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## I. INTRODUCTION

1. The United States respectfully submits its Appellee Submission pursuant to Rule 22(1) of the *Working Procedures for Appellate Review*. For the reasons set forth below, the Appellate Body should reject the cross-appeal and conditional cross-appeal contained in the 6 November 2001 "Appeal by the European Communities pursuant to Rule 23(1) of the Working Procedures for Appellate Review" ("*EC Appellant Submission*").

## II. THE PANEL DID NOT ERR WHEN IT DECLINED TO EXPAND THE RIGHTS OF THIRD PARTIES TO INCLUDE ACCESS TO THE PARTIES' REBUTTAL SUBMISSIONS

2. The EC challenges the "Panel Decision Concerning the Request by the European Communities Relating to Third Party Access to Parties' Rebuttal Submissions" ("*Decision*"),[1] alleging that the Panel erred when it declined to expand the rights of third parties to include access to the parties' rebuttal submissions.[2] For the reasons set forth below, the Panel did not abuse the discretion conferred upon it by the DSU. Therefore, the Appellate Body should affirm the *Decision*.

3. At the outset, the United States notes that the EC's description of the *Decision* and the process leading up to it is incomplete in the following respects. First, the EC omits the fact that when the Panel circulated its draft working procedures for comment, the EC did not object to the fact that the procedures limited the access of third parties to the first written submissions of the parties.[3] Second, the EC omits the fact that no third party requested any third party rights other

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[1] The *Decision* is reproduced in *United States - Tax Treatment for "Foreign Sales Corporations" - Recourse to Article 21.5 of the DSU by the European Communities* ("ETI Panel Report"), WT/DS108/RW, Report of the Panel circulated 20 August 2001, para. 6.3.

[2] *EC Appellant Submission*, paras. 5-28.

[3] *Decision*, para. 11.

than those referred to in the Panel's working procedures.[4] Third, the EC omits the fact that no third party requested the United States to provide a copy of its rebuttal submission. Finally, the EC omits the fact that the United States made all of its submissions publicly available, so that the only rebuttal submission to which third parties may not have had access was that submitted by the EC.[5]

4. Putting aside these omissions, however, the EC's allegations of legal error are incorrect. The EC essentially makes two arguments: a textual argument and a policy argument.

5. With respect to its textual argument, Article 10.3 of the DSU provides as follows: "Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel." The EC interprets Article 10.3 as requiring that anything that was submitted by the parties prior to the single meeting with the Panel had to be made available to third parties.[6] However, this interpretation – which ignores the context in which Article 10.3 appears – is inconsistent with Article 31 of the *Vienna Convention on the Law of Treaties* ("*VCLT*"). As the Appellate Body recognized in its first report, treaty terms can be given meaning only "by careful scrutiny of the factual and legal context in a given dispute."[7]

6. Unlike the EC, the Panel took context into account, and correctly concluded that the phrase "*first* meeting of the panel" in Article 10.3 "clearly presupposes a context where there is

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[4] *Id*.

[5] *First U.S. 21.5 Submission*, ETI Panel Report, Annex A-2, para. 238. The United States says "may not", because it does not know one way or the other whether the EC provided third parties with copies of its rebuttal submission.

[6] *EC Appellant Submission*, para. 13.

[7] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, Report of the Appellate Body adopted 20 May 1996, page 18.

more than one meeting of a Panel. This reflects the fact that the reference at issue is made in the context of standard panel procedures."[8] From this, the Panel reached the equally correct conclusion that the effect of Article 10.3 is to limit third party rights to receive only the parties' first written submissions.[9] It is clear that given the extremely limited timeframe for the Article 21.5 proceedings, the parties in fact chose to forego the first substantive[10] meeting of the panel in order to save time. In the view of the United States, the Panel's reasoning on this particular issue is sound.

7. The EC argues that if the drafters had intended to limit third party access to the parties' first written submissions they would have written Article 10.3 differently.[11] The implicit suggestion is that the Panel somehow rewrote Article 10.3. This argument, of course, simply begs the question of what the drafters did intend in Article 10.3. Although the EC asserts that the language of Article 10.3 is clear, four panels – including the ETI Act Panel – have found the language to be ambiguous when considered in the context of anything other than standard panel

[8] *Decision*, para. 5.

