

UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

Recourse to Article 21.5 of the DSU by the European Communities

Notification of an Appeal by the United States under paragraph 4
of Article 16 of the Understanding on Rules and Procedures
Governing the Settlement of Disputes

The following notification, dated 15 October 2001, sent by the Permanent Mission of the United States to the Dispute Settlement Body ("DSB"), is circulated to Members. This notification also constitutes the Notice of Appeal, filed on the same day with the Appellate Body, pursuant to the *Working Procedures for Appellate Review*.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108/RW) and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's findings that the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 ("ETI Act") involves export subsidies prohibited by Article 3.1(a) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and the corollary finding that the United States has acted inconsistently with its obligation under Article 3.2 of the *SCM Agreement*. These findings are in error, and are based upon erroneous findings on issues of law and on related legal interpretations with respect to various provisions of the *SCM Agreement* and other covered agreements, including:

- (a) the Panel's findings that the ETI Act's exclusion of extraterritorial income from tax constitutes the foregoing of revenue that is otherwise due within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*;
- (b) the Panel's findings that the ETI Act's exclusion of extraterritorial income from tax is contingent upon export performance within the meaning of Article 3.1(a) of the *SCM Agreement*;
- (c) the Panel's findings that the ETI Act's exclusion of extraterritorial income from tax is not a measure to avoid the double taxation of foreign-source income within the meaning of the fifth sentence of footnote 59 of the *SCM Agreement*, including the Panel's finding that the responding party bears the burden of proof with respect to establishing that the fifth sentence applies to that party's measure.

Should the Appellate Body reverse the Panel's finding referred to in paragraph 1(c), above, the United States respectfully requests that the Appellate Body complete the Panel's analysis and find that the

ETI Act's exclusion of extraterritorial income from tax is not a prohibited subsidy by virtue of footnote 5 of the *SCM Agreement*.

2. The United States seeks review by the Appellate Body of the Panel's findings and related legal interpretations that the ETI Act is inconsistent with U.S. obligations under Articles 8 and 10.1 of the *Agreement on Agriculture*.

3. The United States seeks review by the Appellate Body of the Panel's finding and related legal interpretations that the ETI Act is inconsistent with Article III:4 of the *General Agreement on Tariffs and Trade 1994*.

4. The United States seeks review by the Appellate Body of the Panel's finding and related legal interpretations that the United States has not fully withdrawn the FSC subsidies found to be prohibited export subsidies inconsistent with Article 3.1(a) of the *SCM Agreement* and has therefore failed to implement the recommendations and rulings of the DSB made pursuant to Article 4.7 of the *SCM Agreement*.
