The fuselage and wings are the most fundamental aspects of an airplane and a perfectly logical way to define what it means to produce an airplane. 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) of the GATT 1994, and is

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<sup>1</sup> This is explained in greater detail below, as well as in the US Appellant Submission, paras. 90-91.

<sup>2</sup> *EC – Large Civil Aircraft (21.5) (Panel)*, paras. 6.788-6.790.

consistent with Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement read together with Article III:8(b) of the GATT 1994.

6. Indeed, 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.<sup>3</sup> 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. In the event that it did, the manufacturer would lose the B&O aerospace tax rate on the manufacture and sales of the relevant new airplane model, but not on any other airplanes it produces. The rate would also remain applicable for all other aerospace manufacturers.

8. These conditions have nothing to do with disciplining the use of goods to favor domestic goods over imported 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. It would not trigger the Second Siting Provision, and would not have precluded fulfillment of the First Siting Provision, if every molecule on the 777X was from a foreign source. In addition, the relevant tax treatment is extended without condition to all eligible taxpayers other than the manufacturer that fulfills the First Siting Provision. Thus, they too receive the subsidy regardless of what goods they use.

9. The EU insists that its claim of inconsistency with Article 3.1(b) relates solely to an alleged contingency on the use of domestic over imported wings and fuselages, and that “{t}he European Union’s claim simply did not extend to any *other* components or sub-components or sub-assemblies.”<sup>4</sup> But fuselages and wings need not be components used to produce an airplane, and they in fact are not components used to manufacture the 777X. 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. In the case of the 777X, fuselages and 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.

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<sup>3</sup> See Panel Report, *EC – Large Civil Aircraft (21.5)*, paras. 6.782-6.786.

<sup>4</sup> EU Other Appellant Submission, para. 33 (emphasis added). Despite this acknowledgment, the EU continues to make arguments based on a wing sub-assembly that Boeing refers to as Section 12. See EU Other Appellant Submission, para. 7. Of course, this sub-assembly is distinct from the airplane’s wing of which it will form a part. See US RPQ 16, paras. 34-36.

10. Consistent with this fact, Boeing [BCI]. And Boeing remains free to have those millions of components or parts produced wherever it chooses, without risking its eligibility for the subsidies challenged in this dispute.

11. 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.

12. The EU’s arguments throughout its Other Appellant Submission simply assume the “use” for purposes of Article 3.1(b) of fuselages and wings. In Section II below, the United States demonstrates that, under the proper interpretation of the term “use,” it is not the case that airplane manufacturing involves the “use” of fuselages and wings simply because fuselages and wings can be identified as elements of finished airplanes. 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. These two points demonstrate the EU’s error in simply assuming “use” – a critical element of any Article 3.1(b) claim. Based on this conceptual error alone, the EU’s claims of error in its Other Appeal all fail.

13. 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. As the Panel found, the First Siting Provision called for a one-time determination regarding a decision to site manufacturing activities in Washington. It placed no requirements on the use of goods. It is for this reason that the Panel found it consistent with Article 3.1(b), and not, as the EU suggests, because the Panel interpreted Article 3.1(b) as applying only to subsidies contingent on the exclusive use of domestic 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. The First Siting Provision was a one-time determination that occurred prior to the use of any goods. It was therefore not conditioned on the use of goods of any kind.

14. In Section IV, the United States demonstrates that the Panel did not err in the interpretation of Article 3.1(b) in finding that the First Siting Provision is not *de facto* contingent on the use of domestic over imported goods, and that in reaching this finding the Panel did not fail to make an objective assessment of the matter as required by Article 11 of the DSU. The interpretive error alleged by the EU is the same error alleged in its *de jure* appeal and, therefore, fails for the same reasons. Moreover, there are no undisputed facts or Panel factual findings that even suggest that the First Siting Provision contains a contingency requiring the use of domestic over imported fuselages or wings. Therefore, the EU’s claim that the Panel failed to make an objective assessment of the matter in finding that no *de facto* contingency had been established is meritless.

15. 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. Thus, the Panel correctly found that it does not contain a *de jure* import-substitution contingency. 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 apply Article 3.1(b) by failing to consider a supposed U.S. "admission." The supposed admission is not a statement regarding the meaning of the Second Siting Provision. Finally, the Panel did not fail to make an objective assessment of the matter in reaching its *de jure* finding regarding the Second Siting Provision. 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.

**II. THE EU'S ARGUMENTS ERRONEOUSLY ASSUME THAT THE MANUFACTURE OF LARGE CIVIL AIRCRAFT NECESSARILY INVOLVES THE "USE" OF FUSELAGES AND WINGS WITHIN THE MEANING OF ARTICLE 3.1(b) OF THE SCM AGREEMENT.**

16. Throughout its submission, the EU repeats the same basic syllogism with regard to the siting conditions: aircraft must be manufactured in Washington; fuselages and wings must be manufactured in Washington; therefore, domestic fuselages and wings must be used in the manufacture of the aircraft. But the conclusion does not follow from the EU's premises.

17. The EU's argument assumes that either: (1) under the proper interpretation of the term "use," because all airplanes *have* fuselages and wings as elements, the manufacture of all airplanes necessarily involves the "use" of fuselages and wings regardless of how the aircraft is produced, including whether the fuselages and wings are used as inputs or components or are outputs; or (2) if "use" in Article 3.1(b) would capture a manufacturer's inputs used in downstream production but would not include a manufacturer's output, that the inherent facts of LCA manufacturing require that fuselages and wings be manufactured separately and subsequently used as inputs or components in final assembly of the airplane.<sup>5</sup>

18. However, both of these assumptions are erroneous. It is not the case that the manufacture of airplanes necessarily involves the "use" of fuselages and wings within the meaning of Article 3.1(b), and the Panel did not make such a finding. Likewise, it is not the case that the inherent facts of LCA manufacturing require a sequencing in which fuselages or wings – essential elements of the airframe – are manufactured as separate articles and then used as inputs or components in the final assembly of the airplane. Indeed, not only did the Panel not make a

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<sup>5</sup> Theoretically, another alternative could be that the measure, rather than the inherent facts of LCA manufacturing, require this sequencing. But this also is not the case, and other EU statements make clear that this is not the inference on which the EU relies.

finding to this effect, it recognized that fuselages and wings do not necessarily have to be produced as separate articles prior to final assembly.<sup>6</sup>

19. Therefore, the EU’s basic syllogism is in error.

**A. The Fact that Fuselages and Wings are Elements of Airplanes Does Not Mean that All Airplane Manufacturing Involves the “Use” of Fuselages and Wings.**

20. Showing that a subsidy is contingent on the “use” of domestic goods is a necessary element of any Article 3.1(b) claim.<sup>7</sup> As the Appellate Body has noted, Article III of the GATT 1994 provides relevant context for the interpretation of Article 3.1(b) of the SCM Agreement.<sup>8</sup> “[B]oth Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement apply to measures that require the use of domestic goods over imports.”<sup>9</sup> The overlap in what is disciplined by Article III of the GATT 1994 and Article 3.1(b) of the SCM Agreement therefore calls for a degree of consistency in interpreting the provisions of those two articles.<sup>10</sup>

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

The provisions of this Article *shall not prevent the payment of subsidies exclusively to domestic producers*, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.<sup>11</sup>

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<sup>6</sup> See Panel Report, paras. 7.351 (“{A}n examination of the available evidence suggests that manufacturers of large civil aircraft can incorporate wing structures into the process of final assembly at different levels of completion based on a number of factors, including economic, business, logistical, and technological considerations.”), 7.354 (“{T}he Panel recognizes that neither the First Siting Provision nor the Second Siting Provision, either explicitly or in their operation, binds Boeing to a specific process for manufacturing 777X aircraft...”). To the extent that the Panel simply avoided addressing the critical “use” element in Article 3.1(b) – by not making any findings regarding whether Boeing “uses” 777X fuselages and wings *in* final assembly and by resorting instead to hypothetical scenarios with no evidentiary basis – such avoidance both constituted and reflected legal error. See US Appellant Submission, paras. 112-124, 134-164.

