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UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

NOTIFICATION OF AN APPEAL BY THE UNITED STATES 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 16 December 2016, from the Delegation of the United States, is being circulated to Members.

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

[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.

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]

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 Provision[8] 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.

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[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.
[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.