WORLD TRADE ORGANIZATION

WT/DS486/R

6 July 2017

(17-3595)

Page: 1/74

Original: English

# EUROPEAN UNION – COUNTERVAILING DUTIES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

REPORT OF THE PANEL

*BCI deleted, as indicated **[***]***

## TABLE OF CONTENTS

## LIST OF ANNEXES

## ANNEX A

WORKING PROCEDURES OF THE PANEL



## ANNEX B

ARGUMENTS OF THE EUROPEAN UNION



## ANNEX C

ARGUMENTS OF PAKISTAN



## ANNEX D

ARGUMENTS OF THE THIRD PARTIES



## ANNEX E

INTERIM REVIEW

## CASES CITED IN THIS REPORT

| Short title | Full case title and citation |
|---|---|
| *Argentina – Ceramic Tiles* | Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, p. 6241 |
| *Argentina – Footwear (EC)* | Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515 |
| *Argentina – Poultry Anti-Dumping Duties* | Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, DSR 2003:V, p. 1727 |
| *Argentina – Textiles and Apparel* | Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033 |
| *Australia – Apples* | Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010, DSR 2010:V, p. 2175 |
| *Brazil – Aircraft* | Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161 |
| *Brazil – Desiccated Coconut* | Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 167 |
| *Chile – Price Band System* | Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473) |
| *China – Autos (US)* | Panel Report, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States*, WT/DS440/R and Add.1, adopted 18 June 2014, DSR 2014:VII, p. 2655 |
| *China – Electronic Payment Services* | Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305 |
| *China – GOES* | Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251 |
| *China – GOES (Article 21.5 – US)* | Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS414/RW and Add.1, adopted 31 August 2015 |
| *China – HP-SSST (Japan) / China – HP-SSST (EU)* | Panel Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/R and Add.1 / WT/DS460/R, Add.1 and Corr.1, adopted 28 October 2015, as modified by Appellate Body Reports WT/DS454/AB/R / WT/DS460/AB/R |
| *China – Raw Materials* | Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295 |
| *Dominican Republic – Import and Sale of Cigarettes* | Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425 |
| *EC – Approval and Marketing of Biotech Products* | Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847 |
| *EC – Bananas III* | Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591 |

| Short title | Full case title and citation |
|---|---|
| *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)* | Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165 |
| *EC – Bed Linen* | Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report WT/DS141/AB/R, DSR 2001:VI, p. 2077 |
| *EC – Countervailing Measures on DRAM Chips* | Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671 |
| *EC – Fasteners (China)* | Appellate Body Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995 |
| *EC – Fasteners (China)* | Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289 |
| *EC – Hormones* | Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135 |
| *EC – IT Products* | Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933 |
| *EC – Salmon (Norway)* | Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, p. 3 |
| *EC – Selected Customs Matters* | Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791 |
| *EC – Tube or Pipe Fittings* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613 |
| *EC – Tube or Pipe Fittings* | Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701 |
| *EC and certain member States – Large Civil Aircraft* | Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7 |
| *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* | Panel Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States, WT/DS316/RW and Add.1, circulated to WTO Members 22 September 2016 [appealed by European Union 13 October 2016] |
| *Egypt – Steel Rebar* | Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667 |
| *EU – Biodiesel (Argentina)* | Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016 |
| *EU – Biodiesel (Argentina)* | Panel Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/R and Add.1, adopted 26 October 2016, as modified by Appellate Body Report WT/DS473/AB/R |
| *EU – Fatty Alcohols (Indonesia)* | Panel Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R and Add.1, circulated to WTO Members 16 December 2016 [appealed by Indonesia 10 February 2017] |
| *EU – Footwear (China)* | Panel Report, *European Union – Anti-Dumping Measures on Certain Footwear from China*, WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585 |

| Short title | Full case title and citation |
|---|---|
| *Guatemala – Cement I* | Appellate Body Report, Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767 |
| *India – Additional Import Duties* | Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/R, adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R, DSR 2008:XX, p. 8317 |
| *India – Patents (US)* | Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9 |
| *Indonesia – Autos* | Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201 |
| *Japan – Alcoholic Beverages II* | Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97 |
| *Korea – Certain Paper* | Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637 |
| *Korea – Dairy* | Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3 |
| *Mexico – Olive Oil* | Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179 |
| *Mexico – Steel Pipes and Tubes* | Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, DSR 2007:IV, p. 1207 |
| *Mexico – Taxes on Soft Drinks* | Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3 |
| *Peru – Agricultural Products* | Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015 |
| *Russia – Commercial Vehicles* | Panel Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy*, WT/DS479/R and Add.1, circulated to WTO Members 27 January 2017 [appealed by Russia 20 February 2017] |
| *Russia – Tariff Treatment* | Panel Report, *Russia – Tariff Treatment of Certain Agricultural and Manufacturing Products*, WT/DS485/R, Corr.1, Corr.2, and Add.1, adopted 26 September 2016 |
| *Thailand – H-Beams* | Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 2701 |
| *Thailand – H-Beams* | Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R, DSR 2001:VII, p. 2741 |
| *Turkey – Textiles* | Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, adopted 19 November 1999, as modified by Appellate Body Report WT/DS34/AB/R, DSR 1999:VI, p. 2363 |
| *Ukraine – Passenger Cars* | Panel Report, *Ukraine – Definitive Safeguard Measures on Certain Passenger Cars*, WT/DS468/R and Add.1, adopted 20 July 2015 |
| *US – Anti-Dumping and Countervailing Duties (China)* | Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869 |
| *US – Carbon Steel* | Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779 |
| *US – Carbon Steel (India)* | Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727 |

| Short title | Full case title and citation |
|---|---|
| *US – Carbon Steel (India)* | Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189 |
| *US – Certain EC Products* | Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373 |
| *US – Continued Zeroing* | Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291 |
| *US – Countervailing and Anti-Dumping Measures (China)* | Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027 |
| *US – Countervailing Duty Investigation on DRAMS* | Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131 |
| *US – Countervailing Measures (China)* | Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015 |
| *US – DRAMS* | Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521 |
| *US – FSC* | Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R, adopted 20 March 2000, as modified by Appellate Body Report WT/DS108/AB/R, DSR 2000:IV, p. 1675 |
| *US – FSC (Article 21.5 – EC)* | Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55 |
| *US – FSC (Article 21.5 – EC)* | Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by Appellate Body Report WT/DS108/AB/RW, DSR 2002:I, p. 119 |
| *US – Gasoline* | Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29 |
| *US – Hot-Rolled Steel* | Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697 |
| *US – Hot-Rolled Steel* | Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769 |
| *US – Lamb* | Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051 |
| *US – Large Civil Aircraft (2nd complaint)* | Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7 |
| *US – Large Civil Aircraft (2nd complaint)* | Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/R, adopted 23 March 2012, as modified by Appellate Body Report WT/DS353/AB/R, DSR 2012:II, p. 649 |
| *US – Line Pipe* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, p. 1403 |
| *US – Oil Country Tubular Goods Sunset Reviews* | Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257 |
| *US – Poultry (China)* | Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909 |

| Short title | Full case title and citation |
|---|---|
| *US – Softwood Lumber IV (Article 21.5 – Canada)* | Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357 |
| *US – Steel Safeguards* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117 |
| *US – Tyres (China)* | Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811 |
| *US – Tyres (China)* | Panel Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R, adopted 5 October 2011, upheld by Appellate Body Report WT/DS399/AB/R, DSR 2011:IX, p. 4945 |
| *US – Wheat Gluten* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717 |
| *US – Wool Shirts and Blouses* | Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323 |
| *US – Wool Shirts and Blouses* | Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343 |
| *US – Zeroing (Japan) (Article 21.5 – Japan)* | Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441 |

## ABBREVIATIONS USED IN THIS REPORT

| Abbreviation | Description |
|---|---|
| Anti-Dumping Agreement | Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 |
| BCI | Business Confidential Information |
| CVD | Countervailing duty |
| Definitive Determination | Council Implementing Regulation (EU) No. 857/2010 of 27 September 2010 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, Official Journal of the European Union, L Series, No. 254/10 (29 September 2010), (Exhibit PAK-2) |
| DSB | Dispute Settlement Body |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| EU | European Union |
| GATT 1994 | General Agreement on Tariffs and Trade 1994 |
| IP | Investigation period |
| KIBOR | Karachi Inter-Bank Offer Rate |
| LTF-EOP | Long Term Financing of Export-Oriented Projects |
| MBS | Manufacturing Bond Scheme |
| PET | Polyethylene terephthalate |
| PKR | Pakistani rupees |
| POI | Period of investigation |
| Provisional Determination | Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, Official Journal of the European Union, L Series, No. 134/25 (1 June 2010), (Exhibit PAK-1) |
| SBP | State Bank of Pakistan |
| SCM Agreement | Agreement on Subsidies and Countervailing Measures |
| Vienna Convention | Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679 |
| WTO | World Trade Organization |

# 1 INTRODUCTION

## 1.1 Complaint by Pakistan

1.1. On 28 October 2014, Pakistan requested consultations with the European Union pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and Article XXIII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).[1]

1.2. Consultations were held on 17 December 2014 but failed to resolve this dispute.

## 1.2 Panel establishment and composition

1.3. On 12 February 2015, Pakistan requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 25 March 2015, the Dispute Settlement Body (DSB) established a panel pursuant to the request of Pakistan in document WT/DS486/3, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by Pakistan in document WT/DS486/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 13 May 2015, the parties agreed that the Panel would be composed as follows:

| | |
|---|---|
| Chairperson: | Mr William Davey |
| Members: | Mr Michael Mulgrew |
| | Mr Welber Barral |

1.6. The United States and China notified their interest in participating in the Panel proceedings as third parties.

## 1.3 Panel proceedings

### 1.3.1 General

1.7. The Panel began its work on this case later than it would have wished due to staff constraints in the WTO Secretariat.[5] After consultation with the parties, the Panel adopted its Working Procedures[6] on 15 March 2016 and the timetable on 1 April 2016. The timetable was revised on 16 June 2016, 1 December 2016 and 20 March 2017.

1.8. The Panel held a first substantive meeting with the parties on 21 and 22 September 2016. A session with the third parties took place on 22 September 2016. The Panel held a second substantive meeting with the parties on 29 and 30 November 2016. On 27 January 2017, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 24 February 2017. The Panel issued its Final Report to the parties on 31 March 2017.

[1] Pakistan's request for consultations, WT/DS486/1.
[2] Pakistan's request for the establishment of a panel, WT/DS486/2 (Pakistan's panel request).
[3] DSB, Minutes of the meeting held on 25 March 2015, (circulated on 1 May 2015), WT/DSB/M/359.
[4] Constitution note of the Panel, WT/DS486/3.
[5] *EU – PET (Pakistan)*, communication from the Panel, (issued and circulated on 13 November 2015), WT/DS486/4.
[6] Working Procedures of the Panel, Annex A-1.

### 1.3.2 Working Procedures on Business Confidential Information (BCI)

1.9. After consultation with the parties, the Panel adopted, on 14 April 2016, Additional Working Procedures Concerning Business Confidential Information (BCI).[7]

### 1.3.3 Request for a preliminary ruling

1.10. On 3 March 2016, the European Union submitted to the Panel a request for a preliminary ruling. The Panel addresses the European Union's request for a preliminary ruling in its findings below.[8]

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. This dispute concerns countervailing measures imposed by the European Union on imports of certain polyethylene terephthalate (PET) from Pakistan pursuant to the Council Implementing Regulation (EU) No. 857/2010 of 27 September 2010 imposing a definitive countervailing duty (CVD) and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates (the Definitive Determination). The previously applicable provisional measure challenged by Pakistan had been imposed pursuant to Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates (the Provisional Determination).

## 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. Pakistan requests that the Panel find that[9]:

a. With respect to the Manufacturing Bond Scheme (MBS), which the European Commission (the Commission) found to be a countervailable subsidy contingent on export performance, the Commission acted inconsistently with its obligations under:

   i. Article 1.1(a)(1)(ii) of the SCM Agreement, because it improperly determined the existence of a financial contribution;

   ii. Article 1.1(b) of the SCM Agreement, because it improperly analysed the existence of a benefit;

   iii. Article 3.1(a) of the SCM Agreement, because – given its incorrect interpretation and application of Article 1 – it incorrectly determined the existence of an export subsidy;

   iv. Article 10 of the SCM Agreement, because it imposed a countervailing duty not in accordance with the provisions of Article VI of the GATT 1994 and the above-mentioned terms of the SCM Agreement;

   v. Article 32 of the SCM Agreement, because it took specific action against a subsidy not in accordance with the provisions of the GATT 1994, as interpreted by the SCM Agreement, in particular by the above-mentioned provisions;

   vi. Article 19.1 of the SCM Agreement, because it made a final determination of the existence and amount of the subsidy and imposed a countervailing duty not in accordance with Article 19;

   vii. Annex I(i) of the SCM Agreement by failing to properly determine the existence of an export subsidy within the meaning of that provision; and

[7] Additional Working Procedures of the Panel Concerning Business Confidential Information, Annex A-2.
[8] See below para. 7.9 *et seq.*
[9] Pakistan's first written submission, paras. 9.3-9.6.

viii. Article VI:3 of the GATT 1994, by levying a countervailing duty in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of the product at issue.

If the Panel finds that the MBS falls under Annex II of the SCM Agreement, Pakistan also requests the Panel to find that the Commission acted inconsistently with:

i. The procedures under Annex II(II) as a whole;

ii. Annex II(II)(2), because it failed to ensure/provide for the opportunity that an investigation be carried out to determine the existence of an excess remission; and

iii. Annex II(II)(1), because it failed to examine the "generally accepted commercial principles" prevailing in Pakistan when examining the verification system and procedures under the MBS.

If the Panel finds that the MBS falls under Annex III of the SCM Agreement, Pakistan also requests the Panel to find that the Commission acted inconsistently with:

i. The procedures under Annex III(II) as a whole;

ii. Annex III(II)(3) because it failed to ensure/provide for the opportunity that an investigation be carried out to determine the existence of an excess remission; and

iii. Annex III(II)(2), because it failed to examine the "generally accepted commercial principles" prevailing in Pakistan when examining the verification system and procedures under the MBS.

b. With respect to the Long Term Financing of Export-Oriented Projects (LTF-EOP), which the Commission found to be a countervailable subsidy contingent on export performance, the Commission acted inconsistently with its obligations under:

i. Article 1.1(b) of the SCM Agreement by improperly analysing and determining the existence of benefit;

ii. The *chapeau* of Article 14 of the SCM Agreement, because the Commission failed to adequately explain the application of the method used by the investigating authority in calculating the benefit (which is provided for in the national legislation or implementing regulations) to the particular case at hand;

iii. Article 14(b) of the SCM Agreement, because the Commission failed to properly calculate any benefit as the difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market;

iv. Article 10 of the SCM Agreement, because it failed to impose a countervailing duty in accordance with the provisions of Article VI of GATT 1994 and the above-mentioned terms of the SCM Agreement;

v. Article 19.1 of the SCM Agreement, because it made a final determination of the existence and amount of the subsidy and imposed a countervailing duty not in accordance with Article 19 (benefit);

vi. Article 32 of the SCM Agreement, because it failed to take specific action against a subsidy in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement, in particular by the above-mentioned provisions; and

vii. Article VI:3 of the GATT 1994, by levying a countervailing duty in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production, or export of the product at issue.

c. With respect to its non-attribution determinations, the Commission acted inconsistently with its obligations under Article 15.5 of the SCM Agreement.

d. With respect to its obligation to disclose the results of the verification visit to the exporting producer in Pakistan, the Commission acted inconsistently with its obligations under Article 12.6 of the SCM Agreement.

3.2. The European Union requests that the Panel reject Pakistan's claims in this dispute in their entirety.[10]

## 4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2 and Annexes C-1 and C-2).

## 5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the China and the United States are reflected in their executive summaries, provided in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes D-1 and D-2).

## 6 INTERIM REVIEW

6.1. On 24 February 2017, the Panel issued its Interim Report to the parties. On 8 March 2017, the European Union communicated to the Panel that it had no substantial comments on the Panel's Interim Report. On 10 March 2017, Pakistan submitted a written request for the Panel to review aspects of the Interim Report. Neither party requested an interim review meeting. On 16 March 2017, the European Union submitted comments on Pakistan's requests for review.

6.2. The parties' comments made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex E-1.

## 7 FINDINGS

7.1. This dispute concerns EU measures imposing CVDs on certain PET from Pakistan. Pakistan's claims proceed under various provisions of the SCM Agreement and the GATT 1994. The European Union requests that the Panel reject each of the claims presented by Pakistan. In the request for a preliminary ruling, the European Union also argued that the Panel should terminate its work in this dispute because the challenged measures have expired, and, in the alternative, that certain of Pakistan's claims were outside the Panel's terms of reference under the standards set forth in Article 6.2 of the DSU.

7.2. We begin by examining the request for a preliminary ruling submitted by the European Union. Thereafter, we consider Pakistan's claims concerning the MBS, followed by Pakistan's claims concerning the LTF-EOP. We then consider Pakistan's claims under Article 15.5 of the SCM Agreement, before turning to Pakistan's claim under Article 12.6 of the SCM Agreement pertaining to the results of the verification visit. However, before proceeding to do so, we briefly recall the relevant general principles regarding treaty interpretation, the standard of review and the burden of proof in World Trade Organization (WTO) dispute settlement proceedings, as laid down by the Appellate Body.

### 7.1 General principles regarding treaty interpretation, the applicable standard of review, and burden of proof

#### 7.1.1 Treaty interpretation

7.3. Article 3.2 of the DSU provides that the dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of

[10] European Union's first written submission, para. 269.

interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention are such customary rules.[11]

### 7.1.2 Standard of review

7.4. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part:

> [A] panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.[12]

7.5. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[13]

7.6. The Appellate Body has also clarified that a panel reviewing an investigating authority's determination may not conduct a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. A panel's examination of those conclusions must be "in-depth" and "critical and searching".[14]

7.7. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[15] A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion.[16] Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination.[17] That notwithstanding, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation − even when founded on record evidence − cannot form the basis of a panel's conclusion.[18]

### 7.1.3 Burden of proof

7.8. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.[19] Therefore, Pakistan bears the burden of demonstrating that the European Union's measures are inconsistent with the WTO Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.[20] Finally, it is generally for each party asserting a fact to provide proof thereof.[21]

---

[11] Appellate Body Report, *Japan − Alcoholic Beverages II*, p. 10, section D.
[12] Emphasis added.
[13] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 186.
[14] Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93.
[15] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, paras. 187 and 188.
[16] See Appellate Body Report, *Thailand − H-Beams*, paras. 117-119.
[17] See Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 164.
[18] Appellate Body Report, *US − Lamb*, paras. 153-161. See also Appellate Body Reports, *US − Steel Safeguards*, para. 326; and *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 97; and Panel Reports, *Argentina − Ceramic Tiles*, para. 6.27; and *Argentina − Poultry Anti-Dumping Duties*, para. 7.48.
[19] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 14.
[20] Appellate Body Report, *EC − Hormones*, para. 104.
[21] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 14.

## 7.2 Request for a preliminary ruling

### 7.2.1 Introduction

7.9. On 3 March 2016, the European Union filed a request for a preliminary ruling. The request asked the Panel to: (a) cease all work on this dispute because the relevant EU CVD measures on certain PET from Pakistan terminated on 30 September 2015 (the Termination Request)[22]; and (b) if the Panel denied the Termination Request, find that certain of Pakistan's claims are outside the Panel's terms of reference under the standards set forth in Article 6.2 of the DSU.[23] This Section addresses each subject in turn.

### 7.2.2 The Termination Request

#### 7.2.2.1 Main arguments of the parties

7.10. The European Union argues that the Panel should terminate its work in this dispute because the purpose of these proceedings has already been fulfilled, i.e. to secure the withdrawal of the challenged measures.[24] The European Union cites Articles 3.4, 3.7, and 11 of the DSU for the proposition that the role of a panel is to make recommendations or rulings when these contribute to securing a positive solution to a dispute.[25] The European Union asserts that because the challenged measures no longer exist, they have been "withdrawn" within the meaning of Article 3.7 of the DSU, and thus a positive solution has been secured.[26] The European Union further argues that relevant WTO jurisprudence supports its position. As an additional justification for terminating this proceeding, the European Union refers to the backlog of cases in the WTO dispute settlement system, cases which could be more rapidly addressed if the Panel were to terminate this dispute.[27]

7.11. Pakistan asks the Panel to reject the Termination Request because it "lacks any basis in the text of the DSU or the practice of panels and the Appellate Body".[28] Pakistan asserts that, "[f]rom a strictly legal perspective … the core issue here is … that the measures were in force on the date on which the panel was established. In these circumstances, the Panel must rule on Pakistan's claims".[29] According to Pakistan, the Appellate Body has explained that the expiry of a measure does not limit a panel's jurisdiction to issue findings regarding that measure and a panel cannot decline to rule on the entirety of the claims over which it has jurisdiction.[30] Pakistan notes that many GATT and WTO panels have made findings with respect to expired measures, and that no panel has declined to exercise its jurisdiction over a measure that expired after the panel's establishment and where the complainant asked the panel to issue findings regarding that measure.

#### 7.2.2.2 Evaluation by the Panel

7.12. On 19 May 2016, the Panel sent a communication to the parties denying the Termination Request and indicating that "[t]he Panel will provide the reasons for its decision in due course. This

[22] Pakistan responded to the Termination Request on 24 March 2016, and the European Union filed comments thereon on 4 April 2016. Pakistan filed a reply to the European Union's comments on 8 April 2016.
[23] Pakistan responded to the European Union's objections under Article 6.2 of the DSU in its first written submission, and the European Union filed comments thereon on 13 June 2016. In those comments, the European Union raised additional objections under Article 6.2 regarding certain claims that Pakistan pursued in its first written submission. Pakistan filed a reply to the European Union's comments regarding Article 6.2 issues on 4 July 2016.
[24] European Union's request for a preliminary ruling, para. 14.
[25] European Union's comments on Pakistan's response to the European Union's preliminary ruling request, para. 10.
[26] European Union's request for a preliminary ruling, para. 15.
[27] European Union's request for a preliminary ruling, para. 31.
[28] Pakistan's response to the European Union's preliminary ruling request, para. 1.3.
[29] Pakistan's response to the European Union's preliminary ruling request, para. 4.36.
[30] Pakistan's response to the European Union's preliminary ruling request, para. 4.14 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 46).

preliminary ruling, and the reasons for it, will form an integral part of the Panel's final report."[31] The Panel provides its reasons for denying the Termination Request here.

7.13. The challenged measures in this dispute are CVDs on certain PET from Pakistan imposed pursuant to the Definitive Determination. The legal effect of the Definitive Determination *vis-à-vis* certain PET from Pakistan expired on 30 September 2015, at which time the associated CVDs on certain PET from Pakistan were removed.[32] The challenged measures have thus expired and ceased to have legal effect.[33] WTO panel and Appellate Body jurisprudence indicates that panels have discretion regarding whether to make findings regarding such expired measures.[34] We have not identified any reason to depart from this current of jurisprudence. We therefore have discretion as to whether to make findings with respect to the challenged measures in this dispute. In deciding how to exercise our discretion, we note certain other circumstances surrounding this dispute. First, and in particular, the challenged measures expired only after panel establishment.[35] Second, the complainant has continued to request that we make findings with respect to the expired measures.[36] Third, we consider it a reasonable possibility that the European Union could impose CVDs on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.[37] In particular, we note that Pakistan claims, not contested by the European Union, that a wide range of Pakistani exports benefit from the MBS[38] and that the parties dispute, on a fundamental level, how investigating authorities should determine the extent to which duty drawback schemes like the MBS may constitute countervailable subsidies within the meaning of the SCM Agreement. Given such circumstances, we proceed with this dispute.[39]

[31] Panel communication to the parties, 19 May 2016.

[32] On 1 October 2015, the European Union sent a letter to the Panel notifying the Panel that "the measures at issue in this dispute no longer exist as of 30 September 2015" and enclosing the notice of expiry. (European Union's communication, 1 October 2015).

[33] It is therefore possible neither: (a) for the European Union to "withdraw" the challenged measures within the meaning of Article 3.7 of the DSU; nor (b) for the Panel to issue meaningful recommendations under Article 19.1 of the DSU that the European Union bring the measures into conformity with the relevant WTO agreement(s) if the Panel were to find the measures WTO-inconsistent. (See Appellate Body Report, *US – Certain EC Products*, paras. 80-82 (discussing appropriateness of making DSU Article 19.1 recommendations *vis-à-vis* expired measures)). We emphasize the fact-specific nature of these conclusions. Given the array of measures subject to WTO dispute settlement, and the many ways measures may operate in Members' municipal law, there may be other cases where it is unclear the extent to which the legal effect of a certain measure or group of measures expired in a manner that makes Article 19.1 recommendations inutile. (See Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.831-6.838 (observing this phenomenon and discussing related jurisprudence) (appeal pending)).

[34] Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270; and *China – Raw Materials*, para. 263; and Panel Reports, *US – Poultry (China)*, para. 7.54; and *EC – IT Products*, para. 7.165. Expiry of the challenged measures does not affect the jurisdiction of the Panel to issue findings with respect to such measures. (Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

[35] For reports considering this factor, see Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; and *EC – Approval and Marketing of Biotech Products*, paras. 7.1307 and 7.1308. See also Panel Reports, *US – Gasoline*, para. 6.19 (declining to make findings with respect to a measure that expired *before* panel establishment); and *Argentina – Textiles and Apparel*, paras. 6.4, 6.12, and 6.13 (same). No panel has declined to hear the entirety of a dispute due to the expiry of the challenged measure(s).

[36] For reports considering this factor, see Panel Reports, *US – Wool Shirts and Blouses*, para. 6.2; *Indonesia – Autos*, paras. 14.134 and 14.135; and *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343. See also Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18 and 5.19 ("Members *enjoy discretion* in deciding whether to bring a case, and are thus expected to be largely self-regulating in deciding whether any such action would be fruitful. The largely self-regulating nature of a Member's decision to bring a dispute is borne out by Article 3.3 [of the DSU]" but also cautioning that "the considerable deference accorded to a Member's exercise of its judgment in bringing a dispute is not entirely unbounded" (emphasis original; fns omitted; internal quotation marks omitted)).

[37] For reports considering this factor, see Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, para. 6.14; *India – Additional Import Duties*, paras. 7.69 and 7.70; *US – Poultry (China)*, para. 7.55; *EC – IT Products*, para. 7.1159; *China – Electronic Payment Services*, para. 7.227; and *EC – Approval and Marketing of Biotech Products*, para. 7.1310.

[38] Pakistan's response to the European Union's preliminary ruling request, para. 4.72.

[39] We note that in a different context the Appellate Body suggested a number of reasons why a panel should not normally decline to exercise jurisdiction in a case that is properly before it. (Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 46-53). We further note the European Union's argument that granting the Termination Request would conserve the WTO Secretariat's dispute settlement resources, thus allowing

### 7.2.3 Article 6.2 of the DSU

7.14. The European Union's request for a preliminary ruling also asked us to find that certain of Pakistan's claims are outside our terms of reference under the standards set forth in Article 6.2 of the DSU. The European Union raised additional objections under Article 6.2 in subsequent submissions. This Section addresses those objections. It proceeds in three parts. First, it examines relevant legal considerations. Second, it notes certain EU objections under Article 6.2 of the DSU that have become moot. Third, it examines the European Union's remaining objections under Article 6.2 of the DSU.

#### 7.2.3.1 Relevant legal considerations

7.15. Article 6.2 of DSU provides, in relevant part:

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

7.16. Identifying the measure(s) at issue and briefly summarizing the legal basis of the complaint so as to present the problem clearly are central to the establishment of a panel's jurisdiction.[40] The panel request also serves a due process function, providing the respondent and third parties notice as to the nature of the complainant's case[41], enabling them to respond accordingly.[42] A panel must therefore determine whether the panel request, read as a whole and as it existed at the time of filing[43], is "sufficiently clear" or "sufficiently precise" on the basis of an "objective examination".[44]

7.17. In order to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly", the panel request must set out the *claims* so as to "present the problem clearly".[45] A "claim" in this context is an allegation "that the respondent party has violated, or nullified or impaired the benefits arising from, an identified provision of a particular agreement".[46] Further, "the narrative" of panel requests should "explain succinctly *how* or *why* the measure at

---

their reallocation to other matters. Although true, we have trouble accepting this as a goal to pursue in isolation. Rather, we consider the conservation of judicial resources as a constituent of the larger, and legitimate, goal of promoting the efficiency of the WTO dispute settlement system. We are mindful, however, that such efficiency may be derivative of a variety of factors extending beyond the expediency with which a panel may dispose of one particular dispute.

[40] See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, paras. 639 and 640 (referring to Appellate Body Reports, *Guatemala – Cement I*, paras. 72 and 73; and *US – Carbon Steel*, para. 125); *US – Continued Zeroing*, paras. 160 and 161; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107; *Australia – Apples*, para. 416; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.6; and *Brazil – Desiccated Coconut*, p. 22.

[41] See Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *US – Carbon Steel*, para. 126; and *EC and certain member States – Large Civil Aircraft*, para. 640.

[42] See Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *Chile – Price Band System*, para. 164; *US – Continued Zeroing*, para. 161; and *Thailand – H-Beams*, para. 88.

[43] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642.

[44] Appellate Body Reports, *EC – Bananas III*, para. 142; *EC and certain member States – Large Civil Aircraft*, para. 641; *US – Carbon Steel*, para. 127; *US – Continued Zeroing*, para. 161; *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8; *US – Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; and *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108. Parties' subsequent submissions and statements, therefore, cannot "cure" defects in panel requests. (Appellate Body Reports, *China – Raw Materials*, para. 220; *EC – Bananas III*, para. 143; *EC and certain member States – Large Civil Aircraft*, para. 787; *US – Carbon Steel*, para. 127; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.9).

[45] Appellate Body Report, *EC – Selected Customs Matters*, para. 153.

[46] Appellate Body Report, *Korea – Dairy*, para. 139. "Identification of the treaty provisions claimed to have been violated by the respondent is always necessary." (Appellate Body Report, *Korea – Dairy*, para. 124 (referring to Appellate Body Reports, *Brazil – Desiccated Coconut*, p. 22; *EC – Bananas III*, paras. 145 and 147; and *India – Patents (US)*, paras. 89, 92, and 93)). A panel request need not, however, include arguments seeking "to demonstrate that the responding party's measure does indeed infringe upon the identified treaty provision". (Appellate Body Report, *Korea – Dairy*, para. 139 (referring to Appellate Body Reports, *EC – Bananas III*, para. 141; *India – Patents (US)*, para. 88; and *EC – Hormones*, para. 156)).

issue is considered by the complaining Member to be violating the WTO obligation in question".[47] Moreover, a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".[48] "[T]o the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[49] "Whether such a brief summary is 'sufficient to present the problem clearly' is to be assessed on a case-by-case basis, keeping in mind the nature of the measure(s) at issue, and the manner in which it is (or they are) described in the panel request, as well as the nature and scope of the provision(s) of the covered agreements alleged to have been violated."[50]

#### 7.2.3.2 Moot objections

7.18. During the course of this proceeding, the following objections raised by the European Union under Article 6.2 of the DSU have become moot:

a. The objections to claims regarding: (i) certain EU "practices" or "methodologies"[51]; (ii) the European Union's imposition of provisional CVDs[52]; (iii) the Commission's "allocation of the amount of the subsidy" with respect to the LTF-EOP programme[53]; and (iv) the Commission's conduct during verification visits.[54] Pakistan does not pursue these claims in this dispute.[55]

b. The objection to the claim that the Commission failed to explain adequately the application of its method to calculate the benefit conferred by the LTF-EOP programme. The European Union has withdrawn this objection.[56]

c. Certain other objections relating to claims that we do not address for other reasons described herein.[57]

#### 7.2.3.3 Remaining objections

##### 7.2.3.3.1 Annex II(II)(1) and/or Annex III(II)(2) of the SCM Agreement

7.19. Pakistan's first written submission claimed, *inter alia*, 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".[58] The European Union argues that the panel request failed to present this problem clearly.[59] The panel request, in relevant part, provides:

- The EU determined that the "Manufacturing Bond Scheme" (MBS) is a countervailable subsidy that is contingent upon export performance. This determination appears to be

[47] Appellate Body Reports, *China – Raw Materials*, para. 226 (emphasis original); and *EC – Selected Customs Matters*, para. 130.
[48] Appellate Body Reports, *China – Raw Materials*, para. 220; *US – Oil Country Tubular Goods Sunset Reviews*, para. 162; and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.
[49] Appellate Body Reports, *China – Raw Materials*, para. 220 (referring to Appellate Body Reports, *Korea – Dairy*, para. 124; and *EC – Fasteners (China)*, para. 598); and *US – Countervailing and Anti-Dumping Measures (China)*, para. 4.8.
[50] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.9.
[51] European Union's request for a preliminary ruling, paras. 26-29 and 34.
[52] European Union's request for a preliminary ruling, paras. 35-38.
[53] European Union's request for a preliminary ruling, para. 43.
[54] European Union's request for a preliminary ruling, paras. 44 and 45.
[55] See, e.g. Pakistan's response to the European Union's preliminary ruling request, para. 4.86; comments on the European Union's comments on Pakistan's response to the European Union's preliminary ruling request, para. 5.1; first written submission, paras. 3.5-3.7; and response to Panel question No. 10, para. 1.49.
[56] European Union's comments on Pakistan's response to section 5.2 of the European Union's preliminary ruling request, para. 33; response to Panel question No. 13, para. 5.
[57] See below paras. 7.61 (and fns thereto) and 7.105 (and fns thereto).
[58] Pakistan's first written submission, paras. 5.134, third bullet point, and 5.135, third bullet point.
[59] European Union's comments on Pakistan's response to section 5.2 of the European Union's preliminary ruling request, para. 18.

inconsistent with Articles 1 and 3, and *Annexes I, II, and III* of the SCM Agreement, as well as Article VI of the GATT 1994. In particular:

- the EU appears to have acted inconsistently with Articles 1.1(a)(1)(i), 1.1(a)(1)(ii), and 3.1(a) and Annexes I(h), I(i), II(I)(1)-(2), *II(II)(1)-(2)*, III(I), and *III(II)(1)-(3)* of the SCM Agreement, as well as Article VI of the GATT 1994, by determining that the MBS constituted a remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product; and

- the EU appears to have acted inconsistently with Articles 1.1(a)(1)(i), 1.1(a)(1)(ii), and 3.1(a) and Annexes I(h), I(i), II(I)(1)-(2), *II(II)(1)-(2)*, III(I), and *III(II)(1)-(3)* of the SCM Agreement, as well as Article VI of the GATT 1994, by determining that the entirety of the duty refunds under the MBS scheme − rather than just the excess portion of these refunds − constituted an export subsidy.[60]

7.20. Pakistan thus presents its MBS claims in two bullet points that reference identical provisions of the SCM Agreement and the GATT 1994 but offer different narratives as to why the Commission acted inconsistently with the provisions. For present purposes, we assume that both narratives are relevant as our resolution of the European Union's objection is the same under both.

7.21. Annex II(II)(1) and Annex III(II)(2) of the SCM Agreement both refer to the obligation that Pakistan alleges the Commission failed to fulfil in this context, i.e. to examine "generally accepted commercial practices in the country of export" under certain relevant circumstances. The panel request includes these provisions in its references to "Annexes … II(II)(1)-(2) … and III(II)(1)-(3) of the SCM Agreement". But Annex II(II)(1) and Annex III(II)(2), in our view, contain multiple obligations.[61] Moreover, the panel request cites additional provisions of the SCM Agreement, including additional provisions of Annexes II and III, and the GATT 1994. Such additional provisions contain their own disciplines, and the nature and scope of such provisions differ significantly.[62] In the face of such complexity, we look to the panel request's narratives to clarify the problem being presented. The commercial-practices issue, however, appears nowhere in the narratives. Rather, the narratives present problems focused on the extent to which the Commission found import-duty remissions obtained under the MBS to be "excess". We find no reasonable way in which such narratives can be read as isolating the commercial-practices issue from the content of the numerous provisions cited in the panel request. Read as a whole, therefore, the panel request does not "provide a brief summary of the legal basis of the complaint sufficient to present the [commercial-practices] problem clearly".[63]

7.22. For these reasons, we find 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

[60] Emphasis added.

[61] We note, therefore, that Annex II(II)(1) alone appears to contain the following obligations for investigating authorities: (a) "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"; (b) "examine the [verification] system or procedure to see whether it is reasonable, effective for the purpose intended"; (c) ascertain whether the system is "based on generally accepted commercial practices in the country of export"; and (d) if the investigating authority deems it necessary, to conduct "certain practical tests" of the verification system "in accordance with paragraph 6 of Article 12". Annex III(II)(2) contains similar obligations.

[62] For example, these provisions reflect obligations relating to, *inter alia*, identifying a "financial contribution" under Articles 1.1(a)(1)(i) and 1.1(a)(1)(ii), determining whether a subsidy is contingent on export performance under Article 3.1(a), and others contained in Annexes II and III. Further, a brief examination of the nature of the measures at issue and nature and scope of the provisions cited would reveal that certain cited provisions appear facially inapposite to the case at hand. Article 1.1(a)(1)(i) describes a financial contribution in the form of "a government practice involv[ing] a direct transfer of funds", which the Commission did not find in the investigation regarding the MBS. Annex I(h) addresses situations involving indirect taxes, remissions of which were not at issue in the MBS context. Inclusion of such provisions creates further confusion as to the focus of the cited provisions.

[63] The Appellate Body has recognised that "listing general or over-inclusive legal claims in a panel request runs the risk of having such claims excluded from the panel's terms of reference if, as a consequence, the panel request fails to present the problem clearly". (Appellate Body Report, *US − Countervailing and Anti-Dumping Measures (China)*, para. 4.46).

the 'generally accepted commercial [practices]' prevailing in Pakistan when examining the verification system and procedures under the MBS" is outside our terms of reference.

#### 7.2.3.3.2 Article 1.1(a)(1) of the SCM Agreement

7.23. The European Union argues that "by omitting provisions in the SCM Agreement directly addressing the issue of the calculation of benefit or the amount of subsidisation (such as Articles 14 or 19.4), Pakistan failed to present the problem clearly as required by Article 6.2 of the DSU."[64] This is so because, from the European Union's perspective, the only relevant narrated claim is contained in the second sub-bullet, i.e. that the Commission "determin[ed] that the entirety of the duty refunds under the MBS scheme − rather than just the excess portion of these refunds − constituted an export subsidy". In the European Union's view, under the circumstances presented in this dispute, this narrative logically goes to the calculation of the benefit, rather than, for example, how the Commission determined the existence of a financial contribution under Article 1.1(a)(1)(ii).[65]

7.24. Article 6.2 does not require that all provisions of WTO agreements be cited that may have been violated in light of described conduct of a respondent. Thus, insofar as the European Union argues that the referenced narrative describes a problem that relates to additional provisions of the SCM Agreement, we reject the European Union's objection as raising a problem with which Article 6.2 is unconcerned. Insofar as the European Union argues that the panel request is unclear because the narrative describes a problem that does not meaningfully relate to the cited provisions, especially Article 1.1(a)(1)(ii)[66], we also reject the European Union's objection. Indeed, even the European Union has expressly stated that it clearly understood the problem that the panel request presented in this context at least with respect to Articles 1.1(a)(1) and 3.1(a) of the SCM Agreement.[67] The European Union's objection is, rather, that the legal obligations contained in the cited provisions do not discipline the described conduct. Viewed as such, the European Union essentially asks us to resolve the merits of Pakistan's claim in a preliminary ruling. In our view, the panel request presents the problem clearly, and the issue of whether the conduct described by Pakistan violates the provisions it cites goes to the merits of the case and not to the issue of whether we have jurisdiction to reach the merits.[68]

#### 7.2.3.3.3 Article 12.6 of the SCM Agreement

7.25. Pakistan's panel request contained, *inter alia*, a claim that the Commission acted inconsistently with "Articles 12.6 and 12.8 of the SCM Agreement by failing to provide the Pakistani exporter with the results of the EU's verification visits to that exporter and by failing to inform all interested parties of the essential facts under consideration."[69] Pakistan does not pursue a claim under Article 12.8 that the Commission failed to disclose the essential facts of the investigation in this dispute. Thus, the relevant language in the panel request is limited to a claim that the Commission violated Article 12.6 because it failed "to provide the Pakistani exporter with the results of the EU's verification visits to that exporter".

[64] European Union's response to Panel question No. 30, para. 19.
[65] See, e.g. European Union's response to Panel question No. 30, para. 25.
[66] European Union's response to Panel question No. 30, para. 23.
[67] European Union's comments on Pakistan's response to section 5.2 of the European Union's preliminary ruling request, para. 24 (asserting that "the European Union considers that the only claims which fall under the Panel's terms of reference are Pakistan's claims under Articles 1.1(a)(1)(ii), and 3.1(a) and Annex[] I(i) of the SCM Agreement. From Pakistan's panel request, it can be understood that Pakistan alleges that the EU's determination that the MBS was a countervailable subsidy contingent upon export performance was contrary to Articles 1.1(a)(1)(ii) and 3.1(a) and Annex[] I(i) of the SCM Agreement, because the European Union found that the entirety of the duty refunds under the MBS programme − rather than just the excess portion of these refunds − constituted an export subsidy").
[68] If respondents are allowed to convert arguments that complainants' claims cannot succeed under a given provision into an objection under Article 6.2 of the DSU in this manner, it is difficult to see what argument could *not* be readily converted into an objection under Article 6.2 of the DSU, and thus become subject to a request for a preliminary ruling. We further emphasize that even if we were to construe this objection as one properly raised under Article 6.2 of the DSU, we would reject it for reasons discussed further below when we discuss the substance of Pakistan's MBS claims (i.e. the panel request presents the problem clearly under Article 1.1(a)(1)(ii)). (See below Section 7.3.3.1.2 (and fns thereto)).
[69] Panel Request, section B (fourth main bullet).

7.26. The European Union argues that the panel request failed to present the problem clearly for two reasons. First, the European Union observes that Article 12.6 provides two alternatives for investigating authorities in this context, i.e. "the authorities shall make the results of any such investigations available *or* shall provide disclosure thereof pursuant to paragraph 8".[70] The European Union explains that during the investigation the Commission did not avail itself of the first alternative, but rather performed the actions described in the second alternative. Therefore, the panel request should have, but did not, specifically mention a failure to comply with the second alternative.[71] Second, the European Union argues that the panel request should have specified, but did not, what "results" of the verification visit in question were not disclosed.[72]

7.27. We reject both arguments. Regarding the first, we observe that (as explained in more detail further below in this Report[73]) Article 12.6 describes two approaches to satisfy the same obligation in this context, i.e. the provision of the "results" of verification visits "to the firms to which they pertain". The language in the panel request, i.e. the Commission's failure "to provide the Pakistani exporter with the results of the EU's verification visits to that exporter", matches the language of neither approach, nor does it appear to materially resemble one more than the other. We therefore do not consider that the panel request only claims that the Commission failed to properly use one such approach. Rather, the panel request describes a failure to satisfy the obligation contained in both and thus a failure to comply with either. The panel request therefore clearly presents the problem, i.e. a failure to provide the results of verification visits which is precisely what Article 12.6, in relevant part, demands.

7.28. We thus turn to the European Union's second argument. In this context, we observe that a claim regarding the failure to provide "results" of verification visits logically depends, of course, on certain "results" not being provided. All that is necessary under Article 6.2 of the DSU, however, is a clear, succinct claim explaining *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This is what Pakistan did. From the panel request it is clear that Pakistan claims that the Commission failed to provide the Pakistani exporter with the results of the Commission's verification visits to that exporter. Article 12.6, which the panel request cites, contains the obligation to do precisely this. We further note that, in this context, Article 12.6 contains a relatively specific obligation pertaining to a particular body of information relating to a specific event, as opposed to a provision broad in scope that applies on "a continuous basis throughout an investigation".[74] In light of these considerations, the European Union asks for a level of detail in the panel request that is not required.[75]

## 7.3 Claims regarding the MBS

### 7.3.1 Introduction

7.29. Pakistan's MBS permits licensed companies to import duty-free production input materials if such materials are consumed in the production of a product that is subsequently exported. Under the MBS, when a licensed company imports inputs, it posts securities in the amount of import duties due on those inputs.[76] Pakistan remits the security to that company upon export of the company's products if the company presents documents indicating that inputs for which remissions

[70] Emphasis added.
[71] See generally European Union's response to Panel question No. 87 (summarizing arguments on this score).
[72] See, e.g. European Union's comments on Pakistan's response to section 5.2 of the European Union's preliminary ruling request, para. 38.
[73] See below Section 7.6.4. The European Union's objection in this context appears to implicate the interpretation of the substantive legal standard(s) contained in Article 12.6 of the SCM Agreement. Analyses under Article 6.2 of the DSU often require panels to consider the nature and scope of legal provisions, and thus such analyses may well relate to the substantive content of such provisions. We are somewhat concerned, however, that such overlap may be employed by respondents as a means by which to request the effective resolution of the merits of a dispute at a preliminary stage through the use of Article 6.2 of the DSU.
[74] Appellate Body Report, *EC – Fasteners (China)*, para. 598 (discussing Articles 6.2 and 6.4 of the Anti-Dumping Agreement in the context of a DSU Article 6.2 analysis).
[75] If the investigating authority does not disclose any such results, we wonder whether a complainant can reasonably be expected to divine and list all such specific results.
[76] See Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, Official Journal of the European Union, L Series, No. 134/25 (1 June 2010) (Provisional Determination), (Exhibit PAK-1), para. 63 (describing securities).

are requested were used in its production of the exports. Systems like the MBS (i.e. systems allowing domestic producers to obtain reductions on duties paid on production inputs if they are consumed in the production of exports) are commonly referred to as duty drawback schemes.[77]

7.30. A Pakistani PET producer and exporter named Novatex used the MBS to obtain remissions of import duties on imported PET production inputs. The Commission considered that all duties remitted to Novatex[78] – "rather than any purported excess remission"[79] – constituted a countervailable subsidy, contingent on export performance, in the form of revenue forgone otherwise due that conferred a benefit to Novatex. The Commission considered that it was appropriate to countervail all remissions, rather than excess remissions, essentially because Pakistan lacked a reliable system to confirm what inputs Novatex used in producing its exported PET and because Pakistan conducted no further examination regarding that issue.

### 7.3.2 Main arguments of the parties

7.31. Pakistan argues that the Commission improperly found the existence of a "financial contribution" in this context, i.e. "government revenue that is otherwise due [but] forgone" within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, resulting in an improper subsidy determination.[80] Pakistan asserts that, with respect to duty drawback schemes like the MBS, footnote 1 of the SCM Agreement states a rule that a "financial contribution" for purposes of Article 1.1(a)(1)(ii) is limited to *excess* remissions.[81] Pakistan notes that footnote 1 indicates that it is "[i]n accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement". Pakistan argues that the meaning of "[i]n accordance with" in this context means that the referenced provisions reflect the same rule as footnote 1 does.[82] Pakistan argues that the text of these provisions supports Pakistan's position. In particular, Pakistan argues that, contrary to the European Union's argument, neither Annex II nor Annex III provide any basis for departing from the rule stated in footnote 1, but rather confirm its validity.[83] Thus, by finding that all remitted duties, rather than excess remissions, constituted a financial contribution and thus the countervailable subsidy, the Commission violated, *inter alia*, Articles 1.1(a)(1)(ii) and 3.1(a) of the SCM Agreement.

7.32. The European Union first asserts that it is evident from the record of the investigation and Pakistan's submissions in this dispute that Novatex received excess remissions under the MBS. Thus, the Commission properly found a financial contribution to exist in the investigation in the form of revenue forgone otherwise due.[84] Pakistan, therefore, logically only challenges the *amount* of the subsidy found in the investigation. A subsidy's amount is determined by measuring the "benefit" conferred. Because Pakistan raises no claim under, for example, Articles 1.1(b), 14, and/or 19.4 of the SCM Agreement, which address the concept of benefit and/or amount of the subsidy, Pakistan's MBS claims are without a proper legal basis and the Panel must reject them. The European Union further argues that footnote 1 and Annexes I-III of the SCM Agreement contain no requirement that investigating authorities, with respect to duty drawback schemes, always equate excess remissions and the subsidy's amount. The European Union agrees with Pakistan that footnote 1 does describe a subsidy in terms of *excess* remissions, but the European Union further observes that footnote 1 states that it must be read "[i]n accordance with", *inter alia*, Annexes II and III. If conditions described in Annexes II and III are unsatisfied,

[77] The SCM Agreement and this Report adopt this term in describing such systems in general. We note that "substitution" drawback schemes closely relate to duty drawback schemes. Substitution schemes allow participants, when requesting drawback, to treat certain domestically sourced inputs that were consumed in the production of an exported product as if they had been imported and thus subject to import duties.

[78] Specifically, such duties were the "import duties forgone (basic custom duties unpaid) in the import of raw materials used in the production of [PET] during the investigation period ('IP')". (European Commission, Definitive company-specific disclosure, 26 July 2010, (Exhibit PAK-33) (BCI), p. 1). This Report describes these as "remissions", a term that the European Union also adopts in this context. (See, e.g. European Union's first written submission, para. 52 ("The Commission found that, in the absence of permitted duty drawback systems or substitution drawback systems, the amount of the benefit conferred consisted in the *remission* of total import duties normally due upon importation of inputs.") (emphasis added)).

[79] Provisional Determination, (Exhibit PAK-1), para. 78.

[80] Pakistan's first written submission, para. 5.21.

[81] Pakistan's first written submission, para. 5.3; opening statement at the first meeting of the Panel, paras. 3.2 and 3.3.

[82] Pakistan's second written submission, para. 2.9.

[83] Pakistan's opening statement at the first meeting of the Panel, paras. 3.11.

[84] European Union's second written submission, para. 34.

therefore, footnote 1 no longer can be interpreted to mean that a subsidy in this context can only exist by reason of excess remissions.[85] According to the European Union, the condition relevant to this dispute is that Pakistan either have a reliable verification system to confirm what inputs Novatex used in producing its exported PET or conduct a further examination regarding that issue. Because that condition was unsatisfied in the underlying investigation, the Commission was free to apply other principles to calculate the amount of the countervailable subsidy.[86] The European Union argues that this result is supported by policy considerations. In particular, in the absence of effective verification systems or further examinations by the exporting Member, investigating authorities would have to rely on unverifiable information from companies to calculate excess remissions, inviting abuse of duty drawback schemes by companies.[87]

#### 7.3.3 Evaluation by the Panel

7.33. This Section proceeds in two parts. First, it examines Pakistan's claim under Article 1 of the SCM Agreement. Second, it addresses Pakistan's claims under other provisions of the SCM Agreement and the GATT 1994.

##### 7.3.3.1 Article 1

7.34. This Section examines Pakistan's claim under Article 1 of the SCM Agreement. It proceeds in three parts. First, it interprets the relevant legal standard under Article 1.1(a)(1)(ii) of the SCM Agreement. Second, it applies that legal standard to the Commission's subsidy determination *vis-à-vis* the MBS. Finally, it concludes.

###### 7.3.3.1.1 Legal standard under Article 1.1(a)(1)(ii)

7.35. Article 1 of the SCM Agreement provides, in relevant part:

> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> ...
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[*];
>
> [*fn original][1] In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, 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 or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

7.36. Article 1.1(a)(1)(ii) requires a "comparison" "between the challenged measure and a 'defined, normative benchmark'".[88] "The purpose of this comparison is to distinguish between situations where revenue forgone *is* 'otherwise due' and situations where such revenue is *not* 'otherwise due'."[89] Article 1.1(a)(1)(ii) is silent regarding what two things should be compared to determine whether import duty remissions obtained by a company under a duty drawback scheme like the MBS constitute revenue forgone otherwise due. Footnote 1, however, attaches to this

[85] European Union's first written submission, para. 98; second written submission, para. 20.
[86] European Union's first written submission, paras. 60 and 93.
[87] European Union's first written submission, para. 95.
[88] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 808. The Appellate Body articulated this standard in cases in which a WTO panel was determining whether a "subsidy" existed under the SCM Agreement in the first instance, rather than reviewing the decision of an investigating authority. We see no reason to think, however, that a different analytic framework should apply in this context.
[89] Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 89 (emphasis original). See also Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 812 (discussing this issue). Such guidance was mainly formulated in disputes examining tax systems, rather than duty drawbacks. Article 1.1(a)(1)(ii), however, should be interpreted in a flexible fashion so as to adapt to different circumstances. (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, fn 66).

provision, and contains crucial guidance[90] on this score. Footnote 1 consists of one sentence with two basic parts. The first identifies legal provisions that the remainder of the sentence are "[i]n accordance with". The second identifies two situations, i.e. (a) the "exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption"; or (b) "the remission of such duties or taxes in amounts not in excess of those which have accrued", that "shall not be deemed to be a subsidy". Attaching footnote 1, which refers to a "subsidy", to Article 1.1(a)(1)(ii), which defines a "financial contribution" (i.e. a part of a subsidy) in terms of revenue forgone otherwise due, indicates that it should be interpreted *vis-à-vis* that article, and is further an implicit recognition of the close relationship between the concepts of revenue forgone otherwise due and a subsidy.[91] That is, as panels have observed, where "financial contributions" exist in the form of revenue forgone otherwise due, a finding of a "benefit" − and hence a "subsidy" − readily follows.[92]

7.37. The language "shall not be deemed to be a subsidy" in footnote 1 indicates that, in the absence of further qualification, the two situations described are never subsidies under Article 1. Of the two, the latter appears the more material and contains the terms at which the parties direct their arguments, i.e. "the remission of such duties or taxes in amounts not in excess of those which have accrued".[93] The parties appear to agree, and we see no reason to doubt, that the "duties" that "accrued" in this context are import duties that accrued on imported inputs consumed in the production of a subsequently exported product.[94] Thus, the comparison under Article 1.1(a)(1)(ii) is between *remissions of duties* obtained by a company under a duty drawback scheme, on the one hand, and *duties that accrued* on imported production inputs used by that company to produce a subsequently exported product, on the other hand. A subsidy exists insofar as the former exceeds the latter, i.e. an "excess" remission occurs representing revenue forgone otherwise due. For ease of reference, this Report refers to this as the Excess Remissions Principle.

7.38. The issue thus becomes whether situations exist where the Excess Remissions Principle should not be used to analyse remissions obtained under duty drawback schemes. The European Union asserts that the first part of footnote 1 prescribes such a situation through its explanation that footnote 1 is "[i]n accordance with … Annexes I through III". More specifically, the European Union argues that Annex II(II)(2) and/or Annex III(II)(3) describe certain circumstances in which the Excess Remissions Principle is inapplicable. In evaluating this issue, we examine the language of footnote 1 and the provisions cited therein.

#### 7.3.3.1.1.1 Footnote 1 and the term "[i]n accordance with"

7.39. The first part of footnote 1 reads: "In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement". The word "accordance" means "[a]greement; conformity; harmony".[95] Thus, the Excess Remissions Principle is "in agreement with", "in conformity with" and/or "in harmony with" the cited provisions. The footnote refers to these provisions equally, suggesting that the Excess Remissions Principle is equally in agreement with each.

---

[90] Pakistan does not claim a violation of footnote 1.

[91] A subsidy cannot exist without a financial contribution. Further, the guidance that footnote 1 provides appropriately coheres with the analytic framework regarding identification of revenue forgone otherwise due. Moreover, as also discussed in this paragraph, the identification of a benefit and hence a subsidy follows readily from identification of revenue forgone otherwise due.

[92] See, e.g. Panel Reports, *US − FSC*, paras. 7.41-7.103; *US − FSC (Article 21.5 − EC)*, paras. 8.3-8.48; and *US − Large Civil Aircraft (2nd complaint)*, paras. 7.115-7.171. We are mindful that a "financial contribution" and a "benefit" are still "separate legal elements in Article 1.1". (Appellate Body Report, *Brazil − Aircraft*, para. 157).

[93] Although the two situations described in footnote 1 may be related, we see no reason why the issues at stake in this dispute cannot be effectively resolved with particular reference to the second.

[94] See, e.g. Annex II(I)(2) (explaining that "drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product"). If the scheme allows for substitution, the characterization of what duties "accrued" may differ to allow for the enhanced complexity of such schemes. (See generally Annexes I(i) and III of the SCM Agreement). Pakistan, however, asserts that the MBS is not a substitution drawback scheme. (See Pakistan's first written submission, fn 63). The European Union has not argued to the contrary. We further find no basis upon which to conclude that the MBS is a "substitution" drawback scheme on this record.

[95] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 15.

7.40. We consider the European Union's argument to be in tension with the language in footnote 1.[96] Indeed, it appears incongruous to say that a principle is in agreement with a provision when the provision potentially eliminates the principle. Moreover, we find no other instance in which the SCM Agreement uses the term "in accordance with", on its own, to create an exception to an otherwise stated rule by cross-referencing another provision.[97] We nonetheless consider the possibility that the term "in accordance with" signals that the Excess Remissions Principle only applies insofar as the cited provisions "agree" that it should, such that the provisions limit its application. We examine the cited provisions (i.e. Article XVI of GATT 1994 (Note to Article XVI), and Annexes I-III of the SCM Agreement) in turn to assess this possibility.[98]

#### 7.3.3.1.1.2 Article XVI of GATT 1994 (Note to Article XVI)

7.41. Article XVI of GATT 1994 contains the original GATT disciplines on subsidies. The Note to Article XVI reads:

> 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 or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

7.42. This is the predecessor of footnote 1 of the SCM Agreement. Because Article XVI of the GATT 1994 applies together with the SCM Agreement to discipline subsidies, we impart some weight to this provision.[99] We therefore note that it states the Excess Remissions Principle *vis-à-vis* GATT subsidy disciplines without qualification.

#### 7.3.3.1.1.3 Annex I

7.43. Annex I is the Illustrative List of Export Subsidies. The examples listed therein describe "subsidies" within the meaning of Article 1 of the SCM Agreement that are, additionally, prohibited under Article 3. Parts (g), (h), and (i) address situations that resemble the situations described in the second part of footnote 1 of the SCM Agreement in that they describe situations involving remissions of taxes or import duties. Under all these provisions, remissions are "subsidies" only if they are excess. Moreover, one of these provisions, Annex I(i), specifically addresses situations involving import duty drawbacks of the type at issue in this dispute[100]:

> The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the

[96] It will be recalled that the European Union's argument is that the words "in accordance with" mean that the cited provisions in footnote 1 limit the situations in which the Excess Remissions Principle applies.

[97] See SCM Agreement, Articles 1.2, 6.8, 8.3, 10, 11.7, 12.12, 13.3, 17.1, 18.6, 19.1, 25.10, 27.8, 32.1, Annex I(h)-(i), Annex II(II)(1)-(2), Annex III(II)(2)-(3), Annex V(5), and fns 12, 14, 35, 44, and 45. Rather, such exceptions or deviations are generally achieved by using the word "except". (See SCM Agreement, Articles 3.1, 7.1, 11.1, 12.5, 16.1, 20.1, 20.4, 30, Annex IV(2), and fn 49).

[98] The European Union only argues that Annex II(II)(2) and/or Annex III(II)(3) limit the availability of the Excess Remissions Principle in a relevant manner. Nonetheless, to more fully understand footnote 1, we examine all provisions it cross-references.

[99] We are mindful that "[t]he relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex" and "Article[] … XVI of the GATT 1994 alone do[es] not represent the total rights and obligations of WTO Members. The … SCM Agreement reflect[s] the latest statement of WTO Members as to their rights and obligations … [and] represent[s] a substantial elaboration of the provisions of the GATT 1994". (Appellate Body Report, *Brazil – Desiccated Coconut*, p. 15). In the event of a conflict between the GATT 1994 and the SCM Agreement, the latter prevails. (WTO Agreement, General interpretive note to Annex 1A).

[100] Annex I(i) addresses drawbacks of "import charges". It will be recalled that footnote 1 operates with respect to "duties or taxes". "Import charges" include import duties. (SCM Agreement, fn 58). The Commission found remissions granted under the MBS to be contingent upon export performance. (Provisional Determination, (Exhibit PAK-1), para. 74). Neither party has provided any reason to suggest that this finding was flawed.

production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.[101]

7.44. Annex I(i) therefore restates the Excess Remissions Principle.[102]

#### 7.3.3.1.1.4 Annex II

7.45. Annex II is entitled "Guidelines on Consumption of Inputs in the Production Process". As described below, the Annex applies to duty drawback schemes like the MBS.[103] It has two parts, i.e. Annex II(I) and II(II), which we address in turn.

7.46. Annex II(I) provides:

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, *drawback schemes can allow for the remission or drawback of import charges* levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Annex I of this Agreement makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. *Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product.* Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product. Paragraph (i) also provides for substitution, where appropriate.[104]

7.47. Annex II(I) states facts and associated principles. Paragraph 1, *inter alia*, acknowledges the existence of, and describes, duty drawback schemes. Paragraph 2, in most relevant part, recalls circumstances under which Annex I(i) considers such schemes subsidies, i.e. when remissions obtained under them are excess. The paragraph neither states nor suggests other circumstances in which remissions under drawback schemes may be subsidies, and contains no language restricting the application of the Excess Remissions Principle in any relevant way. We take special note that Annex II(I) is placed at the beginning of Annex II. This indicates that Annex II(I) is context for interpreting Annex II(II), and, more specifically, that Annex II(I) indicates that the scope of the second part of the Annex is limited to the context of determining whether remissions under a drawback system constitute a subsidy by reason of them being excess. With these observations in mind, we turn to examine Annex II(II).

[101] Fn omitted.
[102] We are mindful that Annex I is an illustrative list, and does not describe all subsides. We note that Annex I(i) states that it "shall be interpreted in accordance with" Annexes II and III. We turn next to examine those Annexes.
[103] Neither party has questioned the relevance of Annex II *vis-à-vis* the MBS. The parties, rather, dispute the consequences of its guidance as applied to the MBS.
[104] Emphasis added.

7.48. Annex II(II) provides:

> II
>
> *In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities should proceed on the following basis*:
>
> 1. *Where it is alleged* that an indirect tax rebate scheme, or *a drawback scheme*, conveys a subsidy *by reason of over-rebate or excess drawback* of indirect taxes or *import charges* on inputs consumed in the production of the exported product, 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. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.
>
> 2. Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out *in the context of determining whether an excess payment occurred.* If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.[105]

7.49. Annex II(II) provides guidance for investigating authorities. Its introduction describes the issue at which this guidance is directed, i.e. how to determine "whether inputs are consumed in the production of the exported product". This is an intermediate, but necessary, factual issue to address when determining whether excess payments occurred under a drawback scheme.[106]

7.50. Annex II(II)(1) indicates that investigating authorities should essentially: (a) determine whether the exporting Member has a system for tracking what inputs were consumed in the production of a relevant exported product; and (b) if such a system exists, evaluate its reliability. This guidance only applies, however, "[w]here it is alleged that … a drawback scheme, conveys a subsidy by reason of … excess drawback". This language appears to assume that the only relevant allegation underlying the inquiry as to whether a drawback scheme conveys a subsidy is that it resulted in excess remissions. In other words, it assumes the operation of the Excess Remissions Principle. If it were permissible to label all drawn back duties as a countervailable subsidy, whether excess or not, we would expect allowance for an allegation to that effect. Indeed, we would consider it odd if the very guidance that could lead to the non-application of the Excess Remissions Principle could only be triggered by an allegation assuming its application.

7.51. Annex II(II)(2) addresses the situation in which, pursuant to the inquiries performed under Annex II(II)(1), it is determined that the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product. In this scenario, "a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred."[107] We first note that this provision operates "in the context of determining whether an excess payment occurred", which reinforces the idea that Annex II is focused on identifying excess remissions. Annex II(II)(2), however, does not indicate what happens if the "further examination" that "would

[105] Emphasis added.

[106] After establishing what inputs were used in the production of an exported product, it would also have to be determined what duties accrued and were remitted.

[107] The "further examination" appears to be an *ad hoc* process intended to substitute for the presence of a verification system that would otherwise have monitored which inputs were used in the production of the relevant exported product.

need to be carried out" is not performed. In the European Union's view, this silence means that the Excess Remissions Principle ceases to apply, and different principles apply such that an investigating authority − like the Commission in this investigation − may find that the entire sum of drawn back duties, rather than excess, is a countervailable subsidy.

7.52. We must disagree. We have found nothing in footnote 1, Article XVI of GATT 1994 (Note to Article XVI), Annex I, or Annex II that materially suggests that the Excess Remissions Principle, as stated in footnote 1, is anything but the final word in how remissions under duty drawback schemes like the MBS are to be identified as subsidies. We agree that Annex II provides incomplete guidance as to how to investigate a particular issue in this context in that it does not specify what occurs if something that "need[s] to be carried out" is not. But we see no reasonable basis upon which to interpret that silence as a directive to read footnote 1 out of the SCM Agreement. Indeed, we take special note that this silence in Annex II(II)(2) does not mean that other portions of Annex II cease to speak, and we recall that the entirety of Annex II(II)(2) only operates in the presence of an allegation that a "drawback scheme[] conveys a subsidy by reason of over-rebate or excess drawback".[108] Thus, we interpret such silence as just that, leaving us to the provisions that the otherwise intact SCM Agreement provides, including footnote 1.

#### 7.3.3.1.1.5 Annex III

7.53. Annex III is entitled "Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies". As the title indicates, it is applicable to a particular species of duty drawback schemes, i.e. substitution drawback schemes. Substitution schemes allow participants, when requesting drawback, to treat certain domestically sourced inputs that were consumed in the production of an exported product as if they had been imported and thus subject to import duties.[109]

7.54. Although there are certain structural and textual differences between Annexes II and III due to the different issues they address[110], these are minor for our purposes. Given the similarities between Annexes II and III, therefore, we limit our discussion of Annex III to the following observations. Like Annex II, Annex III consists of two parts. Annex III(I) states facts and principles, acknowledging the existence of and describing substitution drawback schemes, and recalls that under Annex I(i) such schemes result in subsidies when remissions obtained under them are excess.[111] Consistent with this observation, Annex III(II) provides guidance for investigating authorities that is designed to allow investigating authorities to identify *excess remissions*.[112] We especially note that the issue addressed in Annex III(II)(3) is analogous to that addressed in Annex II(II)(2), and the texts of the two are also materially similar. Annex III(II)(3) provides:

> Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting Member based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred.

7.55. The European Union argues that because Annex III(II)(3) does not specify what occurs in the absence of reliable verification procedures or a "further examination" that "would need to be

[108] Annex II(II)(1).
[109] We have previously noted that we find no basis on this record to conclude that the MBS is a substitution drawback scheme. (See above fn 94).
[110] Annex II addresses a prominent but specific factual issue arising in the context of addressing duty drawback schemes. Annex III addresses substitution drawback schemes as a whole.
[111] In the context of substitution drawback schemes, the word "excess" has the same basic meaning as when used in the context of a non-substitution drawback scheme, i.e. when remissions exceed duties accrued.
[112] See Annex III(II)(1) ("The 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 inputs 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" (emphasis added)), and III(II)(2) (offering guidance regarding determinations of whether the exporting member maintains a reliable "verification system or procedure" that guards against excess drawbacks).

carried out", as was the case with Annex II(II)(2), the Excess Remissions Principle ceases to apply and investigative authorities may use other principles to identify the subsidy. The crucial point again is that even if Annex III provides incomplete guidance as to how to determine whether excess payments occurred under substitution drawback schemes, without some relatively clear indication to the contrary within Annex III's focus of determining whether excess remissions occurred, we see no reasonable basis upon which to interpret this silence as substantively altering what amounts to a "subsidy" in Article 1 of the SCM Agreement. We find no such indication in any examined provision, including Annex III.[113]

#### 7.3.3.1.1.6 Conclusion – legal standard under Article 1.1(a)(1)(ii)

7.56. We conclude that the Excess Remissions Principle provides the legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constitutes a financial contribution in the form of revenue forgone otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement[114], and reject the European Union's position that Annex II and/or Annex III provides a relevant reason to depart from the Excess Remissions Principle. Thus, even if the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product and in the absence of a further examination by the exporting Member of that issue, investigating authorities should still determine if an excess remission occurred.

#### 7.3.3.1.2 Application of Article 1 to the Commission's MBS subsidy determination

7.57. In its investigation, the Commission concluded that the MBS was "a[n export] subsidy … in the form of forgone government revenue which confers a benefit upon [Novatex]".[115] The following statements in the Provisional Determination clearly explain that the financial contribution, i.e. the "forgone government revenue", was not any excess remissions but the total amount of unpaid duties, and it was this amount that was to be countervailed[116]: (a) "the normal rule of *countervailing of* [*sic*] *the amount of (revenue forgone) unpaid duties* applies, *rather than any purported excess remission*"[117]; and (b) "[t]he *subsidy amount* … was calculated on the basis of *import duties forgone* … on the material imported under the [MBS]".[118]

---

[113] No party has provided reason to believe that different results should be reached under Annex II(II)(2) and Annex II(II)(3) in this context, and we see no reason to believe that divergent results should occur.

[114] We do not *a priori* exclude the possibility that an investigating authority might permissibly reject a company's characterization of monies obtained from a government as remissions obtained under a duty drawback scheme. This is not that case, however. The entirety of the Commission's analysis in its Determinations characterized the relevant financial contribution as received under the operation of the MBS, no suggestion was ever made that Novatex obtained remissions of import duties for which it had never posted securities, and the mere application of the revenue-forgone-otherwise-due rubric indicates that remissions of government revenue, i.e. customs duties, was at stake.

[115] Provisional Determination, (Exhibit PAK-1), para. 73.

[116] Contrary to the European Union arguments, therefore, the Commission did not simply "tick the box of the existence of a financial contribution". Rather the Commission specified the duties that it considered to be the financial contribution. (European Union's response to Panel question No. 89, para. 17).

[117] Provisional Determination, (Exhibit PAK-1), para. 78. (emphasis added)

[118] Provisional Determination, (Exhibit PAK-1), para. 79 (emphasis added). We recall that the second sub-bullet of Pakistan's MBS-related claims in its panel request asserted a violation of Article 1.1(a)(1)(ii) because the Commission "determin[ed] that the entirety of the duty refunds under the MBS scheme − rather than just the excess portion of these refunds − constituted an export subsidy" (See above para. 7.19). In light of our discussion above, and recalling that the European Union made an objection to Pakistan's Article 1.1(a)(1)(ii) claim under Article 6.2 of the DSU, we consider this is a sufficiently clear statement of the problem. The Commission's determination that the entirety of remissions under the MBS − rather than just the excess portion of these refunds − constituted an export subsidy, was a clear and direct consequence of how the Commission identified the financial contribution. Indeed, without providing any additional calculations or reasoning, the Commission also explained that the financial contribution was also the amount of the benefit: "[T]he benefit consists in [*sic*] the remission of total import duties normally due upon importation on inputs." (Provisional Determination, (Exhibit PAK-1), para. 78). This is consistent with the manner in which WTO panels and the Appellate Body have treated the relationship between revenue forgone otherwise due and the benefit conferred by that particular financial contribution. (See above para. 7.36 *et seq.*). We recall that the first sub-bullet of Pakistan's MBS-related claims in its panel request also asserted a violation of Article 1.1(a)(1)(ii) because the Commission "determin[ed] that the MBS constituted a remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product".

