

8 FINDINGS AND CONCLUSIONS

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

- a. In respect of the European Union's objections under Article 6.2 of the DSU:
 - i. the Panel finds that Pakistan's claim that the Commission acted inconsistently with Annex II(II)(1) and/or Annex III(II)(2) of the SCM Agreement "because it failed to examine the 'generally accepted commercial [practices]' prevailing in Pakistan when examining the verification system and procedures under the MBS" is outside the Panel's terms of reference as the panel request failed to present the problem clearly;
 - ii. the Panel rejects the European Union's objection to Pakistan's claim under Article 1.1(a)(1)(ii) of the SCM Agreement, and thus finds that this claim is within the Panel's terms of reference;
 - iii. the Panel rejects the European Union's objection to Pakistan's claim under Article 12.6 of the SCM Agreement, and thus finds that this claim is within the Panel's terms of reference; and
 - iv. the Panel finds that the remaining objections raised by the European Union have become moot and therefore the Panel does not address them.
- b. In respect of Pakistan's claims regarding the MBS:
 - i. the Panel finds that the Commission acted inconsistently with 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;
 - ii. the Panel finds that the Commission also acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent on export performance; and
 - iii. the Panel exercises judicial economy or finds that, for other reasons, it need not address Pakistan's claims that the Commission: (a) failed to investigate whether Pakistan's duty drawback system verification mechanisms were based on generally accepted commercial practices in Pakistan; (b) failed to provide Pakistan with the opportunity to assist the Commission's determination of the excess amount; (c) failed to take into account evidence regarding the amount of any excess drawback; (d) failed to make normal allowance for waste; (e) violated Annexes II(II) and III(II) "as a whole"; (f) violated Annex I(i); (g) violated Articles 1.1(b), 10, 19, and 32 of the SCM Agreement; and (h) violated Article VI of the GATT 1994.
- c. In respect of Pakistan's claims regarding the LTF-EOP:
 - i. the Panel finds that the Commission acted inconsistently with Article 14(b) of the SCM Agreement by failing to properly identify what Novatex would have paid on a "comparable commercial loan" in calculating the benefit conferred by the LTF-EOP Loan;
 - ii. the Panel finds that the Commission acted inconsistently with Article 1.1(b) of the SCM Agreement as a consequence of having acted inconsistently with Article 14(b) of the SCM Agreement;
 - iii. the Panel finds that the Commission acted inconsistently with the *chapeau* of Article 14 of the SCM Agreement by failing to transparently and adequately explain how it identified a "comparable commercial loan"; and
 - iv. the Panel exercises judicial economy in respect of Pakistan's claims that as a result of violating Article 14(b) of the SCM Agreement and/or the *chapeau* of Article 14 of

the SCM Agreement, the Commission acted inconsistently with Articles 10, 19 and 32 of the SCM Agreement, and Article VI of the GATT 1994.

- d. In respect of Pakistan's claims under Article 15.5 of the SCM Agreement:
- i. the Panel finds that Pakistan failed to establish that the Commission's use of the "break the causal link" methodology in this case was inconsistent with Article 15.5 of the SCM Agreement;
 - ii. the Panel finds that Pakistan failed to establish that the Commission acted inconsistently with Article 15.5 of the SCM Agreement by failing to conduct a proper non-attribution analysis of imports from Korea;
 - iii. the Panel finds that Pakistan failed to establish that the Commission acted inconsistently with Article 15.5 of the SCM Agreement by failing to conduct a proper non-attribution analysis of the economic downturn;
 - iv. the Panel finds that the Commission acted inconsistently with Article 15.5 of the SCM Agreement with respect to its analysis of competition from non-cooperating producers; and
 - v. the Panel finds that the Commission acted inconsistently with Article 15.5 of the SCM Agreement with respect to its analysis of oil prices.
- e. In respect of Pakistan's claim under Article 12.6 of the SCM Agreement, the Panel finds 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.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue have been found to be inconsistent with the SCM Agreement, they have nullified or impaired benefits accruing to Pakistan under that agreement. The European Union asserts that because the challenged measures in this dispute expired, the measures cannot nullify or impair Pakistan's rights under the WTO agreements. The European Union thus considers that it has rebutted the presumption of nullification or impairment referenced in Article 3.8 of the DSU.³⁹⁸ We reject the European Union's argument. Because the expiry of the measures had no retroactive effect, such expiry cannot eliminate any nullification or impairment existing at the time of the Panel's establishment.³⁹⁹ Moreover, the legal status of a measure and the presence of actual impacts resulting from its WTO-inconsistency are, in our view, conceptually distinct and should not be equated without further evidence.⁴⁰⁰ Further, we do not know what the condition of the EU PET market would be if the WTO-inconsistent measures had not been imposed.⁴⁰¹

8.3. Given that the measures at issue in this dispute have expired, we make no recommendation to the DSB pursuant to Article 19.1 of the DSU.⁴⁰²

³⁹⁸ European Union's request for a preliminary ruling, paras. 10 and 18.

³⁹⁹ See, e.g. Panel Report, *Russia – Tariff Treatment*, para. 7.125.

⁴⁰⁰ See, e.g. Panel Report, *US – Poultry (China)*, para. 8.6 (finding that an expired measure nullified or impaired China's benefits, and refusing to make recommendations under Article 19.1 of the DSU with respect to that measure).

⁴⁰¹ See, e.g. Panel Report, *Turkey – Textiles*, para. 9.204.

⁴⁰² See above fn 33.