ANNEX C

THIRD PARTY SUBMISSIONS

ANNEX C-1

THIRD PARTY SUBMISSION OF AUSTRALIA

(9 June 2005)

TABLE OF CONTENTS

1. Introduction

1. This submission concentrates on three issues of relevance to this proceeding.

2. First, it considers the mandate of an Article 21.5 proceeding. Second, it considers whether the United States is under any obligation to withdraw the ETI scheme. Third, it discusses the relevance of section 5 of the *ETI Act*.[1]

2. The Mandate of an Article 21.5 Proceeding

3. The mandate of an Article 21.5 proceeding is to adjudicate on disputes "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB.

4. Australia submits that the "recommendations and rulings" referred to are those made by the original Panel and Appellate Body (if the Panel decision was appealed), as adopted by the DSB. In this dispute, the relevant "recommendations and rulings" are those made by the DSB on 20 March 2000 when it adopted the Panel and Appellate Body reports in *United States – Tax Treatment of "Foreign Sales Corporations"*.[2] In relevant part, those recommendations and rulings were that:

[1] In this submission, the term "*ETI Act*" is used to refer to the *FSC Repeal and Extraterritorial Income Exclusion Act of 2000*.

[2] WT/DS108/R and WT/DS108/AB/R, respectively (the "Panel Report" and "Appellate Body Report", respectively).

(a) the FSC subsidies be withdrawn at the latest with effect from 1 October 2000;[3] [4] and

(b) the United States bring the FSC measure into conformity with its obligations under the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*") and the *Agreement on Agriculture*.[5]

5. Hence, the purpose of the current Article 21.5 proceeding is to decide whether certain measures that the United States has taken to comply with the recommendations and rulings set out above are consistent with the covered agreements. For its part, the EC has argued that the grandfathering of the FSC scheme and the transition and grandfathering provisions of the ETI scheme are inconsistent with 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 *GATT 1994*.[6]

6. The United States does not contest that the grandfathering of the FSC scheme and the transition and grandfathering provisions of the ETI scheme are measures taken to comply with the DSB's original recommendations and rulings. Under those circumstances, the measures at issue come within the mandate of an Article 21.5 proceeding.

7. In addition, the United States does not appear to contest that the grandfathering of the FSC scheme and the transition and grandfathering provisions of the ETI scheme are inconsistent with 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 *GATT 1994*. The Panel should therefore uphold the EC's arguments in this respect.

3. Is the United States Under an Obligation to Withdraw the ETI Scheme?

8. The United States submits that in order for it to be under any obligation to withdraw the ETI scheme it would have been necessary for the Panel Report (First Article 21.5)[7] to make a finding under Article 4.7 of the *SCM Agreement*.[8] It follows that the Article 21.5 Panel would have been required to "specify … the time-period within which the measure must be withdrawn".[9] The United States' argument would thus require that it be given a period of time to withdraw the ETI scheme (e.g. from the adoption of the Article 21.5 reports until the first practicable date by which the United States could have withdrawn the ETI scheme). However, such a ruling would be outside the Article 21.5 mandate, which is to decide whether "measures taken to comply with the recommendations and rulings" of the DSB exist or are consistent with a covered agreement.

9. Once a decision has been made, as in this dispute, that a measure "taken to comply" is inconsistent with a covered agreement, it necessarily follows that the Member has failed to take "measures … to comply with the recommendations and rulings"[10] of the DSB in the original proceeding and that the original, and any replacement, measures must be brought into consistency immediately.

---

[3] Paragraph 8.8 of the Panel Report.

[4] At its meeting on 12 October 2000, the DSB acceded to the United States' request to extend until 1 November 2000 the time by which the United States was required to comply with the DSB's recommendations and rulings (see WT/DSB/M/90).

[5] Paragraph 178 of the Appellate Body Report.

[6] Paragraphs 36, 46, 58, 59 and 69 of the First Written Submission of the European Communities. See also the second dash point on page 2 of the EC's Request for the Establishment of a Panel.

[7] Panel Report in *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108/RW).

[8] Paragraph 19 of the First Written Submission of the United States of America.

[9] As required by the second sentence of Article 4.7 of the *SCM Agreement*.

[10] See Article 21.5 of the *DSU*.

10. Australia thus submits that the obligation to withdraw the ETI scheme arises from the fact that the Panel Report (First Article 21.5) and Appellate Body Report (First Article 21.5)[11], as adopted by the DSB, found that the ETI scheme violated the covered agreements (including Article 3 of the *SCM Agreement*).

