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Chairman: Mr. Junichi Ihara (Japan)

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1 UNITED STATES – CONDITIONAL TAX INCENTIVES FOR LARGE CIVIL AIRCRAFT

A Report of the Appellate Body (WT/DS487/AB/R and WT/DS487/AB/R/Add.1) and Report of the Panel (WT/DS487/R and WT/DS487/R/Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS487/10 transmitting the Appellate Body Report in the dispute: "United States – Conditional Tax Incentives for Large Civil Aircraft", which had been circulated on 4 September 2017 in document WT/DS487/AB/R and Add.1, in accordance with Article 17.5 of the DSU. The Chairman recalled that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU and Article 7.7 of the SCM Agreement, as applicable to this case, required that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 20 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

1.2. The representative of the European Union said that his delegation considered that, now more than ever, the WTO needed a dispute settlement system that was mandatory, binding and independent, that strove to be objective, and that was properly resourced. The EU remained as committed as ever to those principles, with respect to all aspects of the design and operation of the overall system, as well as the disposition of individual cases. The EU believed that all Members, and all other actors within the system, shared or should share this perspective. Nevertheless, the EU was very surprised and disappointed with the result in this particular dispute. Normally, the EU would refrain from commenting in great detail. However, in this particular instance, the EU was compelled to make certain observations.

1.3. The first observation concerned paragraph 5.17 of the Appellate Body Report, which could be taken to suggest that the analysis of contingency was different under Articles 3.1(a) (export subsidies) and 3.1(b) (import substitution subsidies) of the SCM Agreement. The EU found such a proposition to be highly problematic. In the EU's view, given that adverse impact was generally presumed pursuant to Article 3.8 of the DSU, WTO cases were always about what measures at

issue implied for competitive opportunities. That was, they were about what the design and architecture of the measure implied for future trade. It had never been the case that complainants had to wait for a measure to have actual effects before initiating dispute settlement proceedings. The EU thought that this was true irrespective of whether the case was a *de jure* case or a *de facto* case. Thus, even if the "geared to induce" language used with respect to Article 3.1(a) of the SCM Agreement had found some additional support in the term "anticipated" in footnote 4, it was at the same time a specific expression of the more general principle that the EU had just outlined. Therefore, while it agreed that the legal "test" consisted of the terms actually used by the treaty, and that the "geared to induce" language was a useful analytic tool that did not in itself answer the question under either Article 3.1(a) or 3.1(b), the EU did not agree that the concept of contingency was different in the two provisions. Both parties and all third parties in this dispute had agreed with this proposition, which the EU thought was self-evident. The EU considered that any determination to the contrary would constitute manifest legal error.

1.4. The second observation concerned the three reasons given in paragraph 5.79 of the Appellate Body Report. With respect to the first reason, given that the second siting provision had made the subsidy in this case conditional on the production or assembly of the wing in Washington State, and thus not in any other WTO Member, the EU did not understand why that had not constituted a breach of Article 3.1(b). Nor did the EU understand why that conclusion might change as a function of the three factors to which the Appellate Body had referred: (i) the existence of a multi-stage production process; (ii) the level of specialization of the subsidized inputs; and (iii) the level of integration of the manufacturing and assembly chain in the aircraft industry. With respect to the second reason, the EU did not understand how a US hypothetical that it could make the wing in Washington State, export it for painting, then re-import it, without losing the subsidy, had any bearing on the plain language of the second siting condition. With respect to the third reason, the EU again did not understand how a US hypothetical regarding an isolated instance of final assembly outside Washington State had any bearing on the plain language of the second siting condition.

1.5. The third observation concerned the Appellate Body's use of the term "consequence". The EU agreed that the economic consequences of a subsidy were not caught by the prohibition in Article 3.1(b). Thus, the EU agreed that a production subsidy to a local input that increased the supply and lowered the price of that local input, making it more attractive and displacing imports was not caught by the prohibition. However, the EU did not think this should be confused with the legal consequence associated with a contingency. In this dispute, that legal consequence was clear: use of one imported wing would have entailed the loss of the subsidy. This was something that, in effect, the United States had admitted in this particular case. For these reasons, as and when future disputes arose under Article 3.1(b) of the SCM Agreement, and panels were generally called upon to apply the guidance contained in this Appellate Body Report, the EU anticipated that panels would be sure to give more extensive consideration to any explanations emanating from the defendant and relating to the matters referred to by the Appellate Body, no matter how far-fetched they may be. However, having done so, the EU also firmly anticipated that, faced with the kind of fact pattern arising in this dispute, such panels would affirm a breach of Article 3.1(b). In other words, the EU firmly anticipated that this Appellate Body Report would not be construed as a blank cheque for protectionism and the disruption of the global supply chains that had such a central role to play in the modern and evolving international trading system. Rather, the EU hoped that this particular Report would prove unique, and, in essence, a dead end.

1.6. The representative of the United States said that the United States would like to begin by thanking the members of the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work during this proceeding. In a way, the United States was pleased that the EU had requested the DSB to adopt these Panel and Appellate Body Reports at the present meeting. The Reports, after all, affirmed the US position in this dispute: that the United States had not granted prohibited subsidies to Boeing. While the United States was not convinced that this item was an efficient use of Members' time, it nonetheless took the opportunity to explain why the EU had lost this dispute. First, before the Panel, the EU had challenged certain measures of the state of Washington, specifically: (i) a reduction in the business and occupation (B&O) tax rate that applied to business activities concerning the manufacture and sale of commercial airplanes; and (ii) other tax credits or exemptions relating to product development activities, property and leasehold taxes, and sales and use taxes. The EU had claimed that these tax incentives were

prohibited import-substitution subsidies under Articles 3.1(b) and 3.2 of the SCM Agreement.[1] The Panel had fundamentally disagreed.