<sup>7</sup> See DSU, Art. 3.1(b).

<sup>8</sup> Appellate Body Report, *Canada – Autos*, para. 140.

<sup>9</sup> Appellate Body Report, *Canada – Autos*, para. 140.

<sup>10</sup> See Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

<sup>11</sup> Emphasis added.

Thus, in light of Article III:8(b), Article III:4 does not prohibit the provision of subsidies exclusively to domestic producers for reason of their production activities in the territory of the subsidizing Member.

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

23. It follows then that a manufacturer does not "use" its output within the meaning of Article 3.1(b). If it did, then all subsidies contingent on producing a good domestically would breach Article 3.1(b), which would render the interpretation of that provision directly at odds with Article III of the GATT 1994. This is consistent with the demonstration in the U.S. Appellant Submission that a manufacturer only "uses," at most, inputs employed in downstream production and instrumentalities of production, but does not "use" its output.<sup>12</sup>

24. Thus, if the EU position is that, because all airplanes have fuselages and wings, the manufacture of all airplanes necessarily involves the "use" of fuselages and wings, regardless of whether fuselages or wings ever exist as inputs, this is an incorrect interpretation of the word "use." Because a manufacturer does not "use" its output, merely identifying elements of an output does not demonstrate "use."

25. Boeing therefore does not "use" the airplanes it manufactures. Moreover, just because fuselages and wings can be identified as elements of those airplanes does not mean that they necessarily are "used" within the meaning of Article 3.1(b). By way of analogy, one can point to the façade of a building. But a builder does not "use" the façade any more than the builder "uses" the finished building. The building is the builder's output, and the façade is merely an identifiable element of that output. Similarly, it may be easy to identify the arms of a statue of a person, but that does not establish that the sculptor "uses" arms. As a factual matter, sculptors often sculpt human figures from a single piece of marble, and the arms are merely an element of the output – the statue.

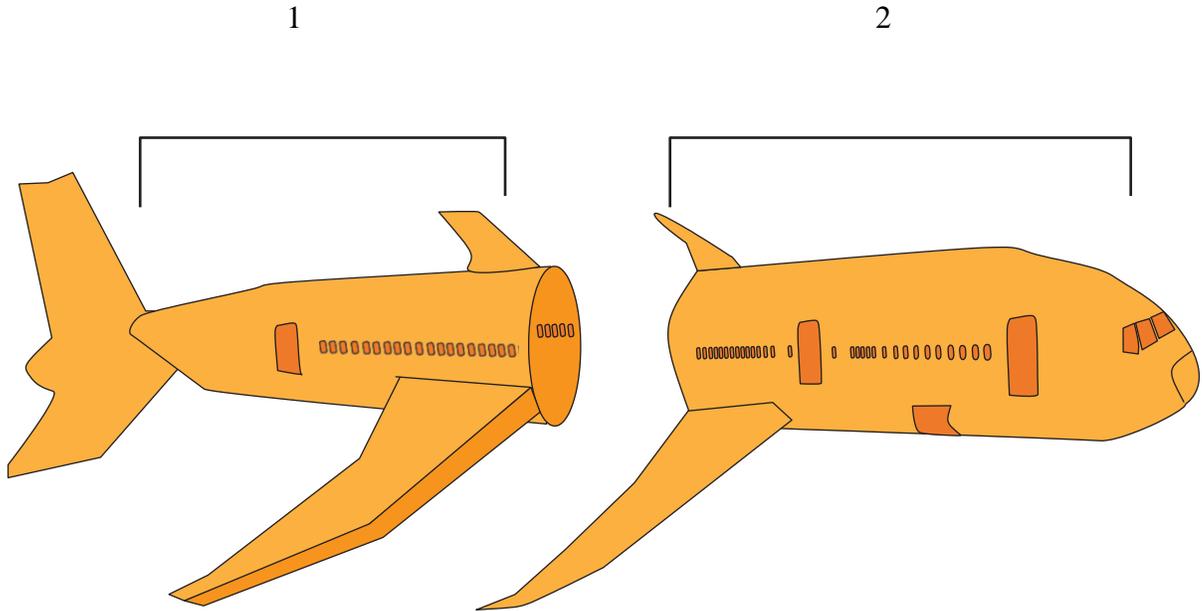
26. The situation here is no different. Like the façade of a building or the arms of a statue, fuselages and wings need not be used as inputs. As with the 777X, they may only come into existence when the airplane itself is assembled, in which case they are not "used."

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<sup>12</sup> See US Appellant Submission, paras. 84-93 (indicating that an end user also "uses" finished goods).

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27. To illustrate this point, consider the following picture:



Structure 1 is the entire back half of the airplane, including the back half of the fuselage and the back half of the wings. Structure 2 is the entire front half of the airplane, including the front half of the fuselage and the front half of the wings.

28. Suppose a measure required, in order for a manufacturer to be eligible to receive a subsidy, that all of the parts in Structure 1 and Structure 2 be of foreign origin, and that all manufacturing activity associated with producing Structure 1 and Structure 2 be undertaken exclusively outside the United States. Further suppose that the measure required the manufacturer receiving the subsidy to then import Structure 1 and Structure 2 and join them together in the United States to create a finished airplane.

29. This measure cannot possibly be said to require the “use” of domestic fuselages and wings. The fuselage and the wings come into existence through the assembly of the imported structures into the finished airplane. Putting aside whether the fuselage or wings could be considered “domestic” entirely on the basis that they were not imported in their completed form, the manufacturer in no sense “uses” the fuselage or the wings any more than it uses the finished airplane. This is true even though a fuselage and wings can be identified as elements of the finished airplane.

30. Therefore, any assumption that the manufacture of all planes that have fuselages and wings necessarily involves the “use” of fuselages and wings reflects an improper interpretation of the term “use.”

**B. The Inherent Facts of LCA Manufacturing Do Not Require Fuselages and Wings to Be Produced as Separate Articles and Used as Inputs in Downstream Assembly.**

31. If the EU is not assuming the improper interpretation of the term “use” described in the previous subsection, then its arguments rely on the implicit premise that the inherent facts of LCA manufacturing require in the case of every LCA that fuselages and wings be manufactured as separate articles and then used as inputs or components in downstream production of the airplane. However, this is also not the case, and the Panel never found as much.

