



**UNITED STATES – CONDITIONAL TAX INCENTIVES
FOR LARGE CIVIL AIRCRAFT**

AB-2016-8

Report of the Appellate Body

Addendum

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

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

LIST OF ANNEXES**ANNEX A**

NOTICES OF APPEAL AND OTHER APPEAL

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

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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

ANNEX D

PROCEDURAL RULINGS

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

ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

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

ANNEX A-1

UNITED STATES' NOTICE OF APPEAL *

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

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

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

- a. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement as if it prohibited subsidies conditional on the domestic siting of production activities.²
- b. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate for the 777X program is contingent on the "use" of wings for the 777X, even though Boeing does not and will not "use" wings to produce the 777X, and Boeing is nonetheless eligible to receive the B&O aerospace tax rate for the 777X program (and other programs).³
- c. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement in finding that the B&O aerospace tax rate for the 777X program is contingent on the use of "domestic" over "imported" wings for the 777X, even though the Panel did not interpret the meaning of the terms "domestic" and "imported," did not provide sufficient analysis of what would make wings "domestic" or "imported," and did not assess whether the 777X wings are "domestic."⁴ The Panel also failed to provide the basic rationale behind its finding as required by Article 12.7 of the DSU.
- d. The Panel erroneously interpreted and applied Article 3.1(b) of the SCM Agreement by relying on hypothetical scenarios with no evidentiary basis to evaluate whether the B&O aerospace tax rate for the 777X program is "contingent" in fact on the use of domestic over imported goods.⁵ The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU because it used hypothetical scenarios involving Boeing's purchase of 777X wings from another Washington manufacturer and Boeing's importation of 777X wings from a foreign producer that were contrary to the evidence before it.⁶

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

¹ See, e.g., Panel Report, paras. 7.369, 8.1(c), 8.2.

² See, e.g., Panel Report, paras. 7.360, 7.368-7.369, 8.1(c), 8.2.

³ See, e.g., Panel Report, paras. 7.219-7.222, 7.353-7.356, 7.368.

⁴ See, e.g., Panel Report, Section 7.5.4 (interpreting certain terms of Article 3.1(b), but not interpreting the terms "domestic" and "imported"), paras. 7.364, 7.367.

⁵ See, e.g., Panel Report, paras. 7.355-7.356, 7.359, 7.363-7.369.

⁶ See, e.g., Panel Report, paras. 7.355-7.356, 7.359, 7.363-7.369.

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

- f. The Panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case," as required by Article 11 of the DSU in finding that the Second Siting Provision⁸ concerns the use of certain goods, and specifically the origin of those goods that enter into the production process for the 777X, as a condition for the continued availability of the B&O aerospace tax rate for the 777X program.⁹ Were the Appellate Body to consider the meaning and operation of the Second Siting Provision as an issue of law for purposes of the DSU, then the United States considers the Panel erred as a matter of law in its understanding or interpretation of the Second Siting Provision.

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

⁷ See, e.g., Panel Report, paras. 7.363-7.367, 7.369.

⁸ See Panel Report, Section 7.3.2.2.

⁹ See, e.g., Panel Report, paras. 7.341, 7.348-7.356, 7.358-7.368.

ANNEX A-2

EUROPEAN UNION'S NOTICE OF OTHER APPEAL*

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

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect, the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report¹:

1. The Panel erred in the interpretation of Article 3.1(b) of the *SCM Agreement* by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the First Siting Provision,² set out in Section 2 of Washington State Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), does not make the subsidies subject to that condition *de jure* contingent on the use of domestic over imported goods.³
2. The Panel erred in the application of Article 3.1(b) of the *SCM Agreement* in finding that the First Siting Provision does not make the subsidies subject to that condition⁴ *de jure* contingent on the use of domestic over imported goods.⁵
3. The Panel erred in the interpretation of Article 3.1(b) of the *SCM Agreement* by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the First Siting Provision, considered alone, does not make the subsidies subject to that condition⁶ *de facto* contingent on the use of domestic over imported goods.⁷ The European Union requests the Appellate Body to consider this appeal only if it does not find (in accordance with the appeals described in paragraph 1 or 2, above) that the First Siting Provision, considered alone, makes the subsidies subject to it *de jure* contingent on the use of domestic over imported goods in violation of Article 3.1(b).
4. The Panel failed to make an objective assessment under Article 11 of the DSU in finding that the First Siting Provision, considered alone, does not make the subsidies subject to that condition⁸ *de facto* contingent on the use of domestic over imported goods, within the

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

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

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

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

⁴ See footnote 3, above.

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

⁶ See footnote 3, above.

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

⁸ See footnote 3, above.

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

5. The Panel erred in the interpretation of Article 3.1(b) of the *SCM Agreement* by requiring the complaining Member to demonstrate that the measure at issue "per se and necessarily exclude{s}" the use of imported goods, and on that basis, finding that the Second Siting Provision,¹⁰ set out in Sections 5 and 6 of ESSB 5952, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) *de jure* contingent on the use of domestic over imported goods.¹¹
6. The Panel erred in the application of Article 3.1(b) of the *SCM Agreement* in finding that the Second Siting Provision, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) *de jure* contingent on the use of domestic over imported goods.¹²
7. The Panel failed to make an objective assessment under Article 11 of the DSU, in finding that the Second Siting Provision, considered alone or together with the First Siting Provision, does not make the B&O tax rate reduction (in respect of the 777X) *de jure* contingent on the use of domestic over imported goods, within the meaning of Article 3.1(b) of the *SCM Agreement*.¹³ In particular, the Panel's findings lacked a sufficient evidentiary basis.

⁹ Panel Report, paras. 7.330, 7.342-7.345.

¹⁰ See Panel Report, paras. 7.32-7.33 (defining "Second Siting Provision").

¹¹ Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).

¹² Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).

¹³ Panel Report, paras. 7.305-7.311, 7.315-7.317, 8.1(b)(ii)-(iii).

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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

ANNEX B-1**EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION**

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

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

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

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

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

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

¹ Panel Report, paras. 7.296, 7.308, and 7.315. The United States refers to the Panel Report in this dispute as "Panel Report," with no dispute short title following it.

