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**UNITED STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT
(SECOND COMPLAINT)**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN UNION

**NOTIFICATION OF AN APPEAL BY THE EUROPEAN UNION UNDER ARTICLE 16.4 AND ARTICLE 17
OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT
OF DISPUTES ("DSU"), ARTICLE 7.6 OF THE AGREEMENT ON SUBSIDIES AND
COUNTERVAILING MEASURES ("SCM AGREEMENT"), AND UNDER RULE 20(1)
OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 29 June 2017, from the delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17.1 of the *DSU* and Article 7.6 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 – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) (Recourse to Article 21.5 of the DSU by the European Union)* (WT/DS353/RW). Pursuant to Rule 20(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

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, and to complete the legal analysis, with respect to the following errors of law and legal interpretations contained in the Panel Report:¹

I. SUBSIDIES

A. DOD Procurement Contracts

1. The Panel failed to make an objective assessment of the matter, pursuant to Article 11 of the DSU, when finding that the provision to Boeing of funding, and of access to DOD facilities, equipment, and employees, by the United States Department of Defense ("DOD") through pre-2007 and post-2006 DOD procurement contracts are not subsidies within the meaning of Article 1 of the *SCM Agreement*.² The Panel erred in characterising the provision of funding and support to Boeing as "purchases of services", rather than as, respectively, a

¹ Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

² Panel Report, paras. 8.360-8.378, 8.311-8.316, 8.418-8.437, 8.1077.a, 9.220, 9.291, 9.298, 9.332, 9.333-9.335, 9.373, 9.476, 9.485, 9.486(a), 9.487(a), 9.487(c), 11.7.c.i, 11.8.a, 11.8.b, 11.8.e.

direct transfer of funds under Article 1.1(a)(1)(i) and the provision of goods and services under Article 1.1(a)(1)(iii).³

2. The Panel also failed to make an objective assessment of the matter, pursuant to Article 11 of the DSU, when finding (in the alternative) that the allocation of intellectual property rights arising from the DOD procurement contracts does not demonstrate conferral of a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*.⁴

B. Foreign Sales Corporation/Extraterritorial Income Act Subsidies

3. The Panel erred in the interpretation of Articles 7.8 and 1.1(a)(1)(ii) of the *SCM Agreement*, when finding that the United States no longer continues to grant or maintain the subsidies provided pursuant to the Foreign Sales Corporation/Extraterritorial Income ("FSC/ETI") Act after the end of the implementation period.⁵ The Panel erred in finding that, because there is insufficient evidence that Boeing has actually used the tax concessions after 2006, there can be no foregoing of revenue otherwise due within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*.⁶

C. City of Wichita Industrial Revenue Bond Programme

4. The Panel erred in the interpretation of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the City of Wichita's Industrial Revenue Bond ("IRB") programme is no longer *de facto* specific.⁷
5. The Panel erred in the application of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the City of Wichita's IRB programme is no longer *de facto* specific.⁸
6. The Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, when finding that the City of Wichita's IRB programme is no longer *de facto* specific, within the meaning of Article 2.1(c) of the *SCM Agreement*.⁹

D. South Carolina Economic Development Bonds

7. The Panel erred in the interpretation of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the subsidy provided by South Carolina to Boeing, through economic development bond ("EDB") proceeds used to fund Project Gemini facilities and infrastructure, is not specific within the meaning of Article 2.1(c) of the *SCM Agreement*.¹⁰
8. The Panel erred in the application of Articles 7.8 and 2.1(c) of the *SCM Agreement*, when finding that the subsidy provided by South Carolina to Boeing, through EDB proceeds used to fund Project Gemini facilities and infrastructure, is not specific within the meaning of Article 2.1(c) of the *SCM Agreement*.¹¹

³ Panel Report, paras. 8.363-8.378, 8.311-8.316, 8.1077.a, 9.220, 9.291, 9.298, 9.332, 9.333-9.335, 9.373, 9.476, 9.485, 9.486(a), 9.487(a), 9.487(c), 11.7.c.i, 11.8.a, 11.8.b, 11.8.e.

⁴ Panel Report, paras. 8.418-8.437, 8.311-8.316, 8.1077.a, 9.220, 9.291, 9.298, 9.332, 9.333-9.335, 9.373, 9.476, 9.485, 9.486(a), 9.487(a), 9.487(c), 11.7.c.i, 11.8.a, 11.8.b, 11.8.e.

⁵ Panel Report, paras. 8.596-8.612, 8.1077.b, 9.252, 9.293, 9.333-9.335, 9.487(a), 11.7.c.ii, 11.8.a, 11.8.b, 11.8.e.

⁶ Panel Report, paras. 8.596-8.612, 8.1077.b, 9.252, 9.293, 9.333-9.335, 9.487(a), 11.7.c.ii, 11.8.a, 11.8.b, 11.8.e.

⁷ Panel Report, paras. 8.634-8.640, 8.1077.c, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.iii, 11.8.a, 11.8.b, 11.8.e.

⁸ Panel Report, paras. 8.634-8.640, 8.1077.c, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.iii, 11.8.a, 11.8.b, 11.8.e.