11. As stated by the Panel in *Australia – Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada*:[12]

> "The text [of Article 21.5 of the *DSU*] refers generally to "consistency with a covered agreement". The *rationale* behind this is obvious: a complainant, after having prevailed in an original dispute, should not have to go through the entire DSU process once again if an implementing Member in seeking to comply with DSB recommendations under a covered agreement is breaching, inadvertently or not, its obligations under other provisions of covered agreements. In such instances an expedited procedure should be available. This procedure is provided for in Article 21.5. It is in line with the fundamental requirement of "prompt compliance" with DSB recommendations and rulings expressed in both Article 3.3 and Article 21.1 of the DSU".[13]

12. A similar point was made by the Panel in *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India - Recourse To Article 21.5 of the DSU by India*[14] when it stated that:

> "[A] Member found to have violated a provision in an Article 21.5 proceeding pursuant to a claim that could have been pursued in the original dispute but was not would be deprived of the opportunity to seek a mutually acceptable solution, of the opportunity to bring its measure into conformity, and might, depending on the nature of the violation, be subjected to suspension of concessions".[15]

13. A recommendation or ruling under Article 4.7 of the *SCM Agreement* for the United States to withdraw the ETI scheme would have been outside the mandate of a panel constituted under Article 21.5 of the *DSU*. The requirement for the United States to withdraw the ETI scheme follows logically from the fact that it was required to withdraw the FSC scheme – a replacement for the FSC scheme that is itself a violation of a covered agreement should not have been granted or maintained. The United States cannot argue that such a measure should not be withdrawn.

4. The Relevance of Section 5 of the *ETI Act*

14. In defence of the EC's assertions regarding the grandfathering of the FSC scheme, the United States asserts that section 5 of the *ETI Act* is not within the Panel's terms of reference.[16]

15. Australia notes that section 5 of the *ETI Act* sets up, amongst other things, the grandfathering of the FSC scheme. The Panel Report (First Article 21.5) and Appellate Body Report (First Article 21.5) have already found this grandfathering to be a violation of the covered agreements.[17]

---

[11] Appellate Body Report in *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108/AB/RW).

[12] WT/DS18/RW.

[13] Paragraph 7.10, subparagraph 9.

[14] WT/DS141/RW.

[15] Paragraph 6.45.

[16] Paragraph 20 of the First Written Submission of the United States of America.

[17] Paragraph 9.1(e) of the Panel Report (First Article 21.5) and paragraph 256(f) of the Appellate Body Report (First Article 21.5).

16. Australia also notes that it is section 101 of the *Jobs Act*[18] that fails to repeal section 5 of the *ETI Act*. The former section was mentioned in the EC's request for the establishment of a panel.

5. Conclusion

17. The mandate of an Article 21.5 proceeding is to adjudicate on disputes "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. Given the absence of any defence from the United States, the Panel should uphold the EC's arguments that the grandfathering of the FSC scheme and the transition and grandfathering provisions of the ETI scheme are inconsistent with 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 *GATT 1994*.

18. A ruling under Article 4.7 of the *SCM Agreement* in the Panel Report (First Article 21.5) would have been outside of the mandate discussed above. The requirement for the United States to withdraw the ETI scheme follows logically from the fact that the United States was required to withdraw the FSC scheme and that its replacement, the ETI scheme, also violates the covered agreements.

19. The Panel Report (First Article 21.5) and Appellate Body Report (First Article 21.5) have already found the grandfathering of the FSC scheme to be a violation of the covered agreements.[19]

[18] The term "*Jobs Act*" is used to refer to the *American Jobs Creation Act of 2004*.

[19] Paragraph 9.1(e) of the Panel Report (First Article 21.5) and paragraph 256(f) of the Appellate Body Report (First Article 21.5).

ANNEX C-2

THIRD PARTY SUBMISSION OF BRAZIL

(9 June 2005)

TABLE OF CONTENTS

I. INTRODUCTION

1. Brazil, as a third party, offers its contribution in view of systemic interests in the discussions to be held and the interpretations to be developed by parties and the Panel in this dispute. Brazil recalls, however, that in *United States – Subsidies on Upland Cotton* (DS 267), the *FSC Repeal and Extraterritorial Income Act of 2000* ("ETI Act"), which is at the very core of the present case brought by the European Communities (EC), constituted one of the measures Brazil claimed to be inconsistent with the Agreement on Agriculture ("AoA") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").[1]

2. In this submission, Brazil will limit itself to comment on the following issues:

(a) *Prompt* compliance as a core principle and central objective of the WTO dispute settlement mechanism; and

(b) The transition and "grandfathering" provisions in the *American Jobs Creation Act of 2004* ("AJCA") as an extension of a non-compliance situation.