32. The EU argues:

{A}ccording to the words and necessary implication of the First Siting Provision, the aircraft program meeting the requirements set out in the First Siting Provision would not only include production of an aircraft in Washington State, but would also integrate the wings and fuselages that must also be manufactured in Washington State in that aircraft.<sup>13</sup>

33. The EU further argues:

{T}he First Siting Provision appropriates Boeing’s commercial decision-making and places it in a situation where it has precisely one rational course of action – to use the 777X wings and fuselages manufactured in Washington State (as a legal requirement), *in* the final assembly of the 777X in Washington State (as a legal requirement).<sup>14</sup>

34. In addition, the EU asserts:

{A}t 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 to produce an aircraft in Washington State, and to manufacture the wings and fuselages of that same aircraft also in Washington State, necessarily imply that the aircraft produced in Washington State must use the wings and fuselages manufactured *in* Washington State.<sup>15</sup>

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<sup>13</sup> EU Other Appellant Submission, para. 56.

<sup>14</sup> EU Other Appellant Submission, para. 77 (emphasis original).

<sup>15</sup> EU Other Appellant Submission, para. 34 (emphasis original).

Along the same lines, the EU argues that the First Siting Provision “necessarily imp{ies} that wing and fuselage manufacturing, integration of those domestic components, and final assembly of the aircraft all take place in Washington.”<sup>16</sup>

35. The EU’s reference to “integration” of “domestic components” suggests the fuselages and wings would have to be produced as inputs. But there is nothing inherent in the nature of LCA manufacturing that requires a manufacturer to “integrate” fuselages and wings as “components” into the manufacturing process. It need not, and the Panel never found as much.

36. In fact, in the 777X production process – the only one that actually fulfilled the First Siting Provision and is subject to the Second Siting Provision – fuselages and wings are *not* produced as separate articles and used as inputs or “components” in the final assembly process. Instead, the 777X’s fuselage and wings come into existence during and as part of final assembly of the 777X.<sup>17</sup> They are simply elements of the finished airplane and never exist until the finished airplane is assembled.<sup>18</sup>

37. Therefore, the EU’s implicit premise that the manufacture of an airplane’s fuselage or wings requires the *use* of the airplane’s fuselage or wings as inputs or “components” in assembling the finished airplane is simply not supported by the facts inherent to LCA production, which would have had to have been established through uncontested facts or Panel factual findings. The particular facts of the 777X production process, which were before the Panel, demonstrate that fuselages and wings are not used *in* final assembly, which only underscores the EU’s error if it is assuming that they *must* be.

**III. THE PANEL DID NOT ERR IN INTERPRETING AND APPLYING ARTICLE 3.1(b) IN FINDING THAT THE FIRST SITING PROVISION DOES NOT *DE JURE* REQUIRE THE USE OF DOMESTIC OVER IMPORTED FUSELAGES OR WINGS.**

38. The Panel did not err in the interpretation or application of Article 3.1(b) in finding that the First Siting Provision does not make the subsidy *de jure* contingent on the use of domestic over imported fuselages or wings. The Panel correctly found that “the First Siting Provision is silent as to the use of imported or domestic goods,”<sup>19</sup> and that the contingency in the First Siting Provision requires siting manufacturing activities in Washington, not the use of goods.<sup>20</sup> The Panel also correctly found that the First Siting provision is a one-time determination based on a decision to site the manufacturing program in Washington, and has no further effect after that

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<sup>16</sup> EU Other Appellant Submission, para. 61.

<sup>17</sup> See Panel Report, paras. 7.261-7.262.

<sup>18</sup> See Panel Report, paras. 7.261-7.262; Boeing Expert Statement, paras. 52-53, 64-67 (Exhibit USA-1(BCI)).

<sup>19</sup> Panel Report, para. 7.290.

<sup>20</sup> See Panel Report, para. 7.293.

moment in time regardless of what the manufacturer that fulfills the First Siting Provision does. Accordingly, the Panel’s finding that the First Siting Provision does not make the subsidy *de jure* contingent on the use of domestic over imported goods is consistent with Article 3.1(b) of the SCM Agreement and Article 11 of the DSU.

39. In subsection A below, the United States demonstrates that this finding should not be reversed for a failure to properly interpret Article 3.1(b). In subsection B, the United States discusses aspects of the EU’s argument that actually highlight many of the weaknesses in its case including the EU’s failure to even attempt a showing under the “geared to induce” numerical test endorsed by the Appellate Body in the Article 3.1(a) context and invoked by the EU. In subsection C, the United States demonstrates that the Panel’s *de jure* finding with respect to the First Siting Provision should not be reversed for a failure to properly apply Article 3.1(b).

**A. The EU is Mistaken in Arguing that the Panel Misinterpreted Article 3.1(b) as Requiring the Use of Exclusively Domestic Goods.**

40. The EU alleges that the Panel erroneously interpreted Article 3.1(b) of the SCM Agreement as meaning that a “prohibited contingency would exist only where the measure *per se* and necessarily exclude {s}’ any use of imported goods.”<sup>21</sup> While this would be an erroneous interpretation, this is not what the Panel found.

41. Contrary to the EU’s argument, the Panel never found that for the purposes of Article 3.1(b) “contingency could be demonstrated only where the recipient of the subsidy must *entirely* refrain from using imported goods.”<sup>22</sup> Rather, the Panel framed the relevant inquiry as follows:

In 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.<sup>23</sup>

42. The EU characterization of the Panel’s interpretation is based on the following sentence:

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

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<sup>21</sup> EU Other Appellant Submission, para. 33 (emphasis added).

<sup>22</sup> EU Other Appellant Submission, para. 36 (emphasis original).

<sup>23</sup> Panel Report, para. 7.274.

wings in the state of Washington, with the additional use of fuselages and wings that were manufactured separately elsewhere).<sup>24</sup>

43. But, as the EU acknowledges, this one sentence was explicitly an “example.”<sup>25</sup> The Panel made other specific findings that the EU ignores. These findings further undermine the EU’s contention that the Panel interpreted Article 3.1(b) to require the *exclusive* use of domestic goods.

44. For example, the Panel found that “the First Siting Provision is silent as to the use of imported or domestic goods.”<sup>26</sup> (The EU actually uses ellipsis to omit this statement.)<sup>27</sup> The Panel also found that the contingency in the First Siting Provision is not that wings or fuselages must be *used*, but rather that manufacturing activities must be *sited* in Washington.<sup>28</sup> In other words, the First Siting Provision does not concern the use of goods at all. In addition, the Panel correctly recognized that, even if it were possible that wings and fuselages manufactured in Washington can be used in the final assembly of the 777X airplanes, that does not mean that such use is a requirement for receipt of the subsidy.<sup>29</sup>

45. Thus, the Panel neither explicitly framed the legal inquiry in terms of the exclusive use of domestic goods, nor focused in its analysis on the exclusive use of domestic goods. Accordingly, the EU’s argument that the Panel erroneously interpreted Article 3.1(b) as requiring the exclusive use of domestic goods fails, and its appeal in this respect should be rejected.

46. Finally, the EU also emphasizes that there is no “*de minimis* exception” to Article 3.1(b).<sup>30</sup> However, the Panel did not find a “*de minimis* exception,” and the First Siting Provision does not require the use of domestic over imported goods at any level, minimal or otherwise. Thus, in reality, the EU’s “*de minimis*” argument is a distraction from the central issues in this appeal.

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<sup>24</sup> Panel Report, para. 7.291 (internal footnote indicating an *arguendo* assumption “that the manufacturer could use wings or fuselages manufactured separately” omitted).

<sup>25</sup> See EU Other Appellant Submission, para. 38.

<sup>26</sup> Panel Report, para. 7.290.

<sup>27</sup> EU Other Appellant Submission, para. 37.

