

## **ANNEX B**

### **SECOND SUBMISSIONS OF THE PARTIES**

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## ANNEX B-1

### SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(16 June 2005)

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## I. INTRODUCTION

1. The US First Written Submission in this proceeding does not call for a long reply on the part of the European Communities.

2. The United States has not contested the substance of the EC claims. It does not argue that the JOBS Act is WTO-compatible in respect of any of the claims advanced by the European Communities (although it makes certain unsubstantiated and irrelevant assertions as to the "understanding" by the US Congress and others about the "EC's concerns" on which the European Communities will not comment further).<sup>1</sup> Rather, the United States confines itself to raising two procedural arguments. As demonstrated below, those arguments are without merit and should be dismissed.

3. The European Communities will first examine the US argument according to which, in the absence of a recommendation under Article 4.7 of the SCM Agreement expressly addressing the ETI Act, the United States can keep the transition and "grandfathering" provisions of the JOBS Act in force. It will then turn to the United States argument that section 5 of the ETI Act is not before the Panel.

## II. LEGAL ARGUMENT

### A. INTRODUCTION

4. The United States does not contest the substance of the EC claims. In particular it does not contest that, by partially maintaining in force the ETI Act and the FSC provisions, even after the promulgation of the JOBS Act, it continues to violate a number of obligations which it has under the WTO Agreement (specifically, under 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 the GATT 1994).<sup>2</sup>

5. The United States also does not contest the violation of Articles 19.1 and 21.1 of the DSU.

### B. WHETHER THE UNITED STATES MAY MAINTAIN THE ETI SCHEME

6. The focus of the US procedural defence is the extraordinary proposition that

in the absence of any recommendation or ruling of withdrawal under Article 4.7, this Panel cannot find that the United States has failed to comply with a DSB recommendation or ruling to withdraw its prohibited subsidies within the meaning of Article 4.7 of the SCM Agreement<sup>3</sup>

and that

the United States has not failed to comply with the DSB's recommendations and rulings, and the transition provisions of the AJCA are not inconsistent with Article 4.7 of the SCM Agreement, for the simple reason that, as explained below, there was no DSB recommendation or ruling under Article 4.7 to withdraw the subsidy insofar as the ETI Act tax exclusion is concerned.<sup>4</sup>

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<sup>1</sup> US First Written Submission, para. 6.

<sup>2</sup> EC First Written Submission, para. 55.

<sup>3</sup> US First Written Submission, para. 2.

<sup>4</sup> US First Written Submission, para. 10 (emphasis added).

## 1. The DSB adopted rulings concerning the ETI scheme

7. The United States is rather playing with words in making this procedural objection. For one thing, even if the DSB did not make a new recommendation, it certainly made rulings by adopting the reports of the Panel and the Appellate Body containing findings to the effect that the ETI Act is inconsistent with the SCM Agreement, the Agreement on Agriculture and the GATT 1994. These rulings comprise in particular the findings set out in paragraph 9.1(a)-(d) of the Article 21.5 Panel Report and upheld in paragraph 256 (b)-(e) of the Article 21.5 Appellate Body Report. If the reports did not contain the necessary findings or recommendations, it would mean that the DSB achieved nothing at its special meeting convened to adopt the reports which was held on 29 January 2002.<sup>5</sup>

8. The United States does not contest that section 101 of the JOBS Act was adopted to comply with these rulings.

## 2. Article 4.7 of the SCM Agreement

9. The US position quoted above also seems to erroneously assume that a recommendation under Article 4.7 of the SCM Agreement specifically addressing the ETI Act, and additional to the original recommendation under the same provision concerning the withdrawal of the FSC subsidy scheme, is necessary in order for it to be under an obligation to withdraw the ETI subsidy scheme.

10. This position misunderstands the function of the Article 21.5 proceedings. Such proceedings, as noted by the United States elsewhere in its submission<sup>6</sup>, concern measures taken to comply with recommendations and rulings.<sup>7</sup> Thus, it logically follows that in the first Article 21.5 proceeding it was sufficient for the Panel to find that, by promulgating the ETI Act, the United States has not withdrawn its prohibited subsidy (in other words, that the United States had not complied with the original recommendation to withdraw the prohibited subsidy).

