

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

Expiry of the measure at issue

6.2. Panels have a margin of discretion in the exercise of their inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure. Rather, a panel, in the exercise of its jurisdiction, has the authority to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue. In our view, the Panel in this dispute made an objective assessment that "the matter" before it still required to be examined because the parties continued to be in disagreement as to the "applicability of and conformity with the relevant covered agreements" with respect to the European Commission's findings underpinning the expired measure at issue.

6.3. Accordingly, we find that the European Union has not demonstrated that the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding, at paragraph 7.13 of the Panel Report, to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue.

6.4. We therefore reject the European Union's request that we reverse the entirety of the Panel Report and declare moot and of no legal effect the findings and legal interpretations contained therein.

Government revenue foregone

6.5. A harmonious reading of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994 confirms 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. Thus, 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 on inputs and does not encompass the entire amount of the remission or drawback of import charges.

6.6. Furthermore, the perceived "silence" in Annexes II and III to the SCM Agreement, referred to by the European Union, is not one that pertains to the definition of the subsidy, and in particular to what constitutes the financial contribution element of the subsidy, in the form of government revenue foregone. Instead, the perceived "silence" relates to a procedural step in the context of an investigating authority's inquiry into whether the excess remission or drawback of import charges occurred. As regards this procedural step, where an investigating authority determines that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member, and where a further examination by the exporting Member has not been undertaken or is considered unsatisfactory by the investigating authority, it is true that Annexes II and III do not explicitly provide for what should happen next. Nonetheless, the SCM Agreement, as a whole, is not silent, and the perceived "silence" in Annexes II and III does not grant an investigating authority the liberty to depart from these other disciplines of the SCM Agreement. In particular, Article 12.7 of the SCM Agreement allows an investigating authority to rely on the "facts available" on its investigation record to complete its inquiry into whether a duty drawback scheme conveys a subsidy by reason of excess drawback of import charges on inputs.

6.7. Accordingly, we find that the European Union has not demonstrated that the Panel erred in its interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994, as summarized at paragraph 7.56 of the Panel Report.

6.8. The European Union does not challenge the Panel's review of the European Commission's findings on the MBS, beyond the European Union's claim that the Panel applied the wrong legal standard to the facts of this case.

6.9. Accordingly, we find that the European Union has not demonstrated that the Panel erred in its application of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement to the facts of this case.

6.10. Consequently, we uphold the Panel's findings:

- a. in paragraphs 7.60 and 8.1.b.i of the Panel Report that the European Commission erred under Article 1.1(a)(1)(ii) of the SCM Agreement 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" within the meaning of footnote 1 of the SCM Agreement; and
- b. in paragraphs 7.60 and 8.1.b.ii of the Panel Report that the European Commission acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.

The European Commission's causation analysis

6.11. The key objective of a causation analysis under Article 15.5 of the SCM Agreement is for an investigating authority to establish whether there is a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury to the domestic industry. A showing of such a "genuine and substantial" causal relationship entails: (i) an examination of the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports; and (ii) a non-attribution analysis of the injurious effects of other known factors. As such, an investigating authority is required under Article 15.5 to determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.

6.12. While an investigating authority must complete a non-attribution analysis before it reaches an overall conclusion as to the existence of a "causal relationship", Article 15.5 does not prescribe any particular methodology an investigating authority must use in carrying out such analysis. Thus, it is possible for an investigating authority to address the two components of causation in two separate steps. In doing so, an investigating authority can consider a "causal link" to exist between the subsidized imports and the injury on the basis of the first step of its analysis, provided that the authority compares the significance of such a "causal link" with the significance of the injurious effects of other known factors and objectively assesses whether this link qualifies as a "genuine and substantial" causal relationship in light of those other factors.

6.13. We have observed that the Panel correctly found that, while the European Commission stated that a "causal link" existed between the subsidized imports and the injury before it turned to its non-attribution analysis, such consideration of a "causal link" was not a final conclusion, and it had not necessarily prejudged the European Commission's assessment of the effects of the other known factors.

6.14. We have also addressed, and rejected, Pakistan's arguments regarding the four alleged flaws in the European Commission's approach to causation that are raised in support of its claim that this approach precluded the European Commission from satisfying the correct legal standard under Article 15.5. In particular, we have stated that it is inappropriate for an investigating authority to examine whether other known factors "break" the causal link in the sense that the injurious effects of each non-attribution factor are so significant that they eliminate the link between the subsidized imports and the injury. This is because the correct causation standard requires instead an examination of whether, in light of the significance of the injurious effects of the other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury. However, with respect to the countervailing duty investigation at issue, we have observed that the European Commission effectively examined whether and why the subsidized imports can be considered a "genuine and substantial" cause of the injury taking into

account the injurious effects of all of the other known factors that it found to have contributed to the injury.

6.15. Accordingly, we find that the Panel did not err in its interpretation or application of Article 15.5 of the SCM Agreement in rejecting Pakistan's claim that the European Commission's use of the "break the causal link" approach precluded the European Commission from satisfying the non-attribution requirements of Article 15.5 in this case.

- a. Consequently, we uphold the Panel's finding, in paragraph 8.1.d.i of the Panel Report, that Pakistan failed to establish that the European Commission's approach to causation in this case was inconsistent with Article 15.5 of the SCM Agreement.

Recommendation

6.16. As the Panel found, the measure at issue in this dispute has expired and has ceased to have legal effect. Therefore, we do not make any recommendation to the DSB under Article 19.1 of the DSU.

Signed in the original in Geneva this 27th day of April 2018 by:

Shree Baboo Chekitan Servansing
Presiding Member

Ujal Singh Bhatia
Member

Peter Van den Bossche
Member