<sup>28</sup> Panel Report, para. 7.293.

<sup>29</sup> Panel Report, para. 7.293.

<sup>30</sup> See EU Other Appellant Submission, para. 42.

**B. The Appellate Body Guidance Discussed by the EU Only Underscores the Weaknesses in Its Case.**

47. In the process of arguing that the Panel misinterpreted Article 3.1(b), the EU discusses previous Appellate Body reports that actually undermine both its *de jure* and *de facto* claims as they relate to the First Siting Provision and the Second Siting Provision. Specifically, the EU invokes the Appellate Body’s prohibited export subsidy guidance in *EC – Large Civil Aircraft* with respect to a “geared to induce” numerical test, but this only highlights that the EU did not even attempt in this dispute to show the type of “skewing” that could suggest contingency under the Appellate Body’s reasoning. The evidence actually showed the opposite – that the measure was not geared to affect, and indeed had no effect, on Boeing’s use of any goods. In addition, the EU points to *US – FSC (21.5)*, but again, the relevant passage highlights a contrast with the present dispute rather than a similarity.

48. The EU argues that “the question is whether or not the subsidy is designed so as to skew, to any degree, the recipient’s sales in favour of exports.”<sup>31</sup> The EU relies on the Appellate Body’s guidance in *EC – Large Civil Aircraft*, which endorsed a numerical test to determine whether a subsidy is “geared to induce” exports for purposes of Article 3.1(a). This is a tool for *de facto*, rather than *de jure*, analysis. Furthermore, the EU did not even attempt to show such skewing in this dispute, whereas the United States demonstrated with unrebutted evidence that the measure at issue did *not* result in such skewing.<sup>32</sup>

49. The EU reasons that, because the legal standard is the same for *de facto* and *de jure* contingency, the Appellate Body’s numerical test for assessing whether a subsidy is geared to induce exports, or import substitution if assumed to apply in the context of Article 3.1(b), “holds equally true for a claim of *de jure* contingency as it does for a claim of *de facto* contingency.”<sup>33</sup> This is wrong.

50. While the legal standard for *de jure* and *de facto* claims is the same, the evidence differs.<sup>34</sup> The Appellate Body’s “geared to induce” numerical test is meant, in the *de facto* context, to determine based on the total configuration of facts whether a subsidy is contingent upon exportation. According to the Appellate Body, where evidence shows that, all else equal, a subsidy skews anticipated sales toward exports, “this would be an *indication* that the granting of the subsidy is *in fact* tied to anticipated exportation.”<sup>35</sup> Therefore, the EU is wrong that this tool

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<sup>31</sup> EU Other Appellant Submission, para. 47.

<sup>32</sup> See US SWS, paras. 72-77.

<sup>33</sup> EU Other Appellant Submission, para. 48.

<sup>34</sup> Panel Report, para. 7.320.

<sup>35</sup> *Canada Autos (AB)*, para. 130 (emphasis added).

applies equally to an assessment of whether the words of a measure or the necessary implications therefrom establish the requisite contingency for a *de jure* breach.

51. More importantly, the EU did not even attempt to show that the measure *in fact* was tied to the use of domestic over imported goods based on skewing Boeing’s use of domestic over imported fuselages or wings. Uncontested facts actually proved the opposite.

52. As an initial matter, fuselages and wings are elements of the finished airplane and not inputs that Boeing “uses” to manufacture the 777X.<sup>36</sup> Thus, with or without the measure, Boeing uses the same proportion of domestic wings and fuselages – none. This case is only about fuselages and wings, but it is worth noting that the actual inputs that Boeing sources, including fuselage and wing components, are not subject to conditions on where they can be produced and do in fact come from all over the world.<sup>37</sup>

53. Furthermore, even aside from the fact that Boeing does not “use” fuselages and wings within the meaning of Article 3.1(b), the evidence indicates that the ratios would be identical to each other because there is no plausible situation absent the alleged subsidies in which Boeing could have, and would have, imported 777X fuselages or wings. Thus, even if one were to ignore that Boeing does not “use” fuselages and wings, the EU’s argument would fail.

54. First, [BCI].<sup>38</sup> Moreover, Boeing has a long history as a U.S. manufacturer, and has never performed its core functions of assembling LCA outside the United States.<sup>39</sup> Thus, given that it would be [BCI], the evidence shows Boeing would not be importing 777X fuselages or wings – [BCI].

55. Second, due to an issue with the relevant labor union in Washington, Boeing looked for alternative sites outside of Washington, which would not have provided the tax treatment reflected in ESSB 5952. Specifically, when the union voted on November 13, 2013, to reject a new labor contract, Boeing opened the site selection process to locations outside Washington. Although it considered numerous alternative sites that would make it ineligible for the tax treatment provided by ESSB 5952, Boeing [BCI].<sup>40</sup>

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<sup>36</sup> See Panel Report, paras. 7.261-7.262; Boeing Expert Statement, paras. 52-53, 64-67 (Exhibit USA-1(BCI)).

<sup>37</sup> See Panel Report, para. 7.344 (“undisputed evidence submitted by the United States shows that Boeing will source a significant number of the components for the 777X, including wing and fuselage components and subassemblies, outside the United States”); Boeing Expert Statement, paras. 51-52, 59-60 (Exhibit USA-1(BCI)).

<sup>38</sup> Boeing Expert Statement, paras. 41-44, 57-58, 61-62 (Exhibit USA-1(BCI)).

<sup>39</sup> See Boeing Expert Statement, paras. 33-34, 61 (Exhibit USA-1(BCI)).

<sup>40</sup> See Boeing Expert Statement, paras. 45-48, 61 (Exhibit USA-1(BCI)).

56. This search provides a natural experiment for how Boeing would have acted in the absence of the challenged measures. It shows that, absent the First and Second Siting Provisions, Boeing [BCI].<sup>41</sup> This natural experiment confirms that the challenged measures in no way skewed the use of domestic over imported goods. Accordingly, it also confirms that, by definition, the challenged measures could not have required such use of domestic over imported goods, as required for a finding of inconsistency under Article 3.1(b).

57. Third, the evidence showed that [BCI], regardless of whether Boeing received the subsidy.<sup>42</sup>

58. Therefore, the undisputed factual evidence before the Panel certainly did not establish that Boeing's use of domestic fuselages and wings was skewed as a result of the subsidy. On the contrary, it established that the siting provisions had no effect on the domestic or imported character of any goods used by Boeing.

59. The EU also misapplies the Appellate Body's guidance in *US – FSC (21.5)*. The EU explains that, in response to an argument that in some instances it was possible for manufacturers to meet the measure's requirement without using domestic goods, the Appellate Body indicated that, while there may have been some cases of property for which the fair market value rule would not bear upon the input choices manufacturers made, there was "an indefinite number of other cases" where the measure did constrain manufacturers in favor of domestic inputs.<sup>43</sup>

60. But this is a point of contrast with the present dispute, not a similarity. A proper analogy would exist only if, despite that Boeing is not required to use domestic fuselages or wings, there were an indefinite number of other cases where such use is required. However, there are *not* an indefinite number of other cases where use of domestic fuselages or wings is required.

