ANNEX D

ORAL STATEMENTS, MEETING WITH THE PANEL

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ANNEX D-1

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(30 June 2005)

Mr. Chairman, distinguished Members of the Panel,

1. The European Communities would first like to thank you all for agreeing to serve on this Panel. And we also thank the Secretariat for the assistance that it is providing to the Panel in this case.

2. Although this case is relatively straightforward and may appear to relate to a temporary and residual problem, it is nonetheless important.

3. It is important that adopted recommendations and findings in WTO dispute settlement proceedings are respected and implemented properly and promptly. Moreover, given their inherently distortive character, it is important that prohibited subsidies are withdrawn without delay. As will no doubt be clear to you, this has not happened in this case. Indeed, the continuing violations at issue in this proceeding are either identical or similar in all relevant respects to those that have already been condemned in the previous Article 21.5 proceeding. Long-standing non-compliance situations operate against the very credibility of the WTO system to the detriment of all Members.

4. The original Panel report in this case was circulated in 1999 and adopted by the DSB on 20 March 2000 after an unsuccessful appeal by the United States. The United States was given a generous period to withdraw the FSC scheme but simply replaced it with a partly identical scheme that was duly condemned in turn (as were the transitional and grandfathering provisions that the United States accorded itself for its original FSC scheme).

5. More than five years after the circulation

the United States has failed to withdraw its prohibited subsidy as required by Article 4.7 of the *SCM Agreement* because in the previous Article 21.5 proceeding the Panel merely *found* that the ETI scheme was inconsistent with the obligations of the United States under the *SCM Agreement* and did not make a new recommendation under Article 4.7 of the *SCM Agreement*. Second, the United States contends that where there is *no* measure taken to comply (as in the case of the FSC grandfathering provisions contained in the ETI Act), the continuing violation is not within the Panel's terms of reference unless the WTO-inconsistent measure is again included in the Panel request under Article 21.5.

9. Mr. Chairman, distinguished Members of the Panel, one only needs to restate these procedural arguments to realise they are unfounded. The European Communities has set out in its rebuttal submission detailed reasons why they are without merit and should be dismissed accordingly. The European Communities does not wish to repeat the arguments it has made in writing but would stress two points:

- First, an Article 21.5 panel need not make new recommendations since its purpose is to rule on a disagreement as to whether previous recommendations and rulings have been complied with. In the first Article 21.5 proceeding, the Panel ruled that they had not been and the United States has not advanced any arguments in the present proceeding as to why they have been complied with (manifestl42(aniftl4len com)8.2(p)-1.0765 0(F(21.5 3 Tc nlO). I7(snticle 49ith2rebutt6.

ANNEX D-2

ORAL STATEMENT OF THE UNITED STATES

(30 June 2005)

Mr. Chairman, members of the Panel:

1. At the outset, on behalf of the United States, I would like to express our appreciation for your willingness to serve on this Panel. In particular, I would like to thank the Chairman for agreeing to step in at this stage in this dispute.

2. However, while we are grateful for your willingness to serve, it is unfortunate that you had to do so. In enacting the American Jobs Creation Act – or "AJCA" – US officials consulted closely with EC officials, and we believed the legislation addressed the EC's primary concerns. Unfortunately, the EC has chosen to prolong this dispute involving a subsidy that, if this were a countervailing duty proceeding, would be regarded as *de minimis*.

3. In light of the speculation in the press that the EC decision to prolong this dispute was linked to the US decision to challenge the massive subsidies provided to Airbus, the United States cannot help but note that in its counter-case against Boeing aircraft, the EC appears to have included a claim that the FSC tax exemption and the ETI Act tax exclusion have caused adverse effects within the meaning of Article 5 of the SCM Agreement.[1] While the United States continues to hope that the aircraft disputes can be resolved without recourse to litigation, we must confess that we find tantalizing the prospect of the EC being required for the first time to demonstrate how these *de minimis* tax exemptions and exclusions have caused harm to EC trade interests.

4. In any event, the EC has decided that we need to get together again, so here we are. Today, we will focus on two issues: (1) the EC's claims under Article 4.7 of the SCM Agreement; and (2) the EC's claims regarding the transition provisions for the FSC tax exemption contained in section 5 of the ETI Act.