7.58. The Commission indicated that this approach was justified because: (a) Pakistan "did not effectively apply its verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product"; and (b) Pakistan "did not carry out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effectively applied verification system".[119] The problem with this approach is thus clear. That is, as explained above, these reasons, even if true, provide no basis upon which to depart from the Excess Remissions Principle. The Commission should still have determined whether an excess remission occurred. The Commission, therefore, offered no reasoned and adequate explanation for why the entire amount of unpaid duties was a financial contribution and that those duties were "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement, and thus acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement.

7.59. In this regard, we note the European Union's concern that our decision would require investigating authorities to essentially administer another Member's duty drawback system in the event that the system is found to be deficient under Annex II(II). To be clear, this is not what we believe the SCM Agreement requires. If an exporting Member's system is found to be wanting under Annex II(II), the amount of the excess remissions would need to be determined on the basis of information available to the investigating authority. If an investigating authority lacks "necessary information" with respect to a specific issue, it may rely on facts available under Article 12.7 of the SCM Agreement.[120] In that event, we do not exclude the possibility that an investigating authority might permissibly determine that all remitted duties under a drawback scheme are "excess" in the absence of reliable information with which to calculate the excess amount. But that outcome results from the lack of necessary information, not from the non-applicability of the Excess Remissions Principle. This is an important distinction because it may be possible for an exporter to supply the necessary information in circumstances where the exporter's government failed, for example, to conduct a further examination under Annex II(II). Indeed, it was noted in this case that the Commission has in the past used other information to determine the extent of excess remissions in circumstances where the Commission determined that the exporting Member did not have a reliable verification system with respect to its duty drawback scheme and did not conduct a further investigation of the excess remissions matter.[121]

#### 7.3.3.1.3 Conclusion – Article 1

7.60. In accordance with our reasoning above, we find that by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties, which the Commission found to be the financial contribution (and, thus, the countervailable subsidy), was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement, the Commission acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement.[122] Because the Commission, therefore, incorrectly identified the existence of a subsidy, we also find that the Commission acted inconsistently with Article 3.1(a) by improperly finding the existence of a "subsidy" that was contingent on export performance.[123]

---

Pakistan has provided no reason for us to believe that resolution of its claims under the two sub-bullets should require any sort of separate treatment. We thus exercise judicial economy with respect to the claims in the first sub-bullet.

[119] Provisional Determination, (Exhibit PAK-1), para. 76.

[120] See, e.g. Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.178 and 4.179 (explaining that the "evaluation of the 'facts available' that is required, and the form it may take, depend on the particular circumstances of a given case, including the nature, quality, and amount of evidence on the record and the particular determinations to be made" and that "the nature and extent of the explanation and analysis will necessarily vary from determination to determination").

[121] See, e.g. Commission Regulation (EC) No. 1411/2002 of 29 July 2002 imposing a provisional countervailing duty on imports of polyester textured filament yarn originating in India, Official Journal of the European Communities, L Series, No. 205/26 (2 August 2002), (Exhibit PAK-42), paras. 65 and 66; and Commission Decision No. 284/2000/ECSC of 4 February 2000, Official Journal of the European Communities, L Series, No. 31/44 (5 February 2002), (Exhibit PAK-43), paras. 30-34.

[122] See above para. 7.4 *et seq.* (setting forth standard of review).

[123] Pakistan has stated that its Article 3.1(a) claim is consequential to the Panel finding a violation of Article 1. (Pakistan's first written submission, paras. 5.133 and 9.3; response to Panel question No. 22, para. 2.30).

#### 7.3.3.2 Other MBS-related claims

7.61. Pakistan also claims that the Commission, in making its MBS subsidy determination:

a. *Failed to investigate whether the duty drawback system verification mechanisms were based on generally accepted commercial practices in the country of export*. This Report has previously found this claim to be outside our terms of reference.

b. *Failed to provide Pakistan with the opportunity to assist the Commission's determination of the excess amount, failed to take into account evidence regarding the amount of any excess drawback, and failed to make normal allowance for waste*. Pakistan has indicated that if the Panel reaches the conclusion stated in Section 7.3.3.1.3, above, and reaches that conclusion in the manner that we did, Pakistan no longer requests findings on these claims.[124] We therefore do not address them.

c. *Violated Annexes II(II) and III(II) "as a whole"*. Pakistan's arguments, in our view, have clarified that this claim is predicated on the Panel finding a violation of one of the "steps" that Annex I(i), II(II) and/or Annex III(II) prescribe.[125] In light of the discussion directly above in paragraphs (a) and (b), and the fact that we find no relevant violation of Annex I(i) as described in paragraph (d), below, we find no such violations. This claim is therefore moot.

d. *Violated Annex I(i)*. Pakistan has asserted this claim in two different ways. First, Pakistan argues that the Commission violated this provision for the same reasons that it violated Article 1. Insofar as this is the case, we exercise judicial economy with respect to this claim. Second, Pakistan argues that the Commission violated Annex I(i) as a necessary consequence of its violations of Annexes II and/or III.[126] Insofar as this is the case, because we find no separate violations of Annexes II and III, this claim is moot.

e. *Violated Articles 1.1(b), 10, 19, and 32, and Article VI of the GATT 1994*. Pakistan has explained that these claims are consequential to other violations of the SCM Agreement.[127] Insofar as such claims are premised on claims that we do not consider, such claims are moot. Insofar as they are based on violations of Article 1.1(a)(1)(ii) and/or Article 3.1(a), we exercise judicial economy with respect to them.[128]

### 7.4 Claims regarding the LTF-EOP

#### 7.4.1 Introduction

7.62. Pakistan's LTF-EOP programme provided government-financed loans through pre-approved banks for certain qualifying companies. The banks were prohibited from charging interest rates

[124] Pakistan's response to Panel question No. 25, para. 2.35.

[125] See Pakistan's response to Panel question No. 3(b), para. 1.15 (explaining that "the failure to include a given step – or the decision to 'skip' one of these obligatory steps – is a violation of the procedures of Annex II(II) as a whole"), No. 3(c), para. 1.18 (explaining that a separate violation of Annex I(i) results in a violation of Annex II(II) "as a whole"), and No. 6(a), paras. 1.39 (explaining that "[a] failure to respect a particular aspect of th[e] process [in Annex II(II) or Annex III(II)] … results in a violation of that process as a whole"), and 1.40 (explaining that the Commission violated the Annex provisions "as a whole" "because it failed to observe the totality of the steps mandated" therein). In the alternative, Pakistan may argue that the Commission violated Annex II(II) or Annex III(II) "as a whole" for the same reasons that the Commission violated Article 1. (See Pakistan's response to Panel question No. 6(b), para. 1.41 (stating that "by countervailing the total amount of the import duty remissions rather than just the excess amount, the EU acted inconsistent with Article 1, Annex I(i) and the whole of Annexes II(II) and III(II) to the SCM Agreement")). Insofar as this is the case, we exercise judicial economy regarding this claim.

[126] See, e.g. Pakistan's response to Panel question No. 2, paras. 1.6-1.8, No. 3(a), para. 1.11, No. 3(b), para. 1.16, and No. 3(c), para. 1.17.

[127] Pakistan's comments on the European Union's comments on Pakistan's response to the European Union's preliminary ruling request, para. 5.13; and response to Panel question No. 7(b), para. 1.43, and No. 23, para. 2.32.

[128] The European Union has raised objections under Article 6.2 of the DSU with respect to many of the claims discussed immediately above in paragraphs (b)-(e). Because we do not address these claims, however, we do not address the European Union's related objections under Article 6.2 of the DSU.

above a specified level, which consisted of a base interest rate that was to be determined by the State Bank of Pakistan (SBP) on an annual basis, plus a further mark-up of up to three percentage points. Novatex concluded a loan under the LTF-EOP with a consortium of five banks in June 2005 for a maximum of Pakistani rupees (PKR) **[***]** (the LTF-EOP Loan). The LTF-EOP Loan was structured so that it could be drawn down in tranches over time, and Novatex drew down the loan in this manner. Each tranche had a maturity term of 7.5 years and was assigned an interest rate at the time of its drawdown, which was locked in for the duration of its term. That rate was the SBP's annual base rate prevailing at the time of drawdown plus a mark-up of 1.8 percentage points. In June 2005, the SBP's annual base rate was 5% and never changed thereafter. Thus, the interest rate assigned to all tranches that Novatex drew down ended up being the same, i.e. 6.8%. The Commission determined the LTF-EOP Loan to be a countervailable subsidy in its investigation. In doing so, the Commission determined that the LTF-EOP Loan conferred a "benefit" to Novatex by comparing the amount of interest Novatex paid on the total outstanding amount of the LTF-EOP Loan during the period of investigation (POI) with the interest that Novatex would have paid if the interest rate on the LTF-EOP Loan had not been 6.8%, but a commercial benchmark interest rate instead. That benchmark interest rate was a rate taken from the website of the SBP that prevailed during the POI (the SBP Rate)[129], and was 14.44%.

### 7.4.2 Main arguments of the parties

7.63. Pakistan raises two related claims in this context, one under the *chapeau* of Article 14 of the SCM Agreement and one under Article 14(b). Pakistan argues that the Commission's determination that the LTF-EOP Loan conferred a "benefit" to Novatex within the meaning of Article 1.1(b) of the SCM Agreement is inconsistent with the *chapeau* of Article 14 because the Commission failed to adequately explain the application of its method of calculating the benefit in light of its own guidelines on this subject (the EU Guidelines).[130] In this context, Pakistan argues that the Commission failed to: (a) identify a comparable commercial loan; (b) identify the interest normally payable on a comparable commercial loan to Novatex; (c) identify the interest payable on a comparable loan to companies in a similar financial situation in the same sector of the economy; (d) identify the interest payable on a comparable loan to companies in any sector of the economy; (e) reflect in its analysis the particular multi-tranche structure of the LTF-EOP Loan, whereby each tranche was assigned an interest rate at the time of its drawdown; (f) explain why the SBP Rate was an appropriate benchmark for a loan of 7.5 years, which the LTF-EOP Loan assigned to each tranche drawn down, when the SBP Rate reflects an average of several lending rates for shorter loans; and (g) explain why the Commission rejected evidence on the record concerning available commercial loans to Novatex that Novatex provided during the investigation.[131] For essentially the same reasons, Pakistan argues that the Commission's method of calculating the "benefit" was inconsistent with Article 14(b)[132], i.e. "because the application of its method was not 'consistent with [the] guidelines [in Article 14(b)]', because the EU failed to identify a comparable commercial loan".[133] In this context, Pakistan emphasizes that the Commission improperly benchmarked interest payments made on principal drawn down by Novatex under the LTF-EOP Loan before the POI with a benchmark (i.e. the SBP Rate) prevailing during the POI. Relying on these arguments Pakistan also claims violations of Articles 1.1(b), 10, 19.1, and 32 of the SCM Agreement, and Article VI:3 of the GATT 1994.[134]

7.64. The European Union argues that the Commission adequately explained its methodology for assessing the benefit conferred under the LTF-EOP Loan as required by the *chapeau* of Article 14. In particular, the European Union stresses that Novatex could draw down amounts under the LTF-EOP Loan at times of its choosing, and that interest rates were assigned to tranches at the time they were drawn down. This flexibility meant that the LTF-EOP Loan was more akin to a line of credit than a fixed-term loan where an interest rate is typically assigned to the entire loan amount at the time of contracting. Due to such fundamental differences, it was proper to not

[129] The "SBP Rate" is distinct from the annual base rate that the SBP set with respect to the LTF-EOP programme.
[130] Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations, (98/C 394/04), Official Journal of the European Communities, C Series, No. 394/6 (17 December 1998), (Exhibit PAK-5).
[131] Pakistan's first written submission, paras. 6.28-6.44; opening statement at the second meeting of the Panel, para. 3.5.
[132] Pakistan's first written submission, paras. 6.45-6.100.
[133] Pakistan's first written submission, para. 6.25.
[134] Pakistan's first written submission, para. 6.101.

consider typical fixed-term loans when benchmarking the LTF-EOP Loan, including the commercial loans offered by Novatex in the investigation, and instead the Commission chose a proxy against which to benchmark the LTF-EOP Loan, i.e. the SBP Rate. That the LTF-EOP Loan operated like a flexible line of credit also meant that it was proper to benchmark any interest payments made during the POI on principal outstanding during the POI against a benchmark prevailing during the POI, regardless of whether such principal had been drawn down by Novatex before or during the POI.[135] The European Union emphasizes, however, that the record most reasonably reflects that the entirety of the countervailed loan amount was drawn down during the POI.[136] The European Union asserts that the Commission explained all such issues in its Determinations and associated disclosure documents to Novatex. Moreover, the European Union stresses that the Commission's explanations on this score were sufficient considering that Novatex and Pakistan advocated the use of the SBP Rate during the investigation.[137] The European Union submits that Pakistan's claim under Article 14(b) is unfounded for essentially the same reasons.[138] The European Union therefore also argues that the Panel should reject Pakistan's claims under Articles 1.1(b), 10, 19.1, and 32 of the SCM Agreement and with Article VI:3 of the GATT 1994.[139]

### 7.4.3 Relevant legal considerations

7.65. Article 14 of the SCM Agreement reads, in relevant part:

> *Article 14*
>
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> ...
>
> (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;

7.66. Sub-paragraph (b), therefore, establishes "guidelines" for determining whether a loan confers a benefit on a recipient. According to those guidelines, a benchmark under Article 14(b) is a "comparable commercial loan", which "should have as many elements as possible in common with the investigated loan to be comparable" such that the comparison is meaningful.[140] Selecting such a benchmark "involves a progressive search for a comparable commercial loan, starting with the commercial loan that is closest to the investigated loan (a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency) and moving to less similar commercial loans while adjusting them to ensure comparability with the investigated loan".[141] In the absence of a commercial loan actually available on the market, a proxy may be used.[142] The further away a selected benchmark is from the ideal benchmark of a materially identical loan, however, the more adjustments must be made to ensure the benchmark's comparability to the subject loan. Moreover, because a "benefit" analysis depends on

[135] See generally European Union's first written submission, paras. 132-159.
[136] See, e.g. European Union's second written submission, para. 127.
[137] See, e.g. European Union's second written submission, para. 78; and response to Panel question No. 93, paras. 24-26.
[138] See generally European Union's first written submission, paras. 160-186.
[139] European Union's first written submission, paras. 187 and 188.
[140] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 476.
[141] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.
[142] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 487.

making a comparison "between the terms and conditions of the [loan] when it is granted with the terms and conditions that would have been offered on the market *at that time*"[143], for purposes of Article 14(b) "[t]he comparison is to be performed as though the [actual and benchmark] loans were obtained at the same time … [and thus] the assessment focuses on the moment in time when the lender and borrower commit to the transaction".[144] Article 14(b) thus allows certain flexibility in selecting a benchmark.[145] Moreover, according to the *chapeau* of Article 14, the method employed "shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained".[146]

### 7.4.4 Evaluation by the Panel

7.67. This Section evaluates Pakistan's claims under Article 14 of the SCM Agreement. It proceeds in two parts. First, it examines Pakistan's claim under Article 14(b). Second, it examines Pakistan's claim under the *chapeau* of Article 14.

#### 7.4.4.1 Article 14(b)

7.68. To succeed in its claim under Article 14(b), Pakistan must make out a *prima facie* case that the SBP Rate does not represent "the amount [Novatex] would pay on a comparable commercial loan which [Novatex] could actually obtain on the market".[147] With this in mind, this Section proceeds in four parts. First, we address a factual disagreement between the parties regarding when Novatex drew down the principal under the LTF-EOP Loan on which it paid interest during the POI, i.e. the principal that the Commission countervailed. Addressing this issue will provide helpful background for the following two parts. Second, it examines the portions of the Determinations and associated disclosure documents that discuss the selection of the SBP Rate as the benchmark interest rate. Third, based the previous two parts, it examines whether Pakistan has made out its *prima facie* case and whether the European Union has rebutted it. Finally, it concludes.

##### 7.4.4.1.1 Whether Novatex drew down principal before the POI on which it paid interest during the POI

7.69. This Section examines when Novatex drew down the principal under the LTF-EOP Loan on which it paid interest during the POI. The parties agree that, in fact, Novatex drew down tranches

[143] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 706. (emphasis original)

[144] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 835 and 836. The Appellate Body has indicated that in examining this issue *vis-à-vis* loans, "the assessment of benefit must examine the terms and conditions of a loan at the time it is made and compare them to the terms and conditions that would have been offered by the market at that time" including the issue of how risk is factored into the loan's terms. (Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 834-838).

[145] See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 476 (agreeing with the panel that "ideally, an investigating authority should use as a benchmark a loan to the same borrower that has been established around the same time, has the same structure as, and similar maturity to, the government loan, is about the same size, and is denominated in the same currency. … [I]n practice, the existence of such an ideal benchmark loan would be extremely rare, and th[us] a comparison should also be possible with other loans that present a lesser degree of similarity"), 484 (warning against excessive formalism in interpreting Article 14(b)), and 489 (explaining that "we are of the view that a certain degree of flexibility also applies under Article 14(b) in the selection of benchmarks, so that such selection can ensure a meaningful comparison for the determination of benefit"). Whatever benchmarking method an investigating authority uses, however, it must be transparent and adequately explained. (See Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 489; and *US – Carbon Steel (India)*, para. 4.345).

[146] Prior panel reports have opined that this requirement indicates that such application should be set out in a manner that it can be "easily understood or discerned" and making clear or intelligible, and giving details of how the methodology was applied. (Panel Report, *US – Carbon Steel (India)*, para. 7.191. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.279 (citing this standard)).

[147] This *prima facie* case and the European Union's rebuttal must be based on the European Union's Determinations and associated disclosure documents. This follows from the fact that, although we may take into account record evidence connected to the explanations provided by the Commission in its Determinations, our review is not *de novo* and thus cannot consider *ex post* rationalizations unconnected to the Commission's explanations, even if such rationalizations are founded on record evidence. (See above para. 7.4 *et seq.* (setting forth standard of review)).

of the LTF-EOP Loan before the POI began.[148] For ease of reference, this Report will refer to this as the Pre-POI Principal. Pakistan claims that the record before the Commission reflected that Novatex carried over a substantial amount of the Pre-POI Principal into the POI, and thus made interest payments on it during the POI. The European Union asserts that the record reflected that all principal drawn down under the LTF-EOP Loan on which Novatex paid interest during the POI was drawn down during the POI. We address this factual disagreement here because: (a) all the evidence that we discuss in this Section was on the record of the investigation before the issuance of the Provisional Determination, and thus it provides context for understanding the content of the Determinations; and (b) it may pertain to an assessment regarding whether Pakistan has made out a *prima facie* case that the SBP Rate represented what Novatex would have paid on a "comparable commercial loan".[149]

7.70. In this context, we first recall that during the investigation both Novatex and Pakistan argued that the entire amount of the LTF-EOP Loan should have been benchmarked against an interest rate prevailing during the time-period in which Novatex negotiated and concluded the LTF-EOP Loan, i.e. 2004-2005.[150] Under this argument, when Novatex drew down tranches under the LTF-EOP Loan was immaterial. As an apparent result, neither party ever explicitly told the Commission that Novatex drew down principal under the LTF-EOP Loan before the POI. Pakistan's position now, therefore, is not that the Commission ignored any particular argument by a relevant party to the investigation, but that the record at large reflected that Novatex paid interest on Pre-POI Principal during the POI.

7.71. We therefore examine the evidence that was before the Commission during the investigation that went to the issue of when Novatex drew down the LTF-EOP Loan principal upon which it paid interest during the POI. Based on the parties' arguments and our own review of the record, the material pieces of evidence in this context are: (a) the questionnaire sent to Novatex; (b) Novatex's questionnaire response; (c) the Second Deficiency Letter and Novatex's response thereto; (d) the LTF-EOP offer letter; (e) the LTF-EOP Contract; and (f) Novatex's 2007-2008 and 2008-2009 annual reports. We examine each in turn.

#### 7.4.4.1.1.1 The questionnaire

7.72. At the outset of the investigation, the Commission sent a questionnaire to Novatex requesting, *inter alia*, information on "[s]chemes of export credit".[151] Under this heading, the questionnaire queried whether Novatex had availed itself of the LTF-EOP, and, if the answer was affirmative, to "provide … [certain] information in relation to export credits used during the IP".[152] This requested information included the "[a]mount of credit granted" under the scheme, the "[d]ate of grant", the "[r]epayment period", the [i]nterest rate payable", and the "[n]ormal commercial interest rate".[153] The questionnaire indicated that this "information [should] be presented in" an attached Excel spreadsheet (the Spreadsheet Template).[154] The Spreadsheet Template contained a number of columns with headings the names of which generally

[148] See, e.g. European Union's response to Panel question No. 91, para. 19; and Pakistan's comments on the European Union's response to Panel question No. 91.

[149] More specifically, this issue may pertain to an examination as to whether the SBP Rate *that prevailed during the POI* represented what Novatex would have paid on a comparable loan in terms of *timing*. We note that, as discussed further below, the manner in which the Commission identified timing comparability is highly ambiguous, and thus addressing this factual issue may not be necessary. (See below Section 7.4.4.1.3). We address this factual issue, however, in the interest in providing a record allowing for most effective appellate review.

[150] See Council Implementing Regulation (EU) No. 857/2010 of 27 September 2010 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, Official Journal of the European Union, L Series, No. 254/10 (29 September 2010) (Definitive Determination), (Exhibit PAK-2), para. 72.

[151] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 30.

[152] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 30.

[153] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 30.

[154] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 30.

corresponded to the types of information requested.[155] We take special note, however, that the template contains no heading for the "date of grant" of any amounts. Given the context in which it was provided, therefore, the purpose of the completed Spreadsheet Template was to provide information on Novatex's interest payments on "export credit[s] used during the IP", and allow a comparison of such payments to what Novatex would have paid under a commercial interest rate. In other words, the Spreadsheet Template asked Novatex to compare its interest payments made under the LTF-EOP Loan to an applicable commercial benchmark, thereby assisting the Commission in determining whether, and in what amount, the loan conferred a "benefit" to Novatex.

7.73. Two aspects of this questionnaire warrant emphasis. First, the questionnaire requested "information in relation to export credits *used during the IP*".[156] This phrase indicates, and the parties agree, that the questionnaire requested information on interest payments made during the POI on amounts of any relevant LTF-EOP loan that were outstanding during the POI.[157] It was therefore foreseeable that Novatex might provide information on payments made on principal received by Novatex under an LTF-EOP loan before the POI. Second, the Commission would have expected Novatex's response to reasonably reflect the "date of grant" of any such export credits, at least in a manner relevant for purposes of calculating the benefit the loan may have conferred upon Novatex. However, given that the template contained no section for the "date of grant", it was foreseeable that the provision of such information would be subject to the judgment of Novatex[158], and thus may require interpretation by the Commission.

#### 7.4.4.1.1.2 The questionnaire response and the Original Spreadsheets

7.74. On 20 October 2009, Novatex responded to the questionnaire.[159] In that response, Novatex indicated that it had availed itself of the LTF-EOP.[160] Novatex provided certain background information concerning the LTF-EOP Loan, including that it had been "approved … in April 2005", the total amount of the loan, the identity of the five-bank lending consortium, the PKR amounts to which Novatex was entitled from each bank, and the interest rate of 6.8%.[161] Moreover, Novatex attached Excel spreadsheets laying out Novatex's interest payments on the LTF-EOP Loan during the POI (the Original Spreadsheets).[162] A group of spreadsheets was assigned to each of the five lending consortium banks. The Original Spreadsheets contained all the columns and headings that the Spreadsheet Template contained, but also added columns, marking them with an asterisk that indicated their addition.[163] In particular, the Original Spreadsheets added columns entitled: "Opening"; "Received/(Payments)"; "Outstanding balance"; "Period"; and "Date of Payment". Generally, each row of the spreadsheets was dedicated to a "Period" of time within the POI over which a specific and static "Outstanding balance" of principal under the loan prevailed. Thus, every

[155] Excel file F-V.1 of the Commission's questionnaire, (Exhibit EU-14). This was labelled as "Excel file F-V.1" in the questionnaire. (European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 30).

[156] Emphasis added.

[157] European Union's response to Panel question No. 67, para. 100; and Pakistan's response to Panel question No. 67, para. 3.47.

[158] As noted further above, Novatex argued that the entirety of the LTF-EOP Loan should have been benchmarked against a single interest rate prevailing at the time of the loan's negotiation and conclusion, i.e. 2004-2005. Under this line of argument, the timing of tranche drawdowns did not matter. Thus, this may have provided reason to suspect that Novatex would not have been overly concerned with how it presented "date of grant" information in the spreadsheets.

[159] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI); and European Union's first written submission, para. 117 (identifying the date of return). Pakistan has not disputed the accuracy of this date.

[160] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 30.

[161] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), pp. 31 and 32. In June 2005, the SBP's annual base rate was 5% and never changed thereafter. (Pakistan's first written submission, paras. 6.14 and 6.15).

[162] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 31. This was attached to the questionnaire as "Annex F-V.1.b.a".

[163] See generally European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), annex F-V.1.b.a.

time that outstanding amount changed (i.e. when Novatex "Received" principal during the POI, evidenced by a non-parenthesized amount in this column, or executed a "Payment" of principal back to the banks during the POI, evidenced by a parenthesized amount in this column) a new row in the spreadsheet appears with the re-adjusted "Outstanding balance". For each "Period", Novatex indicated the amount of interest that it had paid on the outstanding principal present during that period and the "Date of [such] Payment". Each row compared that amount of interest paid to what Novatex would have paid under a commercial interest rate of **[***]**.

7.75. Six aspects of the Original Spreadsheets warrant emphasis. First, in each group of spreadsheets applying to each of the five consortium banks, only one numeric entry[164] appears under the column "Opening". This indicates this entry's uniqueness.

7.76. Second, the amount in each "Opening" entry corresponds exactly to the "Outstanding balance" entry in the same row. Moreover, each such row corresponds to a "Period" that begins on the first day of the POI. This indicates that Novatex received this "Opening" amount either before the POI or on the first day of the POI. We consider the word "Opening", however, as too ambiguous on its own to signal which was the case.[165]

7.77. Third, for each "Opening" amount, there is no corresponding entry for principal "Received". This contrasts with every other instance in which Novatex drew down principal under the loan during the POI, reflected by a positive entry in the "Received / (Payments)" column.[166] In our view, this strongly suggests that the "Opening" amounts were not received on the first day of the POI, but beforehand.

7.78. Fourth, given the logic of the spreadsheets' structure, it would appear that in each row that reflects principal being "Received", the corresponding "Period" reflected in that same row will begin on the date of the drawdown. Novatex drew down amounts from each bank in the lending consortium **[***]** or **[***]** times during the POI (excluding the "Opening" amounts), depending on the bank. Drawdowns were, therefore, rare events during the year-long POI. It would thus appear a remarkable coincidence that Novatex would have drawn down amounts from all five banks on what happened to be the first day of the POI.[167] In our view, this made the notion that the "Opening" amounts were drawn down during the POI highly questionable.

7.79. Fifth, we note the magnitude of the "Opening" amounts. The aggregate value of the five "Opening" amounts is PKR **[***]**.[168] This is roughly **[***]** of the total amount to which Novatex was entitled under the LTF-EOP Loan, i.e. PKR **[***]**. The drawdowns during the POI reflected by entries in the "Received / (Payments)" column were much smaller, totalling PKR **[***]**[169], or approximately **[***]** of the amount to which Novatex was entitled under the loan. It will be recalled that in its questionnaire response, Novatex indicated that Novatex's PKR **[***]** LTF-EOP

[164] For three banks the spreadsheets contain duplicate entries for the same amounts. This would not appear to alter the conclusions regarding how such amounts warrant interpretation, however.

[165] Pakistan has argued that the term "opening" should be understood to be synonymous with "opening balance", and has submitted evidence indicating that the term "opening balance" is "the balance brought forward at the beginning of an accounting period". (Pakistan's comments on the European Union's response to Panel question No. 92, paras. 4.10 and 4.11). But, according to the same source, this definition applies not only to a balance carried forward from a previous time into a new period, but can also apply to "when a company is first starting up its accounts". (Debitoor Dictionary, definition of "opening balance" <https://debitoor.com/dictionary/opening-balance>, (Exhibit PAK-57)).

[166] Payments of principal are parenthesized in this column. We note that each "Opening" amount has a corresponding identical entry made in the column for "TOTAL" "Amount of Credit granted". Thus, although this column may indicate the opening amounts were "granted", it appears to shed no material light on when such amounts were granted.

[167] When Novatex drew down an amount from one bank during the POI, it tended to be accompanied by drawdowns from other banks as well at or around the same date. Pakistan has explained that this was because "[w]hen Novatex drew down any amount, it turned first to [an] agent, who then in turn coordinated the drawdown with the remaining banks. All five banks contributed to the draw-down amount in proportion to their participation in the agreement." (Pakistan's response to Panel question No. 45(f), para. 3.20). Due to differences in when the SBP provided refinancing for the banks in connection with the loan, however, drawdowns sometimes resulted on different dates across the five banks. (Pakistan's response to Panel question No. 45(f), para. 3.21).

[168] Calculated by the Secretariat.

[169] Calculated by the Secretariat.

Loan had been "approved … in April 2005".[170] It would appear a rather extraordinary coincidence, therefore, that, of a loan approved in April 2005, **[***]** would be drawn down in one day that happened to be 1 July 2008, i.e. the first day of the POI in this particular investigation. In our view, this indicates that it was highly unlikely that the "Opening" amounts were drawn down during the POI.

7.80. Sixth, in its questionnaire response, Novatex stated that it "has made total drawdowns of PKR **[***]**", (i.e. the last day of the POI).[171] The spreadsheets indicate, however, that during the POI Novatex drew down *less* than PKR **[***]** (even assuming the "Opening" amounts were drawdowns), and the parties agree that the spreadsheets indicate that Novatex had paid back *less* than PKR **[***]**.[172] These data demonstrate that pre-POI principal drawdowns and pre-POI principal repayments had occurred. Although detecting these differences would have required some calculation, at least summing the drawdown amounts in the spreadsheets would not appear overly complex. We thus find such differences indicative that the "Opening" amounts could very well represent drawdowns occurring before the POI, as Novatex could have well carried over Pre-POI Principal into the POI.

#### 7.4.4.1.1.3 The Second Deficiency Letter and the Revised Spreadsheets

7.81. As indicated in the above Section, the Original Spreadsheets claimed that the commercial benchmark interest rate to apply to the LTF-EOP Loan was **[***]**. This interest rate was lower than the interest rate Novatex indicated that it paid on the LTF-EOP Loan, i.e. 6.8%. This apparently begged the question as to why Novatex would have opted for the LTF-EOP Loan in the first place. Apparently recognizing this, on 13 November 2009, the Commission sent a letter to Novatex (the Second Deficiency Letter). The letter, *inter alia*, asked Novatex to clarify whether the provision of the **[***]** figure was in error, and asked Pakistan to provide the contract for Novatex's LTF-EOP Loan from the five-bank consortium.[173]

7.82. On 24 November 2009, Novatex responded to the Second Deficiency Letter. In the response, Novatex provided the Commission with "[t]he facility offer letter [(Offer Letter)] signed by the consortium banks and the final contract executed between Novatex Limited and consortium of five banks" (the LTF-EOP Contract).[174] Novatex also confirmed that the **[***]** figure in the Original Spreadsheets had been provided in error, and indicated that the relevant commercial interest benchmark was instead **[***]**.[175] Novatex provided revised versions of the Original Spreadsheets (the Revised Spreadsheets) that reflected this correction in the "Commercial Interest rate for loans and guarantees" column, and resultant changes in the "Interest payable for Commercial Interest Rate" columns (i.e. the interest that Novatex would have paid on the LTF-EOP Loan had the interest rate been **[***]** instead of 6.8%). Aside from those revisions, the Revised Spreadsheets were almost identical to the Original Spreadsheets.[176]

7.83. One further change was significant, however. To the left of the "Opening" column, Novatex added a column entitled "Date of grant of Principal LTF-EOP". Entries in this new column appear in each row representing a drawdown of principal during the POI reflected by a non-parenthesized

[170] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 31. At this point in time, the Commission did not yet have Novatex's LTF-EOP Loan contract that indicated the LTF-EOP Loan had actually been concluded in June 2005. The April 2005 date appeared to come from the LTF-EOP offer letter, discussed further below.

[171] European Commission, Directorate-General for Trade, Novatex's Original Questionnaire Response, including Annexes F.V.1.b.a and F.VIII.1.d, 20 October 2009, (Exhibit EU-9) (BCI), p. 32.

[172] See European Union's response to Panel question No. 91, para. 19 (stating that Novatex only had paid back roughly PKR **[***]** during the POI); and Pakistan's comments on the European Union's response to Panel question No. 91, para. 4.2 (stating that Novatex only had paid back roughly PKR 220 million during the POI).

[173] Second Deficiency Letter dated 13 November 2009 from the Commission to Novatex, (Exhibit PAK-12) (BCI), p. 2.

[174] Letter dated 24 November 2009 from Novatex to the Commission as response to the Commission's Second Deficiency Letter (excerpts only), (Exhibit PAK-3-A) (BCI), p. 3.

[175] Letter dated 24 November 2009 from Novatex to the Commission as response to the Commission's Second Deficiency Letter (excerpts only), (Exhibit PAK-3-A) (BCI), p. 3.

[176] Letter dated 24 November 2009 from Novatex to the Commission as response to the Commission's Second Deficiency Letter, including Revised Annex F-V.1.b.a of Novatex's questionnaire response, (Exhibit EU-7) (BCI), annex F-V.1.b.a.

entry in the "Received / (Payments)" column. Pakistan has explained that the addition of this column "was intended to help the investigating authority to identify more quickly those entries in the 'Received/(Payments)' column that reflect drawdowns actually made during the [POI]".[177] The problem with this revision, however, was that this column also included a date next to each of the "Opening" amounts in the Revised Spreadsheets, i.e. the first day of the POI. On its face, this indicated that the "Opening" amounts had been "granted" on the first day of the POI. The "Opening" amounts, however, still had no associated entries in the "Received" column, which continued to contrast with every other instance in which Novatex drew down principal under the loan during the POI, reflected by a non-parenthesized entry in the "Received / (Payments)" column. Thus, there continued to appear something different about the "Opening" amounts from other entries indicating drawdowns during the POI.

7.84. We note that the Revised Spreadsheets were particularly noteworthy in the investigation. This was so because the Commission used them as the basis on which to calculate the benefit conferred by the LTF-EOP Loan. The Commission did this by apparently replacing the **[***]** interest rate provided by Novatex with its chosen benchmark rate, i.e. 14.44%.[178] Thus, in this dispute, the European Union emphasizes the importance of the fact that the Revised Spreadsheets indicated that the "Date of grant" of the "Opening" amounts was the first day of the POI.

#### 7.4.4.1.1.4 The LTF-EOP offer letter

7.85. Novatex attached the Offer Letter to its response to the Second Deficiency Letter. The Offer Letter is dated 30 April 2005 and contains terms of a proposed loan. The Offer Letter identifies Novatex as the borrower in a facility that was to be "**[***]**".[179] It further identifies a consortium of **[***]** banks as the lenders; five of these banks became the lending consortium reflected in the LTF-EOP Contract (discussed in the following Section of this Report).[180] The Offer Letter, therefore, was the predecessor, and eventually formed the basis, of the LTF-EOP Contract. Its terms are non-binding.[181] Nevertheless, given that it provided the basis for negotiations between Novatex and the banks for what eventually became the LTF-EOP Contract, and was on the record of the investigation, we believe that it carries some probative weight.

7.86. The Offer Letter contains an "**[***]**" of proposed terms of what became the LTF-EOP Loan. Regarding the "**[***]**" of the facility, the Offer Letter specifies that "**[***]**" and that "**[***]**" and that such drawdowns could only occur until "**[***]**". The Facility Effective Date is "**[***]**".[182] The "**[***]**" of the loan was to be 7.5 years.[183]

#### 7.4.4.1.1.5 The LTF-EOP Contract

7.87. Novatex also attached the LTF-EOP Contract to the Second Deficiency Letter.[184] The LTF-EOP Contract is dated 9 June 2005, and was thus concluded roughly six weeks after the conclusion of the Offer Letter. The LTF-EOP Contract describes a loan very similar to that described in the Offer Letter.

7.88. Under the LTF-EOP Contract, a consortium of five banks would make a loan of up to PKR **[***]** available to Novatex under the LTF-EOP programme.[185] The loan was structured such that it

[177] Pakistan's response to Panel question No. 45(a), para. 3.3.
[178] See generally Novatex Provisional Subsidy Calculation, (Exhibit EU-8) (BCI).
[179] Offer Letter, (Exhibit PAK-31) (BCI), p. 3. The circular generally described the terms of the LTF-EOP programme. (See Banking Policy Department, Circular No. 14 (18 May 2004), (Exhibit PAK-60)).
[180] Only **[***]** did not participate in the eventual lending consortium. The removal of this bank apparently caused a decrease in the proposed amount of the loan, which was PKR **[***]** in the Offer Letter but PKR **[***]** in the LTF-EOP Contract.
[181] Its terms "**[***]**". (Offer Letter, (Exhibit PAK-31) (BCI), p. 1).
[182] Offer Letter, (Exhibit PAK-31) (BCI), p. 3.
[183] Offer Letter, (Exhibit PAK-31) (BCI), p. 3.
[184] See Exhibit PAK-29 (BCI) containing the **[***]** and the **[***]**. Pakistan has explained that **[***]** concluded a separate agreement as to operate under Islamic banking principles. As it appears the case that the two agreements' relevant terms operated similarly, this Report does not, therefore address the two separately. Rather, it generally refers to them, taken together, as the "LTF-EOP Contract". (See Pakistan's response to Panel question No. 44, paras. 3.1 and 3.2).
[185] See Syndicate Agreement, (Exhibit PAK-29) (BCI), clause 1.1(ai) (providing **[***]**) and Murabaha Agreement, (Exhibit PAK-29) (BCI), clause 1.01 (providing **[***]**). The LTF-EOP Contract also states that the

could be drawn down in tranches. Novatex was required to draw down **[***]** of the total loan amount within **[***]** of the signing of the LTF-EOP Contract, and Novatex could only draw down the remaining amounts within **[***]** of the signing of the LTF-EOP Contract.[186] There is nothing on the record specifically indicating that the **[***]** deadline had ever been extended.[187] It is undisputed that the **[***]** deadline was extended, which accounted for Novatex's drawdowns during the POI, which began roughly three years following the conclusion of the LTF-EOP Contract.[188] The interest rate for a particular tranche would be set when it was drawn down and remained locked in until the tranche was paid back; that interest rate comprised of the SBP annual base rate that prevailed at the time of drawdown, plus a mark-up of 1.8 percentage points.[189] At the time of its drawdown, each tranche was assigned its own 7.5-year repayment period. Further, when read together with the government circular describing the LTF-EOP programme, the parties further agree, and we see no reason to doubt, that the LTF-EOP Loan had an initial eighteen-month grace period on principal repayment.[190]

7.89. We therefore note that the LTF-EOP Contract clarifies: (a) that the LTF-EOP Loan was concluded in June 2005 (i.e. roughly *three years* before the beginning of the POI); (b) each tranche of principal drawn down thereunder had its own *7.5-year* repayment period assigned to it; (c) the LTF-EOP Loan had an initial eighteen-month grace period on principal repayment; and (d) Novatex had to draw down at least **[***]** of the loan by roughly **[***]**. Given that there is no material evidence on the record that the **[***]** deadline was not respected, and the European

consortium has agreed to provide the loan pursuant to the LTF-EOP scheme. (Syndicate Agreement, (Exhibit PAK-29) (BCI), clause 1.1(w) and p. 5/61 (item ii); and Murabaha Agreement, (Exhibit PAK-29) (BCI), clause 1.02 and p. 42/61 (definition of "LTF-EOP Scheme").

[186] Consistent with the terms of the Offer Letter, **[***]** could have been added to the **[***]** and **[***]** drawdown deadlines stated above. (Syndicate Agreement, (Exhibit PAK-29) (BCI), clauses 1.1(i), 1.1(j), 1.1(o), 1.1(p), and 2.3; and Murabaha Agreement, (Exhibit PAK-29) (BCI), clause 2.03 and definitions of **[***]** p. 41/61).

[187] We recall that the balances in the "Opening" columns in the Original and Revised Spreadsheets was well over **[***]** of the total amount of the LTF-EOP Loan. The LTF-EOP Contract appeared to provide for additional payments to the bank consortium by Novatex if Novatex drew down less than **[***]** of the loan amount before the **[***]** deadline, but there is no evidence that such payments occurred. (Syndicate Agreement, (Exhibit PAK-29) (BCI), clause 5.5; and Murabaha Agreement, (Exhibit PAK-29) (BCI), clause 4.06). The LTF-EOP Contract also contained repayment schedules that indicated that significant amounts of Pre-POI Principal would be drawn down and would still be outstanding as of the first day of the POI. (Syndicate Agreement, (Exhibit PAK-29) (BCI), schedule C (envisioning payments years beyond July 2008); and Murabaha Agreement, (Exhibit PAK-29) (BCI), schedule E (same)).

[188] At least the Syndicate Agreement appeared to allow for extension of the **[***]** deadline subject to agreement among the parties. (Syndicate Agreement, (Exhibit PAK-29) (BCI), clause 2.4(b)).

[189] The parties agree that the record reflected this "lock-in" structure. (European Union's response to Panel question No. 96, para. 30; and Pakistan's response to Panel question No. 96, para. 3.20. See also Syndicate Agreement, (Exhibit PAK-29) (BCI), p. 36/61). Pakistan has explained that under the Murabaha Agreement (under which Novatex was entitled to only about **[***]** of the total loan amount), "this explicit statement is lacking, due to the adherence to strict Islamic banking principles which do not utilize the concept of 'interest rate'". (Pakistan's response to Panel question No. 44, fn 116). We note, however, that the Murabaha Agreement indicates that the loan is "**[***]**" which is "**[***]**". (Murabaha Agreement, (Exhibit PAK-29) (BCI), clause 1.02 and the definition of "**[***]**" on p. 42/61). The referenced circular references this "lock-in" structure. (See Banking Policy Department Circular No. 14 (18 May 2004), (Exhibit PAK-60), para. 4). The circular also attaches more detailed terms and conditions of the LTF-EOP scheme, some of which also appear to reference this structure. (See Banking Policy Department Circular No. 14 (18 May 2004), (Exhibit PAK-60), p. 20, para. 9(a)). The Provisional Determination refers to the LTF-EOP as set out in this circular. (Provisional Determination, (Exhibit PAK-1), para. 118).

[190] See Pakistan's second written submission, para. 3.53 (explaining eighteen-month grace period). The European Union claims the grace period was even longer, amounting to over two years, in which case it would appear even less likely that Pre-POI Principal would have been paid back in its entirety by the first day of the POI. (European Union's second written submission, table in para. 100 and para. 108 (referencing two-year grace period); and opening statement at the second meeting of the Panel, para. 52 (same). But see European Union's comments on Pakistan's response to Panel question No. 93, para. 6 (referencing eighteen-month grace period)). It is not entirely clear to us whether the grace period applied to the loan as a whole or to each individual tranche, although this appears immaterial for our purposes. We also note that the parties agree that each tranche was assigned its own 7.5-year repayment term. (Pakistan's response to Panel question No. 70, para. 3.52; European Union's response to Panel question No. 70, para. 104. See also Pakistan's opening statement at the first meeting of the Panel, para. 4.8 (explaining that drawdowns occurred in 2005 and the LTF-EOP Loan was "repaid (ahead of schedule) by 2015", i.e. roughly ten years following the conclusion of the LTF-EOP Contract and the first drawdowns); Syndicate Agreement, (Exhibit PAK-29) (BCI), p. 3/61 (item (i); and Murabaha Agreement, (Exhibit PAK-29) (BCI), clause 1.02). We see no reason to disagree with this interpretation.

Union has provided us no particular reason to believe that it would have been reasonable to assume that Novatex would not avail itself of the full 7.5-year repayment term per tranche, we consider that this combination of facts means that it was a near certainty that Novatex would have drawn down Pre-POI Principal and carried over at least some of that principal into the POI, and thus that the "Opening" amounts in the Original and Revised Spreadsheets represented, or at least contained significant amounts of, Pre-POI Principal.[191]

#### 7.4.4.1.1.6 Novatex annual reports

7.90. Pakistan asserts that the Commission also should have been on notice that the "Opening" amounts in the Original and Revised Spreadsheets represented Pre-POI Principal because Novatex's 2007-2008 and 2008-2009 annual reports, which included financial statements, both indicated that on 30 June 2008 (i.e. the last day preceding the POI) Novatex had large sums outstanding from all five of the lending consortium banks under the LTF-EOP Loan. The statements do indeed reflect this[192], and were on the record of the investigation before the Provisional Determination was issued.[193] The financial statements clearly list Novatex's outstanding balances under the LTF-EOP Loan bank-by-bank in the notes to the financial statements. When one compares these bank-specific outstanding balances on 30 June 2008 to the bank-specific "Opening" amounts in the Original and Revised Spreadsheets for the first day of the POI (i.e. 1 July 2008), we observe that those two amounts are identical for three of the five lending banks (**[***]**) and almost identical for two of the banks (**[***]**). These data, on their own, prove that the "Opening" balances were indeed Pre-POI Principal, not drawdowns that occurred on the first day of the POI. We note that even though these reports may have been examined by the Commission for purposes other than examining the LTF-EOP, and contain many types of information beyond the LTF-EOP Loan balances, they were still on the record before the Commission, and the outstanding balance data were, in our view, plain enough that we would expect a reasonable investigating authority to detect it and take it into account, especially given the evidence (discussed above) calling into question the nature of the "Opening" balances in the Original and Revised Spreadsheets.[194]

#### 7.4.4.1.1.7 Conclusion – timing of drawdowns of principal

7.91. We conclude that the evidence discussed above, taken together, would clearly suggest to a reasonable investigating authority that the amounts in the "Opening" balances in the Original and Revised Spreadsheets represented Pre-POI Principal.[195] This is not to say, however, that the manner in which Novatex presented its data in the Original and, in particular, the Revised Spreadsheets, to the Commission in this context was a model of clarity. Indeed, assigning the date of the first day of the POI to the "Date of grant" column next to the "Opening" amounts in the Revised Spreadsheets appeared confusing at best.

#### 7.4.4.1.2 The decision to use the SBP Rate: Determinations and disclosure documents

7.92. In this Section, we examine the portions of the Determinations and associated disclosure documents provided to Novatex discussing how the Commission determined the LTF-EOP Loan to

[191] We recall that the Offer Letter also referenced the **[***]** deadline and 7.5-year repayment term. Even though its terms were non-binding, it basically repeated certain key information contained in the LTF-EOP Contract, and thus should have further drawn the Commission's attention to such facts.

[192] See Novatex' audited Annual Report 2007-2008, (Exhibit PAK-40) (BCI), p. 16 Nos. 17 and 17.1; and Novatex' audited Annual Report 2008-2009, (Exhibit PAK-41) (BCI), p. 17 Nos. 18 and 18.1.

[193] See generally European Union's response to Panel question No. 95, para. 28; and Pakistan's response to Panel question No. 95, para. 3.13.

[194] In the Second Deficiency Letter, the Commission asked Pakistan to provide details regarding a short-term borrowing facility referenced in the notes to the financial statements in the Novatex 2007-2008 annual report. (Second Deficiency Letter dated 13 November 2009 from the Commission to Novatex, (Exhibit PAK-12) (BCI), p. 2). The LTF-EOP loan amounts are listed just two pages before this reference in the notes to the financial statements concerning long term borrowing. (Novatex' audited Annual Report 2007-2008, (Exhibit PAK-40) (BCI), pp. 16 and 18). This indicates that the Commission reviewed the notes to the financial statements in some detail.

[195] See, e.g. European Union's second written submission, para. 129 (advocating the following standard in this context: "whether a reasonable investigating authority would have concluded, on the basis of the evidence before it and in view of all factual circumstances surrounding the submission of the evidence, that the spreadsheets submitted by Novatex showed amounts that were drawn down during the IP").

be a subsidy, and, more specifically, how it chose to benchmark Novatex's interest payments under the loan during the POI against the SBP Rate.

7.93. In the Provisional Determination, the Commission found the LTF-EOP Loan to be a countervailable subsidy. In so finding, the Commission first discussed the LTF-EOP scheme, demonstrating an understanding of its legislative basis, eligibility requirements, and implementation procedures. With respect to such procedures, the Provisional Determination indicated that: (a) the maximum period of financing was 7.5 years; (b) "[b]anks are allowed to charge the borrower up to 3% over and above the rates notified by the SBP. Interest rates for financing under [the] LTF-EOP scheme are benchmarked with the weighted average yields of 12 months Treasury Bills and three and five years Pakistan Investment Bond, depending on the period of financing"; (c) "[u]nder this scheme, the SBP mandatorily sets maximum ceiling interest rates applicable to long-term loans"; and (d) Novatex's loan under the LTF-EOP was "a long-term financing and the benefit was availed of in April 2005 for a period of 7-1/2 years".[196] The Commission then considered that "Pursuant to Article 6(b) of the basic Regulation, the benefit to the recipient is calculated by taking the difference between the [SBP] imposed credit ceiling and the applicable commercial credit rates."[197]

7.94. The provisional company-specific disclosure sent to Novatex[198] revealed what this "applicable commercial credit rate" was in its subsidy calculation regarding the LTF-EOP Loan. The document explained that, *vis-à-vis* the LTF-EOP Loan, "[t]he normal interest rate was found at an average of 14,44% (source Statistic on monthly average of interest rate - outstanding loans - from SBP" (i.e. the SBP Rate).[199] An associated table in the disclosure also indicated that this monthly average rate was "Interest normally payable (based on average for the IP; Outstanding loan; excluding zero Markup".[200] The table provided this rate for each month of the POI, and then averaged them, yielding the 14.44% figure. The following note appears below this table: "all banks - source: Statistics DWH Department - sbp.org.pk)".[201] It is undisputed that the Commission then calculated the subsidy amount by taking the difference between Novatex's actual interest payments on the LTF-EOP Loan (pursuant to the loan's 6.8% interest rate) made during the POI and the interest that Novatex would have paid on the LTF-EOP Loan had the interest rate been 14.44% instead.[202]

7.95. The definitive general disclosure document (which was a draft of the Definitive Determination) provided the following relevant discussion:

> Both parties claimed that the interest rate used to calculate the subsidy margin of this financing scheme has to be the interest rate available at the time the exporting producer was negotiating the fixed rate financing, namely the rate in the year 2004-2005. …
>
> These claims had to be rejected. First of all, it should be clarified that the rate used in the calculation is the commercial interest rate applied during the IP in Pakistan, as sourced from the website of the [SBP]. When calculating the subsidy amount the amount of credit for the IP, as reported by the cooperating exporting producer, was used. It is the normal practise [*sic*] when examining the benefit availed by a party

[196] See generally Provisional Determination, (Exhibit PAK-1), paras. 117-126. We note that the technical accuracy of these descriptions is not at issue.
[197] Provisional Determination, (Exhibit PAK-1), para. 131. It should be noted that, in calculating the subsidy amount, the Commission in fact took the difference between the rate *actually charged* by the bank consortium on the Novatex loan (i.e. 6.8%) and the "applicable commercial credit rates". (See generally Novatex Provisional Subsidy Calculation, (Exhibit EU-8) (BCI)).
[198] These disclosure documents were sent to Novatex along with a copy of the Provisional Determination.
[199] Novatex Provisional Subsidy Calculation, (Exhibit EU-8) (BCI), second text box under item 4. See also European Commission, Provisional company-specific disclosure, 1 June 2010, (Exhibit PAK-32) (BCI) (containing same content).
[200] Novatex Provisional Subsidy Calculation, (Exhibit EU-8) (BCI), table on p. 5 of PDF.
[201] Novatex Provisional Subsidy Calculation, (Exhibit EU-8) (BCI), table on p. 6 of PDF.
[202] Novatex Provisional Subsidy Calculation, (Exhibit EU-8) (BCI).

> during a specific IP to take the applicable commercial credit rate prevailing in the market during the corresponding IP.[203]

7.96. The definitive company-specific disclosure document provided the following relevant discussion:

> The subsidy amount obtained under the LTF-EOP … was derived from the difference between the … [SBP] imposed credit ceiling under the LTF-EOP credit facilities and the interest payable under the normal commercial interest (i.e. interest rate of 14,44% found from the [SBP]: Statistic on monthly average interest rate − outstanding loans).[204]

7.97. The Definitive Determination provided the following relevant discussion:

> Both parties claimed that the interest rate used to calculate the subsidy margin of this financing scheme has to be the interest rate available at the time the exporting producer was negotiating the fixed rate financing, namely the rate in the year 2004-2005. …
>
> These claims had to be rejected. First of all, it should be clarified that the rate used in the calculation is the commercial interest rate which prevailed during the IP in Pakistan, as sourced from the website of the [SBP]. The financing negotiated in 2004/2005 was drawn down in tranches by the exporter concerned. When calculating the subsidy amount the amount of credit drawn down for the IP, as reported by the cooperating exporting producer, was used. When examining the benefit received by a party during a specific IP the applicable commercial credit rate prevailing in the market during the IP is normally compared to the rate paid on the loan received during the IP, and this was done here.[205]

7.98. The Definitive Determination then confirmed the relevant findings in the Provisional Determination, discussed above.[206]

#### 7.4.4.1.3 Whether Pakistan has made out a *prima facie* case and, if so, whether the European Union has rebutted it

7.99. It will be recalled that to succeed in its claim under Article 14(b), Pakistan must make out a *prima facie* case that the SBP Rate does not represent "the amount [Novatex] would pay on a comparable commercial loan which [Novatex] could actually obtain on the market". Based on the evidence discussed above, we conclude that Pakistan has done so and that the European Union has not rebutted it.[207] The key issue in this context is whether the SBP Rate is associated with a "comparable commercial loan". Through its arguments highlighting the lack of discussions in the Determinations and associated disclosure documents surrounding the choice of the SBP Rate as a benchmark, Pakistan, in our view, has demonstrated that the Determinations and associated

[203] European Commission, General Definitive Disclosure, (Exhibit PAK-36), paras. 71-72.
[204] European Commission, Definitive company-specific disclosure, 26 July 2010, (Exhibits PAK-33 and EU-6) (exhibited twice) (BCI), section 1.5.
[205] Definitive Determination, (Exhibit PAK-2), paras. 72 and 73.
[206] Definitive Determination, (Exhibit PAK-2), para. 74.
[207] We dismiss the following European Union arguments as *ex post* rationalizations for choosing the SBP Rate, as the Commission did not include them in its Determinations: (a) an obstacle for identifying a comparable commercial loan for a company in a similar financial situation as Novatex in the same sector of the economy was the influence of "different subsidy schemes" (European Union's response to Panel question No. 59, para. 90); (b) the application of the SBP Rate to the LTF-EOP Loan was beneficial to Novatex because the duration of the LTF-EOP Loan was 7.5 years (and perhaps as long as 10 years if viewed as a whole) whereas the Karachi Inter-Bank Offer Rate (KIBOR) (discussed more below in this Section) pertains to loans of shorter durations, which usually carry lower interest rates (See European Union's response to Panel question No. 55, para. 80, and No. 61, para. 93); (c) the KIBOR was beneficial to Novatex because it did not include "the amount of benefit enjoyed by Novatex for not having to bear the cost of having borrowed the total amount at once (cost borne by the banks at issue)" (European Union's response to Panel question No. 62, para. 94); and (d) the KIBOR was an appropriate benchmark interest rate in light of the fact that one of the private loans, specifically an **[***]**, that Novatex offered the Commission to demonstrate the benchmark interest rate (we note that the Commission did not use the loan to do so) had a **[***]** KIBOR rate incorporated into it. (European Union's response to Panel question No. 57, para. 86).

disclosure documents leave serious and systemic doubts regarding comparability in terms of timing, structure, maturity, size, and the identities of relevant borrowers.

7.100. We first consider timing. A "benefit" analysis depends on making a "comparison … to be performed as though the [subject and benchmark] loans were obtained at the same time … [and thus] the assessment focuses on the moment in time when the lender and borrower commit to the transaction".[208] We perceive three dates that could, in our view, plausibly reference the moment that Novatex and the bank consortium committed to the LTF-EOP Loan (or any portion thereof): (i) the conclusion of the LTF-EOP Contract in June 2005; (ii) the moment each tranche was drawn down and therefore the time at which an interest rate was assigned to that tranche; and/or (iii) the time at which Novatex and the bank consortium extended drawdown deadlines under the loan, thus allowing tranches to be drawn down later than originally planned or allowed under the LTF-EOP Contract. We need not decide which date(s) would be proper to use because the Determinations offer no demonstration that the SBP Rate is meaningfully connected to any of them.[209] We recall that the Determinations revealed that the SBP Rate was based on monthly rates for "interest normally payable" on "outstanding loans", i.e. the "commercial interest rate applied during the IP in Pakistan". Such descriptions, however, do not in our view reveal whether this means that the monthly rates were: (a) rates (or averages thereof) that banks intended to, and perhaps did in fact, assign to loans during each month; and/or (b) rates (or averages thereof) that banks had assigned to then-outstanding loans when such loans had been concluded at unknown points in the past (which may have included some loans concluded during the POI). In the presence of such ambiguity, we cannot determine to what extent the SBP Rate is a rate taken from a time that is comparable to the time at which the parties committed to the LTF-EOP Loan (or any portion thereof). Moreover, even if we assume that (a) represents the correct interpretation[210], the SBP Rate during the POI would appear to have no meaningful connection to the time at which the parties committed to the transaction *vis-à-vis* principal drawn down before the POI (it will be recalled that the record suggested that this represented the great majority of the principal on which Novatex paid interest during the POI) and ambiguous connections at best *vis-à-vis* principal drawn down during the POI.[211] If we assume that (b) represents the correct interpretation, this would not avail the European Union because of the ambiguity surrounding when the relevant loans underlying the SBP Rate were concluded and how such times meaningfully coincide with any of the plausible reference dates identified above in this paragraph. The Determinations, therefore, leave serious and systemic doubts as to whether the SBP Rate is associated with comparable commercial loans in terms of timing. The European Union has pointed to nothing that materially mitigates such doubts.

7.101. We therefore turn to consider comparability issues regarding structure, maturity, size, and the identity of borrowers. The Determinations and associated disclosure documents reveal that the

[208] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 835 and 836.

[209] We therefore also do not consider it necessary to identify which (if any) of these three dates the Commission used as the proper reference date in its Determinations, although we note that only option (ii) appears plausible. (See Definitive Determination, (Exhibit PAK-2), para. 73 (rejecting the use of a 2004-2005 reference date, never discussing drawdown extensions, but discussing "the amount of credit drawn down *for the IP*" and "the loan *received* during the IP") (emphasis added)). We note that we find no support for the European Union's apparent argument in this dispute that the time during which *a borrower* "effectively uses" or "enjoys" a loan can represent the moment in time when the *lender and borrower* commit to a loan transaction. (See, e.g. European Union's second written submission, para. 106). If the Determinations used the time during which Novatex was "using" the LTF-EOP Loan as the time at which the parties committed to the LTF-EOP Loan (or any portion thereof), therefore, the Commission misidentified a fundamental aspect of the LTF-EOP Loan, logically pre-empting that aspect's proper comparison with any benchmark with respect to timing, and leaving serious and systemic doubts as to whether the SBP Rate is associated with comparable commercial loans in terms of timing.

[210] In our view, the parties' arguments in this dispute have appeared to reflect the assumption that this is the correct interpretation of the SBP Rate, or, perhaps more precisely, the rates that were averaged to calculate the SBP Rate.

[211] No evidence indicates that either the Pre-POI Principal drawdown dates or the dates of any drawdown extension agreements were on the record. We further note that drawdowns only occurred during certain months of the year-long POI, whereas the monthly rates that were averaged to produce the SBP Rate of 14.44% were taken from all POI months. Further, insofar as the monthly rates represented averaged KIBOR rates prevailing during each month (a possibility discussed in the next paragraph), KIBOR rates are produced daily, not monthly, and drawdowns occurred on certain days, not over months. Even assuming that the LTF-EOP Loan (or any portion thereof) was comparable in terms of timing to the SBP Rate, however, we could not find that such limited comparability sufficient to satisfy Article 14(b) due to the other comparability problems that exist with respect to structure, duration, size and identify of the borrowers, discussed below.

SBP Rate is a rate that reflected "interest normally payable" on "outstanding loans" from "all [presumably Pakistani] banks" that can be expressed as a monthly average, and that it "exclud[ed] zero Markup". But for the fact that such descriptions indicate that the SBP Rate is associated with "loans" that "exclude[ed] zero Markup", this yields no meaningful insight into the structure, maturity, or size of such loans, and provides no indication of the character of borrowers.[212] We note that the European Union has stated that the SBP Rate is "synonymous" with the Karachi Inter-Bank Offer Rate (KIBOR). Even assuming *arguendo* that it was discernible from the Determinations that the SBP Rate represented averaged KIBOR rates prevailing over each month of the POI (the record reflects that KIBOR rates are produced daily)[213], and that such rates were on the record of the investigation, the same basic problems with the SBP Rate persist. The European Union points to nothing on the record revealing the size or structure of the loans with which the KIBOR from any particular time was associated.[214] Moreover, the European Union agrees that the KIBOR is associated with loans of much shorter durations than the LTF-EOP Loan.[215] Further, the European Union points to nothing on the record indicating that the borrowers of the loans associated with the KIBOR in any material way resemble Novatex.[216] The Determinations, therefore, leave serious and systemic doubts as to whether the SBP Rate is associated with comparable commercial loans in terms of structure, maturity, and size, and the identities of borrowers.[217] The European Union has pointed to nothing that materially mitigates such doubts.

#### 7.4.4.1.4 Conclusion – Article 14(b)

7.102. In accordance with our reasoning above, we find that the Commission, in calculating the benefit conferred by the LTF-EOP Loan, acted inconsistently with Article 14(b) of the SCM Agreement by failing to properly identify what Novatex would have paid on a "comparable

[212] Given that it is provided by the SBP, we assume *arguendo* that the loans associated with the SBP Rate occur in the same currency as the LTF-EOP Loan, i.e. PKR.

[213] See, e.g. KIBOR rate for 2 July 2008, (Exhibit EU-16). See also Pakistan's response to Panel question No. 93, para. 3.6 (indicating that KIBOR rates are daily).

[214] The European Union itself notes the importance of size comparability. (European Union's first written submission, para. 124 (explaining that it could not use one of the loans offered by Novatex during the investigation to evidence the relevant benchmark because, *inter alia*, it was "for a much smaller amount")). Throughout this dispute, the European Union has also stressed the importance of comparability in terms of structure, indicating that the "flexible" multi-tranche structure of the LTF-EOP Loan where interest rates are assigned to tranches as they are drawn down must be considered in picking a benchmark to apply to the LTF-EOP Loan. (See, e.g. European Union's first written submission, para. 115).

[215] The KIBOR is associated with lending rates for the following durations: weeks, months, and one to three years. (KIBOR rate for 2 July 2008, (Exhibit EU-16). See also European Union's response to Panel question No. 55, para. 81 (discussing KIBOR terms), and No. 61, para. 93 (same); and Pakistan's first written submission, para. 6.17 (same)). The European Union itself notes that shorter duration loans could lead to comparability problems. (See, e.g. European Union's first written submission, para. 125 (explaining that it could not use one of the loans offered by Novatex during the investigation to evidence the relevant benchmark because, *inter alia*, it was "for a much shorter duration")).

[216] The KIBOR is an inter-bank lending rate, although both parties indicate at times that it is also a basis upon which banks formulate lending rates to other customers, perhaps including corporate customers. We note, however, that while the European Union appears to suggest that the KIBOR rates themselves were extended to a variety of customers, Pakistan is of the view that KIBOR rates would serve as the benchmark for rates given to at least corporate customers, which would include a mark-up above and beyond KIBOR the magnitude of which would depend on the customer. (See European Union's response to Panel question No. 59, para. 90 and No. 93, para. 22; Pakistan's response to Panel question No. 93, para. 3.6; and comments on the European Union's response to Panel question No. 93). Whatever the case may be, however, such considerations simply underline that the recipients of the loans associated with SBP Rate would be either markedly different than Novatex (e.g. banks) and/or comprise an unknown group of borrowers (at best, an unknown mix of corporate customers).

[217] This conclusion holds with respect to the LTF-EOP Loan as a whole or any portion thereof. We further note that Novatex offered into the record of the investigation certain commercial loans that it claimed were comparable commercial loans. (Letter dated 24 November 2009 from Novatex to the Commission as response to the Commission's Second Deficiency Letter (excerpts only), (Exhibit PAK-3-A) (BCI), p. 3). Pakistan claims that the Commission should have explained why it did not use these loans as a basis on which to calculate the benchmark interest rate. We find it sufficient to note that the Determinations did not specifically explain why these loans did not evidence an acceptable benchmark interest rate. Thus, that the Commission did not depend on them yields no meaningful insight into the appropriateness of the SBP Rate as a benchmark in terms of structure, maturity, size, or with respect to the identity of the borrowers.

commercial loan".[218] As a consequence of this violation, we further find that the Commission acted inconsistently with Article 1.1(b) of the SCM Agreement.[219]

#### 7.4.4.2 The *chapeau* of Article 14

7.103. Pakistan also claims that the Commission failed to explain its method of benchmarking the LTF-EOP Loan in a transparent and adequate manner *vis-à-vis* the European Union's national legislation or implementing regulations that provide for such method, as required by the *chapeau* of Article 14 of the SCM Agreement. In its Determinations, the Commission applied Article 6(b) of its Basic Regulation[220] to calculate the subsidy amount with respect to the LTF-EOP Loan.[221] The European Union has explained that "[t]he process for the identification of a comparable loan is explained in more detail in sub-paragraph E(b) of the EU Guidelines".[222] The European Union has further explained that Article 6(b) of the Basic Regulation[223] and sub-paragraph E(b) of the EU Guidelines require that a benefit be calculated with reference to a "comparable commercial loan".[224]

7.104. In the preceding Section of this Report, we found that Pakistan has made out a *prima facie* case that the Commission 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, and the European Union had failed to rebut that *prima facie* case. This failure mainly stemmed from the fact that the Determinations are virtually silent as to why the SBP Rate is associated with a comparable commercial loan. As already noted, the European Union has explained that both the Basic Regulation and EU Guidelines require the identification of a comparable loan. Thus, an explanation of how the Commission identified a comparable loan must be part of the "application" in this particular case of the "method" called for in the Basic Regulation, which includes

[218] In assessing Pakistan's Article 14(b) claim, the European Union has argued that we must take into account the facts that Pakistan and Novatex understood the SBP Rate/KIBOR during the investigation, provided such rates to the Commission, and advocated the use of such rates as the benchmark interest rate. (See, e.g. European Union's second written submission, para. 78; and response to Panel question No. 93, paras. 24-26). Even if true, these considerations are immaterial on this record. While parties' understanding, provision, and/or advocacy of a benchmark during an investigation may affect the rigor with which an investigating authority addresses the appropriateness of a chosen benchmark, they cannot remove the investigating authority's obligation to demonstrate the comparability of that benchmark to the subject loan to some minimum threshold that demonstrates that the comparison is meaningful. We also note that the European Union has consistently argued in this dispute that the LTF-EOP Loan was more similar to a "line of credit" rather than a traditional loan, and requiring it to be benchmarked to a "proxy", i.e. the SBP Rate. Attaching the moniker "line of credit" to the LTF-EOP Loan and/or the moniker "proxy" to the SBP Rate (neither moniker appears in the SCM Agreement) does not assist the European Union on this record. A comparison that satisfies Article 14(b) must be *meaningful*. Even if it were true that other types of loans were not comparable to the LTF-EOP Loan, this does not mean that the SBP Rate was or should be presumed to be out of convenience. We further note that the Commission made no adjustments to the SBP Rate. (European Union's response to Panel question No. 62, para. 94).

[219] The European Union suggests that certain of Pakistan's arguments on comparability raise due process concerns because the European Union was limited to responding to them in its comments on Pakistan's responses to the second set of questions from the Panel. (European Union's comments on Pakistan's response to Panel question No. 93, para. 5). We emphasize that the comparability of a benchmark loan with a subject loan is at the heart of the discipline imposed by Article 14(b), and that our decision in this context in no way depends on evidence or arguments to which the European Union has been unable to respond. We more specifically note that we do not rely on exhibits submitted by Pakistan in its comments on the European Union's responses to the second set of questions by the Panel, nor must we do so to reach our above conclusions.

[220] Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidized imports from countries not members of the European Community, Official Journal of the European Union, L Series, No. 188/93 (18 July 2009) (Basic Regulation). See Provisional Determination, (Exhibit PAK-1), preamble.

[221] Provisional Determination, (Exhibit PAK-1), para. 131. This provision is very similar to Article 14(b) of the SCM Agreement. (See European Union's first written submission, fn 87 (quoting Article 6(b) of the Basic Regulation)).

[222] European Union's first written submission, para. 143 (quoting EU Guidelines). This is the part of the EU Guidelines on which Pakistan relies in this context. (See generally Pakistan's first written submission, section 6.3.1.1).

[223] The European Union at times argues that Pakistan's claims under the *chapeau* of Article 14 must be rejected because they represent claims under Article 22.3 of the SCM Agreement. (See, e.g. European Union's comments on Pakistan's response to Panel question No. 93, para. 4). We note that our resolution of Pakistan's claims under Article 14(b) and the *chapeau* of Article 14 is in accordance with proper legal standards.

[224] Pakistan does not claim that the European Union's relevant national legislation or implementing regulations are contrary to the principles stated in Article 14(b) in any relevant manner.

identification of a comparable loan, within the meaning of the *chapeau* of Article 14(b) of the SCM Agreement, that the Commission used to benchmark the LTF-EOP Loan. In the absence of any meaningful explanations in the Determinations as to why the loans with which the SBP Rate was associated were comparable to the LTF-EOP Loan, we conclude that the Commission acted inconsistently with the *chapeau* of Article 14 of the SCM Agreement.

#### 7.4.4.3 Other LTF-EOP-related claims

7.105. Pakistan also asserts that, as a consequence of violating Article 14(b) and the *chapeau* of Article 14 of the SCM Agreement, the Commission also violated Articles 10, 19, and 32, and Article VI of the GATT 1994. Such claims are consequential to other alleged violations of the SCM Agreement, and we exercise judicial economy with respect to them.[225]

### 7.5 Pakistan's claims under Article 15.5 of the SCM Agreement

#### 7.5.1 Introduction

7.106. In this Section of our Report, we address Pakistan's claims concerning Article 15.5 of the SCM Agreement. During the investigation, certain parties argued that any injury the domestic industry[226] experienced during the period considered[227] was not due to subject imports, but other factors. The Commission rejected these arguments, finding that although certain other factors may have also caused injury to the domestic industry, no other factor broke the causal link that existed between subject imports and the injury the domestic industry experienced. In this context, Pakistan advances a "twofold" claim. First, Pakistan argues that the Commission's "approach to causation", whereby the Commission made a finding of the existence of a causal link between subject imports and the injury to the domestic industry prior to the assessment of other known factors, is inconsistent with Article 15.5 of the SCM Agreement. Second, Pakistan claims that the Commission failed to properly "separate and distinguish" the effects of certain other known factors from those of subject imports. This Section addresses each in turn.