[9] *Id*., para. 6.

[10] While Article 10.3 of the DSU refers to the "first meeting of the panel" it is necessary to examine the context of that Article to understand that it refers to the first substantive meeting of the panel, the term used in Appendix 3 to the DSU (see for example paragraphs 4, 5, and 6). The "first" meeting of the panel is typically an organizational meeting with the parties. DSU Article 10.3 must be interpreted in context as not referring to this "first" meeting.

[11] *EC Appellant Submission*, para. 25.

procedures.[12] Thus, the Panel did not rewrite Article 10.3, but instead construed that ambiguous provision in accordance with the principles of Article 31 of the *VCLT*.[13]

8. Turning to the EC's policy argument, the EC asserts that (1) third parties are disadvantaged by having their access limited to the parties first written submissions, and (2) the panel process would be improved if third parties had access to everything communicated to a panel up to the time of the third-party session.

9. As an initial matter, the United States is struck by the peculiar circumstances of the EC's policy argument on this issue. The United States has no objection in principle to third parties having access to rebuttal submissions, because the United States favors greater transparency in dispute settlement and to this effect has made its submissions routinely available to the public

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[12] *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, Report of the Panel adopted 11 February 2000, para. 3.9; *Australia - Measures Affecting Importation of Salmon - Recourse to Article 21.5 by Canada*, WT/DS18/RW, Report of the Panel adopted 20 March 2000, paras. 7.5-7.6; and *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea - Recourse by Korea to Article 21.5 of the DSU*, WT/DS99, Decision of the Panel Concerning the EC Request for Access to the Parties' Rebuttal Submissions, 27 June 2000. With respect to the decision in *DRAMs*, the EC insinuates that the United States somehow failed to substantiate that decision. *EC Appellant Submission*, para. 11, note 3. However, the relevant portions of the decision were reproduced in *First U.S. 21.5 Submission*, ETI Panel Report, Annex A-2, para. 236. The EC has not previously disputed the accuracy of this reproduction.

The EC cites one case in which the panel reached a different result, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products - Recourse to Article 21.5 of the DSU by New Zealand and the United States*, WT/DS103/RW, WT/DS113/RW, Report of the Panel circulated 11 July 2001 (unadopted). However, that panel, like the EC, erred by failing to consider the context of Article 10.3. That panel's assertion that the text of Article 10.3 is "clear" and "unequivocal" is belied by the fact that four other panels found the text to be ambiguous when considered in context. *Id*., paras. 2.33-2.34.

[13] *See Decision*, para. 8.

(and hence to third parties). The United States' position in this appeal is instead based on concern with the proper approach to interpretation of the WTO agreements. Furthermore, if the EC were truly concerned with greater third party participation in this dispute, it had the power, specifically recognized by the Panel's working procedures, to ensure that greater participation by providing the third parties with a copy of its own rebuttal submissions. If the EC had done so, then the third parties would have had access to all of the submissions prior to the panel meeting. The EC provides no indication that it did so. The United States cannot help but conclude that the EC's appeal is not aimed at the rights of third parties to this dispute, but rather is aimed at securing expanded EC rights in other disputes.

10. With respect to the assertion of disadvantage, aside from the fact that none of the third parties in the instant dispute complained of any such disadvantage, it is a simple fact that under the DSU third parties do not have the same rights as compared to the parties themselves. For example, in a normal case third parties will arrive at the third-party session of a panel meeting without having heard or read the oral statements of the parties.[14] As the United States itself has experienced, a third party may have prepared for the third party session a lengthy statement on a

[14] Ironically, if the Panel had granted the EC's request and expanded the rights of third parties, those third parties still would not have had a right of access to the "real" rebuttal submission of the United States. Because there was only one panel meeting, and because the Panel rejected the U.S. request for sequential rebuttal submissions, *see* ETI Panel Report, para. 6.6, when the United States filed its second written submission it had nothing to rebut given that it had already responded in its first written submission to the EC's arguments presented as of that time. As a result, the United States was forced to present its "real" rebuttal in a lengthy oral statement at the panel meeting. *See* ETI Panel Report, Annex D-23. Even under the EC's interpretation of Article 10.3, the third parties would not have had a right of access to that document.

particular issue only to learn that the issue had already been disposed of or had been conceded by one of the parties at their earlier meeting with the panel.