² RCW § 82.32.850(1) and (2)(c).

³ RCW § 82.323.85011(e)(ii).

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

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

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

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

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

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

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

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

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

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

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

⁵ Panel Report, para. 7.362.

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

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

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

ANNEX B-2**EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION****I. INTRODUCTION**

1. Washington State enacted Engrossed Substitute Senate Bill 5952 ("ESSB 5952") in November 2013,¹ creating the largest targeted state tax break in United States history. This legislation amended aerospace tax incentives originally created in 2003, including incentives found to be WTO-inconsistent in the *US – Large Civil Aircraft* dispute, and extended them through fiscal year 2040.
2. The Panel found that each of the seven tax incentives, as amended and extended by ESSB 5952, constitutes a subsidy within the meaning of Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*"). These subsidy findings have not been appealed.
3. ESSB 5952 makes the amendment and extension of all of the subsidies contingent on satisfying a condition the Panel referred to as the "First Siting Provision".² Additionally, one of these subsidies – the B&O aerospace tax rate reduction, in respect of Boeing's 777X – is subject to a condition that the Panel referred to as the "Second Siting Provision".³ The Panel found that the two Siting Provisions, together, make the B&O tax rate reduction for Boeing's 777X *de facto* contingent on the use of domestic over imported goods, in violation of Article 3.1(b) of the *SCM Agreement*.
4. The European Union appeals the Panel's findings that the European Union failed to demonstrate that (i) the First Siting Provision, considered alone, makes the subsidies subject to it contingent on the use of domestic over imported goods, and (ii) the Second Siting Provision makes the B&O tax rate reduction for the 777X *de jure* contingent on the use of domestic over imported goods.

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

5. Section 2 of ESSB 5952 provides that the entirety of the legislation, amending and extending (through the year 2040) billions of dollars in tax breaks to the aircraft industry, would take effect only upon Boeing's decision to locate a new commercial aircraft programme in Washington State, i.e., the First Siting Provision. *In addition* to the production of the aircraft itself in Washington, the First Siting Provision requires that *wings* and *fuselages* of the sited aircraft are manufactured in Washington State. The Washington State Department of Revenue ("DOR") determined in July 2014 that this First Siting Provision had been satisfied, based on Boeing's decision to produce the 777X in Washington State, and to also manufacture the wings and fuselages of that aircraft there.
6. The European Union details several legal errors made by the Panel in finding that the First Siting Provision, alone, does not make the tax incentives either *de jure* or *de facto* contingent on the use of domestic over imported goods.

¹ Engrossed Substitute Senate Bill 5952 ("ESSB 5952"), Exhibit EU-03.

² ESSB 5952 § 2(1), Exhibit EU-03.

³ ESSB 5952 (exhibit EU-3), Sections 5 and 6; Panel Report, para. 7.32.

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

7. In rejecting the European Union's principal claim of *de jure* contingency, in respect of the First Siting Provision, the Panel erred in the interpretation and application of Article 3.1(b) of the *SCM Agreement*.
8. *First*, the Panel interpreted Article 3.1(b) to mean that the relevant contingency would exist only where the measure "*per se* and necessarily exclude{s}" any use of imported goods. Under the Panel's interpretation, to the extent that the subsidy recipient may use *some* imported goods *in addition to* domestic goods, and is nevertheless eligible for the subsidy, the subsidy is not contingent on the use of domestic over imported goods. Such an interpretation finds no support in Article 3.1(b), would defeat the object and purpose of that provision, and is contradicted by the relevant context provided by Article 3.1(a) of the *SCM Agreement*.
9. *Second*, the Panel's finding that the First Siting Provision does not, by necessary implication, require the use of domestic over imported goods constitutes an error in the application of Article 3.1(b). The words in the First Siting Provision require the siting in Washington State of "an airplane program" "*in which*" the aircraft itself is produced in Washington State, and "*in which*" the wings and fuselages of that same aircraft type are likewise manufactured in Washington State. That is, according to the words and necessary implication of the First Siting Provision, the aircraft program would not only include production of an aircraft in Washington State, but would also integrate *in* that aircraft the wings and fuselages that must also be manufactured *in* Washington State.
10. In all possible interpretations envisaged by the Panel for the First Siting Provision, at least some production of the 777X must be undertaken in Washington State *as a legal requirement*, and at least some 777X wings and fuselages must be, *as a legal requirement*, manufactured in Washington State. These dual requirements necessarily imply that the aircraft produced in Washington State would use the wings and fuselages manufactured in Washington State. Thus, the Panel should have found the contingency by necessary implication. The Panel's finding to the contrary constitutes an error in the application of Article 3.1(b).
11. The European Union requests the Appellate Body to reverse the Panel's finding and complete the analysis to find that the First Siting Provision, considered alone, makes all of the subsidies amended and extended by ESSB 5952 *de jure* contingent on the use of domestic over imported goods.

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

12. The European Union appeals the Panel's finding that the First Siting Provision does not make these subsidies *de facto* contingent on the use of domestic over imported goods. The European Union requests the Appellate Body to consider this appeal only if it does not find that the First Siting Provision, considered alone, makes all of the subsidies subject to it contingent on the use of domestic over imported goods.
13. *First*, the Panel's finding of *de facto* contingency suffers from the same interpretative error that the European Union demonstrated above, in relation to *de jure* contingency.⁴
14. *Second*, the Panel failed to make an objective assessment of the matter before it, under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). The Panel found that "the Department of Revenue's determination

⁴ See paragraph 8, above.

