

## **UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"**

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

The following communication, dated 17 November 2000, from the Permanent Delegation of the European Commission to the Permanent Mission of the United States and to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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On 20 March 2000, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report and the Panel Report, as modified by the Appellate Body, in case WT/DS108 United States – Tax Treatment for "Foreign Sales Corporations". The resulting DSB recommendations and rulings include the recommendation that the United States bring its measures found to be inconsistent with the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and the Agreement on Agriculture into conformity with its WTO obligations, and that the United States withdraw the export subsidies at the latest with effect from 1 October 2000.

On 12 October 2000, in a special session, the DSB agreed to the US request to allow it a time period ending on 1 November 2000 to implement the DSB recommendations and rulings.

On 15 November 2000 the President of the United States signed an Act of the US Congress entitled FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the "FSC Replacement Act"). It is the EC understanding, as confirmed by US Ambassador to the WTO Mrs Hayes during the DSB meeting of 17 November 2000, that the United States considers this Act to bring the US into compliance with the DSB recommendations and rulings in case WT/DS108.

The European Communities strongly disagrees. The EC considers that the US has failed to comply with the above-mentioned DSB recommendations and rulings by 1 November 2000. Furthermore, the FSC Replacement Act appears to replicate the violations of the WTO Agreement found in the original dispute rather than remove them.

In particular, the European Communities' considers that:

- like the FSC scheme, the FSC Replacement Act results in the forgoing of tax revenue that is otherwise due, conferring a benefit to recipients. Therefore, the FSC Replacement Act provides subsidies within the meaning of Article 1 of the SCM Agreement and under the Agreement on Agriculture;
- the FSC Replacement Act provides subsidies which are contingent upon export performance contrary to Article 3.1(a) of the SCM Agreement and specifically related to export contrary to item (e) of Annex 1 of the SCM Agreement;

- the FSC Replacement Act provides subsidies contingent upon the use of domestic over imported goods contrary to Article 3.1(b) of the SCM Agreement;
- consequently, the FSC Replacement Act continues to grant and maintains subsidies, contrary to Article 3.2 of the SCM Agreement;
- the subsidies provided by the FSC Replacement Act also constitute export subsidies within the meaning of Articles 1(e) and 9.1(a) of the Agreement on Agriculture and are contrary to Articles 3, 8, and 10.1 of the Agreement on Agriculture;
- the FSC Replacement Act provides treatment less favourable to imported products than is accorded to like United States products, contrary to Article III:4 of GATT 1994;
- the FSC Replacement Act contains transitional provisions which allow companies to continue to benefit from the WTO incompatible FSC scheme beyond the 1 October 2000, thus failing to withdraw the subsidy and implement the DSB recommendations and rulings.

For all these reasons, the European Communities considers that the United States has failed to withdraw the subsidies as required by Article 4.7 of the SCM Agreement and has thus failed to comply with the DSB recommendations and rulings.

Nevertheless, and without prejudice to its rights under the WTO, the European Communities hereby requests the United States of America to enter into consultations under Articles 4 and 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article 4 of the SCM Agreement, Article 19 of the Agreement on Agriculture and Article XXIII:1 of GATT 1994 with respect to the FSC Replacement Act to discuss the above matter. A statement of available evidence as to the existence and nature of the subsidies is included in the Annex.

**ANNEX**

**Statement of available evidence**

The following evidence is available to the EC within the meaning of Article 4.2 of the SCM Agreement

1. Panel and Appellate Body Reports in WT/DS108.
  2. US statements to the DSB.
  3. The FSC Repeal and Extraterritorial Income Exclusion Act of 2000 as signed by the President.
  4. US budget for 2001.
  5. Congressional documents:
    - United States House of Representatives, Committee on Ways and Means, Report to accompany the FSC Repeal and Extraterritorial Income Exclusion Act 2000, H.R. 4986.
    - United States Senate, Finance Committee discussion leading to approval of modified text of the FSC Repeal and Extraterritorial Income Exclusion Act of 2000, H.R. 4986.
    - United States Senate, Finance Committee, Description of the FSC Repeal and Extraterritorial Income Exclusion Act 2000, H.R. 4986.
    - United States Senate, Finance Committee, Report to accompany the FSC Repeal and Extraterritorial Income Exclusion Act 2000, H.R. 4986.
    - Congressional Record of Nov. 14, 2000 on the House passage of the Senate Amendment to HR 4986 FSC Repeal and Extraterritorial Income Exclusion Act of 2000.
  6. Congressional Research Service Report "The Foreign Sales Corporations ("FSC") tax benefit for exporting and the WTO".
  7. US Internal Revenue Code provisions.
  8. US position paper on FSC sent to EU Member States.
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