

UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

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

Notification of an Other Appeal by the European Communities under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 28 November 2005, from the Delegation of the European Commission, is being circulated to Members.

1. Pursuant to Article 16.4 and Article 17 of the DSU and to Rule 23.1 of the Working Procedures for Appellate Review, the European Communities submits its Notice of Other Appeal on certain issues of law in the Report of the Panel on *United States – Tax Treatment for "Foreign Sales Corporations": Second recourse to Article 21.5 of the DSU by the European Communities*¹ and certain legal interpretations developed by the Panel.

2. The European Communities agrees with the Panel's findings of continued violation and inconsistency and its conclusion that there is a continuing failure to implement DSB recommendations and rulings, as well as with the Panel's rejection of the US procedural defences. However, if the Appellate Body were to uphold any of the US claims on appeal, the European Communities considers that it would become necessary for the Appellate Body to consider certain other issues in order to resolve this dispute. For this reason, the European Communities requests the Appellate Body, in the event that it should reverse any of the Panel's findings, to consider the following claims:

- (a) By not entirely withdrawing FSC and ETI subsidies, the United States has failed to comply with its obligations under Article 4.7 of the *SCM Agreement*;²
- (b) By not entirely withdrawing FSC and ETI subsidies and maintaining the less favourable treatment of imported as compared to domestic products, the United States has failed to comply with its obligations under Articles 19.1 and 21.1 of the *DSU*.³

3. Furthermore, for the case the Appellate Body considered that the Panel was in error in concluding that no new recommendations under Article 4.7 of the *SCM Agreement* or Article 19.1 of the DSU are needed,⁴ the European Communities respectfully requests the Appellate Body to correct the error and issue the necessary recommendations.

¹ WT/DS 108/RW2, circulated on 30 September 2005.

² Which the Panel did not address in its Report (see WT/DS108/29, 14 January 2005).

³ On which the Panel exercised judicial economy (see e.g. Panel Report, footnote 84).

⁴ See e.g. Panel Report, paras. 7.37-7.46, 7.49, 7.52-7.58, 8.2.

4. The European Communities considers that if the Appellate Body were to find that the Panel had erred, this would mean that the Panel had not conducted its assessment of the matter in accordance with Article 11 of the DSU and had not contributed to an effective resolution of the dispute within the meaning of Article 3 of the DSU.
