

**UNITED STATES - TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"**

Recourse to Article 21.5 of the DSU by the European Communities

*Request for the Establishment of a Panel*

The following communication, dated 7 December 2000, from the Permanent Delegation of the European Commission to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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On 17 November 2000, the Ambassador to the WTO of the United States of America (US) informed the European Communities (EC) that on 15 November 2000 the US President signed into law H.R. 4986, the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the "FSC Replacement Act") and that the US considered that with this law it has implemented the recommendations and rulings of the WTO Dispute Settlement Body in *United States - Tax Treatment for "Foreign Sales Corporations"*, WT/DS108. The FSC Replacement Act was adopted 14 days after the extended deadline granted by the Dispute Settlement Body (DSB) to the US to implement the WTO recommendations and rulings on the above-mentioned dispute, i.e. 1 November 2000.

In the view of the EC, the FSC Replacement Act fails to bring the US into compliance with the DSB recommendations and rulings in *United States - Tax Treatment for "Foreign Sales Corporations"*, WT/DS108 and is inconsistent with the covered agreements. The FSC Replacement Act provides equally prohibited subsidies to US exporters as did the FSC scheme and introduced further prohibited subsidies to certain foreign corporations.

On 17 November 2000 the EC initiated the procedures under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) by requesting the United States to enter into consultations. The request was circulated in document WT/DS108/14 of 21 November 2000. Consultations were held on 4 December 2000 in Geneva. Consultations have allowed a better understanding of the respective positions but have failed to settle the dispute.

Accordingly, "there is 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. Pursuant to Article 6 and Article 21.5 of the DSU, Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 19 of the Agreement on Agriculture and Article XXIII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and as envisaged in the "Agreed procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 4 of the SCM Agreement applicable in the follow-up to the *United States - Tax Treatment for "Foreign Sales*

*Corporations'* WTO dispute" between the EC and the US of 29 September 2000, the EC hereby requests the establishment of a panel.

In particular, the EC claims and requests the Panel to find the following:

- that the FSC Replacement Act results in the foregoing of tax revenue that is otherwise due, thereby conferring a benefit upon recipients. Therefore, the FSC Replacement Act provides subsidies within the meaning of Article 1 of the SCM Agreement and under the Agreement on Agriculture;
- that 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;
- that the FSC Replacement Act provides subsidies which are contingent upon the use of domestic over imported goods contrary to Article 3.1(b) of the SCM Agreement;
- that consequently, the FSC Replacement Act grants and maintains subsidies contrary to Article 3.2 of the SCM Agreement;
- that 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;
- that the FSC Replacement Act provides treatment less favourable to products imported into the US that is accorded to like US products, contrary to Article III:4 of GATT 1994;
- that the FSC Replacement Act contains transitional provisions which allow companies to continue to benefit from the WTO incompatible FSC scheme beyond 30 September 2000;
- that the US has failed to comply with the DSB recommendations and rulings in *United States - Tax Treatment for "Foreign Sales Corporations"*, WT/DS108 by 1 November 2000, as specified by the DSB on 12 October 2000.

Accordingly, the EC requests the Panel to conclude:

- that the FSC Replacement Act is inconsistent with the above provisions of the SCM Agreement, the Agreement on Agriculture and GATT 1994; and
- that by failing to withdraw the subsidies found to be inconsistent with the SCM Agreement and to bring its law into conformity with its obligations under the SCM Agreement and the Agreement on Agriculture, the US has also failed to comply with the DSB recommendations and rulings in this dispute.

The EC requests that the Panel be established with the standard terms of reference set out in Article 7 of the DSU.

The EC requests that a special meeting of the DSB be held on 20 December 2000 to consider this request.

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