61. The only manufacturer that must meet conditions of any kind is the manufacturer that sited the significant commercial aircraft manufacturing program in Washington in fulfillment of the First Siting Provision, and is therefore subject to the conditions in the Second Siting Provision. None of the other beneficiaries of the subsidy had to meet a single condition for the subsidy to take effect, and there is no action related to the use of goods or otherwise that any of those beneficiaries can take that would affect their eligibility for the subsidy. Thus, this is the opposite of the situation in *US – FSC (21.5)*. Here, instead of there being an indefinite number of other cases where a manufacturer is constrained by the contingency, it is certain that there are no such cases.

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<sup>41</sup> See Boeing Expert Statement, paras. 61-62 (Exhibit USA-1(BCI)).

<sup>42</sup> See Boeing Expert Statement, paras. 42-43, 58, 65 (Exhibit USA-1(BCI)). See also Panel Report, para. 7.264 and note 532.

<sup>43</sup> See *US – FSC (AB) (21.5)*, para. 221.

**C. The EU’s Contention that the Panel Misapplied Article 3.1(b) Ignores that the First Siting Provision is a One-Time Determination Based on a Manufacturer’s Decision that Does Not Necessarily Mean that Any Goods of Any Kind Will be Used.**

62. The EU also alleges that the Panel erred in the application of Article 3.1(b) in finding that the First Siting Provision does not *de jure* require the use of domestic over imported fuselages and wings. The EU starts from the premise that the Panel listed two scenarios other than the use of fuselages and wings manufactured in Washington (discussed below).<sup>44</sup> The EU then attempts to show that, in both scenarios, the First Siting Provision would require the use of at least some quantum of domestic fuselages and wings.

63. The EU’s argument fails because the two scenarios it addresses are not the only potential scenarios. The First Siting Provision was a one-time determination that was triggered by a *decision* to site an airplane program. A manufacturer could have made such a decision and triggered the First Siting Provision, and then altered the program or even cancelled the program entirely before any production began. Thus, no goods of any kind were ever needed to be used to trigger the First Siting Provision. It was triggered before any manufacturing occurred and was triggered even if manufacturing in the end did not occur. Accordingly, the EU’s argument is based on a flawed premise.

64. According to the EU, the Panel addressed two alternative scenarios. First, Boeing could manufacture some 777X fuselages and wings in Washington and use some imported 777X fuselages and wings. And second, Boeing could stop manufacturing fuselages, wings, and even commercial airplanes in Washington. The EU’s basic argument is that, in either scenario, Boeing will have to use domestic 777X fuselages and wings “at least for a limited period of time.”<sup>45</sup>

65. But this is not accurate. First of all, the EU’s argument incorrectly equates domestic production of aircraft (including wings and fuselages) with the use of domestic wings and fuselages in the production of aircraft. As discussed above in Section III.A, this is incorrect. To the contrary, the fact that airplanes have wings and fuselages does not imply that wings and fuselages must be “used” within the meaning of Article 3.1(b).

66. Furthermore, the First Siting Provision was triggered upon the “siting” of a “significant commercial airplane manufacturing program” in Washington.<sup>46</sup> “Siting” was defined to mean a

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<sup>44</sup> See EU Other Appellant Submission, para. 57.

<sup>45</sup> EU Other Appellant Submission, para. 61.

<sup>46</sup> See Panel Report, para. 7.282; ESSB 5952 § 2 (Exhibit EU-3), codified at RCW § 82.32.850 (Exhibit EU-58)).

final decision to commence manufacturing in the future.<sup>47</sup> And, as the Panel found, the fulfillment of the First Siting Provision was “a one-time decision and there is no legal mechanism under Washington State law that would allow the Department of Revenue to revoke its determination.”<sup>48</sup> Therefore, the First Siting Provision was triggered without any goods of any kind having been used 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.

67. Accordingly, the EU is simply wrong that the use of any goods would have been required for at least a limited period of time – much less the use of domestic over imported 777X fuselages and wings. The EU is equally wrong when it asserts that the First Siting Provision could not have been satisfied without using any domestic goods when, in fact, the First Siting Provision was satisfied without using any goods at all.

68. This is sufficient to dispose of the EU’s appeal in this respect. But the United States notes that even the flexibility demonstrated in the two scenarios addressed by the EU stems from and underscores a critical point made by the Panel: the First Siting Provision is silent as to the use of goods and instead addresses only the siting of a manufacturing program.<sup>49</sup> As a result, it does not direct the use of domestic goods, imported goods, or any goods at all. It is simply a measure contingent on the siting of certain manufacturing activity within the territory of Washington.

#### IV. CONDITIONAL APPEAL

##### A. **The EU’s Argument that the Panel Misinterpreted Article 3.1(b) in its Analysis of *De Facto* Contingency Fails for the Same Reasons that its Equivalent Argument on *De Jure* Contingency Fails.**

69. The EU argues that the Panel erred in its *de facto* analysis of the First Siting Provision by interpreting Article 3.1(b) of the SCM Agreement as requiring a *per se* and necessary exclusion

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<sup>47</sup> “Siting” is defined as “a final decision, made on or after November 1, 2013, by a manufacturer to locate a significant commercial airplane manufacturing program in Washington State.” Panel Report, para. 7.283 (quoting ESSB 5952 § 2(2)(d) (Exhibit EU-3), codified at RCW §82.32.850(2)(d) (Exhibit EU-58)).

<sup>48</sup> Panel Report, para. 7.271.

<sup>49</sup> Panel Report, paras. 7.290, 7.293 (“The contingency set out in the terms of the First Siting Provision is not that products manufactured in the state of Washington (wings or fuselages) must be *used* in the manufacturing of commercial airplanes as a condition for receiving the subsidies, but rather that the manufacturing (including by final assembly) of all of these products be *sited* within the state of Washington.”).

of any possibility of importing the relevant goods.<sup>50</sup> The EU’s argument is no different from its argument in the *de jure* context. Accordingly, it fails for the same reasons.

**B. The EU’s Article 11 Appeal Merely Re-Packages Its Argument that the Panel’s Conclusion in Its *De Facto* Analysis Should Have Informed the Panel’s *De Jure* Analysis.**

70. The EU also alleges that the Panel failed to make an objective assessment under Article 11 of the DSU in finding that the First Siting Provision does not *de facto* require the use of domestic over imported 777X fuselages and wings.<sup>51</sup> However, the EU itself concedes that, beyond the express words of the measure and necessary implications therefrom that are relevant to the *de jure* analysis, there are no additional facts to consider in the *de facto* analysis. The only additional consideration it identifies is the assumption that aircraft producers are economically rational entities.<sup>52</sup> This is not even a fact. The *de facto* inquiry is meant to consider the total configuration of facts to analyze if, despite not containing a prohibited contingency on its face, the measure nevertheless is in fact contingent on the use of domestic over imported goods. The assumption that all aircraft producers are economically rational adds no facts that would reveal a prohibited import-substitution contingency.

71. Thus, if the Panel had reached such a conclusion based on that single additional non-fact, *that* would have been in error. The Panel not reaching what would be an obviously erroneous *de facto* conclusion therefore clearly does not constitute a failure to make an objective assessment of the matter under Article 11 of the DSU.

72. The EU also faults the Panel for its “observation that ‘Boeing will source a significant number of the components for the 777X, including wing and fuselage components and subassemblies, outside the United States’.”<sup>53</sup> The EU considers this observation “extraneous and irrelevant” because the EU’s claim concerned only the use of wings and fuselages, and the “European Union’s claim simply did not extend to any other components or sub-components or sub-assemblies.”<sup>54</sup>

73. Even if this were accurate, it would not matter, because the EU admits that the only supposed fact is the assumption that airplane manufacturers are economically rational. That assumption could not possibly suffice as the sole evidence to show that a measure is in fact contingent on the use of domestic over imported goods, even though no such contingency can be

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<sup>50</sup> EU Other Appellant Submission, paras. 69-71.

