

United States – Tax Treatment for “Foreign Sales Corporations”
Second Recourse to Article 21.5 of the DSU by the European Communities
(WT/DS108)

Third Party Submission - Australia

Geneva, 9 June 2005

TABLE OF CONTENTS

1. Introduction.....	1
2. The Mandate of an Article 21.5 Proceeding	1
3. Is the United States Under an Obligation to Withdraw the ETI Scheme?	2
4. The Relevance of Section 5 of the <i>ETI Act</i>	4
5. Conclusion	4

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:

(a) the FSC subsidies be withdrawn at the latest with effect from 1 October 2000;^{3 4} and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

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).

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.

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.

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*).

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*.

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).

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.

¹² WT/DS18/RW.

¹³ Paragraph 7.10, subparagraph 9.

¹⁴ WT/DS141/RW.

¹⁵ Paragraph 6.45.

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

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

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).

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).