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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

Short Title	Full Case Title and Citation
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled*

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

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,

First Siting Provision makes the aerospace tax measures

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

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 exclu , sysUc.

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.

TJ 3.180 5.22. We agree with the European

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 2 (x)11.3 (c)7 (lu (h)23.4 (i)-0 (l)-2 (ega06)2 ()-4.6 (s,)3 (an)5.do40 Tw -2.615.6 (")in)12.6 ( )]

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 ()7(d n)10nhion >>Bo8th2.4 (r)rar.ou"TJ 0.T0 1 Tf -0

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

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 diofTJ 0 uihc

domestically produced wings and fuselages in its production of the 777X aircraft in Washington.[100] Th

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

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

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

5.51.

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(om)5.7 eBody <</6aeed t12.3

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 analyryrternd ap7 (n)12..136 Tw 2.36 (h)23.7 (e)13.3 ( )]TJ 0.006o0.7(r)l.3 (its)7 (a-0.7 (i)-7 (o)o0.7(

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

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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:

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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 k.7 (th)12.3 (a)7si(t)13.3 (e)2(is)tatrov ess

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 datS .004 Tc 0.098 Tw -40.52 -1.22372.3 (t)t0 2P37 (a)5 04 7.3 ( )077X

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 im0 (ta)7 ((n)12.3 (ot)0.6)0a12.4 ( ) (ot)0.6 e dtivtaof

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 Wash7 (n)12.3 (in)12.3 (')8t (t (d)]TJ 0 Tc 05.923.107 0 Td ( )Tj 0.006 T010.176 T375.533 0 T.7 (w7)2o)7 (u

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