#### 7.5.2 The Commission's approach to causation

7.107. In the Provisional Determination, the Commission began its causation analysis with the assessment of the "[e]ffect of the subsidized imports", pursuant to which it "considered" that a causal link existed between the subject imports and the observed injury to the domestic industry.[228] The Commission then assessed the "effect of other factors".[229] None of these factors was found to "break the causal link" between subject imports and the observed injury to the domestic industry. Thereafter, the Commission "concluded that the imports from the countries concerned have caused material injury to the Union industry".[230] In the Definitive Determination,

[225] We therefore do not address the European Union's objections to any such claims under Article 6.2 of the DSU.

[226] We use the term "domestic industry" for the purpose of this Report to describe what the Commission referred to as the "Union industry" in its Determinations, i.e. the EU producers that cooperated with the investigation. The Commission further relied on a sample of those cooperating producers to ascertain the situation of the domestic industry in certain respects. (See Provisional Determination, (Exhibit PAK-1), paras. 8, 201-204, and 219). We note, therefore, that the Commission found that a causal link existed between subject imports and the observed injury to the *domestic industry*. (Provisional Determination, (Exhibit PAK-1), para. 245). We further note that in assessing whether the domestic industry suffered injury, the Commission at times presented data (e.g. market share and price data) that was derived from *all* EU producers (i.e. the domestic industry and, additionally, non-cooperating producers). (Provisional Determination, (Exhibit PAK-1), para. 219). We use the term "domestic producers" to refer to *all* EU producers, which the Determinations referred to as "Union producers".

[227] Paragraph 15 of the Provisional Determination explains: "The investigation of subsidisation and injury covered the period from 1 July 2008 to 30 June 2009 ('investigation period' or 'IP'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2006 to the end of the investigation period ('period considered')." We equate the term "IP" with "POI" (i.e. period of investigation), and adopt the term "period considered" as referring to 1 January 2006 through the end of the POI.

[228] Provisional Determination, (Exhibit PAK-1), para. 245.

[229] Provisional Determination, (Exhibit PAK-1), paras. 246-261.

[230] Provisional Determination, (Exhibit PAK-1), para. 264.

the Commission addressed certain additional arguments raised by interested parties and "confirmed" its findings on causation made in the Provisional Determination.[231]

#### 7.5.2.1 Main arguments of the parties

7.108. Pakistan presents three main arguments in this context. First, Pakistan argues that the Commission's "break the causal link" approach is contrary to the "three-step analysis" laid down by the Appellate Body in *US – Wheat Gluten*.[232] Second, Pakistan argues that the Commission's approach prejudged its analysis of other known factors.[233] Third, Pakistan argues that the Commission's basis for finding a causal link between subject imports and observed injury to the domestic industry was flawed because: (a) it equated its findings of price undercutting by subject imports with the existence of a causal link between the subject imports and the injury[234]; and (b) it assumed the existence of a causal link based on temporal coincidence between increase in volume of imports and deterioration of the domestic industry.[235]

7.109. The European Union rejects all of Pakistan's arguments. The European Union argues that investigating authorities are free to choose the methodology they use to separate and distinguish the effects of other known factors from the effects of the subsidized imports.[236] The European Union asserts that the challenged approach allows the Commission to conclude that the other factors "break the causal link" if such other factors are the true cause of injury.[237] The European Union further submits that the Commission's finding of the causal link between subsidized imports and the injury to the domestic industry was based on both volume and price effects of subsidized imports, and not on price undercutting alone as Pakistan contends.[238]

#### 7.5.2.2 Relevant legal considerations

7.110. Article 15.5 of the SCM agreement provides:

> It must be demonstrated that the subsidized imports are, through the effects[*] of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.
>
> [*fn original][47] As set forth in paragraphs 2 and 4.

7.111. It is well-established that Article 15.5 requires an investigating authority to demonstrate the existence of a causal link between subject imports and the injury to the domestic industry. This causal link must involve a "genuine and substantial relationship of cause and effect" between these two elements. The third sentence of Article 15.5 calls for a "non-attribution" analysis which requires the authorities to ensure that the injury caused by "known factors other than the subsidized imports" is not attributed to subsidized imports under investigation. The non-attribution language in Article 15.5 calls for an assessment that involves separating and distinguishing the injurious effects of the other factors from the injurious effects of the subsidized imports and

[231] Definitive Determination, (Exhibit PAK-2), para. 126.
[232] Pakistan's second written submission, paras. 4.6 and 4.7.
[233] Pakistan's response to Panel question No. 74, para. 4.22.
[234] Pakistan's response to Panel question No. 74, paras. 4.12-4.20.
[235] Pakistan's opening statement at the second meeting of the Panel, para. 4.7.
[236] European Union's second written submission, para. 155.
[237] European Union's response to Panel question No. 78, para. 111.
[238] European Union's second written submission, para. 178.

requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.[239]

7.112. We note that in accordance with the guidance laid down by previous panels and the Appellate Body, we consider the jurisprudence on causation analysis developed under Article 4.2(b) of the Agreement on Safeguards and Article 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) to be instructive in our evaluation of Pakistan's claims under Article 15.5 of the SCM Agreement.[240] The following Section will draw upon such guidance when discussing Pakistan's claims.

#### 7.5.2.3 Evaluation by the Panel

7.113. This Section proceeds in three parts. First, we address Pakistan's argument that the Commission's "break the causal link" approach is contrary to the three-step analysis laid down by the Appellate Body in *US – Wheat Gluten*. Second, we address whether the Commission's approach prejudged its analysis of other known factors. Third, we address certain arguments by Pakistan concerning the basis on which the Commission found a causal link to exist between subject imports and the injury to the domestic industry.

##### 7.5.2.3.1 Significance of *US – Wheat Gluten*

7.114. Pakistan argues that the Commission improperly failed to adhere to a prescribed methodology for causation analysis outlined by the Appellate Body in *US – Wheat Gluten*. Pakistan relies on the following observation of the Appellate Body in *US – Wheat Gluten*:

> [A]s a first step in the competent authorities' examination of causation, … the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) [of the Agreement on Safeguards] by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not "attributed" to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.[241]

7.115. In *US – Lamb*, the Appellate Body clarified that the "three steps" identified in *US – Wheat Gluten* "simply describe *a* logical process for complying with the obligations relating to causation", and "are not legal 'tests' mandated by the text of the Agreement on Safeguards".[242] The Appellate Body stressed that "the method and approach WTO Members choose to carry out the process of separating the effects of increased imports and the effects of the other causal factors is not specified" in the Agreement on Safeguards, but that whatever methodology is followed "the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors".[243] Moreover, later cases concerning Article 4.2(b) of the Agreement on Safeguards[244], Article 3.5 of the

[239] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.125 (quotation marks and citations omitted).
[240] See Appellate Body Reports, *US – Hot-Rolled Steel*, para. 230; and *US – Line Pipe*, para. 214; and Panel Report, *China – GOES (Article 21.5 – US)*, para. 7.119.
[241] Appellate Body Report, *US – Wheat Gluten*, para. 69. (emphasis original)
[242] Appellate Body Report, *US – Lamb*, para. 178. (emphasis added)
[243] Appellate Body Report, *US – Lamb*, paras. 178-181. As discussed further below, the Commission reached its *final* conclusion as to the existence of a causal link only *after* performing the non-attribution analysis. (See below para. 7.118).
[244] Panel Report, *Ukraine – Passenger Cars*, para. 7.296.

Anti-Dumping Agreement[245] and Article 15.5 of the SCM Agreement[246] have established that no method is prescribed in these provisions for satisfying the requirements of the causation analysis of the type contained in Article 15.5 of the SCM Agreement.[247] We find nothing in either the SCM Agreement or jurisprudence indicating that the three-step methodology described in *US – Wheat Gluten* is mandatory in any circumstances presented in this case.

7.116. We therefore reject Pakistan's argument that the Appellate Body report in *US – Wheat Gluten* prescribes a methodology regarding causation analysis to which the Commission improperly failed to adhere.

#### 7.5.2.3.2 Prejudgment of other known factors

7.117. Pakistan argues that the Commission's "break the causal link" approach prejudged its non-attribution analysis. In particular, the approach led to the disregard of "the correct legal standard, … [i.e.] whether the injurious effects of … other factors were such as to render the causal link between the subject imports and the alleged injury too distant, remote or insubstantial" and because the existence of the causal link was "used to dismiss the significance of the non-attribution factors the Commission purported to analyse".[248]

7.118. The Introduction to the Provisional Determination's "Causation" section indicates that the Commission performed a non-attribution analysis to ensure that only injurious effects attributable to subject imports would be considered in establishing a causal link between subject imports and injury to the domestic industry.[249] In paragraph 245 of the Provisional Determination, the Commission then "considered" that a causal link existed between the subject imports and the observed injury to the domestic industry. Thereafter, the Commission examined whether other factors "broke the causal link".[250] It was only after the analysis of other known factors revealed that they did not do so did the Commission "conclude[] that the imports from the countries concerned … caused material injury to the Union industry".[251] It is therefore evident that the Commission allowed for the possibility that the analysis of other known factors could have negated its initial consideration that a causal link existed between subject imports and the observed injury to the domestic industry, as the Commission only made its final identification of the injurious effects caused by subject imports after separating and distinguishing the injurious effects of the other known factors.

7.119. We do not see how this approach, in this case[252], led to the disregard of a relevant legal standard. The Commission's analysis indicates that the Commission's finding that subject imports

---

[245] See, e.g. Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189; and Panel Report, *EC – Salmon (Norway)*, para. 7.656.

[246] Panel Reports, *EC – Countervailing Measures on DRAM Chips*, para. 7.405; and *Mexico – Olive Oil*, para. 7.303.

[247] We also note the following observation of the Appellate Body, albeit not made in the context of a discussion on the methodology to be followed in causation analysis:

> Article 4.2(b) of the Agreement on Safeguards establishes two distinct legal requirements for competent authorities in the application of a safeguard measure. *First*, there must be a demonstration of the "existence of the causal link between increased imports of the product concerned and serious injury or threat thereof ". *Second*, the injury caused by factors other than the increased imports must not be attributed to increased imports.

(Appellate Body Report, *US – Line Pipe*, para. 208 (emphasis added))

[248] Pakistan's opening statement at the second meeting of the Panel, para. 4.4.

[249] Provisional Determination, (Exhibit PAK-1), para. 241.

[250] We note that in the Definitive Determination, the Commission confirmed its findings on causation made in paragraphs 242 through 264 of the Provisional Determination (Definitive Determination, (Exhibit PAK-2), paras. 117 and 126). The Commission's "approach" to causation is, therefore, best reflected in the Provisional Determination.

[251] Provisional Determination, (Exhibit PAK-1), para. 264.

[252] The "appropriateness of a particular method [to establish causation] may have to be determined on a case specific basis, depending on a number of factors and factual circumstances". (Appellate Body Report, *US – Tyres (China)*, para. 191 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 1376) (square bracketing original)). (See also Panel Report, *EU – Footwear (China)*, para. 7.489 (making similar remarks)). We therefore reject as immaterial Pakistan's discussions concerning other circumstances in which the "break the causal link" approach might be problematic or did not appear to have been followed by the Commission. (See, e.g. Pakistan's response to Panel question No. 74, paras. 4.34-4.38; and second written submission, paras. 4.7 and 4.24-4-38).

caused material injury to the domestic industry would be based on effects attributable to subject imports, and not on effects attributable to other known factors. We also do not see how the Commission's approach precluded the Commission from separating and distinguishing the injurious effects of any other known factors from those of the subject imports and from providing a satisfactory explanation of the nature and extent of the injurious effects of other known factors, as distinguished from the injurious effects of the subject imports, in accordance with the non-attribution requirement of Article 15.5 of the SCM Agreement.[253] Pakistan does identify certain purported deficiencies in the Commission's analysis of specific other known factors, discussed below[254], and we agree that certain such deficiencies exist. But we see no reason to think that the use of the overall "break the causal link" framework necessarily compelled their occurrence or would preclude their remedy. Indeed, we find further below that the Commission sufficiently separated and distinguished the effects of two known factors, demonstrating that the Commission did not simply "dismiss" the role of other known factors because the Commission had earlier considered that a causal link existed between subject imports and injury to the domestic industry. We further note that certain panel reports addressing issues within the context of non-attribution and causation – albeit not addressing the specific type of challenge Pakistan asserts here – have appeared to accept the "break the causal link" methodology in a variety of circumstances.[255]

7.120. We therefore reject Pakistan's argument that the Commission's "break the causal link" approach precluded the Commission from satisfying the non-attribution requirements of Article 15.5 of the SCM Agreement in this case.

#### 7.5.2.3.3 The basis on which the finding of the causal link was made

7.121. In this Section, we examine two arguments put forth by Pakistan concerning the basis on which the Commission found a causal link to exist between subject imports and the injury to the domestic industry. First, Pakistan argues that the Commission conflated the analysis required under Article 15.5 of the SCM Agreement with that required under Article 15.2 of the SCM Agreement by equating its findings on the price effects of the subject imports with the existence of a causal link between subject imports and the injury to the domestic industry.[256] Second, Pakistan argues that the Commission found a causal link between subject imports and the injury based on nothing more than a "coincidence in time" between increase in volume of subject imports and the deterioration in the condition of the domestic industry.[257]

7.122. We reproduce below the most relevant findings of the Commission in the Provisional Determination under the heading "Effects of the subsidized imports", which were made within the overall framework of determining whether a causal link existed between subject imports and the observed injury to the domestic industry:

> Between 2006 and the IP, the volume of the subsidised imports of the product concerned increased by more than 5 times to 304 200 tonnes, and their market share increased by almost 8 percentage points (from 2,1% to 10,2%). At the same time, the Union industry lost some 10 percentage points of market share (from 84,9% to 72,1%). The average price of these imports decreased between 2006 and the IP and remained lower than the average price of Union producers.

---

[253] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.125.
[254] See below Section 7.5.3.
[255] See, e.g. Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.200; *EU – Footwear (China)*, para. 7.489; *US – Tyres (China)*, para. 7.371; and *EU – Biodiesel (Argentina)*, para. 7.490.
[256] Pakistan's response to Panel question No. 74, paras. 4.12-4.20; second written submission paras. 4.3 and 4.4.
[257] Pakistan's opening statement at the second meeting of the Panel, paras. 4.6 and 4.7. We note that the two lines of argument appear to contradict each other. Insofar as they do so, we treat them as having been presented in the alternative. Pakistan also asserts that the Commission improperly attributed greater value to the coincidence between subject imports and the injury to the domestic industry, than to the coincidence between several non-attribution factors and the injury to the domestic industry, but does not elaborate further. (Pakistan's opening statement at the second meeting of the Panel, paras. 4.8 and 4.9). Article 15.5 of the SCM Agreement does not require subject imports to be the sole cause of injury to the domestic industry. (See Appellate Body Reports, *US – Wheat Gluten*, para. 67; and *US – Line Pipe*, para. 209. See also Panel Report, *China – Autos (US)*, para. 7.322). We thus do not see a role for this argument that is meaningfully separate from that of Pakistan's other arguments regarding why the Commission's non-attribution analysis was flawed. We therefore do not address it further.

> As indicated above at recital (217), price undercutting of the subsidised imports was on average 3,2%. Even if the price undercutting was below 4%, it cannot be considered as insignificant given that PET is a commodity and competition takes place mainly via price.
>
> ...
>
> In view of the undercutting of Union industry's prices by imports from the countries concerned, it is considered that these subsidised imports exerted a downward pressure on prices, preventing the Union industry from keeping its sales prices to a level that would have been necessary to cover its costs and to realise a profit. Therefore, it is considered that a causal link exists between those imports and the Union industry's injury.[258]

7.123. Further, after discussing the effects of other factors, the Commission stated:

> The coincidence in time between, on the one hand, the increase in subsidised imports from the countries concerned, the increase in market shares and the undercutting found and, on the other hand, the deterioration in the situation of the Union producers, leads to the conclusion that the subsidised imports caused material injury to the Union industry within the meaning of Article 8(5) of the basic Regulation.[259]

7.124. The Final Determination confirmed all such findings.[260]

7.125. Thus, in establishing a causal link between subject imports and the observed injury to the domestic industry, the Commission considered: (a) the condition of the domestic industry; (b) price undercutting by subject imports; (c) the fact that "PET is a commodity and competition takes place mainly via price", due to which it attached special significance to price undercutting by subject imports; (d) the observation that subject imports "exerted a downward pressure on prices, preventing the Union industry from keeping its sales prices to a level that would have been necessary to cover its costs and to realise a profit"; (e) the increase in volume of subject imports; and (f) an increase in market shares of subject imports.[261]

7.126. We therefore reject Pakistan's arguments that the Commission, in establishing a causal link between subject imports and observed injury to the domestic industry, relied on only the presence of price undercutting by subject imports and/or a coincidence in time between an increase in volume of subject imports and the injury to the domestic industry.[262]

#### 7.5.2.3.4 Conclusion

7.127. We thus reject Pakistan's claim 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.

### 7.5.3 The Commission's analysis of "other known factors"

7.128. Pakistan argues that the Commission failed to perform a proper non-attribution analysis with respect to each of the following four factors:

---

[258] Provisional Determination, (Exhibit PAK-1), paras. 242, 243, and 245.
[259] Provisional Determination, (Exhibit PAK-1), para. 262.
[260] Final Determination, (Exhibit PAK-2), paras. 117 and 126.
[261] We take special note that the Commission considered the increase in market share of subject imports both before and after considering the effects of other factors. (Provisional Determination, (Exhibit PAK-1), paras. 242 and 262).
[262] In addition, we recall that the finding of the existence of the causal link in paragraph 245 was confirmed only in paragraph 264, after the Commission analysed the effects of other known factors causing injury to the domestic industry, which is further consistent with the view that the finding of the causal link between subject imports and the injury to the domestic industry was not based solely on the finding of price undercutting by subject imports and/or on the coincidence in time between an increase in volume of subject imports and the injury to the domestic industry.

a. imports from Korea[263];

b. economic downturn[264];

c. competition from non-cooperating EU producers[265]; and

d. oil prices.[266]

7.129. We recall that Article 15.5 calls for an assessment that involves separating and distinguishing the injurious effects of the other factors from the injurious effects of the subsidized imports and requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the subsidized imports.[267] In this Section, we examine Pakistan's arguments concerning the Commission's analysis of each of the four factors identified above in turn.

#### 7.5.3.1 Imports from Korea

7.130. In its examination of the factor "[i]mports from third countries – Republic of Korea", the Commission addressed, *inter alia*, the increase in market share and volume of imports from Korea, and the price undercutting by such imports.[268] However, in light of the fact that "the Korean prices were higher than the average prices from the countries concerned", the Commission concluded that the contribution of imports from Korea to the injury suffered by the domestic industry "was only limited" and that imports from Korea did not break the causal link between subsidized imports and the injury to the domestic industry.[269]

##### 7.5.3.1.1 Main arguments of the parties

7.131. Pakistan puts forth certain arguments which, "individually and together", demonstrate that the Commission failed to separate and distinguish the effects of imports from Korea from those of subject imports within the meaning of Article 15.5 of the SCM Agreement.[270] First, Pakistan argues that the Commission did not adequately assess the effects of price undercutting by imports from Korea.[271] Second, Pakistan argues that the Commission did not properly assess the growth in volume and market share of imports from Korea.[272] Third, Pakistan submits that the Commission failed to assess the correlation between the exemption of certain Korean producers from EU anti-dumping duties and the increase in volume and market share of Korean imports.[273] Fourth, and related to the three arguments above, Pakistan contends that because the price undercutting and increasing volumes of Korean imports had the same effects on the domestic industry as the price and volumes of the subject imports, "the Commission's summary conclusion that the effects of Korean imports were 'limited' was not reasoned and adequate". Therefore, the Commission failed to carry out its duty to separate and distinguish the injurious effects of the Korean imports.[274]

7.132. The European Union argues that the Commission's analysis of imports from Korea fully conforms to the requirements of Article 15.5 of the SCM Agreement because it recognized imports from Korea as possibly causing injury to domestic industry, separated and distinguished the effects

[263] Pakistan's first written submission, para. 7.21.
[264] Pakistan's first written submission, para. 7.40.
[265] Pakistan's first written submission, para. 7.53.
[266] Pakistan's first written submission, para. 7.60.
[267] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.125.
[268] Provisional Determination, (Exhibit PAK-1), para. 248.
[269] Provisional Determination, (Exhibit PAK-1), para. 249.
[270] Pakistan's response to Panel question No. 97, para. 4.7.
[271] Pakistan's first written submission, paras. 7.30-7.34; response to Panel question No. 97, paras. 4.2 and 4.3.
[272] Pakistan's first written submission, para. 7.35; response to Panel question No. 97, para. 4.4.
[273] Pakistan's first written submission, para. 7.36; response to Panel question No. 97, para. 4.5.
[274] Pakistan's first written submission, paras. 7.37 and 7.38; response to Panel question No. 97, para. 4.6.

of this factor from the effects of subject imports, and provided a qualitative explanation for that conclusion.[275]

#### 7.5.3.1.2 Evaluation by the Panel

7.133. In the Provisional Determination, the Commission made the following findings with respect to imports from Korea:

> The Republic of Korea is subject to anti-dumping duties since 2000. However, two Korean companies are subject to a zero duty and the investigation established that imports from the Republic of Korea remain at a high level and increased significantly in the period considered. The Korean imports increased by almost 150% between 2006 and the IP and their corresponding market share increased from 3,5% in 2006 to 7,7% in the IP.
>
> The average price of the Korean imports remained in general slightly below the average prices of the Union producers. However, the Korean prices were higher than the average prices from the countries concerned. Consequently, although it cannot be excluded that imports from the Republic of Korea contributed to the injury suffered by the Union industry, their contribution was only limited and they are considered not to have broken the causal link established as regards the subsidised imports from the countries concerned.[276]

7.134. We consider that the Commission sufficiently separated and distinguished the effects of Korean imports. The Commission expressly noted that Korean imports undercut the prices of the domestic like product, and increased their volumes[277] and market share during the period considered. The Commission considered, however, that any injury caused by Korean imports "was only limited" because subject imports undercut the prices of the domestic like product by more than Korean imports did. This appears a reasonable conclusion in light of the uncontested assertion stated in the Provisional Determination that the EU PET market is characterized by price competition.[278] Furthermore, we note that subject imports increased their market share and volume more than imports from Korea did over the period considered, and that in the POI, subject imports had a higher market share (10.2%)[279] and volume (304,202 tonnes)[280] than the market share (7.7%)[281] and volume (231,107 tonnes)[282] of imports from Korea.

7.135. We therefore reject Pakistan's claim that the Commission's analysis of imports from Korea is inconsistent with Article 15.5 of the SCM Agreement.

### 7.5.3.2 Economic downturn

7.136. In the Provisional Determination, the Commission addressed the effects of the 2008 economic downturn on the domestic industry.[283] The Commission found that the financial and economic crisis of 2008 led to a market growth that was slower than expected, and that there was a contraction of demand for PET in 2008, which had an effect on the overall performance of the

[275] European Union's first written submission, para. 219.
[276] Provisional Determination, (Exhibit PAK-1), paras. 248 and 249.
[277] We note Pakistan's argument that the Commission did not adequately consider the effect of the exemption of certain Korean producers from EU anti-dumping duties on PET imports from Korea, the relevance of which was a purported sharp increase in the volume of imports from Korea during the period considered. (Pakistan's first written submission, para. 7.36; response to Panel question No. 97, para. 4.5). However, as discussed above, the Commission did consider the growth in volume and market share of imports from Korea. Therefore, the Commission effectively addressed the relevance of exemption of certain Korean producers from EU anti-dumping duties.
[278] Provisional Determination, (Exhibit PAK-1), para. 243. Indeed, Pakistan's argument in this context depends on such price-based competition, or else there would be no reason to suggest that price undercutting by Korean imports would have been expected to contribute to the domestic industry's observed injury.
[279] Provisional Determination, (Exhibit PAK-1), table 2.
[280] Provisional Determination, (Exhibit PAK-1), para. 211.
[281] Provisional Determination, (Exhibit PAK-1), table 17.
[282] Provisional Determination, (Exhibit PAK-1), table 17.
[283] Provisional Determination, (Exhibit PAK-1), paras. 253-256.

domestic industry.[284] However, the Commission reasoned that the negative effects of the economic downturn were exacerbated by the low-priced subsidized imports, as unfair competition from such imports prevented the domestic industry from maintaining an acceptable level of prices.[285] The Commission concluded that given the global character of the economic downturn, and the fact that the economic downturn could be considered as having contributed to the injury suffered by the domestic industry only as from the last quarter of 2008, the economic downturn did not break the causal link between subject imports and the injury to the domestic industry.[286]

#### 7.5.3.2.1 Main arguments of the parties

7.137. Pakistan argues that the Commission's analysis of the economic downturn fell short of the requirements of Article 15.5 of the SCM Agreement.[287] According to Pakistan, since the Commission found, on the one hand, that the domestic demand for PET increased by 11% between 2006 and the POI, and on the other hand, that the 2008 financial crisis brought about a contraction of global demand, the Commission should have sought to ascertain whether, in a situation characterized by shrinking global demand and increased domestic demand, it was the increased competition from domestic as well as importing competitors, which caused injury to the domestic industry.[288] Pakistan submits that the "specific factual circumstances" in the challenged investigation warranted a collective analysis of the injurious effects of all other factors.[289] Pakistan argues that the Commission did not "separate and distinguish" the injurious effects of the economic downturn from the injurious effects of other known factors.[290] Pakistan also contends that the Commission did not substantiate and/or explain its assertion that material injury to the domestic industry occurred before the last quarter of 2008, i.e. the time at which the economic downturn began.[291]

7.138. The European Union argues that the Commission properly separated and distinguished the effects of this factor from the injury caused by subject imports by clearly analysing the extent of the injurious impact of the economic downturn, noting how such effects were limited in time, how they are less relevant in the domestic market of the European Union, and how the effects of the economic downturn interact with the effects of the subject imports.[292] The European Union submits that there was no need to assess the relevance of imports from Korea and non-cooperating domestic producers in context of the economic downturn as these factors had been separately assessed.[293] The European Union submits that Pakistan has not presented any evidence as to why there existed special circumstances which required the Commission to carry out a collective assessment.[294] With respect to Pakistan's claim that the Commission made no finding of injury prior to the last quarter of 2008, the European Union submits that the Commission found injury for the whole period considered, therefore including the period in question.[295]

#### 7.5.3.2.2 Evaluation by the Panel

7.139. We first address Pakistan's argument that in light of certain alleged "particularities of global and EU demand" resulting from the economic downturn, the Commission should have examined whether it was increased competition from non-subject imports as well as non-cooperating EU producers resulting from such alleged demand conditions in the EU market which caused injury to the domestic industry. These particularities consisted of "a decline in the global demand and an increase in the EU demand as a result of the 2008 economic downturn".[296]

[284] Provisional Determination, (Exhibit PAK-1), para. 253.
[285] Provisional Determination, (Exhibit PAK-1), para. 254.
[286] Provisional Determination, (Exhibit PAK-1), para. 256; and Definitive Determination, (Exhibit PAK-2), para. 120.
[287] Pakistan's first written submission, para. 7.52.
[288] Pakistan's first written submission, para. 7.48.
[289] Pakistan's second written submission, para. 4.52.
[290] Pakistan's first written submission, para. 7.47.
[291] Pakistan's first written submission, paras. 7.51-7.52.
[292] European Union's first written submission, para. 221.
[293] European Union's response to Panel question No. 79, para. 113.
[294] European Union's opening statement at the second meeting of the Panel, para. 66.
[295] European Union's opening statement at the first meeting of the Panel, para. 51.
[296] Pakistan's second written submission, para. 4.50. In particular, Pakistan states that "[t]he Commission first noted that the *domestic demand* for the product increased by 11 per cent between 2006 and the [POI]. At the same time, the Commission found that the 2008 financial crisis brought about a contraction of *global demand*". (Pakistan's first written submission, para. 7.48 (emphasis original, fn omitted)).

In our view, the record does not reasonably reflect these facts. The only portions of the Determinations to which Pakistan points in support of its argument indicate that the economic downturn caused a decrease in EU demand for PET in 2008, although EU demand appeared to recover in the first half of 2009, i.e. the latter half of the POI:

> Union consumption of the product under investigation increased between 2006 and the IP by 11%. In detail, the apparent demand grew in 2007 by 8%, *decreased slightly between 2007 and 2008 (by 2 percentage points)* and inc*reased by further 5 percentage points between 2008 and the IP*.[297]
>
> …
>
> *The financial and economic crisis of 2008 led to a market growth that was slower than expected and unusual* as compared to the beginning of the years 2000 where yearly growth rates around 10% could be observed. *For the first time, there was a contraction of demand for PET in 2008*. This clearly had an effect on the overall performance of the Union industry.[298]

7.140. There is no data, however, in the Determinations evidencing global PET demand. Moreover, the only narrative statement that we detect potentially relating to the state of global PET demand in the wake of the 2008 economic downturn is that the downturn had a "global character".[299] This statement suggests, however, that the economic downturn had symmetrical impacts on demand patterns in the European Union and the rest of the world, not the opposite as Pakistan claims.[300] Thus, we find that the record does not reasonably reflect the facts upon which Pakistan's argument is based, and we reject it accordingly.

7.141. We now turn to Pakistan's argument that "'the specific factual circumstances' in the challenged investigation warranted a collective analysis of the injurious effects of all other factors".[301] Pakistan's position here appears to be that "as the Commission had found that several other factors had contributed to the injury to the domestic industry during the [POI]", the Commission was required to perform a collective assessment of all other factors causing injury to the domestic industry.[302] In our view, Pakistan has not demonstrated that a collective assessment was necessary in this case. Article 15.5 of the SCM Agreement does not mention the need to perform such a collective assessment in any particular circumstances. We note, however, the following observation by the Appellate Body in *EC – Tube or Pipe Fittings* regarding the issue of the collective assessment of other known factors in non-attribution analyses under Article 3.5 of the Anti-Dumping Agreement:

> [W]e are of the view that Article 3.5 does not compel, *in every case*, an assessment of the *collective* effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors. … At the same time, we recognize

[297] Provisional Determination, (Exhibit PAK-1), para. 206. (emphasis added)

[298] Provisional Determination, (Exhibit PAK-1), para. 253 (emphasis added). In our view, the reference to a decrease in demand for PET in 2008 in this paragraph clearly relates to EU demand. Indeed, the only data relating to demand for PET in any particular market in the Determinations relates to EU demand. (Provisional Determination, (Exhibit PAK-1), table 1). Moreover, even if this statement could be construed as relating to global demand, in light of the data provided in table 1 of the Provisional Determination, it simply means that global demand and EU demand both decreased in 2008 as a result of the economic downturn, which does not support Pakistan's position.

[299] Provisional Determination, (Exhibit PAK-1), para. 256.

[300] Certain other statements appear in the Determinations regarding decreased demand of PET in 2008. Given that the only data in the Determinations regarding demand for PET relate to the EU market, which evidence a demand decrease in 2008, it is clear to us that such discussions relate to a decrease in the EU market rather than global demand. (See, e.g. Definitive Determination, (Exhibit PAK-2), para. 120 (referencing "shrinking demand")). We also note that the data provided in table 16 shows that export sales of the domestic industry dropped in 2008, before recovering in the first half of 2009 (Provisional Determination, (Exhibit PAK-1), table 16). This may further suggest that the economic downturn had symmetrical impacts on global demand and EU demand for PET.

[301] Pakistan's second written submission, para. 4.52. In keeping with Pakistan's positioning of this argument, we address Pakistan's argument concerning cumulative assessment of other known factors in this Section of our Report.

[302] Pakistan's second written submission, para. 4.52.

> that there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports.[303]

7.142. Thus, although there may be circumstances in which a collective assessment is warranted, the simple existence of other known factors that are found to have contributed to the injury to the domestic industry at the same time as subject imports does not on its own amount to such circumstances. Pakistan, however, has pointed to nothing more than that in support of its argument. We therefore reject Pakistan's argument that a collective assessment of other known factors was needed in this case.

7.143. We now recall Pakistan's argument that the Commission failed to "separate and distinguish" the injurious effects of the economic downturn from the injurious effects of subject imports. In that context, the Commission found that the financial and economic crisis of 2008 "led to a market growth that was slower than expected" and brought about a "contraction of demand" which clearly "had an effect on the overall performance of the [domestic] industry".[304] Further, the Commission noted that the domestic industry was "in a situation of decreasing sales" and bore "negative effects of … decrease in the growth of consumption".[305] At the same time, the Commission noted that the "increased subsidized imports" "exacerbated" the effects of the economic downturn. The Commission explained that despite decreasing sales and decrease in growth of consumption caused by the economic downturn, the domestic industry "should be able to maintain an acceptable level of prices … but only in the absence of the unfair competition of low priced imports in the market".[306] In our view, this observation sufficiently separated and distinguished the injurious effects of the economic downturn (i.e. injury through the effect of decreased demand) from that of subject imports (i.e. injury through the effects of things other than decreased demand[307]) during the relevant time-period.[308] We therefore reject Pakistan's argument that the Commission failed to separate and distinguish the effects of the economic downturn from those of subject imports.

7.144. We note Pakistan's argument that the Commission's "bald assertion that there existed injury prior to the last quarter of 2008 [was] unsubstantiated".[309] We reproduce below the portion of the Provisional Determination relevant in this context:

> The economic downturn has also no impact whatsoever on the injury suffered and observed already before the last quarter of 2008.
>
> Consequently, the economic downturn must be considered as an element contributing to the injury suffered by the Union industry as from last quarter of 2008 only and given its global character cannot be considered as a possible cause breaking the causal link between the injury suffered by the Union industry and the subsidised imports from the countries concerned.[310]

We note that for injury analysis, the Commission made findings regarding the negative performance of the domestic industry over the entire period considered, i.e. 2006 to the end of the POI.[311] In light of these findings, we do not view the statements of the Commission quoted above

[303] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 191 and 192. (emphasis original)
[304] Provisional Determination, (Exhibit PAK-1), para. 253.
[305] Provisional Determination, (Exhibit PAK-1), para. 254.
[306] Provisional Determination, (Exhibit PAK-1), para. 254. We find it useful to recall in this context that the Commission found, in the causation analysis, that the subject imports "exerted a downward pressure on prices, preventing the [domestic] industry from keeping its sales prices to a level that would have been necessary to cover its costs and to realize a profit". (Provisional Determination, (Exhibit PAK-1), para. 245).
[307] See Provisional Determination, (Exhibit PAK-1), paras. 242-245.
[308] In the Definitive Determination, the Commission further noted the steady increase of the market share of subject imports during the period from 2008 through the POI. (Definitive Determination, (Exhibit PAK-2), para. 120).
[309] Pakistan's first written submission, para. 7.51.
[310] Provisional Determination, (Exhibit PAK-1), paras. 255 and 256.
[311] Provisional Determination, (Exhibit PAK-1), paras. 238-240. We note that in the Provisional Determination (para. 254) as well as the Definitive Determination (para. 120), the Commission concluded that this factor did not break the causal link between subject imports and the injury to the domestic industry

as referring to any injury specifically found to exist prior to the last quarter of 2008. Rather, these statements simply emphasize that any contribution that the economic downturn made to the injury suffered by the domestic industry could only have occurred after the last quarter of 2008. Hence, we reject this argument by Pakistan.[312]

7.145. We therefore reject Pakistan's claim that the Commission's analysis of the economic downturn is inconsistent with Article 15.5 of the SCM Agreement.

#### 7.5.3.3 Competition from non-cooperating producers

7.146. Certain interested parties argued before the Commission that the injury suffered by the domestic industry was on account of competition from non-cooperating EU producers.[313] The Commission noted that one of the producers stopped production in the POI while two others did so shortly thereafter and that these producers lost market share from 20.5% in 2006 to 16% in the POI. The Commission thus concluded that there was no evidence which suggested that "the behaviour of these producers has broken the causal link" between the subject imports and the injury to the domestic industry.[314]

##### 7.5.3.3.1 Main arguments of the parties

7.147. Pakistan argues that the Commission failed to conduct a proper non-attribution analysis with respect to the factor "effects of other domestic producers" for two main reasons.[315] First, Pakistan argues that by conducting an end-point-to-end-point analysis of market share of non-cooperating producers, pursuant to which the Commission found that the market share of non-cooperating producers dropped from 20.5% in 2006 to 16% in the POI, the Commission did not factor into its analysis that such producers gained market share from 2008 to the end of the POI.[316] Second, Pakistan argues that the fact that the market share and volumes of non-cooperating producers rose between 2008 and the end of POI, while the market share and volumes of the domestic industry continued to decline should have triggered an inquiry by the Commission into whether other factors such as lack of productivity, or necessary skills, were affecting one sector of the domestic industry more than the other.[317]

7.148. The European Union argues that the fact that there was no linear drop in market share in every single part of the period considered does not put its conclusion that competition from non-cooperating producers did not break the causal link in doubt.[318] The European Union also submits that, contrary to what Pakistan appears to suggest in making its arguments in this context, the SCM Agreement does not require the Commission to examine whether the subsidized imports caused injury to non-cooperating producers.[319]

##### 7.5.3.3.2 Evaluation by the Panel

7.149. We first address Pakistan's argument that the Commission should have analysed the non-cooperating producers' market share trends beyond an end-point-to-end-point analysis. We recall that with respect to competition from non-cooperating EU producers, the Commission, in relevant part, observed that these producers' market share declined from 20.5% in 2006 to 16%

keeping in view "the damaging injurious effects of low priced subsidised imports in the EU market *over the whole period considered*" (emphasis added). Further, in paragraph 242 of the Provisional Determination, the Commission noted that the average price of imports "remained lower than the average price of Union producers" between 2006 and the end of POI. We also note that Pakistan has not challenged the Commission's findings concerning injury to the domestic industry.

[312] We further note that these statements were not in any way essential to the manner in which the Commission separated and distinguished the effects of the economic downturn and subject imports during the relevant time-period (discussed further above in this Section).

[313] Provisional Determination, (Exhibit PAK-1), para. 252.

[314] Provisional Determination, (Exhibit PAK-1), para. 252. We note that while the Commission provided separate figures for the market share of non-cooperating producers in 2008 and in the POI, the two periods of time overlap. We recall that the POI refers to the period from 1 July 2008 to 30 June 2009.

[315] Pakistan's first written submission, paras. 7.53-7.59.

[316] Pakistan's first written submission, paras. 7.58 and 7.59.

[317] Pakistan's first written submission, para. 7.59.

[318] European Union's first written submission, para. 223.

[319] European Union's first written submission, para. 226.

in the POI.[320] The Commission then concluded that the "investigation has not shown any evidence that the behaviour of these producers has broken the causal link between the subsidised imports and the injury established for the Union industry".[321] Based on this analysis, we consider that the Commission dismissed the possibility that competition from non-cooperating EU producers caused injury to the domestic industry.[322] The end-point-to-end-point analysis of the non-cooperating producers' market share clearly formed a significant part of the basis for this conclusion.

7.150. In our view, whether an investigating authority has offered a reasoned and adequate explanation in concluding that a particular factor could not have caused injury to the domestic industry, when that conclusion is significantly based on an end-point-to-end-point analysis of data (in this case, market share data for non-cooperating producers), will depend on the facts of a particular case.[323] In this case, we recall that the Provisional Determination presented the market share of non-cooperating producers for 2006, 2007, 2008, and the POI. Their market share decreased during the period considered in every consecutive interval except between 2008 and the POI. The Commission correctly observed that the non-cooperating EU producers lost 4.5 percentage points of market share during the period considered, i.e. from 20.5% in 2006 to 16% in the POI[324], but did not note that between 2008 and the POI their market share rose by 3.6 percentage points, i.e. from 12.4% to 16%.[325] We note that the magnitude of the rise in market share of non-cooperating producers between 2008 and the POI was, at least in absolute terms, similar to the drop in market share the Commission observed pursuant to the end-point-to-end-point analysis. We further note that the rise in market share of non-cooperating producers between 2008 and the POI coincided with: (a) a drop of 8.3 percentage points in the market share of the domestic industry[326]; (b) a rise of 2.6 percentage points in the market share of subject imports; and (c) a rise in the market shares of non-subject imports (a rise of 1.5 percentage points in market share of Korean producers and of 0.5 percentage points for other imports).[327] This indicates that non-cooperating producers, whose market share increased by 3.6 percentage points between 2008 and the POI, were the largest gainers of market share at the

[320] Provisional Determination, (Exhibit PAK-1), para. 252.

[321] Provisional Determination, (Exhibit PAK-1), para. 252. The Commission also observed that one of the non-cooperating producers stopped production in the POI while two others did so shortly thereafter. This statement regarding the cessation of production by certain producers is unaccompanied by any reference as to why that cessation diminishes the significance of the increase in the market share of non-cooperating producers between 2008 and the POI, and we detect no basis upon which to make that inference.

[322] European Union's response to Panel's question No. 100, para. 33 (agreeing with this interpretation of the Commission's analysis). Even if we were to interpret the Commission's reasoning in this context as indicating that non-cooperating producers caused injury to the domestic industry, or even allowing for that possibility, we would find a violation of Article 15.5 because, on its face, the analysis contains no explanation whatsoever of the nature and extent of such injury, as distinguished from injurious effects of subject imports. Without such explanation, it is not logically possible to separate and distinguish that injury from that caused by subject imports.

[323] See Panel Reports, *China – Autos (US)*, paras. 7.289 and 7.334; *Ukraine – Passenger Cars*, para. 7.302; and *Russia – Commercial Vehicles*, para. 7.126 (appeal pending). We also note that the Appellate Body has found end-point-to-end-point analysis of data to be unsuitable in certain contexts. (See, e.g. Appellate Body Report, *Argentina – Footwear (EC)*, para. 129).

[324] Provisional Determination, (Exhibit PAK-1), para. 252.

[325] We note that merely by presenting the market share held by non-cooperating producers in different intervals within the period considered in the form a table, the Commission cannot be assumed to have taken into account the increase in market share of non-cooperating producers from 2008 through the POI in any meaningful fashion. (See Panel Reports, *US – Hot-Rolled Steel*, para. 7.232; *Egypt – Steel Rebar*, paras. 7.42 and 7.44; and *EC – Tube or Pipe Fittings*, para. 7.316).

[326] In the Provisional Determination, the Commission presented relevant market share data for: (a) all domestic producers (i.e. cooperating and non-cooperating); and (b) non-cooperating producers. (Provisional Determination, (Exhibit PAK-1), para. 219 and tables 7 and 19). It did not specifically break out the market share trends for the domestic industry (i.e. cooperating producers). However, the aggregate market share data reflect a loss of market shares by all domestic producers between 2008 and the POI. Thus, because non-cooperating producers *gained* market share over this time, it can reasonably be inferred that cooperating producers must have lost market share over the same period. Indeed, the Provisional Determination notes that the decreasing markets share trend of domestic producers "was also found for the sampled Union producers". (Provisional Determination, (Exhibit PAK-1), para. 224). We further note that the market share held by the domestic industry in any given period for which the Commission presented market share data could be derived by subtracting the market share of non-cooperating producers from the market share of all domestic producers in that period. The domestic industry's market share for 2006, 2007, 2008 and the POI was 64.4%, 66.4%, 67.4%, and 59.1%, respectively.

[327] Provisional Determination, (Exhibit, PAK-1), tables 2, 7, 17, 18, and 19.

domestic industry's expense between 2008 and the POI.[328] Moreover, the domestic industry's loss of market share during the period considered was a significant consideration in the Commission's finding that the domestic industry had suffered injury.[329] We consider that, under these circumstances, the increase in market share of the non-cooperating producers between 2008 and the POI warranted more specific examination. This increase in market share raises the distinct possibility that competition from non-cooperating producers caused injury to the domestic industry as between 2008 and the POI, which would seem counter to the Commission's unqualified conclusion, significantly based on its end-point-to-end-point analysis, that competition from non-cooperating producers did not cause injury to the domestic industry.[330]

7.151. We now recall Pakistan's argument that because the non-cooperating EU producers gained market share while the domestic industry lost market share between 2008 and the POI, the Commission should have inquired into whether instead of subject imports being the cause of injury, it was other factors, such as lack of productivity, or necessary skills, which were affecting one sector of the EU industry more than the other. To the extent that Pakistan argues that the Commission was required to investigate whether and/or why "the alleged injurious effects of the subject imports were markedly uneven"[331] across various subsets of the domestic producers, we disagree. We do not see why a comparative examination of how subject imports impacted the cooperating and the non-cooperating parts of the EU industry would be material in determining the impact of competition from non-cooperating producers on the domestic industry.[332] Furthermore, insofar as Pakistan argues that there might have been other factors, such as lack of productivity or necessary skills, that caused injury to the domestic industry, Pakistan has not cited evidence indicating that such factors were "known" to the Commission within the meaning of Article 15.5 of the SCM Agreement.[333]

7.152. For reasons stated above, we conclude that the Commission's analysis of competition from non-cooperating producers is inconsistent with Article 15.5 of the SCM Agreement.

#### 7.5.3.4 Oil prices

7.153. Before the Commission, certain parties argued that "the low prices for PET in the EU reflect the worldwide cycle of the industry and that from September 2008 until June 2009 the PET prices in the EU followed the low prices of crude oil".[334] The Commission rejected this argument because, according to the Commission, prices for crude oil were not low during the whole POI but volatile,

[328] We note Pakistan's argument that "the negative effects on EU prices were felt only, or most dramatically, from 2008 to the end of the [POI], thus coinciding with the rise of volumes and market share of non-cooperating EU producers". (Pakistan's first written submission, para. 7.56). There is no data on the record regarding the prices of non-cooperating producers, however.

[329] Provisional Determination, (Exhibit PAK-1), para. 238. As the jurisprudence indicates that particular importance attaches to developments in the most recent portion of a period of investigation, the timing of the increase in the market share of non-cooperating producers also imparted significance to the increase. This is especially so given the evolution of the domestic industry's market share as shown in fn 326. (See Appellate Body Report, *US – Steel Safeguards*, para. 370 (quoting Appellate Body Report, *US – Lamb*, para. 138 fn 88); and Panel Report, *Ukraine – Passenger Cars*, para. 7.289). In this context, we note that a recent panel report (which is under appeal) observed that "more recent data during the period of consideration is likely to be particularly relevant to the determination of material injury during the POI". (Panel Report, *Russia – Commercial Vehicles*, para. 7.152 (appeal pending)).

[330] This does not necessarily mean that the conclusion that the Commission reached in respect of competition from non-cooperating producers could not have been sustained had the Commission assessed the market share of non-cooperating producers beyond an end-point-to-end-point analysis.

[331] Pakistan's second written submission, para. 4.56.

[332] We recall that the panel in *EC – Fasteners (China)* observed that an analysis of causation, including the examination of other factors which may be causing injury to the domestic industry at the same time as imports, should rest on information related to the industry as defined for the purpose of that investigation, and not some other group of producers. (Panel Report, *EC – Fasteners (China)*, para. 7.437 (referring to Panel Report, *EC – Bed Linen*, para. 6.182)).

[333] Previous panels have found that "known" factors include those factors that were clearly raised before an investigating authority by interested parties in the course of an investigation, and that an investigating authority is under no obligation to seek out and identify all possible other factors causing injury to the domestic industry in a given investigation on its own initiative. (See Panel Reports, *Thailand – H-Beams*, para. 7.273; *EC – Tube or Pipe Fittings*, para. 7.359; *China – Autos (US)*, para. 7.323; and *EU – Footwear (China)*, para. 7.484).

[334] Definitive Determination, (Exhibit PAK-2), para. 118.

and such volatility could not explain why PET imports were subsidized and undercut the EU producers' prices.[335]

#### 7.5.3.4.1 Main arguments of the parties

7.154. Pakistan argues that the Commission failed to separate and distinguish the injurious effects of oil prices from those of the subject imports because the explanations given by the Commission in dismissing this factor were "unsubstantiated and irrelevant".[336] Further, Pakistan argues that the Commission's finding that the prices of crude oil were "volatile" during the POI was not supported by evidence on the record.[337] For these reasons, Pakistan submits that the Commission's analysis of oil prices falls short of the requirements of Article 15.5 of the SCM Agreement.[338]

7.155. The European Union submits that the Commission did not find the effects of this factor so significant as to break the causal link between subsidized imports and the observed injury to the domestic industry.[339] According to the European Union, this was because oil prices were volatile through the POI, first falling and then recovering, and because prices of crude oil worldwide could be expected to have a symmetrical impact on prices worldwide.[340] The European Union submits that a factor that equally or similarly affects both subsidized imports and domestic producers by definition cannot break the causal link.[341]

#### 7.5.3.4.2 Evaluation by the Panel

7.156. In the Definitive Determination, the Commission offered the following reasoning:

> Some interested parties claimed that any injury found would not be due to subsidised imports, but that the low prices for PET in the EU reflect the worldwide cycle of the industry and that from September 2008 until June 2009 the PET prices in the EU followed the low prices of crude oil. As regards this argument, it is acknowledged that the prices of PET depend to some extent on the prices of crude oil, its derivatives being the main raw material to produce PET. However, prices for crude oil were not low during the whole IP but very volatile, starting with a huge decrease and followed by a recovery. This volatility of world prices of crude oil cannot explain why imports of PET were subsidised and therefore undercut the Union producers' prices. It was precisely this undercutting, made possible due to the subsidies received, that depressed the prices of the Union industry, forcing EU producers to sell at a loss in order not to loose [*sic*] their clients.[342]

7.157. Based on this analysis, we consider that the Commission dismissed the possibility that oil prices caused injury to the domestic industry.[343] The Definitive Determination offers two reasons for this dismissal: (a) "prices for crude oil were not low during the whole IP but very volatile, starting with a huge decrease and followed by a recovery"; and (b) such volatility "cannot explain why imports of PET were subsidised and therefore undercut the Union producers' prices".

---

[335] Definitive Determination, (Exhibit PAK-2), para. 118.
[336] Pakistan's response to Panel question No. 98, para. 4.13. See also Pakistan's first written submission, paras. 7.66 and 7.67.
[337] Pakistan's first written submission, para. 7.65.
[338] Pakistan's first written submission, para. 7.68.
[339] European Union's first written submission, para. 227.
[340] European Union's first written submission, paras. 228 and 229.
[341] European Union's opening statement at the first meeting of the Panel, para. 53.
[342] Definitive Determination, (Exhibit PAK-2), para. 118. Low prices of crude oil were not at issue in the Provisional Determination.
[343] European Union's response to Panel question No. 101, para. 36 (agreeing with this characterization of the Commission's analysis). Even if we were to interpret the Commission's reasoning in this context as indicating that oil prices caused injury to the domestic industry, or even allowing for that possibility, we would find a violation of Article 15.5 because, on its face, the analysis contains no explanation whatsoever of the nature and extent of such injury, as distinguished from injurious effects of subject imports. Without such explanation, it is not logically possible to separate and distinguish that injury from that caused by subject imports.

7.158. The former reason appears an attempt to reject a factual predicate upon which the parties based their argument, i.e. that prices of crude oil were "low" during part of the POI.[344] This attempt fails for two related reasons. First, the Commission's assertion that oil prices were not low *during the whole POI* is not inconsistent with the parties' presented argument. The parties did not argue that prices of crude oil were "low during the whole IP", but for only part of it, i.e. from September 2008 to June 2009.[345] It was only for this period that the parties argued that "the PET prices in the EU followed the low prices of crude oil".[346] Thus, the Commission's statement that crude oil prices "were not low during the *whole* IP"[347] accords with the position that prices for crude oil were "low" for part of the POI. Second, the Definitive Determination does not specify for which part of the POI prices were "not low". Rather, it states that prices during the POI were "volatile, starting with a huge decrease and followed by a recovery". In our view, this statement does not necessarily mean that the oil prices were "not low" from September 2008 to June 2009.[348] The reasoning offered by the Commission did not, therefore, necessarily invalidate any factual predicate upon which the parties' argument was based.

7.159. We next consider whether the statement that the "volatility of world prices of crude oil cannot explain why imports of PET were subsidised and therefore undercut the Union producers' prices" adequately explains why oil prices, which the Commission accepted PET prices follow to some degree, were incapable of causing injury to the domestic industry. In our view, it does not. Even if crude oil prices could not explain why Pakistani PET imports were subsidized and undercut the domestic industry's prices, this has no logical bearing on the ability of oil prices, through some other means, to injure the EU domestic PET industry.[349] The Commission's analysis in this context, therefore, simply addresses the wrong question.[350]

7.160. For reasons stated above, we conclude that the Commission's analysis of oil prices is inconsistent with Article 15.5 of the SCM Agreement.[351]

## 7.6 Claims regarding verification visits

### 7.6.1 Introduction

7.161. On 9 December 2009, the Commission sent a letter to Novatex confirming that the Commission would conduct a verification visit at Novatex's premises in Karachi, Pakistan on 15-17 December 2009.[352] The Commission performed this verification visit. Pakistan claims that the Commission failed to provide the results of this verification visit to Novatex in violation of Article 12.6 of the SCM Agreement.[353]

[344] We note that the Commission acknowledged that "prices of PET depend to some extent on the prices of crude oil". (Definitive Determination, (Exhibit PAK-2), para. 118).
[345] July and August 2008 were also part of the POI.
[346] Definitive Determination, (Exhibit PAK-2), para. 118.
[347] Emphasis added.
[348] It could, for example, have been the case that the prices of crude oil started "not low" in July 2008 and August 2008, but then experienced a "huge decrease" to become "low" from September 2008 to June 2009. Even if oil prices were in a period of recovery to some unspecified, and perhaps modest, degree and/or operated within the bounds of some unspecified range of volatility following the "huge decrease", we see no reason to think that such prices ceased to be in a range which could be considered "low".
[349] The European Union argued that the "intended meaning" of its analysis in this context was that if crude oil prices are low worldwide, one would expect a symmetrical impact on PET prices worldwide. (European Union's first written submission, para. 229). Assuming *arguendo* that this explanation is even discernible from the wording of the determination, we note that just because a factor can have effects on PET prices and/or producers across the world, such effects can still be injurious to the EU domestic industry. (See Provisional Determination, (Exhibit PAK-1), para. 256 (explaining that although the economic downturn had a "global character", it was "an element contributing to the injury suffered by the [domestic] industry")).
[350] This does not necessarily mean that the conclusion that the Commission reached in respect of oil prices could not have been sustained had the Commission properly analysed this factor.
[351] We note that Pakistan claims that the finding by the Commission that the prices of crude oil were "volatile" during the POI is unsubstantiated. Having found above that the Commission's analysis of oil prices is, even as it stands, inconsistent with Article 15.5 of the SCM Agreement, we decline to address this issue.
[352] Pre-verification Letter dated 9 December 2009 from the Commission to Novatex, (Exhibit PAK-19).
[353] Pakistan's first written submission, para. 8.1; second written submission, para. 5.1.

### 7.6.2 Main arguments of the parties

7.162. Pakistan argues that the Commission violated Article 12.6 of the SCM Agreement because it failed to provide the "results" of the verification visit by either "mak[ing] the results of [verifications] available, or … provid[ing] disclosure thereof pursuant to paragraph 8 [of Article 12], to the firms to which they pertain".[354] Relying on the dictionary definition of the term and certain Appellate Body jurisprudence, Pakistan asserts that the term "results" are the "effects" or "outcomes" of the verification visit, and must be interpreted in light of the conduct, content, and purpose of the visit.[355] Given the conduct and purpose of the Commission's verification visit to Novatex, the "results" of that visit would include: (a) descriptions of any additional documents collected by the Commission during the visit; (b) how, and the degree to which, the Commission satisfied itself of the accuracy of information contained in Novatex's questionnaire response during the visit; (c) corrections or additional explanations regarding information in Novatex's questionnaire responses received by the Commission during the visit; (d) descriptions of examination and/or verification of information contained in Novatex's questionnaire response; and (e) any problems the Commission identified with respect to Novatex's questionnaire responses during the verification visit.[356] Pakistan claims this interpretation has been confirmed in certain prior panel reports.[357] Pakistan asserts that disclosure of such "results" is essential to an exporter's ability to safeguard its due process rights guaranteed under Article 12.3 of the SCM Agreement in a CVD investigation and to seek meaningful judicial review of such determinations pursuant to Article 23 of the SCM Agreement.[358] By failing to provide any such "results" in any relevant document – aside from certain references made regarding Novatex's procedures related to the MBS – the Commission violated Article 12.6.

7.163. The European Union argues that Pakistan's claim must be rejected. The European Union recognizes that Article 12.6 contains two options for providing the results of verification visits, i.e. the investigating authority either "shall make the results of any such investigations available", or "shall provide disclosure thereof pursuant to paragraph 8".[359] According to the European Union, the cross-reference to Article 12.8 means that how "results" of verification visits may be communicated to relevant parties should be interpreted in light of the need to disclose "essential facts".[360] In short, therefore, the term "results" refers to the essential factual outcome of the verification visit.[361] In more concrete terms, the European Union asserts that the "results" of a verification visit "is the summary of the information that was reviewed and checked (verified) during the verification visit, whether such information had been submitted by the company prior to the visit or was newly obtained by the authority during the verification visit". The European Union further asserts that the "summary does not have to individually describe each single document reviewed but may generically refer to 'bundles' of documents regarding a certain topic". Additionally, "[t]o the extent information regarding the verification visit is indispensable for due process purposes (e.g. for the use of facts available), results may also include such additional information (e.g. information that was refused access to it [*sic*])".[362] Thus, although the two are not identical, the disclosure of "essential facts" under Article 12.8 will reflect, to a significant degree if not completely, the "results" of verification visits. For instance, the European Union asserts that insofar as an investigating authority is unable to verify certain necessary information as a result of a verification visit, the investigated firm would learn of this by virtue of the investigating authority's reliance on facts available under Article 12.7 of the SCM Agreement, reliance that would be reflected in the disclosure of the essential facts under Article 12.8. If the investigating authority does not rely on facts available, then this would indicate that such

[354] Pakistan's first written submission, para. 8.1 (quoting Article 12.6 of the SCM Agreement).
[355] Pakistan's first written submission, paras. 8.21 and 8.22; second written submission, para. 5.5.
[356] Pakistan's first written submission, para. 8.27.
[357] Pakistan's first written submission, paras. 8.30 and 8.31 (referring to Panel Reports, *Korea – Certain Paper*; and *Mexico – Steel Pipes and Tubes*).
[358] Pakistan's first written submission, paras. 8.46 and 8.47.
[359] European Union's first written submission, para. 235.
[360] See, e.g. European Union's first written submission, para. 241 (arguing that the cross-reference to Article 12.8 in Article 12.6 means that "[t]he requirement to *make available* the results of the verification visit is thus related to the need to inform the producers of the *essential facts* including any data-related concerns relating to the verification visit") (emphasis added)); and response to Panel question No. 87, para. 6 (arguing that the "cross-reference [to Article 12.8 in Article 12.6] implies that the scope of the obligation *under the second alternative* in Article 12.6 should be interpreted in the context of the obligation to disclose essential facts under Article 12.8") (emphasis added)).
[361] European Union's first written submission, para. 240.
[362] European Union's second written submission, para. 193.

necessary information had been verified. Through the Article 12.8 disclosure, therefore, relevant parties will learn of the "outcomes" of verification visits and allow those parties to structure their cases and protect their interests before investigating authorities accordingly.[363] The European Union further denies that prior jurisprudence supports Pakistan's arguments.

7.164. The European Union argues that the Commission complied with its relevant obligations here because, as reflected in the record, the Commission disclosed the "essential facts" under consideration to Novatex in the form of the provisional and definitive disclosure documents, and allowed Novatex to respond to such disclosures. The European Union also asserts that other means exist by which investigated producers like Novatex could become aware of the "outcomes" of verification visits. For instance, the European Union asserts that investigated companies, including Novatex, have representatives present during verification visits, and at the end of verification visits the Commission and verified producers agree on a list of documents collected during the visit, and thus investigated producers will always know what was and what was not checked and collected during a visit.[364] The European Union also argues that there is nothing to suggest that Novatex's ability to defend its interests in the investigation was compromised by any alleged failure of the Commission to disclose the results of the verification visit.[365]

### 7.6.3 Relevant legal considerations

7.165. Article 12 of the SCM Agreement provides, in relevant part:

> 12.6 The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. The procedures set forth in Annex VI shall apply to investigations on the premises of a firm. Subject to the requirement to protect confidential information, *the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8,* to the firms to which they pertain and may make such results available to the applicants.
>
> ...
>
> 12.8 The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.[366]

### 7.6.4 Evaluation by the Panel

7.166. This Section proceeds in three parts. First, it examines the relevant legal standard under Article 12.6 of the SCM Agreement. Second, it applies that legal standard to the case at hand. Finally, it concludes.

#### 7.6.4.1 Legal standard under Article 12.6 of the SCM Agreement

7.167. If an investigating authority conducts a verification visit at a firm during a CVD investigation[367], Article 12.6, in relevant part, indicates that the authority "shall" do one of two things: (a) make the results of the verification visit available to the firm concerned; or (b) disclose such results pursuant to Article 12.8 to the firm concerned. Both options, therefore, require the

[363] European Union's first written submission, paras. 240-242.
[364] European Union's first written submission, para. 244; second written submission, para. 196.
[365] European Union's first written submission, para. 261; opening statement at the first meeting of the Panel, para. 57.
[366] Emphasis added.
[367] The SCM Agreement imposes no obligation on investigating authorities to perform such visits. We also note that while the SCM Agreement also envisions verification visits being conducted on the premises of entities other than firms, the only visit at issue here is the verification visit to Novatex.

provision of the "results" of verification visits to the investigated firm. This Section, therefore, turns to examining the meaning of this term.

7.168. Neither Article 12 of the SCM Agreement nor any other provision of the SCM Agreement defines the "results" of verification visits. Moreover, this term is not defined in a relevant manner in any other covered agreement (e.g. the Anti-Dumping Agreement) and has not yet been extensively defined in any adopted panel or Appellate Body report.[368] A "result" is defined, however, as "[a] consequence, effect, or conclusion", "[t]hat which is achieved, brought about, or obtained, esp. by purposeful action"[369], and "[t]he effect, consequence … or outcome of some action, process, or design".[370] We therefore interpret the results of verification visits, for purposes of Article 12.6, as referring to what the "outcomes" of verification visits are, i.e. what is achieved, brought about, or obtained via the visit. Because such outcomes are achieved particularly through "purposeful action" and through some "process or design", we further interpret the term "results" as used in Article 12.6 in light of the purpose of verification visits.

7.169. Regarding that purpose, it will be recalled that Article 12.6 of the SCM Agreement indicates that "[t]he procedures set forth in Annex VI shall apply to" verification visits. Annex VI is entitled "Procedures for on-the-spot Investigations pursuant to Paragraph 6 of Article 12". Paragraph 7 explains that "the main purpose of the on-the-spot investigation is to *verify* information provided or to obtain further details".[371] It further explains that "it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be *verified* and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained."[372] The word "verify" is defined as "[t]o prove to be true; to confirm or establish the truth or truthfulness of; to authenticate"[373], "[s]how to be true by demonstration or evidence; confirm the truth or authenticity of; substantiate", and "[a]scertain or test the accuracy or correctness of, esp. by examination or comparison of data … check or establish by investigation".[374] The main purpose of verification is, therefore, to enable investigating authorities to confirm the accuracy of information supplied.[375] It follows, therefore, that the "results" of a verification visit should reflect the extent to which information supplied was ascertained to be accurate.

7.170. Other provisions of the SCM Agreement provide contextual support for this interpretation. In particular, Article 12.5 of the SCM Agreement, which immediately precedes Article 12.6, provides that "the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based." Verification visits appear a means by which to accomplish this general obligation *vis-à-vis* the information supplied.[376] We conclude, therefore, that the "results" of a verification visit should reflect the "outcomes" of the process of verifying information supplied. The

[368] We note that one panel report − which, at this writing, is subject to appeal − addressed a materially similar situation in the context of the Anti-Dumping Agreement. Our analysis herein is substantially in accordance with that panel's analysis and conclusions. (Panel Report, *EU − Fatty Alcohols (Indonesia)*, paras. 7.219-7.236 (appeal pending)).

[369] *Black's Law Dictionary*, 10th edn, B. A. Garner (ed.) (Thomson Reuters, 2009), p. 1509.

[370] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2554.

[371] Emphasis added.

[372] Emphasis added.

[373] *Black's Law Dictionary*, 10th edn, B. A. Garner (ed.) (Thomson Reuters, 2009), p. 1793.

[374] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 3517.

[375] Because Annex VI(7) states that "the *main* purpose of the on-the-spot investigation is to verify information provided *or* to obtain further details", it appears that the purpose(s) of a particular on-spot-investigation may, to at least some degree, need to be ascertained on a case-by-case basis. (emphasis added)

[376] Previous reports discussing Article 6.6 of the Anti-Dumping Agreement, which is analogous to Article 12.5 of the SCM Agreement, are consistent with this proposition. (See, e.g. Panel Reports, *US − DRAMS*, para. 6.78 (discussing Article 6.6 of the Anti-Dumping Agreement and stating that "Members could 'satisfy themselves as to the accuracy of the information' in a number of ways"); and *Argentina − Ceramic Tiles*, para. 6.57 ("Article 6.6 of the AD Agreement thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying")).

most notable such information in the case of verification visits to an investigated firm will, in our view, be information contained in its questionnaire response.

7.171. We further note certain statements in previous adopted panel reports discussing Article 6.7 of the Anti-Dumping Agreement, which is analogous to Article 12.6 of the SCM Agreement in this context. In particular, although the context in which the issue arose differs somewhat from the present dispute, the panel report in *Korea – Certain Paper* stated:

> [T]he purpose of … Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results. It is therefore important that such disclosure *contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully*. This is because, in our view, information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties' cases.[377]

7.172. At this point, we consider it appropriate to recall that the European Union advocates that the Panel interpret the term "results" of verification visits in light of Article 12.8 and its obligation to disclose "essential facts". In other words, because Article 12.6 allows communication of results of verification visits "pursuant to" Article 12.8, Article 12.8 should substantively bear on what constitutes disclosure of "results" in Article 12.6. We consider that, contrary to the European Union's position, the cross-reference to Article 12.8 in Article 12.6 does not reflect a substantive relationship of this nature between the two provisions for four main reasons:

a. First, the SCM Agreement contains the obligation to communicate results of verification visits, on the one hand, and disclose essential facts, on the other hand, in different and non-sequential provisions (i.e. Article 12.6 and Article 12.8, respectively). This indicates the two provisions are substantively distinct.

b. Second, only the second of the two communication options in Article 12.6 cross-references Article 12.8, but both options require the provision of the same thing, i.e. the "results" of verification visits. It thus appears unreasonable to us to interpret Article 12.8 as substantively modifying the term "results" in the manner proposed by the European Union under either both options, as only one refers to Article 12.8, or only under the second option, in which case the concept of a disclosed "result" would fundamentally differ in the two instances.[378] We believe, rather, the more reasonable position is that the term "result" should be interpreted consistently in Article 12.6.

c. Third, the only limitation on the scope of "results" in Article 12.6 is that the information pertains to a verification visit. In contrast, the scope of disclosure under Article 12.8 is limited to "essential facts under consideration which form the basis for the decision whether to apply definitive measures".[379] This indicates that the results of verification

[377] Panel Report, *Korea – Certain Paper*, para. 7.192 (emphasis added). Based on such reasoning and its earlier review of the facts, the panel found that Korea had insufficiently disclosed the results of a certain verification visit in violation of Article 6.7 of the Anti-Dumping Agreement. We note, however, that in that dispute the parties did not actively dispute what "results" of verification visits are. This statement, therefore, although necessary to the panel's finding that a violation of Article 6.7 occurred, did not appear to be the consequence of extensive discussion during the proceedings.

[378] We recall the European Union's position that the first communication option in Article 12.6 indicates that investigating authorities can provide "detailed reports" (European Union's response to Panel question No. 87, para. 6), while the second option basically allows investigating authorities to do what the Commission did here, i.e. to disclose essential facts under Article 12.8 and allow their content to reflect the results of verification visits.

[379] The "essential facts" contemplated in Article 6.9 of the Anti-Dumping Agreement were described by the Appellate Body in *China – GOES* as "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures". (Appellate Body Report, *China – GOES*, para. 240).

visits are neither limited to the "essential" results of such investigations nor limited to facts that form the basis of the decision to impose definitive CVDs.[380]

d. Fourth, it will be recalled that Article 12.6 provides that the investigating authority "may make such results available to the applicants." The "essential facts", however, must be disclosed to all interested parties, which include the applicants. It would appear odd, therefore, for Article 12.6 to broach the possibility of providing "results" of verification visits to applicants if the applicants would receive disclosure thereof upon receipt of the "essential facts". This further indicates the substantive separateness of the two provisions.

7.173. If the connection between Articles 12.6 and 12.8 is not substantive, however, this begs the question as to what the cross-reference to Article 12.8 in Article 12.6 means. We conclude that the presence of the two communication options in Article 12.6 clarifies two main procedural aspects regarding the provision of results of verification visits:

a. First, the two communication options in Article 12.6 make clear that there is flexibility regarding *how* to communicate the results of verification visits. The first option for communicating results of verification visits in Article 12.6 is to "make … available" such results. The second option is to "provide disclosure thereof" pursuant to Article 12.8. The use of different terms in describing *how* the "results" of verification visits may be communicated suggests that the two reflect different methods in which this may be accomplished.[381] We therefore note that it is undisputed that providing a separate verification report is a means by which to satisfy the first disclosure option in Article 12.6, i.e. to "make … available" the results of verification visits.[382] Disclosing such results pursuant to Article 12.8, however, suggests that the means used to disclose essential facts is also the procedural vehicle by which to communicate such results, i.e. the disclosure of the results of verification visits may accompany the disclosure of the essential facts. This method may well not involve the provision of a separate report.

b. Second, the two options make clear that there is flexibility regarding *when* to communicate results of verification visits. If only the first option were present in Article 12.6, the question may arise as to when the results should be made available, perhaps leading to an interpretation that communication had to occur relatively soon after the visit. If only the second option were present in Article 12.6, it would appear to limit the investigating authority's discretion to communicate the results of verification visits before the disclosure of essential facts. Including both options, therefore, indicates that investigating authorities might make the results known relatively soon after the verification visit occurs, but if it wishes, it could wait as late as the disclosure of essential facts to do so.

