

contemplates, and seeks to prevent *inter alia*, any wings (of the airplane model that satisfied the First Siting Provision) from being produced as separate products outside Washington State (including overseas), that would then be shipped to Washington State for incorporation in the final assembly process. Statements made by the Governor of Washington about the goal of keeping 777X wing production in Washington, seen in the light of the United States' responses, are consistent with this conclusion and are considered by the Panel to be relevant evidence in this *de facto* analysis.⁶⁷⁸

7.367. The loss of the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme if Boeing used 777X wings produced outside of Washington State, even if it maintained production of such wings in Washington State, makes the B&O aerospace tax rate for that programme contingent upon the use of wings made in Washington State. This is confirmed by the 777X programme retaining access to the B&O aerospace tax rate if Boeing used 777X wings made in Washington State by another producer. Accordingly, pursuant to ESSB 5952, and as a result of the Second Siting Provision, the B&O aerospace tax rate subsidy for the manufacturing or sale of commercial airplanes under the 777X programme is contingent *de facto* not only on the production of that aircraft and its wings in Washington State, but additionally on not using 777X wings other than those made in Washington State. Since wings made in Washington State are domestic goods and any imported wings would by definition be made outside of Washington State, it follows that the Second Siting Provision makes the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme contingent upon the use of domestic wings over imported wings.

7.368. Lastly, and for completeness, the Panel returns to the contention by the United States that wings are not used in the production of the 777X, in the sense that separate, identifiable and complete "wings" never come into existence in the production process of the 777X. In this regard we observe that Article 3.1(b) does not require the identification of a specific good in order that it can be applied to a particular situation. In the case before us, it is the output or outputs of a wing assembly process that the evidence establishes must not be sourced by Boeing from overseas, because of the implications of doing so. Regardless of precisely what these outputs are, and regardless of the reference to "wing" and to "wing assembly" in the siting provisions, there can be no doubt that goods, which together make up a wing to the factual satisfaction of the Department of Revenue, cannot be sourced by Boeing from outside the state of Washington without the consequence of activating the Second Siting Provision. The Panel's references to wings should be understood in this context.

7.369. For the reasons explained above, the Panel concludes that the siting provisions in ESSB 5952, and in particular the prospective modalities of operation of the Department of Revenue's discretion under the Second Siting Provision, make the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1 Conclusions

8.1. In light of the findings in the foregoing sections of the Report, and with respect to the aerospace tax measures at issue, as amended and extended through Washington State's Engrossed Substitute Senate Bill (ESSB 5952), the Panel concludes that:

⁶⁷⁸ Upon the passage of ESSB 5952, the Washington State Governor issued a press release indicating that ESSB 5952 "includes strong contingency language to ensure that all of the 777X assembly and wing assembly remains in Washington. Specifically, the bill includes a provision that says the company will lose its preferential B&O tax rate for the 777X if any of that work is moved out of state." Office of Washington Governor, "Legislature approves key elements of 777X incentive package", 10 November 2013 (Exhibit EU-59). The Governor additionally provided testimony to the Washington State legislature prior to the passage of ESSB 5952 regarding House Bill 2089, a companion bill to a previous version of ESSB 5952, which had similar siting provisions referring to wing assembly and final assembly (in addition to "wing fabrication", which does not appear in ESSB 5952). In that testimony, the Governor expresses the aim of maintaining employment in the aerospace industry by retaining production of the 777X carbon fibre wing in Washington State. See Washington State House Finance Committee, Video, "Testimony of Governor Inslee before House Finance Committee", 7 November 2013 (Exhibit EU-110).

- a. Each of the seven aerospace tax measures at issue in the present case constitutes a subsidy within the meaning of Article 1 of the SCM Agreement;
- b. Regarding the European Union's claim that the aerospace tax measures at issue are subsidies *de jure* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement:
 - i. The European Union has not demonstrated that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods with respect to the First Siting Provision in ESSB 5952 considered separately;
 - ii. The European Union has not demonstrated that the reduced business and occupation (B&O) tax rate for the manufacture and sale of commercial airplanes (B&O aerospace tax rate) is *de jure* contingent upon the use of domestic over imported goods with respect to the Second Siting Provision in ESSB 5952 considered separately;
 - iii. The European Union has not demonstrated that the aerospace tax measures are *de jure* contingent upon the use of domestic over imported goods with respect to the First Siting Provision and the Second Siting Provision considered jointly;
- c. With respect to the First Siting Provision and the Second Siting Provision in ESSB 5952, considered jointly, the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme is a subsidy *de facto* contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement.

8.2. Having found that the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme is inconsistent with Article 3.1(b) of the SCM Agreement, the Panel also finds that the United States has acted inconsistently with Article 3.2 of the SCM Agreement.

8.3. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the United States has acted inconsistently with the SCM Agreement, it has nullified or impaired benefits accruing to the European Union under that Agreement.

8.2 Recommendation

8.4. Article 4.7 of the SCM Agreement provides that, having found a measure in dispute to be a prohibited subsidy:

[T]he panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn.

8.5. The Panel has found that the European Union has demonstrated that the B&O aerospace tax rate for the manufacturing or sale of commercial airplanes under the 777X programme, pursuant to ESSB 5952, is a subsidy contingent upon the use of domestic over imported goods, prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement.

8.6. Accordingly, taking into account the nature of the prohibited subsidy found in this dispute, the Panel recommends that the United States withdraw it without delay and within 90 days.

8.7. Finally, the Panel notes that the rules contained in Part II of the SCM Agreement do not require a panel to specify how the implementation of recommendations under Article 4.7 should be effected by the subsidizing Member. In this context, the second sentence of Article 19.1 of the DSU provides that a panel *may* suggest ways in which a recommendation could be implemented. Assuming that this provision also applies to recommendations under Article 4.7 of the SCM Agreement, the Panel notes that, pursuant to Article 21.3 of the DSU, the means of

implementation is in the first instance for the Member concerned.⁶⁷⁹ Further, the Appellate Body has made clear that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion".⁶⁸⁰ In this case, in the absence of any request from the parties, the Panel refrains from making any suggestions concerning steps that might be taken to implement its recommendation.

⁶⁷⁹ Panel Report, *US – Hot-Rolled Steel*, para. 8.11.

⁶⁸⁰ Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.