Article 4.7 of the SCM Agreement

5. Starting with Article 4.7, the EC's claim that the transition provisions of the AJCA are inconsistent with Article 4.7 is premised on the notion that the ETI Act tax exclusion was found to be inconsistent with the DSB recommendation under Article 4.7 to withdraw the FSC subsidies. The US response to this claim is straightforward: no such finding was ever made, nor did the DSB make a recommendation under Article 4.7 that the ETI Act tax exclusion be withdrawn. Thus, the premise of the EC's claim is simply in error.

6. Insofar as the ETI Act tax exclusion is concerned, the only findings made were that the tax exclusion was inconsistent with Article 3.1(a) of the SCM Agreement, Articles 3.3, 8 and 10.1 of the Agriculture Agreement, and Article III:4 of the GATT 1994. The corresponding recommendations of the DSB were that the United States bring the ETI measure into conformity with its obligations under these provisions. There was no finding that the ETI Act tax exclusion was inconsistent with the

[1] WT/DS317/2 (3 June 2005).

provisions of section 5 of the ETI Act.[4] Likewise, in the "Conclusion" section, wherein the EC laid out the specific findings that it wanted the Article 21.5 Panel to make, the only finding sought by the EC with respect to Article 4.7 related to the transition provisions of section 5 of the ETI Act.[5]

18. In summary, the original Article 21.5 process resulted in two different sets of findings and recommendations. One set pertained to section 5 of the ETI Act and the transition provisions for the FSC tax exemption and involved a finding and recommendation under Article 4.7. The other set pertained to the ETI Act tax exclusion. With respect to the tax exclusion, there was no finding or recommendation under Article 4.7. Thus, the EC is simply incorrect when it asserts that the Appellate Body made a finding that the enactment of the ETI Act tax exclusion resulted in non-compliance with the DSB's recommendation under Article 4.7 to withdraw the FSC subsidies.

The Panel Should Reject the EC's Claims Under Article 4.7 of the SCM Agreement

19. To sum up, the EC's claim under Article 4.7 is based on the notion that the United States had an obligation under Article 4.7 to withdraw the ETI Act tax exclusion. According to the EC, the transition provisions of sections 101(d) and (f) of the AJCA are inconsistent with this obligation because they permit the continued use of the tax exclusion.

20. Insofar as the ETI Act tax exclusion itself is concerned, the United States had an obligation to bring the measure into conformity with Article 3.1(a) of the SCM Agreement, Articles 3.3, 8 and 10.1 of the Agriculture Agreement, and Article III:4 of the GATT 1994. However, the United States did not have an obligation under Article 4.7 of the SCM Agreement with respect to the ETI Act tax exclusion. As the United States has demonstrated, the first Article 21.5 proceeding did not result in any findings that the ETI Act tax exclusion resulted in a failure to comply with Article 4.7.

Section 5 of the ETI Act Is Not Within the Panel's Terms of Reference

21. The United States now would like to turn to the EC' s claims regarding section 5 of the ETI Act. Section 5, as the Panel will recall, is the transition provision in the ETI Act that allowed for the continued use of the FSC tax exemption for a period of time. As previously explained by the United States, section 5 is not within the Panel's terms of reference for several reasons. First, the only provisions of the AJCA identified by the EC in its panel request were sections 101(d) and (f), which are the transition provisions for the ETI Act tax exclusion and which do not concern the FSC tax exemption. Second, section 5 of the ETI Act was not mentioned in the EC's panel request.[12]

22. According to the EC, the US position is wrong because the "United States considers the subsections of the [AJCA] expressly mentioned in a particular part of the request for the establishment of the Panel to be the sole subject of litigation in this proceeding."[13] Well, the United States must admit that it did rely on the fact that in Section 2 of the EC's panel request the EC was, in fact, purporting to identify the subject of the dispute. The United States reached the conclusion that it did because Section 2 is entitled "THE SUBJECT OF THE DISPUTE". Apparently, according to the EC, the title to Section 2 actually means "**A** SUBJECT OF THE DISPUTE".

23. Section 2, consistent with the plain English reading of its title, identifies as the subject of the dispute sections 101(d) and (f), referring to them as "provisions which will allow US exporters to continue benefiting from the tax exemptions ... ."[14] However, the only tax exemption that these provisions allow to continue to be used is the ETI Act tax exclusion. Therefore, the only fair reading of the EC panel request is that the EC's claims related to the transition provisions for the ETI Act tax exclusion, and not the FSC tax exemption.