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

15. In treating as conclusive the fact that Washington State law described the contingency as a decision to locate "a significant commercial airplane manufacturing programme", and that the DOR used those terms in its determination, and by failing to properly consider the implications of that contingency on Boeing's incentives to use domestic over imported 777X wings or 777X fuselages *in* its Washington State production of the 777X, the Panel failed to make an objective assessment of the matter before it.
16. The European Union explained that the dual requirements, under the First Siting Provision, of producing the 777X in Washington State, and of manufacturing the wings and fuselages of the same aircraft in Washington State, necessarily implied a requirement that domestic wings and fuselages be used on the 777X. Given that the only *confirming* fact, outside the text of the measure, that the Panel might have considered to arrive at that conclusion was that aircraft producers are economically rational entities, the European Union considered that a finding of *de jure* contingency was warranted. However, if the Panel considered that the assertion that aircraft manufacturers are rational economic actors somehow fell outside the purview of a *de jure* contingency claim, the Panel's analysis of the *de facto* contingency claim would have been the place to accommodate that assertion.
17. In light of the errors demonstrated above, the European Union seeks the reversal of the Panel's findings, and completion of the analysis to find that the First Siting Provision, considered alone, makes the subsidies subject to it *de facto* contingent on the use of domestic over imported goods, in violation of Article 3.1(b).

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

18. The Second Siting Provision provides that the B&O tax rate reduction subsidy would become unavailable in respect of the aircraft program satisfying the First Siting Provision – the 777X – if the DOR determines that "any final assembly or wing assembly" of the relevant aircraft model "has been sited outside the state of Washington".
19. The Panel's finding that the Second Siting Provision does not create, *de jure*, a contingency on using domestic over imported goods, is the result of errors in the interpretation and application of Article 3.1(b), as well as a failure to make an objective assessment of the matter, under Article 11 of the DSU.
20. *First*, as the European Union has already demonstrated above, in the context of the First Siting Provision, the Panel erred in the interpretation of Article 3.1(b).⁷ The Panel's finding of lack of *de jure* contingency in respect of the Second Siting Provision was driven by this same interpretative error.
21. *Second*, the United States admitted before the Panel that the Second Siting Provision, properly interpreted, would deprive Boeing of the B&O tax rate reduction if the wings for the 777X were imported. This confirmation by the United States played a key role in the Panel subsequently making a finding of *de facto* contingency. This evidence would have been critical in the assessment of *de jure* contingency, but the Panel entirely ignored it in its *de jure* analysis. By imposing undue restrictions on the scope of evidence that it considered permissible for the purpose of assessing *de jure* contingency, the Panel erred in the application of Article 3.1(b).

⁵ Panel Report, para. 7.343 (underlining added).

⁶ Panel Report, para. 7.343 (underlining added).

⁷ See paragraph 8, above.

22. *Finally*, the Panel failed to make an objective assessment, under Article 11 of the DSU, in according to the Second Siting Provision an "interpretation" that neither Party advocated. That "interpretation" is contradicted by the words of ESSB 5952, the critical admission made by the United States, as well as the arguments put forth by both Parties. The Panel's finding thus suffers from the lack of an evidentiary basis.
23. In light of these errors, the European Union seeks reversal of the Panel's finding, and completion of the analysis to find that the Second Siting Provision, considered alone or together with the First Siting Provision, makes the B&O tax rate reduction for the 777X *de jure* contingent on the use of domestic over imported goods, in violation of Article 3.1(b).

ANNEX B-3**EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION****I. INTRODUCTION**

1. The Panel in the present dispute concluded that a subsidy (the B&O tax rate reduction for the 777X) which would be available to Boeing so long as Boeing uses wings manufactured in Washington State (including wings manufactured by third parties in Washington State), but would be lost if any imported 777X wings are used, is contingent on the use of domestic over imported wings. On that basis, the Panel correctly found that the subsidy is inconsistent with Article 3.1(b) of the Agreement on Subsidies and Countervailing Measures ("*SCM Agreement*"). The Panel's finding was based not just on the words of the measure at issue, but also confirmed by other evidence that aided the Panel in interpreting those words (i.e., admissions by the United States confirming the proper interpretation under domestic law, and legislative history of the measure).¹
2. In its Appellant's Submission, the United States expends significant effort and creativity to convert what is a textbook example of a subsidy contingent upon the use of domestic over imported goods (in this case, "wings"), within the meaning of Article 3.1(b), into a complex dispute requiring careful consideration of the peculiarities of the currently planned (but not yet active) manufacturing process of the primary subsidy recipient, Boeing. But the Panel correctly found that the focus in evaluating a claim under Article 3.1(b) of the *SCM Agreement* is "not on the production processes for the 777X", but the "design, structure, and modalities of operation" of the measure at issue.²
3. As detailed herein, however, a Member cannot defend a measure that, on its face (and in view of confirmatory admissions by that Member) is contingent upon the use of domestic over imported goods, by simply asserting that a subsidy recipient has not yet used those goods, whether domestic or imported, or does not currently have plans to use such goods in the future, whether domestic or imported. Indeed, it is the measure's contingency, itself, at the time the subsidy is granted, that can skew the subsidy recipients' incentives in a manner that shapes its current or future plans on whether or not to use imported goods.
4. Regardless of whether the United States' assertions about Boeing's plans for the production of the 777X are factually accurate, the entirety of the US appeal rests on a deeply flawed reading of the word "use". According to the United States, Boeing can be considered to "use" a wing only if it first fully assembles a wing, and then attaches that wing to the fuselage of the aircraft. Under the US' theory, if Boeing employs a slightly different process, such as attaching one part of the wing to the fuselage first, and then finishing the wing (regardless of how little additional work is required), then no "use" of a wing occurs. As the European Union details below, this interpretation of the term "use", which makes the WTO-consistency of a measure dependent on the sequence in which a subsidy recipient turns certain screws, is erroneous.
5. As for the United States' attempts throughout its Appellant's Submission to characterise the Panel's finding of *de facto* contingency as reflecting an interpretation of Article 3.1(b) prohibiting subsidies contingent on the location of production activities (regardless of whether they are contingent on the use of domestic over imported goods),³ this is contradicted by the Panel's clear explanations to the contrary.
6. Before turning to the United States' allegations of error, the European Union notes that the United States dedicates 19 pages, of its 56-page Appellant's Submission, to a section entitled "Background".⁴ This section is filled with numerous factual assertions that are

¹ Panel Report, paras. 7.361-7.367.