3. Brazil reserves the right to present, at the third parties' session of the meeting with the Panel, more elaborated views or additional points.

[1] *See inter alia US – Subsidies on Upland Cotton,* Report of the Panel (WT/DS267/R, 8 September 2004), at para. 3.1(iv), and Report of the Appellate Body (WT/DS267/AB/R, 3 March 2005), at paras. 189-193.

II. *PROMPT* COMPLIANCE AS A CORE PRINCIPLE AND CENTRAL OBJECTIVE OF THE WTO DISPUTE SETTLEMENT MECHANISM

4. If a person not acquainted with the WTO dispute settlement mechanism were asked to comment on the relevance of the present dispute, it could well be that he or she would be tempted to classify this second recourse by the EC to Article 21.5 of the DSU on the FSC-related matters as a legal action of minor importance. Let us not be easily deceived, however, by the first impression caused by the conciseness of the first written submissions of the EC and the United States. These less-than-30-pages (in total) briefs cannot dismiss or disguise the density of the systemic implications this controversy has for all WTO Membership.

5. The United States is basically arguing that "*in the absence of any recommendation or ruling of withdrawal under Article 4.7* [of the SCM Agreement in the prior proceeding under Article 4 of the SCM Agreement and Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU")] *this Panel cannot find that the United States has failed to comply with a DSB recommendation or ruling to withdraw its prohibited subsidies*"[2] as a result of maintaining in the AJCA transition provisions that extend the life of previously found prohibited subsidies.

6. Brazil will submit in the next section that, as the United States itself recognizes, the AJCA is nothing more than a new chapter of the same story. But, first, Brazil wishes to draw the Panel's attention to the central role played by the principle and objective of *prompt* compliance within the WTO dispute settlement mechanism. It goes without saying that we find the United States to be in breach of the prompt compliance requirement under the DSU as regards both the original FSC dispute and its offspring.

7. The DSU drafters made it clear that *prompt* compliance is, at once, (i) one of the central tenets for the optimal functioning of the WTO dispute settlement mechanism and (ii) a fundamental objective of this mechanism. Such principle and objective not only permeates the whole system but is also enshrined in the text of several provisions of the Understanding. Article 3.3 summarizes what has just been stated:

> *The* **prompt** *settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is* **essential** *to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members*. (emphasis added)

8. Article 21.1, in turn, develops further such a principle in the context of implementation of the DSB's rulings and recommendations. It reads:

> **Prompt** *compliance with recommendations or rulings of the DSB is* **essential** *in order to ensure effective resolution of disputes to the benefit of all Members*. (emphasis added)

9. In addition, Articles 3.7 and 21.3 place the ***immediate withdrawal*** of the measure found to be WTO-incompatible or ***the immediate compliance*** with DSB's rulings and recommendations at the top of the objectives to be pursued in and by the system, in the absence of a mutually satisfactory solution.

---

[2] US First Written Submission, at para. 2.

10. In our view, these abundant references to the principle of *prompt* compliance are far from being a vain exercise of exhortatory style or text-embellishment. These textual references must be given concrete meaning where disputes take place. At a minimum, these provisions definitively demonstrate that long-standing non-compliance situations are in complete disconnection with the letter and spirit of the DSU. In fact, such situations operate against the very credibility of the system to the detriment of all WTO Members.

11. Should any WTO Member still oddly consider that the DSU does not provide a sufficient basis for the conclusion that *prompt* compliance is a critical feature of the WTO dispute settlement mechanism, it is noteworthy that the present dispute involves previous findings and conclusions relating to prohibited subsidies under the SCM Agreement. Given the inherently distorting nature of the prohibited subsidies, this Agreement is even more stringent than the DSU in respect of the *prompt* compliance requirement. Article 4.7 establishes that

> *If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time within which the measure must be withdrawn.*

12. In case a defendant Member does not implement the DSB's recommendation in a prohibited subsidy dispute within the time-period specified under Article 4.7, Article 4.10 of the SCM Agreement obliges the DSB to grant authorization to the complaining party to take appropriate countermeasures. These countermeasures are not bound by the more restrictive (to complaining parties' discretion) "equivalency test" under Article 22.4 of the DSU. Therefore, they may be even more onerous to the party complained against that a DSU-only suspension of concessions or other obligations.