24. Thus, the EC's discussion of the nature of Article 21.5 proceedings and what can and cannot be raised therein is irrelevant.[15] Even if the EC could have made a claim regarding section 5 of the

[12] *First Written Submission of the United States*, 2 June 2005, para. 20.
[13] EC Rebuttal, para. 19 (footnote omitted).
[14] WT/DS108/29, page 2.
[15] *See, e.g.,* EC Rebuttal, paras. 21-23.

ETI Act and the continued use of the FSC tax exemption, the fact is that it did not do so in its request for the establishment of a panel. Therefore, the Panel must find that these claims are not within its terms of reference.

Conclusion

25. Mr. Chairman, that concludes our oral statement. The US delegation stands ready to respond to any questions you may have.

ANNEX D-4

THIRD PARTY ORAL STATEMENT OF BRAZIL

(1 July 2005)

Mr. Chairman and Distinguished Members of the Panel,

1. Brazil welcomes the opportunity to appear before you today at this third party session of the meeting with the Panel in the present dispute.

2. In light of the conciseness of the submissions presented by the parties and third parties in this proceeding, it would not come as a surprise to the Panel if Brazil says that it will *briefly* touch on some of the issues in question in this case. As you will see, we will give the word *briefly* its full

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8. Brazil only notes that the adjective the drafters of the DSU choose to signify the relevance to be attached to this principle is ***essential***. Among its meanings, we will find those of ***necessary, fundamental, indispensable.*** It is not a light word, for sure.

9. The drafters, however, did not use the term only once. In two DSU provisions – Articles 3.3

ANNEX D-5

THIRD PARTY ORAL STATEMENT OF THE PEOPLE'S REPUBLIC OF CHINA

(1 July 2005)

1. Thank you, Mr. Chairman, and members of the Panel. China appreciates this opportunity to present its views on the issues raised in this Panel proceeding.

2. In regard to the situation in this case, China cannot share the view 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, … there was no DSB recommendation or ruling under Article 4.7 to withdraw the subsidy insofar as the ETI Act tax exclusion is concerned."[1]

3. The DSB made recommendations and rulings under article 4.7 when adopting the panel and Appellate Body report on 20 March 2000, which requested the US to withdraw the FSC subsidies within certain time-period. Subsequently, the United States enacted the ETI Act with a view to complying with the recommendations and rulings of the DSB in *US-FSC*. In the first compliance panel proceeding, the ETI scheme was found inconsistent with article 3.1(a) of the SCM Agreement and the US was requested to bring it into conformity with its obligations under relevant Agreement, including *the SCM Agreement*.[2]

4. Article 4.7 of *the SCM Agreement* requires prohibited subsidies to be withdrawn "without delay", and provides that a time-period for such withdrawal shall be specified by the panel.[3] The obligation to withdraw prohibited subsidies without delay is not released simply because the first compliance panel did not specify a time-period in its conclusion. The party concerned failed to fully implement the DSB recommendations and rulings by introducing transition period and grandfathering provisions for FSC scheme, an export subsidy measure. How can transition period and grandfathering provisions for another prohibited subsidy measure be justified?

5. The Appellate Body has made it clear why a long transition period and grandfathering provision are not in conformity with the obligation to withdraw the prohibited subsidies without delay. A Member's obligation under Article 4.7 of *the SCM Agreement* to withdraw prohibited subsidies "without delay" is unaffected by contractual obligations that the Member itself may have assumed under municipal law. Likewise, a Member's obligation to withdraw prohibited export subsidies, under Article 4.7 of *the SCM Agreement*, cannot be affected by contractual obligations which private parties may have assumed *inter se* in reliance on laws conferring prohibited export subsidies.[4]

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[1] US First Written Submission para. 10.
[2] US-FSC 21.5 AB report para. 257.
[3] US-FSC 21.5 AB report para. 229.
[4] US-FSC 21.5 AB report para. 229.

6. China would like to conclude its submission by recalling that the primary objective of the dispute settlement mechanism is to secure the withdrawal of the measures found to be inconsistent with the covered agreements.

Thank you, Mr. Chairman.