² Panel Report, para. 7.355.

³ US Appellant's Submission, para. 2.

⁴ US Appellant's Submission, pp. 4-23.

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

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

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

8. The United States argues that the Panel erroneously interpreted and applied Article 3.1(b) of the *SCM Agreement*, and characterises the Panel's application/interpretation as effectively prohibiting any subsidies conditional on domestic manufacturing.⁵
9. The European Union, and the Panel, agreed with the United States that a subsidy contingent solely on domestic production of goods, without more, is not disciplined by Article 3.1(b).⁶ Specifically in the context of *de facto* contingency, the Panel clarified that "provision of subsidies exclusively to domestic producers, without more, is not in itself a breach of the obligations under the covered agreements".⁷ Thus, the Panel made no error in interpretation.
10. As for application, the Panel examined whether the subsidy was contingent on the use of domestic over imported goods. Having reviewed the evidence before it, the Panel found that "the *only* decision by Boeing to source wings which it would then 'use' in producing the 777X that *would not* trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings".⁸ Therefore, it was abundantly clear to the Panel that the subsidy was conditioned solely on the origin of the wings used on the 777X. In this context, the Panel was right in rejecting the United States' unilateral characterisation of the subsidy as a "production subsidy", and finding that the subsidy was inconsistent with Article 3.1(b).

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

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

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

12. The focus of analysis in adjudicating a claim under Article 3.1(b) is the subsidy measure, not the recipient. In this context, the Panel was right in finding that "{t}he focus of the Panel's analysis, for the purpose of the current dispute, is not on the production processes for the 777X, in general or at any point in time, but rather on whether the measures at issue, in their design, structure, and modalities of operation, would limit access to existing subsidies if imported goods were to be used in any such processes".¹⁰
13. The United States repeatedly makes claims regarding the "current production process" for the 777X. Yet, it is entirely meaningless to speak of "Boeing's current 777X production process". It is undisputed that no 777X wing or 777X aircraft production even began during

⁵ US Appellant's Submission, Section IV.

⁶ Panel Report, paras. 7.201, 7.357.

⁷ Panel Report, para. 7.357.

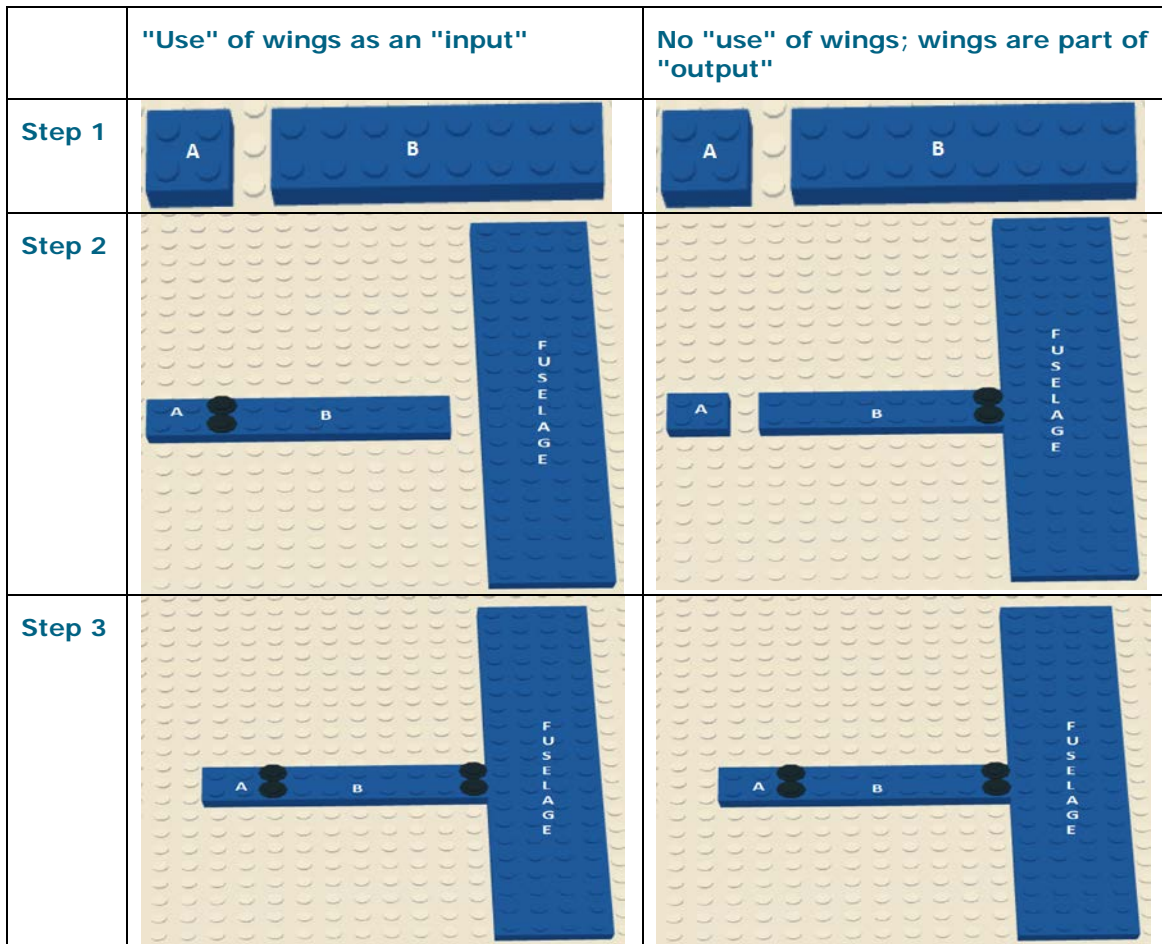
⁸ Panel Report, para. 7.364.

⁹ US Appellant's Submission, Section V.

¹⁰ Panel Report, para. 7.355.