7.174. We conclude, therefore, that the two communication options in Article 12.6 clarify that there is flexibility regarding how and when to communicate results of verification visits to relevant parties. The task still remains, however, to formulate an understanding of what the term "results" of verification visits means such that we may effectively apply this term in the case at hand. We formulate this understanding in light of three main considerations:

a. First, the purpose of verification visits, which, as discussed above, indicates that the results should reflect the "outcomes" of the process of verifying information supplied. Relatedly, and further regarding the scope of such "outcomes", we recall that one adopted panel report has explained that it is important that "such disclosure contain adequate information regarding all aspects of the verification, including a description of

[380] We therefore agree with Pakistan that "[t]he results of the verification visit may include matters that are ultimately not essential to the final determination". (Pakistan's response to Panel question No. 84, para. 5.15).

[381] Panel Report, *Korea – Certain Paper*, para. 7.188 (asserting that Article 6.7 of the Anti-Dumping Agreement "requires that the verification results be disclosed to the investigated exporters without specifying the format in which such disclosure is to be made").

[382] This is not to say that there may be other ways to "make available" the results.

the information which was not verified as well as of information which was verified successfully".[383]

b. Second, the pervasive theme in the SCM Agreement of maintaining a record regarding interactions between the investigating authority and parties particularly as to the exchange of evidence. In this respect we note that the SCM Agreement places strong emphasis on the provision of written information and the reduction of evidence given orally to writing[384], and also provides that "[a]ny decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority".[385]

c. Third, and relatedly, the rights of the parties to an investigation. As the panel in *Korea – Certain Paper* indicated, receiving relatively particularized information regarding the results of verification visits may bear on parties' due process rights by affecting how the parties structure their cases and the effectiveness of judicial review.[386]

7.175. Our analysis indicates a minimum standard under Article 12.6 encompassing the provision of specific enough disclosures as to allow the interested parties to discern[387]:

a. the information in the questionnaire response or other information supplied for which supporting evidence was requested, and whether such evidence was provided;

b. whether the investigating authority requested further information at the verification visit, and whether such information was provided;

c. whether the investigating authority collected requested documents, and if so what documents[388]; and

d. whether the investigating authorities verified the information for which supporting evidence was requested. This is not to say, however, that the results of the verification visit must necessarily include conclusions as to the ultimate suitability of the data checked for use in a final determination in the investigation.

7.176. It would appear unnecessary, however, for investigating authorities to address all arguments and evidence presented during the verification or to prepare minutes of the verification. Based on the above discussion, we must therefore disagree with the European Union that the "results" of verification visits are only the essential factual outcomes of the verification.

---

[383] Panel Report, *Korea – Certain Paper*, para. 7.192.

[384] See, e.g. SCM Agreement, Articles 11.1 and 11.2 (providing, *inter alia*, for a "written application" by a domestic industry and the information to be included therein), 12.1 ("Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question"), and 12.2 ("Where such information is provided orally, the interested Members and interested parties subsequently shall be required to reduce such submissions to writing").

[385] SCM Agreement, Article 12.2.

[386] Panel Reports, *Korea – Certain Paper*, para. 7.192 (explaining that "information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties' cases"); and *Mexico – Steel Pipes and Tubes*, paras. 7.124-7.129 (using verification report to determine reasonableness of statements made in final anti-dumping determination). It will be recalled that Article 12.6 envisions the results of verification visits being supplied not just to the investigated firm, but also to the applicants. It appears plausible that the results of verification visits could have implications for both types of parties. We also take special note that in order to determine whether an investigating authority's decision to resort to the use of facts available under Article 12.7 is consistent with Article 12.7, it must be evident from the record of the investigation the extent to which the strictures of Annex II of the Anti-Dumping Agreement were adhered.

[387] No qualification exists in Article 12.6 such that the results of verification visits must be provided to an investigated firm *only if* non-provision would infringe a party's due process rights. It is thus immaterial whether or not Novatex's ability to defend itself in the investigation was compromised due to the manner in which the European Union claims the Commission disclosed the results of the Novatex visit.

[388] We do not mean to suggest that each and every document be individually described. Rather, categories of documents could be described within a reasonable level of specificity.

7.177. With this in mind, we turn to consider whether the Commission complied with its obligation to provide the results of the Novatex verification visit.

#### 7.6.4.2 Whether the Commission provided the results of the Novatex verification visit to Novatex

7.178. It will be recalled that the Commission conducted a verification visit at Novatex in Karachi on 17-19 December 2009. The European Union argues that it complied with Article 12.6 because it disclosed the results of this visit to Novatex via the second communication option in Article 12.6, i.e. "in the context of the disclosure of the essential facts".[389] We therefore discuss the relevant disclosure documents of the investigation below to determine to what degree they contain the "results" of the verification visit.

7.179. On 1 June 2010, the Commission sent a letter to Novatex that, along with its enclosures, "constitute[d] disclosure of the essential facts and considerations on the basis of which the European Commission has imposed provisional countervailing duties".[390] The enclosures were: (a) a copy of the Provisional Determination; (b) explanations regarding subsidy calculations concerning Novatex; (c) explanations regarding undercutting and underselling calculations concerning Novatex; and (d) explanations regarding comments on initiation. In the Provisional Determination, the Commission explained that "[t]he Commission sought and verified all information deemed necessary for the determination of subsidisation, resulting injury and Union interest", and confirmed that the Commission had conducted the verification visit at Novatex.[391] The Provisional Determination made certain statements pertaining to the degree to which the Commission verified the effectiveness of the procedures relating to Novatex's import-duty remissions obtained under the MBS during the visit.[392] Pakistan accepts that such discussions contain some of the "outcomes" of the verification visit to Novatex, and we see no reason to disagree.[393] Beyond such statements, however, the European Union points to, and we discern, no other content of the letter and its enclosures that specifically discuss the visit.

7.180. On 26 July 2010, the Commission sent a letter to Novatex that, along with its enclosures, "constitute[d] disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive anti-subsidy duties".[394] The enclosures were: (a) explanations of definitive subsidy and injury methodology and calculations; (b) explanations of definitive subsidy and undercutting-underselling calculations; and (c) a general disclosure

[389] European Union's opening statement at the first meeting of the Panel, para. 55. See also European Union's response to Panel question No. 87, para. 5 (restating position). We note the following additional two pieces of evidence in the record that were not part of the disclosure of essential facts but were discussed by the parties in this context: (a) the pre-verification letter that the Commission sent to Novatex on 9 December 2009 (Pre-verification Letter dated 9 December 2009 from the Commission to Novatex, (Exhibit PAK-19)); and (b) a document the Commission created containing a list of some but not all of the documents reviewed at the Novatex verification visit, and all of the documents collected by the Commission at the visit (List of Exhibits regarding Novatex's on-spot verification, (Exhibit EU-10)). Regarding the former, because it was created before the verification visit, it logically cannot contain the "results" of the visit. Regarding the latter, there is no evidence in the record indicating that this document was ever provided to Novatex during the investigation, and thus it cannot be a means by which the "results" of the visit were provided to Novatex.

[390] European Commission, Provisional company-specific disclosure, 1 June 2010, (Exhibit PAK-32) (BCI), p. 1.

[391] Provisional Determination, (Exhibit PAK-1), paras. 12-14. The Provisional Determination does not state how all such information was verified. We note the European Union's statement that verification visits are "only one of several ways for investigating authorities to verify information". (European Union's opening statement at the first meeting of the Panel, para. 58). We agree. Thus, a simple statement that the "Commission sought and verified all information deemed necessary for the determination of subsidisation, resulting injury and Union interest" is too ambiguous to meaningfully provide results of verification visits. The presence of verified information in the disclosed essential facts, statements that certain information was verified as a result of deficiency letters, or that certain information had not been verified at all, cannot convey the results of verification visits in a manner to satisfy Article 12.6. Such statements, by their very nature, pertain to a completed verification process. Article 12.6, in this context, is designed to provide details regarding a specific stage of that process.

[392] See Provisional Determination, (Exhibit PAK-1), para. 68 *et seq.*

[393] See, e.g. Pakistan's comments on the European Union's response to Panel question No. 103, para. 6.3 (stating that "paragraphs 68-72 of the Provisional Determination contain *some* results of the verification [visit]").

[394] European Commission, Definitive company-specific disclosure, 26 July 2010, (Exhibit PAK-33) (BCI), p. 1.

document, i.e. a draft of the Definitive Determination. The general disclosure document again made reference to verification of Novatex's procedures relating to the MBS that the Provisional Determination had previously indicated occurred at the visit. Again, we accept that such content contains "outcomes" of the verification visit. Beyond such statements, however, the European Union points to, and we discern, no other content of the letter and its enclosures that specifically discuss the visit.[395]

7.181. Thus, the "results" that were provided to Novatex via the disclosure documents related only to certain observations concerning the MBS. We cannot find that this constituted adequate provision of the "results" of the verification visit to Novatex. Such limited discussions fail to sufficiently communicate the information in the questionnaire response or other information supplied for which supporting evidence[396] was requested (and whether such evidence was provided), whether the Commission requested further information at the verification visit (and whether such information was provided), what comprised the universe of documents the Commission collected, and whether the Commission confirmed the accuracy of the information for which supporting evidence was requested.[397]

#### 7.6.4.3 Conclusion

7.182. In accordance with our reasoning above, we find 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.

[395] See European Commission, General Definitive Disclosure, (Exhibit PAK-36), paras. 43 and 47. The European Union appears to suggest at times that because Novatex representatives were present at the verification visit, and allowed access to documents to the Commission at the visit, this process might be a way to comply with Article 12.6. (See, e.g. European Union's first written submission, para. 256). First, as this process occurs before the disclosure of essential facts, and the European Union expressly argues that the Commission complied with Article 12.6 "in the context of the disclosure of the essential facts", we do not consider that the European Union actually argues that this is a way in which the Commission complied with Article 12.6 in this particular case. (European Union's opening statement at the first meeting of the Panel, para. 55. See also European Union's response to Panel question No. 87, para. 5 (restating position)). Rather, we interpret it as an observation as to why Novatex's rights were not compromised due to the absence of more specific disclosures regarding the results of the verification visit. Second, we would reject such an argument even if it were made. Article 12.6 places the burden of providing the "results" of verification visits squarely on the investigating authority. It thus endures regardless of whether circumstances exist through which an investigated firm might otherwise become aware of such results. We could not therefore accept that an investigated firm's mere participation in the verification visit itself signifies compliance with Article 12.6 in this context.

[396] We note that such evidence may not always take the form of documentation. For instance, the Commission examined the organization of Novatex's manufacturing facilities during the verification visit. (See Provisional Determination, (Exhibit PAK-1), paras. 68-72; Annex II(II)(1) and III(II)(2) of the SCM Agreement (envisioning on-the-spot investigations being conducted to test the reliability of duty drawback verification procedures)). The European Union has explained, however, that the examination essentially informed its understanding of whether it could rely on Novatex's documentation purportedly indicating the quantities of imported production inputs that it used to produce exported PET. (European Union's second written submission, para. 39). Thus, we interpret the examination of the manufacturing facilities as essentially evidence used to attempt to verify other information supplied by Novatex.

[397] We note that it would be plainly unreasonable to assume that the limited MBS-related subjects discussed in the disclosure documents (identified above) formed the entirety of the subjects investigated at the verification visit, and the European Union never claims that this was so. Indeed, the content of Novatex's questionnaire response went beyond such matters, the pre-verification letter that the Commission sent to Novatex indicated that documents pertaining to the full scope of data provided in the questionnaire response were to be made available at the visit (Pre-verification Letter dated 9 December 2009 from the Commission to Novatex, (Exhibit PAK-19)), and other evidence indicates that documents were collected at the visit that appear to have little or nothing to do with the MBS. (See, e.g. List of Exhibits regarding Novatex's on-spot verification, (Exhibit EU-10), item 1, "Accounts July 2008 to June 2009", referring to, as Pakistan has explained, Novatex's annual reports for those years). We further note that, because we have previously observed that results of verification visits are neither limited to the "essential" results of such investigations nor limited to facts that form the basis of the decision to impose definitive CVDs, there is no guarantee that the scope of the subject matter addressed by essential facts fully covers that of the results of verification visits.

## 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.

WORLD TRADE ORGANIZATION

WT/DS486/R/Add.1

6 July 2017

(17-3589)

Page: 1/77

Original: English

# EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

## (WT/DS486)

REPORT OF THE PANEL

*Addendum*

*BCI deleted, as indicated **[***]***

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS486/R.

# LIST OF ANNEXES

## ANNEX A

WORKING PROCEDURES OF THE PANEL



## ANNEX B

ARGUMENTS OF THE EUROPEAN UNION



## ANNEX C

ARGUMENTS OF PAKISTAN



## ANNEX D

ARGUMENTS OF THE THIRD PARTIES



## ANNEX E

INTERIM REVIEW

# ANNEX A

## WORKING PROCEDURES OF THE PANEL

## ANNEX A-1

## EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN (WT/DS486)

WORKING PROCEDURES OF THE PANEL

ADOPTED ON 15 MARCH 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

### General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

### Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Pakistan requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Pakistan shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause. The Panel notes that one request for a preliminary ruling has already been filed in this dispute, and appropriate procedures have been put in place for addressing that request. Unless the Panel decides otherwise, any further requests for a preliminary ruling should follow the procedures in this paragraph.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such an exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party be aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

10. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Pakistan could be numbered PAK-1, PAK-2, etc. If the last exhibit in connection with the first submission was numbered PAK-5, the first exhibit of the next submission thus would be numbered PAK-6.

**Questions**

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

**Substantive meetings**

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Pakistan to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Pakistan presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Pakistan. If the European Union chooses not to avail itself of that right, the Panel shall invite Pakistan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

**Third parties**

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

**Descriptive part**

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

**Interim review**

23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

**Service of documents**

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing.

The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to geoffrey.carlson@wto.org and lina.somait@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

## ANNEX A-2

## EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN (WT/DS486)

### ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

ADOPTED ON 14 APRIL 2016

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS486.

1. For the purposes of these Panel proceedings, BCI includes

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the countervailing duty investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the countervailing duty investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific

information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

# ANNEX B

## ARGUMENTS OF THE EUROPEAN UNION

## ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

### 1 INTRODUCTION

1. In this integrated executive summary, the European Union summarizes the facts and arguments presented to the Panel in its first written submission, its opening oral statement at the first substantive meeting and its responses to the Panel's questions.

### 2 THE MEASURES AT ISSUE AND FACTUAL BACKGROUND

2. The measures at issue in this dispute as contained in Pakistan's Panel Request are the provisional and definitive countervailing duties imposed by the European Union on imports of certain polyethylene terephthalate ("PET") from Pakistan, as well as certain aspects of the underlying investigation and determinations related thereto, as set forth in the following instruments:

- Commission Regulation (EU) No 473/2010 of 31 May 2010, imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates, OJ L134/25.

- Council Implementing Regulation (EU) 857/2010 of 27 September 2010, imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates, OJ L254/10.

3. The European Union refers to the description of the facts set out in Regulations No 473/2010 ("provisional determination") and No 857/2010 ("definitive determination").

#### 2.1 Original investigation

4. Pursuant to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (the "Basic CVD Regulation"), an anti-subsidy proceeding was initiated by the European Union concerning certain PET originating, *inter alia*, in Pakistan on 3 September 2009 following a complaint lodged on 20 July 2009 by the Polyethylene Terephthalate Committee of Plastics Europe (the "complainant"). The European Commission (the "Commission") imposed a provisional countervailing duty on 31 May 2010 in Regulation No 473/2010.

5. On 27 September 2010, the Council imposed, by Regulation No 857/2010, definitive countervailing duties on imports of certain PET having a viscosity number of 78 ml/g or higher, according to ISO Standard 1628-5, originating *inter alia* in Pakistan.

6. The subsidy investigation period was 1 July 2008 to 30 June 2009 ("the period of investigation" or "POI") and the examination of trends relevant for the assessment of injury covered the period from 1 January 2006 to the end of the POI ("the period considered"). While seven measures were investigated by the European Union, only the determinations in relation to two measures, the MBS programme and the LTF-EOP programme, are questioned by Pakistan in this dispute.

#### 2.2 Legal challenge and amendment of the countervailing duty amounts

7. On 6 December 2010, Novatex lodged an application at the General Court seeking the annulment of Regulation No 857/2010 in so far as it applied to Novatex, on the ground that the FTR is not a subsidy within the meaning of the Basic CVD Regulation and that the calculation of the subsidy amount granted under the LTF-EOP programme was erroneous.

8. The General Court in its judgment in case T-556/10 of 11 October 2012 ("the General Court judgment") found that the European Commission and the Council failed to take account of certain information as regards the FTR, and that the error resulting therefrom affected the legality of Article 1 of Regulation No 857/2010 in so far as the definitive countervailing duty fixed by the Council exceeded the duty applicable in the absence of that error. Therefore, the General Court annulled Article 1 of Regulation No 857/2010 in so far as it concerned Novatex and in so far as the definitive countervailing duty exceeded that applicable in the absence of the error. The General Court dismissed Novatex's claim as regards the LTF-EOP programme. Novatex did not appeal the General Court judgment.

9. Following the General Court judgment, the Commission initiated on 17 May 2013, a partial reopening of the anti-subsidy proceeding with regard to imports of certain PET originating, *inter alia*, in Pakistan. On 25 September 2013, the Council adopted Implementing Regulation (EU) No 917/2013 in order to reduce the countervailing duty rate applicable to Novatex in accordance with the General Court judgment. The revised duty rate was applied retroactively as of 2 June 2010.

### 2.3 Termination of the countervailing duties

10. On 26 September 2015, the European Union published in its Official Journal the Notice of the expiry of the countervailing duties imposed on certain PET from Pakistan pursuant to Regulation No 857/2010. Pursuant to that Notice, the European Union stopped imposing the countervailing duties at issue as of 30 September 2015.

## 3 LEGAL ARGUMENT

### 3.1 Claims relating to the MBS programme

11. The MBS programme permits the import of duty-free input material under the condition that it is used for subsequent exports. The Commission found that the MBS constituted a subsidy in the form of revenue forgone by the government which confers a benefit upon the recipient company and was specific. The subsidy rate established in respect of this scheme during the POI for the co-operating exporting producer in Pakistan, namely Novatex Limited ("Novatex"), amounted to 2.57%.

#### 3.1.1 Pakistan failed to raise specific claims in its Panel Request regarding an alleged incorrect determination of the amount of subsidisation in this case

12. Pakistan appears to agree that the MBS programme amounted to a countervailable subsidy, even in view of Annexes II and III of the SCM Agreement. Indeed, Pakistan agrees that during the period of investigation Novatex obtained a refund of imported duties on raw materials "in excess of" those actually borne by Novatex. Thus, Pakistan's argument entirely boils down to a disagreement on the amount of subsidisation granted to Novatex during the period of investigation.

13. However, Pakistan has not raised any claims in its Panel Request concerning an alleged violation by the Commission when calculating the amount of subsidisation in the present case (e.g. under Article 1.1(b) or 14 of the SCM Agreement, unlike its claims under the LFT-EOP programme). As a result, the European Union considers that the Panel does not have authority to examine whether the Commission's determination (that the full amount of import duties foregone as opposed to merely the excess amount conceded by Pakistan should be countervailed) was inconsistent with the SCM Agreement. In this respect, the European Union considers that Pakistan's claims under Articles 10, 32.1 and 19.1 of the SCM Agreement cannot serve to make rulings by the Panel on an alleged incorrect amount of subsidisation found. Those claims are clearly consequential. Pakistan has not developed its claims under those provisions in its first written submission either, other than consequential breaches of the alleged incorrect determination by the Commission.

14. Therefore, the European Union requests the Panel to refrain from examining the legal arguments and facts brought by Pakistan in view of the uncontested facts that (i) neither of the parties discuss that the MBS programme amounted to a countervailable subsidy in view of Articles 1.1, 3.1(a), 3.2 and Annex I(i) of the SCM Agreement; and (2) since Pakistan has not

raised any claims under Articles 1.1(b) or 14 of the SCM Agreement concerning an alleged violation of the obligations when determining the amount of subsidisation, the Panel should reject Pakistan's claim.

### 3.1.2 Pakistan's interpretation of the relevant provisions of the SCM Agreement is incorrect

15. Pakistan's view appears to be that the obligation to countervail only the excess of duties rebated or refunded is already contained in Annexes I to III of the SCM Agreement and, hence, in situations where an alleged duty drawback system is being investigated, the investigating authority can only countervail the amounts provided in excess in order to comply with its obligation under those Annexes. However, an examination of Annexes I to III shows that this is not the case.

16. To begin with, Article 1 of the SCM Agreement is a definitional provision of what type of measures fall under the disciplines of the SCM Agreement and footnote 1 contains a carve-out or scope provision: 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 or taxes in amounts not in excess of those which have accrued "shall not be deemed to be a subsidy", i.e. should not be subject to the disciplines of the SCM Agreement. The reference to the Ad Note to GATT Article XVI in footnote 1 is merely repetitive, as it contains the same reference to the carve-out. However, footnote 1 further specifies that for the carve-out to apply, those exemptions and remissions of duties must take place "[i]n accordance with the provisions of (...) Annexes I through III of this Agreement". The use of the terms "in accordance with" has an exhortative meaning, and usually refers to a set of conditions or rules that need to be complied with.

17. Annex I(i) of the SCM Agreement provides for situations where certain types of subsidies would be deemed as prohibited. This provision alone does not speak about *how* to determine whether the remission of import duties was in excess of those levied on imported inputs. It merely confirms a situation leading to a prohibited subsidy. In turn, this provision 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 and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III".

18. Annex II of the SCM Agreement contains "guidelines on consumption of inputs in the production process". Paragraphs 1 and 2 in the first part of Annex II merely recalls footnote 1 and Annex I(i) of the SCM Agreement. Again, this provision does not speak about *how* to calculate the amount of subsidisation in those cases. It only contains the consequence of having determined that the measure in question amounts to a duty drawback system in accordance with Annexes II and III.

19. The second part of Annex II contains certain rules or steps that investigating authorities should take in order to determine the inputs that are consumed or incorporated into the exported product. However, those provisions do not establish what happens if the investigating authority cannot determine on a reliable basis which inputs are consumed in the production of the exported product and in what amounts.

20. In a situation where there is no system to control and confirm the inputs consumed or incorporated into the exported product, and where it is clear that the duty drawback scheme is totally unreliable, absent reliable evidence on the actual amounts of inputs incorporated into the exported product, the European Union considers that, in view of the guiding principles contained under Article 14 of the SCM Agreement, an investigating authority is entitled to countervail the full amount refunded. Indeed, Article 14 of the SCM Agreement specifically deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient.

21. In this respect, contrary to what Pakistan alleges, the European Union does not consider that, absent a verification system or the demonstration by the exporting Member that no excess amounts were rebated or refunded, there is an automatic presumption that the entire amount of the import duties foregone or refunded can be countervailed. If the conditions under Annexes II and III are not met, the carve-out in footnote 1 (and Annex I(i)) simply is not met either, since those provisions stipulate that should be read "in accordance with" Annexes II and III. Annexes I to III contain rules which must be complied with in order to avoid qualifying a remission or

exemption from duties as a subsidy. Then, each case has to be examined on its own merits and in view of the guiding principles established under Article 14 of the SCM Agreement to calculate the amount of subsidisation.

22. Finally, with respect to Annex III of the SCM Agreement, the European Union observes that this Annex provides guidelines in the determination of substitution drawback systems as export subsidies Quite tellingly again, Annex III does not speak about *how* to determine the amount of subsidisation in cases of substitution drawback systems. Annex III merely provides that, if an investigating authority is satisfied with the procedures to verify and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is no drawback of import charges in excess of those originally levied on the imported inputs in question, "no subsidy should be presumed to exist". Absent such a system of verification, if the exporting Member fails to show whether excess payment occurred on the basis of actual transactions, the investigating authority may conclude legitimately that such an excess amount took place. Then, the principles to determine the amount of benefit under Article 14 of the SCM Agreement would apply.

23. In sum, the European Union considers that Pakistan is reading too much into the provisions in question. Contrary to what Pakistan alleges, nothing in footnote 1, or Annexes I to III require investigating authorities to only countervail the excess of duties refunded in all cases, thereby imposing an active obligation upon them to estimate in each and every case the amount of import duties paid on inputs that were consumed and incorporated into the exported products and the amounts of refunds granted upon exportation. Annexes II and III contain the rules or the necessary steps that must be taken to determine whether an alleged duty drawback system results in a prohibited subsidy by reason of over rebate or excess drawback of import duties on inputs consumed in the production of the exported product. If there is no system or no proper application of a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts, and the exporting Member fails to show that the quantity of inputs for which drawback is claimed does not exceed the amounts rebated or refunded upon exportation of the products incorporating those inputs, then the only conclusion can be that the alleged subsidy scheme does not fall under the carve-out in footnote 1 (or Annex(i)) of the SCM Agreement. Thus, the general principles governing the calculation of benefit apply to that measure. If it is found that there are no reliable information provided by the exporting Member about the actual amounts of imported materials incorporated into the exported products for which a rebate or refund was granted, the investigating authority is entitled to consider the full amount as the basis for calculating the subsidisation.

### 3.1.3 Pakistan's wrongly applies its incorrect interpretation of the law to the facts of the PET investigation

24. In its first written submission, Pakistan employs an incorrect interpretation of the relevant provisions of the SCM Agreement to create an obligation for the investigating authorities to calculate precisely the amount of duties that were refunded in excess of those paid with respect to imported inputs consumed and incorporated into the exported products. There is no such obligation and, consequently, Pakistan's claims should be rejected. In any event, in the investigation at hand, the Commission complied with the relevant rules foreseen in Annexes II and III of the SCM Agreement.

25. Pakistan wrongly asserts that the Commission's view was that the "absence of an adequate monitoring process − including sufficient review by the exporting government" was sufficient to justify the deeming of the full amount of drawn-back duties to be the amount of the subsidy, and that "the Commission's approach converts the enquiry into a simple binary question − does an adequate mechanism exist or not?". However, it is not the EU's position that an absence of an adequate control mechanism implies that the full amount rebated or refunded must be countervailed. If there is no such a reliable system or procedure of control in place, the exporting Member can still show that no excess amounts were rebated or refunded, something that Pakistan failed to show in this case on the basis of the actual transactions.

26. Pakistan also wrongly argues that the Commission failed to provide Pakistan with the opportunity to assist the Commission's determination of the excess amount. To recall, according to Annexes II and III, in cases where the investigating authority finds that there is no reliable system or procedure in place, it is for the exporting Member to show that there was no excess amounts

rebated or refunded. As can be seen from paragraph 76 of the provisional determination, Pakistan was sufficiently informed of the Commission's conclusions at that stage of the investigation.

27. Further, Pakistan wrongly considers that it was for the Commission to ask Pakistan to provide evidence that no excess amounts were rebated or refunded through its duty drawback system. The European Union disagrees. Paragraph 2 of the second part in Annex II (similar to paragraph 3 of the second part in Annex III) does not specify *when* the exporting Member has to further examine the actual transactions to show that no excess amounts were rebated or refunded. It could well happen after an investigating authority reaches its preliminary conclusions as to the countervailability of a particular subsidy programme.

28. Moreover, in making its wrong allegations, Pakistan insinuates that the Commission could have estimated the amount of benefit conferred in this case on the basis of information provided by Novatex and in the record of the investigation. However, Novatex's argument in reality amounted to a repetition of its main argument that the duty drawback system was reliable. While Novatex provided a list of around 500 transactions relating to the importation of inputs during the period of investigation, it was impossible for the Commission on the basis of the information provided by Novatex to confirm the amounts incorporated into the exported products, in a situation where, moreover, Novatex was selling both domestically and for export. And even more so when the Commission also found that an effective control done by the Government based on a correctly kept actual consumption register did not take place, and where the Pakistani Government did not carry out a further examination based on actual inputs involved. Thus, the Commission's determination to countervail the entire amount of import duties refunded to Novatex was reasoned and reasonable in view of the specific circumstances of the case.

29. Finally, Pakistan alleges that the Commission failed to investigate whether the duty drawback verification mechanisms were based on "generally accepted commercial practices in the country of export". The European Union disagrees. Whereas paragraph 1 of the second part in Annex II lists the elements that the investigating authority should examine to satisfy itself with the reliability of the verification system (i.e. all the elements, in view of the term "and"), paragraph 2 of the second part in Annex II is phrased in an alternative manner ("or"), thereby indicating that a further examination by the exporting Member is required when the investigating authority finds that the system or procedure in place is "not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively". The Commission did not need to examine whether Pakistan's system was based on "generally accepted commercial practices in the country of export" since it already found that system as not reasonable and was not applied effectively.

### 3.2 Claims relating to the LTF-EOP programme

30. With respect to the LTF-EOP programme, Pakistan essentially argues that the Commission failed, under the *chapeau* of Article 14, to explain, as provided by its municipal law, the methodology it used in the investigation at issue to calculate the amount of benefit to Novatex. The Commission also miscalculated the amount of benefit conferred to Novatex through the LTF-EOP programme in violation of Article 14(b).

31. The LTF-EOP programme was a financing mechanism set up by the State Bank of Pakistan in 2004. It enabled eligible financial institutions to grant financing facilities to borrowers for up to 7.5 years on attractive terms and conditions for the import of machinery, plant, equipment and accessories thereof. It is only available to companies that export, directly or indirectly, at least 50% of their annual production.

32. The key features of the LTF-EOP programme, as found during the investigation, were the following: first, an eligible company could contract financing in a specific amount under the programme. However, it did not have to draw the entire amount at the time it contracted (as would be the case e.g. for a standard mortgage loan). Instead, it could draw down tranches when and if it needed them. Thus, the LTF-EOP programme is comparable to a line of credit. A "line of credit" is not an *ex ante* agreement about the disbursement of specific funding amounts at a pre-determined moment in the future, but rather a lending facility in the form of a promise on the part of a lender to make funding available (in possibly one or more instalments) to a borrower in the event it is requested. The interest rates that the company had to pay for any financing under the scheme were fixed at a maximum of up to 3% over and above the rates notified by the State Bank

of Pakistan ("SBP"), and benchmarked against the weighted average yields of 12 months Treasury Bills and three and five years Pakistan Investment Bonds, depending on the period of financing. The actual interest payable, therefore, was determined *only* at the moment the company draws down any money under the regime. It was therefore a very flexible system of financing, comparable with a line of credit, which allowed companies fulfilling the conditions in order to benefit from it to raise funds if and when they needed them to finance the importation of machines and other equipment.

### 3.2.1 Pakistan's claims under the chapeau of Article 14 of the SCM Agreement have no merit

33. Pakistan claims that the European Union failed to adequately explain the application of its method in the light of its own rules for the calculation of the amount of subsidy in countervailing duty investigations. Pakistan alleges that the Commission did not follow its own methodology to establish "the difference between the amount of interest paid on the government loan and the interest normally payable on a comparable commercial loan during the investigation period" and, hence, the method was not adequately explained in the Commission's determinations. Pakistan claims that the Commission failed to correctly describe the characteristics of Novatex's loan and to explain which type of commercial loan available on the market would be comparable to Novatex's loan agreement. According to Pakistan, the Commission disregarded the loans submitted by Novatex as comparable and did not attempt to identify a comparable loan. The Commission also failed to take into account the multi-tranche character of the LTF-EOP programme and proceeded on the incorrect basis that the entire amount under the LTF-EOP programme had been drawn down during the IP.

34. The Appellate Body previously found that under the chapeau of Article 14 any method used to calculate the benefit shall be provided for in national legislation or implementing regulations of the Member concerned, that method in each particular case shall be transparent and adequately explained and it shall be consistent with the guidelines in paragraphs (a)-(d) of Article 14.

35. In the present case, the Commission undertook to identify a comparable commercial loan - and the related benchmark interest rate - which Novatex could actually obtain on the market with respect to the amount under the LTF-EOP programme that Novatex had drawn down during the IP. This is exactly what EU law (and Article 14(b) SCM) requires of the investigating authority in case of loans (a line of credit is a type of loan, even if it is to be treated differently than a standard commercial loan). This benchmark interest rate was found by the Commission to be SBP's average interest rate as regards outstanding loans during the IP. The SBP's rate had been actively and repeatedly proposed by Novatex and Pakistan (even if the SBP's rate was proposed for a different year than the IP).

36. In the process of identifying this interest rate proxy the Commission discarded other loans (and rates) which Novatex had presented because they were not comparable. The Commission explained in the provisional disclosure of 1 June 2010 that the comparable benchmark interest used was the interest rate of 14.44% applied by the SBP during the IP. The Commission in the final disclosure and determinations also explained that it had rejected the other loans submitted by Novatex because they did not relate to the IP.

37. The Commission made clear in its determinations that it was treating the LTF-EOP programme as a line of credit and not as a standard loan and hence took into account the multi-layered nature of this scheme. This follows for example from paragraphs 121 ("credit provided"), 122 ("interest rates for financing under the LTF-EOP scheme are benchmarked…, depending on the period of financing") and 126 ("long-term loans at preferential interest rates") in the provisional determinations. This also follows from Annex II of the provisional and final company specific disclosure ("line of credit utilisation"). In the final determination the Commission referred to the fact that "the financing negotiated in 2004/2005 was drawn down in tranches."

38. The Commission also properly explained its methodology of using a proxy prevailing during the IP with respect to the amounts outstanding under the LTF-EOP during the IP (i.e., the amounts effectively used or enjoyed by Novatex during the IP). The file also shows that Novatex had clearly understood the Commission's methodology of using a proxy for the IP and of countervailing the entire amount outstanding during the IP.

### 3.2.2 Pakistan's erroneous claims under Article 14(b) of the SCM Agreement

39. First, Pakistan considers that the Commission failed to identify a proper benchmark loan and hence used an improper benchmark interest rate. Second, Pakistan claims that the Commission ignored factual evidence concerning other available loans for Novatex. Third, Pakistan argues that the Commission improperly applied the commercial interest rate proxy from the IP; the Commission should have used a benchmark from the period 2004-2005 or should have taken different benchmarks depending on when the respective tranches were drawn down.

40. The European recalls that a benchmark loan under Article 14(b) must be a loan that is "comparable" to the investigated government loan and should have as many elements as possible in common with the investigated loan to be comparable. The Appellate Body acknowledged that the existence of such an ideal benchmark loan would be extremely rare and hence a comparison is also possible with other loans that present a lesser degree of similarity or with a proxy.

41. The Commission in the present case carefully assessed the information provided by Novatex about comparable private loans. The Commission found that the loans submitted were not comparable with the special financing mechanism under the LTF-EOP programme, which was more akin to a line of credit. The loans and interest rates submitted by Novatex were also not for the correct reference period as they dated from the period 2004-2005 whereas the Commission applied as proxy a rate from the IP, i.e. 2008-2009. Pakistan and Novatex repeatedly advocated and even "requested" the use of the SBP rate as benchmark. The SBP rate was the proxy that the Commission eventually used, even if for a different year than argued by Pakistan and Novatex. It was therefore perfectly reasonable for the Commission to rely on a proxy promoted by the investigated company rather than using non comparable private loans for an incorrect reference period.

42. The Commission was also reasonable in light of the principles contained in Article 14(b) to use the SBP rate (KIBOR) in 2008-2009 as a market benchmark. First, the Commission only countervailed the amount that was "effectively used" or enjoyed by Novatex in 2008-2009 and, hence, it was appropriate to also apply a benchmark for that same period. Second, amounts under the LTF-EOP programme continued to be drawn down during the IP which further confirms the close nexus between the benchmark chosen by the Commission and the LTF-EOP programme. Third, Novatex had not provided any information about the start dates of the respective tranches and the Commission therefore had no means of calculating the respective benchmarks as now requested by Pakistan. Fourth, using different benchmark interest rates for each tranche would have disregarded the character of the LTF-EOP mechanism as a single financing scheme and would in fact have treated the tranches as separate individual loans which would not reflect the reality of the financing scheme. The European Union also notes that the EU General Court agreed that the Commission was justified to use the KIBOR in 2008-2009 as a benchmark, and Novatex did not appeal this finding before the EU Court of Justice.

43. In fact, the Commission was reasonable in taking the SBP rate suggested by Pakistan and Novatex, which was an average of various rates having short-term durations (from one day, one week, on month, one year and three years), whereas the repayment terms of the LTF-EOP mechanism were in principle 7.5 years. Obviously, a short-term rate is lower than a longer-term rate because of the higher risk of non-payment involved. The Commission was all the more reasonable as it also did not take into account the benefit for Novatex resulting from the flexibility under the LTF-EOP, namely the availability of the money for Novatex at any time, nor did it take into account the generous grace period for repayments under the LTF-EOP programme.

## 3.3 Claims relating to causation (Article 15.5 of the SCM Agreement)

### 3.3.1 Pakistan's erroneous claim concerning the nature of the obligation to examine other known factors

44. Pakistan argues that Article 15.5 requires investigating authorities not only to separate and distinguish the effects of other known factors from those of the subsidised imports, but more specifically to perform this analysis in a particular order. According to Pakistan, the effects of other factors must be assessed as a "first step", which would then be followed by an analysis of the effects of the subsidised imports. At least, Pakistan argues, the injurious effects of other factors and of the subsidized imports must be assessed at the same time. Pakistan contends that the

Commission's method of analysing first whether the subsidized imports caused the injury and only to assess, in a second step, if the other factors break the causal link, is not in conformity with Article 15.5.

45. None of the case-law cited by Pakistan supports such an interpretation. Contrary to Pakistan's assertion, the Appellate Body does not prescribe any particular order of analysis. According to the Appellate Body the injurious effects of other known factors must be separated and distinguished from those of the subsidised imports. Quite to the contrary, the Appellate Body in fact emphasized that no particular method is prescribed for this assessment. And even Pakistan acknowledges that authorities enjoy "a degree of discretion" to carry out the non-attribution analysis. The method applied by the Commission in the present case is also supported by the wording of Article 15.5. Article 15.5 requires investigating authorities, in the first sentence, to demonstrate that the subsidised imports caused injury through their effects and only subsequently, in the third sentence, to "also examine other factors".

46. What follows from the case-law on non-attribution is that there is no particular method of analysis and that such analysis will depend on the facts of the case. There is no obligation to quantify the amount of injury caused by the subsidised imports and by other factors, respectively. Investigating authorities have an obligation to provide a satisfactory explanation of the nature and extent of the injurious effects of other known factors. If adequately reasoned, a qualitative explanation is sufficient. The proper standard remains whether the EU properly established the facts with respect to the other "known factors" and evaluated the evidence in an objective and unbiased manner.

47. In the investigation at hand, the Commission first examined whether subsidised imports caused injury to domestic producers, and concluded that they did. Then, it carefully examined whether the effects of any of the other known factors are such as to affect that preliminary conclusion, i.e. to "break the causal link". It concluded that they did not. In doing so, the Commission fulfilled its obligation to separate and distinguish the effects of subsidised imports from the effects of other known factors.

### 3.3.2 Pakistan's erroneous claim regarding the Commission's analysis of specific known factors

48. Pakistan claims that the European Union acted inconsistently with Article 15.5 SCM Agreement because it allegedly improperly assessed the role of other factors which, in Pakistan's view, broke the causal link between the subsidy and the injury. The other factors challenged by Pakistan are (i) the Korean imports, (ii) the economic downturn, (iii) non-cooperating domestic producers and (iv) oil prices.

49. First, regarding the **Korean imports** the EU recalls that the Commission separated and distinguished their effects and recognised that they may have contributed to injury. In the process the Commission carried out an extensive analysis of prices, market shares and volumes of Korean, subsidised and domestic producers. The Commission reasoned that prices of Korean imports were higher than the subsidised imports and only slightly below prices of domestic producers and hence their contribution would only be limited. This type of qualitative explanation is exactly what the case-law requires. No precise quantification of the injury is required under Article 15.5.

50. Second, with respect to the **economic downturn**, the Commission acknowledged that it contributed to the injury but concluded that it did not break the causal link. Pakistan claims that the Commission did not sufficiently distinguish and separate this element as it failed to assess the "nature and extent of the hurt". Pakistan errs about the legal standard which is not about the precise quantification of injury. The Commission clearly explained that the downturn only started in the last quarter of 2008 and that it had a global character, which meant that it similarly affected domestic and importing producers. More is not needed. The role of Korean imports and non-cooperating domestic producers did not have to be re-assessed in this context as these factors had been analysed by the Commission separately. Pakistan's claim that the Commission made no separate finding of injury for the period prior to the last quarter of 2008 is misguided. The key finding of the Commission was that the economic downturn only contributed to the injury as of the last quarter of 2008, i.e. the impact was limited in time and the downturn had no impact whatsoever on the third quarter of 2008 during the IP. The Commission's data cover the entire

period of 2006 to 2009 and establish injury notably for the period of investigation. More is not needed.

51. Third, regarding the market shares of **non-cooperating domestic producers** Pakistan errs when it contends that the Commission should have carried out a more in-depth trend analysis rather than focusing on a point-to-point assessment. The Commission did not carry out a simple point-to-point assessment but analysed the market shares in each year. As set forth in the Commission's determinations, the subsidised imports increased their market share by around 500% from 2.1% to 10.2% between 2006 and 2009 whereas the non-cooperating domestic producers lost around 20% of their market share in the same period (i.e. a decrease in market share from 20.5% to 16%). Under these circumstances, it was perfectly reasonable for the Commission to conclude that non-cooperating producers did not break the casual link, irrespective of whether they managed to increase their market share by a few percentage points between 2008 and the investigation period (i.e. from 12.4% to 16%). A more detailed trend analysis would not have made any difference in the Commission's assessment. In addition, one of companies concerned stopped production during the IP and two others shortly after the IP, further confirming that these producers could not break the causal link.

52. Fourth, Pakistan's challenge regarding the Commission's assessment of **crude oil prices** is without merit. The Commission stated in its determinations that crude oil prices were volatile at a worldwide level. A factor that equally or similarly affects both subsidised imports and domestic producers by definition cannot break the causal link. Even if crude oil prices and hence PET prices may have been low at times, subsidised imports could be priced even lower as a result of the subsidies and were priced lower as established by the Commission.

### 3.4 Claims relating to verification visits (Articles 12.6 and 12.8 of the SCM Agreement)

53. Pakistan claims that the Commission acted inconsistently with Article 12.6 of the SCM Agreement because it failed to disclose the "results" of the Commission's verification visit. Pakistan argues that the Commission complied neither with the first alternative set out in Article 12.6, namely to make the results of the verification visit available separately, nor with the second alternative of Article 12.6, namely to disclose the results of the verification visit as part of the disclosure of essential facts. Pakistan contends that − with the exception of the MBS − the Commission failed to communicate anything even remotely resembling the "results" of the verification visit. According to Pakistan, "results" of verification visits include "adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully". The Commission did not provide information of what occurred during the verification visit, which additional documents were collected, which information was corrected and which topics, other than the MBS, the Commission discussed with the investigated company.

#### 3.4.1 Legal standard under Article 12.6 of the SCM Agreement

54. Article 12.6 of the SCM Agreement provides for the possibility of verification visits and lays out the general obligations that apply to investigating authorities if they undertake such a procedure. There is no obligation on the part of investigating authorities to carry out verification visits. Regarding the disclosure of the results of the verification visit to the verified firms, Article 12.6 allows for two methods: the investigating authority either "shall make the results of any such investigations available", or "shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain". The results "may" be made available to the applicants, but there is no obligation to do so. The ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design" and suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. The context of Article 12.6 as well as its direct cross-reference to Article 12.8 of the SCM Agreement confirm that the term "results" is information that is closely related to the essential facts. Article 12.6 therefore does not require a full report on everything that happened during the verification visit, i.e. lengthy minutes.

### 3.4.2 Factual Background

55. The on-the-spot investigation of Novatex took place from 15-17 December 2009 at Novatex's premises in Karachi in the presence of Novatex's legal counsel. On 23-24 February 2010 a hearing and consultations with the government of Pakistan took place. By provisional disclosure of 1 June 2010 the Commission disclosed to Novatex "the essential facts" including the provisional determinations and the company-specific subsidy calculations. Novatex provided its observations to the provisional disclosure by way of a written submission on 1 July 2010. Consultations with Pakistan took place on 12 July 2010. At the request of Novatex, a hearing took place on 14 July 2010. The definitive disclosure by the Commission took place by letter of 26 July 2010. In this final disclosure the Commission informed Novatex of the essential facts which included *inter alia* a specific company disclosure document. Both Pakistan and Novatex provided extensive comments during the entire procedure.

### 3.4.3 The European Union's Rebuttal of Pakistan's claims

56. In the European Union's view, the results or outcome of a verification visit is the "yes" or "no" answer to the fact that certain information was checked (in the sense of reviewed and verified) during the verification visit by the investigating authority (and, by implication, that other information was not checked). In exceptional circumstances, the results of the verification visit may also include limited additional information (e.g. in case of the use of facts available the fact that the investigating authority requested information during the verification visit and that it was not provided). This interpretation of "results" follows from the close textual and thematic relationship between Article 12.6 on verification visits and Article 12.8 on the disclosure of essential facts. The purpose of Article 12.8 is to allow interested parties and interested Members "to defend their interests" by disclosing the essential facts and it is against this background that the obligation of Article 12.6 should be interpreted.

57. The European Union takes the position that the term "result" does not include information, for example, about whether the Commission requested additional documents, whether Novatex provided requested documents or whether the Commission asked questions during the verification visit. This is because such actions do not constitute "results" or an outcome of the verification visit but form part of the "process" of the verification visit. Nor does the term result comprise information about whether the Commission could or could not verify the accuracy of the information on the spot or whether the Commission corrected certain information as a result of the verification visit. This is because such information does not concern the result of the verification visit within the meaning of Annex VI(7) but concerns the overall result of the Commission's investigation which will be disclosed, to the extent relevant, as essential facts.

58. In the present case, the Commission established a log of exhibits which listed all documents that were collected and checked during the verification visit at Novatex. The European Union also recalls that Novatex (and its lawyer) was present during the entire verification visit. The Commission can only verify information during the verification visit that is actively provided by the company investigated. The Commission cannot choose to verify documents at its discretion but depends on the cooperation of the company investigated in this respect. Novatex was therefore fully aware of what was verified during the verification visit. In addition, Novatex has not claimed that any information about the verification visit that is indispensable for its due process rights was not made available.

## 4 CONCLUSIONS

59. In view of the foregoing, the European Union requests the Panel to reject Pakistan's claims in their entirety.

## ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

### 1. INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its second written submission, its opening oral statement at the second substantive meeting and its responses to the Panel's questions.

### 2. LEGAL ARGUMENTS

#### *2.1. ARTICLE 6.2 DSU / TERMS OF REFERENCE ISSUES*

2. The EU has raised important jurisdictional issues in a preliminary ruling request. The EU reiterates its stance that the function and role of a panel is to adjudicate disputes (in the sense of Article 3.3. of the DSU) for the purposes set out in Articles 3.4 and 3.7 of the DSU. In light of the withdrawal of the contested measure without any lingering effect or a possibility of reintroduction, there is no dispute between the parties in the sense of Article 3.3 of the DSU. For this reason and not contesting the Panel's jurisdiction, the dispute settlement system should not be used for "advisory opinions". Therefore, the Panel should refrain from taking a formal and final position on a given interpretation of the relevant provisions at stake and from making findings on the consistency of the Commission's determination. The Panel should limit its report to the views of the parties and the uncontested facts, without making findings.

3. Annex I(i) of the SCM Agreement provides an example of prohibited export subsidies falling under Article 3.1(a) of the SCM Agreement and creates rights and obligations for WTO Members. The scope of the examples illustrated should be determined pursuant to the requirements of Annex I(i), and Annexes II and III by reference. These requirements in their totality apply to panels and WTO Members. In light of Pakistan's agreement of the link between Annex I(i) and Annexes II and III, the EU argues that the wording in footnote 1 of the SCM Agreement should also be read to incorporate the requirements of Annexes I to III and its carve-out should apply only pursuant to steps explicitly foreseen in these Annexes.

4. With regard to the limits of Article 6.2 of the DSU, Pakistan should not be allowed to repurpose its arguments under its now withdrawn Annexes II(II)(4)-(5) claims, to fall under Annex I(i) and/or Annex II(II)(2), thus circumventing Article 6.2 of the DSU and its own Panel Request. Similarly, Pakistan in its first written submission focused only on one of two allegations with respect to the MBS programme – on the amount countervailed rather than on the finding of a subsidy. It is not possible that both pleas were raised as part of the same analysis due to the different obligations applicable to them. Footnote 1 and Annexes I to III are not applicable to the issue of the correct amount to be countervailed, however SCM provisions regarding "benefit", not properly raised by Pakistan, would have been relevant. Due to the MBS programme not fulfilling the requirements to constitute a proper duty drawback system, this footnote 1 does not apply at all.

5. The EU considers that the certain claims, not included in the Panel Request should not be accepted by the Panel. These claims are entirely consequential to its main argument on the exact calculation of the amount foregone. A party should not be allowed to expand the scope of the dispute through its written submissions. Furthermore, Pakistan has itself confirmed in its responses that some of its claims are entirely consequential and, should, therefore be dropped.

6. Finally, through its claim of a violation of Annexes II(II) and III(II) "as a whole", Pakistan is seeking an advisory opinion from the Panel. Accordingly, this claim should be rejected.

#### *2.2. CLAIMS RELATING TO THE MBS PROGRAMME*

7. In the view of the EU, footnote 1 of the SCM Agreement is a "scope" provision, similar to Ad Note to Article XVI of the GATT 1994, rather than an "exception" provision. Furthermore,

footnote 1 does not expand or compliment the definition of "financial contribution" in cases of duty drawbacks. Such systems could fall either under Article 1.1(a)(1)(i) or (ii), but it rather informs the entire Article 1 by specifying a situation of a remission or refund that does not amount to a subsidy and does not fall under the disciplines of the SCM Agreement. If the situation described in footnote 1 is found to exist, "in accordance with" the provisions in Annexes I to III of the SCM Agreement, the disciplines of the SCM Agreement will not apply to it. However, any remissions or refunds in excess of the import duties paid on import inputs used on the production of exported products would be considered an export subsidy, pursuant to Annex I(i) and Annexes II and III. Although being entitled "guidelines", Annexes II and III should be construed as binding upon WTO Members, similar to other "principles or "guidelines" in the Agreement.

8. In connection with Pakistan's claims as to the amount to be countervailed, the determination of a "financial contribution" in Article 1.1(a)(1)(ii) of the SCM Agreement should be distinguished from any "benefit" granted as a separate determination. The "financial contribution" is the revenue foregone by the state, owed "but for" the MBS program. The determination of the existence of "benefit" is a different, further step. In a case not fulfilling the requirements of footnote 1 and where there is an excess remission or refund, the benefit countervailable would only be that excess remission, provided that the necessary information to calculate it is available and reliable. Footnote 1 does not contain an obligation for an investigating authority to establish in each case whether an excess amount was drawn back.

9. Annexes II(II) and III(II) contain the elements necessary to determine whether there has been an excess remission or not, a requirement for the existence of the situation under footnote 1. First, an exporting Member must have a verification system or procedure, allowing the tracing of inputs consumed and their quantity in the production of exports. Second, the system or procedure should be reasonable, effective and based on generally accepted commercial practices. In this regard, the Commission's determination that Pakistan's verification system was inadequate has remained unchallenged. Its reasoning for this finding is set out below. Third, if there is no (adequate) verification system or procedure, a further examination by the exporting Member of the actual inputs used in export production must be carried out, so as to determine whether excess remission has occurred. Annexes II and III are silent on further steps when no such "further examination" takes place. Since footnote 1 refers specifically to them, no other provisions of the SCM Agreement apply in this regard.

10. As to the question of who is responsible for the "further examination", Annexes I to III do not contain any obligation for investigating authorities to request the results of any "further examination" from the exporting Member, nevertheless, the Commission has never showed any unwillingness to allow such further examinations. In its provisional determination, the Commission clearly signalled that Pakistan had failed to conduct a "further examination", alerting it of its obligations under Annex II(II)(2) and allowing it multiple occasions to provide it. The list of issues, which Pakistan alleges it had to receive from the Commission to aid it in this task, is not provided for in Annex II(II)(2). After the finding of inadequacy of the verification system, the obligation to conduct a "further examination" falls only on the exporting Member, as it is the one benefitting under footnote 1, and no obligation on Members to "give notice" is envisioned.

11. With regard to additional evidence, evidence on the record should be considered even when a "further examination" is not provided and, therefore, footnote 1 is found to be inapplicable. The remaining disciplines of the SCM Agreement apply to the measure at issue, resulting in an obligation on investigating authorities to conduct a normal assessment of whether the contested measure amounts to a subsidy and its amount. All foregone or refunded import duties could be considered a countervailable subsidy. The determination of the appropriate amount to countervail should be judged in view of other obligations of the SCM Agreement (such as Article 14 or 19.4), and in light of the totality of the evidence and information available in each case. Absent an adequate verification system or a further examination by the exporting Member, as well as no other reliable information, investigating authorities should be permitted to conclude, on the basis of the information available, to countervail the entire amount.

12. In this regard, the EU's position and practice has been that when an inadequate verification system exists, companies' records may be relied on, if they clearly show what imported inputs were used for the production of exports. In the present case, this was not possible, as (1) Novatex was not subject to regular customs supervision, (2) was sourcing inputs both locally and from abroad, the majority of one of its main raw materials being of local origin, (3) did not provide for

any traceability of the use of differently sourced inputs, and (4) was selling both locally as well as on foreign markets. These findings were confirmed through a verification visit. Nevertheless, the Commission accepted Nocatex's cost of production and the duty drawback amounts for its calculations, however, remained unable to conclude that Novatex was only using imported raw materials in the production of exported products. Thus, the Commission could not rely on the information.

13. The Commission could not rely on the information of the MBS programme either, due to its (1) reliance on company-provided "theoretical" information, (2) lack of verification aside from documents provided by the companies themselves, (3) lack of regular checks and follow-ups and (4) lack of traceability of the uses of domestic and imported raw materials into final products, but rather a blind assumption that exported products were entirely produced from imported inputs. A systemic risk was identified by the European Union. The exporting Member could not show that no excess remissions occurred in its duty drawback scheme. A differing degree of "adequacy" of the system due to deference to the company's own data, lacking government verification or monitoring, cannot be acceptable for the purposes of footnote 1. Having examined the requirement of traceability in a duty drawback system, the Commission did not have to examine the element of "generally accepted commercial practices", another independent reason or finding the verification system inadequate.

14. For the foregoing reasons, the Commission reasonably concluded that the subsidy amount for Novatex should be calculated on the basis of import duties foregone on the imported material under the MBS programme, used for the product concerned during the investigation period.

15. Pakistan's contention that there was ample evidence on the record to permit the Commission to determine the exact excess remission is wrong. Even Pakistan could not provide examples of such evidence. In any event, footnote 1 (together with Annex I to III) does not place a burden of showing that excess remissions occurred on investigating authorities. Such obligation relates to the determination of the amount to be countervailed and is laid down in other provisions of the SCM Agreement, which were not cited by Pakistan in this dispute.

### *2.3. CLAIMS RELATING TO THE LTF-EOP PROGRAMME*

#### 2.3.1. Pakistan's claim under the chapeau of Article 14 SCM Agreement

16. The relevant legal standard under the chapeau of Article 14 is whether the Commission adequately explained its methodology for calculating the benefit in accordance with its municipal law. The legal standard is not whether the Commission's determinations set forth in sufficient detail the material findings and conclusions reached on issues of fact and law (e.g. whether the Commission set out in its determinations why it rejected the loans proposed by Novatex as non-comparable). Such a standard only applies to claims under Article 22.3 which Pakistan decided not to pursue in the present case.

17. The Commission's methodology for calculating benefit in the present case is set forth in Article 6(b) of the Basic CVD Regulation. Just like Article 14(b) of the SCM Agreement, Article 6(b) requires the Commission to calculate the benefit on the basis of the difference between the interest paid by the investigated company for the government loan and the interest that would be due under a comparable commercial loan. The Commission explicitly referred to Article 6(b) and therefore to its calculation method in the provisional determinations.

18. Under the *chapeau* of Article 14 the investigating authority has to adequately explain the methodology used to calculate benefit. In the present case the Commission indeed adequately explained all the basic parameters of its calculation method:

- It was clear from the determinations and other evidence that the Commission treated the preferential credit mechanism as a line of credit. The Commission explicitly used the term "line of credit" in its company specific disclosures and described the LTF-EOP as a line of credit in its provisional and final determinations. Irrespective of the Commission's legal or factual qualification of the preferential credit mechanism as a line of credit in its determinations, the Commission clearly explained its method for calculating the benefit for the LTF-EOP programme, namely the applicable legal provision as well as which comparable benchmark rate, which benchmark year and which amounts it would use

(see the following bullet points). This is all that matters under the chapeau of Article 14. It should be recalled once again that Pakistan did not make a claim under Article 22.3.

- The Commission explained in recital 131 of the provisional determinations that the calculation of benefit for the preferential line of credit mechanism was to be carried out under Article 6(b) of the Basic CVD Regulation, the applicable municipal law. Article 6(b) provides for a calculation of benefit based on a comparison of the interest rate paid by the investigated company under the investigated government loan and the rate that the company would have paid under a comparable commercial loan.

- The Commission in the same recital also explained that the benefit would be calculated by comparing the interest rate under the LTF-EOP programme with an "applicable commercial credit rate", in line with Article 6(b). This was clearly understood by Novatex and Pakistan which submitted comparable loans and interest rates to the Commission.

- The Commission also explained in the provisional and final disclosure that the proxy interest rate applied by the Commission was the SBP rate, i.e. the KIBOR rate. This was explicitly so stated in the provisional company-specific disclosure, in the final company-specific disclosure, in the General Disclosure Document and in the final determinations. In fact, it was Pakistan and Novatex that submitted the KIBOR rates to the Commission. Novatex and Pakistan therefore clearly understood that the Commission was going to use the KIBOR for the IP and both supported the use of the KIBOR rate as a matter of principle (while arguing for a different year).

- The Commission further explained that the relevant benchmark year for the comparable rate was the IP. This was explicitly so stated in the provisional company-specific disclosure, in the final company-specific disclosure, in the General Disclosure Document as well as in the final determinations. This was clearly understood by Novatex and Pakistan which both disagreed with the Commission's choice and repeatedly insisted on the use of a different benchmark year.

- Finally, the Commission explained that it was using the amounts effectively used during the IP under the LTF-EOP (including both outstanding amounts and amounts drawn down during the IP) to calculate the benefit. This clearly follows from the calculations and calculation sheets which were provided by the Commission to Novatex in the provisional and final disclosure. These calculation sheets show that the Commission compared the interest rate actually paid by Novatex with the interest rate proxy on the basis of the respective outstanding amounts during the IP. The Commission in the General Disclosure Document also stated that it used for its calculation "the amount of credit for the IP, as reported by Novatex". This was also clearly understood by Novatex which explicitly acknowledged that the benchmark rate would "be applied to the outstanding amount in the IP."

19. Contrary to Pakistan's claims it was also clear from the determinations and other evidence that the Commission treated the preferential credit mechanism as a line of credit. The Commission explicitly used the term "line of credit" in its company specific disclosures and described the LTF-EOP as a line of credit in its provisional and final determinations. Irrespective of the Commission's legal or factual qualification of the preferential credit mechanism as a line of credit in its determinations, the Commission clearly explained its method for calculating the benefit for the LTF-EOP programme, namely the applicable legal provision as well as which comparable benchmark rate, which benchmark year and which amounts it would use (see the following bullet points). This is all that matters under the chapeau of Article 14. It should be recalled once again that Pakistan did not make a claim under Article 22.3.

20. Therefore, all the essential parameters of the Commission's methodology to calculate benefit were clearly explained in the Commission's determinations and were fully understood by Novatex and Pakistan. There is no violation of the transparency requirements of the chapeau of Article 14 as alleged by Pakistan.

2.3.2. Pakistan's claims under Article 14(b) of the SCM Agreement

21. The EU recalls that Article 14(b) contains "guidelines" and that investigating authorities have a considerable amount of flexibility and discretion when calculating benefit. Article 14(b) requires a comparison with a benchmark loan, comparable to the investigated government loan, with "as many elements as possible in common". Where a similar commercial loan to the same borrower does not exist, other similar loans may be used, including proxies. The individual calculation method is a matter of case-by-case analysis. The question is whether in the present the Commission's methodology to calculate benefit was reasonable and appropriate in light of all relevant circumstances.

22. The EU also notes that Pakistan's claims under Article 14(b) - that the Commission's search for a comparable commercial loan and the rejection of the loans submitted by Novatex are not sufficiently reflected in the Commission's determinations − must be rejected as these aspects are sufficiently reflected in the determinations and, in any event, these claims can only be brought under Article 22.3 and not under Article 14(b).

23. ***Progressive search***. The EU has shown that the Commission did carry out a search for a comparable loan that was appropriate under the circumstances of the case. The Commission in the questionnaire asked Novatex to provide comparable commercial loans. The Commission ultimately did not use the loans submitted by Novatex for its calculation of benefit (i) because the loans were standard commercial loans and hence not comparable to a preferential line of credit mechanism like the LTF-EOP programme, (ii) because they dated from the years 2004 and 2005 and not from the IP and (iii) because they displayed different characteristics with respect to duration, amounts etc. The Commission instead used the KIBOR rate because this rate reflected the average lending rate of all companies in Pakistan. The KIBOR rate was also actively and repeatedly promoted by Pakistan and Novatex as the record amply shows. For example, already in November 2009, Novatex submitted to the Commission a loan, said to be comparable, that was tied to the KIBOR/SBP rate. During the investigation, Novatex requested, for example, that the benchmark rate should "in any event not be more than the SBP website rate" and Pakistan claimed that "it is just plain logic" to compare the rate under the LTF-EOP to the KIBOR rate. Therefore, under these circumstances, where the investigating authority and the parties agreed on an appropriate benchmark rate as a matter of principle, there was no reason for the Commission to search further for a comparable loan.

24. ***Use of KIBOR rate in IP***. The EU considers that the moment of drawdown of certain amounts, which was the subject of some discussion, is irrelevant for the legal question whether the Commission could use the KIBOR rate during the IP. The EU recalls that it has consistently maintained the position that the Commission, at the time of the investigation, had to assume that the amounts indicated on the excel spreadsheets under the heading "Opening" were disbursed in July 2008, i.e. during the IP because of the way in which the spreadsheets were provided and presented by Novatex. Furthermore, it was also clearly understood by Novatex and Pakistan which amounts the Commission had taken into account in its calculation of benefit, namely the amounts outstanding during the IP as reported by Novatex. At no point during the investigation did Novatex or Pakistan contest the amounts taken into account by the Commission in its calculations. In any event, Pakistan also agrees that the exact moment of drawdown of the amounts in question is in fact irrelevant for the legal assessment in this case because it is undisputed that the amounts used for the calculation of benefit were outstanding during the IP. The decisive question is therefore whether the Commission was correct to use the IP for the determination of the benchmark proxy or was legally required to use a previous year of a "mix" of different years. This question depends on the characteristics of the financial instrument under investigation.

25. The LTF-EOP programme was a flexible financing instrument akin to a line of credit, and not a typical standard loan with a fixed rate. A previous panel has confirmed that a line of credit is to be distinguished from a standard loan. There are many differences between a standard loan and the preferential line of credit mechanism granted to Novatex.

26. Under a standard loan, the entire amount would have been disbursed in 2005. Under the preferential line of credit mechanism, the amounts were disbursed to Novatex during an extended period, between 2005 and 2009. Novatex therefore had flexibility as to when to withdraw the amounts. The banks had to hold the respective amounts in reserve. Under a standard loan, the repayment obligation would have started immediately after conclusion of the contract in

June 2005. Under the preferential credit mechanism, the repayment obligation for Novatex regarding the principal only started more than two years later, in July 2007. Under a standard loan, the interest rate would have been fixed for the entire repayment period and for the entire amount. Under the preferential line of credit mechanism, the interest rate depended on the moment of withdrawal by Novatex. The EU does not contest that the interest rates were fixed for a specific tranche once that tranche was drawn down. However, Novatex could decide when to draw down the money and hence could in principle influence the interest rate which is very different from a standard commercial loan. The fact that ultimately only one single interest rate applied for the different tranches was only decided ex post in view of the market circumstances, in order to ensure that Novatex would maintain the advantageous financial mechanism, no matter how high the market rates would be.

27. Moreover, nothing prevented Novatex from seeking financing from the market if the market conditions changed in a more favourable manner than the LTF-EOP mechanism. Indeed, under a standard loan, the borrower decides to get all the necessary financing at a given moment in time. In contrast, through the LTF-EOP mechanism, Novatex could decide whether to draw down further instalments if and when it needed the money, and it could also decide to borrow the money from other sources, market conditions so permitting, without the need to renegotiate the original preferential credit mechanism and without incurring any penalties.

28. It is in light of the above considerations, that the alternative calculation methods presented by Pakistan and the Commission's calculation method should be assessed.

29. First, the Commission was not obliged to use the year 2005 for the KIBOR rate as requested by Pakistan and Novatex during the investigation. The interest rate under the preferential line of credit mechanism was not determined or fixed in 2005 but depended on the moment of drawdown. The repayment obligation by Novatex on the principal did not start in 2005 but only in July 2007. The credit amount was not disbursed in 2005 but over a 4-year period.

30. Second, the Commission was not obliged to use a mix of different years for the determination of the benchmark as requested by Pakistan before the Panel. The Commission would have needed very detailed information about each disbursement by each individual bank to Novatex prior to the IP under the LTF-EOP. It is undisputed that Novatex did not provide this information during the investigation. Pakistan did not even provide this information when asked by the Panel. Hence, the Commission was simply unable to perform such a calculation, even leaving aside the practical difficulties of such a calculation. In addition, neither Pakistan nor Novatex ever raised this particular – and very complex - calculation method during the investigation. Both Pakistan and Novatex consistently and exclusively requested a calculation based on the benchmark year of 2005. Such a scientific approach is not legally required and would not only put an enormous burden on parties, investigating authorities and the respective review bodies but would also significantly increase the risk of arithmetical errors and hence of legal challenges. Finally, using several benchmark years would also treat the LTF-EOP programme as separate mini standard loans and hence would disregard the flexibility of this preferential financing instrument and its nature as being akin to a line of credit.

31. Third, it was perfectly legitimate for the Commission to use the IP as the KIBOR benchmark year since the IP provided a good "snapshot" of the LTF-EOP line of credit facility for several reasons: Novatex continued repaying outstanding amounts under the LTF-EOP during the IP. Disbursements under the preferential credit mechanism also continued during the IP. And Novatex benefited from the respective amounts that were outstanding during the IP. All these elements render the IP a perfectly suitable period for the determination of the benchmark rate proxy. The Commission certainly complied with the standard of reasonableness that permeates the guidelines under Article 14. This applies all the more so as the Commission acted in the favour of Novatex by using the shorter term KIBOR rate for a long-term credit mechanism and by not taking into account the 2-year grace period for the repayment of the principal in its benefit calculation.

32. Therefore, the EU maintains its request that the Panel should reject Pakistan's claims against the Commission's determination regarding the preferential credit mechanism in their entirety.

### *2.4. CLAIMS RELATING TO CAUSATION (ARTICLE 15.5 OF THE SCM AGREEMENT)*

#### 2.4.1. The Commission's method in the causation analysis

33. Under Article 15.5 of the SCM Agreement investigating authorities must "separate and distinguish" the injurious effects of other known factors from those of the alleged subsidised imports. When both subsidised imports and other factors potentially causing injury are present at the same time, the investigating authority must assess whether and to what extent subsidised imports cause injury, and whether and to what extent other factors cause injury. These two "steps" can be done in either sequence, and there is no reason why the assessment of one "step" should not refer to findings made in the other "step".

34. Article 15.5 imposes no obligation to carry out the causation analysis in a particular order. Causation and non-attribution are closely related aspects of the overall assessment of a causal link between the subsidized imports and the injury, and it would be artificial to impose a particular order of analysis between them. This position is also supported by the Appellate Body which emphasized the discretion enjoyed by the investigating authority in this respect and repeatedly stated that no method was prescribed for the process of separating and distinguishing the injurious effects of subsidized imports from other known factors.

35. Pakistan's claim that the Appellate Body in *US - Wheat Gluten* would have mandated the three-step analysis advocated by Pakistan is incorrect. *US - Wheat Gluten* concerned non-attribution under the Safeguards Agreement, and the main focus of the Appellate Body was that the effects of other known factors should be properly separated and distinguished. In subsequent cases, the Appellate Body has also repeatedly emphasized that Article 15.5 does not set out a specific order of analysis, e.g. in *US Hot-Rolled Steel and in EC – Tube or Pipe Fittings* where the Appellate Body "underscored" that no method is prescribed for non-attribution.

36. Pakistan's claim that the Commission's preliminary finding of a causal link in the first step of the Commission's analysis can never become less than "substantial" or be undone by other factors is also obviously incorrect. If that were the case, the Commission would always find a causal link in its determinations and could never come to the conclusion that other factors were the true cause of injury. Pakistan's allegation is belied by the many terminations of Commission's investigations in anti-dumping and anti-subsidy proceedings where other factors were found to be the true cause of injury.

37. Pakistan's attempt to find support in previous negative determinations of the Commission in which the Commission did not use verbatim the phrase that the causal link was "broken" by other factors is misguided. It is obvious that in case of negative determinations an investigating authority will not find interim causation by subsidised imports only to find a few paragraphs later that causation was "broken" and injury was in fact caused by other factors. In such case, an investigating authority will simply condense its written analysis and find that the injury was not caused, or not sufficiently caused, by the subsidised imports. This does not change the fact that for a positive determination, which is solely at issue in the present case, the Commission's method constitutes a logical sequence and useful analytical tool to assess whether the subsidised imports constitute a genuine and substantial cause of injury as required under the case-law.

38. In the present case, the Commission first established that there was a causal link between subsidised imports and an injury to domestic producers. Then the Commission examined other known factors and whether they could break the causal link between the imports and the injury, concluding that they did not. As such, the Commission fully met its obligation to separate and distinguish the effects of subsidized imports from the effects of other known factors.

39. The European Union also recalls that under the case law investigating authorities are not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.

40. Thus, Pakistan's claim against the Commission's method of assessing causation should be rejected.

2.4.2. The Commission's analysis of specific known factors

41. Contrary to Pakistan's claims, the Commission provided a well-reasoned explanation in the determinations why the nature and extent of the contribution of specific other factors were insufficient to break the causal link.

42. First, regarding the **Korean imports** the EU recalls that the Commission separated and distinguished their effects and recognised that they may have contributed to injury. In the process the Commission carried out an extensive analysis of prices, market shares and volumes of Korean, subsidised and domestic producers. The Commission reasoned that prices of Korean imports were higher than the subsidised imports and only slightly below prices of domestic producers and hence their contribution would only be limited. This finding is further supported by the lower volumes of Korean imports and the fact that subject imports increased by 440% whereas Korean imports only increased by 146% since 2006. This type of qualitative explanation is exactly what the case-law requires. No additional quantification of the injury is required under Article 15.5.