⁹ Panel Report, paras. 8.634-8.640, 8.1077.c, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.iii, 11.8.a, 11.8.b, 11.8.e.

¹⁰ Panel Report, paras. 8.837-8.841, 8.843, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.8.a, 11.8.b, 11.8.e, 8.1077.e, 11.7.c.v.

¹¹ Panel Report, paras. 8.837-8.841, 8.843, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.8.a, 11.8.b, 11.8.e, 8.1077.e, 11.7.c.v.

9. The Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, when finding that the subsidy provided by South Carolina to Boeing, through EDB proceeds used to fund Project Gemini facilities and infrastructure, is not specific within the meaning of Article 2.1(c) of the *SCM Agreement*.¹²

E. Multi-County Industrial Park Job Tax Credits

10. The Panel erred in the application of Articles 7.8 and 2.2 of the *SCM Agreement*, when finding that the subsidy provided by South Carolina to Boeing through the multi-county industrial park ("MCIP") job tax credits is not specific within the meaning of Article 2.2 of the *SCM Agreement*.¹³
11. The Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU, when finding that the subsidy provided by South Carolina to Boeing through the MCIP job tax credits is not specific within the meaning of Article 2.2 of the *SCM Agreement*.¹⁴

II. ADVERSE EFFECTS

A. Continuing Adverse Effects

12. The Panel erred in the interpretation of Article 7.8 of the *SCM Agreement*, when finding that, to "take appropriate steps to remove the adverse effects" under that provision, a responding Member found to be granting or maintaining an actionable subsidy need not remove adverse effects that remain present after the end of the implementation period, in circumstances where those effects result from sales transactions that were agreed prior to the end of the implementation period and for which performance remains incomplete.¹⁵
13. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that sales that had occurred prior to the end of the implementation period cannot constitute "present" adverse effects under Article 7.8 of the *SCM Agreement*, even where deliveries under those sales remain outstanding after the end of the implementation period.¹⁶
14. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that sales that had occurred prior to the end of the implementation period cannot constitute "present" adverse effects under Article 7.8 of the *SCM Agreement*, even though the original panel had determined that an adverse effect from such sales lasts until deliveries under the sale are completed.¹⁷
15. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that the European Union's continuing adverse effects arguments were "unsupported by the evidence and/or in contradiction with the findings made in the original proceeding".¹⁸
16. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, on the basis of an erroneous counterfactual, that the European Union's continuing

¹² Panel Report, paras. 8.837-8.841, 8.843, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.8.a, 11.8.b, 11.8.e, 8.1077.e, 11.7.c.v.

¹³ Panel Report, paras. 8.931, 8.933, 8.1077.g, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.vii, 11.8.a, 11.8.b, 11.8.e.

¹⁴ Panel Report, paras. 8.931, 8.933, 8.1077.g, 9.277, 9.297, 9.333-9.335, 9.472, 9.484, 9.486(d), 9.487(a), 9.487(c), 11.7.c.vii, 11.8.a, 11.8.b, 11.8.e.

¹⁵ Panel Report, paras. 9.107, 9.312-9.314, 9.332, 9.333-9.335, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁶ Panel Report, paras. 9.307-9.314, 9.332, 9.333-9.335, 9.403 (footnotes 3323, 3329), 9.407, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁷ Panel Report, paras. 9.307-9.314, 9.332, 9.333-9.335, 9.403 (footnotes 3323, 3329), 9.407, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

¹⁸ Panel Report, paras. 9.315, 9.321-9.323, 9.326, 9.331, 9.332, 9.333-9.335, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

adverse effects arguments were "unsupported by the evidence and/or in contradiction with the findings made in the original proceeding".¹⁹

B. Role and Consequence of Product Market Delineation

17. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when interpreting those provisions to require that, as regards significant price suppression, price depression, or lost sales, "a subsidized product can only cause serious prejudice to another product if the two products in question compete in the same market".²⁰

C. Collective Assessment of Effects of Multiple Subsidies

18. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement* in identifying "aggregation" and "cumulation" as the only two permissible approaches to assess collectively the effects of multiple subsidies.²¹

D. Causation Standard for Lost Sales

19. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that there must be "no non-price factors that explain Boeing's success in obtaining the sale" in order for the subsidies at issue to be found to cause significant lost sales.²²

E. Price Effects

20. The Panel erred in the interpretation of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that the European Union had failed to demonstrate that the untied state and local cash flow subsidies and the untied post-2006 aeronautics R&D subsidies resulted in lower prices for Boeing LCA.²³
21. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that the European Union had failed to demonstrate that the untied state and local cash flow subsidies and the untied post-2006 aeronautics R&D subsidies resulted in price effects.²⁴
22. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that the European Union had failed to demonstrate that the untied state and local cash flow subsidies and the untied post-2006 aeronautics R&D subsidies resulted in price effects.²⁵

F. Technology Effects

23. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding that the "technology effects" of the pre-2007 US aeronautics R&D subsidies, which were found in the original proceedings to have accelerated the development of technologies