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

14. The United States alleges that these *intended* production processes do not involve the "use" of a wing. The US' position translates into an assertion that Boeing would "use" wings within the meaning of Article 3.1(b) only if it first finishes the manufacture of complete wings, and then attaches them to the fuselage of the 777X.¹¹ If Boeing alters this production process such that one part of the wing is attached to the fuselage first, and then the remaining components of the wing (however small or insignificant) are attached to that first part, no "use" of a wing occurs.¹²
15. As illustrated in the figure below, imagine an aircraft wing consists of two rectangular pieces, A and B. If A and B are first screwed together, and then B (with A attached) is screwed on to the fuselage, the United States would consider this "use" of a wing. On the other hand, under the US position, if B is first screwed on to the fuselage, and then A is screwed on to B, no "use" of a wing occurs. In this way, the order in which these screws are turned would be "dispositive" as to whether a subsidy, which would become unavailable upon importation of any wings, is consistent with Article 3.1(b).



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

¹¹ See US Appellant's Submission, para. 115.

¹² *Ibid.*

17. Additionally, the word "contingent" in Article 3.1(b) does not cover only those subsidies that are available exclusively to entities that use domestic over imported goods. When faced with a claim under that provision, the responding Member cannot defeat that claim by simply demonstrating that the subsidy is available to some entities that do not use domestic goods, or in some circumstances where such use does not occur.
18. Thus, the United States errs in asserting that Boeing's production plan does not involve the "use" of wings. Even if that assertion were true (*quod non*), it would not be "dispositive" on the question of contingency.

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

19. The Panel interpreted and applied the word "domestic" in Article 3.1(b), in finding that wings manufactured in Washington State would be "domestic". The United States alleges error in the interpretation and application of Article 3.1(b), and under Article 12.7 of the DSU.
20. The United States fails to offer any legal arguments in support of its allegation of error in interpretation. This appeal therefore fails to meet the requirement in Rule 21(2)(b)(i) of the Working Procedures for Appellate Review, and must fail.
21. In any event, the words used in Article 3.1(b) support the interpretation that "domestic" means "not imported". Under this proper interpretation, any wings made in Washington State are domestic wings. Thus, the Panel did not err in the interpretation or application of Article 3.1(b).
22. The brevity of the Panel's treatment of this issue does not constitute error under Article 12.7 of the DSU. Nothing in Article 12.7 requires a panel to elaborate the reasons behind each of its intermediate findings. The requirement is that a panel should inform the responding Member about "(i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal".¹³ Here, the Panel provided the United States adequate information for both implementation and appeal. The Panel's approach is consistent with practice of WTO panels and the Appellate Body. Not a single panel adjudicating claims under similar provisions, where "domestic" goods, "imported goods" or "products of the territory" of a Member are relevant, has ever identified specific goods and extensively examined the make-up of those goods in order to determine whether they were "domestic", "imported", or "products of the territory" of a specific Member. The Panel's approach was further justified by the United States' failure to allege that wings made in Washington State were not "domestic".

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

23. The United States takes issue with the Panel's use of hypothetical scenarios in assessment of *de facto* contingency.
24. The logical way for the Panel to test whether the Second Siting Provision includes a contingency on use of domestic over imported wings was to examine what would happen in a scenario where Boeing, in the future, chooses to use imported wings, rather than domestic wings. This enquiry is necessarily hypothetical in nature, because the production process of the 777X is yet to commence, and the Second Siting Provision is yet to be triggered.
25. Article 3.1(b) "protects competitive opportunities of imported products, rather than existing trade flows of such products".¹⁴ In assessing a claim under a provision of that type, "the analysis ... is not limited to an examination of the operation of the {subsidy} at issue within the confines of scenarios that are representative of current patterns of trade".¹⁵
26. The Panel's use of hypothetical scenarios was thus not only permissible, but also inevitable.

¹³ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

¹⁴ Panel Report, para. 7.225.

¹⁵ Appellate Body Reports, *US – COOL (Article 21.5 – Canada and Mexico)*, para. 5.17.

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

27. The United States alleges multiple errors under Article 11 of the DSU. Each of these is baseless.
28. The first appeal in this series¹⁶ improperly seeks to modify or retract the US' confirmatory admissions made in response to Panel Questions 40 and 80. These admissions confirmed that the subsidy would continue to be available as long as Boeing uses domestic wings (including those manufactured by third parties), but would become unavailable if wings were imported. The US assertions on appeal are contradicted by the responses that the United States offered to the Panel.
29. The second appeal¹⁷ is conditional on the Appellate Body finding that the Panel understood the word "or" in the Second Siting Provision to require the sequential undertaking of wing assembly and final assembly. The Panel made no such finding. Rather, the Panel found that none of the Siting Provisions "either explicitly or in their operation, binds Boeing to a specific process for manufacturing 777X aircraft".¹⁸ Thus, there is no basis for the Appellate Body to consider the substance of this appeal.
30. In the third appeal in this series,¹⁹ the United States takes issue with the Panel's appreciation of the Washington State Governor's statements. The United States seeks to simply re-litigate the meaning and relevance of the Governor's statements. These US disagreements with the Panel's factual findings do not evidence any error under Article 11. In any event, the Panel's finding of *de facto* contingency was only *confirmed by*, not based on, the Governor's statements.
31. Finally, the United States' factual assertions about the "Section 12 Sub-Assemblies"²⁰ are irrelevant. In this section, the United States makes no allegation of error. As such there simply is no "appeal" for the Appellate Body to adjudicate.

¹⁶ US Appellant's Submission, Section VII.A.

¹⁷ US Appellant's Submission, Section VII.B.

¹⁸ Panel Report, para. 7.355.

¹⁹ US Appellant's Submission, Section VII.C.

²⁰ US Appellant's Submission, Section VII.D.

ANNEX B-4**EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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

ANNEX C-1**EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTICIPANT'S SUBMISSION**

1. This dispute addresses important distinctions between a subsidy which is prohibited for being issued contingent on the use of domestic over imported goods, and a subsidy which is issued to incentivise an activity taking place in a particular location.
2. Australia supports the Panel's finding that the first siting provision does not, of itself, make any subsidy contingent upon the use of domestic over imported goods.¹ Australia regards the second siting provision as one which may possibly be contingent upon the use of domestic over imported goods.