11. Precisely because a measure challenged in an Article 21.5 proceeding is "taken to comply" with earlier recommendations and rulings, and because "compliance" is the focus of such proceeding, a panel is not required to also make a new recommendation under Article 4.7 specifically concerned with the measure "taken to comply" (although it will need to make findings concerning the consistency of the new measure with the covered agreements).

12. In the same way, if the measure under review in such a proceeding is found not to be "consistent with a covered agreement", the defaulting Member is not entitled to a new deadline to "withdraw the subsidy without delay" within the meaning of Article 4.7 of the SCM Agreement, contrary to what the United States seems to suggest.<sup>8</sup> Otherwise, the defaulting Member would be rewarded for its continuing non-compliance. Therefore, a new recommendation would also not perform any function additional to that performed by the one in the original proceeding.

13. The Appellate Body confirmed this approach in its Report in the original Article 21.5 proceedings and, contrary to the US assumption,<sup>9</sup> the fact that the Panel or the Appellate Body did not

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<sup>5</sup> WT/DSB/M/118, 18 February 2002.

<sup>6</sup> US First Written Submission, para. 17.

<sup>7</sup> Even though, as clarified by the Appellate Body in its Article 21.5 Report in *Canada - Aircraft (Article 21.5)*, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances relating to the measure originally challenged, but may also examine further claims which are pertinent to the "measure taken to comply" under review (Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000 ("*Canada - Aircraft - Article 21.5*"), DSR 2000:IX, 4299, para. 41).

<sup>8</sup> US First Written Submission, para. 16.

<sup>9</sup> US First Written Submission, para. 15.

make a new recommendation under Article 4.7 does not help the US case. First, as recalled in the EC First Written Submission, the Appellate Body clearly upheld the Panel's finding that the transition and "grandfathering" clauses of the ETI Act do not conform with the original recommendation and rulings.<sup>10</sup> Moreover, the Appellate Body closely linked its findings on the ETI Act and the original recommendation under Article 4.7 of the SCM Agreement, in the following terms:

257. The Appellate Body *recommends* that the DSB request the United States to bring the ETI measure, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under Article 3.1(a) of the *SCM Agreement*, under Articles 3.3, 8 and 10.1 of the *Agreement on Agriculture*, and under Article III:4 of the GATT 1994, into conformity with its obligations under those Agreements, and that the DSB request the United States to implement fully the recommendations and rulings of the DSB in US – FSC, made pursuant to Article 4.7 of the SCM Agreement.<sup>11</sup>

14. Had a new recommendation under Article 4.7 been needed, the Appellate Body would not have come to such conclusion. The reason why the Appellate Body did not come to a different conclusion is that the findings on a measure "taken to comply" within the meaning of Article 21.5 of the DSU and the recommendations and rulings of the DSB, the compliance with which is at issue, are inextricably linked.<sup>12</sup>

15. Furthermore, as recalled by the European Communities in its First Written Submission<sup>13</sup>, the Appellate Body found that Article 4.7 of the SCM Agreement requires prohibited subsidies to be withdrawn "without delay" (while it mandates panels to specify the time-period prescribed for the withdrawal). The Appellate Body's recognition that, by passing the ETI Act, the United States had not withdrawn its prohibited subsidy, and thus had not complied with the recommendation and rulings under Article 4.7 of the SCM Agreement contained in the original Panel Report, rules out that the United States is authorized to keep the ETI scheme in place. If the US argument were correct, then the partial repeal of the ETI scheme would represent an act of generosity vis-à-vis other WTO Members which was not sufficiently publicised by the US authorities to their constituencies.

