

UNITED STATES - TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS"

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

Request for Consultations

The following communication, dated 5 November 2004, from the delegation of the European Communities to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

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 Agreement on Subsidies and Countervailing Measures (the "*SCM Agreement*"), Article 19 of the Agreement on Agriculture and Article XXII:1 of GATT 1994 with respect to the *American JOBS Creation Act of 2004* (the "*JOBS Act*") enacted by the US on 22 October 2004.

The *JOBS Act* was intended to implement the DSB recommendations and rulings in case *WT/DS108 United States – Tax Treatment for "Foreign Sales Corporations"* and *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities* but fails to do so properly and is inconsistent with the same provisions of the *WTO Agreement* as did the predecessor legislation.

In particular, the European Communities considers that Section 101 of the *JOBS Act* contains transitional provisions which will allow US exporters to continue to benefit from the WTO incompatible FSC Replacement and Extraterritorial Income Exclusion Act (a) in the years 2005 and 2006 with respect to all export transactions and (b) for an indefinite period with respect to certain binding contracts, thus failing to withdraw the subsidy and implement the DSB's recommendations and rulings.

In the light of the above, 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 failed to implement the DSB's recommendations and rulings as required by Articles 19.1 and 21.1 of the *DSU*. It also considers that the US continues to violate Articles 3.1(a) and 3.2 of the *SCM Agreement*, Articles 10.1 and 8 of the *Agreement on Agriculture* and Article III:4 of the GATT 1994.

Therefore, the European Communities requests consultations with the United States 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. The *American JOBS Creation Act of 2004* as signed by the President.
 3. US Congress, Joint Explanatory Statement of the Committee on Conference, F:/EWB/CONF/H4250CNF.STM.
 4. The US Internal Revenue Code provisions.
-