I. THE FIRST SITING PROVISION ONLY DESCRIBES AN ACTIVITY

3. Australia supports the Panel's description of the legal tests for *de jure* and *de facto* contingency. *De jure* contingency is to be found, according to the Appellate Body in *Canada – Autos* where the condition "is set out expressly, in so many words, on the face of the law, regulation or other legal instrument ... [or] is clearly, though implicitly, in the instrument comprising the measure."² In Australia's view, the first siting provision does not make any subsidy contingent, *de jure*, on the use of domestic over imported goods. All it does is incentivise an activity taking place in a particular location.
4. According to the Appellate Body in *EC and certain member States – Large Civil Aircraft*, *de facto* contingency is to be "inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy."³ In Australia's written submission to the Panel, Australia encouraged the Panel to "clarify whether the beneficiary of the tax incentive would receive benefits for manufacture and assembly regardless of the source of the inputs to manufacture and assembly." As the Panel found, the total configuration of facts in this instance show that the recipient of the subsidy could relocate their manufacturing processes without losing access to the tax incentives under the first siting provision.⁴
5. Australia therefore regards the first siting provision as a description of an activity. It does not make a subsidy contingent on the use of domestic over imported goods. Subsidies which incentivise an activity, absent other elements, are permitted under the Agreement on Subsidies and Countervailing Duties (SCM). Article III(8) of GATT provides helpful guidance to interpreting the SCM, and makes it clear that subsidies which only encourage local activities are permitted. The effect of Articles 1, 8.2(b) and 25.2 of the SCM also help demonstrate that a subsidy which does nothing more than encourage an activity is permitted under the SCM. Where these subsidies cause adverse effects, a WTO Member could still challenge them, but it is appropriate to alter the distinction between a finding of adverse effects and contingency.⁵

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

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

¹ Panel Report, *US – Conditional Tax Incentives For Large Civil Aircraft*, para. 7.311.

² Appellate Body Report, *Canada – Autos*, para. 100.

³ Appellate Body Report, *EC – Large Civil Aircraft*, para. 1046, quoting Appellate Body Report, *Canada – Aircraft*, para. 1038.

⁴ Panel Report, *US – Conditional Tax Incentives For Large Civil Aircraft*, para. 7.291.

⁵ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1054, has warned against blurring the lines between actionable and prohibited subsidies.

⁶ Panel Report, *US – Conditional Tax Incentives For Large Civil Aircraft*, para. 7.362.

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

III. CONCLUSION

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

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

ANNEX C-2**EXECUTIVE SUMMARY OF BRAZIL'S THIRD PARTICIPANT'S SUBMISSION**

1. Brazil's submission deals with three main issues: (i) the Panel's interpretation of prohibited import substitution subsidies under the SCM Agreement, (ii) the Panel's findings on that "by necessary implication" subsidies are *de jure* contingent on the use of domestic over imported goods, and (iii) the proper interpretation of the term "use" under Article 3.1(b) of the SCM Agreement.
2. With regard to the first issue, the SCM Agreement does not prevent a Member from conditioning the provision of a subsidy on the performance of production steps in the country granting the subsidy. It is not because a subsidy is granted upon a requirement to perform locally certain production steps related to different stages of the production chain that a subsidy should be considered *ipso facto* a subsidy contingent upon the use of domestic product.
3. On the second, the key question in order to assess the existence of *de jure* contingency is whether by necessary implication the requirements establish or create any condition favoring domestic or imported goods as the source of the components used in the production process. Just as in the distinction between production and product, the contingency under Article 3.1(b) of the *SCM Agreement* must be established upon the actual *use* of the domestic content to the detriment of the imported content, not in relation to "any domestic transaction" it may entail.
4. On the concept of "use", Brazil understands that the sourcing of the input rather than its production determines the import substitution contingency, which is made clear by the term "use". Article 3.1(b) prohibits the contingency upon the use of finished domestic products, even if they are inputs used in the production of final goods, not upon the production of domestic products.

ANNEX C-3

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION¹

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

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

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

ANNEX C-4

EXECUTIVE SUMMARY OF CHINA'S THIRD PARTICIPANT'S SUBMISSION

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

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

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

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

ANNEX C-5**EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION**

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

A. "Contingency"

2. Japan agrees with the Panel taking note of the Appellate Body's findings that "*contingency*" has the same meaning in Articles 3.1(a) and 3.1(b) of the SCM Agreement.¹
3. In case of *de facto* contingency, the Appellate Body has concluded that the contingency must be established on the basis of objective evidence² and by assessing the subsidy itself³, rather than by relying on subjective intent.⁴
4. Japan considers that if a subsidy-scheme has been designed not to be terminated as long as a long-term commitment of the subsidized investment is maintained regardless of the circumstances, including when imported goods are used in the production, then the local production requirement appears not to be contingent upon the use of domestic products.⁵

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

5. The text of Article 3.1(b) refers to a contingency upon the "use" of domestic over imported goods. The position of the US appears unduly restrictive and confines the term "use" to the phrase "use of purchased products from another entity".
6. The Panel added that "... the goods in question must be at least potentially tradable". Japan has systemic concerns with this interpretation of "goods" by the Panel⁶ not least because neither the words "potentially tradable" nor "tradable" form part of the text of the SCM Agreement whatsoever. Such interpretation limiting the meaning of a "good" would open up an easy path for circumvention of the disciplines under Article 3.1(b).
7. "{D}omestic over imported goods" in Article 3.1(b) suggests that the term "*domestic*" refers to any good that itself is not imported.

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

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

¹ Panel Report, para. 7.212.

² Appellate Body Report, *EC – Large Civil Aircraft*, para. 1050.

³ *Ibid*, para. 1051.

⁴ *Ibid*, para. 1050.

⁵ US Appellant submission, para. 88.

⁶ Panel Report, para. 7.225.

⁷ Appellate Body Reports on *US – Taxes on Petroleum and Labelling Practices on Imported Wines and Alcoholic Beverages*, para. 5.1.9, and *Japan – Alcoholic Beverages II*, para. 109.

