EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

(DS486)

RESPONSE OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS TO THIRD PARTIES

October 3, 2016

QUESTIONS FOR THE UNITED STATES

> ***3. Assume that an exporting Member has no "system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts" (within the meaning of Annex II(II)(1) of the SCM Agreement). Does the United States formally ask the exporting Member to perform a "further examination" of the excess issue as envisioned by Annex II(II)(2) first sentence, and if so at what point in the investigation? If such an examination does not occur or the results of which are deemed to be unsatisfactory does the United States countervail the entire amount of remissions without attempting to calculate the excess portion, even if the United States has information regarding the amount of such excess?***

1. The United States, as a third party in this dispute, provides this response with a view towards aiding the Panel in its interpretation of Article 1.1 of the SCM Agreement. The issue is whether the SCM Agreement permits a Member to treat the remission of import duties otherwise due on imported inputs under a duty drawback scheme as a financial contribution under Article 1.1, absent the fulfillment of Annex II(II)(1) and (2).[1] The practice of the United States does not bear on the interpretive issue before the Panel nor Pakistan's claim that the European Union acted inconsistently with Article 1.1(a)(1)(ii) and accompanying footnote 1, as clarified by Annex II, in treating Pakistan's Manufacturing Bond Scheme as a countervailable subsidy. Therefore, in this response we focus on the interpretation of the text at issue.

2. The United States understands that to invoke the language of footnote 1 – which describes a program that shall "not be deemed to be a subsidy" – a program must accord with the text of Annex II(II)(1) and (2). The text of those provisions requires that an exporting Member's program demonstrably ensure that there is no excess remission of import duties.[2]

3. In the context of an investigation, if the investigating authority cannot satisfy itself that the exporting Member has an adequate verification system or procedure in place under Annex II(II)(1), or the exporting Member does not demonstrate that there are otherwise no excess import duties remitted pursuant to Annex II(II)(2), then there is no textual basis for the investigating authority to make a determination *per footnote 1* that the alleged financial contribution shall "not be deemed to be a subsidy." Thus, where the inquiry posed by Annex II(II) is inconclusive, the limitation in footnote 1 to Article 1.1(a)(1)(ii) does not apply and an investigating authority may determine whether there exists a financial contribution irrespective of footnote 1.[3]

4. Turning to the Panel's scenario, assuming an exporting Member has no "system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts," the only remaining step through which an exporting Member may comport with Annex II (and, therefore, footnote 1) is for the exporting Member to perform the "further examination" as envisioned by Annex II(II)(2). The exporting Member's opportunity to perform

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[1] *See, e.g.*, United States Third Party Submission, para. 4.
[2] *See* footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement.
[3] United States Third Party Oral Statement, paras. 6, 10-13; *see also* United States Third Party Submission, para. 15.

that examination is not contingent upon a request for such action on the part of an investigating authority.

5. In the view of the United States, the analysis under subparagraphs (II)(1) and (2) is sequential.[4] Thus, absent satisfaction of the criteria in paragraph 1, a "further examination by the exporting Member… would need to be carried out". Nothing in the text of paragraph 2 suggests that the investigating authority must request that the exporting Member carry out the "further examination" "[w]here there is no such system or procedure" (as is assumed by the Panel's question).

6. Suppose that, prior to verification, an exporting Member has acknowledged in its questionnaire response that its duty drawback scheme lacks a verification system or procedure under Annex II(II)(1), but has also submitted evidence of the results obtained from conducting a further examination of the amount of excess remission based on actual inputs consumed, pursuant to Annex II(II)(2). In this scenario, the investigating authority could take that information into account in determining whether a subsidy exists and the extent of the benefit. During on-the-spot verification, the investigating authority would then be able to "satisfy itself" as to the veracity of the evidence already submitted.

7. By contrast, suppose that an exporting Member has asserted, prior to verification, that its duty drawback scheme comports with Annex II(II)(1), but has not undertaken "a further examination" as described by Annex II(II)(2). An investigating authority then conducting a verification to "satisfy itself" as to the veracity of the evidence already submitted would be able to spot-check basis for the Annex II(II)(1) assertion, but would have nothing to "verify" regarding Annex II(II)(2) if no "further examination" had been conducted by the exporting Member.

8. In sum, if the exporting Member has not provided information that its duty drawback system comports with Annex II in its questionnaire responses submitted prior to an on-the-spot verification, and cannot further demonstrate at an on-the-spot verification that it has an adequate verification system or procedure in place or that it has done an accounting of the inputs involved to demonstrate that there is no excess – then an investigating authority is not required by Annex II to provide further opportunities for on-the-spot verification.

9. Whether the entire amount of duty remission or an "excess" amount is countervailed would depend on the factual circumstances confronted by an investigating authority. Depending on the factual circumstances, an investigating authority might conclude based on the facts before it that the full amount of import duties otherwise remitted conferred a benefit under Article 1.1(b). But as noted above, if the authority determined that any benefit conferred was more limited than the full remission of duties, the authority may determine that the full amount is not countervailable.

4. Does the United States treat "lines of credit" differently from "loans" in its CVD investigations? If so, how?

[4] *See* United States Third Party Submission, paras. 13-15; United States Third Party Oral Statement, para. 9.

10. In the first instance, the United States notes that the characterization of such terms is highly dependent on the specific facts before the authority. However, generally speaking, a "line of credit" can be considered a type of loan. The general principles underpinning loan benchmark selection under Article 14(b), such as the requirements that a benchmark be "comparable" to and contemporaneous with the subsidy under investigation, should guide the investigating authority's benchmark analysis with regard to loans, including "lines of credit".[5] Of course, in considering whether a loan benchmark is "comparable," the investigating authority should consider a benchmark that "'ha[s] as many elements as possible in common with the investigated loan . . .'"[6] although "in practice, the existence of such an ideal benchmark loan would be extremely rare," and "a comparison should also be possible with other loans that present a lesser degree of similarity."[7] As we have noted, this suggests that factual circumstances are central to the benchmark selection.

[5] U.S. Third Party Submission, paras. 25-26.
[6] *US – Carbon Steel (India) (AB)*, para. 4.345 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 476).
[7] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 476 (citations omitted).