III. THE TRANSITION AND "GRANDFATHERING" PROVISIONS IN THE *AMERICAN JOBS CREATION ACT OF 2004* ("AJCA") AS AN EXTENSION OF A NON-COMPLIANCE SITUATION

13. Brazil takes the EC's summary of the relevant sections of the AJCA as a fair and accurate description of the US measure under review.[3] The United States does not appear to disagree with that factual description.

14. According to the EC, the FSC scheme is, in part, still effective, since section 101 of the AJCA did not repeal section 5 of the ETI Act (entitled "Effective date"), thereby providing room for the continuation of the effects of the scheme of transactions relating to certain binding contracts entered into by FSCs in existence on 30 September 2000.[4]

15. The EC also points out other aspects of the AJCA, in particular the "grandfathering" provision contained in section 101(f) for the benefit of all transactions pursuant to a binding contract (1) which is between the taxpayer and a person who is not a related person, and (2) which is in effect on 17 September 2003, and at all times thereafter.[5]

16. As to the "grandfathering clause", the treatment of transactions involving FSCs in existence on 30 September 2000, and pursuant to a "binding contract", is sufficient to illustrate that both the FSC and ETI Act subsidies will continue to be available, at least, for some of the beneficiaries of the subsidies found to be WTO-incompatible by the original Panel in this dispute. Almost 5 years after the expiry of the time-period for the withdrawal of the FSC-prohibited subsidies, part of these

[3] *See* Section V of EC's First Written Submission.
[4] *See* paras. 36-37 of EC's First Written Submission.
[5] *See* para. 40 of EC's First Written Submission.

subsidies would still remain in place in the situation Brazil has just outlined. The two US legislations adopted purportedly to comply with the previous recommendations of the DSB in the case may have altered the original scenario, but have not withdrawn *in totum*, as required by the SCM Agreement and the DSU, the subsidies held illegal by the DSB.

17. The United States submits that it "*has not failed to comply with the DSB's recommendations and rulings, and the transition provisions of the AJCA are not inconsistent with Article 4.7 of the SCM Agreement, for the simple reason that* [...] *there was no DSB recommendation or ruling under Article 4.7 to withdraw the subsidy insofar as the ETI Act tax exclusion is concerned*."[6] The United States attempts to erroneously split into two completely separate cases a situation where the facts and circumstances show that the cases are part of one same continuum (FSC – ETI – AJCA).

18. Both the ETI Act and, now, the AJCA are measures taken to comply with the DSB's rulings and recommendations concerning the original proceedings. This is the premise on which hinges the Appellate Body's conclusion upholding the Panel's finding that the "*United States has not fully withdrawn the subsidies found, in the original proceedings, to be prohibited export subsidies under Article 3.1(a) of the* SCM Agreement, *and that the United States has, therefore, failed fully to implement the recommendations and rulings of the DSB made pursuant to Article 4.7 of the* SCM Agreement."[7] On this basis, the Appellate Body recommended the DSB to request the United States to implement fully the recommendations and ruling of the DSB in *US – FSC*, made pursuant to Article 4.7 of the SCM Agreement.[8]

19. The United States asserts that "*while the Article 21.5 Panel found that the ETI Act tax exclusion constituted a prohibited export subsidy, it did not make a recommendation pursuant to Article 4.7 that the subsidy be withdrawn* [...]".[9] In doing so, the United States is simply asking that a compliance panel - having found that a prohibited subsidy expected to be eliminated in light of the original panel's findings is still in place – should recommend – again! – that the very same (maybe under new clothes) prohibited subsidy be withdrawn. Consequently, the defendant would "deserve" a new time-period for removing the prohibited subsidy.

20. Brazil notes that, as recalled in paragraph 18 above, the ETI Act Panel found that the United States has not fully withdrawn the subsidies found, *in the original proceedings*, to be prohibited export subsidies, and that the United States has, therefore, failed to fully implement the recommendations and rulings of the DSB made pursuant to Article 4.7 of the SCM Agreement.

21. This being the case, the US argument in the *present proceedings* amounts to claiming that the ETI Act proceedings should have resulted in DSB's recommendations or rulings adding to US rights under the covered agreements, in violation to Article 19.2 of the DSU, through an extension of the time-period for the full withdrawal of the prohibited FSC subsidies.[10]

IV. CONCLUSION

22. In light of the above, Brazil considers that this Panel should find that the United States has not yet fully withdrawn the subsidies found to be WTO-incompatible in previous proceedings relating to the matter being dealt with in the present dispute. Accordingly, the Panel should recommend the

---

[6] *See* para. 10 of US first written submission.