1.7. The United States said that the Panel, looking carefully at the evidence and arguments, had found that the EU had failed to demonstrate that any of the tax measures were *de jure* contingent upon the use of domestic over imported goods. The Panel had therefore dismissed all of the EU's case except for one *de facto* prohibited subsidy claim on one tax measure. The EU had appealed all of the claims that it had lost before the Panel, and the Appellate Body had rejected all of the EU's appeals. The United States had appealed the Panel's one *de facto* prohibited subsidy finding, and the Appellate Body had reversed the Panel's finding on that one issue. The Appellate Body had determined that the Panel had relied on an incorrect legal interpretation of what it meant for a subsidy to be "contingent" on "the use of domestic over imported goods." The Appellate Body had explained that under the WTO Agreement, "something more than mere subsidization of domestic production is required for finding an import substitution subsidy". This was consistent with the view of the United States and third-parties that a requirement that a manufacturer undertake certain activities in a territory beyond final production in order to receive an incentive did not, in itself, establish the existence of a condition requiring the use of domestic over imported goods. Thus, as a result of the Panel's findings, unsuccessfully challenged by the EU on appeal, and as a result of the Appellate Body's findings, reversing the Panel's one prohibited subsidy finding, all of the EU's claims in this dispute had been rejected.

1.8. The United States welcomed the Panel and Appellate Body's findings in this dispute. It was not often that a WTO complaining party lost all of its claims. But the EU had long pursued claims at the WTO to validate its view that the EU's many billions of dollars in subsidized financing for Airbus were comparable to supposed US subsidies to Boeing. At each stage, the WTO had found that there was no comparison – the value and adverse effects of any US support were far less than the value and adverse effects of the EU's subsidies. The United States said that Members may recall that in June 2017, a compliance Panel in the challenge brought by the EU had found that 28 of 29 US programs were consistent with WTO rules and had found that only a single Washington State tax program had limited effects contrary to WTO rules. The EU had promptly appealed its own "win" in that compliance challenge. The United States said that it looked forward to the outcomes in the pending appeals in the compliance proceedings that were currently underway. The United States said that it took the opportunity under this Agenda item to renew its call to the EU to finally negotiate and find a solution that would end all its WTO-inconsistent subsidies.

1.9. The representative of Canada said that his country wished to thank the Panel, the Appellate Body and the Secretariat for their work in this dispute. As a third party in this dispute, Canada welcomed the Appellate Body's finding that a subsidy that simply required the production by the recipient of both specialized input goods and final goods did not violate Article 3.1(b) of the SCM Agreement.

1.10. The DSB took note of the statements and adopted the Appellate Body Report contained in document WT/DS487/AB/R and Add.1 and the Panel Report contained in document WT/DS487/R and Add.1, as modified by the Appellate Body Report.

2 CHINA – TARIFF RATE QUOTAS FOR CERTAIN AGRICULTURAL PRODUCTS

A Request for the establishment of a panel by the United States (WT/DS517/6)

2.1. The Chairman recalled that the DSB had considered this matter at its meeting on 31 August 2017 and had agreed to revert to it. He drew attention to the communication from the United States contained in document WT/DS517/6 and invited the representative of the United States to speak.

2.2. The representative of the United States said that, as had been stated at the 31 August 2017 DSB meeting, the United States had serious concerns regarding China's administration of its tariff-rate quotas for wheat, short- and medium-grain rice, long-grain rice, and corn. When China joined the WTO, it had committed to remove its import restrictions and to operate its tariff-rate quotas in a transparent, predictable, fair, and reasonable manner. But the reality appeared to be

[1] Agreement on Subsidies and Countervailing Measures.

very different. Instead, China was failing to live up to basic WTO commitments on import restrictions and tariff-rate quota administration, denying farmers and traders the full market access for agricultural products China had committed to when it joined the WTO. The US panel request explained that China did not administer these tariff-rate quotas consistently with its commitments in its Accession Protocol or with the GATT 1994 and specified the US claims under these agreements. Accordingly, the United States requested at the present meeting, for the second time, that the DSB establish a panel to examine the matter set out in its panel request, with standard terms of reference.

2.3. The representative of China said that his country regretted the US request for the establishment of a panel in this dispute. China said that it was disappointed by the United States' consecutive challenges to China's legitimate measures with respect to vital agricultural staples including rice, wheat and corn. Indeed, since its accession to the WTO, China had taken the fulfilment of its commitments concerning the administration of TRQs for the agricultural products mentioned above seriously. China would defend its interests and demonstrate the WTO-consistency of its measures before the Panel.

2.4. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

2.5. The representatives of Australia, Brazil, Canada, Ecuador, the European Union, Guatemala, Indonesia, Japan, Kazakhstan, Korea, Norway, the Russian Federation, Singapore, Chinese Taipei and Viet Nam reserved their third-party rights to participate in the Panel's proceedings.