

UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

Second Recourse to Article 21.5 of the DSU by the European Communities

Request for the Establishment of a Panel

The following communication, dated 13 January 2005, from the delegation of the European Communities to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

1. THE HISTORY OF THE DISPUTE

On 8 October 1999, the Panel in this dispute found that the United States of America's "Foreign Sales Corporations" scheme violated Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (the "*SCM Agreement*") and Article 3.3 of the Agreement on Agriculture [WT/DS108/R]. On 24 February 2000 the Appellate Body confirmed the findings of the Panel with respect to the violations of the *SCM Agreement* and modified the findings concerning the Agreement on Agriculture, concluding that the Foreign Sales Corporations scheme violated Articles 10.1 and 8 of the Agreement on Agriculture [WT/DS108/AB]. On 20 March 2000, the Dispute Settlement Body (the "DSB") adopted the Appellate Body report and the report of the Panel, as modified by the Appellate Body. The resulting DSB recommendations and rulings include the recommendation that the United States bring its measures found to be inconsistent with the *SCM Agreement* and the Agreement on Agriculture into conformity with the provisions of those agreements, and that the United States withdraw its export subsidies at the latest with effect from 1 October 2000.

On 12 October 2000, at a special session, the DSB agreed to the United States' request to allow it a time period expiring on 1 November 2000 to implement the DSB recommendations and rulings.

On 15 November 2000, the President of the United States signed into law the FSC Repeal and Extraterritorial Income Exclusion Act of 2000, US Public law No 106-519 (the "ETI Act").

On 20 December 2000, the matter was referred back to the Panel under Article 21.5 of the DSU and on 29 January 2002 the DSB adopted the Panel [WT/DS108/RW] and Appellate Body [WT/DS108/AB/RW] reports declaring that the ETI Act violates Articles 3.1(a), 3.2 and 4.7 of the *SCM Agreement*, Articles 8, 10.1 and 3.3 of the Agreement on Agriculture and Article III:4 of the General Agreement on Tariffs and Trade 1994 (the "GATT 1994"), so that the US had failed to fully withdraw its prohibited subsidy scheme and failed to implement DSB recommendations and rulings in this dispute.

On 22 October 2004, the United States enacted the "the American JOBS Creation Act of 2004" (the "JOBS Act"). In purported implementation of the above DSB recommendations and rulings

in case WT/DS108, the JOBS Act fails to properly implement them and is inconsistent with the same provisions of the *WTO Agreement* as its predecessor legislation.

2. THE SUBJECT OF THE DISPUTE

Section 101 of the JOBS Act purports to repeal the ETI Act (Section 101 (a)). However, at the same time, it effectively maintains part of the ETI Act tax exemptions for a transitional period up to the end of 2006 (Section 101 (d)). Furthermore, the repeal of the ETI Act does not apply to certain contracts, without any time limits (Section 101(f)).

In the light of the above, the European Communities considers that Section 101 of the JOBS Act contains provisions which will allow US exporters to continue benefiting from the tax exemptions already found to be WTO incompatible (a) in the years 2005 and 2006 with respect to all transactions, and (b) for an indefinite period with respect to certain contracts. Thus, the United States has failed to implement the DSB's recommendations and rulings by failing to withdraw without delay schemes found to be prohibited subsidies under the *SCM Agreement* and to bring its legislation into conformity with its obligations under the *SCM Agreement*, the Agreement on Agriculture and the GATT 1994.

3. REQUEST FOR THE ESTABLISHMENT OF A PANEL

On 5 November 2004, the European Communities requested consultations with the United States of America with a view to reaching a mutually satisfactory solution of the matter. The request was circulated in document WT/DS/108/27 dated 10 November 2004. Consultations were held on 11 January 2005 in Geneva. They have allowed a better understanding of the respective positions but have not led to a satisfactory resolution of the matter.

Therefore, there continues to be "a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB between the United States and the European Communities, within the meaning of Article 21.5 of the DSU.

Accordingly, pursuant to Articles 6 and 21.5 of the DSU, Article 4 of the *SCM Agreement*, Article 19 of the Agreement on Agriculture and Article XXIII of the GATT 1994, the European Communities hereby requests the establishment of a Panel. In particular, the European Communities respectfully requests the Panel to find the following:

- that the United States has failed to withdraw its prohibited subsidies as required by Article 4.7 of the *SCM Agreement*, has failed to bring its scheme into conformity with its WTO obligations and has thus failed to implement the DSB's recommendations and rulings, as specified by the DSB on 20 March 2000 and on 29 January 2002, as required by Articles 19.1 and 21.1 of the *DSU*.
- that the United States continues to violate Articles 3.1(a) and 3.2 of the *SCM Agreement*, Articles 10.1, 8 and 3.3 of the Agreement on Agriculture and Article III:4 of the GATT 1994.

In accordance with Article 21.5 of the DSU, the European Communities requests that this matter be referred to the original Panel. It further requests that the Panel examines the matter above in accordance with the standard terms of reference set out in Article 7 of the DSU.

The European Communities asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 25 January 2005.