43. Regarding the **economic downturn**, the EU recalls that the Commission found that the downturn did have an injurious effect. But the downturn did not break the causal link because it had a global character and hence affected all companies more or less equally. In addition, the Commission stated in the determinations that the downturn had no impact on the period prior to the last quarter of 2008. This made clear that the downturn only affected part of the period considered (i.e. 1 January 2006 to the end of the IP), namely three quarters out of 3.5 years and part of the IP, namely three out of four quarters starting in September 2008. The downturn therefore only affected 3 quarters during the period considered and during the IP and hence had a limited impact in terms of duration.

44. The Commission made it clear in its determinations that **oil prices** were not low but volatile during the IP and that they were "world" prices and hence applied to all companies equally. Oil price developments did not break the causal link.

45. Regarding **non-cooperating EU producers**, the EU recalls that the market share of the subsidised imports increased by almost 500% during the period considered whereas the non-cooperating EU producers lost 20% market share during the same time. This would in itself be sufficient to counter any argument that these producers would have broken the causal link. The Commission also assessed the market shares during a period of 4 years and did not simply carry out a point-to-point analysis of two years. In addition, the EU observes that several non-cooperating producers exited the market during or shortly after the IP, which confirms that the slight increase of market share during the IP of was not a reversal of the previous trend of declining market shares.

46. Pakistan's claims under Article 15.5 should therefore be rejected.

2.5. CLAIMS RELATING TO VERIFICATION VISITS (ARTICLE 12.6 SCM AGREEMENT)

2.5.1. The proper legal standard under Article 12.6 of the SCM Agreement and the meaning of "result"

47. Article 12.6 of the SCM Agreement makes it clear that investigating authorities are not required to conduct a verification visit but rather gives permission to do so ("may carry out…"). Regarding the disclosure of the results of the verification visit to the verified firms, Article 12.6 allows for two methods: the investigating authority either "shall make the results of any such investigations available", or "shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain". The purpose of the disclosure requirement under Article 12.6 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results.

48. The phrase "results of any such investigations" within the meaning of Article 12.6 is to be understood as category of information closely related to the "essential facts" within the meaning of Article 12.8. In fact, the cross-reference to Article 12.8 in Article 12.6 confirms this close relationship. The "results of any such investigations" are used, together with other information available, to form the universe of essential facts used by the investigating authority in its

determination. This category related to the essential facts with respect to the verification visit can either be made available separately (as is the practice of some investigating authorities) or in the context of the disclosure of essential facts under Article 12.8 (as is the practice for example of the Commission). This is also in line with the interpretation of the term "results" as posited by the European Union. A result is an outcome. The "outcome" of a verification visit cannot therefore be mere factual information about the verification visit as such, e.g., a detailed account of what happened during the visit, or which documents were requested by the Commission or were provided by Novatex. Such facts are the verification visit (or, in other words, concern the process of the verification visit), but they are not an "outcome" or "result" of the verification visit.

49. There is no requirement that the investigating authority prepare written "minutes" of the verification visit. If what Pakistan wants is minutes of the verification visit, such minutes can be easily prepared by the company investigated. The investigating authority usually only has 2 officials on the spot whereas the company may have hundreds of employees available as well as its legal representatives. It is not the task of investigating authorities to draft minutes for the company.

50. "Result" does not include an explanation why the authority looks at certain information as requested by Pakistan. It is obvious and needs no further detailed explanation that the overarching reason of the verification visit is to verify the accuracy of previously submitted documents and possibly of documents submitted during the verification visit. "Result" also does not include information as to whether a verification visit was successful or not as argued by Pakistan (e.g. whether the information previously provided is accurate). This is because the ultimate "success" of a verification visit can only be determined once all other information has been assessed and cross-checked, i.e. at the disclosure stage. It would also make little sense to report on which information was successfully or unsuccessfully verified during the verification visit when many of the documents may not even be relied on by the investigating authority in its determinations.

#### 2.5.2. Pakistan's claims that the results of the verification visit were needed to defend itself are not credible

51. Pakistan has failed to demonstrate how the alleged failure by the Commission to provide the results of the verification visit would have impeded Pakistan's or Novatex's rights of defence. Quite to the contrary, both parties have been perfectly able to defend themselves during the CVD investigation and Pakistan in the present panel proceedings. Pakistan also has not shown concretely in the case at hand how its rights of defence were allegedly compromised. Pakistan argues that if a "result" of the verification visit, as understood by Pakistan, would be provided by the authority, then the authority would be unable to "ignore" whatever information is provided by the company. Such a proposition is of course incorrect. The fact that the authority verifies certain information provided by the company does not mean that it has to agree with the company's view regarding such information. The authority may still "ignore" the company's view if it has reasons to do so, even if the authority confirms that such information was checked at the company's premises, thereby providing the "result" of the verification visit. The disagreement about the moment of drawdown of certain amounts in the calculation sheets provides a good example. The Commission did verify the calculation sheets submitted by Novatex and sent out a deficiency letter regarding the incorrect commercial interest rate provided by Pakistan. Nevertheless, this verification did not prevent the Commission from interpreting the column "Opening" differently than Pakistan. Nor did the knowledge by Pakistan that the calculation sheets were verified by the Commission have any relevance for its defence since Pakistan has not once made reference to this fact during the entire proceeding - even though it claims that knowledge about whether certain information was verified is of paramount importance.

52. This example shows that the essential due process safeguard with respect to information being "ignored" by the authority cannot be the "result" of the verification visit. Safeguarding due process rights is precisely the purpose of instruments such as the disclosure of the essential facts which sets out the authority's factual and legal interpretations and provides the company with the possibility to defend itself.

2.5.3. Pakistan was informed of the result

53. In the present case, Novatex was informed by pre-verification letter that the verification visit would focus on the MBS programme. Recitals 68-72 of the Provisional Determination set out in considerable detail what type of information the Commission checked during the verification visit (e.g., the (non)existence of a proper verification system, the records of input goods received, the Analysis Certificates etc.). In addition, several of the items in the log of exhibits concern the MBS programme. Even assuming that Novatex was not provided with the log of exhibits, Novatex held originals or a copy of all the documents that were collected during the verification visit (both as regards the MBS and other subsidy schemes). Other items that were also relevant for the other subsidy schemes were verified in addition, such as the company's turnover and sales figures and (KIBOR) interest rates as submitted by the company. Novatex and/or its legal counsel were present or had the opportunity to be present during the entire verification visit. Any new documents during the visit would have to be handed out by Novatex. The European Union also recalls that Pakistan in its First Written Submission did not appear to take issue with a purported lack of "result" a as regards the MBS programme, the main aspect of the verification visit.

54. In sum, Pakistan's claim under Article 12.6 should be rejected.

## 3. CONCLUSIONS

55. In view of the foregoing, the European Union requests the Panel to reject Pakistan's claims in their entirety.

# ANNEX C

## ARGUMENTS OF PAKISTAN

## ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF PAKISTAN

*Prepared with the cooperation of the Advisory Centre on WTO Law*

## 1. INTRODUCTION AND OVERVIEW

1.1. In this dispute, Pakistan challenges several aspects of the EU's Determinations in a CVD investigation concerning polyethylene terephthalate (PET) from, inter alia, Pakistan. Pakistan's claims concern various aspects of the subsidy determination, the causation analysis, as well as the lack of disclosure of verification results.

## 2. PAKISTAN'S ARGUMENTS UNDER ARTICLE 6.2 OF THE DSU

2.1. The EU makes a number of procedural objections under Article 6.2 of the DSU. First, the EU contends that the "references to Annexes I, II and III of the SCM Agreement contain multiple obligations and, thus, the European Union fails to understand to which specific obligations within those provisions Pakistan is referring".[1] The EU's objections are without merit.

2.2. Pakistan's panel request clearly specifies items (h) and (i) of Annex I to the SCM Agreement, each of which contains one particular category or type of export subsidy. Each of these provisions contains a specific obligation on investigating authorities. Thus, the EU clearly could understand from the panel request to which "specific obligations" Pakistan referred.

2.3. With respect to Annexes II and III, Pakistan notes that these Annexes are referenced in Annex I(h) and I(i) described above and constitute guidelines for the interpretation of the obligations set out therein. As such, they provide a detailed explanation of an integrated and single process that reflects and leads up to a unified, single and "overarching" fundamental obligation[2], that is, a determination of whether the alleged subsidy satisfies the definitions in Annex I(h) or I(i). In any case, Pakistan has identified in the panel request the specific paragraphs on Annexes II and III it considers to have been violated: Annexes II(I)(1)-(2), II(II)(1)-(2), (III)(I) and (III)(II)(1)-(3). WTO jurisprudence has made clear that a comprehensive reference to a set of legal rules is permissible when the complainant makes a claim concerning this set of rules in its totality.

2.4. Moreover, even if Pakistan was required under Article 6.2 of the DSU to identify the specific procedural step in Annexes II and III, the panel request clearly set out that Pakistan was taking issue with the fact the Commission countervailed the entirety of the duty remissions, as opposed to the "excess portion of these refunds". Thus, by referring to the "excess portion" it is clear that Pakistan referred to the specific part of Annexes II and III that refer to it. In this respect, WTO jurisprudence confirms that a reference to, for instance, Article 3 of the Anti-Dumping Agreement may be sufficient if a reader can discern, from the narrative in the panel request, the specific paragraph(s) or obligation(s) to which the complainant refers.[3]

2.5. Second, with respect to the LTF-EOP programme, the EU argues that the phrase "by failing to explain adequately the application of its method to calculate the benefit in the case at hand" does not allow it to "identify in any of the provisions listed therein" the "problem" described by Pakistan.[4] The EU argues that "[t]he provisions cited by Pakistan appear to address substantive violations as opposed to failures to provide adequate reasoning".[5]

[1] EU's Request for a Preliminary Ruling, para. 41.
[2] Panel Report, *China – Broiler Products*, para. 7.521.
[3] Appellate Body Report, *Thailand – H-Beams*, para. 90; and Panel Report, *Thailand – H-Beams*, para. 7.36.
[4] EU's Request for a Preliminary Ruling, para. 43.
[5] EU's Request for a Preliminary Ruling, para. 43.

2.6. Thus, the EU disagrees with Pakistan on whether the "problem" described by Pakistan is capable of violating the WTO provisions cited in the panel request. This is, however, a matter to be dealt with on the merits of this dispute. In fact, in response to similar objections, the Appellate Body has stated that "the question of whether the measures identified in the panel request can violate, or cause the violation of, [a WTO] obligation [] is a substantive issue to be addressed and resolved on the merits".[6]

2.7. At any rate, the EU's objection cannot be upheld because the narrative of Pakistan's panel request clearly reflects the wording of, for instance, the *chapeau* of Article 14 of the SCM Agreement. Moreover, the EU's objection unduly parses out the distinction between substantive and procedural violations in the realm of trade remedies. The Appellate Body has consistently stated that substantive violations are to be assessed against the explanation given by the authority, and that a lack of appropriate explanation "enables panels to determine" an inconsistency with the substantive provisions.[7] For these reasons, the EU's objection cannot stand.

2.8. The EU makes three additional objections to the panel request. In response, first, Articles 10, 19.1 and 32 of the SCM Agreement were explicitly referred to in the panel request. Second, even though Article 32 has been referred to generally, the narrative in the panel request makes clear that Pakistan referred to the first paragraph only. Pakistan fails to see how the EU was somehow prevented from understanding that Pakistan was referring to Article 32.1. Third, even if Article 1.1(b) of the SCM Agreement was not explicitly mentioned in the panel request, a violation of this provision follows automatically from a violation of Article 1.1(a)(1)(ii), given that revenue forgone or not collected is tantamount to providing a benefit and no separate analysis of a benefit is thereby required.

2.9. Finally, the EU has also argued that Pakistan's claim under Article 12.6 is not properly specified because Pakistan did not identify which of the two options for disclosing verification results the EU chose. This assertion is illogical. Pakistan argues that the EU adopted neither of the two alternative means of disclosure under Article 12.6. Moreover, at the time of drafting the panel request, Pakistan could not have known which of the two permissible alternative approaches the EU would argue it adopted during the investigation.

## 3. PAKISTAN'S CLAIM CONCERNING THE MANUFACTURING BOND SCHEME (MBS)

### 3.1 Introduction

3.1. The EU acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), 10, 19.1, 32.1 and Annexes I(i), II(II) as a whole, II(II)(1) and II(II)(2) of the SCM Agreement, as well as Article VI:3 of the GATT 1991. The core of the issue is that the EU incorrectly determined that a subsidy existed in the form of the totality of the duties drawn back/remitted, rather than only the excess drawback/remission, if any. Moreover, in reaching that incorrect subsidy determination, the EU failed to observe the prescribed analytical process set out in Annexes II and III of the SCM Agreement and violated a number of other related requirements enshrined in the above-mentioned provisions.

### 3.2 A duty drawback scheme gives rise to a subsidy only if there is an excess drawback

3.2. A subsidy under a duty drawback/remission scheme within the meaning of Footnote 1 and Annex I(i) to the SCM Agreement can exist only if there is an excess drawback or remission. As a matter of legal principle, under the SCM Agreement, the totality of the duties drawn back is never the subsidy. For instance, Footnote 1 of the SCM Agreement states that duties drawn-back or remitted not in excess are deemed not to be a subsidy. However, under the EU's reading, Footnote 1 is a conditional exception (a "carve-out") to the otherwise applicable rules of the SCM Agreement and this exception may or may not apply, depending on whether the duty-drawback regime of the exporting Member satisfies certain conditions set out in Annexes II and III.

[6] Appellate Body Report, *Australia – Apples*, paras. 423-425.
[7] Appellate Body Report, *US – Steel Safeguards*, paras. 301-303.

3.3. This is demonstrably incorrect. Footnote 1, together with the Ad Note Article XVI of the GATT 1994, Annex I(i), and Annexes II and III, reflect a special rule applicable to duty drawback systems. This rule stipulates that only the excess drawback can constitute a subsidy. There are no other (default) rules applicable to duty drawback schemes. The principle that only the excess drawback or remission can be a subsidy is also explicitly set out in Annex I(g) and I(h), which like Annex I(i) relate to *indirect* taxes or charges. In contrast, Annex I(e), which relates to *direct* charges, considers any exemption or remission as a subsidy.

### 3.3 Footnote 1 is not a conditional carve-out and the EU's reading of the "in accordance with" introductory clause is nonsensical

3.4. The EU is incorrect in reading the "In accordance with" introductory clause under Footnote 1 as a condition for the applicability of the remainder of the footnote. The EU would have the Panel read the clause as "If the facts are in accordance with … ". However, the "[i]n accordance with" phrase does not express any conditionality, but instead clarifies that the provisions listed therein (the Ad Note Article XVI, and Annexes I through III) reflect the same cardinal and decades-old principle as the second part of Footnote 1, that is, that only an excess drawback or remission can be a subsidy. The correct reading of the words "in accordance with" in Footnote 1 is therefore "as stated in", "as stipulated in", "in harmony with", "as provided in".

3.5. In this regard, the grammar and syntax of Footnote 1 are similar to, for instance, Article 19.2 of the DSU, Article 4.1(b) of the Agreement on Safeguards and numerous other provisions in the covered agreements. If these provisions were given the reading proposed by the EU for Footnote 1 − that of a condition for the application of the rest of the provision − they would become entirely nonsensical. Moreover, the ordinary meaning of the words "in accordance with" is not to create a condition, as the EU's interpretation would require. When the drafters wished to create a conditionality, and make the applicability of a provision dependent on compliance with another provision, they used words or phrasing such as "if", "when", "provided that", "unless that", etc. This can be seen, for instance, in Article 1.2 of the SCM Agreement, Article 2.9 of the TBT Agreement or other provisions throughout the covered agreements.

### 3.4 The drafting history confirms Pakistan's reading of Footnote 1

3.6. The drafting history of the SCM Agreement during the Uruguay Round confirms Pakistan's reading of the phrase "in accordance with". As late as 1990, the draft text of the SCM Agreement contained an introductory ("In accordance with") clause that referred only to the Ad Note to Article XVI, and not also to Annexes I to III. Because the text of the Ad Note is identical to the second clause of the Footnote, the words "in accordance with" must have the meaning argued by Pakistan, namely, "as stated in", "as stipulated in", "in harmony with", "as provided in".

3.7. In the final version of the SCM Agreement, the drafters chose to include also Annexes I through III in the "in accordance with" clause. Thus, the drafters obviously must have considered that the reference to Annexes I through III fitted within the existing meaning, structure and thrust of the sentence, which defined the subsidy as the excess remission or drawback only. The drafters cannot have intended to change fundamentally, at the last minute, a clear definition found in GATT/WTO law since the 1950s, by creating conditions for the applicability of that definition.

### 3.5 The EU's reading of footnote 1 contains additional logical problems

3.8. The EU's reading of Footnote 1 also creates several logical problems. First, Annexes II and III apply *only in a countervailing duty investigation*. It is therefore not clear how the EU's logic would apply when a *direct challenge* is brought against a subsidy in a WTO dispute under Article 3 of the SCM Agreement, and when no prior CVD investigation has taken place. Second, Annexes II and III contain *obligations on an investigating authority* to adopt a certain analytical approach, in a certain sequence. If the investigating authority fails to comply with these requirements, the exporting Member and its companies would then suffer the adverse consequences. Third, it is not clear how a WTO panel, in a direct WTO challenge against a subsidy, could comply with a definitional provision such as Annex I(i), as a condition for applying another definitional provision.

### 3.6 Pakistan was not required to make its claim under Article 1.1(b) or 14 of the SCM Agreement

3.9. The EU also argues that Pakistan accepts that a financial contribution existed and that it takes issue only with the Commission calculation of the amount of the subsidy. This, in the EU's view means that Pakistan should have brought its claim under the provisions relevant for benefit, that is, Articles 1.1(b) and 14 of the SCM Agreement.

3.10. The EU's assertions are without merit. A subsidy consists of a financial contribution and a benefit element. These two elements are separate and must not be confused. In the case of duty drawback systems, determining the existence of an excess drawback is part of the definition of a financial contribution. Footnote 1, one the key provisions in this dispute, is attached to Article 1.1(a)(1)(ii), which is concerned with the determination of the financial contribution. For some subsidies, such as grants or government revenue foregone, identifying the financial contribution, for all practical purposes, has the effect of quantifying the benefit also, and relevant WTO caselaw confirms this.[8] However, this does not undermine the conceptual distinction between the two elements. Pakistan's case rests primarily on the issue of identifying the financial contribution.

### 3.7 There is no basis for the EU's argument that the investigating authority is entitled to assume that the entirety of the duty remission is a subsidy

#### 3.7.1 Introduction

3.11. The EU relies on a range of arguments to argue that an investigating authority has discretion to "assume" that the entirety of the drawn-back duties constitute the excess amount.[9] This discretion would be triggered by a determination that the exporting Member's monitoring mechanism is not adequate, and when no additional investigation by the exporting Member has been undertaken.

3.12. However, in this case, the Commission failed to provide the Government of Pakistan with an opportunity to conduct that further examination. The absence of the allegedly required information is therefore the EU's own responsibility. Second, even if no additional investigation was conducted, there was nevertheless record evidence on which the Commission could have relied to examine the existence and amount of any excess. Third, all provisions at issue make clear that, even where a monitoring system is considered inadequate, the resulting subsidy can only be the amount of any excess remission. Nothing in these provisions suggests that *all amounts* remitted (including those that are clearly not in excess) may be treated as a financial contribution.

#### 3.7.1 The EU has failed to provide Pakistan with the opportunity to conduct the "further examination"

3.13. The EU claims the right to "assume"[10] that the entirety of refunded duties constitute a subsidy, in part because there was "no reliable information provided by [Pakistan] about the actual amounts of imported materials incorporated into the exported products".[11] However, the investigating authority must provide a meaningful opportunity for the exporting Member to conduct the "further examination", which comes only after the monitoring mechanism has been found to be inadequate.

3.14. It is common sense that the exporting Member cannot conduct this investigation *before* it has been apprised of the ruling of the investigating authority about the monitoring mechanism. Similarly, an investigating authority cannot determine *at the same time* that the verification system is insufficient and that the exporting Member has failed to conduct the "further examination". Finally, the exporting Member requires at least *some time* to conduct that examination and subsequently communicate the results to the investigating authority.

[8] Panel Report, *US – Aircraft*, paras. 7.115 – 7.167; Panel Report, *US – FSC (21.5),* paras. 8.3 – 8.43; Appellate Body Report, *US – FSC (21.5)*, para. 106.
[9] EU's first written submission, paras. 91 and 92.
[10] EU's first written submission, paras. 91 and 92.
[11] EU's first written submission, para. 98.

3.15. In this case, the EU made a simultaneous finding, in its Preliminary Determination, that the monitoring mechanism was inadequate and that Pakistan "had failed" to conduct the further examination. An investigating authority that was genuinely open to seeing the exporting Member conduct the "further examination", and was open to relying on the results, would not have used the language used by the Commission. Therefore, faced with the Commission's determination and tis failure to ask Pakistan to conduct an examination, Pakistan could reasonably conclude only that there was no scope for any such "further examination", because the EU was simply not interested in the results. This is confirmed by the subsequent parts of the Determination, in which the Commission refers only to its finding that the monitoring mechanism was not adequate, not to any failure of Pakistan to follow up. These statements reveal, in essence, that the EU considered the mandated "further examination" as a dispensable and ultimately not relevant part of the investigation. In these circumstances, the Commission's reference to Pakistan's alleged failure to conduct the "further examination" appears at most to pay lip service to the legal text, rather than being a proper application of the analytical steps of Annexes II and III.

3.16. In any event, the Commission was also obliged to inform the exporter of: the type of information the investigating authority would accept as output of the "further examination"; the form and format in which the results of the "further examination" had to be reported; the required procedural steps taken during the "further examination" and any required communication with the investigating authority prior to the conclusion of the "further examination"; and the time frame for the further examination and the deadline by which the exporting Member was required to report to the investigating authority the results of the "further examination". This obligation is analogous to that in Article 12.1 of the SCM Agreement, which requires an investigating authority to "give notice" to "[i]nterested Members and all interested parties" "of the information which the authorities require".

### 3.7.2 Following the procedures of Annexes II and III does not entitle the investigating authority to disregard the investigation record

3.17. The EU also argues that Annexes II and III provide for certain investigative steps, but that they do not address "how" an analysis of the excess should be undertaken.[12] The EU also argues that Annexes II and III do not address the consequences of the various intermediate conclusions that an investigating authority might reach under these procedures. In the EU's apparent view, these perceived "gaps" under Annexes II and III entitle the investigating authority to "assume" that the entire refunded amount, rather than just the excess, amounts to a subsidy.

3.18. There is no basis for this view. First, as Pakistan has demonstrated, whatever the outcomes of the prescribed analytical steps under Annexes II and III, the underlying legal principle remains that only the excess remission or drawback can be a subsidy. Second, Pakistan does not agree with the EU's reading of certain parts of Annexes II and III. By way of example, contrary to the EU's assertions, if a monitoring mechanism is found effectively to apply, a presumption exists that no subsidy exists even under Annex II, which is less explicit on this particular point than Annex III.

3.19. Third, nothing in Annexes II and III relieves the investigating authority of its obligation to actually analyse the data before it or to explain why the data is considered unreliable. Rather than making "assumptions" without any basis on record evidence, the authority must base its decision on any other available record evidence, or third-source information. The investigating authority can address any data deficiencies in the same manner as it would for any other subsidy in a countervailing duty investigation, including by relying on facts available.[13]

3.20. Annexes II and III provide for *additional* rules that apply together with the normal rules and principles. This cumulative application of legal provisions is one of the cardinal rules of WTO law.[14] Hence, application of Annexes II and III does not mean that other rules cease to apply.

3.21. Finally, the investigation concerns an exporter, and not the government; and any CVD action is imposed on the exporter, and not the government. The investigating authority cannot equate misgivings about a government's documents or actions with misgivings about an exporter's

[12] EU's first written submission, paras. 72 and 74.
[13] Appellate Body, *Mexico – Anti-Dumping Measures on Rice*, paras. 290 - 295.
[14] See, for instance, Appellate Body Report, *Korea – Dairy*, para. 74. See also Panel Report, *Indonesia – Autos*, para. 14.56.

data. The authority cannot "punish" an exporter for any real or perceived flaws in the government's regulatory system or the government's actions in the investigation.

### 3.7.3 Record evidence does not suddenly become unreliable because the investigating authority has determined that the monitoring mechanism is not adequate

3.22. The EU also appears to believe that, when the investigating authority finds that the monitoring mechanism is not adequate, all the remaining information on the record, from whatever source, is no longer reliable. But that cannot be correct. The monitoring mechanism under a duty drawback scheme relates to how a government operates an overarching system that applies to multiple companies. It is separate from the data and financial records of individual companies that operate under that regime. The drafters of the SCM Agreement also saw these two as separate, since both Annex II and III envisage a "further examination" on the basis of "actual inputs"[15] or "actual transactions involved".[16] In this investigation, the use of the "input/output" ratio in the context of the duty drawback scheme – the main reason why the Commission considered the MBS monitoring mechanism unsatisfactory – says nothing about how the company in its own records tracks its actual stocks, the quantities produced and exported, and the prices of its inputs.

3.23. In certain prior investigations in which it found that a monitoring mechanism did not exist or was inadequate, however, the Commission went on to find that the company was able to demonstrate that no excess remission had occurred.[17] Moreover, in this case, the Commission continued to rely extensively on information and data provided by the company, despite its misgivings about the government's monitoring mechanism. The Commission relied, for instance, on the volume and value of PTA imports imported by Novatex into the MBS, as well as the volume and value of Novatex' exports out of the MBS. Furthermore, the Commission conducted a parallel anti-dumping investigation on the same product. Both preliminary AD and CVD determinations were published on the same day. In the dumping determination, the Commission relied on a broad range of Novatex's data, including cost of production data that tracked separate raw input for domestic and for export production that could have been used in determining whether an excess existed.

### 3.7.4 There was extensive record evidence that the Commission could have relied on in order to estimate any alleged excess remission

3.24. Even though the Commission did not properly investigate, there was record evidence on which the Commission could have relied to estimate any alleged excess remission. Contrary to what the EU claims, Pakistan's arguments on this point do not mean that Pakistan admits that there was in fact an actual excess, within the meaning of Footnote 1 and Annex I(i).

3.25. Finally, the evidence suggests that it was highly unlikely that all of the duties remitted were an "excess". Novatex made substantial exports during the PoI, implying that, at the very least, a very high proportion of the imported inputs were actually exported. They must have been incorporated into the final exported product. Consequently, the EU could – if at all – countervail only a (small) proportion of the refunded/drawn-back duties as a subsidy.[18]

3.26. Contrary to what the EU argues, there is not a shred of evidence that Novatex diverted duty-free (MBS) imported PTA into the domestic market. Indeed, Novatex was legally precluded from doing so, unless it paid the import duty. The Commission's determination speaks a different language, in that it reflects acceptance of the fact that imported inputs were used for production for export. The Commission's criticism of the MBS revolves largely around the input/output ratio.

3.27. Moreover, the Commission had before it extensive evidence that showed how Novatex traced raw inputs throughout its production chain. Specifically, in response to the Commission's third deficiency letter[19], Novatex filed over 1,000 pages of documentation relating to the MBS, for two sample months in the PoI selected by the Commission. This included examples of the type of

[15] Annex II(II)(2).
[16] Annex III(II)(3).
[17] Commission Regulation (EC) No 1411/2002 of 29 July 2002 and Commission Decision No 284/2000/ECSC of 4 February 2000.
[18] Pakistan's first written submission, paras. 5.47 – 5.48.
[19] Exhibit PAK-20.

documentation that Novatex presented to Pakistani customs upon the exportation of PET, in order to claim the release of securities posted on imports of raw materials.[20] These documents link the final exported PET to the imported raw materials, including PTA, consumed in the production of the exported PET. The Commission never mentioned, let alone analysed, that evidence. An investigating authority cannot expressly request such extensive highly relevant information and then simply act as if that evidence were never part of the investigation record.

3.28. In addition, there was substantial evidence on the record to confirm whether an excess remission was taking place. For instance, the company traced its actual consumption data and, on its own initiative, periodically reported any differences to the input/output ratio-based consumption data to the Pakistani authorities. The Commission explicitly acknowledged this practice by the company in its Determination. Novatex conducted a similar exercise for the Commission during the investigation, by presenting it with its actual consumption data for the period of investigation. This data showed a deviation of 0.71% and 1.16%, respectively, for the two key raw materials.[21] Although this difference was only temporary and would have been later accounted for (and therefore was not a real "excess"), the Commission could have used this figure to estimate the amount of any perceived excess. The Commission could have estimated that the drawback was 1%, rather than 100% under its unsupported "assumption". This would have meant a subsidization margin (from the MBS programme) of 0.0384%, rather than 2.57%. Instead, the Commission simply ignored the data.[22]

3.29. Pakistan also pointed to other evidence, such as data from a pre-PoI analytical exercise through which Novatex's input/output ratio was revised and adjusted. The relevant data pointed to a difference, again, in the range of 1-2% of an excess (rather than the 100% assumed by the Commission), which would have yielded a subsidization margin of well below 0.1%, instead of the 2.57% calculated by the Commission.

### 3.8 Conclusion and request for findings

3.30. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraphs 5.133 to 5.135 of Pakistan's first written submission.[23]

## 4. PAKISTAN'S CLAIM CONCERNING THE LTF-EOP PROGRAMME

4.1. The EU violated Articles 1.1(b), the chapeau of Article 14, Article 10, 14(b), 19.1, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it applied a single (and ill-suited) commercial interest rate benchmark to Novatex's multi-tiered LTF-EOP loan, because it failed to explain the application of the methods enshrined in its domestic law and because it failed to analyse whether a comparable commercial loan existed in order to calculate the amount of the subsidy.

### 4.1 The structure of the LTF-EOP loan

4.2. The basic structure of the LTF-EOP loan was as follows. In 2005, Novatex obtained a loan from a consortium of five Pakistani banks. Disbursement of the principal took place in tranches. When a particular tranche was drawn down, the interest rate set by the Pakistani Government for that year got "locked in" for that particular tranche, for the remainder of the duration of the loan. Hence, even if the interest rate increased or decreased in subsequent years, this change would affect only the tranches drawn down in each subsequent year. Tranches drawn down in previous years remained subject to the interest rate prevailing at the time of draw-down of each tranche.

4.3. The loan agreement was executed on 9 June 2005, and the funds became effectively available on 16 June 2005 (the "Facility Effective Date"). At least half of the total authorized amount of **[***]** rupees was to be drawn down within **[***]** months of the Facility Effective Date,

[20] Novatex' Response to the Commission's Third Deficiency Letter, dated 10 December 2009. Exhibit PAK-51.
[21] Pakistan's first written submission, para. 5.110.
[22] See Exhibit PAK-11.
[23] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

and the rest within **[***]** months of the Facility Effective Date. The **[***]**-month deadline was extended several times due to unforeseen circumstances, such that Novatex made its last draw-downs during the PoI.

4.4. The principal repayment terms were "up to seven and a half years (90 months)", to be made in "up to twelve consecutive, equal, semi-annual instalments", with an 18-month grace period before the first repayment of principal. The vast majority (over 90%) of funds outstanding during the PoI had been drawn down in years prior to the PoI, in periods when the commercial interest rate was significantly lower than the commercial interest rate during the PoI.

4.5. In its Questionnaire response, Novatex reported to the Commission all of the amounts outstanding during the PoI, that is, amounts drawn down prior to the PoI as well as amounts drawn down during the PoI.

### 4.2 The EU's changing position on the monetary amounts countervailed wholly undermines its credibility on this issue

4.6. During these proceedings, the Commission has changed its description of how it understood the facts during the investigation. In its first written submission, the Commission stated emphatically that it countervailed only the amounts drawn down **during** the PoI, to the exclusion of amounts drawn down **prior to** the PoI. The EU continued to make these assertions in its Opening Statement at the Panel meeting.[24] These assertions are demonstrably incorrect, as the spreadsheets used included amounts drawn down prior to and during the PoI. The Commission was thus under a mistaken impression as to what exactly it had calculated.

4.7. In a complete reversal of its previous argument, the EU in its oral responses to the Panel's questions at the meeting began to claim that it knew all along that the spreadsheet contained all amounts outstanding during the PoI, including drawdowns prior to the PoI. In Pakistan's view, this change in the EU's factual description affects the credibility of all of the EU's arguments on this issue.

### 4.3 The Commission countervailed the entire amount outstanding during the PoI, not only the amounts drawn down during the PoI

4.8. Pakistan explained in detail that the loan amounts listed by Novatex in its Questionnaire Response, separately for each of the banks involved in the LTF-EOP loan, were the total amounts outstanding during the PoI. Novatex had been requested to inform the Commission about the loan amounts that it "used" during the PoI. In Pakistan's view, this language can only be read as including amounts drawn down prior to the PoI. The term "use" in Pakistan's view clearly includes all amounts from which the company was drawing some benefit during the PoI, which includes amounts drawn down prior to the PoI, but not yet repaid prior to the PoI.

4.9. The "Opening" amount in each of the bank-specific worksheets show the total cumulative amount drawn down prior to the PoI. This is obvious not only from the ordinary meaning of the term "Opening" (balance), which a sophisticated investigating authority such as the EU Commission must have understood. These figures also match the "closing" amounts for each of those banks in Novatex' financial statements, which the Commission had itself requested Novatex to file. Moreover, other columns in the spreadsheets make clear that movements in principal (drawdowns or repayments) were marked in an altogether different column. All these facts meant that the Commission either should have known that the amounts indicated all prior draw-downs or at the very least could not have assumed that the amounts had all been drawn down during the PoI, without asking Novatex at least some relevant questions. Indeed, whenever the Commission applied its mind to any issue, it had no difficulties asking additional questions to Novatex.

### 4.4 The Commission was not entitled to apply the same interest rate for all outstanding amounts

4.10. In a reversal of its previous arguments, the EU now accepts that the Commission was aware that the reported amounts reflected the total amounts outstanding during the PoI, and not only amounts drawn down during the PoI. However, the EU now argues that it was entitled to apply one

[24] See for instance EU's opening statement at the first panel hearing, paras. 29 and 30.

single interest rate to these entire outstanding amounts, even though the majority of the funds - the tranches drawn-down prior to the PoI – were subject to interest rates locked in in previous years.

4.11. This is entirely incorrect. The EU is asking the Panel for license to ignore the most fundamental difference between the terms of loans, whether they have a fixed interest rate or a variable interest rate. Novatex's loan is a bundle of fixed-rate tranches and had to be treated as such. Thus, the Commission was required to identify the commercial interest rate benchmark for a particular year and use it to calculate the amount of the subsidy with respect to the tranches drawn down during that year. However, the Commission could not use, for instance, the commercial interest rate from 2008 in calculations for amounts drawn down during 2007. For amounts drawn down during 2007, the Commission was required to use a commercial interest rate from 2007.

4.12. If the Commission's position were to prevail, investigating authorities could start treating any fixed-term loan as a subsidy, not because it was granted at a preferential interest rate at the time of disbursement, but rather only because, in a subsequent year, the commercial interest rate happened to change. This cannot be correct. An investigating authority must respect the basic terms and conditions of the subsidized loan when identifying a commercial interest rate benchmark. Distinguishing between a fixed-rate and variable-rate loan is one of the most fundamental terms and conditions, and an investigating authority cannot be permitted to ignore it.

### 4.5 The Commission is incorrect in arguing that Novatex's loan was not a loan, but a line of credit

4.13. The Commission argues that it determined that Novatex's loan was not a standard loan, but rather a line of credit. This finding, in the Commission's view, justifies the application of a single commercial interest rate benchmark from the PoI, rather than multiple interest rate benchmarks that would respect the fact that different parts of Novatex's loan were drawn down in different years.

4.14. The EU is incorrect in its characterization of Novatex's loan. Pakistan is not aware that the explanation in the Commission's Determination contains a finding on this issue, nor did the Commission explain in any way to the investigated company that the Commission's subsidy calculation methodology would depend on this distinction. Thus, the EU's arguments on this point appear to be an *ex post* rationalization.

4.15. In any event, Novatex's loan is not a line of credit, in the sense that the company – as the EU incorrectly insinuates – had the right to draw down any amount at any time. The initial terms and credits made clear that 50% of the principal had to be drawn down within 9 months, and the totality of the principal had to be drawn down within the first 11 months of the entry into force of the loan agreement. Each drawdown had to be repaid within 7.5 years. Pakistan fails to see how this kind of arrangement could be equated to, for instance, a revolving line of credit, where withdrawals and repayments could be made at any time at the discretion of the borrower. The subsequent extensions of the draw-down period came about due to unforeseen circumstances. In any event, the Commission never investigated this point and never asked Novatex any questions on this topic, even though as a diligent authority that had studied the terms and conditions of the agreement, it would have been aware of the extensions of the strict draw-down deadlines.

4.16. In any event, Pakistan is not aware that the term line of credit is a term of art for purposes of CVD investigations that would enable an investigating authority to ignore the terms and conditions of the loan agreement/arrangement, especially that the interest rate was locked in for a fixed term, and to proceed to apply an interest rate that does not mirror the structure of the loan agreement/arrangement. Put differently, even if the Commission were correct that the loan agreement could be characterized as a line of credit, this does not mean that the Commission could apply the PoI commercial interest rate to tranches drawn down in previous years, for which the locked-in interest rate is the rate applicable in the year of draw-down.

### 4.6 The Commission failed to explain the applied methodology in the light of its own domestic law

4.17. The Commission's internal rules (the so-called "Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations") require the Commission to undertake a series of analytical steps when calculating the benefit on a subsidized loan. These Guidelines are modelled on Article 14 of the SCM Agreement. However, none of these steps is discernible in any way in the Commission's Determination. Therefore, the Commission failed to provide the explanation required by the chapeau of Article 14.

4.18. First, the Commission made no effort to identify a comparable commercial loan. The Commission failed to mention, let alone to analyse, the fact that Novatex proposed several comparable commercial loans. The Commission also made no effort to identify the interest normally payable on that loan. Nor did the Commission attempt to identify the interest payable on a comparable loan to companies in a similar financial situation in the same sector of the economy or to identify the interest payable on a comparable loan to companies in any sector of the economy. Instead, without any explanation, the Commission used the so-called Karachi Interbank Offered Rate (KIBOR) that the Commission itself identified on the internet. The KIBOR is an average of several lending rates in effect in the relevant period for loans of one day, one week, one month, one year, two years, and three years' duration. The Commission failed to explain why this rate would be appropriate for a loan with a tenor of 7.5 years for every tranche from the date of its draw-down.

4.19. The Commission also failed to reflect in its analysis the particular multi-tranche structure of the loan at issue by applying a single rate to all of the outstanding amounts, rather than differentiating between the sub-amounts depending on when they were drawn down.

### 4.7 The Commission acted inconsistently with Article 14(b) because it failed to identify, nor did it attempt to identify, a comparable commercial loan as benchmark for its benefit calculations analysis

4.20. Article 14(b) instructs the investigating authority to undertake a "progressive search" to identify a comparable commercial loan, so as to identify the proper benchmark, for an allegedly subsidized loan.[25] The Commission failed to conduct such a progressive search. It failed to make any effort to identify a comparable commercial loan; it failed to acknowledge that Novatex submitted a number of commercial loans it had itself concluded, by way of identifying the proper commercial interest rate benchmark, much less explained why it did not use these loans. All of the EU's statements on this point before the Panel are impermissible ex post rationalizations.

4.21. The Commission also violated Article 14(b) because it applied the KIBOR, which is a blend of interest rates for tenors of up to 3 years, which is much shorter than the 7.5 years under Novatex's LTF-EOP loans. The Commission failed to explain why, these differences notwithstanding, the KIBOR was not only an appropriate interest rate benchmark, but also was better than any other commercial interest rate benchmark available to the Commission.

4.22. With respect to the EU's procedural objection that the requirement to "explain" is contained only in the chapeau of Article 14(b), the requirement to provide a reasoned and adequate explanation permeates most of the substantive disciplines of the SCM Agreement. This explanation is the vehicle by which an investigating authority demonstrates compliance with its substantive obligations, including that under Article 14(b). In the absence of any explanation of, for instance, how the authority identified, or sought to identify a comparable commercial loan, there is no basis for a WTO panel to find that the authority acted consistently with its obligations.

### 4.8 Conclusion and request for findings

4.23. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraph 6.101 of Pakistan's first written submission.[26]

[25] Appellate Body Report, *US – AD/CVD (China)*, para. 486.
[26] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

## 5. THE COMMISSION'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLE 15.5 OF THE SCM AGREEMENT

5.1. Pakistan submits that the analysis of the existence of a "causal link" between the subject imports and the alleged injury to the domestic industry is inconsistent with Article 15.5 of the SCM Agreement. Pakistan's allegations are two-fold in this respect.

### 5.1 The Commission's approach to causation is inconsistent with Article 15.5 of the SCM Agreement

#### 5.1.1 The Commission's finding of a causal link conflated the distinct analytical steps in Article 15

5.2. The Commission's causation analysis conflated the distinct analytical steps that an investigating authority is required to follow under Article 15. In this respect, the Appellate Body has observed that there is a "logical progression" in paragraphs 2, 4 and 5 of Article 15.[27] Article 15.2 enquires into the effects of the subject imports on the prices of the domestic product, notably whether such effects take the form of significant price undercutting, price depression or price suppression. Article 15.4 requires an assessment of the relationship between the subject imports and the state of the domestic industry. Finally, and importantly, Article 15.5 requires an enquiry into the relationship between the subject imports and the injury to the domestic industry.

5.3. In the challenged Determinations, the Commission found, as an initial matter, that the volumes of the subject imports had increased over the PoI[28], and that the subject imports had undercut the prices of the EU producers.[29] Moreover, the Commission found that certain indicators of the domestic industry's performance showed a modest decline, while others showed a deterioration.[30] Turning to its causation analysis, the Commission recalled its finding that the subject imports had undercut the prices of the EU producers. On that basis, alone, the Commission found that "a causal link exists between those imports and the Union industry's injury".[31] Finally, the Commission assessed whether the other known factors were capable of "breaking the causal link" previously found.[32]

5.4. The Commission's causation analysis thus conflated the "logical progression" set out in Articles 15.2, 15.4 and 15.5. Particularly, the Commission assumed that its finding of the effects of the subject imports on the prices of the domestic product (price undercutting) constituted, without more, a causal link between the subject imports and the injury. By so doing, the Commission conflated the analysis required under Article 15.2 with that required under Article 15.5.

5.5. Pakistan recalls the Appellate Body's understanding of the "logical progression" set out in Article 15 of the SCM Agreement to the effect that the outcome of the analyses under Articles 15.2 and 15.4 are not dispositive, but rather "form the basis", of the subsequent causation analysis under Article 15.5.[33] In other words, the findings under Articles 15.2 and 15.4 do not automatically lead to the conclusion that there exists a causal link between the subject imports and the injury to the domestic industry within the meaning of Article 15.5 of the SCM Agreement. Rather, under Article 15.5, an investigating authority is required to assess whether, through the effects of the subsidies (the effects previously found under both Articles 15.2 and 15.4), the subject imports are causing injury.

5.6. As shown below, by conflating the distinct analytical steps in Article 15, the Commission prejudged its causation analysis.

[27] Appellate Body Report, *China – GOES*, para. 128.
[28] Preliminary Determination, recital 211. Exhibit PAK-1.
[29] Preliminary Determination, recital 217. Exhibit PAK-1.
[30] Preliminary Determination, recital 239. Exhibit PAK-1.
[31] Preliminary Determination, recital 245. Exhibit PAK-1.
[32] Preliminary Determination, recitals 246-261. Exhibit PAK-1.
[33] Appellate Body Report, *China – GOES*, para. 149.

### 5.1.2 The Commission's finding of a "causal link" prior to assessing the effects of "other known factors" is inconsistent with Article 15.5

5.7. The Appellate Body has laid out a three-step analysis of causation. First, an investigating authority must ensure that "the injurious effects caused to the domestic industry by increased imports are distinguished from the injurious effects caused by other factors".[34] In "separating and distinguishing"[35] the effects of these other factors from those of the subject imports, an investigating authority must provide a "meaningful explanation of the nature and extent of the injurious effects".[36] Second, once the effects of all factors, including those of the subject imports, are separated and distinguished, an investigating authority must "attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports".[37] Third, an investigating authority must determine, based on the proper attribution of the injury, whether "a causal link" exists between the subject imports and the injury to the domestic industry—that is, "a genuine and substantial relationship of cause and effect between these two elements".[38]

5.8. The Commission's approach to finding, first, a "causal link" between the subject imports and the alleged injury, and then ascertaining whether other factors could "break the causal link" is inconsistent with Article 15.5 and with the three-step causation analysis laid out by the Appellate Body. The Commission should in the first place have separated and distinguished the injurious effects of all the relevant factors including those of the subject imports. Having properly separated and distinguished all such effects, the Commission should then have attributed to the subject imports the actual injury that they were causing. This analysis is what Pakistan called a "simultaneous analysis" in response to Panel Question No. 73. Finally, only once the Commission had attributed the actual injury caused by the subject imports, would it have been in a position to determine whether a "causal relationship" between these elements existed. Importantly, a finding of causation required ascertaining, not any causal link however remote or insignificant, but a "genuine and substantial relationship of cause and effect" between the subject imports and the alleged injury to the domestic industry.[39]

5.9. Accordingly, the finding of a "causal link" should have been made at the third step of the causation analysis. Yet, by making this finding upfront, the Commission prejudged its later non-attribution analysis. By the time it turned to the analysis of the other factors, the Commission had already found a "causal link" by virtue of its earlier finding of significant price undercutting. Pakistan questions how under this approach the Commission could ever find that an "other factor" could undo its earlier finding of the existence of a causal link between the subject imports and the injury to the domestic industry.

## 5.2 The Commission's analysis of "other factors" is inconsistent with Article 15.5

5.10. The methodological flaws explained above prejudged, and rendered meaningless, the Commission's non-attribution analysis of at least four "other factors".

5.11. First, in the case of the imports from Korea, the Commission merely pointed out that "it cannot be excluded" that these imports "contributed to the injury suffered by the Union industry". The words "cannot be excluded" amount to no more than a speculative statement made without any effort to probe the nature and extent of the contribution of those factors to the alleged injury. Instead, the Commission should have assessed the injurious effects of the price undercutting of Korean imports. In principle, there is no reason to exclude the proposition that this price undercutting had a downward effect on domestic prices similar to that of the effects of the subject imports, all the more so when (1) both imports from Korea and the subject imports had similar market shares during the PoI; and (2) imports from Korea grew by almost 150% during the same period. If the Commission believed that the price undercutting by the Korean imports did not have the same injurious effects as the price undercutting by the subject imports, it should have found so explicitly, following an appropriate analysis and explanation. Accordingly, the Commission's

[34] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[35] Appellate Body Reports, *US – Hot – Rolled Steel*, para. 228; and *US – Wheat Gluten*, para. 68.
[36] Appellate Body Reports, *US – Pipe Line*, para. 215; and *US – Lamb Safeguard*, para. 186.
[37] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[38] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[39] Appellate Body Report, *US – Wheat Gluten*, para. 69.

analysis of the imports from Korea cannot constitute a "meaningful explanation of the nature and extent of [its] injurious effects".

5.12. Second, in the case of the 2008 economic downturn, the Commission stated that, regardless of its nature and extent, any injury it caused was in any event "exacerbated by the increased subsidised imports from the countries concerned, which undercut the prices of the Union industry".[40] Thus, the Commission based its dismissal of this factor on its previous price undercutting finding. In other words, regardless of the magnitude of the injurious effects of the 2008 economic downturn on the domestic industry, this factor could never have been sufficient to break the causal link, as the Commission had already found the alleged price undercutting of the subject imports. Importantly, The Commission failed to explain what "exacerbate" means and the extent to which the subject imports "exacerbated" the negative effects of the 2008 economic downturn. This question remained unresolved because the Commission did not separate and distinguish the injurious effects of the 2008 economic downturn from those of the subject imports. Moreover, the Commission partly dismissed the 2008 economic downturn on the grounds that the EU industry had suffered injury prior to 2008. This statement was unsubstantiated because its injury finding was by reference to the period 2008-June 2009. Thus, the Commission's statement that the EU industry was suffering injury prior to 2008 lacked supporting analysis. It is all the more puzzling since a large number of injury indicators actually showed a positive performance up to 2008 and it was only then that they began to languish.

5.13. Third, in the case of low prices of crude oil, the Commission again recognized the (at least potential) negative effects of this factor on the domestic industry. However, it did not separate and distinguish these effects, or provide a "meaningful explanation of the nature and extent of [its] injurious effects".[41] It merely dismissed this "other factor" by recalling its previous finding that the subject imports undercut the prices of the EU producers. The Commission thus failed to ascertain the extent of the impact of this factor, if any, on the domestic industry. In fact, it recognized that prices of PET depend to some extent on prices of crude oil, but failed to address the argument that low prices of PET in the EU were a function of the low prices of crude oil. Rather, it gave an off-the-point explanation about the volatility of world prices and how this cannot explain "why imports of PET were subsidised and therefore undercut the Union producers' prices".[42]

5.14. Fourth, the Commission should have addressed the reasons why a part of the EU industry, which did not cooperate, improved their performance from 2008 to the end of the PoI. This period coincided with the contraction of global demand and with the expansion of the EU demand. It is at least intriguing that the subject imports only affected one part of the EU industry (those supporting the investigation), whereas the other part of the EU industry (those not supporting the investigation) showed a positive performance from 2008 to the end of the PoI. The Commission failed to explain why a certain part of the overall domestic industry was able to recover market share and sales from 2008 to the end of the PoI, while another part of the same domestic industry experienced injury during the same period.

### 5.3 Conclusion and request for findings

5.15. For the reasons set out above, Pakistan requests the Panel to find that the causation analysis in the challenged Determinations is inconsistent with Article 15.5 of the SCM Agreement.

## 6. PAKISTAN'S CLAIM UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE RESULTS OF THE VERIFICATION VISIT

6.1. Pakistan claims that the European Union has acted inconsistently with its obligation under Article 12.6 of the SCM Agreement, because it failed either to make the results of the verification visit to Novatex available or to provide disclosure thereof as part of the disclosure of essential facts under Article 12.8.

6.2. Article 12.6 requires the investigating authority to provide the companies subject to a verification visit with the "results" of these verification visits. It provides, in relevant part:

[40] Preliminary Determination, recital 254. Exhibit PAK-1.
[41] Appellate Body Report, *US – Lamb*, para. 186.
[42] Definitive Determination, recital 118. Exhibit PAK-2.

> Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.3. Article 12.6 thus requires the investigating authority to disclose the "results" of the verification visits, by means of one or other of two different avenues: the investigating authority may either (i) "make available" a separate report containing the results of the verification visits, or (ii) "provide disclosure" of the results as part of the disclosure of the essential facts under Article 12.8. Regardless of which avenue is chosen, however, the investigating authority must disclose the same thing − the "results" of the verification visit.

6.4. The term "result" is defined, in relevant part, as "a thing that is caused or produced by something else; a consequence or outcome".[43] In *US − Steel Safeguards*, the Appellate Body has stated that the term "result" is to be read as "an effect, issue, or outcome from some action, process or design".[44] The "result" of any given activity is closely linked to the conduct, content and the purpose of that activity. Thus, the "result" of a verification visit is closely linked to the conduct, content and purpose of that verification visit. Annex VI(7) of the SCM Agreement defines the purpose of a verification visit as to "verify the information provided or to obtain further details". As noted, the purpose, conduct, and content of a verification visit is to verify the information provided by the investigated firms in their questionnaire responses and to enable the investigating authority to obtain, and the investigated exporter to provide, additional information or explanations regarding the exporter's submitted questionnaire responses.

6.5. In the normal course of events, during a verification visit, an investigating authority will request the investigated company to provide access to its accounting system and other records, including all of the worksheets and source documents used to prepare the questionnaire responses. During the verification visits, the investigating authority normally reviews these documents and cross-checks them against the data provided in the questionnaire responses. The investigating authority also uses the opportunity to clarify any areas of doubt regarding the contents of the questionnaire responses. As part of this process, the investigating authority may, for instance, request access to an entire category of documents or data or focus on certain specific documents.

6.6. It is important to note here that the investigating authority normally does not take any final decisions during the verification as to how the verification will affect the investigating authority's determinations of subsidization and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have not been gathered or checked. However, the results of the verification do not include any subsequent determinations by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate subsidization margins for the exporter in accordance with the SCM Agreement. The subsequent decision how to determine the subsidization margins is the result of the *investigation*, not the result of the *verification*.

6.7. Thus, the *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter, but that the investigating authority did not immediately consider relevant to its final determination. This is precisely the conclusion reached by the panel in *Korea − Certain Paper*, which stated that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[45]

[43] Oxford English Dictionary Online, available at http://oxforddictionaries.com/definition/english/result?q=result
[44] Appellate Body Report, *US − Steel Safeguards*, para. 315. (original emphasis)
[45] Panel Report, *Korea − Certain Paper*, para. 7.192. (emphasis added)

6.8. A clear reporting of the results of the verification is essential to enable the exporter to structure its case for the rest of the investigation. Pursuant to Annex II(3) of the Anti-Dumping Agreement, which applies by analogy under the SCM Agreement[46], all information that is "verifiable" and submitted in timely and usable fashion, must be taken into account by the investigating authority. The investigating authority is "not entitled to disregard the submitted information and use information from another source to make the determination."[47] This means that any information that is verifiable − which includes information that has actually been verified by the investigating authority − must be taken into consideration by the investigating authority.

6.9. In addition, the ability of domestic courts (using their own standard of review) and of WTO panels (using the standard of review pursuant to Article 11 of the DSU) to review the determinations of investigating authorities depends on the existence of a proper disclosure of the "results" of the verification visit under Article 12.6 of the SCM Agreement. A failure to disclose the results of the verification, or an incomplete disclosure, will thus significantly undermine a domestic court's or WTO panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority.

6.10. In the investigation at issue, the Commission failed to disclose the results of the verification visit. To the extent it made an effort to comply with the requirements of Article 12.6, in this case the Commission opted to disclose the results of the verification via the disclosure of essential facts under Article 12.8. However, the Commission's disclosures contain no information of what occurred during the verification visit and which topics, other than the MBS, the Commission discussed with the investigated company, even though the Commission had provided the exporter with an extensive list of topics to be verified. However, there is no information whatsoever about verification on any of these issues other than the Manufacturing Bond Scheme. Hence, the EU has failed to provide any information on the results of its verification concerning all these other issues.

6.11. Beyond the list of exhibits collected at verification, the EU disclosed no information on the conduct of the verification visit, or any corrections or rectification of the information contained in the Questionnaire Response. The EU has not disclosed which particular aspect of these documents was discussed, for what purpose, or whether the Commission considered the data and information contained in this document to be verified or verifiable.

6.12. In its submissions, the EU attempts to conflate the concept of the results of the verification with the results of the investigation. In its opening statement at the first meeting of the Panel with the parties, for example, the EU explained that the results of the verification were the facts that the investigating authority had decided to include in the essential facts disclosure as those on which it intended to base its final determination.

6.13. This approach would deprive exporters of their rights and ability to defend themselves. Under this approach, the results of the verification would be only those the investigating authority *subjectively* considers to be important or to support its final determination. The results of the verification would not include outcomes of the verification to which the exporter may attach greater importance than the investigating authority or outcomes on which the exporter thinks the investigating authority *should* base its final determination. This would undermine the exporter's ability to obtain review of the investigating authority's determination in domestic courts and the exporting Member's ability to obtain review from a WTO panel.

6.14. The results of the verification and the results of the verification are *not* the same thing. The SCM Agreement imposes separate legal obligations governing each of these concepts. Effect must be given to these textual differences in the references to the results of the verification and the disclosure of the essential facts.

6.15. Moreover, these are also different concepts from a practical point of view. Pakistan has also provided to the Panel examples from both this particular investigation and a generic or hypothetical cases illustrating how the EU's conflation of the results of the verification with the results of the investigation would negatively affect the ability of interested parties to defend their interests, both in this investigation and more generally. These examples make clear that disclosure

[46] See Appellate Body Report, *Mexico − Rice*, paras. 290 − 295.
[47] Panel Report, *EC − Salmon (Norway)*, para. 7.383 (see also Ibid., para. 7.347). Panel Report, *US − Steel Plate*, para. 7.57.

of the essential facts of the investigation does not, in itself, satisfy the EU's obligation to provide a clear and objective disclosure of the results of the verification.

### 6.2 Conclusion and request for findings

6.16. For the reasons set out above, Pakistan requests the Panel to find that the EU's failure to disclose the results of the verification visit is inconsistent with Article 12.6 of the SCM Agreement.

## ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF PAKISTAN

### 1 INTRODUCTION AND OVERVIEW

1.1. In this dispute, Pakistan challenges several aspects of the EU's Determinations in a CVD investigation concerning polyethylene terephthalate (PET) from, inter alia, Pakistan. Pakistan's claims concern various aspects of the subsidy determination, the causation analysis, as well as the lack of disclosure of verification results.

1.2. This executive summary summarizes Pakistan's submissions since the filing of Pakistan's responses to the Panel's first set of questions, that is, Pakistan's second written submission, Pakistan's opening and closing statements at the second meeting of the panel with the parties, Pakistan's responses to the Panel's second set of questions, and Pakistan's comments on the EU's responses to the Panel's second set of questions.

### 2 PAKISTAN'S ARGUMENTS UNDER ARTICLE 6.2 OF THE DSU

2.1. The EU has "confirm[ed] that it no longer objects to Pakistan's claim under the chapeau of Article 14 of the SCM Agreement with respect to the LTF-EOP programme". The EU nevertheless claims that, to the extent that Pakistan argues that "the determinations at issue fail to properly explain e.g. its reasons for not using certain private loan information", the claim "would pertain to the obligations in Article 22 of the SCM Agreement, which Pakistan has decided not to pursue in this case".[1] However, this reflects a disagreement that boils down to the applicability of Article 14 of the SCM Agreement. This is an issue that goes to the merits and not to the Panel's jurisdiction.

2.2. The EU also continues to insist that the reference to Article VI of the GATT 1994 in Pakistan's panel request is not sufficiently precise so as to be a reference to Article VI:3. However, based on the description of Pakistan's claim in the panel request, the only conceivably relevant sub-paragraph of Article VI could be sub-paragraph 3. Pakistan has also listed a large number of disputes in which a reference to Article VI of the GATT 1994 was deemed to be sufficient as a reference to Article VI:3. None of these disputes has been addressed by the EU.

2.3. Next, contrary to the EU's arguments, Pakistan's reference to Article 32 of the SCM Agreement can only be read as a reference to Article 32.1. The EU argues that Pakistan's claim could also have fallen under Articles 32.5 and 32.6, because "Pakistan could have claimed that the Commission applied a method that was not foreseen in its municipal law and, thus, its administrative procedures were not in accordance with the SCM Agreement".[2] But the narrative description in the panel request makes clear that Pakistan did not make that claim. Rather, the explanation is clear that Pakistan takes issue with the "specific action against a subsidy of another Member" within the meaning of Article 32.1 of the SCM Agreement. Consequently, the reference to Article 32 unequivocally means Article 32.1 of the SCM Agreement. Upholding the EU's objection would erroneously elevate form over substance.

2.4. Finally, the EU continues to argue that Pakistan's claim under Article 12.6 was not sufficiently clear, because Pakistan did not indicate which of the two options under Article 12.6 Pakistan considers the EU did not satisfy. The EU continues to argue that Article 12.6 contains two separate obligations, which are "alternatives", and that Pakistan was aware that the EU would argue that it opted for the second "alternative" (disclosure of the verification results together with the essential facts disclosure), but failed to specify this "alternative" in the panel request.

2.5. The EU misunderstands the structure of Article 12.6. Article 12.6 contains two alternative "pathways" for achieving compliance with an overarching obligation. These two pathways are not two "separate obligations", because neither has to be complied with if the other has been complied with. Moreover, from a practical perspective, a complainant cannot know in advance which of the

[1] EU's response to Panel Question No. 13, para. 5.
[2] EU's response to Panel Question No. 15(b) para. 10.

two options the defendant will argue it took and complied with; indeed, the defendant may argue, as the EU has overtime done in this case, that it used *both* options. The EU now argues that disclosure of verification results occurred not only through the "essential facts" disclosure, but also at or after verification in the form of the list of documents collected during verification, that is, outside the context of the essential facts disclosure.

2.6. The EU's view is also untenable because the complainant may also have incomplete information, since disclosure of verification results may occur through confidential, company-specific documents. In any event, under the EU's approach, a complainant would argue that both alleged "obligations" have been violated, which would effectively be the same as Pakistan has done in this case, and would not provide any greater level of information to the defendant.

## 3 PAKISTAN'S CLAIM CONCERNING THE MANUFACTURING BOND SCHEME (MBS)

### 3.1 Introduction

3.1. The EU acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), 10, 19.1, 32.1 and Annexes I(i), II(II) as a whole, II(II)(1) and II(II)(2) of the SCM Agreement, as well as Article VI:3 of the GATT 1994. The core of the issue is that the EU incorrectly determined that a subsidy existed in the form of the totality of the duties drawn back/remitted, rather than only the excess drawback/remission, if any. Moreover, in reaching that incorrect determination, the EU failed to observe the prescribed analytical process set out in Annexes II and III of the SCM Agreement and violated a number of other related requirements enshrined in the above-mentioned provisions.

### 3.2 A duty drawback scheme gives rise to a subsidy only if there is an excess drawback

3.2. The EU continues to deny that a subsidy under a duty drawback/remission scheme within the meaning of Footnote 1 and Annex I(i) to the SCM Agreement can exist only if there is an excess drawback or remission. As before, the EU argues that Footnote 1 describes a "situation" − that is, a situation in which a duty drawback system and the monitoring system under that system is to the liking of an investigating authority − and if that situation is found to exist, only an excess drawback will constitute a subsidy. If the monitoring system does not please the investigating authority, the alleged "carve-out" does not apply. In contrast, Pakistan continues to argue that this is not what Article 1 and footnote of the SCM Agreement state. The limitation of a financial contribution to the "excess" only, as opposed to the entirety of the drawn-back duties, is not conditional on anything. Rather, it is the definition of this type of subsidy.

3.3. The EU views the limitation of a financial contribution/subsidy to the *excess* drawback (as opposed to the *totality* of the drawback) as some kind of a privilege for the exporting Member that must be earned. The exporting Member enjoys the privilege only if the exporting government's monitoring system is to the satisfaction of the investigating authority. As the key element of this argument, the EU points to the "[i]n accordance with" phrase in Footnote 1 and argues that this clause is to be read, effectively, as "*[i]f the duty drawback scheme is in accordance with*". Only if that is the case should the remainder of the Footnote 1 apply. Otherwise, the totality of the drawn-back duties constitutes the financial contribution.

3.4. Pakistan has provided extensive arguments, including numerous references to other WTO provisions, to refute the EU's position. Pakistan has referred to no less than 15 provisions throughout the covered agreements that demonstrate that the EU's reading of Footnote 1 is incorrect. These include provisions that use an "in accordance with" clause like that in Footnote 1 that have a meaning different from the meaning postulated by the EU. Moreover, the provisions listed by Pakistan demonstrate that, where the drafters wished to express the kind of reading proposed by the EU, they used different formulations. The Panel has explicitly asked the EU to respond to these arguments. However, the EU has not addressed a single one of the provisions listed by Pakistan. Instead, the EU merely asserts that Pakistan draws an "artificial distinction" between provisions that contain a condition and other types of provisions. What the EU labels "artificial distinction[s]" are, however, essential steps in the process of treaty interpretation under the Vienna Convention on the Law of Treaties.

3.5. Pakistan notes that the EU has also so far not provided any response to Pakistan's argument that Annexes II and III apply only in CVD investigations and not in a direct subsidy challenge in the WTO; that Annexes II and III contain obligations on the investigating authority, compliance with which the exporting Member has no control of; and that Footnote 1 refers, in part, to definitional provisions. It is not clear how a WTO panel can be said to act consistently or inconsistently with definitional provisions. The EU's reading of Footnote 1 is convoluted and leads to logical impasses.

3.6. The EU's interpretation of the footnote also continues to ignore the fundamental historical context of the principle that only the "excess" drawback can constitute a subsidy, including the Report of the Working Party on Border Tax Adjustments. This Report and the Illustrative List of Export subsidies, which dates from the 1960s, reveal that the limitation of a subsidy to an "excess" drawback is a long-standing, decades-old principle in GATT law, as well as in the OECD where the original Illustrative List was developed. The "excess" principle is enshrined in several other items of the Illustrative List that address so-called indirect taxes or charges − that is, charges imposed on products. These charges have historically been considered as eligible for border tax adjustment. This is in contrast to so-called direct charges/taxes (e.g. income taxes or social security charges), which are not eligible for border tax adjustment. For direct charges, any exemption, remission or deferral are considered a subsidy − not just the excess drawback, as shown by Annex I(e). These principles were never intended to be subject to qualifications of the type the EU now postulates.

3.7. Moreover, the EU's argument would create an inexplicable asymmetry in how the SCM Agreement treats (finished) products and the inputs for those products. Annex I(g) refers to indirect tax drawbacks or remissions on final products, whereas Annexes I(h) and I(i) refer to indirect taxes or tariffs on inputs. However, for final products, there are no additional "guidelines" like in Annexes II and III, presumably because determining the excess remission on those products is a less complex determination. The EU's arguments would mean that the definition of a subsidy as consisting of the excess would apply only *sometimes* for subsidies under Annex I(h) and I(i) (namely, in situations of compliance with Annexes II and III), but would apply *always* for subsidies under Annex I(g), because there is no Annex II and III to comply with. There is no logical reason for this difference, nor anything in the text or negotiating history of the Ad Note, the documents concerning border-tax adjustments, or Footnote 1 to justify such a difference.

### 3.3 Pakistan was correct in bringing a challenge to a financial contribution determination and not a benefit determination

3.8. The EU continues to assert that Pakistan should have brought its claim under provisions pertaining to the benefit calculation. The EU argues that "the excess remission ... amounts to a financial contribution [under] Article 1.1(a)(1)(ii)", that "[t]his element is easy to be found" and is binary (yes/no),[3] whereas the determination of benefit involves determining a "quantum".

3.9. Pakistan does not doubt that the EU found it "easy" in this investigation to determine the existence of a financial contribution, because it conveniently resorted to an unsupported "assumption" rather than examining the extensive relevant record evidence before it. However, an investigating authority that actually follows the SCM Agreement will not necessarily find it "easy" to determine the existence of an excess. Similarly, it is not clear what the EU means by saying that the question behind financial contribution "is not about its *quantum*, but about their (yes or no) existence". That is not correct, because some financial contributions require the determination of a "quantum". For instance, a grant of $ 0 is not a financial contribution; a grant of $ 1'000 is. Similarly, it may not be true for other types of financial contribution, such as government revenue foregone or a duty drawback scheme. This principle applies also in the context of duty drawback schemes, where only the excess remission is a financial contribution. Here, an investigating authority must compare the total amount of duties (definitively) drawn back with the amount that the exporter was entitled to receive. The investigating authority must necessarily come up with a "quantum" to determine the existence of a financial contribution.

3.10. As Pakistan has already explained, this means that indeed for some forms of financial contributions, the benefit analysis is for all practical purposes a foregone conclusion. A grant of $ 1'000 will virtually always result in a benefit that corresponds precisely to that amount.

[3] EU's response to Panel Question No. 30, para. 24.

### 3.4 The EU failed to examine relevant evidence, such as the documents contained in Exhibit PAK-58

3.11. The EU also continues to argue that it was entitled to resort to an unsubstantiated assumption or conclusion that the entirety of duties was an excess remission because there was no reliable record evidence. However, in this investigation, the Commission had before it extensive evidence submitted by Novatex in direct response to the Commission's explicit requests. This evidence pertained to how Novatex traces its raw materials through the production process and how individual specific export consignments are linked to specific import consignments of raw materials; and how Novatex traces its actual consumption data, in order to perform annual reconciliation exercises, to adjust for any difference between the "standard" input-output ratio and actual output. Moreover, in the parallel anti-dumping investigation, the Commission also had before it cost-accounting data that tracked separately raw inputs for, respectively, the production of export products and the production of products for the domestic market.

3.12. There is no discussion whatsoever of this evidence in the Commission's determination. Whatever the substantive merits of this evidence, the Commission could not ignore it without providing a corresponding "reasoned and adequate" explanation. The entirety of the EU's arguments on these matters before this Panel is inadmissible *ex post facto* rationalisations.

3.13. The EU also continues to point to the misgivings expressed by the investigating authority about the use of the input/output ratio used by Novatex and the GoP as part of the MBS management, to argue that the use of this ratio also means Novatex was unable to trace its imported inputs throughout the production chain. That is incorrect, because one does not exclude the other. The input/output ratio is very close to the actual consumption, and the variance between the actual input/output ratio and the approved (or "standard") analysis card ratio was between 1% and 2%. Pakistan has made this point repeatedly, but the EU has never responded.

3.14. The practical reason, in layman's terms, why a producer such as Novatex might use a standard input/output ratio is that the production process at issue involves pouring bags of various raw materials into a melting pot, processing them, and pouring the end product out of the melting pot. It is expected that there will be some wastage in the pouring, in the pot in terms of burn off or residue, and spillage when pouring the final product out of the pot. All of these residues, spillages, and waste will be very small. It would not make business sense to measure them on a bag-by-bag basis. This is precisely why businesses and governments (including the GOP) use input/output ratios. In these circumstances, the Commission should have relied on Novatex's actual production records and accounting records and systems, to determine whether an excess remission occurred. The Commission could have easily done this based on the ample information provided by Novatex to the Commission in respect of actual consumption ratios that were achieved.

3.15. Moreover, the use of standard costs/costing ratios that are converted to actual costs by means of a variance is a standard accounting practice with which the Commission is very familiar. Pakistan has provided two examples of EU antidumping determinations in which normal value was constructed on the basis of standard costs. In contrast, in this case, the Commission failed to review or consider the same type of information.

### 3.5 The EU failed to apply facts available

3.16. The EU was not entitled to reject the manifold record evidence that was presented by Novatex and that would have enabled the Commission to approximate the excess drawback. Even if the EU had been entitled to do so, it should have provided an explanation for why the information was deemed to be unreliable.

3.17. An investigating authority in a trade remedy investigation, including in a CVD investigation, is required to make its determinations on the basis of record evidence. The record evidence consists primarily of data and information submitted by the investigated companies and other interested parties, as well as of data and information collected by the investigating authority itself. The rules of evidence, including on the conditions under which an investigating authority may depart from evidence submitted by an investigated party and instead use other evidence, are practically the same under the Anti-Dumping Agreement and under the SCM Agreement. The

Anti-Dumping Agreement contains detailed rules in Annex II concerning the use of facts available. The Appellate Body has found that these rules in Annex II of the Anti-Dumping Agreement apply – by analogy – also under the SCM Agreement.