11. With respect to the EC assertion that the panel process would benefit from expanded third-party access, this may or may not be true.[15] However, the fact is that the current dispute settlement procedures afford third parties fewer rights than parties. Whether the rights of third parties should be expanded is a question better left for negotiators.[16]

12. To date, the Appellate Body has not had to examine the question of whether all of the procedures contained in the DSU apply without modification to Article 21.5 proceedings.[17] However, the Appellate Body has stated that

> the DSU, and in particular its Appendix 3, leave panels a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated. Within this context, an appellant requesting the Appellate Body to reverse a panel's ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling.[18]

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[15] In any event, it would be peculiar to provide this supposed benefit only in Article 21.5 panel proceedings and not in the greater number of regular panel proceedings.

[16] In this context, the United States notes that a number of Members have proposed amendments to the DSU in part to expand third parties' access to dispute settlement proceedings and to re-write the provisions of Article 21.5 of the DSU (see for example WT/MIN(01)W/6). The United States has supported greater transparency in the WTO dispute settlement process, including those aspects of the proposal which would expand third party access. The Fourth Ministerial Conference has just agreed to further negotiations on improvements and clarifications to the DSU (see paragraph 30 of WT/MIN(01)/DEC/W/1).

[17] *See Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, Report of the Appellate Body circulated 22 October 2001, para. 53.

[18] *European Communities - Measures Affecting Meat and Meat Products (Hormones)* ("*EC Hormones*"), WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 152, note 138.

In view of the fact that Article 10.3 does not explicitly regulate the situation of third-party rights in a proceeding with only one panel meeting, the Panel's reasonable decision was well within its margin of discretion, and the EC has not demonstrated any prejudice from the Panel's legal ruling (nor did the third parties themselves complain of any prejudice). Accordingly, the Appellate Body should affirm the Panel's decision to limit third-party access to the first written submission of the parties.

## III. THE APPELLATE BODY SHOULD REJECT THE EC'S CONDITIONAL CROSS-APPEAL

13. The EC has filed a conditional cross-appeal on four claims on which the Panel did not rule for reasons, according to the EC, of judicial economy.[19] At the outset, the United States notes that the conditions that would trigger the Appellate Body's consideration of any of these claims is not clear. The EC states that the Appellate Body would need to consider them if it reversed "*any* of the findings of the Panel on the claims that the Panel did address."[20] However, it is difficult to fathom how the Appellate Body's reversal of certain findings would trigger a consideration of all of the claims subject to the EC's conditional cross-appeal, because considerations of judicial economy would continue to apply. For example, if the Appellate Body reversed the Panel's finding regarding Article III:4 of GATT 1994, considerations of judicial

[19] *EC Appellant Submission*, paras. 4 and 29-30.

[20] *Id*., para. 4 (emphasis added). Presumably, the EC meant to use here and in paragraph 33 the formulation it used in paragraph 31: "those of the Panel's findings that led the Panel to exercise judicial economy." Even that formulation, however, would not solve the problems identified below.

economy would continue to militate against consideration of the claims identified in subparagraphs (a), (b) and (d) of paragraph 29 of the *EC Appellant Submission*.

14. The United States also notes that the Appellate Body's reversal of certain findings by the Panel would be dispositive of one or more claims subject to the EC's conditional cross-appeal. For example, if the Appellate Body reversed the Panel and found that the ETI Act is a measure to avoid double taxation within the meaning of the fifth sentence of footnote 59 of the SCM Agreement, the Appellate Body would have to reject the claims identified in subparagraphs (a)-(c) of paragraph 29 of the *EC Appellant Submission*.

### A. The Appellate Body Should Reject the EC's Claim that the So-Called "Extended FSC Replacement Subsidy" Is Contrary to Article 3.1(a) of the SCM Agreement

15. The Appellate Body should reject the EC's claim that the so-called "extended FSC replacement subsidy" is contrary to Article 3.1(a) of the SCM Agreement.[21] The United States refers the Appellate Body to its prior submissions to the Panel with respect to this claim.[22] Here, the United States limits itself to the following observations.

