

***EUROPEAN UNION – COUNTERVAILING MEASURES ON
CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN***

(AB-2017-5 / DS486)

**EXECUTIVE SUMMARY OF THE
THIRD PARTICIPANT SUBMISSION OF
THE UNITED STATES OF AMERICA**

September 20, 2017

I. THE EUROPEAN UNION'S CLAIM THAT THE PANEL ERRED IN CONSIDERING EXPIRED MEASURES

1. The expiration of a measure after panel establishment is not relevant to the Panel's analysis of WTO consistency, nor to its obligation under the DSU to make recommendations with respect to any measures found to be inconsistent with a Member's obligations.
2. Under the DSU, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "*at the time of establishment of the Panel.*" It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings.
3. Therefore, the panel in this dispute was authorized and charged by the DSU to make a finding with respect to the measures within its terms of reference found to be WTO-inconsistent, i.e., the challenged measures, as they existed at the time of the Panel's establishment. The expiration or withdrawal of one of the legal instruments identified in Pakistan's panel request does not alter the scope of the Panel's terms of reference, nor the Panel's mandate under the DSU. The United States thus agrees with Pakistan that the Panel acted in accordance with its obligations under the DSU by making findings with respect to the EU's measure, notwithstanding the expiry of that measure.
4. Having found an inconsistency, however, the United States considers that the Panel was obligated under Article 19.1 of the DSU also to issue a recommendation with respect to the WTO-inconsistent measure. Therefore, if the Appellate Body finds the EU measure to be inconsistent with the SCM Agreement, it must recommend that the EU bring its measure into compliance, as required under Article 19.1, unless the parties agree that not issuing a recommendation will assist them in securing a positive resolution to this dispute.

II. THE EUROPEAN UNION'S CLAIMS OF ERROR WITH REGARD TO THE SCM AGREEMENT

5. Footnote 1 to the SCM Agreement and the Ad Note to Article XVI of the GATT 1994 contemplate that a duty drawback scheme "shall not be deemed to be a subsidy" so long as there is no "excess" remission of duties or taxes from those which have accrued. Consequently, if a duty drawback system were to provide for exemption or remission of duties or taxes in amounts that exceed the amounts of "duties or taxes that have accrued," then such a system may be "deemed to be a subsidy" under the terms of Article 1.1.
6. Importantly, footnote 1 also notes that this standard is "[i]n accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement."
7. Annex II(II) is key to interpreting footnote 1; Annex I, item (i); and Annex II(I). This is because a determination of what inputs are consumed directly informs the analysis of whether there is any excess remission of import duties in connection with those inputs.

8. Annex II(II)(1)-(2) contemplates a system that in itself can demonstrate that there is no excess remission on the part of the exporting Member. In that respect, the United States agrees with the EU that “[l]imiting classification as a ‘subsidy’ solely to the excess remitted or refunded” in all circumstances “*presupposes* that the system for remission or exemption of import duties is compatible with the Annexes I to III, since in those cases exporters are indeed ‘entitled’ to drawback in respect of duties on the inputs used in the exported products.”

9. For this reason, where a purported remission of duties does not satisfy the requirements found in the Annexes, an investigating authority is permitted to examine that measure as a financial contribution under Article 1.1 as it would any other measure, and, if appropriate, to countervail the full amount of the financial contribution.