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UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

NOTIFICATION OF AN OTHER 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), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication, dated 17 January 2017, from the delegation of the European Union, is being circulated to Members.

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 Report[1]:

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 condition[4] *de jure* contingent on the use of domestic over imported goods.[5]

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[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).

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 condition[6] *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 condition[8] *de facto* contingent on the use of domestic over imported goods, within the 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.

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[6] See footnote 3, above.
[7] Panel Report, paras. 7.291, 7.330, 7.342-7.345.
[8] See footnote 3, above.
[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).