UNITED STATES - TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS" - RECOURSE BY THE UNITED STATES TO ARTICLE 22.6 OF THE DSU AND ARTICLE 4.11 OF THE SCM AGREEMENT

WT/DS108

QUESTIONS FROM THE UNITED STATES FOR THE EUROPEAN COMMUNITIES

1. The European Communities ("EC") has asserted that the sole purpose of countermeasures under Article 4.10 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") is to induce compliance. Assuming for purposes of argument that this assertion is correct, what limit does this standard impose on the amount of countermeasures that would be "appropriate"? Would not an amount in excess of the amount of the subsidy or an amount in excess of the trade impact on the complaining Member (or on all Members) be more effective in inducing compliance? Please explain the basis for your answers. In general would it not be true that the higher the amount the more effective it is in inducing compliance?

2. In paragraph 71 of the EC's Oral Statement of March 7, 2000, the EC asserts that the Arbitrator should rely on the 1997 Treasury study (Exhibit EC-1) because this study "has been presented to the US body politic by its own experts". Is it not true that the U.S. Government tax expenditure estimates have been presented to the "US body politic by its own experts"? Please explain the basis for your answer.

3. Again referring to paragraph 71 of the EC's Oral Statement and the EC's assertion that the Arbitrator should rely on the 1997 Treasury study, would the EC please explain why the Arbitrator should not also rely on the statement in the 1997 Treasury study that the assumptions made for purposes of that study will "tend to overstate the loss in exports that would accompany the removal of FSC benefits"? Was not the study, in its entirety, "presented to the US body politic by its own experts"?

4. At the meeting with the Arbitrator on March 7, in its oral comments on the U.S. Oral Statement, the EC asserted that the United States has agreed with the EC that the ordinary meaning of the term "countermeasures" is insufficient to for purposes of determining the meaning of that term. Would the EC please identify where, in either the written submissions of the United States or in the U.S. Oral Statement, the United States has expressed this alleged agreement?

5. In document WT/DS108/13 (17 November 2000), the EC has requested the DSB to act under both Article 4.10 of the SCM Agreement and Article 22.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). Would the EC agree that this proceeding consists of recourse to both Article 4.11 of the SCM Agreement and Article 22.6 of

the DSU? Does the Arbitrator not need to indicate how it is exercising its authority pursuant to Article 4.11 and how it is exercising its authority with respect to Article 22.6? With respect to the $4.043 billion in suspension of concessions which the EC has requested in that document, would the EC please identify the precise portion of that amount for which authority is requested under Article 4.10 and the precise amount for which authority is requested under Article 22.2?

6. Referring to Question 5, above, the United States has indicated its intention to comply with the January 29, 2000 recommendations and rulings of the DSB regarding the ETI Act. However, let us assume that another Member is in a situation identical to that of the United States and that the Arbitrator decides to award the EC suspension of concessions in an amount of $4.043 billion. Let us also assume that this Member promptly eliminates the inconsistency with Article III:4 of the GATT 1994, but takes longer to eliminate the inconsistency with Article 3.1(a) and 3.2 of the SCM Agreement. How would the parties to the dispute know which portion of the $4.043 billion in suspension of concessions should be terminated upon the elimination of the inconsistency with Article III:4 if the Arbitrator had not separately identified the amount attributable to the violation of the SCM Agreement and the amount attributable to the violation of the GATT 1994? Is it the EC's position that the complaining Member may determine *unilaterally* which portion is attributable to the respective violations? Please explain the basis for your answers.

7. Regarding paragraph 15 of the EC Oral Statement, is it not true that the EC has asserted elsewhere that adopted panel reports that have not been subject to Appellate Body review have less precedential value than adopted panel reports that have been subject to such review?

8. As the United States understands it, based on the EC's Oral Statement and its oral comments at the March 7 meeting with the Arbitrator, the EC attaches great significance to the fact that the recommendation under Article 4.7 of the SCM Agreement is to "withdraw" the subsidy, whereas the recommendation under Article 19.1 of the DSU is to "bring the measure into conformity". However, the EC previously has asserted that the ETI Act would be consistent with the SCM Agreement if the export contingency were eliminated. *See United States - Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, Report of the Panel, as modified by the Appellate Body, adopted 29 January 2002, Annex F-1, para. 148. In other words, the EC has indicated that the subsidy can remain in place so long as it is not export contingent. Assuming the EC position is correct, why, then, is the use of the phrase "withdraw the subsidy" so significant? If the EC's position is that the elimination of a prohibited contingency constitutes the "withdrawal" of a prohibited subsidy and its replacement by an actionable or non-actionable subsidy, how is this any different from the situation under Article 19.1 of the DSU? Specifically, if, under Article 19.1, a Member brings a WTO-inconsistent measure into conformity, has it not "withdrawn" the WTO-inconsistent measure and replaced it with a new, WTO-consistent measure?