3.18. Annex II(3) of the Anti-Dumping Agreement defines the conditions under which submitted information must be taken into account. To the extent that the authority wishes to depart from the evidence submitted by an investigated company, Annex II(6) sets forth specific rules, in particular that the investigating authority inform the company and provide it with an opportunity to provide further explanations.

3.19. In this investigation, the Commission had before it extensive evidence submitted by Novatex in direct response to the Commission's explicit requests. This evidence pertained to, for instance, how Novatex traces its raw materials through the production process and how individual specific export consignments are linked to specific import consignments of raw materials; and how Novatex traces its actual consumption data, in order to perform annual reconciliation exercises, to adjust for any difference between the "standard" input-output ratio and actual output. In the parallel anti-dumping investigation, the Commission also had before it cost-accounting data that tracked separately raw inputs for, respectively, the production of export products and the production of products for the domestic market.

3.20. There is no discussion whatsoever of this evidence in the Commission's determination. There is not even an acknowledgement that this evidence had been submitted. The EU was, first and foremost, obliged to use the record evidence before it supplied by the investigated company. If the EU considered this information unreliable, it was required to explain the reasons therefor to the company, provide the company with the opportunity to provide further explanation and then make a final decision concerning that evidence. This deliberative process must be discernible from the authority's determination and explanation.

3.21. Only if the investigating authority has, in this process, properly determined that the data and information supplied by the investigated company was unreliable, can the investigating authority have recourse to facts available, e.g. second-source information. However, even then the investigating authority cannot, in principle, resort to unwarranted "assumptions" without any evidentiary support and must seek, to the greatest extent possible, to rely on *some* evidence for its determination.

3.22. In this investigation, the EU failed to explain why it could not use the information and data provided by Novatex. Even assuming that the EU would have been entitled to reject Novatex' record evidence, the EU would then have to apply the best other information available, rather than jumping to an unwarranted "assumption" that the totality of the duties constituted a subsidy.

### 3.6 The EU failed to provide the Government of Pakistan with an opportunity to conduct the "further examination"

3.23. An investigating authority has the obligation to structure its investigation such that there is an effective opportunity for the exporting government to conduct the "further examination". At the very minimum, the investigating authority cannot make statements – like the Commission did in this investigation – that require the exporting government to do the impossible and that effectively signal to the exporting Member that the investigating authority is not interested in any such "further examination" or the results thereof.

3.24. The Commission found that Pakistan had "failed" to conduct the "further examination", even though logically this was impossible for Pakistan to have done so prior to being informed about the Commission's decision on the monitoring mechanism. The EU now tries to imply that Pakistan should have known *before* the Provisional Determination that its monitoring mechanism would be found deficient. This argument should, of course, be rejected because it was only in the Provisional Determination that the Commission determined that the monitoring system was inadequate. The EU also repeatedly points to the Government of Pakistan's effort to convince the EU of the merits of its monitoring regime, as if that somehow proved that Pakistan was not willing to conduct the "further examination". Clearly, Pakistan would have done so had the Commission given it a proper opportunity to do so and informed it of what was needed.

3.25. An investigating authority has a duty, analogous to Article 12.1 of the SCM Agreement (and for instance Annex II(1) to the Anti-Dumping Agreement), to provide certain information to the exporting Member explaining what information is required, in which format, how the further examination was to be conducted and within which timeframe. This is because the required scope of the "further examination" will vary on a case-by-case basis. For instance, the precise scope of the investigation could depend on the precise deficiencies that have been found in the monitoring system; the authority may be required to point to precise aspects or elements of the "actual inputs" or "actual transactions" that should be examined; the exporting Member might require access to some of the confidential information that the investigated exporters have provided to the investigating authority, but that the exporting Member does not have. The investigating authority might also have to provide the relevant information to the *investigated company*. The due process rights of an investigated company − whether it is access to information, the ability to request hearings, the ability to submit evidence, etc. − must be safeguarded also in the context of the "further examination". Finally, the "further examination" might require the exporting Member to consider documents or information of the investigated company that have not been previously submitted, either with the Questionnaire Response or in subsequent stages of the investigation.

### 3.7 The EU's arguments about the alleged unreliability of Novatex's records and bookkeeping

3.26. The EU also continues to argue that Novatex's records and data were unreliable and therefore could be rejected whole-sale by the Commission. These arguments are an *ex post facto* explanation provided by the EU in these proceedings. The EU also appears to argue that, because it ruled that the monitoring mechanism was inadequate and unreliable, this implicitly also meant that all information and data provided by Novatex was also inadequate and unreliable. However, real or perceived deficiencies in a monitoring scheme say nothing about the reliability of a company's data and records. Moreover, the drafters of Annexes II and III clearly considered that, as a general rule, a company's records remain a reliable source of information even if a monitoring scheme is considered to be deficient. Finally, the rules on the use of facts available require a clear statement by the investigating authority to the affected company as to why information is not deemed reliable.

3.27. The Commission's refusal to engage with the evidence provided by Novatex, to analyse that evidence and − at the very least − to explain why this information could not be used or deemed reliable, is *particularly inappropriate in this particular investigation* where Novatex's data addressed the alleged problems in the monitoring system. Even assuming for a moment that the Commission's misgivings about the input/output ratio are justified, these concerns should have been addressed − at least in principle − by the record evidence regarding the company's *actual consumption data*. In any event, as demonstrated by Exhibit PAK-58, Novatex provided records showing how it could trace a given set of raw materials throughout the production chain.

### 3.8 Pakistan's approach to Footnote 1 and Annexes II and III does not create a risk of abuse by exporting governments nor impose an "unreasonable burden" on investigating authorities

3.28. The EU is also incorrect in arguing that its approach to Footnote 1 and Annexes I through III is the only manner to avoid abuse by exporting governments or individual companies, or that Pakistan's approach would impose an undue burden on the investigating authorities. Under Pakistan's approach, an investigating authority can always ensure that inadequately monitored duty drawback schemes do not enjoy the presumption created by Annexes II and III (namely, the presumption that an adequately monitored regime does not give rise to an excess drawback). Indeed, even upon a finding that a monitoring mechanism is adequate, an investigating authority may still proceed to examine the exporting company's records to determine whether an excess exists, as the EU itself argues. Thus, when an investigating authority finds that the monitoring mechanism is inadequate and then examines the company's own records, it is merely doing what it could/should be doing in any event. Thus, no new burden or requirement is imposed on the investigating authority.

3.29. In other words, the investigating authority is simply asked to proceed like it would in any other CVD, anti-dumping or safeguard investigation. It must base itself on record evidence provided by interested parties. Depending on the circumstances, the investigating authority may be required to become active and gather evidence on its own. Of course, in the case of duty-

drawback schemes, the authority must additionally observe the supplementary rules that the drafters chose to include in the SCM Agreement. But at the same time, the investigating authority enjoys the same rights that it has in any trade remedy investigation. It can reject evidence and data as unreliable if they so are, in accordance with the applicable rules of evidence and subject to the requirement of providing a transparent, reasoned and adequate explanation. This also means that the authority can resort to facts available, in order to remedy any data deficiencies.

### 3.9 Request for findings

3.30. For all of the above reasons, Pakistan requests the Panel to find that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraphs 5.133 to 5.135 of Pakistan's first written submission.[4]

## 4 PAKISTAN'S CLAIM CONCERNING THE LTF-EOP PROGRAMME

4.1. The EU violated Articles 1.1(b), the chapeau of Article 14, Article 10, 14(b), 19.1, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it applied a single (and ill-suited) commercial interest rate benchmark to Novatex's multi-tiered LTF-EOP loan, because it failed to explain the application of the methods enshrined in its domestic law and because it failed to analyse whether a comparable commercial loan existed in order to calculate the amount of the subsidy.

### 4.1 The structure of the LTF-EOP loan

4.2. The structure of the LTF-EOP loan is described in Pakistan's first integrated executive summary.

### 4.2 The EU's defence has shifted multiple times throughout these proceedings

4.3. The EU's defence against Pakistan's claim has changed several times since Pakistan filed its first written submission. At first, the EU argued that it did not countervail the entirety of the outstanding loan amounts, but rather only the amounts drawn down during the PoI. During the first panel hearing, the EU then argued that it had known all along that it had based its calculations on the full outstanding amount, that is, including pre-PoI amounts, and not only the amounts actually drawn down during the PoI. However, according to the EU, the Commission was nevertheless entitled to apply the interest rate prevailing during the PoI, because Novatex's loan was akin to a "line of credit", rather than a standard fixed rate loan. Then, in its Responses to the Panel's questions, the EU changed its arguments *again* and argued that that it considered the amounts reported by Novatex to have been exclusively amounts drawn down during the PoI. In the second panel hearing, the EU admitted that this was erroneous.

4.4. These shifts in the EU's position alone demonstrate that the EU cannot have provided a reasoned and adequate explanation for its determination. Where the respondent member is uncertain as to what its investigating authority actually did; and where a determination is so vague that it permits multiple shifting of key arguments; this cannot satisfy the requirement of a "reasoned and adequate" explanation.

### 4.3 It is also irrelevant whether the Commission's error was "excusable"

4.5. Contrary to what the EU has argued, and to what at least one question by the Panel suggests, it does not matter whether the Commission "should … have been reasonably expected" to understand Novatex's spreadsheet. It is abundantly clear from the evidence cited by Pakistan that the Commission committed an error, and indeed that was explicitly admitted by the EU during the second panel meeting with the parties. An error by an investigating authority that results in a violation of the covered agreements remains an error even if one were to consider that error excusable. Pakistan is not aware of any such "excusable error" doctrine that could somehow justify

[4] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

a violation of a provision of the SCM Agreement, such as Article 14(d) or Article 1, by the investigating authority.[5]

### 4.4 Pakistan fails to understand what the EU's labelling of the LTF-EOP loan as a "line of credit" is meant to achieve

4.6. Having admitted definitively that the Commission erred in its understanding of the facts, as reported in Novatex's spreadsheet, the EU has chosen to center its defence on the argument that Novatex's LTF-EOP loan was not a loan, but a "line of credit"; and that, therefore, the Commission was entitled to apply the KIBOR rate as a commercial interest rate benchmark from the PoI.

4.7. No matter what label the EU chooses to unilaterally apply to a financing arrangement, it must respect the basic parameters of that arrangement when identifying and applying a commercial interest rate benchmark. Any financing arrangement has to define at least three major parameters: how much, for how long, at which interest rate. Where the investigating authority is looking for a commercial benchmark interest rate, it must choose a benchmark rate that best approximates or reflects these fundamental parameters. This is also why Article 14(b) refers to a "comparable commercial loan" (underlining added). The arrangement that is chosen as a commercial benchmark must be "comparable". In this case, the evidence is clear that the interest rate for each tranche was fixed or locked in on the date on which the tranche was drawn down. Furthermore, the interest rate for each tranche was fixed on that date for the duration of the term of that tranche. It is not clear why the EU believes that simply relabelling the loan would mean that the Commission can start ignoring the basic parameters of Novatex's financing arrangement.

#### 4.4.1 In any event, the Commission's determinations do not state that it determined that the LTF-EOP loan was a "line of credit" and there is no such concept in EU law

4.8. If, as the EU now argues, the question of whether the loan was a "line of credit" has such fundamental impact on the choice of the commercial interest rate benchmark, the Commission was required to make this point very clear to the investigated company, disclose it as part of the essential facts, and provide the company with an opportunity to make representations on this point. In response to Panel's Question 54, the EU refers to several passages in the Commission's determinations where it allegedly "specifically determine[d] that the LTF-EOP loan to Novatex was best considered a 'line of credit', rather than a traditional loan." However, none of the passages to which the EU refers even remotely resemble such a determination.

4.9. More fundamentally, simple logic suggests that the Commission did not make this determination. As the EU admits, the Commission erroneously assumed that all reported amounts were drawn down during the PoI. By definition, therefore, in its analysis during the investigation, the Commission was not concerned with any amounts drawn down pre-PoI. The issue of the alleged "line of credit" – and its alleged differences to a "standard commercial loan" – did not arise and had no reason to be on the Commission's mind. It is not surprising, therefore, that nothing even remotely related to this point, including the concept of a "line of credit", can be found in the Commission's Determination. The EU is now simply creating reasoning that cannot be found in the Determinations.

4.10. The EU's allegations about the LTF-EOP loan as a "line of credit" is belied also by the EU's own domestic law. The EU's Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations (98/C 394/04) contain a separate detailed section entitled "Loans", which provides detailed instructions for an investigating authority in identifying a comparable commercial loan. These Guidelines even contain separate criteria for "specific cases", that is, particular "loan" arrangements that warrant special attention in the identification of a commercial interest rate benchmark. There is no reference whatsoever to a "line of credit", nor is there any trace of a distinction between this alleged category of "line of credit" as compared to a "standard loan".

[5] Pakistan notes that, for instance, the "negligible error" doctrine was rejected in *Guatemala – Cement II*. Panel Report, *Guatemala – Cement II*, para. 8.22.

### 4.5 The EU mischaracterizes the core features of the LTF-EOP loan

4.11. The EU's characterization of the LTF-EOP arrangement also contains other significant inaccuracies. For instance, the EU argues that "Novatex could choose when to draw down money under the credit facility and could thereby also choose the applicable interest rate". The Commission also argues that the "disbursement terms were also not established in 2004 – 2005".[6] These statements are demonstrably incorrect, and contradict explicit clauses of the LTF-EOP loan. Similarly, the EU is also incorrect to state that "it [was] not possible to know *ex ante* with precision the duration of the repayment".[7] There was no doubt about the duration of the LTF-EOP arrangement. The duration of the repayment was fixed at 7.5 years, with an initial grace period of 18 months for the principal repayment (but not interest payment).

4.12. The EU's misleading description of the LTF-EOP loan – that is, as some sort of variable-rate line of credit from which Novatex could draw funds entirely at its discretion – is also contradicted by the manner in which the Government of Pakistan designed and described the LTF-EOP programme in the underlying policy documents.

### 4.6 The EU is incorrect about the legal standard under Article 14(b)

4.13. The EU also attempts to justify the use of a commercial interest benchmark from the PoI for all tranches under Article 14(b). Pakistan fails to see how Article 14(b) justifies the EU's approach. The EU argues, for instance, that the Commission countervailed the amount that was "effectively used" or enjoyed by Novatex in 2008-2009 and "hence, it was appropriate to also apply a benchmark for that same period".[8] This argument makes no sense. The fact that Novatex was "effectively us[ing]" funds during the PoI cannot mean that the Commission could use an interest rate from the PoI. If the EU were correct, then any not-yet-repaid fix-term loan taken in the past could be measured against today's commercial interest rate, because the money is still being "used" by the debtor.

4.14. The EU argues that "amounts under the LTF-EOP programme continued to be drawn down during the IP which further confirms the close nexus between the benchmark chosen by the Commission and the LTF-EOP programme."[9] Pakistan never disputed that the Commission could use the PoI benchmark (leaving aside Pakistan's misgivings about KIBOR) for amounts drawn down during the PoI. However, it makes no sense to use the PoI KIBOR for amounts drawn down in previous years, when a different KIBOR was applicable. As indicated in the preceding paragraph, the EU's approach would deprive the term "comparable" of any meaning.

4.15. Similarly, the EU's assertion that the LTF-EOP scheme was a "single scheme" constitutes no basis for applying a single interest rate. It is perfectly possible – as was the case here – that a "single scheme" contains multiple tranches each one of which is subject to a different interest rate from a different period. Thus, the label "single scheme" is an essentially meaningless term.

### 4.7 The EU misrepresents the Commission's determination of the commercial benchmark interest rate

4.16. In response to a Panel question, the EU also misrepresents several aspects related to the nature of the commercial benchmark interest rate applied by the Commission. The EU argues that this rate was the KIBOR, and that Novatex itself had suggested that the KIBOR rate be used.

4.17. First, neither Novatex nor the GOP suggested the use of this rate. The evidence cited by the EU in this regard is inapposite. Second, while "KIBOR" has been used in these proceedings as a convenient short-hand for the Commission's interest rate, and that rate is in the numerical vicinity of the KIBOR, the Commission did not apply the KIBOR. Instead, the Commission obtained the benchmark interest rate by selecting, from a wide range of choices, data from the website of the State Bank of Pakistan (SBP), made its own calculations and then applied this rate, without providing even the most basic explanation of how it had derived this benchmark interest rate. Due to their sophistication and knowledge of the SBP data, the Government of Pakistan and Novatex

[6] EU's response to Panel Question No. 55, para. 80.
[7] EU's response to Panel Question No. 55, para. 80.
[8] EU's response to Panel Question No. 55, para. 81.
[9] EU's response to Panel Question No. 55, para. 81.

were able to reverse engineer this rate and comment on it. However, an uninitiated reader would have no basis to even begin to understand how the Commission derived its benchmark interest rate.

### 4.8 The EU confirmed to the Panel that it failed to follow the analytical process required both by its Guidelines and by Article 14(b)

4.18. Pakistan has argued that the EU failed to explain why it rejected the loan benchmark interest rates provided by Novatex. In addition, in its responses to Panel questions 58, 59, 60 and 61, the EU has confirmed to the Panel that – once the Commission rejected Novatex's proposed commercial interest rates – it did not attempt to identify the interest normally payable on a comparable commercial loan to Novatex; and did not attempt to identify the interest payable on a commercial loan to companies in a similar financial situation in the same sector of the economy. It also did not attempt to identify the interest rate payable on a comparable loan to companies in any sector of the economy, nor did it attempt to identify a proxy that reflected the duration of the subject loan.

4.19. This amounts, in effect, to an admission that the Commission failed to comply with the chapeau of Article 14 and with Article 14(b) and the "progressive search" required by the Appellate Body under that provision.[10]

### 4.9 The EU's responses contain additional misrepresentations and factual inaccuracies

4.20. The EU attempts to argue, for instance, that Novatex paid the same interest on the total outstanding amount and that this somehow puts into question "the alleged separate nature of each tranche." That is incorrect. The fact that the annually-locked in interest rate happened to be similar in certain successive years does not compromise the separate nature of each tranche.

4.21. The EU also claims that that Novatex's data were not sufficiently disaggregated into the various tranches (or the tranches aggregated by years) and that the Commission therefore would have been unable, on the basis of Novatex's Questionnaire response alone, to apply multiple interest rate benchmarks and to calculate the respective subsidization amounts.[11] That is correct. In order to perform the analysis correctly, the Commission would have had to request Novatex to provide more disaggregated data. The reason why Novatex did not provide the data in that format was because the Commission's **questionnaire template did not permit it to do so** and also because Novatex could not know the analytical approach that would be ultimately adopted by the Commission. Novatex also took a view that an altogether different benchmark was appropriate. It was the responsibility of the Commission as the investigating authority, in response to the Questionnaire response, to choose the appropriate analytical approach and to request additional data from the company, if the Commission considered that it needed this additional data.

### 4.10 Conclusion and request for findings

4.22. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraph 6.101 of Pakistan's first written submission.[12]

## 5 THE COMMISSION'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLE 15.5 OF THE SCM AGREEMENT

5.1. The Commission's analysis of the existence of a "causal link" between the subject imports and the alleged injury to the domestic industry is inconsistent with Article 15.5 of the SCM Agreement for the following reasons.

[10] Appellate Body Report, *US – AD/CVD (China)*, para. 486.
[11] EU's response to Panel Question No. 55, para. 81.
[12] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

### 5.2 The Commission's "breaking the causal link" approach is inconsistent with Article 15.5 of the SCM Agreement

5.2. The Commission's "breaking the causal link" approach is inconsistent with Article 15.5 of the SCM Agreement. Pakistan submits that, as a matter of logic, the Commission could not possibly first establish a causal link (i.e. a relationship of cause and effect) between the alleged imports and the subsidized imports and subsequently find that one or more other factors "break" that causal link. If an "other factor" is capable of breaking the causal link, this causal link should never have existed in the first place. In response to this argument, the EU referred to four anti-dumping determinations where the Commission made a negative finding of causation. In none of these four determinations did the Commission make a finding at the outset of its causation analysis that a causal link existed and then examine whether other factors "broke" that link. By not making that finding at the start in those determinations, the Commission was able to assess properly the injurious effects of all the relevant factors on the domestic industry, including those of the subject imports, and then determine that the subject imports "in isolation" could not have caused material injury.[13] Thus, the EU has not provided any instances on which to base its assertion that the Commission can find that a causal link between investigated imports and alleged injury existed but that the injury caused by other factors "broke" that link.

5.3. The Commission's "breaking the causal link" approach effectively vitiated the non-attribution analysis in the challenged Determinations. The causal link found at the start of its causation analysis was not "preliminary", as the EU suggests.[14] Rather, this causal link was exactly the same link that was used to dismiss the significance of the non-attribution factors that the Commission purportedly analysed. This explains why, even if the Commission accepted that at least three other factors might have been causing injury, it ultimately rejected them because they did not "break" the causal link. Had the Commission applied the correct legal standard, it would have examined whether the injurious effects of these other factors were such as to render any link between the subject imports and the alleged injury too distant, remote or insubstantial.

5.4. For these reasons, the EU is incorrect that there is similarity between the Commission's "breaking the causal link" approach and Pakistan's understanding of the proper legal standard in Article 15.5.[15] Under the "breaking the causal link" approach, the Commission failed to analyse the injurious effects of the subject imports and the other known factors *independently* and *objectively*. Rather, under this approach, the Commission merely assessed these other factors against the previously found causal link between the subject imports and the alleged injury. This approach effectively pre-judges the issue of non-attribution: it appears to be impossible as a matter of logic to "break" a causal link once it has been established. This is also evident from the challenged Determinations, where the Commission identified certain injurious effects of at least three non-attribution factors but dismissed them on the grounds that these factors could not "break the causal link". Because the "breaking the causal link" approach vitiated the analysis of the non-attribution factors, the Commission's causation analysis is inconsistent with Article 15.5 of the SCM Agreement.

### 5.3 The Commission merely *assumed* the existence of a causal link based on its finding of increased imports which undercut prices

5.5. The Commission simply *assumed* the existence of a causal link based on its previous finding that the investigated imports were undercutting the prices of the domestic product. The Commission found its causal link based on nothing more than a "coincidence in time" between increased imports, which allegedly undercut the price of the domestic product, and the deterioration in the condition of the domestic industry.[16]

5.6. The Commission should have gone beyond the mere identification of a *coincidence* and provided some analysis of *causation.* By assuming the existence of a causal link based merely on a temporal coincidence, the Commission failed to conduct the analysis required under Article 15.5

[13] Commission Decision 2008/227/EC. Exhibit PAK-63; Commission Decision, 2007/214/EC, para. 138. Exhibit PAK-64. Commission Decision 1999/55/EC. Exhibit PAK-65; and Commission Decision 2005/289/EC. Exhibit PAK-67.
[14] EU's second written submission, paras. 179, 180 and 182.
[15] EU's second written submission, para. 164.
[16] Preliminary Determination, para. 262. Exhibit PAK-1.

and footnote 47 of the SCM Agreement of how the subject imports had a bearing on the negative performance of five economic factors identified by the Commission.[17]

5.7. Also, as matter of fact, the Commission's finding of a temporal coincidence was incomplete and one-sided. The Commission found that five industry indicators showed negative performance: production, sales, profitability, return on investment and cash flow.[18] All five indicators showed positive or neutral performance from 2006 to 2007, and deteriorated *only* in 2008 and the first semester of 2009 (i.e., towards end of the PoI).[19] However, this is also the same time period in which other known factors had their greatest effects on the condition of the domestic industry: the 2008 economic downturn broke out only in 2008; imports from Korea increased by 76% in 2008 and during the first semester of 2009; and non-cooperating EU producers were able to regain significant sales and market share in the first semester of 2009.

5.8. There is, therefore, the same temporal coincidence between the other known factors and the alleged injury. This coincidence was just as compelling as the coincidence between the subject imports and the alleged injury. The Commission, however, improperly attributed greater value to the "coincidence" between the subject imports and the injury than to the other coincidence between several non-attribution factors and the same injury, without providing a reasoned and adequate explanation of why it did so.

### 5.4 The Commission's analysis of "other factors" is inconsistent with Article 15.5

5.9. The Commission's analysis of other factors was also inconsistent with Article 15.5. First, in the case of the imports from Korea, the Commission merely stated that "it cannot be excluded" that these imports "contributed to the injury suffered by the Union industry". The words "cannot be excluded" admit that this factor may have been a cause of injury. However, the Commission made no effort to probe the nature and extent of the contribution of those factors to the alleged injury. In principle, this price undercutting could have had a similar or even greater downward effect on domestic prices than the subject imports, given that (1) both imports from Korea and the subject imports had similar market shares during the PoI; and (2) imports from Korea grew by almost 150% during the same period. In these circumstances, the Commission's cursory analysis of the imports from Korea cannot constitute a "meaningful explanation of the nature and extent of [its] injurious effects".

5.10. Second, the Commission stated that any injury caused by the 2008 economic downturn it caused was in any event "exacerbated by the increased subsidised imports from the countries concerned, which undercut the prices of the Union industry".[20] In other words, regardless of the magnitude of the injurious effects of the 2008 economic downturn, this factor could never have broken the causal link, as the Commission had already found price undercutting by the subject imports. Importantly, the Commission failed to explain what "exacerbate" means and the extent to which the subject imports "exacerbated" the negative effects of the 2008 economic downturn. This question remained unresolved because the Commission did not separate and distinguish the injurious effects of the 2008 economic downturn from those of the subject imports. Moreover, the Commission partly dismissed the relevance of the 2008 economic downturn on the grounds that the EU industry had suffered injury prior to 2008. However, the Commission's statement that the EU industry was suffering injury prior to 2008 lacked supporting analysis. In addition, the Commission's statement is all the more puzzling since a large number of injury indicators actually showed a positive performance up to 2008 and it was only then that they began to languish.

5.11. Third, the Commission again recognized the (at least potential) negative effects of the low prices of crude oil on the domestic industry. However, it did not separate and distinguish these effects, or provide a "meaningful explanation of the nature and extent of [its] injurious effects".[21] It merely dismissed this "other factor" by recalling its previous finding that the subject imports undercut the prices of the EU producers. The Commission thus failed to ascertain the extent of the impact of this factor, if any, on the domestic industry. In fact, it recognized that prices of PET

[17] Preliminary Determination, paras. 238-239. Exhibit PAK-1. (production, sales, return on investment, profitability and cash flow)
[18] Preliminary Determination, paras. 238-239. Exhibit PAK-1.
[19] Preliminary Determination, paras. 220, 223, 233 and 235. Exhibit PAK-1.
[20] Preliminary Determination, recital 254. Exhibit PAK-1.
[21] Appellate Body Report, *US – Lamb*, para. 186.

depend to some extent on prices of crude oil, but failed to address the argument that low prices of PET in the EU were a function of the low prices of crude oil. Rather, it gave an off-the-point explanation about the volatility of world prices and how this cannot explain "why imports of PET were subsidised and therefore undercut the Union producers' prices".[22] Of course, the question is not whether the low prices explain why imports of PET might have been subsidized, but rather whether they explain the alleged injury to the domestic industry.

5.12. Fourth, the Commission should have addressed the reasons why a part of the EU industry, which did not cooperate, improved its performance from 2008 to the end of the PoI. This period coincided with the contraction of global demand and with the expansion of demand in the EU market. It is intriguing to say the least that the subject imports had negative effects on only one part of the EU industry (those supporting the investigation), while the other part of the EU industry (those not supporting the investigation) showed a positive performance from 2008 to the end of the PoI. Moreover, the EU's assertion that the Commission found that the non-cooperating EU producers did not cause injury is troublesome in view of the facts before it.[23] Specifically, the market share of the non-cooperating EU producers was significantly higher than that of the subject imports during the PoI (e.g., 16% and 10.2%, respectively, at the end of the PoI). Pakistan thus fails to understand why the increasing production and market share of the subject imports caused injury, while the more significant increasing production and market share of the non-cooperating EU producers did not. Because the Commission failed properly to assess the injurious effects of the competition from these non-cooperating EU producers, the Commission's causation analysis is inconsistent with Article 15.5 of the SCM Agreement.

### 5.5 Conclusion and request for findings

5.13. For the reasons set out above, Pakistan requests the Panel to find that the causation analysis in the challenged Determinations is inconsistent with Article 15.5 of the SCM Agreement.

## 6 PAKISTAN'S CLAIM UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE RESULTS OF THE VERIFICATION VISIT

6.1. Pakistan continues to claim that the European Union has acted inconsistently with its obligation under Article 12.6 of the SCM Agreement, because it failed either to make the results of the verification visit to Novatex available or to provide disclosure thereof as part of the disclosure of essential facts under Article 12.8.

6.2. The *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter, but that the investigating authority did not immediately consider relevant to its final determination.[24] A clear reporting of the results of the verification is essential to enable the exporter to structure its case for the rest of the investigation. Pursuant to Annex II(3) of the Anti-Dumping Agreement, which applies by analogy under the SCM Agreement[25], all information that is "verifiable" and submitted in timely and usable fashion, must be taken into account by the investigating authority. The investigating authority is "not entitled to disregard the submitted information and use information from another source to make the determination."[26] In addition, the ability of domestic courts (using their own standard of review) and of WTO panels (using the standard of review pursuant to Article 11 of the DSU) to review the determinations of investigating authorities depends on the existence of a proper disclosure of the "results" of the verification visit under Article 12.6 of the SCM Agreement.

6.3. In the investigation at issue, the Commission failed to disclose the results of the verification visit. To the extent it made an effort to comply with the requirements of Article 12.6, in this case the Commission opted to disclose the results of the verification via the disclosure of essential facts

[22] Definitive Determination, recital 118. Exhibit PAK-2.
[23] EU's response to Panel question 100, para. 33.
[24] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)
[25] See Appellate Body Report, *Mexico – Rice*, paras. 290 – 295.
[26] Panel Report, *EC – Salmon (Norway)*, para. 7.383 (see also Ibid., para. 7.347). Panel Report, *US – Steel Plate*, para. 7.57.

under Article 12.8. However, the Commission's disclosures contain no information of what occurred during the verification visit and which topics, other than the MBS, the Commission discussed with the investigated company, even though the Commission had provided the exporter with an extensive list of topics to be verified. However, there is no information whatsoever about verification on any of these issues other than the Manufacturing Bond Scheme. Hence, the EU has failed to provide any information on the results of its verification concerning all these other issues.

6.4. Beyond the list of exhibits collected at verification, the EU disclosed no information on the conduct of the verification visit, or any corrections or rectification of the information contained in the Questionnaire Response. The EU has not disclosed which particular aspect of these documents was discussed, for what purpose, or whether the Commission considered the data and information contained in this document to be verified or verifiable.

6.5. In its submissions, the EU continues to attempt to conflate the concept of the results of the verification with the results of the investigation. The EU argues that the results of the verification were the facts that the investigating authority had decided to include in the essential facts disclosure as those on which it intended to base its final determination. Pakistan has explained how this approach necessarily deprives exporters of their rights and ability to defend themselves. It means that the results of the verification would be only those the investigating authority considers to be important or to support its final determination. The results of the verification would not include outcomes of the verification to which the exporter may attach greater importance than the investigating authority or outcomes on which the exporter thinks the investigating authority *should* base its final determination. In its answers to the Panel's questions, Pakistan provided examples, both specific to this investigation and generic, illustrating how the exporter's interests could be negatively affected by a failure to provide information about what happened at the verification that goes beyond the investigating authority's subsequent, subjective decision as to what evidence supports its final determination.[27]

6.6. Moreover, in its answers to the Panel's questions, the EU "takes the position that the term 'result' does not include information, for example, about whether the Commission requested additional documents, whether Novatex provided requested documents or whether the Commission asked questions during the verification visit".[28] This is an extraordinary proposition. The EU considers that its investigating authority could ask for and receive (or, indeed, not receive) key information regarding the exporter's questionnaire responses and business operations and subsequently simply ignore that fact or evidence in its final determination. This would mean, for instance, that the investigating authority could have asked for clarification in the verification that the term "Opening" balance in the spreadsheet of interest amounts paid on loans subject to the LTF-EOP programme during the PoI included principal amounts drawn down before the PoI, received that clarification, and simply ignored that fact in reporting on the results of the verification.[29]

6.7. The EU appears to acknowledge that further information about the results of the verification may be required to be provided "when such information is indispensable for interested parties to defend their interests with respect to essential facts … (e.g. in the case of the use of facts available …)".[30] There are, however, two problems with this statement. First, the same problem remains that it would be the EU, not the exporter itself, which would determine what information would be "indispensable" to the defence of the exporter's interests. There is no textual basis in Article 12.6 for the EU's position that the "results" of the verification are only those matters that the *investigating authority* considers to be relevant to the defence of the exporter's interests.

6.8. In addition, there is no reason why the logic behind requiring more information in cases involving facts available would not also apply to other situations in which the exporter might consider that additional information about the outcome of the verification might be "indispensable for interested parties to defend their interests".[31] There is no reason why more or less information should be disclosed about the outcome of the verification visit on one issue rather than the other. Certainly, there is textual basis in Article 12.6 for the EU's position that the meaning of the

[27] Pakistan's response to Panel Question No. 80, paras. 5.1 – 5.9.
[28] EU's response to Panel Question No. 84, para. 124.
[29] See, for instance, Pakistan's response to Panel Question No. 38(c), para. 278.
[30] EU's response to Panel Question No. 84, para. 121.
[31] EU's response to Panel Question No. 84, para. 121.

"results" of the verification may be the information at issue or the uses to which it may be put by the investigating authority.

6.9. In its responses to the Panel's questions, the EU refers to two "examples" of how it disclosed the results of the verification visit in the disclosure of the essential facts.[32] First, the EU refers to the statements regarding the MBS in its company-specific disclosures.[33] However, Pakistan, in its own responses to the Panel's questions, has explained how the EU's disclosure of the results of the verification visit with respect to the MBS was at best incomplete and left open important issues that affected Novatex's and Pakistan's ability to defend their interests before reviewing courts and this Panel.[34] Second, the EU refers to the fact that it disclosed "Novatex's turnover figures".[35] It is not clear how the "turnover figures" represented a sufficiently significant "result" of the verification to merit such different treatment than other data that was reviewed during the verification. If the turnover figures merited disclosure as a "results" of the verification, surely so too did the other matters to which Pakistan has referred in its answers to the Panel's questions.

6.10. The EU also overlooks that one option of disclosing the verification results is a separate report that will typically be issued well before the authority decides what the essential facts are. Choosing the option of later disclosure, when the authority has decided on what the essential facts are, cannot mean that the universe of verification results has suddenly become smaller. If this were accepted, the authority could manipulate the scope of its obligations, and the rights of companies, simply by waiting.

6.11. Another pillar of the EU's defence is the mantra that an investigating authority is not required to provide written "minutes" of the verification visit. By means of the label "minutes", the EU tries to discredit and misrepresent Pakistan's argument as requiring some sort of excessive and administratively burdensome level of detail from the investigating authority.

6.12. Under this argument, the EU would allow an investigating authority to pay lip-service to Article 12.6 with generic, boilerplate statements that in reality do not disclose anything meaningful. For the EU, stating that, for instance, "documents relating to the company's financial accounts were verified" would be enough to satisfy Article 12.6.[36] This cannot be so. The disclosed results must be sufficiently specific so that the exporter can subsequently make submissions relating to (i) what specific information or which specific document was verified, (ii) against which other document or other information the original document or information was examined, (iii) for what purpose a given document or information was considered, and (iii) which final conclusion the investigating authority drew.[37]

6.13. The EU also argues that "accuracy of the information" is not part of the results of the verification visit.[38] This is wholly untenable. The accuracy of the information and hence its reliability for use in the determinations, and the views of the authority on this point, are the very core of the verification and therefore are key to the results. This is illustrated well by the questions surrounding the LTF-EOP loan. Pakistan argues that, had the EU properly reported the results of the verification, the Panel would not be required today to seek to divine what the EU thought and how its individual investigators read and understood the term "opening" amount in the LTF-EOP spreadsheets.

6.14. Yet another line of EU arguments is that the results of the verification are a "summary of the summary of the information that was checked during the verification visit"[39]. In Pakistan's view, the word "summary" is not a particularly useful tool to gauge compliance with Article 12.6. The requirement in Article 12.6 is to disclose the "results of the verification". Thus, the word or concept of "summary" is not treaty language and is thus a potential red herring in discerning the meaning of Article 12.6, to the extent that it may divert the analysis from discerning the meaning of the treaty term "results".

[32] EU's response to Panel Question No. 84, paras. 114 – 119.
[33] EU's response to Panel Question No. 84, para. 114.
[34] Pakistan's response to Panel Question No. 80, paras. 5.4 – 5.5.
[35] EU's response to Panel Question No. 83, para. 115.
[36] See the EU's second written submission, para. 193.
[37] See for instance Pakistan's first written submission, para. 8.41, referring *inter alia* to Panel Report, *Korea – Certain Paper*, para. 7.68.
[38] EU's second written submission, para. 208.
[39] EU's opening statement at the second meeting of the Panel, para. 73.

6.15. Finally, in its answers to questions, as in its opening statement at the Panel's meeting with the parties, the EU posits the possibility that no verification visit might take place (as such visits are not required). The EU elaborates on what information might or might not have been disclosed as essential facts in the event that no verification visit had taken place and suggests that the amount of information that must be disclosed under the SCM Agreement does (or should) not vary depending on whether a verification visit has taken place.[40] However, as Pakistan explained in its own answers to the Panel's questions, there is a separate multilateral obligation to report the results of any verification visit. The obligation in Article 12.6 of the SCM Agreement cannot be rendered inutile by suggesting that it should not result in a different disclosure than if no verification visit had occurred.

6.16. With respect to the list of documents collected at the verification visit, as reflected in Exhibit EU-10, this list was not given to Novatex by the EU officials, although the documents on that list match the company-internal list of documents in the company records of the verification visit. In any event, the list does not disclose the content of the document nor the purpose for which the document was inspected and collected. The list does not even make clear whether a given document was collected as part of the CVD investigation or the parallel anti-dumping investigation.

6.17. For the reasons above, Pakistan requests the Panel to find that the EU acted inconsistently with its obligations under Article 12.6 of the SCM Agreement, by failing to disclose the results of the verification in accordance with that provision.

[40] EU's response to Panel Question No. 83, paras. 117-119.

# ANNEX D

## ARGUMENTS OF THE THIRD PARTIES

## ANNEX D-1*

ARGUMENTS OF CHINA

THIRD PARTY ORAL STATEMENT OF CHINA

### I. Introduction

1. Mr. Chairman, Members of the Panel, China welcomes this opportunity to present its views on *European Union – Countervailing Duty Measures on PET from Pakistan (DS486)*. In this session, China will only touch upon two claims by Pakistan under Article 1, Annex II (II) and Article 14 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

### II. Pakistan's Claims Regarding "MBS" Duty Remission Program under Article 1 and Annex II(II) of the SCM Agreement

2. One of the core issues, for which China takes no position on the merits of the factual allegations, in this dispute is whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as an export subsidy under Article 1.1. Put it into more detail, it consists of two parts: (1) Would the lack of an effective system or procedure in the duty drawback system by the exporting Member to monitor the inputs consumed in the production of the exported product directly form the basis for a determination of existence of subsidy; and (2) assuming that a further examination regarding the actual inputs involved in determining whether an excess payment occurred has been failed to carry out, could the entire amount of import duties be treated as an export subsidy?

3. These questions should be answered under the relevant provisions of the SCM Agreement and the GATT 1994. Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement as well as the Ad Note to Article XVI of the GATT 1994 state that "a subsidy shall be deemed to exist if: … government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)", and "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 or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

4. The text itself makes it clear that only when a drawback system leads to excessive drawback could a subsidy then be deemed to exist. Despite footnote 1 refers to "In accordance with…the provision of Annexes I through III of this Agreement", the effectiveness of the duty drawback system cannot replace the criterion for deciding the existence of subsidy. According to the Annex II(II)(1) and (2) of the SCM Agreement, "Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, 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", and "Where… [such system or procedure] is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1". From this, the fact of non-existence effective system or procedure to monitor the inputs consumed in the production of the exported product alone is not decisive for determination of existence of an export subsidy. What the investigating authorities should do is to decide the existence of a subsidy on the ground that the criterion provided in the SCM Agreement has been met.

* The deadline for the third parties to submit their executive summaries was 7 October 2016. China did not submit an executive summary by this time. On 9 December 2016, China was informed that if China did not submit its executive summary by 16 December 2016, China's third party oral statement dated 22 September 2016 would be annexed to the Panel report as the description of China's arguments. China did not submit an executive summary by 16 December 2016. Thus, we attach China's referenced oral statement here.

5. Furthermore, even under the situation that it is determined a drawback system conveys a subsidy by reason of excess drawback of import duties on inputs consumed in the production of the exported product, it does not mean that the entirety of the duties remitted or drawn back are in "excess" and constitute a subsidy. Rather, the excess amount remitted or drawn back which reflects the subsidy provided to the recipient needs to be ascertained, to ensure that the countervailing duty levied does not excess to the amount of the subsidy found to exist. Consequently, it is suggested that the Panel should consider whether the investigating authorities' determination, that one hundred percent of drawn back of import duties constitutes a subsidy, was based on positive evidence and involved an objective examination.

## III. Pakistan's Claims Regarding Its "LTF-EOP" Export Financing Program under Articles 14 of the SCM Agreement

6. Additionally, Pakistan claims that the EU acted inconsistently with Article 1.1(b), the chapeau and subsection (b) of Article 14 of the SCM Agreement in calculating the benefit under the Long-Term Financing of Export-Oriented Projects (LTF-EOP) scheme.[1] In examining whether the Commission's choice of a national interest rate as the benchmark to calculate the benefit of the LTF-EOP loan was in legal error, namely, whether that benchmark is a "comparable" commercial loan benchmark[2], it is necessary to analyze whether the Commission had considered all the relevant evidence and adequately explained the application of its own analytical method.

7. Specifically, in identifying the benefit of a preferential loan program, the approach of Articles 14(b) is a straightforward comparison of the interest paid with "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market". Although the use of the conditional tense, "could", suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can in fact be obtained in the market[3], the Appellate Body has "observe[d] that the Panel reasoned that the identification of an appropriate benchmark under Article 14(b) can be seen as a 'series of concentric circles', where the investigating authorities should first seek commercial loans to the same borrower that are identical or nearly identical to the investigated loan. ….In the absence of an identical or nearly identical loan, an investigating authority should seek, in turn, other similar commercial loans held by the same borrower, then similar commercial loans granted to another borrower with a similar credit risk profile to the investigated borrower. ….Yet, there may be situations where the actual differences between any of the existing commercial loans and the investigated government loan are so significant that it is not realistically possible to address them through adjustments. In such situations, the Panel considered that an investigating authority should be allowed to use proxies as benchmarks."[4]

8. Thus, China does not intend to deny the discretion possessed by the investigating authority in selecting an appropriate benchmark. However, the application of the methods set out in national legislation or regulations to a situation in which the borrower has no comparable commercial loans and a benchmark must be found must be transparent and adequately explained in accordance with the chapeau of Article 14 of the SCM Agreement. Namely, it is important to examine whether the investigating authority fulfil its obligation to provide a transparent and adequate explanation for why it selected a particular benchmark, in which the parties to the investigation can adequately and timely defend their interests.

## IV. Conclusion

9. China thanks the Panel for its consideration of these comments.

[1] Pakistan First Written Submission, para. 6.2.
[2] *See* Pakistan First Written Submission, paras. 6.28-6.56.
[3] *US – Anti-Dumping and Countervailing Duties (China) (AB), para. 674.*
[4] *US – Anti-Dumping and Countervailing Duties (China) (AB), para. 676.*

# ANNEX D-2

## ARGUMENTS OF THE UNITED STATES

## EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

### 1. INTRODUCTION

1. In this submission, the United States presents its views on the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") as relevant to certain issues in this dispute.

### 2. CLAIMS REGARDING ARTICLES 1 AND 3 OF THE SCM AGREEMENT

2. The United States, while taking no position on the merits of the factual allegations made by either party, submits the following comments. The core disagreement between the parties is whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as a financial contribution under Article 1.1 where the exporting Member: (1) does not have an effective system or procedure in place to monitor the inputs consumed in the production of the exported product and (2) has failed to carry out a further examination based on the actual inputs involved in determining whether an excess payment occurred under the duty drawback scheme. The United States submits that this question should be answered in the affirmative under the relevant provisions of the SCM Agreement and the GATT 1994.

3. Both footnote 1 to the SCM Agreement and the Ad Note to Article XVI of the GATT 1994 contemplate that a duty drawback scheme "shall not be deemed to be a subsidy" so long as there is no "excess" remission of duties or taxes from those which have accrued. Consequently, if a duty drawback system were to provide for exemption or remission of duties or taxes in amounts that exceed the amounts of "duties or taxes that have accrued," then such a system may be "deemed to be a subsidy" under the terms of Article 1.1 of that Agreement.

4. Importantly, footnote 1 also notes that this standard (that "the remission of such duties or taxes in amounts not in excess of those which have accrued" shall "not be deemed to be a subsidy") is "[i]n accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement." Article 32.8 of the SCM Agreement provides that "[t]he Annexes to this Agreement constitute an integral part thereof."

5. Annex I to the SCM Agreement, providing an "illustrative list" of export subsidies, elaborates that the "[t]he remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)" would constitute an "export subsidy." Again, this suggests that an export subsidy exists in cases where there is such an excess.

6. In determining whether a duty drawback scheme provides for remission of import duties in amounts that in fact exceed a permitted limit, the procedures described in Annexes II and III are pertinent. The standard in footnote 1 to the SCM Agreement is "in accordance with" Annexes II and III, which each addresses a particular duty drawback scheme. 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 and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III."

7. For a duty drawback system to operate so as not to provide for excess remission of import duties, Annexes II and III provide for procedures to check the system of the exporting Member. Annex II(II)(1) provides that the investigating authority should first determine whether the exporting Member has in place an adequate system or procedure to monitor which inputs are consumed in the production of the exported product and in what amounts. Annex II(II)(2)

contemplates an additional analysis by the exporting Member absent satisfaction of the condition under Annex II(II)(1).

8. Therefore, where an exporting Member has a duty drawback scheme in place that does not satisfy the requirements for such a scheme to "not be deemed to be a subsidy," then an investigating authority would be permitted to consider the full amount of the financial contribution as a subsidy under the terms of Article 1.1. The conditions for a duty drawback scheme to be considered within the scope of footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement are established by reference to Annex II(II)(1)-(2).

9. Finally, an investigating authority need not consider information that post-dates the period of investigation in trade remedy proceedings.

## 3. CLAIMS REGARDING ARTICLES 1.1(B) AND 14 OF THE SCM AGREEMENT

10. Because the title of Article 14 indicates that it sets out "guidelines" for determining benefit, there exists "a certain degree of flexibility … under Article 14(b) in the selection of benchmarks." The selection of an appropriate benchmark under Article 14(b) is guided by the terms "comparable," "commercial," and a "loan which the firm could actually obtain on the market."

11. Of particular relevance to this dispute, the comparable commercial loan benchmark must be contemporaneous in time with the alleged subsidized loan. For example, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that investigating authorities must rely on a benchmark "that would have been available to the recipient firm at the time it received the government loan," such that the comparison to determine the benefit "is to be performed as though the loans were obtained at the same time." This contemporaneity factor accords with the principle that "[t]he investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.)."

12. Finally, Article 14(b) also describes a benchmark loan as reflecting one "which the firm could actually obtain on the market." The Appellate Body has explained that "[t]he use of the conditional tense, 'could', suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can in fact be obtained in the market." The Appellate Body has also observed that "could" refers "'first and foremost' to the borrower's risk profile, that is, whether the benchmark loan is one that could be obtained by the borrower receiving the investigated government loan." Given these findings, the United States agrees with Pakistan's observation that "the investigating authority must, at the very least as the starting point of its analysis, first seek to identify a comparable loan that the *specific firm* under investigation would pay."

13. In light of the guideline of comparing the transaction to one the loan recipient might have obtained on the market, an investigating authority might well examine the transaction and rely on a benchmark that is contemporaneous with when the loan disbursement terms were established. This is because the investigating authority could take the view that each tranche is merely a part of the one overall loan. The investigating authority might also examine the transaction and apply a loan interest rate benchmark that is contemporaneous in time with when each tranche of the investigated loan was drawn down, as Pakistan proposes, because the authority might determine that each tranche should be considered as a distinct loan. These considerations will depend on the factual circumstances concerning the terms of the loan.

14. Finally, the United States observes that an investigating authority has an obligation to provide a transparent and adequate explanation for why it selected a particular benchmark. One reason is so the parties to the investigation can adequately and timely defend their interests.

## 4. CLAIMS REGARDING ARTICLE 12.6 OF THE SCM AGREEMENT

15. The last sentence of Article 6.7 of the AD Agreement largely mirrors the last sentence of Article 12.6 of the SCM Agreement. The last sentence of Article 6.7 of the AD Agreement requires investigating authorities "to inform the investigated exporters of the verification results," *i.e.*, the results of the verification visit. The disclosure of the results of a verification visit are important both in enabling exporters and WTO Members to seek judicial review of the investigating

authority's determination under Article 23 of the SCM Agreement, and to protect exporters' rights to prepare and present their cases under Article 12.3 of the SCM Agreement.

16. The meaning of the term "results" in the last sentence of Article 12.6 of the SCM Agreement informs the extent of what the investigating authority must provide to "the firms to which they pertain." The ordinary meaning of "result" is "an effect, issue, or outcome *from* some action, process or design." The "results" envisaged by Article 12.6 of the SCM Agreement are the "outcome" of the verification visit, which under Annex VI(7) is an on-the-spot investigation "to verify information provided or to obtain further details."

17. Article 12.6 of the SCM Agreement (as does Article 6.7 of the AD Agreement) provides two alternative mechanisms for disclosing the verification visit results: to make the results available to the firm to which the results pertain or to disclose the results as part of the essential facts which form the basis for a decision to impose definitive measures. Thus, one such option is to "'make available' a separate report containing the results of the verification visits."

18. Consequently, the Panel should consider whether Pakistan has demonstrated that the Commission's disclosure of the verification visit results was not sufficient to disclose the outcome of the verification, was not complete such that essential facts were not disclosed, or was not timely such that interested parties were not able to defend their interests.

## EXECUTIVE SUMMARY OF U.S. THIRD-PARTY ORAL STATEMENT AT THE THIRD PARTY SESSION OF THE FIRST MEETING OF THE PANEL WITH THE PARTIES

### 5. INTRODUCTION

19. The United States appreciates the opportunity to provide our views as a third party in this dispute. The United States will focus its remarks 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.

### 6. ARTICLE 1.1 AND FOOTNOTE 1 OF THE SCM AGREEMENT

20. Article 1.1(a)(1)(ii) is accompanied by footnote 1. Footnote 1 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. 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.

21. 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 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.

22. 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 different scenarios. 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.

23. 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.

24. 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.

25. 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 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.

## 7. CHANGES AFTER THE PERIOD OF INVESTIGATION

26. Finally, 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.

## EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

27. 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.

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

29. In the view of the United States, the analysis under subparagraphs (II)(1) and (2) is sequential. 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).

30. 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.

31. 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 the 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.

32. Whether the entire amount of duty remission or an "excess" amount is countervailed would depend on the factual circumstances confronted by an investigating authority.

33. In response to the Panel's final question, generally speaking, a "line of credit" can be considered a type of loan. 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 ...'," 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." As we have noted, this suggests that factual circumstances are central to the benchmark selection.

# ANNEX E

## INTERIM REVIEW

# ANNEX E-1

INTERIM REVIEW

## 1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made certain changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors.

1.2. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

## 2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

### 2.1 Paragraph 7.115 (paragraph 7.115)

2.1. Pakistan asks the Panel to revise this paragraph to more accurately reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.2. Although we do not consider that the language previously used in this paragraph did not represent Pakistan's position accurately, we have decided to accommodate Pakistan's request, and also made further conforming changes to paragraphs 7.114, 7.115, and 7.116 (paragraphs 7.114, 7.115, and 7.116) to more fully account for this revision.

### 2.2 Paragraph 7.117 (paragraph 7.117)

2.3. Pakistan asks the Panel to revise this paragraph to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.4. We have decided to accommodate Pakistan's request, and also made conforming changes to paragraphs 7.117 and 7.118 (paragraphs 7.118 and 7.119) and footnotes thereto to more fully account for this revision.

### 2.3 Paragraph 7.124 (paragraph 7.125)

2.5. Pakistan asks the Panel to revise the part of the Report in which this paragraph appears to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.6. We consider that the Section of the Report that contains paragraph 7.124 (paragraph 7.125) already accurately describes and cites the arguments that Pakistan asks us to include.[1] We

[1] See paragraph 7.120 and footnotes 254 and 255 (paragraph 7.121 and footnotes 256 and 257).

therefore decline Pakistan's request. We further emphasize that the manner in which we dispose of these arguments is consistent with the manner in which Pakistan presented them in its submissions.

### 2.4 Paragraph 7.178 (paragraph 7.179)

2.7. Pakistan asks the Panel to revise this paragraph to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.8. We have decided to accommodate Pakistan's request.

WORLD TRADE ORGANIZATION

WT/DS486/R/Add.1

6 July 2017

(17-3589)

Page: 1/77

Original: English

# EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

## (WT/DS486)

REPORT OF THE PANEL

*Addendum*

*BCI deleted, as indicated **[***]***

This *addendum* contains Annexes A to E to the Report of the Panel to be found in document WT/DS486/R.

# LIST OF ANNEXES

## ANNEX A

WORKING PROCEDURES OF THE PANEL



## ANNEX B

ARGUMENTS OF THE EUROPEAN UNION



## ANNEX C

ARGUMENTS OF PAKISTAN



## ANNEX D

ARGUMENTS OF THE THIRD PARTIES



## ANNEX E

INTERIM REVIEW

# ANNEX A

## WORKING PROCEDURES OF THE PANEL

## ANNEX A-1

## EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN (WT/DS486)

WORKING PROCEDURES OF THE PANEL

ADOPTED ON 15 MARCH 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

### General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information adopted by the Panel.

4. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

5. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

### Submissions

6. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If Pakistan requests such a ruling, the European Union shall submit its response to the request in its first written submission. If the European Union requests such a ruling, Pakistan shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause. The Panel notes that one request for a preliminary ruling has already been filed in this dispute, and appropriate procedures have been put in place for addressing that request. Unless the Panel decides otherwise, any further requests for a preliminary ruling should follow the procedures in this paragraph.

8. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such an exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this procedure upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Should a party be aware of any inaccuracies in the translations of the exhibits submitted by that party, it shall inform the Panel and the other party promptly, and provide a new translation.

10. Each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by Pakistan could be numbered PAK-1, PAK-2, etc. If the last exhibit in connection with the first submission was numbered PAK-5, the first exhibit of the next submission thus would be numbered PAK-6.

**Questions**

12. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

**Substantive meetings**

13. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite Pakistan to make an opening statement to present its case first. Subsequently, the Panel shall invite the European Union to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Pakistan presenting its statement first.

15. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask the European Union if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite the European Union to present its opening statement, followed by Pakistan. If the European Union chooses not to avail itself of that right, the Panel shall invite Pakistan to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

**Third parties**

16. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

17. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

18. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

**Descriptive part**

19. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

20. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, first opening and closing oral statements and responses to questions following the first substantive meeting, and a separate integrated executive summary of its written rebuttal, second opening and closing oral statements and responses to questions following the second substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 15 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

21. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

22. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

**Interim review**

23. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

24. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

25. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

**Service of documents**

26. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. The DS Registrar shall stamp the documents with the date and time of the filing.

The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to geoffrey.carlson@wto.org and lina.somait@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

27. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

## ANNEX A-2

## EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN (WT/DS486)

### ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

ADOPTED ON 14 APRIL 2016

The following procedures apply to any business confidential information (BCI) submitted in the course of the Panel proceedings in DS486.

1. For the purposes of these Panel proceedings, BCI includes

   a. any information designated as such by the party submitting it that was previously treated as confidential by the investigating authority in the countervailing duty investigation at issue in this dispute unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

   b. any other information designated as such by the party submitting it, unless the Panel decides it should not be treated as BCI for purposes of these Panel proceedings based on an objection by a party pursuant to paragraph 3 below.

2. Any information that is available in the public domain may not be designated as BCI. In addition, information previously treated as confidential by the investigating authority in the countervailing duty investigation at issue in this dispute may not be designated as BCI if the person who provided the information in the course of that investigation agrees in writing to make the information publicly available.

3. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated information as BCI which should not be so designated, it shall forthwith bring this objection to the attention of the Panel, the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel, in deciding whether information subject to an objection should be treated as BCI for purposes of these Panel proceedings, will consider whether disclosure of the information in question could cause serious harm to the interests of the originator(s) of the information.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute.

5. A party or third party having access to BCI in these Panel proceedings shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Any information designated as BCI under these procedures shall only be used for the purposes of this dispute. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures to protect BCI.

6. An outside advisor of a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the product(s) that was/were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises. All third party access to BCI shall be subject to the terms of these working procedures.

7. The party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific

information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page.

8. Any BCI that is submitted in binary-encoded form shall be clearly marked with the statement "Business Confidential Information" on a label of the storage medium, and clearly marked with the statement "Business Confidential Information" in the binary-encoded files.

9. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 7.

10. Any person authorized to have access to BCI under the terms of these procedures shall store all documents containing BCI in such a manner as to prevent unauthorized access to such information.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any information that the party has designated as BCI.

12. Submissions containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Panel's Report.

# ANNEX B

## ARGUMENTS OF THE EUROPEAN UNION

## ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

### 1 INTRODUCTION

1. In this integrated executive summary, the European Union summarizes the facts and arguments presented to the Panel in its first written submission, its opening oral statement at the first substantive meeting and its responses to the Panel's questions.

### 2 THE MEASURES AT ISSUE AND FACTUAL BACKGROUND

2. The measures at issue in this dispute as contained in Pakistan's Panel Request are the provisional and definitive countervailing duties imposed by the European Union on imports of certain polyethylene terephthalate ("PET") from Pakistan, as well as certain aspects of the underlying investigation and determinations related thereto, as set forth in the following instruments:

- Commission Regulation (EU) No 473/2010 of 31 May 2010, imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates, OJ L134/25.

- Council Implementing Regulation (EU) 857/2010 of 27 September 2010, imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan and the United Arab Emirates, OJ L254/10.

3. The European Union refers to the description of the facts set out in Regulations No 473/2010 ("provisional determination") and No 857/2010 ("definitive determination").

#### 2.1 Original investigation

4. Pursuant to Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (the "Basic CVD Regulation"), an anti-subsidy proceeding was initiated by the European Union concerning certain PET originating, *inter alia*, in Pakistan on 3 September 2009 following a complaint lodged on 20 July 2009 by the Polyethylene Terephthalate Committee of Plastics Europe (the "complainant"). The European Commission (the "Commission") imposed a provisional countervailing duty on 31 May 2010 in Regulation No 473/2010.

5. On 27 September 2010, the Council imposed, by Regulation No 857/2010, definitive countervailing duties on imports of certain PET having a viscosity number of 78 ml/g or higher, according to ISO Standard 1628-5, originating *inter alia* in Pakistan.

6. The subsidy investigation period was 1 July 2008 to 30 June 2009 ("the period of investigation" or "POI") and the examination of trends relevant for the assessment of injury covered the period from 1 January 2006 to the end of the POI ("the period considered"). While seven measures were investigated by the European Union, only the determinations in relation to two measures, the MBS programme and the LTF-EOP programme, are questioned by Pakistan in this dispute.

#### 2.2 Legal challenge and amendment of the countervailing duty amounts

7. On 6 December 2010, Novatex lodged an application at the General Court seeking the annulment of Regulation No 857/2010 in so far as it applied to Novatex, on the ground that the FTR is not a subsidy within the meaning of the Basic CVD Regulation and that the calculation of the subsidy amount granted under the LTF-EOP programme was erroneous.

8. The General Court in its judgment in case T-556/10 of 11 October 2012 ("the General Court judgment") found that the European Commission and the Council failed to take account of certain information as regards the FTR, and that the error resulting therefrom affected the legality of Article 1 of Regulation No 857/2010 in so far as the definitive countervailing duty fixed by the Council exceeded the duty applicable in the absence of that error. Therefore, the General Court annulled Article 1 of Regulation No 857/2010 in so far as it concerned Novatex and in so far as the definitive countervailing duty exceeded that applicable in the absence of the error. The General Court dismissed Novatex's claim as regards the LTF-EOP programme. Novatex did not appeal the General Court judgment.

9. Following the General Court judgment, the Commission initiated on 17 May 2013, a partial reopening of the anti-subsidy proceeding with regard to imports of certain PET originating, *inter alia*, in Pakistan. On 25 September 2013, the Council adopted Implementing Regulation (EU) No 917/2013 in order to reduce the countervailing duty rate applicable to Novatex in accordance with the General Court judgment. The revised duty rate was applied retroactively as of 2 June 2010.

### 2.3 Termination of the countervailing duties

10. On 26 September 2015, the European Union published in its Official Journal the Notice of the expiry of the countervailing duties imposed on certain PET from Pakistan pursuant to Regulation No 857/2010. Pursuant to that Notice, the European Union stopped imposing the countervailing duties at issue as of 30 September 2015.

## 3 LEGAL ARGUMENT

### 3.1 Claims relating to the MBS programme

11. The MBS programme permits the import of duty-free input material under the condition that it is used for subsequent exports. The Commission found that the MBS constituted a subsidy in the form of revenue forgone by the government which confers a benefit upon the recipient company and was specific. The subsidy rate established in respect of this scheme during the POI for the co-operating exporting producer in Pakistan, namely Novatex Limited ("Novatex"), amounted to 2.57%.

#### 3.1.1 Pakistan failed to raise specific claims in its Panel Request regarding an alleged incorrect determination of the amount of subsidisation in this case

12. Pakistan appears to agree that the MBS programme amounted to a countervailable subsidy, even in view of Annexes II and III of the SCM Agreement. Indeed, Pakistan agrees that during the period of investigation Novatex obtained a refund of imported duties on raw materials "in excess of" those actually borne by Novatex. Thus, Pakistan's argument entirely boils down to a disagreement on the amount of subsidisation granted to Novatex during the period of investigation.

13. However, Pakistan has not raised any claims in its Panel Request concerning an alleged violation by the Commission when calculating the amount of subsidisation in the present case (e.g. under Article 1.1(b) or 14 of the SCM Agreement, unlike its claims under the LFT-EOP programme). As a result, the European Union considers that the Panel does not have authority to examine whether the Commission's determination (that the full amount of import duties foregone as opposed to merely the excess amount conceded by Pakistan should be countervailed) was inconsistent with the SCM Agreement. In this respect, the European Union considers that Pakistan's claims under Articles 10, 32.1 and 19.1 of the SCM Agreement cannot serve to make rulings by the Panel on an alleged incorrect amount of subsidisation found. Those claims are clearly consequential. Pakistan has not developed its claims under those provisions in its first written submission either, other than consequential breaches of the alleged incorrect determination by the Commission.

14. Therefore, the European Union requests the Panel to refrain from examining the legal arguments and facts brought by Pakistan in view of the uncontested facts that (i) neither of the parties discuss that the MBS programme amounted to a countervailable subsidy in view of Articles 1.1, 3.1(a), 3.2 and Annex I(i) of the SCM Agreement; and (2) since Pakistan has not

raised any claims under Articles 1.1(b) or 14 of the SCM Agreement concerning an alleged violation of the obligations when determining the amount of subsidisation, the Panel should reject Pakistan's claim.

### 3.1.2 Pakistan's interpretation of the relevant provisions of the SCM Agreement is incorrect

15. Pakistan's view appears to be that the obligation to countervail only the excess of duties rebated or refunded is already contained in Annexes I to III of the SCM Agreement and, hence, in situations where an alleged duty drawback system is being investigated, the investigating authority can only countervail the amounts provided in excess in order to comply with its obligation under those Annexes. However, an examination of Annexes I to III shows that this is not the case.

16. To begin with, Article 1 of the SCM Agreement is a definitional provision of what type of measures fall under the disciplines of the SCM Agreement and footnote 1 contains a carve-out or scope provision: 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 or taxes in amounts not in excess of those which have accrued "shall not be deemed to be a subsidy", i.e. should not be subject to the disciplines of the SCM Agreement. The reference to the Ad Note to GATT Article XVI in footnote 1 is merely repetitive, as it contains the same reference to the carve-out. However, footnote 1 further specifies that for the carve-out to apply, those exemptions and remissions of duties must take place "[i]n accordance with the provisions of (...) Annexes I through III of this Agreement". The use of the terms "in accordance with" has an exhortative meaning, and usually refers to a set of conditions or rules that need to be complied with.

17. Annex I(i) of the SCM Agreement provides for situations where certain types of subsidies would be deemed as prohibited. This provision alone does not speak about *how* to determine whether the remission of import duties was in excess of those levied on imported inputs. It merely confirms a situation leading to a prohibited subsidy. In turn, this provision 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 and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III".

18. Annex II of the SCM Agreement contains "guidelines on consumption of inputs in the production process". Paragraphs 1 and 2 in the first part of Annex II merely recalls footnote 1 and Annex I(i) of the SCM Agreement. Again, this provision does not speak about *how* to calculate the amount of subsidisation in those cases. It only contains the consequence of having determined that the measure in question amounts to a duty drawback system in accordance with Annexes II and III.

19. The second part of Annex II contains certain rules or steps that investigating authorities should take in order to determine the inputs that are consumed or incorporated into the exported product. However, those provisions do not establish what happens if the investigating authority cannot determine on a reliable basis which inputs are consumed in the production of the exported product and in what amounts.

20. In a situation where there is no system to control and confirm the inputs consumed or incorporated into the exported product, and where it is clear that the duty drawback scheme is totally unreliable, absent reliable evidence on the actual amounts of inputs incorporated into the exported product, the European Union considers that, in view of the guiding principles contained under Article 14 of the SCM Agreement, an investigating authority is entitled to countervail the full amount refunded. Indeed, Article 14 of the SCM Agreement specifically deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient.

21. In this respect, contrary to what Pakistan alleges, the European Union does not consider that, absent a verification system or the demonstration by the exporting Member that no excess amounts were rebated or refunded, there is an automatic presumption that the entire amount of the import duties foregone or refunded can be countervailed. If the conditions under Annexes II and III are not met, the carve-out in footnote 1 (and Annex I(i)) simply is not met either, since those provisions stipulate that should be read "in accordance with" Annexes II and III. Annexes I to III contain rules which must be complied with in order to avoid qualifying a remission or

exemption from duties as a subsidy. Then, each case has to be examined on its own merits and in view of the guiding principles established under Article 14 of the SCM Agreement to calculate the amount of subsidisation.

22. Finally, with respect to Annex III of the SCM Agreement, the European Union observes that this Annex provides guidelines in the determination of substitution drawback systems as export subsidies Quite tellingly again, Annex III does not speak about *how* to determine the amount of subsidisation in cases of substitution drawback systems. Annex III merely provides that, if an investigating authority is satisfied with the procedures to verify and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is no drawback of import charges in excess of those originally levied on the imported inputs in question, "no subsidy should be presumed to exist". Absent such a system of verification, if the exporting Member fails to show whether excess payment occurred on the basis of actual transactions, the investigating authority may conclude legitimately that such an excess amount took place. Then, the principles to determine the amount of benefit under Article 14 of the SCM Agreement would apply.

23. In sum, the European Union considers that Pakistan is reading too much into the provisions in question. Contrary to what Pakistan alleges, nothing in footnote 1, or Annexes I to III require investigating authorities to only countervail the excess of duties refunded in all cases, thereby imposing an active obligation upon them to estimate in each and every case the amount of import duties paid on inputs that were consumed and incorporated into the exported products and the amounts of refunds granted upon exportation. Annexes II and III contain the rules or the necessary steps that must be taken to determine whether an alleged duty drawback system results in a prohibited subsidy by reason of over rebate or excess drawback of import duties on inputs consumed in the production of the exported product. If there is no system or no proper application of a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts, and the exporting Member fails to show that the quantity of inputs for which drawback is claimed does not exceed the amounts rebated or refunded upon exportation of the products incorporating those inputs, then the only conclusion can be that the alleged subsidy scheme does not fall under the carve-out in footnote 1 (or Annex(i)) of the SCM Agreement. Thus, the general principles governing the calculation of benefit apply to that measure. If it is found that there are no reliable information provided by the exporting Member about the actual amounts of imported materials incorporated into the exported products for which a rebate or refund was granted, the investigating authority is entitled to consider the full amount as the basis for calculating the subsidisation.

### 3.1.3 Pakistan's wrongly applies its incorrect interpretation of the law to the facts of the PET investigation

24. In its first written submission, Pakistan employs an incorrect interpretation of the relevant provisions of the SCM Agreement to create an obligation for the investigating authorities to calculate precisely the amount of duties that were refunded in excess of those paid with respect to imported inputs consumed and incorporated into the exported products. There is no such obligation and, consequently, Pakistan's claims should be rejected. In any event, in the investigation at hand, the Commission complied with the relevant rules foreseen in Annexes II and III of the SCM Agreement.

25. Pakistan wrongly asserts that the Commission's view was that the "absence of an adequate monitoring process − including sufficient review by the exporting government" was sufficient to justify the deeming of the full amount of drawn-back duties to be the amount of the subsidy, and that "the Commission's approach converts the enquiry into a simple binary question − does an adequate mechanism exist or not?". However, it is not the EU's position that an absence of an adequate control mechanism implies that the full amount rebated or refunded must be countervailed. If there is no such a reliable system or procedure of control in place, the exporting Member can still show that no excess amounts were rebated or refunded, something that Pakistan failed to show in this case on the basis of the actual transactions.

26. Pakistan also wrongly argues that the Commission failed to provide Pakistan with the opportunity to assist the Commission's determination of the excess amount. To recall, according to Annexes II and III, in cases where the investigating authority finds that there is no reliable system or procedure in place, it is for the exporting Member to show that there was no excess amounts

rebated or refunded. As can be seen from paragraph 76 of the provisional determination, Pakistan was sufficiently informed of the Commission's conclusions at that stage of the investigation.

27. Further, Pakistan wrongly considers that it was for the Commission to ask Pakistan to provide evidence that no excess amounts were rebated or refunded through its duty drawback system. The European Union disagrees. Paragraph 2 of the second part in Annex II (similar to paragraph 3 of the second part in Annex III) does not specify *when* the exporting Member has to further examine the actual transactions to show that no excess amounts were rebated or refunded. It could well happen after an investigating authority reaches its preliminary conclusions as to the countervailability of a particular subsidy programme.

28. Moreover, in making its wrong allegations, Pakistan insinuates that the Commission could have estimated the amount of benefit conferred in this case on the basis of information provided by Novatex and in the record of the investigation. However, Novatex's argument in reality amounted to a repetition of its main argument that the duty drawback system was reliable. While Novatex provided a list of around 500 transactions relating to the importation of inputs during the period of investigation, it was impossible for the Commission on the basis of the information provided by Novatex to confirm the amounts incorporated into the exported products, in a situation where, moreover, Novatex was selling both domestically and for export. And even more so when the Commission also found that an effective control done by the Government based on a correctly kept actual consumption register did not take place, and where the Pakistani Government did not carry out a further examination based on actual inputs involved. Thus, the Commission's determination to countervail the entire amount of import duties refunded to Novatex was reasoned and reasonable in view of the specific circumstances of the case.

