EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

(DS486)

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES OF AMERICA

September 22, 2016

I. INTRODUCTION

Mr. Chairperson, Members of the Panel:

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in this dispute. In our written statement, we addressed certain issues of systemic concern regarding the legal interpretation of the SCM Agreement and the GATT 1994.[1]

2. In our statement today, the United States will focus on the interpretation and application of Article 1 of the SCM Agreement, particularly in light of issues raised by Pakistan with respect to footnote 1 of Article 1.1 and the operation of the annexes related to these provisions.

II. EXAMINATION OF ARTICLE 1.1 AND FOOTNOTE 1 OF THE SCM AGREEMENT

3. In the first instance, the United States would like to highlight its concerns with the interpretative approach to Article 1.1 and footnote 1 of the SCM Agreement suggested by Pakistan in this dispute. To recall, Article 1.1 of the SCM Agreement provides that "a subsidy shall be deemed to exist" if there is a financial contribution per subparagraph (a)(1) or any form of income or price support per subparagraph (a)(2).

4. Among these enumerated types of financial contribution under Article 1.1(a)(1), item (ii) in particular provides that if "government revenue that is otherwise due is foregone or not collected," a subsidy shall be deemed to exist.

5. Subparagraph (a)(1)(ii) is accompanied by footnote 1. Footnote 1 explains that the exemption or remission of certain duties or taxes on exported products borne by the like products destined for domestic consumption "shall not be deemed to be a subsidy" if the exemption or remission is "in amounts not in excess of those which have accrued." Footnote 1 also explains

[1] *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

that this language operates "in accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III" of the SCM Agreement.

6. Footnote 1, therefore, does two things: first, it limits the scope of Article 1.1 subparagraph (a)(1)(ii) where the remission of certain duties or taxes is not in excess of accrued amounts; and second, it requires that this limitation be read "in accordance with" Annexes I, II, and III in determining its applicability. Consequently, if a program were to provide for the exemption or remission of duties or taxes in amounts that exceed the "duties or taxes that have accrued" in a given instance, then such excess may be "deemed to be a subsidy" under the text of Article 1.1 of the SCM Agreement.[2] To reach such a conclusion in the first place, however, the question of excess remission must be answered per the guidelines and procedures of the relevant annexes. Where that inquiry is inconclusive, the limitation found in footnote 1 does not apply and, therefore, an investigating authority may determine whether there is a financial contribution irrespective of footnote 1.

7. This interpretation is supported by the language of the annexes themselves. The procedures described in Annex II, in particular, are pertinent in determining whether there is remission of import duties in amounts that in fact exceed a permitted limit. Annex I, item (i), also states that "[t]his item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II."

8. The United States notes that for a program to operate so as not to provide for excess remission of import duties, Annex II provides for procedures to check the system of the exporting Member. Annex III, which likewise provides procedural guidelines, highlights the

[2] The European Union appears to share the U.S. reading of footnote 1. *See* EU First Written Submission, para. 69 ("[a] natural *a contrario* reading of such provision would indicate that when the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties *in amounts in excess of those which have accrued*, shall be deemed to be a subsidy").

importance of this precision in subparagraph (II)(1). To quote: "[t]he existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of imports for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question."

9. Annex II(II) provides for a two-step analysis for investigating authorities to confirm whether the scheme in question provides for excess remission of import duties. Subparagraph (II)(1) explains that where this sort of program is alleged to be a subsidy, "the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts." If the answer is no, the investigating authority may conclude that the conditions are not satisfied. If the answer is yes, the investigating authority is instructed to conduct a further examination to "see whether" the system or procedure meets three criteria (1) whether the system or procedure is "reasonable;" (2) whether the system or procedure is "effective;" and (3) whether the system or procedure is "based on generally accepted commercial practices in the country of export."

10. Should the system not satisfy the conditions in Annex II(II)(1), Annex II(II)(2) contemplates an additional analysis by the exporting Member. Specifically, subparagraph (II)(2) provides that the exporting Member take steps to demonstrate the validity of its system in three of these different scenarios: (1) where the investigating authority found "no such system or procedure" in place; (2) where the investigating authority found the system or procedure was "not reasonable;" or (3) where the investigating authority found the system or procedures "not to

be applied or not to be applied effectively." In each of those scenarios, the step of demonstrating that there is no excess remission is left to the exporting Member. Specifically, the exporting Member would need to carry out a "further examination . . . based on the actual inputs involved" to determine "whether an excess payment occurred." Otherwise, the investigating authority would have to determine amounts where not possible per the annex guidelines. Such a result would not be consistent with meaning of these provisions.

11. It is for this very reason that both subparagraphs (1) and (2) to Annex II(II) require that the exporting Member ensure and demonstrate that there is no excess remission of import duties. If the exporting Member cannot demonstrate that it has an adequate system or procedure in place or that there are otherwise no excess import duties remitted, then it would be impossible for the investigating authority to make such a determination.

12. The United States notes Pakistan's observation that "[w]ithout examining whether an excess exists, and the amount of that excess, it is not possible to define whether a subsidy exists and the amount of that subsidy." [3] But that assertion misses the point. An investigating authority must be able to identify with some precision the extent to which there is excess duty remission under the system in order to determine whether the limitation provided for in footnote 1 applies to the particular financial contribution at issue. Neither the footnote, nor the referenced annexes, suggests their purpose relates to the determination of subsidy amounts. This is particularly true where the investigating authority cannot discern whether, and to what extent, there is excess remission, because the exporting Member has not been able to make the required demonstration.

13. Thus, the language of the annex supports the interpretation of the United States that footnote 1 operates to limit the definition of a financial contribution set forth in Article

[3] Pakistan First Written Submission, para. 5.70.

1.1(a)(1)(ii). Where the criteria for this limitation are not satisfied per the guidelines of Annex II, the limitation does not apply, and the language of footnote 1 has no further bearing on the question of whether the alleged program is a financial contribution. The question of whether a financial contribution exists must then be answered in its own right. That is, where an exporting Member does not satisfy the evidentiary requirements for the financial contribution to "not be deemed to be a subsidy" per footnote 1, an investigating authority is permitted to consider whether the financial contribution otherwise constitutes a subsidy under Article 1.1(a)(1).

III. CHANGES TO PAKISTAN'S SCHEME AFTER THE PERIOD OF INVESTIGATION

14. Finally, the United States wishes to comment on Pakistan's argument that it amended the rules for its Manufacturing Bond Scheme after the period of investigation. The United States notes that an investigating authority need not consider information that post-dates the period of investigation in a trade remedy proceeding. Rather, the authority must consider the system or procedure that was in place during the period of investigation.[4] Therefore, regardless of what the amendments to Pakistan's Bond Scheme entailed, the Commission was under no obligation to consider them because those changes post-dated the period of investigation.

IV. CONCLUSION

15. This concludes the U.S. oral statement. The United States would like to thank the Panel for its consideration of the views of the United States.

[4] *See EC – Tube or Pipe Fittings (AB)*, paras. 80-81.