

Case Summaries: WTO Disputes

The following summaries provide a brief factual background and describe the key findings of recent WTO panel and Appellate Body reports.

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European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan (EU–PET (Pakistan)), DS486

Adopted	28 May 2018
Complainant	Pakistan
Respondent	European Union
Third Parties	China and the United States

Measures at Issue

This dispute concerns countervailing measures imposed by the European Union (EU) on imports of Polyethylene Terephthalate (PET) from Pakistan. Pakistan has a ‘duty drawback scheme’ by which it remits import duties on input materials consumed in the production of a product that is subsequently exported.¹ The European Commission considered that all duties remitted to a Pakistani PET producer and exporter named Novatex constituted a countervailable subsidy contingent upon export performance. Also, Pakistan has a programme through which it provides government-financed loans to certain qualifying companies. Pre-approved banks are prohibited from charging interest rates above a specified level. The European Commission considered that the loan conferred to Novatex under this programme constituted a countervailable subsidy.²

Main Adopted Findings of the Panel and Appellate Body

At the outset, the Appellate Body concluded that the panel did not fail to comply with Article 11 of the Dispute Settlement Understanding (DSU) when it decided to make

1 Panel Report, *EU–PET (Pakistan)*, para. 7.29.

2 *Ibid.*, para. 7.62.

findings on Pakistan's claims, despite the expiry of the measures at issue.³ The Appellate Body, like the panel, made 'no recommendation' to the Dispute Settlement Body (DSB) under Article 19.1 of the DSU.⁴

Articles 1.1(a)(1)(ii) and 3.1(a) of the SCM Agreement (Export subsidies)

The Appellate Body found that a harmonious reading of Articles 1.1(a)(1)(ii), footnote 1, Annexes II and III of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the Ad Note to GATT Article XVI confirmed that 'duty drawback schemes can constitute an export subsidy that can be countervailed only if they result in a remission or drawback of import charges "in excess" of those actually levied on the imported inputs consumed in the production of the exported product'. Therefore, in the context of duty drawback schemes, "the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is limited to the excess remission or drawback of import charges and does not encompass the entire amount of the remission or drawback of import charges".⁵ The Appellate Body considered that the panel did not err in its interpretation of the aforementioned provisions. It also concluded that the EU failed to demonstrate that the panel erred in its application of Article 1.1(a)(1)(ii) and footnote 1 to the facts of this case. The Appellate Body upheld the panel's conclusions that the European Commission erred under Article 1.1(a)(1)(ii) by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties was 'in excess of those which have accrued'. It also upheld the panel's finding that the European Commission acted inconsistently with Article 3.1(a) by improperly finding the existence of a 'subsidy' that was contingent upon export performance.⁶

Articles 1.1(b) and 14(b) of the SCM Agreement (Benefit)

The panel explained that, for determining whether a loan confers a benefit on a recipient, it must be assessed against a benchmark that is 'a "comparable commercial loan", which "should have as many elements as possible in common with the investigated loan" such that the comparison is meaningful'.⁷ The panel concluded that the European Commission, in calculating the benefit conferred to Novatex by the government-financed loan, acted inconsistently with Article 14(b) of the SCM Agreement because it failed to properly identify what Novatex would have paid on a 'comparable commercial loan'.⁸ Consequently, the Commission acted inconsistently with Article 1.1 (b) of the SCM Agreement too. The panel also concluded that the European Commission acted inconsistently with the chapeau of Article 14 of the SCM Agreement by failing to meaningfully explain how it identified a 'comparable commercial loan'.⁹

3 Appellate Body Report, *EU-PET (Pakistan)*, para. 5.53.

4 *Ibid.*, para. 6.16.

5 *Ibid.*, para. 5.134.

6 *Ibid.*, para. 5.143.

7 Panel Report, *EU-PET (Pakistan)*, para. 7.66.

8 *Ibid.*, para. 7.102.

9 *Ibid.*, para. 7.104.

Article 15.5 of the SCM Agreement (Injury)

The Appellate Body noted that Article 15.5 of the SCM Agreement requires an investigating authority ultimately to establish the existence of a ‘causal relationship between the subsidized imports and the injury to the domestic industry’.¹⁰ It agreed with the panel that it is ‘permissible for an investigating authority to carry out its causation analysis in two steps, by first examining the causal link between the subsidized imports and the injury, and by then examining the injurious effects of other known factors’.¹¹ The Appellate Body concluded that the panel did not err in its interpretation or application of Article 15.5 in rejecting Pakistan’s claim that the European Commission’s causation methodology precluded the Commission from satisfying the non-attribution requirements of Article 15.5. Thus, the Appellate Body upheld the panel’s finding that the European Commission’s approach to causation was not inconsistent with Article 15.5.

Regarding the European Commission’s analysis of ‘other known factors’, the panel concluded that Pakistan failed to establish that the European Commission acted inconsistently with Article 15.5 of the SCM Agreement by failing to conduct a proper non-attribution analysis of imports from Korea and the economic downturn. Conversely, the panel concluded that the European Commission acted inconsistently with Article 15.5 of the SCM Agreement with respect to its analysis of competition from non-cooperating producers and oil prices.¹²

Article 12.6 of the SCM Agreement (Verification visits)

The European Commission performed a verification visit at Novatex’s premises in Karachi, Pakistan in December 2009. The panel observed that, pursuant to Article 12.6, an investigating authority that conducts a verification visit at a firm shall make the results available or disclose such results to the firm concerned. The panel concluded that the Commission acted inconsistently with Article 12.6 of the SCM Agreement ‘because it failed to adequately provide the “results” of the Novatex verification visit to Novatex’.¹³

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10 Appellate Body Report, *EU–PET (Pakistan)*, para. 5.168.

11 *Ibid.*, para. 5.180.

12 Panel Report, *EU–PET (Pakistan)*, paras. 7.135, 7.145, 7.152, and 7.160.

13 *Ibid.*, para. 7.182.