<sup>51</sup> See EU Other Appellant Submission, paras. 72-79.

<sup>52</sup> See EU Other Appellant Submission, para. 77.

<sup>53</sup> EU Other Appellant Submission, para. 79 (quoting Panel Report, para. 7.344).

<sup>54</sup> EU Other Appellant Submission, para. 79.

established as a matter of law. Therefore, even if other facts that cut against the EU’s argument were ignored, the result would be an absence of facts in either direction. As the complaining party, the EU has the burden of establishing *de facto* contingency, and it would therefore fail.

74. In any event, Boeing’s sourcing of significant components, including fuselage and wing components and sub-assemblies, from outside the United States is relevant. As the Panel recognized, for a *de facto* claim, the contingency must be inferred “from the total configuration of facts constituting and surrounding the granting of the subsidy,”<sup>55</sup> including the measure’s design, structure, and modalities of operation.<sup>56</sup> Boeing sources many components, but “fuselages” and “wings” are not even components for the 777X program (the program that satisfied the First Siting Provision and is subject to the Second Siting Provision), let alone components that Boeing sources from other suppliers.<sup>57</sup> Specifically, Boeing has made decisions about whether it will fabricate airframe structures itself or purchase them from suppliers, but in conducting this make/buy exercise, [BCI].<sup>58</sup>

75. These facts provide important information on the structure and modalities of operation of the extended B&O aerospace tax rate. So too does the fact that all other entities in the Washington aerospace industry are eligible for the subsidy without condition. These facts are simply not consistent with a subsidy that *de facto* requires the use of domestic over imported goods.

**V. THE EU FAILS TO ESTABLISH THAT THE PANEL ERRED IN FINDING THAT THE SECOND SITING PROVISION IS *DE JURE* CONSISTENT WITH ARTICLE 3.1(b).**

76. The Panel found that the text of the Second Siting Provision can be interpreted to condition the receipt of the subsidy on the continued presence of a significant commercial airplane manufacturing program in Washington – specifically, the significant commercial airplane manufacturing program that triggered the First Siting Provision. Just as the First Siting Provision conditioned receipt of a subsidy on the location of manufacturing activities rather than the use of domestic over imported goods, so too does the Second Siting Provision. Accordingly, the Panel correctly found that the Second Siting Provision is not *de jure* inconsistent with Article 3.1(b).

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<sup>55</sup> *EC – Large Civil Aircraft (AB)*, para. 1046.

<sup>56</sup> *See* Panel Report, paras. 7.210, 7.212.

<sup>57</sup> *See* Panel Report, paras. 7.258-7.262; 777X Make/Buy, Boeing (Dec. 17, 2014) (Exhibit USA-8(BCI)); Make/Buy: Model 777-300ER, Boeing (July 2007) (Exhibit USA-2(BCI)); Boeing Expert Statement, paras. 64-67 (Exhibit USA-1(BCI)); .

<sup>58</sup> *See* 777X Make/Buy, Boeing (Dec. 17, 2014) (Exhibit USA-8(BCI)); Make/Buy: Model 777-300ER, Boeing (July 2007) (Exhibit USA-2(BCI)); Boeing Expert Statement, paras. 42-51, 61-62, 65 (Exhibit USA-1(BCI)).

77. The text of the Second Siting Provision states:

With respect to the manufacturing of commercial airplanes or making sales, at retail or wholesale, of commercial airplanes, this subsection (11) {i.e., establishing the B&O aerospace tax rate} does not apply on and after July 1st of the year in which {the Washington Department of Revenue (“DOR”)} makes a determination that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act has been sited outside the state of Washington. This subsection (11)(e)(ii) only applies to the manufacturing or sale of commercial airplanes that are the basis of a siting of a significant commercial airplane manufacturing program in the state under section 2 of this act.

78. Article 3.1(b) states that subsidies are prohibited if they are granted contingent on the use of domestic over imported goods. However, Article 3.1(b) does not state that subsidies are prohibited if they require manufacturing activities to be located within the territory of the granting Member. On the contrary, in accordance with Article III:8(b) of the GATT 1994, subsidies to domestic producers are generally permitted.<sup>59</sup>

79. In this case, the Panel found that the Second Siting Provision, based on its express terms and necessary implications, requires certain manufacturing activities to be sited in Washington. The Panel also noted that the Second Siting Provision is “silent as to the use of imported or domestic goods.”<sup>60</sup> The Panel thus correctly found that the Second Siting Provision, on the basis of the text and necessary implications, does not require the use of domestic over imported goods, and therefore is not *de jure* inconsistent with Article 3.1(b).

80. In addition, the Panel’s analysis was consistent with Article 11 of the DSU. The EU argues that the Panel failed to make an objective assessment of the matter by considering an interpretation of the Second Siting Provision different from the interpretation the EU favors. But, the EU does not suggest that the Panel endorsed this alternative interpretation. Rather, according to the EU, the Panel actually adopted the EU’s favored interpretation in its *de facto* analysis.<sup>61</sup> As the EU agrees with this outcome, it has not raised a valid claim related to Article 11 of the DSU. Instead, the EU really just re-packages its complaint that the Panel’s conclusion in its *de facto* analysis should have informed its *de jure* analysis, which is an allegation that the Panel misapplied Article 3.1(b).

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<sup>59</sup> See US Appellant Submission, paras. 91-93; *EC – Large Civil Aircraft (Panel)* (21.5), para. 7.308.

<sup>60</sup> Panel Report, para. 7.315.

<sup>61</sup> See EU Other Appellant Submission, paras. 106, 111.

**A. The Panel Did Not Interpret Article 3.1(b) to Require the Complaining Member to Demonstrate that a Measure Compels the Use of Exclusively Domestic Goods.**

81. The EU argues that the Panel’s analysis of the Second Siting Provision erroneously interpreted Article 3.1(b) as if it required a contingency on the use of *exclusively* domestic goods. This is not what the Panel found.

82. The Panel found that “the Second Siting Provision is silent as to the use of imported or domestic goods.”<sup>62</sup> Having found that the one-time siting of certain manufacturing operations that fulfilled the First Siting Provision does not require the use of domestic goods within the meaning of Article 3.1(b), the Panel correctly considered that a separate provision requiring that those operations not be sited outside the grantor’s territory must also not require the use of domestic goods within the meaning of Article 3.1(b).

83. This proposition is both consistent with the text of Article 3.1(b), the object and purpose of the SCM Agreement, and Article III:8(b) of the GATT 1994. Because, like the First Siting Provision, the Second Siting Provision addresses the location of production activities and does not address the use of domestic over imported goods, it is not in breach of Article 3.1(b).