¹⁹ Panel Report, paras. 9.315, 9.321-9.323, 9.326, 9.331, 9.332, 9.333-9.335, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁰ Panel Report, paras. 9.33, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²¹ Panel Report, paras. 9.62, 9.89, 9.93, 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²² Panel Report, paras. 9.240, 9.241, 9.242, 9.243, 9.246, 9.250-9.252, 9.292, 9.293, 9.333-9.335, 9.379, 9.380, 9.383, 9.426, 9.446, 9.458, 9.477 (footnote 3433), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²³ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.293, 9.297-9.298, 9.333-9.335, 9.470, 9.472, 9.474, 9.475, 9.476, 9.483, 9.484, 9.485, 9.486(c), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁴ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.293, 9.297-9.298, 9.333-9.335, 9.470, 9.472, 9.474, 9.475, 9.476, 9.483, 9.484, 9.485, 9.486(c), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁵ Panel Report, paras. 9.271, 9.273, 9.277, 9.288, 9.291, 9.293, 9.297-9.298, 9.333-9.335, 9.470, 9.472, 9.474, 9.475, 9.476, 9.483, 9.484, 9.485, 9.486(c), 9.486(d), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

applied on the 787-8/9, do not continue to cause adverse effects in the post-implementation period.²⁶

24. The Panel failed to make an objective assessment of the matter under Article 11 of the DSU, when finding that the "technology effects" of the pre-2007 US aeronautics R&D subsidies, which were found in the original proceedings to have accelerated the development of technologies applied on the 787-8/9, do not continue to cause adverse effects in the post-implementation period.²⁷
25. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, based exclusively on the counterfactual launch date of the 787 and without consideration of the counterfactual timing of deliveries, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.²⁸
26. The Panel failed to make an objective assessment under Article 11 of the DSU, when finding, based exclusively on the counterfactual launch date of the 787 and without consideration of the counterfactual timing of deliveries, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.²⁹
27. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, based on evidence regarding the time required to *further develop and mature certain technologies at already advanced stages of technology development*, rather than evidence regarding the time required to *conduct early-stage fundamental R&D for such technologies*, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³⁰
28. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when finding, based on evidence regarding the time required to *further develop and mature certain technologies at already advanced stages of technology development*, rather than evidence regarding the time required to *conduct early-stage fundamental R&D for such technologies*, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³¹
29. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when finding, based on a failure to consider the proper sequence of technology development, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³²
30. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when finding, based on a failure to consider the proper sequence of technology

²⁶ Panel Report, paras. 9.128, 9.152, 9.153, 9.156, 9.157, 9.158, 9.161, 9.162, 9.163, 9.164, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.333-9.335, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁷ Panel Report, paras. 9.128, 9.152, 9.153, 9.156, 9.157, 9.158, 9.161, 9.162, 9.163, 9.164, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.333-9.335, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁸ Panel Report, paras. 9.128, 9.152, 9.153, 9.157, 9.161, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

²⁹ Panel Report, paras. 9.128, 9.152, 9.153, 9.157, 9.161, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁰ Panel Report, paras. 9.128, 9.161, 9.162 (referring to paras. 9.136, 9.139), 9.163, 9.164, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³¹ Panel Report, paras. 9.128, 9.161, 9.162 (referring to paras. 9.136, 9.139), 9.163, 9.164, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³² Panel Report, paras. 9.128, 9.152, 9.161, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

development, that the "technology effects" of the pre-2007 US aeronautics R&D subsidies do not continue in the post-implementation period.³³

31. The Panel erred in the application of Articles 7.8, 5, and 6.3 of the *SCM Agreement*, when accepting the United States' estimate of the counterfactual launch date of the 787 on the basis that the European Union did not "*itself* enumerate the specific additional tasks that Boeing should have reflected in its assessment" and did "not provide evidence of how long Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes".³⁴
32. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when accepting the United States' estimate of the counterfactual launch date of the 787 on the basis that the European Union did not "*itself* enumerate the specific additional tasks that Boeing should have reflected in its assessment" and did "not provide evidence of how long Boeing would have needed to conduct any of the R&D tasks that were actually performed under the NASA and DOD aeronautics R&D programmes".³⁵
33. The Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, when it misconstrued a European Union argument in the original proceedings, in support of its finding that "the acceleration effect of the pre-2007 aeronautics R&D subsidies in relation to Boeing's technology development for the 787, has {not} continued into the post-implementation period".³⁶

³³ Panel Report, paras. 9.128, 9.152, 9.161, 9.165, 9.166, 9.170, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁴ Panel Report, paras. 9.128, 9.153, 9.158, 9.162, 9.163, 9.164, 9.165, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁵ Panel Report, paras. 9.128, 9.153, 9.158, 9.162, 9.163, 9.164, 9.165, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).

³⁶ Panel Report, paras. 9.156, 9.173, 9.176-9.177, 9.184-9.186, 9.197, 9.218-9.220, 9.352-9.355, 9.373, 9.486(a), 9.487(a), 9.487(c), 11.8(a)-(b), 11.8(e).