[7] *See* Report of the Appellate Body in *US – Tax treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the EC* (WT/DS108/AB/RW, 14 January 2002), at para. 256(f).

[8] *Idem*, at para. 257.

[9] *See* para. 14 of the US first written submission.

[10] *See* also para. 228 of the Report of the Appellate Body in *US – FSC – Recourse to Article 21.5 of the DSU by the EC* (WT/DS108/AB/RW).

United States to promptly abide by its multilateral commitments in accordance with the relevant provisions of the SCM Agreement and the DSU.

ANNEX C-3

THIRD PARTY SUBMISSION OF THE PEOPLE'S REPUBLIC OF CHINA

(9 June 2005)

1. China welcomes this opportunity to present its view on the dispute between the European Community and the United States concerning the implementation of the DSB recommendations or rulings in the case of *United States – Tax Treatment for "Foreign Sales Corporations"*.

2. Members agree to develop an integrated, more viable and durable multilateral trading system, since they believe that all members will preserve the principles and rules of such a system so that all members will benefit from such a system. In this regard, members are aware that "the dispute settlement system of the WTO is a central element in providing *security and predictability* to the multilateral trading system."[1] (*emphasis added*) That is the reason why effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members essentially relies on the prompt settlement of any dispute. However, dispute resolution does not end by the adoption of the DSB recommendations or rulings. "Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members."[2]

3. *The SCM Agreement* contain strict disciplines on export-contingent subsidies. A member shall neither grant nor maintain export subsidies, except as provided in *the Agreement on Agriculture*. Article 4 of *the SCM Agreement* includes proceedings for enforcement and remedies. Any measure founded to be prohibited subsidies must be withdrawn. To continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to "withdraw" prohibited subsidies.[3]

4. In regard to the situation in this case, China cannot share the view that "the United States has not failed to comply with the DSB's recommendations and rulings, and the transition provisions of the AJCA are not inconsistent with Article 4.7 of the SCM Agreement, for the simple reason that, … there was no DSB recommendation or ruling under Article 4.7 to withdraw the subsidy insofar as the ETI Act tax exclusion is concerned."[4]

5. The DSB made recommendations and rulings under article 4.7 when adopting the panel and Appellate Body report on 20 March 2000, which requested the US to withdraw the FSC subsidies within certain time-period. Subsequently, the United States enacted the ETI Act with a view to complying with the recommendations and rulings of the DSB in *US-FSC*. In the first compliance panel proceeding, the ETI scheme was found inconsistent with article 3.1(a) of the SCM Agreement and the US was requested to bring it into conformity with its obligations under relevant Agreement, including *the SCM Agreement*.[5]

---

[1] DSU Article 3.2.
[2] DSU Article 21.1.
[3] Brazil-Aircraft 21.5, AB Report para.45.
[4] US First Written Submission para. 10.
[5] US-FSC 21.5 AB Report para. 257.

6. Article 4.7 of *the SCM Agreement* requires prohibited subsidies to be withdrawn "without delay", and provides that a time-period for such withdrawal shall be specified by the panel.[6] The obligation to withdraw prohibited subsidies without delay is not released simply because the first compliance panel did not specify a time-period in its conclusion. The party concerned failed to fully implement the DSB recommendations and rulings by introducing transition period and grandfathering provisions for FSC scheme, an export subsidy measure. How can transition period and grandfathering provisions for another prohibited subsidy measure be justified?

7. The Appellate Body has made it clear why a long transition period and grandfathering provision are not in conformity with the obligation to withdraw the prohibited subsidies without delay. A Member's obligation under Article 4.7 of *the SCM Agreement* to withdraw prohibited subsidies "without delay" is unaffected by contractual obligations that the Member itself may have assumed under municipal law. Likewise, a Member's obligation to withdraw prohibited export subsidies, under Article 4.7 of *the SCM Agreement*, cannot be affected by contractual obligations which private parties may have assumed *inter se* in reliance on laws conferring prohibited export subsidies.[7]

8. China would like to conclude its submission by recalling that the primary objective of the dispute settlement mechanism is to secure the withdrawal of the measures found to be inconsistent with the covered agreements.

[6] US-FSC 21.5 AB Report para. 229.
[7] US-FSC 21.5 AB Report para. 229.