84. The EU’s appeal relies on the Panel’s statement that it considered whether “the subsidy was contingent on recipients ‘*refraining from* using imported products’.”<sup>63</sup> But, contrary to the EU’s suggestion, this formulation did not reflect an interpretation of Article 3.1(b) that, for a breach to exist, the measure must require the exclusive use of domestic goods. Indeed, the formulation appears to have its roots in the terms of the EU’s argument to the Panel.<sup>64</sup>

85. In any event, the Panel recognized that the First Siting Provision addressed the decision at a single point in time to locate subsidized production activities in the grantor’s territory, not the use of goods.<sup>65</sup> The Panel correctly reasoned then that, to the extent the Second Siting Provision merely required that those same activities not subsequently be sited outside of Washington, it also concerned the location of subsidized production activities and not the use of goods. However, consistent with the Panel’s conclusions in its *de facto* analysis, the Panel considered that if the Second Siting Provision requires all 777X wing assembly to be sited in

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<sup>62</sup> Panel Report, para. 7.305.

<sup>63</sup> EU Other Appellant Submission, para. 103 (quoting Panel Report, para. 7.305 (emphasis added by EU)).

<sup>64</sup> See Panel Report, paras. 7.304-7.305 (noting the EU’s argument that “pursuant to {the Second Siting Provision}, 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,” and responding that the EU’s conclusions do not result from the terms of the Second Siting Provision).

<sup>65</sup> See Panel Report, paras. 7.343-7.345.

Washington, such that no 777X wings can be imported,<sup>66</sup> this would indicate that the Second Siting Provision is not just about the production of airplanes, but concerns “the origins of goods that enter into the production process for the 777X as a condition for the continued availability of the subsidy.”<sup>67</sup>

86. To the extent the Panel adopted this understanding in its *de jure* analysis, it was incorrect. Even if the Second Siting Provision applies to additional 777X wing assembly operations not envisaged at the time the First Siting Provision was fulfilled, the character of the contingency is no different. It remains a condition on the location of (quantitatively more) production activities.

87. Furthermore, as the United States demonstrated in its Appellant Submission, the real problem stemming from the Panel’s “refrain from importing” formulation was that it led to the Panel’s failure to establish the critical element of an Article 3.1(b) claim that eligibility for the subsidy requires the “use” of a domestic good.<sup>68</sup> Because a manufacturer need not (and Boeing does not) “use” wings at all, whether domestic or imported, the absence of using imported wings is not tantamount to the use of domestic wings.

88. In any event, the Panel correctly recognized that a subsidy contingent on the location of production activities that does not address the use of domestic over imported goods does not breach Article 3.1(b). The Panel did not interpret Article 3.1(b) as requiring subsidies to be contingent on the use of exclusively domestic goods. Therefore, the EU’s appeal in this respect fails.

**B. The EU Fails to Establish that the Panel Erred in Applying Article 3.1(b)**

89. The EU argues that the Panel erred in the application of Article 3.1(b), because its *de jure* analysis of the Second Siting Provision did not take into account a supposed “admission” by the United States regarding the provision’s meaning.<sup>69</sup> However, the “admission” referred to by the EU was not about the meaning of the Second Siting Provision. It was a prediction about the likely application of the Second Siting Provision to a set of hypothetical factual circumstances. Therefore, conducting the *de jure* analysis without reference to this prediction was appropriate.

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<sup>66</sup> The United States has explained that, based on the Panel’s apparent understanding of the terms “domestic” and “imported” and the same implausible assumptions embedded in the Panel’s hypotheticals, a requirement to conduct all 777X wing assembly and final assembly in Washington would not mean that no 777X wings can be imported. *See* US Appellant Submission, paras. 168-175.

<sup>67</sup> Panel Report, para. 7.366.

<sup>68</sup> *See* US Appellant Submission, paras. 158-164.

<sup>69</sup> EU Other Appellant Submission, para. 109.

90. Moreover, as the United States explained in its Appellant Submission, the conclusion the Panel drew from this supposed “admission” is erroneous.<sup>70</sup> Therefore, if the Panel had relied on it in the *de jure* analysis, as the EU argues it should have done, then the Panel’s *de jure* analysis would suffer from the same errors as its *de facto* findings.

91. The supposed “admission” is the underlined text in the U.S. response to Panel question No. 80:

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.”<sup>71</sup>

According to the EU, this statement “made it abundantly clear that what triggers the Second Siting Provision is importation of wings.”<sup>72</sup>

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<sup>70</sup> See US Appellant Submission, paras. 168-175.

<sup>71</sup> US RPQ 80, paras. 119-120 (emphasis added); EU Other Appellant Submission, para. 109.

<sup>72</sup> EU Other Appellant Submission, para. 109.

92. The Appellate Body has found that a *de jure* analysis under Article 3.1(b) should be based on the express terms of the relevant legal instrument or their necessary implication.<sup>73</sup> The Panel recognized as much.<sup>74</sup> Thus, as the Panel noted, there is a “strict limitation” on a *de jure* analysis “to the terms actually used in the measure at issue and any relevant facts that illuminate the meaning of those words in their particular context.”<sup>75</sup> Consistent with this approach, the Panel found that “the words of the Second Siting Provision do not expressly condition the receipt of a subsidy on the use of domestic over imported goods;”<sup>76</sup> and that “{n}or can an import-substitution contingency be derived by necessary implication from the words of the Second Siting Provision.”<sup>77</sup>

93. However, the supposed “admission,” which appears in the second paragraph of the response to Question 80, does not address the meaning of the terms used in the Second Siting Provision. It predicts what DOR would likely do in a particular hypothetical factual scenario, based on a number of assumptions.

94. It is the first paragraph of the U.S. response to Question 80 that addresses the *meaning* of the Second Siting Provision. That paragraph 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. Thus, the inquiry for DOR would be whether the production activities of 777X wing assembly or final assembly had been sited outside of Washington. A statement as to how DOR would *likely* answer that question in a hypothetical factual scenario and based on a series of assumptions is not a statement on the meaning of the law. This is especially the case

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<sup>73</sup> *Canada – Autos (AB)*, para. 100 (“{T}he 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. The simplest, and hence, perhaps, the uncommon, case is one in which the condition ... is set out expressly, in so many words, on the face of the law, regulation or other legal instrument. We believe, however, that a subsidy is also properly held to be *de jure* ... contingent where the condition ... is clearly, though implicitly, in the instrument comprising the measure. Thus, for a subsidy to be *de jure* ... contingent, the underlying legal instrument does not always have to provide *expressis verbis* that the subsidy is available only upon fulfillment of the condition ... Such conditionality can also be derived by necessary implication from the words actually used in the measure.”).

<sup>74</sup> Panel Report, para. 7.273 (“{T}he terms used in the legislation must either expressly or by necessary implication demonstrate that the granting of a subsidy is contingent upon the use of domestic instead of imported goods.”).

<sup>75</sup> Panel Report, para. 7.307.

<sup>76</sup> Panel Report, para. 7.305.

<sup>77</sup> Panel Report, para. 7.306.

when, as the United States has shown, the evidence indicates that the hypothetical situation is highly implausible.<sup>78</sup>

95. Moreover, the EU is wrong that the supposed “admission” in the U.S. response to Panel Question 80 “made it abundantly clear that what triggers the Second Siting Provision is importation of wings.”<sup>79</sup> Indeed, the very first sentence of the U.S. response states: “Under the Second Siting Provision, the fact that fuselages and wings are imported is irrelevant.”<sup>80</sup>

96. Therefore, contrary to the EU assertions, the United States does not “agree {} that importation of wings would deprive Boeing of the subsidies” as a matter of law. Indeed, the United States has appealed the finding the Panel reached in its *de facto* analysis on the basis of the U.S. response to Panel Question 80. An objective assessment of the U.S. response in its entirety, including the proper recognition of the assumptions the United States made in predicting how DOR would likely view a hypothetical scenario, demonstrates that the Second Siting Provision concerns only the location of certain production activities, which is not a *de jure* or *de facto* contingency on the use of domestic over imported goods. Therefore, even if the U.S. statement were considered in the *de jure* analysis, as the EU argues it should be, it would still lead to the same conclusion that the Panel reached – namely, that the Second Siting Provision does not make the subsidy *de jure* contingent on the use of domestic over imported fuselages or wings.