ANNEX D

PROCEDURAL RULINGS

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

ANNEX D-1**PROCEDURAL RULING OF 22 DECEMBER 2016**

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

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

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

- a. Only Appellate Body Members and Appellate Body Secretariat staff assigned to work on this appeal may have access to BCI contained in the Panel record pending a final decision on the joint request. Appellate Body Members and Appellate Body Secretariat staff shall not disclose BCI, or allow BCI to be disclosed to any person other than those identified in the preceding sentence.
- b. BCI shall be stored in locked cabinets when not in use. When in use by Appellate Body Members and assigned Appellate Body Secretariat staff, all necessary precautions will be taken to protect the confidentiality of the BCI.
- c. Pending a decision on the joint request for the protection of BCI in these proceedings, BCI shall not be transmitted electronically, whether by e-mail, facsimile, or otherwise.

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

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

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

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

7. The confidentiality requirements set out in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes² (Rules of Conduct) are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect the confidentiality of that information. The adoption of such arrangements falls within the authority of the Appellate Body to hear the appeal and to regulate its procedures in a manner that ensures that the proceedings are conducted with fairness and in an orderly manner. To the extent that the arrangements elaborate on the confidentiality requirements of the DSU, the adoption of such arrangements in an "appropriate procedure" needs to conform to the requirement in Rule 16(1) of the Working Procedures for Appellate Review³ (Working Procedures) that any such procedure may not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.

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

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

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

³ 16 August 2010, WT/AB/WP/6.

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

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

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

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

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

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

Additional Procedures to Protect Sensitive Information

General

- i. These additional procedures shall apply to information that was treated as business confidential information (BCI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. The additional procedures apply to written and oral submissions made in the appellate proceedings only to the extent that they incorporate BCI.
- ii. To the extent that information on the record is submitted to the Appellate Body in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants on the proper treatment of this information, the Appellate Body shall decide upon the treatment to be accorded to such information after hearing their views.
- iii. Each participant may, at any time, request that information that it submitted, and that was previously treated as BCI, no longer be treated as such.
- iv. The participants and third participants shall file their written submissions and executive summaries with the Appellate Body Secretariat in accordance with the Working Schedule drawn up by the Division for this appeal. Where a written submission and/or an executive summary contains BCI, a redacted version of the submission and/or the executive summary (that is, a version without BCI) shall be filed simultaneously with the Appellate Body Secretariat. Should an executive summary submitted by a participant or third participant contain BCI, the redacted version of the executive summary will be annexed to the Appellate Body report. The redacted version shall be sufficient to permit a reasonable understanding of the substance of the relevant document. The Division may take appropriate action to ensure that this obligation is satisfied. The participants and third participants shall also provide the Appellate Body Secretariat with an electronic version of all submissions, including the redacted versions. The transmittal of participants' submissions to each other and to the third participants, and the transmittal of third participants' submissions to the participants and to the other third participants are further regulated in the provisions below, which apply *mutatis mutandis* to executive summaries of written submissions.

Appellate Body Members and Appellate Body Secretariat Staff

- v. Appellate Body Members and assigned staff of the Appellate Body Secretariat may have access to the BCI on the Panel record and in the written and oral submissions made in these appellate proceedings. Appellate Body Members and assigned Appellate Body Secretariat staff shall not disclose BCI, or allow BCI to be disclosed, to any person other than those identified in the preceding sentence, or to those "BCI-Approved Persons" of the participants and third participants identified in accordance with paragraphs xii and xiv below. Appellate Body Members and assigned staff of the Appellate Body Secretariat shall ensure that, when it is not in use, BCI is stored in locked cabinets. Appellate Body Members and Appellate Body Secretariat staff are covered by the Rules of Conduct. As provided for in the Rules of Conduct, evidence of breach of these Rules may be submitted to the Appellate Body, which will take appropriate action.
- vi. Appellate Body Members may maintain a copy of documents containing BCI at their places of residence outside Geneva. When not in use, the documents and materials containing BCI kept by Appellate Body Members at their places of residence outside of Geneva shall be stored in locked cabinets. Documents and materials containing BCI shall be sent to Appellate Body Members only by secure e-mail or courier.
- vii. The participants shall provide printed copies of their submissions and other documents containing BCI that are intended for use by Appellate Body Members or assigned Appellate Body Secretariat staff on coloured paper and individually watermarked with "Appellate Body" and numbered consecutively ("Appellate Body No. 1", "Appellate Body No. 2", etc.).

- viii. Subject to appropriate precautions, BCI may be taken outside of the premises of the Appellate Body Secretariat, in hard copy and electronic form, for purposes of any oral hearings that may be held in connection with this appeal.
- ix. Except as provided for in paragraph x, all documents and electronic files containing BCI shall be destroyed or deleted when the Appellate Body report in this dispute has been adopted by the DSB.
- x. The Appellate Body shall retain one hard copy and one electronic version of all documents containing BCI as part of the appellate record. Documents and electronic media containing BCI shall be kept in sealed boxes within locked cabinets on the Appellate Body Secretariat's premises.