29. Finally, Pakistan alleges that the Commission failed to investigate whether the duty drawback verification mechanisms were based on "generally accepted commercial practices in the country of export". The European Union disagrees. Whereas paragraph 1 of the second part in Annex II lists the elements that the investigating authority should examine to satisfy itself with the reliability of the verification system (i.e. all the elements, in view of the term "and"), paragraph 2 of the second part in Annex II is phrased in an alternative manner ("or"), thereby indicating that a further examination by the exporting Member is required when the investigating authority finds that the system or procedure in place is "not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively". The Commission did not need to examine whether Pakistan's system was based on "generally accepted commercial practices in the country of export" since it already found that system as not reasonable and was not applied effectively.

### 3.2 Claims relating to the LTF-EOP programme

30. With respect to the LTF-EOP programme, Pakistan essentially argues that the Commission failed, under the *chapeau* of Article 14, to explain, as provided by its municipal law, the methodology it used in the investigation at issue to calculate the amount of benefit to Novatex. The Commission also miscalculated the amount of benefit conferred to Novatex through the LTF-EOP programme in violation of Article 14(b).

31. The LTF-EOP programme was a financing mechanism set up by the State Bank of Pakistan in 2004. It enabled eligible financial institutions to grant financing facilities to borrowers for up to 7.5 years on attractive terms and conditions for the import of machinery, plant, equipment and accessories thereof. It is only available to companies that export, directly or indirectly, at least 50% of their annual production.

32. The key features of the LTF-EOP programme, as found during the investigation, were the following: first, an eligible company could contract financing in a specific amount under the programme. However, it did not have to draw the entire amount at the time it contracted (as would be the case e.g. for a standard mortgage loan). Instead, it could draw down tranches when and if it needed them. Thus, the LTF-EOP programme is comparable to a line of credit. A "line of credit" is not an *ex ante* agreement about the disbursement of specific funding amounts at a pre-determined moment in the future, but rather a lending facility in the form of a promise on the part of a lender to make funding available (in possibly one or more instalments) to a borrower in the event it is requested. The interest rates that the company had to pay for any financing under the scheme were fixed at a maximum of up to 3% over and above the rates notified by the State Bank

of Pakistan ("SBP"), and benchmarked against the weighted average yields of 12 months Treasury Bills and three and five years Pakistan Investment Bonds, depending on the period of financing. The actual interest payable, therefore, was determined *only* at the moment the company draws down any money under the regime. It was therefore a very flexible system of financing, comparable with a line of credit, which allowed companies fulfilling the conditions in order to benefit from it to raise funds if and when they needed them to finance the importation of machines and other equipment.

### 3.2.1 Pakistan's claims under the chapeau of Article 14 of the SCM Agreement have no merit

33. Pakistan claims that the European Union failed to adequately explain the application of its method in the light of its own rules for the calculation of the amount of subsidy in countervailing duty investigations. Pakistan alleges that the Commission did not follow its own methodology to establish "the difference between the amount of interest paid on the government loan and the interest normally payable on a comparable commercial loan during the investigation period" and, hence, the method was not adequately explained in the Commission's determinations. Pakistan claims that the Commission failed to correctly describe the characteristics of Novatex's loan and to explain which type of commercial loan available on the market would be comparable to Novatex's loan agreement. According to Pakistan, the Commission disregarded the loans submitted by Novatex as comparable and did not attempt to identify a comparable loan. The Commission also failed to take into account the multi-tranche character of the LTF-EOP programme and proceeded on the incorrect basis that the entire amount under the LTF-EOP programme had been drawn down during the IP.

34. The Appellate Body previously found that under the chapeau of Article 14 any method used to calculate the benefit shall be provided for in national legislation or implementing regulations of the Member concerned, that method in each particular case shall be transparent and adequately explained and it shall be consistent with the guidelines in paragraphs (a)-(d) of Article 14.

35. In the present case, the Commission undertook to identify a comparable commercial loan - and the related benchmark interest rate - which Novatex could actually obtain on the market with respect to the amount under the LTF-EOP programme that Novatex had drawn down during the IP. This is exactly what EU law (and Article 14(b) SCM) requires of the investigating authority in case of loans (a line of credit is a type of loan, even if it is to be treated differently than a standard commercial loan). This benchmark interest rate was found by the Commission to be SBP's average interest rate as regards outstanding loans during the IP. The SBP's rate had been actively and repeatedly proposed by Novatex and Pakistan (even if the SBP's rate was proposed for a different year than the IP).

36. In the process of identifying this interest rate proxy the Commission discarded other loans (and rates) which Novatex had presented because they were not comparable. The Commission explained in the provisional disclosure of 1 June 2010 that the comparable benchmark interest used was the interest rate of 14.44% applied by the SBP during the IP. The Commission in the final disclosure and determinations also explained that it had rejected the other loans submitted by Novatex because they did not relate to the IP.

37. The Commission made clear in its determinations that it was treating the LTF-EOP programme as a line of credit and not as a standard loan and hence took into account the multi-layered nature of this scheme. This follows for example from paragraphs 121 ("credit provided"), 122 ("interest rates for financing under the LTF-EOP scheme are benchmarked…, depending on the period of financing") and 126 ("long-term loans at preferential interest rates") in the provisional determinations. This also follows from Annex II of the provisional and final company specific disclosure ("line of credit utilisation"). In the final determination the Commission referred to the fact that "the financing negotiated in 2004/2005 was drawn down in tranches."

38. The Commission also properly explained its methodology of using a proxy prevailing during the IP with respect to the amounts outstanding under the LTF-EOP during the IP (i.e., the amounts effectively used or enjoyed by Novatex during the IP). The file also shows that Novatex had clearly understood the Commission's methodology of using a proxy for the IP and of countervailing the entire amount outstanding during the IP.

### 3.2.2 Pakistan's erroneous claims under Article 14(b) of the SCM Agreement

39. First, Pakistan considers that the Commission failed to identify a proper benchmark loan and hence used an improper benchmark interest rate. Second, Pakistan claims that the Commission ignored factual evidence concerning other available loans for Novatex. Third, Pakistan argues that the Commission improperly applied the commercial interest rate proxy from the IP; the Commission should have used a benchmark from the period 2004-2005 or should have taken different benchmarks depending on when the respective tranches were drawn down.

40. The European recalls that a benchmark loan under Article 14(b) must be a loan that is "comparable" to the investigated government loan and should have as many elements as possible in common with the investigated loan to be comparable. The Appellate Body acknowledged that the existence of such an ideal benchmark loan would be extremely rare and hence a comparison is also possible with other loans that present a lesser degree of similarity or with a proxy.

41. The Commission in the present case carefully assessed the information provided by Novatex about comparable private loans. The Commission found that the loans submitted were not comparable with the special financing mechanism under the LTF-EOP programme, which was more akin to a line of credit. The loans and interest rates submitted by Novatex were also not for the correct reference period as they dated from the period 2004-2005 whereas the Commission applied as proxy a rate from the IP, i.e. 2008-2009. Pakistan and Novatex repeatedly advocated and even "requested" the use of the SBP rate as benchmark. The SBP rate was the proxy that the Commission eventually used, even if for a different year than argued by Pakistan and Novatex. It was therefore perfectly reasonable for the Commission to rely on a proxy promoted by the investigated company rather than using non comparable private loans for an incorrect reference period.

42. The Commission was also reasonable in light of the principles contained in Article 14(b) to use the SBP rate (KIBOR) in 2008-2009 as a market benchmark. First, the Commission only countervailed the amount that was "effectively used" or enjoyed by Novatex in 2008-2009 and, hence, it was appropriate to also apply a benchmark for that same period. Second, amounts under the LTF-EOP programme continued to be drawn down during the IP which further confirms the close nexus between the benchmark chosen by the Commission and the LTF-EOP programme. Third, Novatex had not provided any information about the start dates of the respective tranches and the Commission therefore had no means of calculating the respective benchmarks as now requested by Pakistan. Fourth, using different benchmark interest rates for each tranche would have disregarded the character of the LTF-EOP mechanism as a single financing scheme and would in fact have treated the tranches as separate individual loans which would not reflect the reality of the financing scheme. The European Union also notes that the EU General Court agreed that the Commission was justified to use the KIBOR in 2008-2009 as a benchmark, and Novatex did not appeal this finding before the EU Court of Justice.

43. In fact, the Commission was reasonable in taking the SBP rate suggested by Pakistan and Novatex, which was an average of various rates having short-term durations (from one day, one week, on month, one year and three years), whereas the repayment terms of the LTF-EOP mechanism were in principle 7.5 years. Obviously, a short-term rate is lower than a longer-term rate because of the higher risk of non-payment involved. The Commission was all the more reasonable as it also did not take into account the benefit for Novatex resulting from the flexibility under the LTF-EOP, namely the availability of the money for Novatex at any time, nor did it take into account the generous grace period for repayments under the LTF-EOP programme.

## 3.3 Claims relating to causation (Article 15.5 of the SCM Agreement)

### 3.3.1 Pakistan's erroneous claim concerning the nature of the obligation to examine other known factors

44. Pakistan argues that Article 15.5 requires investigating authorities not only to separate and distinguish the effects of other known factors from those of the subsidised imports, but more specifically to perform this analysis in a particular order. According to Pakistan, the effects of other factors must be assessed as a "first step", which would then be followed by an analysis of the effects of the subsidised imports. At least, Pakistan argues, the injurious effects of other factors and of the subsidized imports must be assessed at the same time. Pakistan contends that the

Commission's method of analysing first whether the subsidized imports caused the injury and only to assess, in a second step, if the other factors break the causal link, is not in conformity with Article 15.5.

45. None of the case-law cited by Pakistan supports such an interpretation. Contrary to Pakistan's assertion, the Appellate Body does not prescribe any particular order of analysis. According to the Appellate Body the injurious effects of other known factors must be separated and distinguished from those of the subsidised imports. Quite to the contrary, the Appellate Body in fact emphasized that no particular method is prescribed for this assessment. And even Pakistan acknowledges that authorities enjoy "a degree of discretion" to carry out the non-attribution analysis. The method applied by the Commission in the present case is also supported by the wording of Article 15.5. Article 15.5 requires investigating authorities, in the first sentence, to demonstrate that the subsidised imports caused injury through their effects and only subsequently, in the third sentence, to "also examine other factors".

46. What follows from the case-law on non-attribution is that there is no particular method of analysis and that such analysis will depend on the facts of the case. There is no obligation to quantify the amount of injury caused by the subsidised imports and by other factors, respectively. Investigating authorities have an obligation to provide a satisfactory explanation of the nature and extent of the injurious effects of other known factors. If adequately reasoned, a qualitative explanation is sufficient. The proper standard remains whether the EU properly established the facts with respect to the other "known factors" and evaluated the evidence in an objective and unbiased manner.

47. In the investigation at hand, the Commission first examined whether subsidised imports caused injury to domestic producers, and concluded that they did. Then, it carefully examined whether the effects of any of the other known factors are such as to affect that preliminary conclusion, i.e. to "break the causal link". It concluded that they did not. In doing so, the Commission fulfilled its obligation to separate and distinguish the effects of subsidised imports from the effects of other known factors.

### 3.3.2 Pakistan's erroneous claim regarding the Commission's analysis of specific known factors

48. Pakistan claims that the European Union acted inconsistently with Article 15.5 SCM Agreement because it allegedly improperly assessed the role of other factors which, in Pakistan's view, broke the causal link between the subsidy and the injury. The other factors challenged by Pakistan are (i) the Korean imports, (ii) the economic downturn, (iii) non-cooperating domestic producers and (iv) oil prices.

49. First, regarding the **Korean imports** the EU recalls that the Commission separated and distinguished their effects and recognised that they may have contributed to injury. In the process the Commission carried out an extensive analysis of prices, market shares and volumes of Korean, subsidised and domestic producers. The Commission reasoned that prices of Korean imports were higher than the subsidised imports and only slightly below prices of domestic producers and hence their contribution would only be limited. This type of qualitative explanation is exactly what the case-law requires. No precise quantification of the injury is required under Article 15.5.

50. Second, with respect to the **economic downturn**, the Commission acknowledged that it contributed to the injury but concluded that it did not break the causal link. Pakistan claims that the Commission did not sufficiently distinguish and separate this element as it failed to assess the "nature and extent of the hurt". Pakistan errs about the legal standard which is not about the precise quantification of injury. The Commission clearly explained that the downturn only started in the last quarter of 2008 and that it had a global character, which meant that it similarly affected domestic and importing producers. More is not needed. The role of Korean imports and non-cooperating domestic producers did not have to be re-assessed in this context as these factors had been analysed by the Commission separately. Pakistan's claim that the Commission made no separate finding of injury for the period prior to the last quarter of 2008 is misguided. The key finding of the Commission was that the economic downturn only contributed to the injury as of the last quarter of 2008, i.e. the impact was limited in time and the downturn had no impact whatsoever on the third quarter of 2008 during the IP. The Commission's data cover the entire

period of 2006 to 2009 and establish injury notably for the period of investigation. More is not needed.

51. Third, regarding the market shares of **non-cooperating domestic producers** Pakistan errs when it contends that the Commission should have carried out a more in-depth trend analysis rather than focusing on a point-to-point assessment. The Commission did not carry out a simple point-to-point assessment but analysed the market shares in each year. As set forth in the Commission's determinations, the subsidised imports increased their market share by around 500% from 2.1% to 10.2% between 2006 and 2009 whereas the non-cooperating domestic producers lost around 20% of their market share in the same period (i.e. a decrease in market share from 20.5% to 16%). Under these circumstances, it was perfectly reasonable for the Commission to conclude that non-cooperating producers did not break the casual link, irrespective of whether they managed to increase their market share by a few percentage points between 2008 and the investigation period (i.e. from 12.4% to 16%). A more detailed trend analysis would not have made any difference in the Commission's assessment. In addition, one of companies concerned stopped production during the IP and two others shortly after the IP, further confirming that these producers could not break the causal link.

52. Fourth, Pakistan's challenge regarding the Commission's assessment of **crude oil prices** is without merit. The Commission stated in its determinations that crude oil prices were volatile at a worldwide level. A factor that equally or similarly affects both subsidised imports and domestic producers by definition cannot break the causal link. Even if crude oil prices and hence PET prices may have been low at times, subsidised imports could be priced even lower as a result of the subsidies and were priced lower as established by the Commission.

### 3.4 Claims relating to verification visits (Articles 12.6 and 12.8 of the SCM Agreement)

53. Pakistan claims that the Commission acted inconsistently with Article 12.6 of the SCM Agreement because it failed to disclose the "results" of the Commission's verification visit. Pakistan argues that the Commission complied neither with the first alternative set out in Article 12.6, namely to make the results of the verification visit available separately, nor with the second alternative of Article 12.6, namely to disclose the results of the verification visit as part of the disclosure of essential facts. Pakistan contends that − with the exception of the MBS − the Commission failed to communicate anything even remotely resembling the "results" of the verification visit. According to Pakistan, "results" of verification visits include "adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully". The Commission did not provide information of what occurred during the verification visit, which additional documents were collected, which information was corrected and which topics, other than the MBS, the Commission discussed with the investigated company.

#### 3.4.1 Legal standard under Article 12.6 of the SCM Agreement

54. Article 12.6 of the SCM Agreement provides for the possibility of verification visits and lays out the general obligations that apply to investigating authorities if they undertake such a procedure. There is no obligation on the part of investigating authorities to carry out verification visits. Regarding the disclosure of the results of the verification visit to the verified firms, Article 12.6 allows for two methods: the investigating authority either "shall make the results of any such investigations available", or "shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain". The results "may" be made available to the applicants, but there is no obligation to do so. The ordinary meaning of the term "results" is "the effect, consequence, issue, or outcome of some action, process or design" and suggests that what needs to be made available is not the process as such but rather the "outcome" of that process. The context of Article 12.6 as well as its direct cross-reference to Article 12.8 of the SCM Agreement confirm that the term "results" is information that is closely related to the essential facts. Article 12.6 therefore does not require a full report on everything that happened during the verification visit, i.e. lengthy minutes.

### 3.4.2 Factual Background

55. The on-the-spot investigation of Novatex took place from 15-17 December 2009 at Novatex's premises in Karachi in the presence of Novatex's legal counsel. On 23-24 February 2010 a hearing and consultations with the government of Pakistan took place. By provisional disclosure of 1 June 2010 the Commission disclosed to Novatex "the essential facts" including the provisional determinations and the company-specific subsidy calculations. Novatex provided its observations to the provisional disclosure by way of a written submission on 1 July 2010. Consultations with Pakistan took place on 12 July 2010. At the request of Novatex, a hearing took place on 14 July 2010. The definitive disclosure by the Commission took place by letter of 26 July 2010. In this final disclosure the Commission informed Novatex of the essential facts which included *inter alia* a specific company disclosure document. Both Pakistan and Novatex provided extensive comments during the entire procedure.

### 3.4.3 The European Union's Rebuttal of Pakistan's claims

56. In the European Union's view, the results or outcome of a verification visit is the "yes" or "no" answer to the fact that certain information was checked (in the sense of reviewed and verified) during the verification visit by the investigating authority (and, by implication, that other information was not checked). In exceptional circumstances, the results of the verification visit may also include limited additional information (e.g. in case of the use of facts available the fact that the investigating authority requested information during the verification visit and that it was not provided). This interpretation of "results" follows from the close textual and thematic relationship between Article 12.6 on verification visits and Article 12.8 on the disclosure of essential facts. The purpose of Article 12.8 is to allow interested parties and interested Members "to defend their interests" by disclosing the essential facts and it is against this background that the obligation of Article 12.6 should be interpreted.

57. The European Union takes the position that the term "result" does not include information, for example, about whether the Commission requested additional documents, whether Novatex provided requested documents or whether the Commission asked questions during the verification visit. This is because such actions do not constitute "results" or an outcome of the verification visit but form part of the "process" of the verification visit. Nor does the term result comprise information about whether the Commission could or could not verify the accuracy of the information on the spot or whether the Commission corrected certain information as a result of the verification visit. This is because such information does not concern the result of the verification visit within the meaning of Annex VI(7) but concerns the overall result of the Commission's investigation which will be disclosed, to the extent relevant, as essential facts.

58. In the present case, the Commission established a log of exhibits which listed all documents that were collected and checked during the verification visit at Novatex. The European Union also recalls that Novatex (and its lawyer) was present during the entire verification visit. The Commission can only verify information during the verification visit that is actively provided by the company investigated. The Commission cannot choose to verify documents at its discretion but depends on the cooperation of the company investigated in this respect. Novatex was therefore fully aware of what was verified during the verification visit. In addition, Novatex has not claimed that any information about the verification visit that is indispensable for its due process rights was not made available.

## 4 CONCLUSIONS

59. In view of the foregoing, the European Union requests the Panel to reject Pakistan's claims in their entirety.

## ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

### 1. INTRODUCTION

1. In this integrated executive summary, the European Union ("EU") summarizes the facts and arguments presented to the Panel in its second written submission, its opening oral statement at the second substantive meeting and its responses to the Panel's questions.

### 2. LEGAL ARGUMENTS

#### *2.1. ARTICLE 6.2 DSU / TERMS OF REFERENCE ISSUES*

2. The EU has raised important jurisdictional issues in a preliminary ruling request. The EU reiterates its stance that the function and role of a panel is to adjudicate disputes (in the sense of Article 3.3. of the DSU) for the purposes set out in Articles 3.4 and 3.7 of the DSU. In light of the withdrawal of the contested measure without any lingering effect or a possibility of reintroduction, there is no dispute between the parties in the sense of Article 3.3 of the DSU. For this reason and not contesting the Panel's jurisdiction, the dispute settlement system should not be used for "advisory opinions". Therefore, the Panel should refrain from taking a formal and final position on a given interpretation of the relevant provisions at stake and from making findings on the consistency of the Commission's determination. The Panel should limit its report to the views of the parties and the uncontested facts, without making findings.

3. Annex I(i) of the SCM Agreement provides an example of prohibited export subsidies falling under Article 3.1(a) of the SCM Agreement and creates rights and obligations for WTO Members. The scope of the examples illustrated should be determined pursuant to the requirements of Annex I(i), and Annexes II and III by reference. These requirements in their totality apply to panels and WTO Members. In light of Pakistan's agreement of the link between Annex I(i) and Annexes II and III, the EU argues that the wording in footnote 1 of the SCM Agreement should also be read to incorporate the requirements of Annexes I to III and its carve-out should apply only pursuant to steps explicitly foreseen in these Annexes.

4. With regard to the limits of Article 6.2 of the DSU, Pakistan should not be allowed to repurpose its arguments under its now withdrawn Annexes II(II)(4)-(5) claims, to fall under Annex I(i) and/or Annex II(II)(2), thus circumventing Article 6.2 of the DSU and its own Panel Request. Similarly, Pakistan in its first written submission focused only on one of two allegations with respect to the MBS programme – on the amount countervailed rather than on the finding of a subsidy. It is not possible that both pleas were raised as part of the same analysis due to the different obligations applicable to them. Footnote 1 and Annexes I to III are not applicable to the issue of the correct amount to be countervailed, however SCM provisions regarding "benefit", not properly raised by Pakistan, would have been relevant. Due to the MBS programme not fulfilling the requirements to constitute a proper duty drawback system, this footnote 1 does not apply at all.

5. The EU considers that the certain claims, not included in the Panel Request should not be accepted by the Panel. These claims are entirely consequential to its main argument on the exact calculation of the amount foregone. A party should not be allowed to expand the scope of the dispute through its written submissions. Furthermore, Pakistan has itself confirmed in its responses that some of its claims are entirely consequential and, should, therefore be dropped.

6. Finally, through its claim of a violation of Annexes II(II) and III(II) "as a whole", Pakistan is seeking an advisory opinion from the Panel. Accordingly, this claim should be rejected.

#### *2.2. CLAIMS RELATING TO THE MBS PROGRAMME*

7. In the view of the EU, footnote 1 of the SCM Agreement is a "scope" provision, similar to Ad Note to Article XVI of the GATT 1994, rather than an "exception" provision. Furthermore,

footnote 1 does not expand or compliment the definition of "financial contribution" in cases of duty drawbacks. Such systems could fall either under Article 1.1(a)(1)(i) or (ii), but it rather informs the entire Article 1 by specifying a situation of a remission or refund that does not amount to a subsidy and does not fall under the disciplines of the SCM Agreement. If the situation described in footnote 1 is found to exist, "in accordance with" the provisions in Annexes I to III of the SCM Agreement, the disciplines of the SCM Agreement will not apply to it. However, any remissions or refunds in excess of the import duties paid on import inputs used on the production of exported products would be considered an export subsidy, pursuant to Annex I(i) and Annexes II and III. Although being entitled "guidelines", Annexes II and III should be construed as binding upon WTO Members, similar to other "principles or "guidelines" in the Agreement.

8. In connection with Pakistan's claims as to the amount to be countervailed, the determination of a "financial contribution" in Article 1.1(a)(1)(ii) of the SCM Agreement should be distinguished from any "benefit" granted as a separate determination. The "financial contribution" is the revenue foregone by the state, owed "but for" the MBS program. The determination of the existence of "benefit" is a different, further step. In a case not fulfilling the requirements of footnote 1 and where there is an excess remission or refund, the benefit countervailable would only be that excess remission, provided that the necessary information to calculate it is available and reliable. Footnote 1 does not contain an obligation for an investigating authority to establish in each case whether an excess amount was drawn back.

9. Annexes II(II) and III(II) contain the elements necessary to determine whether there has been an excess remission or not, a requirement for the existence of the situation under footnote 1. First, an exporting Member must have a verification system or procedure, allowing the tracing of inputs consumed and their quantity in the production of exports. Second, the system or procedure should be reasonable, effective and based on generally accepted commercial practices. In this regard, the Commission's determination that Pakistan's verification system was inadequate has remained unchallenged. Its reasoning for this finding is set out below. Third, if there is no (adequate) verification system or procedure, a further examination by the exporting Member of the actual inputs used in export production must be carried out, so as to determine whether excess remission has occurred. Annexes II and III are silent on further steps when no such "further examination" takes place. Since footnote 1 refers specifically to them, no other provisions of the SCM Agreement apply in this regard.

10. As to the question of who is responsible for the "further examination", Annexes I to III do not contain any obligation for investigating authorities to request the results of any "further examination" from the exporting Member, nevertheless, the Commission has never showed any unwillingness to allow such further examinations. In its provisional determination, the Commission clearly signalled that Pakistan had failed to conduct a "further examination", alerting it of its obligations under Annex II(II)(2) and allowing it multiple occasions to provide it. The list of issues, which Pakistan alleges it had to receive from the Commission to aid it in this task, is not provided for in Annex II(II)(2). After the finding of inadequacy of the verification system, the obligation to conduct a "further examination" falls only on the exporting Member, as it is the one benefitting under footnote 1, and no obligation on Members to "give notice" is envisioned.

11. With regard to additional evidence, evidence on the record should be considered even when a "further examination" is not provided and, therefore, footnote 1 is found to be inapplicable. The remaining disciplines of the SCM Agreement apply to the measure at issue, resulting in an obligation on investigating authorities to conduct a normal assessment of whether the contested measure amounts to a subsidy and its amount. All foregone or refunded import duties could be considered a countervailable subsidy. The determination of the appropriate amount to countervail should be judged in view of other obligations of the SCM Agreement (such as Article 14 or 19.4), and in light of the totality of the evidence and information available in each case. Absent an adequate verification system or a further examination by the exporting Member, as well as no other reliable information, investigating authorities should be permitted to conclude, on the basis of the information available, to countervail the entire amount.

12. In this regard, the EU's position and practice has been that when an inadequate verification system exists, companies' records may be relied on, if they clearly show what imported inputs were used for the production of exports. In the present case, this was not possible, as (1) Novatex was not subject to regular customs supervision, (2) was sourcing inputs both locally and from abroad, the majority of one of its main raw materials being of local origin, (3) did not provide for

any traceability of the use of differently sourced inputs, and (4) was selling both locally as well as on foreign markets. These findings were confirmed through a verification visit. Nevertheless, the Commission accepted Nocatex's cost of production and the duty drawback amounts for its calculations, however, remained unable to conclude that Novatex was only using imported raw materials in the production of exported products. Thus, the Commission could not rely on the information.

13. The Commission could not rely on the information of the MBS programme either, due to its (1) reliance on company-provided "theoretical" information, (2) lack of verification aside from documents provided by the companies themselves, (3) lack of regular checks and follow-ups and (4) lack of traceability of the uses of domestic and imported raw materials into final products, but rather a blind assumption that exported products were entirely produced from imported inputs. A systemic risk was identified by the European Union. The exporting Member could not show that no excess remissions occurred in its duty drawback scheme. A differing degree of "adequacy" of the system due to deference to the company's own data, lacking government verification or monitoring, cannot be acceptable for the purposes of footnote 1. Having examined the requirement of traceability in a duty drawback system, the Commission did not have to examine the element of "generally accepted commercial practices", another independent reason or finding the verification system inadequate.

14. For the foregoing reasons, the Commission reasonably concluded that the subsidy amount for Novatex should be calculated on the basis of import duties foregone on the imported material under the MBS programme, used for the product concerned during the investigation period.

15. Pakistan's contention that there was ample evidence on the record to permit the Commission to determine the exact excess remission is wrong. Even Pakistan could not provide examples of such evidence. In any event, footnote 1 (together with Annex I to III) does not place a burden of showing that excess remissions occurred on investigating authorities. Such obligation relates to the determination of the amount to be countervailed and is laid down in other provisions of the SCM Agreement, which were not cited by Pakistan in this dispute.

### *2.3. CLAIMS RELATING TO THE LTF-EOP PROGRAMME*

#### 2.3.1. Pakistan's claim under the chapeau of Article 14 SCM Agreement

16. The relevant legal standard under the chapeau of Article 14 is whether the Commission adequately explained its methodology for calculating the benefit in accordance with its municipal law. The legal standard is not whether the Commission's determinations set forth in sufficient detail the material findings and conclusions reached on issues of fact and law (e.g. whether the Commission set out in its determinations why it rejected the loans proposed by Novatex as non-comparable). Such a standard only applies to claims under Article 22.3 which Pakistan decided not to pursue in the present case.

17. The Commission's methodology for calculating benefit in the present case is set forth in Article 6(b) of the Basic CVD Regulation. Just like Article 14(b) of the SCM Agreement, Article 6(b) requires the Commission to calculate the benefit on the basis of the difference between the interest paid by the investigated company for the government loan and the interest that would be due under a comparable commercial loan. The Commission explicitly referred to Article 6(b) and therefore to its calculation method in the provisional determinations.

18. Under the *chapeau* of Article 14 the investigating authority has to adequately explain the methodology used to calculate benefit. In the present case the Commission indeed adequately explained all the basic parameters of its calculation method:

- It was clear from the determinations and other evidence that the Commission treated the preferential credit mechanism as a line of credit. The Commission explicitly used the term "line of credit" in its company specific disclosures and described the LTF-EOP as a line of credit in its provisional and final determinations. Irrespective of the Commission's legal or factual qualification of the preferential credit mechanism as a line of credit in its determinations, the Commission clearly explained its method for calculating the benefit for the LTF-EOP programme, namely the applicable legal provision as well as which comparable benchmark rate, which benchmark year and which amounts it would use

(see the following bullet points). This is all that matters under the chapeau of Article 14. It should be recalled once again that Pakistan did not make a claim under Article 22.3.

- The Commission explained in recital 131 of the provisional determinations that the calculation of benefit for the preferential line of credit mechanism was to be carried out under Article 6(b) of the Basic CVD Regulation, the applicable municipal law. Article 6(b) provides for a calculation of benefit based on a comparison of the interest rate paid by the investigated company under the investigated government loan and the rate that the company would have paid under a comparable commercial loan.

- The Commission in the same recital also explained that the benefit would be calculated by comparing the interest rate under the LTF-EOP programme with an "applicable commercial credit rate", in line with Article 6(b). This was clearly understood by Novatex and Pakistan which submitted comparable loans and interest rates to the Commission.

- The Commission also explained in the provisional and final disclosure that the proxy interest rate applied by the Commission was the SBP rate, i.e. the KIBOR rate. This was explicitly so stated in the provisional company-specific disclosure, in the final company-specific disclosure, in the General Disclosure Document and in the final determinations. In fact, it was Pakistan and Novatex that submitted the KIBOR rates to the Commission. Novatex and Pakistan therefore clearly understood that the Commission was going to use the KIBOR for the IP and both supported the use of the KIBOR rate as a matter of principle (while arguing for a different year).

- The Commission further explained that the relevant benchmark year for the comparable rate was the IP. This was explicitly so stated in the provisional company-specific disclosure, in the final company-specific disclosure, in the General Disclosure Document as well as in the final determinations. This was clearly understood by Novatex and Pakistan which both disagreed with the Commission's choice and repeatedly insisted on the use of a different benchmark year.

- Finally, the Commission explained that it was using the amounts effectively used during the IP under the LTF-EOP (including both outstanding amounts and amounts drawn down during the IP) to calculate the benefit. This clearly follows from the calculations and calculation sheets which were provided by the Commission to Novatex in the provisional and final disclosure. These calculation sheets show that the Commission compared the interest rate actually paid by Novatex with the interest rate proxy on the basis of the respective outstanding amounts during the IP. The Commission in the General Disclosure Document also stated that it used for its calculation "the amount of credit for the IP, as reported by Novatex". This was also clearly understood by Novatex which explicitly acknowledged that the benchmark rate would "be applied to the outstanding amount in the IP."

19. Contrary to Pakistan's claims it was also clear from the determinations and other evidence that the Commission treated the preferential credit mechanism as a line of credit. The Commission explicitly used the term "line of credit" in its company specific disclosures and described the LTF-EOP as a line of credit in its provisional and final determinations. Irrespective of the Commission's legal or factual qualification of the preferential credit mechanism as a line of credit in its determinations, the Commission clearly explained its method for calculating the benefit for the LTF-EOP programme, namely the applicable legal provision as well as which comparable benchmark rate, which benchmark year and which amounts it would use (see the following bullet points). This is all that matters under the chapeau of Article 14. It should be recalled once again that Pakistan did not make a claim under Article 22.3.

20. Therefore, all the essential parameters of the Commission's methodology to calculate benefit were clearly explained in the Commission's determinations and were fully understood by Novatex and Pakistan. There is no violation of the transparency requirements of the chapeau of Article 14 as alleged by Pakistan.

2.3.2. Pakistan's claims under Article 14(b) of the SCM Agreement

21. The EU recalls that Article 14(b) contains "guidelines" and that investigating authorities have a considerable amount of flexibility and discretion when calculating benefit. Article 14(b) requires a comparison with a benchmark loan, comparable to the investigated government loan, with "as many elements as possible in common". Where a similar commercial loan to the same borrower does not exist, other similar loans may be used, including proxies. The individual calculation method is a matter of case-by-case analysis. The question is whether in the present the Commission's methodology to calculate benefit was reasonable and appropriate in light of all relevant circumstances.

22. The EU also notes that Pakistan's claims under Article 14(b) - that the Commission's search for a comparable commercial loan and the rejection of the loans submitted by Novatex are not sufficiently reflected in the Commission's determinations − must be rejected as these aspects are sufficiently reflected in the determinations and, in any event, these claims can only be brought under Article 22.3 and not under Article 14(b).

23. ***Progressive search***. The EU has shown that the Commission did carry out a search for a comparable loan that was appropriate under the circumstances of the case. The Commission in the questionnaire asked Novatex to provide comparable commercial loans. The Commission ultimately did not use the loans submitted by Novatex for its calculation of benefit (i) because the loans were standard commercial loans and hence not comparable to a preferential line of credit mechanism like the LTF-EOP programme, (ii) because they dated from the years 2004 and 2005 and not from the IP and (iii) because they displayed different characteristics with respect to duration, amounts etc. The Commission instead used the KIBOR rate because this rate reflected the average lending rate of all companies in Pakistan. The KIBOR rate was also actively and repeatedly promoted by Pakistan and Novatex as the record amply shows. For example, already in November 2009, Novatex submitted to the Commission a loan, said to be comparable, that was tied to the KIBOR/SBP rate. During the investigation, Novatex requested, for example, that the benchmark rate should "in any event not be more than the SBP website rate" and Pakistan claimed that "it is just plain logic" to compare the rate under the LTF-EOP to the KIBOR rate. Therefore, under these circumstances, where the investigating authority and the parties agreed on an appropriate benchmark rate as a matter of principle, there was no reason for the Commission to search further for a comparable loan.

24. ***Use of KIBOR rate in IP***. The EU considers that the moment of drawdown of certain amounts, which was the subject of some discussion, is irrelevant for the legal question whether the Commission could use the KIBOR rate during the IP. The EU recalls that it has consistently maintained the position that the Commission, at the time of the investigation, had to assume that the amounts indicated on the excel spreadsheets under the heading "Opening" were disbursed in July 2008, i.e. during the IP because of the way in which the spreadsheets were provided and presented by Novatex. Furthermore, it was also clearly understood by Novatex and Pakistan which amounts the Commission had taken into account in its calculation of benefit, namely the amounts outstanding during the IP as reported by Novatex. At no point during the investigation did Novatex or Pakistan contest the amounts taken into account by the Commission in its calculations. In any event, Pakistan also agrees that the exact moment of drawdown of the amounts in question is in fact irrelevant for the legal assessment in this case because it is undisputed that the amounts used for the calculation of benefit were outstanding during the IP. The decisive question is therefore whether the Commission was correct to use the IP for the determination of the benchmark proxy or was legally required to use a previous year of a "mix" of different years. This question depends on the characteristics of the financial instrument under investigation.

25. The LTF-EOP programme was a flexible financing instrument akin to a line of credit, and not a typical standard loan with a fixed rate. A previous panel has confirmed that a line of credit is to be distinguished from a standard loan. There are many differences between a standard loan and the preferential line of credit mechanism granted to Novatex.

26. Under a standard loan, the entire amount would have been disbursed in 2005. Under the preferential line of credit mechanism, the amounts were disbursed to Novatex during an extended period, between 2005 and 2009. Novatex therefore had flexibility as to when to withdraw the amounts. The banks had to hold the respective amounts in reserve. Under a standard loan, the repayment obligation would have started immediately after conclusion of the contract in

June 2005. Under the preferential credit mechanism, the repayment obligation for Novatex regarding the principal only started more than two years later, in July 2007. Under a standard loan, the interest rate would have been fixed for the entire repayment period and for the entire amount. Under the preferential line of credit mechanism, the interest rate depended on the moment of withdrawal by Novatex. The EU does not contest that the interest rates were fixed for a specific tranche once that tranche was drawn down. However, Novatex could decide when to draw down the money and hence could in principle influence the interest rate which is very different from a standard commercial loan. The fact that ultimately only one single interest rate applied for the different tranches was only decided ex post in view of the market circumstances, in order to ensure that Novatex would maintain the advantageous financial mechanism, no matter how high the market rates would be.

27. Moreover, nothing prevented Novatex from seeking financing from the market if the market conditions changed in a more favourable manner than the LTF-EOP mechanism. Indeed, under a standard loan, the borrower decides to get all the necessary financing at a given moment in time. In contrast, through the LTF-EOP mechanism, Novatex could decide whether to draw down further instalments if and when it needed the money, and it could also decide to borrow the money from other sources, market conditions so permitting, without the need to renegotiate the original preferential credit mechanism and without incurring any penalties.

28. It is in light of the above considerations, that the alternative calculation methods presented by Pakistan and the Commission's calculation method should be assessed.

29. First, the Commission was not obliged to use the year 2005 for the KIBOR rate as requested by Pakistan and Novatex during the investigation. The interest rate under the preferential line of credit mechanism was not determined or fixed in 2005 but depended on the moment of drawdown. The repayment obligation by Novatex on the principal did not start in 2005 but only in July 2007. The credit amount was not disbursed in 2005 but over a 4-year period.

30. Second, the Commission was not obliged to use a mix of different years for the determination of the benchmark as requested by Pakistan before the Panel. The Commission would have needed very detailed information about each disbursement by each individual bank to Novatex prior to the IP under the LTF-EOP. It is undisputed that Novatex did not provide this information during the investigation. Pakistan did not even provide this information when asked by the Panel. Hence, the Commission was simply unable to perform such a calculation, even leaving aside the practical difficulties of such a calculation. In addition, neither Pakistan nor Novatex ever raised this particular – and very complex - calculation method during the investigation. Both Pakistan and Novatex consistently and exclusively requested a calculation based on the benchmark year of 2005. Such a scientific approach is not legally required and would not only put an enormous burden on parties, investigating authorities and the respective review bodies but would also significantly increase the risk of arithmetical errors and hence of legal challenges. Finally, using several benchmark years would also treat the LTF-EOP programme as separate mini standard loans and hence would disregard the flexibility of this preferential financing instrument and its nature as being akin to a line of credit.

31. Third, it was perfectly legitimate for the Commission to use the IP as the KIBOR benchmark year since the IP provided a good "snapshot" of the LTF-EOP line of credit facility for several reasons: Novatex continued repaying outstanding amounts under the LTF-EOP during the IP. Disbursements under the preferential credit mechanism also continued during the IP. And Novatex benefited from the respective amounts that were outstanding during the IP. All these elements render the IP a perfectly suitable period for the determination of the benchmark rate proxy. The Commission certainly complied with the standard of reasonableness that permeates the guidelines under Article 14. This applies all the more so as the Commission acted in the favour of Novatex by using the shorter term KIBOR rate for a long-term credit mechanism and by not taking into account the 2-year grace period for the repayment of the principal in its benefit calculation.

32. Therefore, the EU maintains its request that the Panel should reject Pakistan's claims against the Commission's determination regarding the preferential credit mechanism in their entirety.

### *2.4. CLAIMS RELATING TO CAUSATION (ARTICLE 15.5 OF THE SCM AGREEMENT)*

#### 2.4.1. The Commission's method in the causation analysis

33. Under Article 15.5 of the SCM Agreement investigating authorities must "separate and distinguish" the injurious effects of other known factors from those of the alleged subsidised imports. When both subsidised imports and other factors potentially causing injury are present at the same time, the investigating authority must assess whether and to what extent subsidised imports cause injury, and whether and to what extent other factors cause injury. These two "steps" can be done in either sequence, and there is no reason why the assessment of one "step" should not refer to findings made in the other "step".

34. Article 15.5 imposes no obligation to carry out the causation analysis in a particular order. Causation and non-attribution are closely related aspects of the overall assessment of a causal link between the subsidized imports and the injury, and it would be artificial to impose a particular order of analysis between them. This position is also supported by the Appellate Body which emphasized the discretion enjoyed by the investigating authority in this respect and repeatedly stated that no method was prescribed for the process of separating and distinguishing the injurious effects of subsidized imports from other known factors.

35. Pakistan's claim that the Appellate Body in *US - Wheat Gluten* would have mandated the three-step analysis advocated by Pakistan is incorrect. *US - Wheat Gluten* concerned non-attribution under the Safeguards Agreement, and the main focus of the Appellate Body was that the effects of other known factors should be properly separated and distinguished. In subsequent cases, the Appellate Body has also repeatedly emphasized that Article 15.5 does not set out a specific order of analysis, e.g. in *US Hot-Rolled Steel and in EC – Tube or Pipe Fittings* where the Appellate Body "underscored" that no method is prescribed for non-attribution.

36. Pakistan's claim that the Commission's preliminary finding of a causal link in the first step of the Commission's analysis can never become less than "substantial" or be undone by other factors is also obviously incorrect. If that were the case, the Commission would always find a causal link in its determinations and could never come to the conclusion that other factors were the true cause of injury. Pakistan's allegation is belied by the many terminations of Commission's investigations in anti-dumping and anti-subsidy proceedings where other factors were found to be the true cause of injury.

37. Pakistan's attempt to find support in previous negative determinations of the Commission in which the Commission did not use verbatim the phrase that the causal link was "broken" by other factors is misguided. It is obvious that in case of negative determinations an investigating authority will not find interim causation by subsidised imports only to find a few paragraphs later that causation was "broken" and injury was in fact caused by other factors. In such case, an investigating authority will simply condense its written analysis and find that the injury was not caused, or not sufficiently caused, by the subsidised imports. This does not change the fact that for a positive determination, which is solely at issue in the present case, the Commission's method constitutes a logical sequence and useful analytical tool to assess whether the subsidised imports constitute a genuine and substantial cause of injury as required under the case-law.

38. In the present case, the Commission first established that there was a causal link between subsidised imports and an injury to domestic producers. Then the Commission examined other known factors and whether they could break the causal link between the imports and the injury, concluding that they did not. As such, the Commission fully met its obligation to separate and distinguish the effects of subsidized imports from the effects of other known factors.

39. The European Union also recalls that under the case law investigating authorities are not required to quantify the injury caused by other factors in order to separate and distinguish it from the injurious effects of the alleged subsidized imports.

40. Thus, Pakistan's claim against the Commission's method of assessing causation should be rejected.

2.4.2. The Commission's analysis of specific known factors

41. Contrary to Pakistan's claims, the Commission provided a well-reasoned explanation in the determinations why the nature and extent of the contribution of specific other factors were insufficient to break the causal link.

42. First, regarding the **Korean imports** the EU recalls that the Commission separated and distinguished their effects and recognised that they may have contributed to injury. In the process the Commission carried out an extensive analysis of prices, market shares and volumes of Korean, subsidised and domestic producers. The Commission reasoned that prices of Korean imports were higher than the subsidised imports and only slightly below prices of domestic producers and hence their contribution would only be limited. This finding is further supported by the lower volumes of Korean imports and the fact that subject imports increased by 440% whereas Korean imports only increased by 146% since 2006. This type of qualitative explanation is exactly what the case-law requires. No additional quantification of the injury is required under Article 15.5.

43. Regarding the **economic downturn**, the EU recalls that the Commission found that the downturn did have an injurious effect. But the downturn did not break the causal link because it had a global character and hence affected all companies more or less equally. In addition, the Commission stated in the determinations that the downturn had no impact on the period prior to the last quarter of 2008. This made clear that the downturn only affected part of the period considered (i.e. 1 January 2006 to the end of the IP), namely three quarters out of 3.5 years and part of the IP, namely three out of four quarters starting in September 2008. The downturn therefore only affected 3 quarters during the period considered and during the IP and hence had a limited impact in terms of duration.

44. The Commission made it clear in its determinations that **oil prices** were not low but volatile during the IP and that they were "world" prices and hence applied to all companies equally. Oil price developments did not break the causal link.

45. Regarding **non-cooperating EU producers**, the EU recalls that the market share of the subsidised imports increased by almost 500% during the period considered whereas the non-cooperating EU producers lost 20% market share during the same time. This would in itself be sufficient to counter any argument that these producers would have broken the causal link. The Commission also assessed the market shares during a period of 4 years and did not simply carry out a point-to-point analysis of two years. In addition, the EU observes that several non-cooperating producers exited the market during or shortly after the IP, which confirms that the slight increase of market share during the IP of was not a reversal of the previous trend of declining market shares.

46. Pakistan's claims under Article 15.5 should therefore be rejected.

2.5. CLAIMS RELATING TO VERIFICATION VISITS (ARTICLE 12.6 SCM AGREEMENT)

2.5.1. The proper legal standard under Article 12.6 of the SCM Agreement and the meaning of "result"

47. Article 12.6 of the SCM Agreement makes it clear that investigating authorities are not required to conduct a verification visit but rather gives permission to do so ("may carry out…"). Regarding the disclosure of the results of the verification visit to the verified firms, Article 12.6 allows for two methods: the investigating authority either "shall make the results of any such investigations available", or "shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain". The purpose of the disclosure requirement under Article 12.6 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results.

48. The phrase "results of any such investigations" within the meaning of Article 12.6 is to be understood as category of information closely related to the "essential facts" within the meaning of Article 12.8. In fact, the cross-reference to Article 12.8 in Article 12.6 confirms this close relationship. The "results of any such investigations" are used, together with other information available, to form the universe of essential facts used by the investigating authority in its

determination. This category related to the essential facts with respect to the verification visit can either be made available separately (as is the practice of some investigating authorities) or in the context of the disclosure of essential facts under Article 12.8 (as is the practice for example of the Commission). This is also in line with the interpretation of the term "results" as posited by the European Union. A result is an outcome. The "outcome" of a verification visit cannot therefore be mere factual information about the verification visit as such, e.g., a detailed account of what happened during the visit, or which documents were requested by the Commission or were provided by Novatex. Such facts are the verification visit (or, in other words, concern the process of the verification visit), but they are not an "outcome" or "result" of the verification visit.

49. There is no requirement that the investigating authority prepare written "minutes" of the verification visit. If what Pakistan wants is minutes of the verification visit, such minutes can be easily prepared by the company investigated. The investigating authority usually only has 2 officials on the spot whereas the company may have hundreds of employees available as well as its legal representatives. It is not the task of investigating authorities to draft minutes for the company.

50. "Result" does not include an explanation why the authority looks at certain information as requested by Pakistan. It is obvious and needs no further detailed explanation that the overarching reason of the verification visit is to verify the accuracy of previously submitted documents and possibly of documents submitted during the verification visit. "Result" also does not include information as to whether a verification visit was successful or not as argued by Pakistan (e.g. whether the information previously provided is accurate). This is because the ultimate "success" of a verification visit can only be determined once all other information has been assessed and cross-checked, i.e. at the disclosure stage. It would also make little sense to report on which information was successfully or unsuccessfully verified during the verification visit when many of the documents may not even be relied on by the investigating authority in its determinations.

#### 2.5.2. Pakistan's claims that the results of the verification visit were needed to defend itself are not credible

51. Pakistan has failed to demonstrate how the alleged failure by the Commission to provide the results of the verification visit would have impeded Pakistan's or Novatex's rights of defence. Quite to the contrary, both parties have been perfectly able to defend themselves during the CVD investigation and Pakistan in the present panel proceedings. Pakistan also has not shown concretely in the case at hand how its rights of defence were allegedly compromised. Pakistan argues that if a "result" of the verification visit, as understood by Pakistan, would be provided by the authority, then the authority would be unable to "ignore" whatever information is provided by the company. Such a proposition is of course incorrect. The fact that the authority verifies certain information provided by the company does not mean that it has to agree with the company's view regarding such information. The authority may still "ignore" the company's view if it has reasons to do so, even if the authority confirms that such information was checked at the company's premises, thereby providing the "result" of the verification visit. The disagreement about the moment of drawdown of certain amounts in the calculation sheets provides a good example. The Commission did verify the calculation sheets submitted by Novatex and sent out a deficiency letter regarding the incorrect commercial interest rate provided by Pakistan. Nevertheless, this verification did not prevent the Commission from interpreting the column "Opening" differently than Pakistan. Nor did the knowledge by Pakistan that the calculation sheets were verified by the Commission have any relevance for its defence since Pakistan has not once made reference to this fact during the entire proceeding - even though it claims that knowledge about whether certain information was verified is of paramount importance.

52. This example shows that the essential due process safeguard with respect to information being "ignored" by the authority cannot be the "result" of the verification visit. Safeguarding due process rights is precisely the purpose of instruments such as the disclosure of the essential facts which sets out the authority's factual and legal interpretations and provides the company with the possibility to defend itself.

2.5.3. Pakistan was informed of the result

53. In the present case, Novatex was informed by pre-verification letter that the verification visit would focus on the MBS programme. Recitals 68-72 of the Provisional Determination set out in considerable detail what type of information the Commission checked during the verification visit (e.g., the (non)existence of a proper verification system, the records of input goods received, the Analysis Certificates etc.). In addition, several of the items in the log of exhibits concern the MBS programme. Even assuming that Novatex was not provided with the log of exhibits, Novatex held originals or a copy of all the documents that were collected during the verification visit (both as regards the MBS and other subsidy schemes). Other items that were also relevant for the other subsidy schemes were verified in addition, such as the company's turnover and sales figures and (KIBOR) interest rates as submitted by the company. Novatex and/or its legal counsel were present or had the opportunity to be present during the entire verification visit. Any new documents during the visit would have to be handed out by Novatex. The European Union also recalls that Pakistan in its First Written Submission did not appear to take issue with a purported lack of "result" a as regards the MBS programme, the main aspect of the verification visit.

54. In sum, Pakistan's claim under Article 12.6 should be rejected.

## 3. CONCLUSIONS

55. In view of the foregoing, the European Union requests the Panel to reject Pakistan's claims in their entirety.

# ANNEX C

## ARGUMENTS OF PAKISTAN

## ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF PAKISTAN

*Prepared with the cooperation of the Advisory Centre on WTO Law*

## 1. INTRODUCTION AND OVERVIEW

1.1. In this dispute, Pakistan challenges several aspects of the EU's Determinations in a CVD investigation concerning polyethylene terephthalate (PET) from, inter alia, Pakistan. Pakistan's claims concern various aspects of the subsidy determination, the causation analysis, as well as the lack of disclosure of verification results.

## 2. PAKISTAN'S ARGUMENTS UNDER ARTICLE 6.2 OF THE DSU

2.1. The EU makes a number of procedural objections under Article 6.2 of the DSU. First, the EU contends that the "references to Annexes I, II and III of the SCM Agreement contain multiple obligations and, thus, the European Union fails to understand to which specific obligations within those provisions Pakistan is referring".[1] The EU's objections are without merit.

2.2. Pakistan's panel request clearly specifies items (h) and (i) of Annex I to the SCM Agreement, each of which contains one particular category or type of export subsidy. Each of these provisions contains a specific obligation on investigating authorities. Thus, the EU clearly could understand from the panel request to which "specific obligations" Pakistan referred.

2.3. With respect to Annexes II and III, Pakistan notes that these Annexes are referenced in Annex I(h) and I(i) described above and constitute guidelines for the interpretation of the obligations set out therein. As such, they provide a detailed explanation of an integrated and single process that reflects and leads up to a unified, single and "overarching" fundamental obligation[2], that is, a determination of whether the alleged subsidy satisfies the definitions in Annex I(h) or I(i). In any case, Pakistan has identified in the panel request the specific paragraphs on Annexes II and III it considers to have been violated: Annexes II(I)(1)-(2), II(II)(1)-(2), (III)(I) and (III)(II)(1)-(3). WTO jurisprudence has made clear that a comprehensive reference to a set of legal rules is permissible when the complainant makes a claim concerning this set of rules in its totality.

2.4. Moreover, even if Pakistan was required under Article 6.2 of the DSU to identify the specific procedural step in Annexes II and III, the panel request clearly set out that Pakistan was taking issue with the fact the Commission countervailed the entirety of the duty remissions, as opposed to the "excess portion of these refunds". Thus, by referring to the "excess portion" it is clear that Pakistan referred to the specific part of Annexes II and III that refer to it. In this respect, WTO jurisprudence confirms that a reference to, for instance, Article 3 of the Anti-Dumping Agreement may be sufficient if a reader can discern, from the narrative in the panel request, the specific paragraph(s) or obligation(s) to which the complainant refers.[3]

2.5. Second, with respect to the LTF-EOP programme, the EU argues that the phrase "by failing to explain adequately the application of its method to calculate the benefit in the case at hand" does not allow it to "identify in any of the provisions listed therein" the "problem" described by Pakistan.[4] The EU argues that "[t]he provisions cited by Pakistan appear to address substantive violations as opposed to failures to provide adequate reasoning".[5]

[1] EU's Request for a Preliminary Ruling, para. 41.
[2] Panel Report, *China – Broiler Products*, para. 7.521.
[3] Appellate Body Report, *Thailand – H-Beams*, para. 90; and Panel Report, *Thailand – H-Beams*, para. 7.36.
[4] EU's Request for a Preliminary Ruling, para. 43.
[5] EU's Request for a Preliminary Ruling, para. 43.

2.6. Thus, the EU disagrees with Pakistan on whether the "problem" described by Pakistan is capable of violating the WTO provisions cited in the panel request. This is, however, a matter to be dealt with on the merits of this dispute. In fact, in response to similar objections, the Appellate Body has stated that "the question of whether the measures identified in the panel request can violate, or cause the violation of, [a WTO] obligation [] is a substantive issue to be addressed and resolved on the merits".[6]

2.7. At any rate, the EU's objection cannot be upheld because the narrative of Pakistan's panel request clearly reflects the wording of, for instance, the *chapeau* of Article 14 of the SCM Agreement. Moreover, the EU's objection unduly parses out the distinction between substantive and procedural violations in the realm of trade remedies. The Appellate Body has consistently stated that substantive violations are to be assessed against the explanation given by the authority, and that a lack of appropriate explanation "enables panels to determine" an inconsistency with the substantive provisions.[7] For these reasons, the EU's objection cannot stand.

2.8. The EU makes three additional objections to the panel request. In response, first, Articles 10, 19.1 and 32 of the SCM Agreement were explicitly referred to in the panel request. Second, even though Article 32 has been referred to generally, the narrative in the panel request makes clear that Pakistan referred to the first paragraph only. Pakistan fails to see how the EU was somehow prevented from understanding that Pakistan was referring to Article 32.1. Third, even if Article 1.1(b) of the SCM Agreement was not explicitly mentioned in the panel request, a violation of this provision follows automatically from a violation of Article 1.1(a)(1)(ii), given that revenue forgone or not collected is tantamount to providing a benefit and no separate analysis of a benefit is thereby required.

2.9. Finally, the EU has also argued that Pakistan's claim under Article 12.6 is not properly specified because Pakistan did not identify which of the two options for disclosing verification results the EU chose. This assertion is illogical. Pakistan argues that the EU adopted neither of the two alternative means of disclosure under Article 12.6. Moreover, at the time of drafting the panel request, Pakistan could not have known which of the two permissible alternative approaches the EU would argue it adopted during the investigation.

## 3. PAKISTAN'S CLAIM CONCERNING THE MANUFACTURING BOND SCHEME (MBS)

### 3.1 Introduction

3.1. The EU acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), 10, 19.1, 32.1 and Annexes I(i), II(II) as a whole, II(II)(1) and II(II)(2) of the SCM Agreement, as well as Article VI:3 of the GATT 1991. The core of the issue is that the EU incorrectly determined that a subsidy existed in the form of the totality of the duties drawn back/remitted, rather than only the excess drawback/remission, if any. Moreover, in reaching that incorrect subsidy determination, the EU failed to observe the prescribed analytical process set out in Annexes II and III of the SCM Agreement and violated a number of other related requirements enshrined in the above-mentioned provisions.

### 3.2 A duty drawback scheme gives rise to a subsidy only if there is an excess drawback

3.2. A subsidy under a duty drawback/remission scheme within the meaning of Footnote 1 and Annex I(i) to the SCM Agreement can exist only if there is an excess drawback or remission. As a matter of legal principle, under the SCM Agreement, the totality of the duties drawn back is never the subsidy. For instance, Footnote 1 of the SCM Agreement states that duties drawn-back or remitted not in excess are deemed not to be a subsidy. However, under the EU's reading, Footnote 1 is a conditional exception (a "carve-out") to the otherwise applicable rules of the SCM Agreement and this exception may or may not apply, depending on whether the duty-drawback regime of the exporting Member satisfies certain conditions set out in Annexes II and III.

[6] Appellate Body Report, *Australia – Apples*, paras. 423-425.
[7] Appellate Body Report, *US – Steel Safeguards*, paras. 301-303.

3.3. This is demonstrably incorrect. Footnote 1, together with the Ad Note Article XVI of the GATT 1994, Annex I(i), and Annexes II and III, reflect a special rule applicable to duty drawback systems. This rule stipulates that only the excess drawback can constitute a subsidy. There are no other (default) rules applicable to duty drawback schemes. The principle that only the excess drawback or remission can be a subsidy is also explicitly set out in Annex I(g) and I(h), which like Annex I(i) relate to *indirect* taxes or charges. In contrast, Annex I(e), which relates to *direct* charges, considers any exemption or remission as a subsidy.

### 3.3 Footnote 1 is not a conditional carve-out and the EU's reading of the "in accordance with" introductory clause is nonsensical

3.4. The EU is incorrect in reading the "In accordance with" introductory clause under Footnote 1 as a condition for the applicability of the remainder of the footnote. The EU would have the Panel read the clause as "If the facts are in accordance with … ". However, the "[i]n accordance with" phrase does not express any conditionality, but instead clarifies that the provisions listed therein (the Ad Note Article XVI, and Annexes I through III) reflect the same cardinal and decades-old principle as the second part of Footnote 1, that is, that only an excess drawback or remission can be a subsidy. The correct reading of the words "in accordance with" in Footnote 1 is therefore "as stated in", "as stipulated in", "in harmony with", "as provided in".

3.5. In this regard, the grammar and syntax of Footnote 1 are similar to, for instance, Article 19.2 of the DSU, Article 4.1(b) of the Agreement on Safeguards and numerous other provisions in the covered agreements. If these provisions were given the reading proposed by the EU for Footnote 1 − that of a condition for the application of the rest of the provision − they would become entirely nonsensical. Moreover, the ordinary meaning of the words "in accordance with" is not to create a condition, as the EU's interpretation would require. When the drafters wished to create a conditionality, and make the applicability of a provision dependent on compliance with another provision, they used words or phrasing such as "if", "when", "provided that", "unless that", etc. This can be seen, for instance, in Article 1.2 of the SCM Agreement, Article 2.9 of the TBT Agreement or other provisions throughout the covered agreements.

### 3.4 The drafting history confirms Pakistan's reading of Footnote 1

3.6. The drafting history of the SCM Agreement during the Uruguay Round confirms Pakistan's reading of the phrase "in accordance with". As late as 1990, the draft text of the SCM Agreement contained an introductory ("In accordance with") clause that referred only to the Ad Note to Article XVI, and not also to Annexes I to III. Because the text of the Ad Note is identical to the second clause of the Footnote, the words "in accordance with" must have the meaning argued by Pakistan, namely, "as stated in", "as stipulated in", "in harmony with", "as provided in".

3.7. In the final version of the SCM Agreement, the drafters chose to include also Annexes I through III in the "in accordance with" clause. Thus, the drafters obviously must have considered that the reference to Annexes I through III fitted within the existing meaning, structure and thrust of the sentence, which defined the subsidy as the excess remission or drawback only. The drafters cannot have intended to change fundamentally, at the last minute, a clear definition found in GATT/WTO law since the 1950s, by creating conditions for the applicability of that definition.

### 3.5 The EU's reading of footnote 1 contains additional logical problems

3.8. The EU's reading of Footnote 1 also creates several logical problems. First, Annexes II and III apply *only in a countervailing duty investigation*. It is therefore not clear how the EU's logic would apply when a *direct challenge* is brought against a subsidy in a WTO dispute under Article 3 of the SCM Agreement, and when no prior CVD investigation has taken place. Second, Annexes II and III contain *obligations on an investigating authority* to adopt a certain analytical approach, in a certain sequence. If the investigating authority fails to comply with these requirements, the exporting Member and its companies would then suffer the adverse consequences. Third, it is not clear how a WTO panel, in a direct WTO challenge against a subsidy, could comply with a definitional provision such as Annex I(i), as a condition for applying another definitional provision.

### 3.6 Pakistan was not required to make its claim under Article 1.1(b) or 14 of the SCM Agreement

3.9. The EU also argues that Pakistan accepts that a financial contribution existed and that it takes issue only with the Commission calculation of the amount of the subsidy. This, in the EU's view means that Pakistan should have brought its claim under the provisions relevant for benefit, that is, Articles 1.1(b) and 14 of the SCM Agreement.

3.10. The EU's assertions are without merit. A subsidy consists of a financial contribution and a benefit element. These two elements are separate and must not be confused. In the case of duty drawback systems, determining the existence of an excess drawback is part of the definition of a financial contribution. Footnote 1, one the key provisions in this dispute, is attached to Article 1.1(a)(1)(ii), which is concerned with the determination of the financial contribution. For some subsidies, such as grants or government revenue foregone, identifying the financial contribution, for all practical purposes, has the effect of quantifying the benefit also, and relevant WTO caselaw confirms this.[8] However, this does not undermine the conceptual distinction between the two elements. Pakistan's case rests primarily on the issue of identifying the financial contribution.

### 3.7 There is no basis for the EU's argument that the investigating authority is entitled to assume that the entirety of the duty remission is a subsidy

#### 3.7.1 Introduction

3.11. The EU relies on a range of arguments to argue that an investigating authority has discretion to "assume" that the entirety of the drawn-back duties constitute the excess amount.[9] This discretion would be triggered by a determination that the exporting Member's monitoring mechanism is not adequate, and when no additional investigation by the exporting Member has been undertaken.

3.12. However, in this case, the Commission failed to provide the Government of Pakistan with an opportunity to conduct that further examination. The absence of the allegedly required information is therefore the EU's own responsibility. Second, even if no additional investigation was conducted, there was nevertheless record evidence on which the Commission could have relied to examine the existence and amount of any excess. Third, all provisions at issue make clear that, even where a monitoring system is considered inadequate, the resulting subsidy can only be the amount of any excess remission. Nothing in these provisions suggests that *all amounts* remitted (including those that are clearly not in excess) may be treated as a financial contribution.

#### 3.7.1 The EU has failed to provide Pakistan with the opportunity to conduct the "further examination"

3.13. The EU claims the right to "assume"[10] that the entirety of refunded duties constitute a subsidy, in part because there was "no reliable information provided by [Pakistan] about the actual amounts of imported materials incorporated into the exported products".[11] However, the investigating authority must provide a meaningful opportunity for the exporting Member to conduct the "further examination", which comes only after the monitoring mechanism has been found to be inadequate.

3.14. It is common sense that the exporting Member cannot conduct this investigation *before* it has been apprised of the ruling of the investigating authority about the monitoring mechanism. Similarly, an investigating authority cannot determine *at the same time* that the verification system is insufficient and that the exporting Member has failed to conduct the "further examination". Finally, the exporting Member requires at least *some time* to conduct that examination and subsequently communicate the results to the investigating authority.

[8] Panel Report, *US – Aircraft*, paras. 7.115 – 7.167; Panel Report, *US – FSC (21.5),* paras. 8.3 – 8.43; Appellate Body Report, *US – FSC (21.5)*, para. 106.
[9] EU's first written submission, paras. 91 and 92.
[10] EU's first written submission, paras. 91 and 92.
[11] EU's first written submission, para. 98.

3.15. In this case, the EU made a simultaneous finding, in its Preliminary Determination, that the monitoring mechanism was inadequate and that Pakistan "had failed" to conduct the further examination. An investigating authority that was genuinely open to seeing the exporting Member conduct the "further examination", and was open to relying on the results, would not have used the language used by the Commission. Therefore, faced with the Commission's determination and tis failure to ask Pakistan to conduct an examination, Pakistan could reasonably conclude only that there was no scope for any such "further examination", because the EU was simply not interested in the results. This is confirmed by the subsequent parts of the Determination, in which the Commission refers only to its finding that the monitoring mechanism was not adequate, not to any failure of Pakistan to follow up. These statements reveal, in essence, that the EU considered the mandated "further examination" as a dispensable and ultimately not relevant part of the investigation. In these circumstances, the Commission's reference to Pakistan's alleged failure to conduct the "further examination" appears at most to pay lip service to the legal text, rather than being a proper application of the analytical steps of Annexes II and III.

3.16. In any event, the Commission was also obliged to inform the exporter of: the type of information the investigating authority would accept as output of the "further examination"; the form and format in which the results of the "further examination" had to be reported; the required procedural steps taken during the "further examination" and any required communication with the investigating authority prior to the conclusion of the "further examination"; and the time frame for the further examination and the deadline by which the exporting Member was required to report to the investigating authority the results of the "further examination". This obligation is analogous to that in Article 12.1 of the SCM Agreement, which requires an investigating authority to "give notice" to "[i]nterested Members and all interested parties" "of the information which the authorities require".

### 3.7.2 Following the procedures of Annexes II and III does not entitle the investigating authority to disregard the investigation record

3.17. The EU also argues that Annexes II and III provide for certain investigative steps, but that they do not address "how" an analysis of the excess should be undertaken.[12] The EU also argues that Annexes II and III do not address the consequences of the various intermediate conclusions that an investigating authority might reach under these procedures. In the EU's apparent view, these perceived "gaps" under Annexes II and III entitle the investigating authority to "assume" that the entire refunded amount, rather than just the excess, amounts to a subsidy.

3.18. There is no basis for this view. First, as Pakistan has demonstrated, whatever the outcomes of the prescribed analytical steps under Annexes II and III, the underlying legal principle remains that only the excess remission or drawback can be a subsidy. Second, Pakistan does not agree with the EU's reading of certain parts of Annexes II and III. By way of example, contrary to the EU's assertions, if a monitoring mechanism is found effectively to apply, a presumption exists that no subsidy exists even under Annex II, which is less explicit on this particular point than Annex III.

3.19. Third, nothing in Annexes II and III relieves the investigating authority of its obligation to actually analyse the data before it or to explain why the data is considered unreliable. Rather than making "assumptions" without any basis on record evidence, the authority must base its decision on any other available record evidence, or third-source information. The investigating authority can address any data deficiencies in the same manner as it would for any other subsidy in a countervailing duty investigation, including by relying on facts available.[13]

3.20. Annexes II and III provide for *additional* rules that apply together with the normal rules and principles. This cumulative application of legal provisions is one of the cardinal rules of WTO law.[14] Hence, application of Annexes II and III does not mean that other rules cease to apply.

3.21. Finally, the investigation concerns an exporter, and not the government; and any CVD action is imposed on the exporter, and not the government. The investigating authority cannot equate misgivings about a government's documents or actions with misgivings about an exporter's

[12] EU's first written submission, paras. 72 and 74.
[13] Appellate Body, *Mexico – Anti-Dumping Measures on Rice*, paras. 290 - 295.
[14] See, for instance, Appellate Body Report, *Korea – Dairy*, para. 74. See also Panel Report, *Indonesia – Autos*, para. 14.56.

data. The authority cannot "punish" an exporter for any real or perceived flaws in the government's regulatory system or the government's actions in the investigation.

### 3.7.3 Record evidence does not suddenly become unreliable because the investigating authority has determined that the monitoring mechanism is not adequate

3.22. The EU also appears to believe that, when the investigating authority finds that the monitoring mechanism is not adequate, all the remaining information on the record, from whatever source, is no longer reliable. But that cannot be correct. The monitoring mechanism under a duty drawback scheme relates to how a government operates an overarching system that applies to multiple companies. It is separate from the data and financial records of individual companies that operate under that regime. The drafters of the SCM Agreement also saw these two as separate, since both Annex II and III envisage a "further examination" on the basis of "actual inputs"[15] or "actual transactions involved".[16] In this investigation, the use of the "input/output" ratio in the context of the duty drawback scheme – the main reason why the Commission considered the MBS monitoring mechanism unsatisfactory – says nothing about how the company in its own records tracks its actual stocks, the quantities produced and exported, and the prices of its inputs.

3.23. In certain prior investigations in which it found that a monitoring mechanism did not exist or was inadequate, however, the Commission went on to find that the company was able to demonstrate that no excess remission had occurred.[17] Moreover, in this case, the Commission continued to rely extensively on information and data provided by the company, despite its misgivings about the government's monitoring mechanism. The Commission relied, for instance, on the volume and value of PTA imports imported by Novatex into the MBS, as well as the volume and value of Novatex' exports out of the MBS. Furthermore, the Commission conducted a parallel anti-dumping investigation on the same product. Both preliminary AD and CVD determinations were published on the same day. In the dumping determination, the Commission relied on a broad range of Novatex's data, including cost of production data that tracked separate raw input for domestic and for export production that could have been used in determining whether an excess existed.

### 3.7.4 There was extensive record evidence that the Commission could have relied on in order to estimate any alleged excess remission

3.24. Even though the Commission did not properly investigate, there was record evidence on which the Commission could have relied to estimate any alleged excess remission. Contrary to what the EU claims, Pakistan's arguments on this point do not mean that Pakistan admits that there was in fact an actual excess, within the meaning of Footnote 1 and Annex I(i).

3.25. Finally, the evidence suggests that it was highly unlikely that all of the duties remitted were an "excess". Novatex made substantial exports during the PoI, implying that, at the very least, a very high proportion of the imported inputs were actually exported. They must have been incorporated into the final exported product. Consequently, the EU could – if at all – countervail only a (small) proportion of the refunded/drawn-back duties as a subsidy.[18]

3.26. Contrary to what the EU argues, there is not a shred of evidence that Novatex diverted duty-free (MBS) imported PTA into the domestic market. Indeed, Novatex was legally precluded from doing so, unless it paid the import duty. The Commission's determination speaks a different language, in that it reflects acceptance of the fact that imported inputs were used for production for export. The Commission's criticism of the MBS revolves largely around the input/output ratio.