**C. The EU Fails to Establish that the Panel Failed to Make an Objective Assessment of the Matter, As Required by Article 11 of the DSU.**

97. The EU argues that the Panel’s *de jure* analysis was “devoid of any evidentiary basis” and therefore violates Article 11 of the DSU.<sup>81</sup> However, in reality, the Panel’s *de jure* analysis was based on an objective assessment of the relevant evidence before it, *i.e.*, the text of the Second Siting Provision and its necessary implications. Accordingly, the Panel did not fail to make an objective assessment of the matter, as required by Article 11 of the DSU, in finding that

<sup>78</sup> See US Appellant Submission, paras. 141-148.

<sup>79</sup> EU Other Appellant Submission, para. 109.

<sup>80</sup> US RPQ 80, para. 118. The United States made very clear that many aspects of the hypothetical were contrary to the facts in evidence and were highly implausible. The United States explained that, assuming the hypothetical scenario and all the implausibilities it would require – and “if the completed fuselages and wings were produced outside the United States and then imported,” a condition the United States assumed for the purpose of its response – “DOR would *likely* determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered.” US RPQ 80, para. 119 (emphasis added).

<sup>81</sup> EU Other Appellant Submission, para. 119.

the Second Siting Provision does not make the subsidy *de jure* contingent on the use of domestic over imported fuselages or wings.

98. The Appellate Body has stated:

{I}t is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings”, and the mere fact that a panel did not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11. Rather, an appellant must explain why such evidence is so material to its case that the panel’s failure to explicitly address and rely upon the evidence has a bearing on the objectivity of the panel’s factual assessment.<sup>82</sup>

99. The Appellate Body has also stated that it will not “interfere lightly” with a panel’s fact-finding authority. Rather, for a claim under Article 11 to succeed, the Appellate Body “must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts.” In other words, “not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU,” but only those that are so material that, “taken together or singly,” they undermine the objectivity of the panel’s assessment of the matter before it.<sup>83</sup>

100. In this case, the EU criticizes three aspects of the Panel’s reasoning, but fails to establish that any of them are in fact errors, let alone errors so serious as to cast doubt on the objectivity of the Panel’s analysis.

101. *First*, the EU argues that the Panel’s reading renders the phrase “of any version or variant of a commercial airplane” in the Second Siting Provision “inutile.”<sup>84</sup> But this is not the case. To recall, the Panel considered two potential interpretations of the Second Siting Provision. In the interpretation challenged by the EU’s appeal, the phrase “of any version or variant of a commercial airplane” is merely a subordinate clause to give greater specificity to the preceding phrase “final assembly or wing assembly.” It would make clear that the relevant activities are wing assembly or final assembly of a commercial airplane. The additional specificity and clarity would not be superfluous.

102. Thus, the EU’s inutility argument fails. Mere disagreement with the Panel is insufficient to establish the Panel’s lack of objectivity, which is what is required for an appeal under Article 11 of the DSU.

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<sup>82</sup> *China – Rare Earths (AB)*, para. 5.178.

<sup>83</sup> *China – Rare Earths (AB)*, paras. 5.178-5.179.

<sup>84</sup> EU Other Appellant Submission, para. 124.

103. *Second*, the EU argues that the text of the First Siting Provision contradicts the Panel’s interpretation of the Second Siting Provision. In particular, the EU argues that a manufacturer siting a program in Washington in fulfillment of the First Siting Provision can “define the specific contours of its planned assembly operations” associated with the program.<sup>85</sup> According to the EU, it is therefore “meaningless to speak of ‘*specific* assembly operations’ that satisfied the First Siting Provision, and that may later not be relocated.”<sup>86</sup> This argument is simply unfounded.

104. While it is true that the First Siting Provision does not require the manufacturer to commit to a particular number of assembly lines, machines, square footage, or employees, the manufacturer must still demonstrate to DOR that it has made a final decision to site a significant commercial airplane manufacturing program in Washington. That is, some decision about conducting the requisite production activities must have been made and demonstrated in order for the First Siting Provision to be fulfilled.

105. There is no logical reason why a separate provision could not refer to the specific production operations that were used to demonstrate to DOR that the First Siting Provision had been fulfilled. Therefore, there is nothing in the First Siting Provision that would prohibit all other provisions from referring to the specific production operations (whatever they may be) that were the basis of the determination that the First Siting Provision had been fulfilled. Accordingly, the EU is wrong that the First Siting Provision contradicts the Panel’s alternative reading of the Second Siting Provision or would make the Second Siting Provision inoperative.<sup>87</sup> Again, this is simply not a sufficient basis to cast doubt on the Panel’s objectivity.

106. *Third*, the EU argues that the alternative interpretation considered by the Panel is inconsistent with several statements made by the United States.<sup>88</sup> However, the EU’s argument is really just a repackaged version of its argument that the Panel’s *de facto* finding should have informed the Panel’s *de jure* analysis.<sup>89</sup>

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<sup>85</sup> EU Other Appellant Submission, para. 125.

<sup>86</sup> EU Other Appellant Submission, para. 125 (emphasis original). In addition, the EU asserts that under the Panel’s alternative interpretation of the Second Siting Provision, “it would be impossible for DOR to determine whether any ‘*specific* assembly operations’ originally intended to be carried out in Washington State were subsequently moved outside the State, and thus whether the Second Siting Provision is triggered on that basis.” *Ibid.*, para. 126. However, there is no support for this factual assertion in the Panel’s findings or uncontested facts on the record. Furthermore, conceptually, it is unclear why the EU believes that it would be impossible for DOR to make a factual determination of this type.

<sup>87</sup> See EU Other Appellant Submission, paras. 125-126.

<sup>88</sup> EU Other Appellant Submission, paras. 127-132.

<sup>89</sup> See EU Other Appellant Submission, para. 113.

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107. To this point, the Panel found in its *de jure* analysis that the Second Siting Provision admitted two possible interpretations.<sup>90</sup> It did not endorse either of them at that stage of the analysis. Subsequently, according to the EU's own telling, in its *de facto* analysis, the Panel concluded that one of those interpretations (the one the EU favors) reflects how DOR would apply the provision.<sup>91</sup> Thus, even the EU acknowledges that the Panel never adopted the alternative interpretation of the Second Siting Provision that the EU now attacks. The Panel merely reached the conclusion urged by the EU at a later stage, in the *de facto* analysis. This argument, which the EU raised elsewhere, relates to the substantive question of whether the Panel correctly applied Article 3.1(b), and not to the objectivity of the Panel's assessment of the matter.

**VI. CONCLUSION**

108. For the foregoing reasons, the United States respectfully requests that the Appellate Body reject the EU's Other Appeal.

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<sup>90</sup> See Panel Report, para. 7.305.

<sup>91</sup> See EU Other Appellant Submission, paras. 111-113.