Appellate Body Report

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

Participants

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

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

Third Participants

- xiv. Third participants may designate up to eight individuals as "Third Participant BCI-Approved Persons". For this purpose, each third participant shall provide a list of Third Participant BCI-Approved Persons to the Appellate Body Secretariat by 5 p.m. on Wednesday, 4 January 2017. A copy of the list of Third Participant BCI-Approved Persons shall be served on each participant and on each other third participant. Third participants may submit amendments to their lists of BCI-Approved Persons by filing an amended list with the Appellate Body Secretariat and serving it on the participants and the other third participants. A participant may object to the designation of an outside advisor as a Third Participant BCI-Approved Person by a third participant. Any objections must be filed with the Appellate Body Secretariat within two working days of the filing of the original or of an amended list of Third Participant BCI-Approved Persons, and simultaneously served on the other participant and the third participants. The Division will reject the designation of an outside advisor as a Third Participant BCI-Approved Person only upon a showing of compelling reasons, having regard to, *inter alia*, the relevant principles in the Rules of Conduct and the Illustrative List in Annex 2 thereto. Third Participant BCI-Approved Persons shall not disclose BCI, or allow it to be disclosed, except to the Appellate Body, assigned Appellate Body Secretariat staff, BCI-Approved Persons, and other Third Participant BCI-Approved Persons.
- xv. The BCI version of all submissions shall be transmitted to the third participants by providing a copy to the Appellate Body Secretariat for placement in the designated reading room located on the premises of the WTO. Third Participant BCI-Approved Persons shall be allowed to view in the designated reading room the BCI version of the Panel Report and the BCI version of the submissions filed in these appellate proceedings. Third Participant BCI-Approved Persons shall not bring into that room any electronic recording or transmitting devices, nor shall they remove copies of the BCI version of the Panel Report or the BCI version of the submissions from that room. Upon request, each third participant shall be provided with one copy of the Panel Report as circulated to WTO Members and of the redacted version of the submissions for use in the reading room. Third Participant BCI-Approved Persons may take handwritten notes on the provided copies of the circulated Panel Report and redacted version of the submissions and they may take these copies with them. These documents shall be printed on coloured, individually watermarked paper; shall bear the names of the Third Participant BCI-Approved Persons for that third participant; and shall state that "This document is not to be copied". In addition, the cover page of each such document shall state that any handwritten BCI added to the document shall only be discussed or shared with other Third Participant BCI-Approved Persons. The content of any handwritten notes shall not be incorporated, electronically or in handwritten form, into any other copy of the Panel Report or of the submissions. These documents and any other handwritten notes taken by the Third Participant BCI-Approved Persons in the reading room shall be locked in a secure cabinet when not in use. These documents and handwritten notes must be

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

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

Oral Hearing

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

ANNEX D-2**PROCEDURAL RULING OF 6 JANUARY 2017**

1. On Thursday, 5 January 2017, the Chair of the Appellate Body received a communication from the United States requesting that the Division selected to hear this appeal modify the deadline for the filing of its appellant's submission. In its letter, the United States invokes Rule 16(2) of the Working Procedures for Appellate Review¹ (Working Procedures), and seeks to have this deadline extended from 10 January 2017 to 17 January 2017. According to the United States, there are exceptional circumstances present in these proceedings, such that "failing to grant such a request would result in manifest unfairness within the meaning of Rule 16(2)". We understand that the European Union and the third participants were served a copy of the United States' request. The United States also indicated, in its letter, that it had asked the European Union for its views on this request for an extension of time.

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

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

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

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

¹ WT/AB/WP/6, 16 August 2010.

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

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

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

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

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

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

ANNEX D-3**PROCEDURAL RULING OF 2 JUNE 2017**

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

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

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

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

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

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

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

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

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

Additional Procedures on the Conduct of the Oral Hearing

- i. These Additional Procedures shall apply to all sessions of the oral hearing to be held in this appeal and, in particular, to any information that is referred to during the course of the oral hearing that was treated as business confidential information (BCI) in the Panel proceedings and that is contained in documents or electronic media that are part of the Panel record. These Additional Procedures complement the Additional Procedures for the Protection of Sensitive Information that we adopted in our Procedural Ruling of 22 December 2016.
- ii. To the extent that information on the record is presented at the oral hearing in a form that differs from the way in which it was presented to the Panel, and there is a disagreement between the participants as to the proper treatment and confidentiality of this information, the Appellate Body shall decide the matter after hearing the views of the participants.
- iii. Appellate Body Members, Secretariat staff assigned by the Appellate Body to work on this appeal, and interpreters and court reporters retained for this appeal may be present throughout the oral hearing, including the session dedicated to the discussion of BCI.
- iv. In addition to the persons indicated in paragraph iii above, BCI shall be disclosed during the oral hearing only to BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons, as designated in accordance with our Procedural Ruling of 22 December 2016.
- v. The session of the oral hearing dedicated to the opening statements of the participants and third participants shall be open to all members of the delegations of the participants and third participants. The participants and third participants shall abstain from referring to BCI in their opening statements.
- vi. In order to protect BCI from unauthorized disclosure, only BCI-Approved Persons of the participants and Third Participant BCI-Approved Persons are invited to attend the session of the oral hearing dedicated to questions and answers.
- vii. During the session of the oral hearing dedicated to questions and answers, the BCI version of the Panel Report and the BCI versions of the submissions filed in this appeal will be made available. Only Third Participant BCI-Approved Persons will be allowed to consult these documents. The documents shall not be removed from the hearing room and shall be returned to the Appellate Body Secretariat at the end of the oral hearing.

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

Public observation of the oral hearing

- ix. The first session of the oral hearing, which will consist of the opening statements by the participants and third participants, shall be open to public observation, subject to paragraph x below. The session of the oral hearing open to public observation shall be videotaped. Within two days of the completion of the oral hearing, either participant may request to review the videotape to verify that no BCI has been included inadvertently or otherwise. Upon such request, staff of the Appellate Body Secretariat shall be present while the participant(s) review the videotape. If the videotape contains BCI, a redacted version of the videotape shall be produced in which the BCI has been deleted. In case of disagreement between the participants regarding the sensitive nature of any information referred to during the opening statements, the relevant portion will not be subject to public observation.
- x. The opening statements of third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation. Any third participant that has not already done so may request that its oral statements remain confidential and not be subject to public observation. Such requests should be made as soon as possible, and no later than the beginning of the oral hearing at 9:30 a.m. Geneva time on Tuesday, 6 June 2017.
- xi. Notice of the oral hearing will be provided to the general public through the WTO website. Members of the general public wishing to observe the oral hearing will be required to register in advance with the WTO Secretariat. The videotapes, or if applicable the redacted versions of the videotapes, shall be screened to WTO delegates and members of the public subject to the terms set out in paragraph ix above. The time and location of the videotape screening shall be announced in due course, and WTO delegates will be invited to indicate to the Appellate Body Secretariat whether they wish to have a reserved seat in the room where the videotape will be screened.
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