

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

(AB-2017-5 / DS486)

**THIRD PARTICIPANT ORAL STATEMENT
OF THE UNITED STATES OF AMERICA**

February 8, 2018

I. INTRODUCTION

Mr. Chairman, members of the Division:

1. In this statement, the United States will address the EU's claim that the Panel erred in making findings with respect to an expired measure.¹ The United States *fundamentally agrees* with the EU that the Panel erred when it "issued a mere 'advisory opinion.'" The United States also *agrees* with the EU that the consequence of this error is that "the Appellate Body [should] *reverse* the Panel's findings and conclusions ... and ... *declare* them moot and with no legal effect."² On further reflection, we consider that the more appropriate basis for this conclusion is to find that the Panel acted inconsistently with its terms of reference as established by the DSB under Article 7.1 of the DSU,³ an issue which the Appellate Body may consider for itself in the course of this appeal.⁴

II. THE EUROPEAN UNION'S REQUEST TO REVERSE THE PANEL'S FINDINGS AND CONCLUSIONS SHOULD BE GRANTED ON THE BASIS THAT THE PANEL ACTED INCONSISTENTLY WITH ITS TERMS OF REFERENCE, NOT THAT THE PANEL ERRED IN CONSIDERING EXPIRED MEASURES

2. The United States agrees with the conclusion argued for by the EU – that the Appellate Body find that the Panel erred in making findings with respect to Pakistan's claims under the SCM Agreement. However, the United States does not agree that *expiry* of the EU measure warrants this outcome. A panel may, and indeed must, make findings on expired measures properly within its terms of reference.⁵ But where a party requests findings that would constitute a "mere 'advisory opinion,'"⁶ as Pakistan does here, such a request falls outside the terms of reference, and a panel should decline to make findings accordingly.

3. Under DSU Articles 7.1 and 6.2, the task of a panel is to determine whether the measure at issue is consistent with the relevant WTO obligations "at the time of establishment of the

¹ See Appellant Submission by the European Union ("EU Appellant Submission"), paras. 23-53.

² EU Notification of Appeal, first bullet; EU Appellant Submission, para. 53.

³ *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

⁴ See *US – 1916 Act (AB)*, para. 54; *EC – Fasteners (AB)*, para. 561 & n. 825 (citing previous AB reports).

⁵ U.S. Third Participant Submission, paras. 4-24.

⁶ EU Appellant Submission, paras. 4, 37, 47-48, 53.

Panel,” as panels and the Appellate Body have repeatedly found.⁷ The expiry of a measure *after* that time may become relevant in later actions to resolve the dispute, e.g., in compliance proceedings under DSU Article 21.5, but the expiry of a measure after panel establishment does not alter what the challenged “matter” is and which the DSB established a panel to examine.

4. Moreover, where a panel finds that a challenged measure within its terms of reference is inconsistent with a covered agreement, DSU Article 19.1 provides, in mandatory terms, that the panel “*shall recommend* that the Member concerned bring the measure into conformity with that agreement.” Just as the expiry of a measure after panel establishment cannot alter the scope of the panel’s terms of reference, it likewise cannot alter the obligation of a panel under Article 19.1 to make a recommendation. Regardless of a measure’s expiry, a complaining party without a recommendation retains no rights under Articles 21 or 22 of the DSU, and a positive solution to the dispute may indeed be *frustrated* by the dispute settlement system. Having found a measure to be inconsistent here, the Panel’s decision to forego a recommendation would fall short of the obligation contained in DSU Article 19.1.⁸

5. The United States recalls that Pakistan explicitly did not seek a recommendation with respect to any findings of inconsistency made by the Panel.⁹ Under these unusual circumstances, the Panel might have considered that Pakistan effectively waived its right to a recommendation under Article 19.1 of the DSU. But it would not be appropriate for a complaining party to request a panel to disregard its DSU obligation, and the consequence of Pakistan’s position was to render this proceeding purely advisory.

6. Pakistan’s actions in this dispute raise a fundamental issue under the DSU. Under Article 7.1, a panel’s terms of reference are “to examine” the matter raised in the panel request and then “*to make such findings as will assist the DSB* in making the recommendations or in giving the rulings provided for in [the covered agreements].” This direction to make those findings as will assist the DSB in making recommendations is reflected in DSU Article 11. This provision likewise establishes that the “function of panels is to assist the DSB in discharging its

⁷ See, e.g., *EC – Selected Customs Matters (AB)*, paras. 187, 259; *EC – Chicken Cuts (AB)*, para. 156; *EC – Approval and Marketing of Biotech Products (Panel)*, para. 7.456; *EC – Large Civil Aircraft (Panel)*, para. 7.680.

⁸ See Panel Report, paras. 7.9, 7.13, 8.13.

⁹ See Pakistan Response to EU Request for Preliminary Ruling, para. 4.19.

responsibilities,” and the panel is to make such “findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.” Thus, it is not within a panel’s terms of reference under Article 7.1, nor consistent with a panel’s function under Article 11, to make findings that *cannot* “assist the DSB in making [its] recommendations.”

7. Pakistan’s insistence that *no recommendation* be made in this dispute confirms that there was no dispute between the parties. Rather, as the Panel found, Pakistan requested the Panel to make findings because “the parties dispute, on a fundamental level, *how* investigating authorities *should determine* the extent to which duty drawback schemes *like the MBS may constitute* countervailable subsidies within the meaning of the SCM Agreement.”¹⁰ That is, Pakistan sought an advisory opinion regarding the application of the SCM Agreement in the future – with respect to different duties on different products, and potentially based on different programs.

8. As the EU explains,¹¹ the DSU does not grant WTO panels the authority to issue advisory opinions regarding the interpretation of provisions of the covered agreements in the abstract. A complaining party may not structure its case in a manner that in effect would create such an authority. Rather, the WTO *dispute settlement* system aims to secure a positive solution to a *dispute* between the parties.¹² As noted, the terms of reference of a panel under DSU Article 7.1 accordingly provide for a panel only to make “such findings” as will assist the DSB in making a recommendation to bring a WTO-inconsistent measure into conformity with WTO rules.¹³

9. Where a complaining party requests that a panel make findings not consistent with its terms of reference, the panel must decline to do so. Having determined that Pakistan requested findings with respect to the interpretation and application of the SCM Agreement, but no

¹⁰ Panel Report, para. 7.13 (emphasis added), citing to Pakistan’s response to the European Union’s preliminary ruling request, para. 4.72.

¹¹ EU Appellant Submission, paras. 35-37.

¹² DSU Article 3.7 (“The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.”).

¹³ DSU Article 19.1 (“Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”) (footnotes omitted).

recommendation, this Panel should have found Pakistan’s request to be outside its terms of reference and refrained from making the requested, purely advisory, findings on that basis.

10. Therefore, for the reasons discussed above, the United States agrees with the EU that the Appellate Body should find that the Panel erred in making findings on Pakistan’s claims and should reverse the Panel’s findings and conclusions. Consequently, the Appellate Body should decline to make any findings on the other claims of error raised by the parties in this appeal.