16. In reality, the repeal of the ETI scheme has consistently been presented by the US legislator as a necessary action to bring an end to a violation of US WTO obligations.<sup>14</sup> The fact that the United States itself has found that repeal of the ETI scheme is required in order to fulfil US treaty obligations may be considered "subsequent practice" within the meaning of Article 31 of the Vienna Convention on the Law of Treaties.<sup>15</sup>

17. The United States also suggests that in commenting on the interim Panel Report in the first Article 21.5 proceeding the European Community asked that the Panel make no recommendation.<sup>16</sup> It does so to explain the fact that the Article 21.5 Panel Report does not contain a new recommendation under Article 4.7 of the SCM Agreement. In reality, the passage of the Article 21.5 Panel Report referenced by the United States records that the European Communities pointed out that a new

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<sup>10</sup> Article 21.5 Appellate Body Report, paras. 230-231 and 256(f), referred to in EC First Written Submission, para. 57 and footnote 27.

<sup>11</sup> Article 21.5 Appellate Body Report, para. 257 (emphasis added).

<sup>12</sup> See also Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/RW, adopted 4 August 2000, as modified by the Appellate Body Report, WT/DS70/AB/RW (*Canada - Aircraft – Article 21.5*), DSR 2000:IX, 4315, paras. 6.1 and 6.2.

<sup>13</sup> EC First Written Submission, para. 29, quoting the Article 21.5 Appellate Body Report, para. 229.

<sup>14</sup> See e.g. the background to the JOBS Act, as described in the Conference Report (Exhibit EC-3, p. 262).

<sup>15</sup> Concluded at Vienna on 23 May 1969, *United Nations Treaty Series*, Vol. 1155, I-18232.

<sup>16</sup> US First Written Submission, para. 14 and footnote 12, referring to para. 7.5 of the Article 21.5 Panel Report.

recommendation under Article 19 of the DSU was not needed (and that the Panel followed this approach, noting that several other earlier Panel reports also did so).<sup>17</sup> The United States also conveniently omits to recall that to the extent it felt this was required, the Appellate Body did make a recommendation to the DSB that it request the United States to bring the ETI Act into conformity with its obligations.<sup>18</sup>

18. As a last remark, it should be recalled that panels are required to make the recommendations which are necessary under Article 4.7 of the SCM Agreement<sup>19</sup> and that panels and the Appellate Body are required to make the recommendations which are necessary under Article 19 of the DSU, if they have found a violation of Article 3 of the SCM Agreement or other "covered agreements" respectively. These recommendations must thus be made irrespective of a specific request of the complaining party.

#### C. WHETHER SECTION 5 OF THE ETI ACT IS WITHIN THE PANEL'S TERMS OF REFERENCE

19. The other procedural argument brought forward by the United States is that section 5 of the ETI Act does not fall within the Panel's terms of reference. The reason for this position seems to be that the United States considers the subsections of the JOBS Act expressly mentioned in a particular part of the request for the establishment of the Panel<sup>20</sup> to be the sole subject of litigation in this proceeding.<sup>21</sup>

20. The European Communities cannot accept the US approach, which is unduly reducing the content of its request in this proceeding. To begin with, section 2 of its request for establishment of the Panel only summarizes the text of the part of the JOBS Act which are pertinent to this panel proceeding. However, the EC request for findings by the Panel is contained in section 3, which is inextricably linked to section 2. Section 3 contains a clear reference to the original recommendation under Article 4.7 of the SCM Agreement and to the findings made in the first Article 21.5 proceeding in respect of the ETI Act. Amongst these are, as indicated above, findings that the ETI Act partly keeps in force the FSC scheme through its "grandfathering" provision.

21. In fact, elsewhere in its submission, the United States admits that Article 21.5 proceedings are concerned with measures taken to comply with (earlier) recommendations and rulings.<sup>22</sup> As found by the Panel and confirmed by the Appellate Body in the first Article 21.5 proceedings in this dispute, the ETI Act did not achieve compliance with the recommendations and rulings in the original proceedings, including the recommendation under Article 4.7 of the SCM Agreement.<sup>23</sup> Quite to the contrary, by passing the ETI Act the United States continued to violate a number of WTO provisions,

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<sup>17</sup> See e.g. Article 21.5 Panel Report, *Australia - Subsidies Provided to Producers and Exporters of Automotive Leather - Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW, adopted 20 March 2000; Article 21.5 Panel Report, *Brazil - Export Financing Programme for Aircraft - Recourse By Canada To Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000; Article 21.5 Panel Report, *Canada - Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU*, adopted 4 August 2000, WT/DS70/RW), all quoted in the Article 21.5 Panel Report, footnote 44.