16. First, the United States continues to object to the EC's attempt to bifurcate artificially the ETI Act into separate tax regimes. As the United States has previously demonstrated, there is a single tax exclusion that applies to a variety of different transactions.[23]

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[21] *See EC Appellant Submission*, para. 29(a).

[22] *Second U.S. 21.5 Submission*, ETI Panel Report, Annex C-2, paras. 31-32; *U.S. Oral Statement*, ETI Panel Report, Annex D-3, para. 33; and *U.S. Comments on the EC's Answers to Questions from the Panel*, ETI Panel Report, Annex F-6, paras. 1-4 and 32-33.

[23] *See, e.g.*, *U.S. Appellant Submission*, paras. 164-171.

17. Second, the United States rejects the EC's contention that the Panel exercised judicial economy with respect to this claim. Instead, the Panel declined to rule in favor of the EC with respect to this claim because the Panel found that it "would be required to assume a different scheme" than the measure actually before it.[24] According to the Panel, "such a significantly transformed measure would be manifestly different from the measure that is currently before us, and, as such, we consider that it would be neither necessary or appropriate to rule on it."[25] These statements do not represent an exercise of judicial economy; they instead reflect that the Panel considered the EC's claim to be without merit.

18. Third, if the Appellate Body reversed the Panel's finding that the ETI Act constitutes a prohibited export subsidy, the United States fails to see how the Appellate Body could find that the so-called "extended FSC replacement scheme" constitutes an export subsidy. If the Appellate Body reversed the Panel's finding of a subsidy, this reversal would apply with equal force to the EC's claims regarding the "extended FSC replacement scheme." The same would be true if the Appellate Body reversed the Panel and found that the ETI Act is a measure to avoid double taxation within the meaning of the fifth sentence of footnote 59 of the SCM Agreement. Finally, if the Appellate Body reversed the Panel's finding of an export contingency, while this technically might not be dispositive of the EC's claim that the 50 percent rule allegedly renders the "extended FSC replacement scheme" export-contingent, the Panel's observation would still

[24] ETI Panel Report, para. 8.163.
[25] *Id*.

remain valid – that to find an export contingency, it "would be required to assume a different scheme" than the measure actually before it.[26]

### B. The Appellate Body Should Reject the EC's Claim that the ETI Act Provides Subsidies Which Are Specifically Related to Exports Within the Meaning of Paragraph (e) of Annex I to the SCM Agreement

19. The Appellate Body should reject the EC's claim that the ETI Act provides subsidies which are specifically related to exports within the meaning of paragraph (e) of Annex I to the SCM Agreement.[27] The United States refers the Appellate Body to its prior submissions to the Panel with respect to this claim.[28] Here, the United States limits itself to the following observations.

20. First, the Appellate Body should reject the EC's contention that paragraph (e) of Annex I expands the scope of Article 3.1(a). As previously demonstrated by the United States, such a contention is inconsistent with the ordinary meaning of the terms used in Article 3.1(a) and paragraph (e).[29]

21. Second, the ETI Act does not refer to and is not targeted at export transactions. The United States fails to understand how a measure that is manifestly not "specifically related to exports" could be found to be "specifically related to exports" for purposes of paragraph (e).

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[26] *Id*.

[27] *See EC Appellant Submission*, para. 29(b).

[28] *First U.S. 21.5 Submission*, ETI Panel Report, Annex A-2, paras. 157-161; *U.S. Oral Statement*, ETI Panel Report, Annex D-3, paras. 105-108; *U.S. Answers to Questions from the Panel*, ETI Panel Report, Annex F-3, paras. 35-37 and 132; and *U.S. Comments on the EC's Answers to Questions from the Panel*, ETI Panel Report, Annex F-6, paras. 11-12 and 47.

[29] *See First U.S. 21.5 Submission*, ETI Panel Report, Annex A-2, paras. 158-161.

22. Finally, if the Appellate Body should reverse the Panel's finding that the ETI Act constitutes an export subsidy, there would be no basis for addressing the EC's claim regarding paragraph (e). Regardless of the basis of such a reversal – a finding of no subsidy, no export contingency, or that the ETI Act is a measure to avoid double taxation – the reversal would eliminate any need to consider the EC's claim.

