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

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

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

6 FINDINGS AND CONCLUSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Thomas Graham
Presiding Member

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Peter Van den Bossche
Member

_____

Shree Baboo Chekitan Servansing
Member

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