<sup>18</sup> Article 21.5 Appellate Body Report, para. 257.

<sup>19</sup> See also e.g. Panel Report, *United States - Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, 8 September 2004 ("*US - Upland Cotton*"), para. 8.3(b); Panel Report, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, as upheld by the Appellate Body Report, WT/DS70/AB/R ("*Canada - Aircraft*"), DSR 1999:IV, 1443, para. 8.3; Panel Report, *Korea - Measures affecting trade in commercial vessels*, WT/DS273/R, 7 March 2005 ("*Korea - Vessels*"), para. 8.4.

<sup>20</sup> WT/DS108/29.

<sup>21</sup> US First Written Submission, para. 20.

<sup>22</sup> US First Written Submission, para. 17.

<sup>23</sup> See in particular Article 21.5 Appellate Body Report, paras. 228-231 and the passages of the Article 21.5 Panel Report referenced therein.

and also the recommendation under Article 4.7 of the SCM Agreement to withdraw the FSC scheme without delay. As a result, effective withdrawal of the FSC scheme under the SCM Agreement also required withdrawal of the measure that (*inter alia*) maintained the FSC scheme in effect. The European Communities is precisely complaining about the US failure to do so.<sup>24</sup>

22. Article 21.5 proceedings concern not only what the defaulting Member has done, but also, and primarily, what it has failed to do. They cover not only the question of whether what has been done is consistent with the covered agreements. They also cover the question of whether measures which ought to have been taken to comply exist.

23. Since the United States has failed to take any action to repeal section 5 of the ETI Act, there is no provision in the JOBS Act that the European Communities could have quoted in its request for establishment of the Panel in connection with this failure. It was no more necessary to explicitly cite section 5 of the ETI Act in the request than it would have been necessary to cite any other provision of the ETI Act or the FSC legislation that remains partially applicable today contrary to the obligations of the United States.

24. Furthermore, the EC would recall that the fact that the ETI Act, including section 5 thereof, is inconsistent with the obligations of the United States under the WTO is *res iudicata* between the parties to this dispute.<sup>25</sup> The United States has an obligation to withdraw it and does not contest that it has not done so.

25. Even assuming, *quod non*, that the only relevant part of the EC request for establishment of the Panel is the one contained in section 2 thereof, that section also includes a general reference to certain contracts which are kept in force by the JOBS Act. Section 2 of the request clearly indicates that

the European Communities considers that Section 101 of the JOBS Act contains provisions which allow US exporters to continue benefiting from the tax exemptions already found to be WTO incompatible ... (b) for an indefinite period with respect to certain contracts.<sup>26</sup>

26. The language quoted above covers both the contracts benefiting from the ETI scheme which are expressly "grandfathered" by the JOBS Act and the "older" contracts benefiting from the FSC scheme which were "grandfathered" by the ETI Act through section 5. The United States does not contest that the JOBS Act allows section 5 of the ETI Act to remain in effect. And there is no doubt that the FSC and ETI schemes were already "found to be WTO incompatible".

### III. CONCLUSION

27. For the reasons above the European Communities maintains its request to the Panel and its conclusions set out in its First Written Submission.

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<sup>24</sup> WT/DS108/29, p. 2.

<sup>25</sup> EC First Written Submission, para. 67.

<sup>26</sup> WT/DS108/29, p. 2 (emphasis added).

## ANNEX B-2

### SECOND WRITTEN SUBMISSION OF THE UNITED STATES

(16 June 2005)

Dear Mr. Chairman:

In our First Written Submission of 2 June 2005, in the dispute *United States – Tax Treatment for "Foreign Sales Corporations": Second Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108), the United States responded to the arguments of the European Communities ("EC") set forth in its First Written Submission of 19 May 2005. Since then, there have been no further arguments submitted by the EC for the United States to rebut. Therefore, this letter constitutes the United States rebuttal submission. Of course, should the EC rebuttal submission contain new arguments, the United States will respond to them at the 30 June 2005, meeting with the Panel.

The United States is providing a copy of this submission directly to the EC, Australia, Brazil, and China.