### C. The Appellate Body Should Reject the EC's Claim that the 50 Percent Rule Renders the ETI Act Contrary to Article 3.1(b) of the SCM Agreement

23. The Appellate Body should reject the EC's claim that the 50 percent rule renders the ETI Act contrary to Article 3.1(b) of the SCM Agreement.[30] The United States refers the Appellate Body to its prior submissions to the Panel with respect to this claim.[31] Here, the United States limits itself to the following observations.

24. First, the EC's submissions to the Panel consistently misstated the standard for finding a violation of Article 3.1(b). The EC alleged that Article 3.1(b) is violated if there is "even a slight bias in favour of domestic goods"[32] or if a contingency on the use of domestic over imported goods "is not precluded."[33] The EC advanced a similar standard in the *Canada Autos* case, and neither the panel nor the Appellate Body accepted it.[34]

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[30] *See EC Appellant Submission*, para. 29(c).

[31] *First U.S. 21.5* Submission, ETI Panel Report, Annex A-2, paras. 196-210; *Second U.S. 21.5 Submission*, ETI Panel Report, Annex C-2, paras. 69-71; *U.S. Oral Statement*, ETI Panel Report, Annex D-3, paras. 152-165; *U.S. Answers to Questions from the Panel*, ETI Panel Report, Annex F-3, paras. 19-20, 53-57 and 77-78; and *U.S. Comments on the EC's Answers to Questions from the Panel*, ETI Panel Report, Annex F-6, paras. 18-20, 34-38 and 49.

[32] *Second EC 21.5 Submission*, ETI Panel Report, Annex C-1, para. 160.

[33] *EC Answers to Questions from the Panel*, ETI Panel Report, Annex F-1, para. 101.

[34] *See U.S. Answers to Questions from the Panel*, ETI Panel Report, Annex F-3, para. 57,

(continued...)

25. Second, the EC's arguments ignore the most significant feature of the Appellate Body's analysis in *Canada Autos*. In that case, the Appellate Body found that it could not determine whether a value-based requirement – such as the ETI Act's 50 percent rule – was *de jure* contingent upon the use of domestic over imported goods without understanding how the measure actually operated. According to the Appellate Body, without this "vital information," a panel cannot know "enough about the measure to determine whether the [domestic value] requirements were contingent 'in law' upon the use of domestic over imported goods."[35] In this regard, the Appellate Body found that a measure requiring 60 percent domestic value did not necessarily lead to a finding of a *de jure* contingency.

26. The 50 percent rule – which is a limit on the amount of certain foreign value added – can be satisfied without the use of any U.S. content. The EC has failed to provide any evidence demonstrating that the actual operation of the 50 percent rule will require any taxpayer to use domestic over imported goods. Accordingly, the EC has failed to establish a violation of Article 3.1(b), as that provision has been interpreted by the Appellate Body.

27. Finally, the United States notes that if the Appellate Body reversed the Panel's finding regarding the existence of a subsidy, or reversed the Panel and found that the ETI Act constitutes a measure to avoid double taxation within the meaning of the fifth sentence of footnote 59, such a decision would require the Appellate Body to reject the EC's claim regarding Article 3.1(b).

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[34] (...continued)
for a discussion of the rejection of the EC argument in *Canada Autos*.

[35] *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, Report of the Appellate Body adopted 19 June 2000, para. 131.

### D. The Appellate Body Should Reject the EC's Claim that the United States Failed to Comply With Its Obligations Under Article 21.5 of the DSU by the End of the Period of Time Allowed by the DSB

28. The Appellate Body should reject the EC's claim that the United States filed to comply with is obligations under Article 21.5 of the DSU by the end of the period of time allowed by the DSB.[36] The United States refers the Appellate Body to its prior submissions to the Panel with respect to this claim.[37]

[36] *See EC Appellant Submission*, para. 29(d).

[37] *First U.S. 21.5* Submission, ETI Panel Report, Annex A-2, paras. 230-233; and *U.S. Oral Statement*, ETI Panel Report, Annex D-3, paras. 183-186.