3.27. Moreover, the Commission had before it extensive evidence that showed how Novatex traced raw inputs throughout its production chain. Specifically, in response to the Commission's third deficiency letter[19], Novatex filed over 1,000 pages of documentation relating to the MBS, for two sample months in the PoI selected by the Commission. This included examples of the type of

[15] Annex II(II)(2).
[16] Annex III(II)(3).
[17] Commission Regulation (EC) No 1411/2002 of 29 July 2002 and Commission Decision No 284/2000/ECSC of 4 February 2000.
[18] Pakistan's first written submission, paras. 5.47 – 5.48.
[19] Exhibit PAK-20.

documentation that Novatex presented to Pakistani customs upon the exportation of PET, in order to claim the release of securities posted on imports of raw materials.[20] These documents link the final exported PET to the imported raw materials, including PTA, consumed in the production of the exported PET. The Commission never mentioned, let alone analysed, that evidence. An investigating authority cannot expressly request such extensive highly relevant information and then simply act as if that evidence were never part of the investigation record.

3.28. In addition, there was substantial evidence on the record to confirm whether an excess remission was taking place. For instance, the company traced its actual consumption data and, on its own initiative, periodically reported any differences to the input/output ratio-based consumption data to the Pakistani authorities. The Commission explicitly acknowledged this practice by the company in its Determination. Novatex conducted a similar exercise for the Commission during the investigation, by presenting it with its actual consumption data for the period of investigation. This data showed a deviation of 0.71% and 1.16%, respectively, for the two key raw materials.[21] Although this difference was only temporary and would have been later accounted for (and therefore was not a real "excess"), the Commission could have used this figure to estimate the amount of any perceived excess. The Commission could have estimated that the drawback was 1%, rather than 100% under its unsupported "assumption". This would have meant a subsidization margin (from the MBS programme) of 0.0384%, rather than 2.57%. Instead, the Commission simply ignored the data.[22]

3.29. Pakistan also pointed to other evidence, such as data from a pre-PoI analytical exercise through which Novatex's input/output ratio was revised and adjusted. The relevant data pointed to a difference, again, in the range of 1-2% of an excess (rather than the 100% assumed by the Commission), which would have yielded a subsidization margin of well below 0.1%, instead of the 2.57% calculated by the Commission.

### 3.8 Conclusion and request for findings

3.30. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraphs 5.133 to 5.135 of Pakistan's first written submission.[23]

## 4. PAKISTAN'S CLAIM CONCERNING THE LTF-EOP PROGRAMME

4.1. The EU violated Articles 1.1(b), the chapeau of Article 14, Article 10, 14(b), 19.1, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it applied a single (and ill-suited) commercial interest rate benchmark to Novatex's multi-tiered LTF-EOP loan, because it failed to explain the application of the methods enshrined in its domestic law and because it failed to analyse whether a comparable commercial loan existed in order to calculate the amount of the subsidy.

### 4.1 The structure of the LTF-EOP loan

4.2. The basic structure of the LTF-EOP loan was as follows. In 2005, Novatex obtained a loan from a consortium of five Pakistani banks. Disbursement of the principal took place in tranches. When a particular tranche was drawn down, the interest rate set by the Pakistani Government for that year got "locked in" for that particular tranche, for the remainder of the duration of the loan. Hence, even if the interest rate increased or decreased in subsequent years, this change would affect only the tranches drawn down in each subsequent year. Tranches drawn down in previous years remained subject to the interest rate prevailing at the time of draw-down of each tranche.

4.3. The loan agreement was executed on 9 June 2005, and the funds became effectively available on 16 June 2005 (the "Facility Effective Date"). At least half of the total authorized amount of **[***]** rupees was to be drawn down within **[***]** months of the Facility Effective Date,

[20] Novatex' Response to the Commission's Third Deficiency Letter, dated 10 December 2009. Exhibit PAK-51.
[21] Pakistan's first written submission, para. 5.110.
[22] See Exhibit PAK-11.
[23] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

and the rest within **[***]** months of the Facility Effective Date. The **[***]**-month deadline was extended several times due to unforeseen circumstances, such that Novatex made its last draw-downs during the PoI.

4.4. The principal repayment terms were "up to seven and a half years (90 months)", to be made in "up to twelve consecutive, equal, semi-annual instalments", with an 18-month grace period before the first repayment of principal. The vast majority (over 90%) of funds outstanding during the PoI had been drawn down in years prior to the PoI, in periods when the commercial interest rate was significantly lower than the commercial interest rate during the PoI.

4.5. In its Questionnaire response, Novatex reported to the Commission all of the amounts outstanding during the PoI, that is, amounts drawn down prior to the PoI as well as amounts drawn down during the PoI.

### 4.2 The EU's changing position on the monetary amounts countervailed wholly undermines its credibility on this issue

4.6. During these proceedings, the Commission has changed its description of how it understood the facts during the investigation. In its first written submission, the Commission stated emphatically that it countervailed only the amounts drawn down **during** the PoI, to the exclusion of amounts drawn down **prior to** the PoI. The EU continued to make these assertions in its Opening Statement at the Panel meeting.[24] These assertions are demonstrably incorrect, as the spreadsheets used included amounts drawn down prior to and during the PoI. The Commission was thus under a mistaken impression as to what exactly it had calculated.

4.7. In a complete reversal of its previous argument, the EU in its oral responses to the Panel's questions at the meeting began to claim that it knew all along that the spreadsheet contained all amounts outstanding during the PoI, including drawdowns prior to the PoI. In Pakistan's view, this change in the EU's factual description affects the credibility of all of the EU's arguments on this issue.

### 4.3 The Commission countervailed the entire amount outstanding during the PoI, not only the amounts drawn down during the PoI

4.8. Pakistan explained in detail that the loan amounts listed by Novatex in its Questionnaire Response, separately for each of the banks involved in the LTF-EOP loan, were the total amounts outstanding during the PoI. Novatex had been requested to inform the Commission about the loan amounts that it "used" during the PoI. In Pakistan's view, this language can only be read as including amounts drawn down prior to the PoI. The term "use" in Pakistan's view clearly includes all amounts from which the company was drawing some benefit during the PoI, which includes amounts drawn down prior to the PoI, but not yet repaid prior to the PoI.

4.9. The "Opening" amount in each of the bank-specific worksheets show the total cumulative amount drawn down prior to the PoI. This is obvious not only from the ordinary meaning of the term "Opening" (balance), which a sophisticated investigating authority such as the EU Commission must have understood. These figures also match the "closing" amounts for each of those banks in Novatex' financial statements, which the Commission had itself requested Novatex to file. Moreover, other columns in the spreadsheets make clear that movements in principal (drawdowns or repayments) were marked in an altogether different column. All these facts meant that the Commission either should have known that the amounts indicated all prior draw-downs or at the very least could not have assumed that the amounts had all been drawn down during the PoI, without asking Novatex at least some relevant questions. Indeed, whenever the Commission applied its mind to any issue, it had no difficulties asking additional questions to Novatex.

### 4.4 The Commission was not entitled to apply the same interest rate for all outstanding amounts

4.10. In a reversal of its previous arguments, the EU now accepts that the Commission was aware that the reported amounts reflected the total amounts outstanding during the PoI, and not only amounts drawn down during the PoI. However, the EU now argues that it was entitled to apply one

[24] See for instance EU's opening statement at the first panel hearing, paras. 29 and 30.

single interest rate to these entire outstanding amounts, even though the majority of the funds - the tranches drawn-down prior to the PoI – were subject to interest rates locked in in previous years.

4.11. This is entirely incorrect. The EU is asking the Panel for license to ignore the most fundamental difference between the terms of loans, whether they have a fixed interest rate or a variable interest rate. Novatex's loan is a bundle of fixed-rate tranches and had to be treated as such. Thus, the Commission was required to identify the commercial interest rate benchmark for a particular year and use it to calculate the amount of the subsidy with respect to the tranches drawn down during that year. However, the Commission could not use, for instance, the commercial interest rate from 2008 in calculations for amounts drawn down during 2007. For amounts drawn down during 2007, the Commission was required to use a commercial interest rate from 2007.

4.12. If the Commission's position were to prevail, investigating authorities could start treating any fixed-term loan as a subsidy, not because it was granted at a preferential interest rate at the time of disbursement, but rather only because, in a subsequent year, the commercial interest rate happened to change. This cannot be correct. An investigating authority must respect the basic terms and conditions of the subsidized loan when identifying a commercial interest rate benchmark. Distinguishing between a fixed-rate and variable-rate loan is one of the most fundamental terms and conditions, and an investigating authority cannot be permitted to ignore it.

### 4.5 The Commission is incorrect in arguing that Novatex's loan was not a loan, but a line of credit

4.13. The Commission argues that it determined that Novatex's loan was not a standard loan, but rather a line of credit. This finding, in the Commission's view, justifies the application of a single commercial interest rate benchmark from the PoI, rather than multiple interest rate benchmarks that would respect the fact that different parts of Novatex's loan were drawn down in different years.

4.14. The EU is incorrect in its characterization of Novatex's loan. Pakistan is not aware that the explanation in the Commission's Determination contains a finding on this issue, nor did the Commission explain in any way to the investigated company that the Commission's subsidy calculation methodology would depend on this distinction. Thus, the EU's arguments on this point appear to be an *ex post* rationalization.

4.15. In any event, Novatex's loan is not a line of credit, in the sense that the company – as the EU incorrectly insinuates – had the right to draw down any amount at any time. The initial terms and credits made clear that 50% of the principal had to be drawn down within 9 months, and the totality of the principal had to be drawn down within the first 11 months of the entry into force of the loan agreement. Each drawdown had to be repaid within 7.5 years. Pakistan fails to see how this kind of arrangement could be equated to, for instance, a revolving line of credit, where withdrawals and repayments could be made at any time at the discretion of the borrower. The subsequent extensions of the draw-down period came about due to unforeseen circumstances. In any event, the Commission never investigated this point and never asked Novatex any questions on this topic, even though as a diligent authority that had studied the terms and conditions of the agreement, it would have been aware of the extensions of the strict draw-down deadlines.

4.16. In any event, Pakistan is not aware that the term line of credit is a term of art for purposes of CVD investigations that would enable an investigating authority to ignore the terms and conditions of the loan agreement/arrangement, especially that the interest rate was locked in for a fixed term, and to proceed to apply an interest rate that does not mirror the structure of the loan agreement/arrangement. Put differently, even if the Commission were correct that the loan agreement could be characterized as a line of credit, this does not mean that the Commission could apply the PoI commercial interest rate to tranches drawn down in previous years, for which the locked-in interest rate is the rate applicable in the year of draw-down.

### 4.6 The Commission failed to explain the applied methodology in the light of its own domestic law

4.17. The Commission's internal rules (the so-called "Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations") require the Commission to undertake a series of analytical steps when calculating the benefit on a subsidized loan. These Guidelines are modelled on Article 14 of the SCM Agreement. However, none of these steps is discernible in any way in the Commission's Determination. Therefore, the Commission failed to provide the explanation required by the chapeau of Article 14.

4.18. First, the Commission made no effort to identify a comparable commercial loan. The Commission failed to mention, let alone to analyse, the fact that Novatex proposed several comparable commercial loans. The Commission also made no effort to identify the interest normally payable on that loan. Nor did the Commission attempt to identify the interest payable on a comparable loan to companies in a similar financial situation in the same sector of the economy or to identify the interest payable on a comparable loan to companies in any sector of the economy. Instead, without any explanation, the Commission used the so-called Karachi Interbank Offered Rate (KIBOR) that the Commission itself identified on the internet. The KIBOR is an average of several lending rates in effect in the relevant period for loans of one day, one week, one month, one year, two years, and three years' duration. The Commission failed to explain why this rate would be appropriate for a loan with a tenor of 7.5 years for every tranche from the date of its draw-down.

4.19. The Commission also failed to reflect in its analysis the particular multi-tranche structure of the loan at issue by applying a single rate to all of the outstanding amounts, rather than differentiating between the sub-amounts depending on when they were drawn down.

### 4.7 The Commission acted inconsistently with Article 14(b) because it failed to identify, nor did it attempt to identify, a comparable commercial loan as benchmark for its benefit calculations analysis

4.20. Article 14(b) instructs the investigating authority to undertake a "progressive search" to identify a comparable commercial loan, so as to identify the proper benchmark, for an allegedly subsidized loan.[25] The Commission failed to conduct such a progressive search. It failed to make any effort to identify a comparable commercial loan; it failed to acknowledge that Novatex submitted a number of commercial loans it had itself concluded, by way of identifying the proper commercial interest rate benchmark, much less explained why it did not use these loans. All of the EU's statements on this point before the Panel are impermissible ex post rationalizations.

4.21. The Commission also violated Article 14(b) because it applied the KIBOR, which is a blend of interest rates for tenors of up to 3 years, which is much shorter than the 7.5 years under Novatex's LTF-EOP loans. The Commission failed to explain why, these differences notwithstanding, the KIBOR was not only an appropriate interest rate benchmark, but also was better than any other commercial interest rate benchmark available to the Commission.

4.22. With respect to the EU's procedural objection that the requirement to "explain" is contained only in the chapeau of Article 14(b), the requirement to provide a reasoned and adequate explanation permeates most of the substantive disciplines of the SCM Agreement. This explanation is the vehicle by which an investigating authority demonstrates compliance with its substantive obligations, including that under Article 14(b). In the absence of any explanation of, for instance, how the authority identified, or sought to identify a comparable commercial loan, there is no basis for a WTO panel to find that the authority acted consistently with its obligations.

### 4.8 Conclusion and request for findings

4.23. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraph 6.101 of Pakistan's first written submission.[26]

[25] Appellate Body Report, *US – AD/CVD (China)*, para. 486.
[26] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

## 5. THE COMMISSION'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLE 15.5 OF THE SCM AGREEMENT

5.1. Pakistan submits that the analysis of the existence of a "causal link" between the subject imports and the alleged injury to the domestic industry is inconsistent with Article 15.5 of the SCM Agreement. Pakistan's allegations are two-fold in this respect.

### 5.1 The Commission's approach to causation is inconsistent with Article 15.5 of the SCM Agreement

#### 5.1.1 The Commission's finding of a causal link conflated the distinct analytical steps in Article 15

5.2. The Commission's causation analysis conflated the distinct analytical steps that an investigating authority is required to follow under Article 15. In this respect, the Appellate Body has observed that there is a "logical progression" in paragraphs 2, 4 and 5 of Article 15.[27] Article 15.2 enquires into the effects of the subject imports on the prices of the domestic product, notably whether such effects take the form of significant price undercutting, price depression or price suppression. Article 15.4 requires an assessment of the relationship between the subject imports and the state of the domestic industry. Finally, and importantly, Article 15.5 requires an enquiry into the relationship between the subject imports and the injury to the domestic industry.

5.3. In the challenged Determinations, the Commission found, as an initial matter, that the volumes of the subject imports had increased over the PoI[28], and that the subject imports had undercut the prices of the EU producers.[29] Moreover, the Commission found that certain indicators of the domestic industry's performance showed a modest decline, while others showed a deterioration.[30] Turning to its causation analysis, the Commission recalled its finding that the subject imports had undercut the prices of the EU producers. On that basis, alone, the Commission found that "a causal link exists between those imports and the Union industry's injury".[31] Finally, the Commission assessed whether the other known factors were capable of "breaking the causal link" previously found.[32]

5.4. The Commission's causation analysis thus conflated the "logical progression" set out in Articles 15.2, 15.4 and 15.5. Particularly, the Commission assumed that its finding of the effects of the subject imports on the prices of the domestic product (price undercutting) constituted, without more, a causal link between the subject imports and the injury. By so doing, the Commission conflated the analysis required under Article 15.2 with that required under Article 15.5.

5.5. Pakistan recalls the Appellate Body's understanding of the "logical progression" set out in Article 15 of the SCM Agreement to the effect that the outcome of the analyses under Articles 15.2 and 15.4 are not dispositive, but rather "form the basis", of the subsequent causation analysis under Article 15.5.[33] In other words, the findings under Articles 15.2 and 15.4 do not automatically lead to the conclusion that there exists a causal link between the subject imports and the injury to the domestic industry within the meaning of Article 15.5 of the SCM Agreement. Rather, under Article 15.5, an investigating authority is required to assess whether, through the effects of the subsidies (the effects previously found under both Articles 15.2 and 15.4), the subject imports are causing injury.

5.6. As shown below, by conflating the distinct analytical steps in Article 15, the Commission prejudged its causation analysis.

[27] Appellate Body Report, *China – GOES*, para. 128.
[28] Preliminary Determination, recital 211. Exhibit PAK-1.
[29] Preliminary Determination, recital 217. Exhibit PAK-1.
[30] Preliminary Determination, recital 239. Exhibit PAK-1.
[31] Preliminary Determination, recital 245. Exhibit PAK-1.
[32] Preliminary Determination, recitals 246-261. Exhibit PAK-1.
[33] Appellate Body Report, *China – GOES*, para. 149.

### 5.1.2 The Commission's finding of a "causal link" prior to assessing the effects of "other known factors" is inconsistent with Article 15.5

5.7. The Appellate Body has laid out a three-step analysis of causation. First, an investigating authority must ensure that "the injurious effects caused to the domestic industry by increased imports are distinguished from the injurious effects caused by other factors".[34] In "separating and distinguishing"[35] the effects of these other factors from those of the subject imports, an investigating authority must provide a "meaningful explanation of the nature and extent of the injurious effects".[36] Second, once the effects of all factors, including those of the subject imports, are separated and distinguished, an investigating authority must "attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports".[37] Third, an investigating authority must determine, based on the proper attribution of the injury, whether "a causal link" exists between the subject imports and the injury to the domestic industry—that is, "a genuine and substantial relationship of cause and effect between these two elements".[38]

5.8. The Commission's approach to finding, first, a "causal link" between the subject imports and the alleged injury, and then ascertaining whether other factors could "break the causal link" is inconsistent with Article 15.5 and with the three-step causation analysis laid out by the Appellate Body. The Commission should in the first place have separated and distinguished the injurious effects of all the relevant factors including those of the subject imports. Having properly separated and distinguished all such effects, the Commission should then have attributed to the subject imports the actual injury that they were causing. This analysis is what Pakistan called a "simultaneous analysis" in response to Panel Question No. 73. Finally, only once the Commission had attributed the actual injury caused by the subject imports, would it have been in a position to determine whether a "causal relationship" between these elements existed. Importantly, a finding of causation required ascertaining, not any causal link however remote or insignificant, but a "genuine and substantial relationship of cause and effect" between the subject imports and the alleged injury to the domestic industry.[39]

5.9. Accordingly, the finding of a "causal link" should have been made at the third step of the causation analysis. Yet, by making this finding upfront, the Commission prejudged its later non-attribution analysis. By the time it turned to the analysis of the other factors, the Commission had already found a "causal link" by virtue of its earlier finding of significant price undercutting. Pakistan questions how under this approach the Commission could ever find that an "other factor" could undo its earlier finding of the existence of a causal link between the subject imports and the injury to the domestic industry.

## 5.2 The Commission's analysis of "other factors" is inconsistent with Article 15.5

5.10. The methodological flaws explained above prejudged, and rendered meaningless, the Commission's non-attribution analysis of at least four "other factors".

5.11. First, in the case of the imports from Korea, the Commission merely pointed out that "it cannot be excluded" that these imports "contributed to the injury suffered by the Union industry". The words "cannot be excluded" amount to no more than a speculative statement made without any effort to probe the nature and extent of the contribution of those factors to the alleged injury. Instead, the Commission should have assessed the injurious effects of the price undercutting of Korean imports. In principle, there is no reason to exclude the proposition that this price undercutting had a downward effect on domestic prices similar to that of the effects of the subject imports, all the more so when (1) both imports from Korea and the subject imports had similar market shares during the PoI; and (2) imports from Korea grew by almost 150% during the same period. If the Commission believed that the price undercutting by the Korean imports did not have the same injurious effects as the price undercutting by the subject imports, it should have found so explicitly, following an appropriate analysis and explanation. Accordingly, the Commission's

[34] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[35] Appellate Body Reports, *US – Hot – Rolled Steel*, para. 228; and *US – Wheat Gluten*, para. 68.
[36] Appellate Body Reports, *US – Pipe Line*, para. 215; and *US – Lamb Safeguard*, para. 186.
[37] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[38] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[39] Appellate Body Report, *US – Wheat Gluten*, para. 69.

analysis of the imports from Korea cannot constitute a "meaningful explanation of the nature and extent of [its] injurious effects".

5.12. Second, in the case of the 2008 economic downturn, the Commission stated that, regardless of its nature and extent, any injury it caused was in any event "exacerbated by the increased subsidised imports from the countries concerned, which undercut the prices of the Union industry".[40] Thus, the Commission based its dismissal of this factor on its previous price undercutting finding. In other words, regardless of the magnitude of the injurious effects of the 2008 economic downturn on the domestic industry, this factor could never have been sufficient to break the causal link, as the Commission had already found the alleged price undercutting of the subject imports. Importantly, The Commission failed to explain what "exacerbate" means and the extent to which the subject imports "exacerbated" the negative effects of the 2008 economic downturn. This question remained unresolved because the Commission did not separate and distinguish the injurious effects of the 2008 economic downturn from those of the subject imports. Moreover, the Commission partly dismissed the 2008 economic downturn on the grounds that the EU industry had suffered injury prior to 2008. This statement was unsubstantiated because its injury finding was by reference to the period 2008-June 2009. Thus, the Commission's statement that the EU industry was suffering injury prior to 2008 lacked supporting analysis. It is all the more puzzling since a large number of injury indicators actually showed a positive performance up to 2008 and it was only then that they began to languish.

5.13. Third, in the case of low prices of crude oil, the Commission again recognized the (at least potential) negative effects of this factor on the domestic industry. However, it did not separate and distinguish these effects, or provide a "meaningful explanation of the nature and extent of [its] injurious effects".[41] It merely dismissed this "other factor" by recalling its previous finding that the subject imports undercut the prices of the EU producers. The Commission thus failed to ascertain the extent of the impact of this factor, if any, on the domestic industry. In fact, it recognized that prices of PET depend to some extent on prices of crude oil, but failed to address the argument that low prices of PET in the EU were a function of the low prices of crude oil. Rather, it gave an off-the-point explanation about the volatility of world prices and how this cannot explain "why imports of PET were subsidised and therefore undercut the Union producers' prices".[42]

5.14. Fourth, the Commission should have addressed the reasons why a part of the EU industry, which did not cooperate, improved their performance from 2008 to the end of the PoI. This period coincided with the contraction of global demand and with the expansion of the EU demand. It is at least intriguing that the subject imports only affected one part of the EU industry (those supporting the investigation), whereas the other part of the EU industry (those not supporting the investigation) showed a positive performance from 2008 to the end of the PoI. The Commission failed to explain why a certain part of the overall domestic industry was able to recover market share and sales from 2008 to the end of the PoI, while another part of the same domestic industry experienced injury during the same period.

### 5.3 Conclusion and request for findings

5.15. For the reasons set out above, Pakistan requests the Panel to find that the causation analysis in the challenged Determinations is inconsistent with Article 15.5 of the SCM Agreement.

## 6. PAKISTAN'S CLAIM UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE RESULTS OF THE VERIFICATION VISIT

6.1. Pakistan claims that the European Union has acted inconsistently with its obligation under Article 12.6 of the SCM Agreement, because it failed either to make the results of the verification visit to Novatex available or to provide disclosure thereof as part of the disclosure of essential facts under Article 12.8.

6.2. Article 12.6 requires the investigating authority to provide the companies subject to a verification visit with the "results" of these verification visits. It provides, in relevant part:

[40] Preliminary Determination, recital 254. Exhibit PAK-1.
[41] Appellate Body Report, *US – Lamb*, para. 186.
[42] Definitive Determination, recital 118. Exhibit PAK-2.

> Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.3. Article 12.6 thus requires the investigating authority to disclose the "results" of the verification visits, by means of one or other of two different avenues: the investigating authority may either (i) "make available" a separate report containing the results of the verification visits, or (ii) "provide disclosure" of the results as part of the disclosure of the essential facts under Article 12.8. Regardless of which avenue is chosen, however, the investigating authority must disclose the same thing − the "results" of the verification visit.

6.4. The term "result" is defined, in relevant part, as "a thing that is caused or produced by something else; a consequence or outcome".[43] In *US − Steel Safeguards*, the Appellate Body has stated that the term "result" is to be read as "an effect, issue, or outcome from some action, process or design".[44] The "result" of any given activity is closely linked to the conduct, content and the purpose of that activity. Thus, the "result" of a verification visit is closely linked to the conduct, content and purpose of that verification visit. Annex VI(7) of the SCM Agreement defines the purpose of a verification visit as to "verify the information provided or to obtain further details". As noted, the purpose, conduct, and content of a verification visit is to verify the information provided by the investigated firms in their questionnaire responses and to enable the investigating authority to obtain, and the investigated exporter to provide, additional information or explanations regarding the exporter's submitted questionnaire responses.

6.5. In the normal course of events, during a verification visit, an investigating authority will request the investigated company to provide access to its accounting system and other records, including all of the worksheets and source documents used to prepare the questionnaire responses. During the verification visits, the investigating authority normally reviews these documents and cross-checks them against the data provided in the questionnaire responses. The investigating authority also uses the opportunity to clarify any areas of doubt regarding the contents of the questionnaire responses. As part of this process, the investigating authority may, for instance, request access to an entire category of documents or data or focus on certain specific documents.

6.6. It is important to note here that the investigating authority normally does not take any final decisions during the verification as to how the verification will affect the investigating authority's determinations of subsidization and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have not been gathered or checked. However, the results of the verification do not include any subsequent determinations by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate subsidization margins for the exporter in accordance with the SCM Agreement. The subsequent decision how to determine the subsidization margins is the result of the *investigation*, not the result of the *verification*.

6.7. Thus, the *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter, but that the investigating authority did not immediately consider relevant to its final determination. This is precisely the conclusion reached by the panel in *Korea − Certain Paper*, which stated that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[45]

[43] Oxford English Dictionary Online, available at http://oxforddictionaries.com/definition/english/result?q=result
[44] Appellate Body Report, *US − Steel Safeguards*, para. 315. (original emphasis)
[45] Panel Report, *Korea − Certain Paper*, para. 7.192. (emphasis added)

6.8. A clear reporting of the results of the verification is essential to enable the exporter to structure its case for the rest of the investigation. Pursuant to Annex II(3) of the Anti-Dumping Agreement, which applies by analogy under the SCM Agreement[46], all information that is "verifiable" and submitted in timely and usable fashion, must be taken into account by the investigating authority. The investigating authority is "not entitled to disregard the submitted information and use information from another source to make the determination."[47] This means that any information that is verifiable − which includes information that has actually been verified by the investigating authority − must be taken into consideration by the investigating authority.

6.9. In addition, the ability of domestic courts (using their own standard of review) and of WTO panels (using the standard of review pursuant to Article 11 of the DSU) to review the determinations of investigating authorities depends on the existence of a proper disclosure of the "results" of the verification visit under Article 12.6 of the SCM Agreement. A failure to disclose the results of the verification, or an incomplete disclosure, will thus significantly undermine a domestic court's or WTO panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority.

6.10. In the investigation at issue, the Commission failed to disclose the results of the verification visit. To the extent it made an effort to comply with the requirements of Article 12.6, in this case the Commission opted to disclose the results of the verification via the disclosure of essential facts under Article 12.8. However, the Commission's disclosures contain no information of what occurred during the verification visit and which topics, other than the MBS, the Commission discussed with the investigated company, even though the Commission had provided the exporter with an extensive list of topics to be verified. However, there is no information whatsoever about verification on any of these issues other than the Manufacturing Bond Scheme. Hence, the EU has failed to provide any information on the results of its verification concerning all these other issues.

6.11. Beyond the list of exhibits collected at verification, the EU disclosed no information on the conduct of the verification visit, or any corrections or rectification of the information contained in the Questionnaire Response. The EU has not disclosed which particular aspect of these documents was discussed, for what purpose, or whether the Commission considered the data and information contained in this document to be verified or verifiable.

6.12. In its submissions, the EU attempts to conflate the concept of the results of the verification with the results of the investigation. In its opening statement at the first meeting of the Panel with the parties, for example, the EU explained that the results of the verification were the facts that the investigating authority had decided to include in the essential facts disclosure as those on which it intended to base its final determination.

6.13. This approach would deprive exporters of their rights and ability to defend themselves. Under this approach, the results of the verification would be only those the investigating authority *subjectively* considers to be important or to support its final determination. The results of the verification would not include outcomes of the verification to which the exporter may attach greater importance than the investigating authority or outcomes on which the exporter thinks the investigating authority *should* base its final determination. This would undermine the exporter's ability to obtain review of the investigating authority's determination in domestic courts and the exporting Member's ability to obtain review from a WTO panel.

6.14. The results of the verification and the results of the verification are *not* the same thing. The SCM Agreement imposes separate legal obligations governing each of these concepts. Effect must be given to these textual differences in the references to the results of the verification and the disclosure of the essential facts.

6.15. Moreover, these are also different concepts from a practical point of view. Pakistan has also provided to the Panel examples from both this particular investigation and a generic or hypothetical cases illustrating how the EU's conflation of the results of the verification with the results of the investigation would negatively affect the ability of interested parties to defend their interests, both in this investigation and more generally. These examples make clear that disclosure

[46] See Appellate Body Report, *Mexico − Rice*, paras. 290 − 295.
[47] Panel Report, *EC − Salmon (Norway)*, para. 7.383 (see also Ibid., para. 7.347). Panel Report, *US − Steel Plate*, para. 7.57.

of the essential facts of the investigation does not, in itself, satisfy the EU's obligation to provide a clear and objective disclosure of the results of the verification.

### 6.2 Conclusion and request for findings

6.16. For the reasons set out above, Pakistan requests the Panel to find that the EU's failure to disclose the results of the verification visit is inconsistent with Article 12.6 of the SCM Agreement.

## ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF PAKISTAN

### 1 INTRODUCTION AND OVERVIEW

1.1. In this dispute, Pakistan challenges several aspects of the EU's Determinations in a CVD investigation concerning polyethylene terephthalate (PET) from, inter alia, Pakistan. Pakistan's claims concern various aspects of the subsidy determination, the causation analysis, as well as the lack of disclosure of verification results.

1.2. This executive summary summarizes Pakistan's submissions since the filing of Pakistan's responses to the Panel's first set of questions, that is, Pakistan's second written submission, Pakistan's opening and closing statements at the second meeting of the panel with the parties, Pakistan's responses to the Panel's second set of questions, and Pakistan's comments on the EU's responses to the Panel's second set of questions.

### 2 PAKISTAN'S ARGUMENTS UNDER ARTICLE 6.2 OF THE DSU

2.1. The EU has "confirm[ed] that it no longer objects to Pakistan's claim under the chapeau of Article 14 of the SCM Agreement with respect to the LTF-EOP programme". The EU nevertheless claims that, to the extent that Pakistan argues that "the determinations at issue fail to properly explain e.g. its reasons for not using certain private loan information", the claim "would pertain to the obligations in Article 22 of the SCM Agreement, which Pakistan has decided not to pursue in this case".[1] However, this reflects a disagreement that boils down to the applicability of Article 14 of the SCM Agreement. This is an issue that goes to the merits and not to the Panel's jurisdiction.

2.2. The EU also continues to insist that the reference to Article VI of the GATT 1994 in Pakistan's panel request is not sufficiently precise so as to be a reference to Article VI:3. However, based on the description of Pakistan's claim in the panel request, the only conceivably relevant sub-paragraph of Article VI could be sub-paragraph 3. Pakistan has also listed a large number of disputes in which a reference to Article VI of the GATT 1994 was deemed to be sufficient as a reference to Article VI:3. None of these disputes has been addressed by the EU.

2.3. Next, contrary to the EU's arguments, Pakistan's reference to Article 32 of the SCM Agreement can only be read as a reference to Article 32.1. The EU argues that Pakistan's claim could also have fallen under Articles 32.5 and 32.6, because "Pakistan could have claimed that the Commission applied a method that was not foreseen in its municipal law and, thus, its administrative procedures were not in accordance with the SCM Agreement".[2] But the narrative description in the panel request makes clear that Pakistan did not make that claim. Rather, the explanation is clear that Pakistan takes issue with the "specific action against a subsidy of another Member" within the meaning of Article 32.1 of the SCM Agreement. Consequently, the reference to Article 32 unequivocally means Article 32.1 of the SCM Agreement. Upholding the EU's objection would erroneously elevate form over substance.

2.4. Finally, the EU continues to argue that Pakistan's claim under Article 12.6 was not sufficiently clear, because Pakistan did not indicate which of the two options under Article 12.6 Pakistan considers the EU did not satisfy. The EU continues to argue that Article 12.6 contains two separate obligations, which are "alternatives", and that Pakistan was aware that the EU would argue that it opted for the second "alternative" (disclosure of the verification results together with the essential facts disclosure), but failed to specify this "alternative" in the panel request.

2.5. The EU misunderstands the structure of Article 12.6. Article 12.6 contains two alternative "pathways" for achieving compliance with an overarching obligation. These two pathways are not two "separate obligations", because neither has to be complied with if the other has been complied with. Moreover, from a practical perspective, a complainant cannot know in advance which of the

[1] EU's response to Panel Question No. 13, para. 5.
[2] EU's response to Panel Question No. 15(b) para. 10.

two options the defendant will argue it took and complied with; indeed, the defendant may argue, as the EU has overtime done in this case, that it used *both* options. The EU now argues that disclosure of verification results occurred not only through the "essential facts" disclosure, but also at or after verification in the form of the list of documents collected during verification, that is, outside the context of the essential facts disclosure.

2.6. The EU's view is also untenable because the complainant may also have incomplete information, since disclosure of verification results may occur through confidential, company-specific documents. In any event, under the EU's approach, a complainant would argue that both alleged "obligations" have been violated, which would effectively be the same as Pakistan has done in this case, and would not provide any greater level of information to the defendant.

## 3 PAKISTAN'S CLAIM CONCERNING THE MANUFACTURING BOND SCHEME (MBS)

### 3.1 Introduction

3.1. The EU acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), 10, 19.1, 32.1 and Annexes I(i), II(II) as a whole, II(II)(1) and II(II)(2) of the SCM Agreement, as well as Article VI:3 of the GATT 1994. The core of the issue is that the EU incorrectly determined that a subsidy existed in the form of the totality of the duties drawn back/remitted, rather than only the excess drawback/remission, if any. Moreover, in reaching that incorrect determination, the EU failed to observe the prescribed analytical process set out in Annexes II and III of the SCM Agreement and violated a number of other related requirements enshrined in the above-mentioned provisions.

### 3.2 A duty drawback scheme gives rise to a subsidy only if there is an excess drawback

3.2. The EU continues to deny that a subsidy under a duty drawback/remission scheme within the meaning of Footnote 1 and Annex I(i) to the SCM Agreement can exist only if there is an excess drawback or remission. As before, the EU argues that Footnote 1 describes a "situation" − that is, a situation in which a duty drawback system and the monitoring system under that system is to the liking of an investigating authority − and if that situation is found to exist, only an excess drawback will constitute a subsidy. If the monitoring system does not please the investigating authority, the alleged "carve-out" does not apply. In contrast, Pakistan continues to argue that this is not what Article 1 and footnote of the SCM Agreement state. The limitation of a financial contribution to the "excess" only, as opposed to the entirety of the drawn-back duties, is not conditional on anything. Rather, it is the definition of this type of subsidy.

3.3. The EU views the limitation of a financial contribution/subsidy to the *excess* drawback (as opposed to the *totality* of the drawback) as some kind of a privilege for the exporting Member that must be earned. The exporting Member enjoys the privilege only if the exporting government's monitoring system is to the satisfaction of the investigating authority. As the key element of this argument, the EU points to the "[i]n accordance with" phrase in Footnote 1 and argues that this clause is to be read, effectively, as "*[i]f the duty drawback scheme is in accordance with*". Only if that is the case should the remainder of the Footnote 1 apply. Otherwise, the totality of the drawn-back duties constitutes the financial contribution.

3.4. Pakistan has provided extensive arguments, including numerous references to other WTO provisions, to refute the EU's position. Pakistan has referred to no less than 15 provisions throughout the covered agreements that demonstrate that the EU's reading of Footnote 1 is incorrect. These include provisions that use an "in accordance with" clause like that in Footnote 1 that have a meaning different from the meaning postulated by the EU. Moreover, the provisions listed by Pakistan demonstrate that, where the drafters wished to express the kind of reading proposed by the EU, they used different formulations. The Panel has explicitly asked the EU to respond to these arguments. However, the EU has not addressed a single one of the provisions listed by Pakistan. Instead, the EU merely asserts that Pakistan draws an "artificial distinction" between provisions that contain a condition and other types of provisions. What the EU labels "artificial distinction[s]" are, however, essential steps in the process of treaty interpretation under the Vienna Convention on the Law of Treaties.

3.5. Pakistan notes that the EU has also so far not provided any response to Pakistan's argument that Annexes II and III apply only in CVD investigations and not in a direct subsidy challenge in the WTO; that Annexes II and III contain obligations on the investigating authority, compliance with which the exporting Member has no control of; and that Footnote 1 refers, in part, to definitional provisions. It is not clear how a WTO panel can be said to act consistently or inconsistently with definitional provisions. The EU's reading of Footnote 1 is convoluted and leads to logical impasses.

3.6. The EU's interpretation of the footnote also continues to ignore the fundamental historical context of the principle that only the "excess" drawback can constitute a subsidy, including the Report of the Working Party on Border Tax Adjustments. This Report and the Illustrative List of Export subsidies, which dates from the 1960s, reveal that the limitation of a subsidy to an "excess" drawback is a long-standing, decades-old principle in GATT law, as well as in the OECD where the original Illustrative List was developed. The "excess" principle is enshrined in several other items of the Illustrative List that address so-called indirect taxes or charges − that is, charges imposed on products. These charges have historically been considered as eligible for border tax adjustment. This is in contrast to so-called direct charges/taxes (e.g. income taxes or social security charges), which are not eligible for border tax adjustment. For direct charges, any exemption, remission or deferral are considered a subsidy − not just the excess drawback, as shown by Annex I(e). These principles were never intended to be subject to qualifications of the type the EU now postulates.

3.7. Moreover, the EU's argument would create an inexplicable asymmetry in how the SCM Agreement treats (finished) products and the inputs for those products. Annex I(g) refers to indirect tax drawbacks or remissions on final products, whereas Annexes I(h) and I(i) refer to indirect taxes or tariffs on inputs. However, for final products, there are no additional "guidelines" like in Annexes II and III, presumably because determining the excess remission on those products is a less complex determination. The EU's arguments would mean that the definition of a subsidy as consisting of the excess would apply only *sometimes* for subsidies under Annex I(h) and I(i) (namely, in situations of compliance with Annexes II and III), but would apply *always* for subsidies under Annex I(g), because there is no Annex II and III to comply with. There is no logical reason for this difference, nor anything in the text or negotiating history of the Ad Note, the documents concerning border-tax adjustments, or Footnote 1 to justify such a difference.

### 3.3 Pakistan was correct in bringing a challenge to a financial contribution determination and not a benefit determination

3.8. The EU continues to assert that Pakistan should have brought its claim under provisions pertaining to the benefit calculation. The EU argues that "the excess remission ... amounts to a financial contribution [under] Article 1.1(a)(1)(ii)", that "[t]his element is easy to be found" and is binary (yes/no),[3] whereas the determination of benefit involves determining a "quantum".

3.9. Pakistan does not doubt that the EU found it "easy" in this investigation to determine the existence of a financial contribution, because it conveniently resorted to an unsupported "assumption" rather than examining the extensive relevant record evidence before it. However, an investigating authority that actually follows the SCM Agreement will not necessarily find it "easy" to determine the existence of an excess. Similarly, it is not clear what the EU means by saying that the question behind financial contribution "is not about its *quantum*, but about their (yes or no) existence". That is not correct, because some financial contributions require the determination of a "quantum". For instance, a grant of $ 0 is not a financial contribution; a grant of $ 1'000 is. Similarly, it may not be true for other types of financial contribution, such as government revenue foregone or a duty drawback scheme. This principle applies also in the context of duty drawback schemes, where only the excess remission is a financial contribution. Here, an investigating authority must compare the total amount of duties (definitively) drawn back with the amount that the exporter was entitled to receive. The investigating authority must necessarily come up with a "quantum" to determine the existence of a financial contribution.

3.10. As Pakistan has already explained, this means that indeed for some forms of financial contributions, the benefit analysis is for all practical purposes a foregone conclusion. A grant of $ 1'000 will virtually always result in a benefit that corresponds precisely to that amount.

[3] EU's response to Panel Question No. 30, para. 24.

### 3.4 The EU failed to examine relevant evidence, such as the documents contained in Exhibit PAK-58

3.11. The EU also continues to argue that it was entitled to resort to an unsubstantiated assumption or conclusion that the entirety of duties was an excess remission because there was no reliable record evidence. However, in this investigation, the Commission had before it extensive evidence submitted by Novatex in direct response to the Commission's explicit requests. This evidence pertained to how Novatex traces its raw materials through the production process and how individual specific export consignments are linked to specific import consignments of raw materials; and how Novatex traces its actual consumption data, in order to perform annual reconciliation exercises, to adjust for any difference between the "standard" input-output ratio and actual output. Moreover, in the parallel anti-dumping investigation, the Commission also had before it cost-accounting data that tracked separately raw inputs for, respectively, the production of export products and the production of products for the domestic market.

3.12. There is no discussion whatsoever of this evidence in the Commission's determination. Whatever the substantive merits of this evidence, the Commission could not ignore it without providing a corresponding "reasoned and adequate" explanation. The entirety of the EU's arguments on these matters before this Panel is inadmissible *ex post facto* rationalisations.

3.13. The EU also continues to point to the misgivings expressed by the investigating authority about the use of the input/output ratio used by Novatex and the GoP as part of the MBS management, to argue that the use of this ratio also means Novatex was unable to trace its imported inputs throughout the production chain. That is incorrect, because one does not exclude the other. The input/output ratio is very close to the actual consumption, and the variance between the actual input/output ratio and the approved (or "standard") analysis card ratio was between 1% and 2%. Pakistan has made this point repeatedly, but the EU has never responded.

3.14. The practical reason, in layman's terms, why a producer such as Novatex might use a standard input/output ratio is that the production process at issue involves pouring bags of various raw materials into a melting pot, processing them, and pouring the end product out of the melting pot. It is expected that there will be some wastage in the pouring, in the pot in terms of burn off or residue, and spillage when pouring the final product out of the pot. All of these residues, spillages, and waste will be very small. It would not make business sense to measure them on a bag-by-bag basis. This is precisely why businesses and governments (including the GOP) use input/output ratios. In these circumstances, the Commission should have relied on Novatex's actual production records and accounting records and systems, to determine whether an excess remission occurred. The Commission could have easily done this based on the ample information provided by Novatex to the Commission in respect of actual consumption ratios that were achieved.

3.15. Moreover, the use of standard costs/costing ratios that are converted to actual costs by means of a variance is a standard accounting practice with which the Commission is very familiar. Pakistan has provided two examples of EU antidumping determinations in which normal value was constructed on the basis of standard costs. In contrast, in this case, the Commission failed to review or consider the same type of information.

### 3.5 The EU failed to apply facts available

3.16. The EU was not entitled to reject the manifold record evidence that was presented by Novatex and that would have enabled the Commission to approximate the excess drawback. Even if the EU had been entitled to do so, it should have provided an explanation for why the information was deemed to be unreliable.

3.17. An investigating authority in a trade remedy investigation, including in a CVD investigation, is required to make its determinations on the basis of record evidence. The record evidence consists primarily of data and information submitted by the investigated companies and other interested parties, as well as of data and information collected by the investigating authority itself. The rules of evidence, including on the conditions under which an investigating authority may depart from evidence submitted by an investigated party and instead use other evidence, are practically the same under the Anti-Dumping Agreement and under the SCM Agreement. The

Anti-Dumping Agreement contains detailed rules in Annex II concerning the use of facts available. The Appellate Body has found that these rules in Annex II of the Anti-Dumping Agreement apply – by analogy – also under the SCM Agreement.

3.18. Annex II(3) of the Anti-Dumping Agreement defines the conditions under which submitted information must be taken into account. To the extent that the authority wishes to depart from the evidence submitted by an investigated company, Annex II(6) sets forth specific rules, in particular that the investigating authority inform the company and provide it with an opportunity to provide further explanations.

3.19. In this investigation, the Commission had before it extensive evidence submitted by Novatex in direct response to the Commission's explicit requests. This evidence pertained to, for instance, how Novatex traces its raw materials through the production process and how individual specific export consignments are linked to specific import consignments of raw materials; and how Novatex traces its actual consumption data, in order to perform annual reconciliation exercises, to adjust for any difference between the "standard" input-output ratio and actual output. In the parallel anti-dumping investigation, the Commission also had before it cost-accounting data that tracked separately raw inputs for, respectively, the production of export products and the production of products for the domestic market.

3.20. There is no discussion whatsoever of this evidence in the Commission's determination. There is not even an acknowledgement that this evidence had been submitted. The EU was, first and foremost, obliged to use the record evidence before it supplied by the investigated company. If the EU considered this information unreliable, it was required to explain the reasons therefor to the company, provide the company with the opportunity to provide further explanation and then make a final decision concerning that evidence. This deliberative process must be discernible from the authority's determination and explanation.

3.21. Only if the investigating authority has, in this process, properly determined that the data and information supplied by the investigated company was unreliable, can the investigating authority have recourse to facts available, e.g. second-source information. However, even then the investigating authority cannot, in principle, resort to unwarranted "assumptions" without any evidentiary support and must seek, to the greatest extent possible, to rely on *some* evidence for its determination.

3.22. In this investigation, the EU failed to explain why it could not use the information and data provided by Novatex. Even assuming that the EU would have been entitled to reject Novatex' record evidence, the EU would then have to apply the best other information available, rather than jumping to an unwarranted "assumption" that the totality of the duties constituted a subsidy.

### 3.6 The EU failed to provide the Government of Pakistan with an opportunity to conduct the "further examination"

3.23. An investigating authority has the obligation to structure its investigation such that there is an effective opportunity for the exporting government to conduct the "further examination". At the very minimum, the investigating authority cannot make statements – like the Commission did in this investigation – that require the exporting government to do the impossible and that effectively signal to the exporting Member that the investigating authority is not interested in any such "further examination" or the results thereof.

3.24. The Commission found that Pakistan had "failed" to conduct the "further examination", even though logically this was impossible for Pakistan to have done so prior to being informed about the Commission's decision on the monitoring mechanism. The EU now tries to imply that Pakistan should have known *before* the Provisional Determination that its monitoring mechanism would be found deficient. This argument should, of course, be rejected because it was only in the Provisional Determination that the Commission determined that the monitoring system was inadequate. The EU also repeatedly points to the Government of Pakistan's effort to convince the EU of the merits of its monitoring regime, as if that somehow proved that Pakistan was not willing to conduct the "further examination". Clearly, Pakistan would have done so had the Commission given it a proper opportunity to do so and informed it of what was needed.

3.25. An investigating authority has a duty, analogous to Article 12.1 of the SCM Agreement (and for instance Annex II(1) to the Anti-Dumping Agreement), to provide certain information to the exporting Member explaining what information is required, in which format, how the further examination was to be conducted and within which timeframe. This is because the required scope of the "further examination" will vary on a case-by-case basis. For instance, the precise scope of the investigation could depend on the precise deficiencies that have been found in the monitoring system; the authority may be required to point to precise aspects or elements of the "actual inputs" or "actual transactions" that should be examined; the exporting Member might require access to some of the confidential information that the investigated exporters have provided to the investigating authority, but that the exporting Member does not have. The investigating authority might also have to provide the relevant information to the *investigated company*. The due process rights of an investigated company − whether it is access to information, the ability to request hearings, the ability to submit evidence, etc. − must be safeguarded also in the context of the "further examination". Finally, the "further examination" might require the exporting Member to consider documents or information of the investigated company that have not been previously submitted, either with the Questionnaire Response or in subsequent stages of the investigation.

### 3.7 The EU's arguments about the alleged unreliability of Novatex's records and bookkeeping

3.26. The EU also continues to argue that Novatex's records and data were unreliable and therefore could be rejected whole-sale by the Commission. These arguments are an *ex post facto* explanation provided by the EU in these proceedings. The EU also appears to argue that, because it ruled that the monitoring mechanism was inadequate and unreliable, this implicitly also meant that all information and data provided by Novatex was also inadequate and unreliable. However, real or perceived deficiencies in a monitoring scheme say nothing about the reliability of a company's data and records. Moreover, the drafters of Annexes II and III clearly considered that, as a general rule, a company's records remain a reliable source of information even if a monitoring scheme is considered to be deficient. Finally, the rules on the use of facts available require a clear statement by the investigating authority to the affected company as to why information is not deemed reliable.

3.27. The Commission's refusal to engage with the evidence provided by Novatex, to analyse that evidence and − at the very least − to explain why this information could not be used or deemed reliable, is *particularly inappropriate in this particular investigation* where Novatex's data addressed the alleged problems in the monitoring system. Even assuming for a moment that the Commission's misgivings about the input/output ratio are justified, these concerns should have been addressed − at least in principle − by the record evidence regarding the company's *actual consumption data*. In any event, as demonstrated by Exhibit PAK-58, Novatex provided records showing how it could trace a given set of raw materials throughout the production chain.

### 3.8 Pakistan's approach to Footnote 1 and Annexes II and III does not create a risk of abuse by exporting governments nor impose an "unreasonable burden" on investigating authorities

3.28. The EU is also incorrect in arguing that its approach to Footnote 1 and Annexes I through III is the only manner to avoid abuse by exporting governments or individual companies, or that Pakistan's approach would impose an undue burden on the investigating authorities. Under Pakistan's approach, an investigating authority can always ensure that inadequately monitored duty drawback schemes do not enjoy the presumption created by Annexes II and III (namely, the presumption that an adequately monitored regime does not give rise to an excess drawback). Indeed, even upon a finding that a monitoring mechanism is adequate, an investigating authority may still proceed to examine the exporting company's records to determine whether an excess exists, as the EU itself argues. Thus, when an investigating authority finds that the monitoring mechanism is inadequate and then examines the company's own records, it is merely doing what it could/should be doing in any event. Thus, no new burden or requirement is imposed on the investigating authority.

3.29. In other words, the investigating authority is simply asked to proceed like it would in any other CVD, anti-dumping or safeguard investigation. It must base itself on record evidence provided by interested parties. Depending on the circumstances, the investigating authority may be required to become active and gather evidence on its own. Of course, in the case of duty-

drawback schemes, the authority must additionally observe the supplementary rules that the drafters chose to include in the SCM Agreement. But at the same time, the investigating authority enjoys the same rights that it has in any trade remedy investigation. It can reject evidence and data as unreliable if they so are, in accordance with the applicable rules of evidence and subject to the requirement of providing a transparent, reasoned and adequate explanation. This also means that the authority can resort to facts available, in order to remedy any data deficiencies.

### 3.9 Request for findings

3.30. For all of the above reasons, Pakistan requests the Panel to find that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraphs 5.133 to 5.135 of Pakistan's first written submission.[4]

## 4 PAKISTAN'S CLAIM CONCERNING THE LTF-EOP PROGRAMME

4.1. The EU violated Articles 1.1(b), the chapeau of Article 14, Article 10, 14(b), 19.1, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it applied a single (and ill-suited) commercial interest rate benchmark to Novatex's multi-tiered LTF-EOP loan, because it failed to explain the application of the methods enshrined in its domestic law and because it failed to analyse whether a comparable commercial loan existed in order to calculate the amount of the subsidy.

### 4.1 The structure of the LTF-EOP loan

4.2. The structure of the LTF-EOP loan is described in Pakistan's first integrated executive summary.

### 4.2 The EU's defence has shifted multiple times throughout these proceedings

4.3. The EU's defence against Pakistan's claim has changed several times since Pakistan filed its first written submission. At first, the EU argued that it did not countervail the entirety of the outstanding loan amounts, but rather only the amounts drawn down during the PoI. During the first panel hearing, the EU then argued that it had known all along that it had based its calculations on the full outstanding amount, that is, including pre-PoI amounts, and not only the amounts actually drawn down during the PoI. However, according to the EU, the Commission was nevertheless entitled to apply the interest rate prevailing during the PoI, because Novatex's loan was akin to a "line of credit", rather than a standard fixed rate loan. Then, in its Responses to the Panel's questions, the EU changed its arguments *again* and argued that that it considered the amounts reported by Novatex to have been exclusively amounts drawn down during the PoI. In the second panel hearing, the EU admitted that this was erroneous.

4.4. These shifts in the EU's position alone demonstrate that the EU cannot have provided a reasoned and adequate explanation for its determination. Where the respondent member is uncertain as to what its investigating authority actually did; and where a determination is so vague that it permits multiple shifting of key arguments; this cannot satisfy the requirement of a "reasoned and adequate" explanation.

### 4.3 It is also irrelevant whether the Commission's error was "excusable"

4.5. Contrary to what the EU has argued, and to what at least one question by the Panel suggests, it does not matter whether the Commission "should … have been reasonably expected" to understand Novatex's spreadsheet. It is abundantly clear from the evidence cited by Pakistan that the Commission committed an error, and indeed that was explicitly admitted by the EU during the second panel meeting with the parties. An error by an investigating authority that results in a violation of the covered agreements remains an error even if one were to consider that error excusable. Pakistan is not aware of any such "excusable error" doctrine that could somehow justify

[4] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

a violation of a provision of the SCM Agreement, such as Article 14(d) or Article 1, by the investigating authority.[5]

### 4.4 Pakistan fails to understand what the EU's labelling of the LTF-EOP loan as a "line of credit" is meant to achieve

4.6. Having admitted definitively that the Commission erred in its understanding of the facts, as reported in Novatex's spreadsheet, the EU has chosen to center its defence on the argument that Novatex's LTF-EOP loan was not a loan, but a "line of credit"; and that, therefore, the Commission was entitled to apply the KIBOR rate as a commercial interest rate benchmark from the PoI.

4.7. No matter what label the EU chooses to unilaterally apply to a financing arrangement, it must respect the basic parameters of that arrangement when identifying and applying a commercial interest rate benchmark. Any financing arrangement has to define at least three major parameters: how much, for how long, at which interest rate. Where the investigating authority is looking for a commercial benchmark interest rate, it must choose a benchmark rate that best approximates or reflects these fundamental parameters. This is also why Article 14(b) refers to a "comparable commercial loan" (underlining added). The arrangement that is chosen as a commercial benchmark must be "comparable". In this case, the evidence is clear that the interest rate for each tranche was fixed or locked in on the date on which the tranche was drawn down. Furthermore, the interest rate for each tranche was fixed on that date for the duration of the term of that tranche. It is not clear why the EU believes that simply relabelling the loan would mean that the Commission can start ignoring the basic parameters of Novatex's financing arrangement.

#### 4.4.1 In any event, the Commission's determinations do not state that it determined that the LTF-EOP loan was a "line of credit" and there is no such concept in EU law

4.8. If, as the EU now argues, the question of whether the loan was a "line of credit" has such fundamental impact on the choice of the commercial interest rate benchmark, the Commission was required to make this point very clear to the investigated company, disclose it as part of the essential facts, and provide the company with an opportunity to make representations on this point. In response to Panel's Question 54, the EU refers to several passages in the Commission's determinations where it allegedly "specifically determine[d] that the LTF-EOP loan to Novatex was best considered a 'line of credit', rather than a traditional loan." However, none of the passages to which the EU refers even remotely resemble such a determination.

4.9. More fundamentally, simple logic suggests that the Commission did not make this determination. As the EU admits, the Commission erroneously assumed that all reported amounts were drawn down during the PoI. By definition, therefore, in its analysis during the investigation, the Commission was not concerned with any amounts drawn down pre-PoI. The issue of the alleged "line of credit" – and its alleged differences to a "standard commercial loan" – did not arise and had no reason to be on the Commission's mind. It is not surprising, therefore, that nothing even remotely related to this point, including the concept of a "line of credit", can be found in the Commission's Determination. The EU is now simply creating reasoning that cannot be found in the Determinations.

4.10. The EU's allegations about the LTF-EOP loan as a "line of credit" is belied also by the EU's own domestic law. The EU's Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations (98/C 394/04) contain a separate detailed section entitled "Loans", which provides detailed instructions for an investigating authority in identifying a comparable commercial loan. These Guidelines even contain separate criteria for "specific cases", that is, particular "loan" arrangements that warrant special attention in the identification of a commercial interest rate benchmark. There is no reference whatsoever to a "line of credit", nor is there any trace of a distinction between this alleged category of "line of credit" as compared to a "standard loan".

[5] Pakistan notes that, for instance, the "negligible error" doctrine was rejected in *Guatemala – Cement II*. Panel Report, *Guatemala – Cement II*, para. 8.22.

### 4.5 The EU mischaracterizes the core features of the LTF-EOP loan

4.11. The EU's characterization of the LTF-EOP arrangement also contains other significant inaccuracies. For instance, the EU argues that "Novatex could choose when to draw down money under the credit facility and could thereby also choose the applicable interest rate". The Commission also argues that the "disbursement terms were also not established in 2004 – 2005".[6] These statements are demonstrably incorrect, and contradict explicit clauses of the LTF-EOP loan. Similarly, the EU is also incorrect to state that "it [was] not possible to know *ex ante* with precision the duration of the repayment".[7] There was no doubt about the duration of the LTF-EOP arrangement. The duration of the repayment was fixed at 7.5 years, with an initial grace period of 18 months for the principal repayment (but not interest payment).

4.12. The EU's misleading description of the LTF-EOP loan – that is, as some sort of variable-rate line of credit from which Novatex could draw funds entirely at its discretion – is also contradicted by the manner in which the Government of Pakistan designed and described the LTF-EOP programme in the underlying policy documents.

### 4.6 The EU is incorrect about the legal standard under Article 14(b)

4.13. The EU also attempts to justify the use of a commercial interest benchmark from the PoI for all tranches under Article 14(b). Pakistan fails to see how Article 14(b) justifies the EU's approach. The EU argues, for instance, that the Commission countervailed the amount that was "effectively used" or enjoyed by Novatex in 2008-2009 and "hence, it was appropriate to also apply a benchmark for that same period".[8] This argument makes no sense. The fact that Novatex was "effectively us[ing]" funds during the PoI cannot mean that the Commission could use an interest rate from the PoI. If the EU were correct, then any not-yet-repaid fix-term loan taken in the past could be measured against today's commercial interest rate, because the money is still being "used" by the debtor.

4.14. The EU argues that "amounts under the LTF-EOP programme continued to be drawn down during the IP which further confirms the close nexus between the benchmark chosen by the Commission and the LTF-EOP programme."[9] Pakistan never disputed that the Commission could use the PoI benchmark (leaving aside Pakistan's misgivings about KIBOR) for amounts drawn down during the PoI. However, it makes no sense to use the PoI KIBOR for amounts drawn down in previous years, when a different KIBOR was applicable. As indicated in the preceding paragraph, the EU's approach would deprive the term "comparable" of any meaning.

4.15. Similarly, the EU's assertion that the LTF-EOP scheme was a "single scheme" constitutes no basis for applying a single interest rate. It is perfectly possible – as was the case here – that a "single scheme" contains multiple tranches each one of which is subject to a different interest rate from a different period. Thus, the label "single scheme" is an essentially meaningless term.

### 4.7 The EU misrepresents the Commission's determination of the commercial benchmark interest rate

4.16. In response to a Panel question, the EU also misrepresents several aspects related to the nature of the commercial benchmark interest rate applied by the Commission. The EU argues that this rate was the KIBOR, and that Novatex itself had suggested that the KIBOR rate be used.

4.17. First, neither Novatex nor the GOP suggested the use of this rate. The evidence cited by the EU in this regard is inapposite. Second, while "KIBOR" has been used in these proceedings as a convenient short-hand for the Commission's interest rate, and that rate is in the numerical vicinity of the KIBOR, the Commission did not apply the KIBOR. Instead, the Commission obtained the benchmark interest rate by selecting, from a wide range of choices, data from the website of the State Bank of Pakistan (SBP), made its own calculations and then applied this rate, without providing even the most basic explanation of how it had derived this benchmark interest rate. Due to their sophistication and knowledge of the SBP data, the Government of Pakistan and Novatex

[6] EU's response to Panel Question No. 55, para. 80.
[7] EU's response to Panel Question No. 55, para. 80.
[8] EU's response to Panel Question No. 55, para. 81.
[9] EU's response to Panel Question No. 55, para. 81.

were able to reverse engineer this rate and comment on it. However, an uninitiated reader would have no basis to even begin to understand how the Commission derived its benchmark interest rate.

### 4.8 The EU confirmed to the Panel that it failed to follow the analytical process required both by its Guidelines and by Article 14(b)

4.18. Pakistan has argued that the EU failed to explain why it rejected the loan benchmark interest rates provided by Novatex. In addition, in its responses to Panel questions 58, 59, 60 and 61, the EU has confirmed to the Panel that – once the Commission rejected Novatex's proposed commercial interest rates – it did not attempt to identify the interest normally payable on a comparable commercial loan to Novatex; and did not attempt to identify the interest payable on a commercial loan to companies in a similar financial situation in the same sector of the economy. It also did not attempt to identify the interest rate payable on a comparable loan to companies in any sector of the economy, nor did it attempt to identify a proxy that reflected the duration of the subject loan.

4.19. This amounts, in effect, to an admission that the Commission failed to comply with the chapeau of Article 14 and with Article 14(b) and the "progressive search" required by the Appellate Body under that provision.[10]

### 4.9 The EU's responses contain additional misrepresentations and factual inaccuracies

4.20. The EU attempts to argue, for instance, that Novatex paid the same interest on the total outstanding amount and that this somehow puts into question "the alleged separate nature of each tranche." That is incorrect. The fact that the annually-locked in interest rate happened to be similar in certain successive years does not compromise the separate nature of each tranche.

4.21. The EU also claims that that Novatex's data were not sufficiently disaggregated into the various tranches (or the tranches aggregated by years) and that the Commission therefore would have been unable, on the basis of Novatex's Questionnaire response alone, to apply multiple interest rate benchmarks and to calculate the respective subsidization amounts.[11] That is correct. In order to perform the analysis correctly, the Commission would have had to request Novatex to provide more disaggregated data. The reason why Novatex did not provide the data in that format was because the Commission's **questionnaire template did not permit it to do so** and also because Novatex could not know the analytical approach that would be ultimately adopted by the Commission. Novatex also took a view that an altogether different benchmark was appropriate. It was the responsibility of the Commission as the investigating authority, in response to the Questionnaire response, to choose the appropriate analytical approach and to request additional data from the company, if the Commission considered that it needed this additional data.

### 4.10 Conclusion and request for findings

4.22. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraph 6.101 of Pakistan's first written submission.[12]

## 5 THE COMMISSION'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLE 15.5 OF THE SCM AGREEMENT

5.1. The Commission's analysis of the existence of a "causal link" between the subject imports and the alleged injury to the domestic industry is inconsistent with Article 15.5 of the SCM Agreement for the following reasons.

[10] Appellate Body Report, *US – AD/CVD (China)*, para. 486.
[11] EU's response to Panel Question No. 55, para. 81.
[12] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

### 5.2 The Commission's "breaking the causal link" approach is inconsistent with Article 15.5 of the SCM Agreement

5.2. The Commission's "breaking the causal link" approach is inconsistent with Article 15.5 of the SCM Agreement. Pakistan submits that, as a matter of logic, the Commission could not possibly first establish a causal link (i.e. a relationship of cause and effect) between the alleged imports and the subsidized imports and subsequently find that one or more other factors "break" that causal link. If an "other factor" is capable of breaking the causal link, this causal link should never have existed in the first place. In response to this argument, the EU referred to four anti-dumping determinations where the Commission made a negative finding of causation. In none of these four determinations did the Commission make a finding at the outset of its causation analysis that a causal link existed and then examine whether other factors "broke" that link. By not making that finding at the start in those determinations, the Commission was able to assess properly the injurious effects of all the relevant factors on the domestic industry, including those of the subject imports, and then determine that the subject imports "in isolation" could not have caused material injury.[13] Thus, the EU has not provided any instances on which to base its assertion that the Commission can find that a causal link between investigated imports and alleged injury existed but that the injury caused by other factors "broke" that link.

5.3. The Commission's "breaking the causal link" approach effectively vitiated the non-attribution analysis in the challenged Determinations. The causal link found at the start of its causation analysis was not "preliminary", as the EU suggests.[14] Rather, this causal link was exactly the same link that was used to dismiss the significance of the non-attribution factors that the Commission purportedly analysed. This explains why, even if the Commission accepted that at least three other factors might have been causing injury, it ultimately rejected them because they did not "break" the causal link. Had the Commission applied the correct legal standard, it would have examined whether the injurious effects of these other factors were such as to render any link between the subject imports and the alleged injury too distant, remote or insubstantial.

5.4. For these reasons, the EU is incorrect that there is similarity between the Commission's "breaking the causal link" approach and Pakistan's understanding of the proper legal standard in Article 15.5.[15] Under the "breaking the causal link" approach, the Commission failed to analyse the injurious effects of the subject imports and the other known factors *independently* and *objectively*. Rather, under this approach, the Commission merely assessed these other factors against the previously found causal link between the subject imports and the alleged injury. This approach effectively pre-judges the issue of non-attribution: it appears to be impossible as a matter of logic to "break" a causal link once it has been established. This is also evident from the challenged Determinations, where the Commission identified certain injurious effects of at least three non-attribution factors but dismissed them on the grounds that these factors could not "break the causal link". Because the "breaking the causal link" approach vitiated the analysis of the non-attribution factors, the Commission's causation analysis is inconsistent with Article 15.5 of the SCM Agreement.

### 5.3 The Commission merely *assumed* the existence of a causal link based on its finding of increased imports which undercut prices

5.5. The Commission simply *assumed* the existence of a causal link based on its previous finding that the investigated imports were undercutting the prices of the domestic product. The Commission found its causal link based on nothing more than a "coincidence in time" between increased imports, which allegedly undercut the price of the domestic product, and the deterioration in the condition of the domestic industry.[16]

5.6. The Commission should have gone beyond the mere identification of a *coincidence* and provided some analysis of *causation.* By assuming the existence of a causal link based merely on a temporal coincidence, the Commission failed to conduct the analysis required under Article 15.5

[13] Commission Decision 2008/227/EC. Exhibit PAK-63; Commission Decision, 2007/214/EC, para. 138. Exhibit PAK-64. Commission Decision 1999/55/EC. Exhibit PAK-65; and Commission Decision 2005/289/EC. Exhibit PAK-67.
[14] EU's second written submission, paras. 179, 180 and 182.
[15] EU's second written submission, para. 164.
[16] Preliminary Determination, para. 262. Exhibit PAK-1.

and footnote 47 of the SCM Agreement of how the subject imports had a bearing on the negative performance of five economic factors identified by the Commission.[17]

5.7. Also, as matter of fact, the Commission's finding of a temporal coincidence was incomplete and one-sided. The Commission found that five industry indicators showed negative performance: production, sales, profitability, return on investment and cash flow.[18] All five indicators showed positive or neutral performance from 2006 to 2007, and deteriorated *only* in 2008 and the first semester of 2009 (i.e., towards end of the PoI).[19] However, this is also the same time period in which other known factors had their greatest effects on the condition of the domestic industry: the 2008 economic downturn broke out only in 2008; imports from Korea increased by 76% in 2008 and during the first semester of 2009; and non-cooperating EU producers were able to regain significant sales and market share in the first semester of 2009.

5.8. There is, therefore, the same temporal coincidence between the other known factors and the alleged injury. This coincidence was just as compelling as the coincidence between the subject imports and the alleged injury. The Commission, however, improperly attributed greater value to the "coincidence" between the subject imports and the injury than to the other coincidence between several non-attribution factors and the same injury, without providing a reasoned and adequate explanation of why it did so.

### 5.4 The Commission's analysis of "other factors" is inconsistent with Article 15.5

5.9. The Commission's analysis of other factors was also inconsistent with Article 15.5. First, in the case of the imports from Korea, the Commission merely stated that "it cannot be excluded" that these imports "contributed to the injury suffered by the Union industry". The words "cannot be excluded" admit that this factor may have been a cause of injury. However, the Commission made no effort to probe the nature and extent of the contribution of those factors to the alleged injury. In principle, this price undercutting could have had a similar or even greater downward effect on domestic prices than the subject imports, given that (1) both imports from Korea and the subject imports had similar market shares during the PoI; and (2) imports from Korea grew by almost 150% during the same period. In these circumstances, the Commission's cursory analysis of the imports from Korea cannot constitute a "meaningful explanation of the nature and extent of [its] injurious effects".

5.10. Second, the Commission stated that any injury caused by the 2008 economic downturn it caused was in any event "exacerbated by the increased subsidised imports from the countries concerned, which undercut the prices of the Union industry".[20] In other words, regardless of the magnitude of the injurious effects of the 2008 economic downturn, this factor could never have broken the causal link, as the Commission had already found price undercutting by the subject imports. Importantly, the Commission failed to explain what "exacerbate" means and the extent to which the subject imports "exacerbated" the negative effects of the 2008 economic downturn. This question remained unresolved because the Commission did not separate and distinguish the injurious effects of the 2008 economic downturn from those of the subject imports. Moreover, the Commission partly dismissed the relevance of the 2008 economic downturn on the grounds that the EU industry had suffered injury prior to 2008. However, the Commission's statement that the EU industry was suffering injury prior to 2008 lacked supporting analysis. In addition, the Commission's statement is all the more puzzling since a large number of injury indicators actually showed a positive performance up to 2008 and it was only then that they began to languish.

5.11. Third, the Commission again recognized the (at least potential) negative effects of the low prices of crude oil on the domestic industry. However, it did not separate and distinguish these effects, or provide a "meaningful explanation of the nature and extent of [its] injurious effects".[21] It merely dismissed this "other factor" by recalling its previous finding that the subject imports undercut the prices of the EU producers. The Commission thus failed to ascertain the extent of the impact of this factor, if any, on the domestic industry. In fact, it recognized that prices of PET

[17] Preliminary Determination, paras. 238-239. Exhibit PAK-1. (production, sales, return on investment, profitability and cash flow)
[18] Preliminary Determination, paras. 238-239. Exhibit PAK-1.
[19] Preliminary Determination, paras. 220, 223, 233 and 235. Exhibit PAK-1.
[20] Preliminary Determination, recital 254. Exhibit PAK-1.
[21] Appellate Body Report, *US – Lamb*, para. 186.

depend to some extent on prices of crude oil, but failed to address the argument that low prices of PET in the EU were a function of the low prices of crude oil. Rather, it gave an off-the-point explanation about the volatility of world prices and how this cannot explain "why imports of PET were subsidised and therefore undercut the Union producers' prices".[22] Of course, the question is not whether the low prices explain why imports of PET might have been subsidized, but rather whether they explain the alleged injury to the domestic industry.

5.12. Fourth, the Commission should have addressed the reasons why a part of the EU industry, which did not cooperate, improved its performance from 2008 to the end of the PoI. This period coincided with the contraction of global demand and with the expansion of demand in the EU market. It is intriguing to say the least that the subject imports had negative effects on only one part of the EU industry (those supporting the investigation), while the other part of the EU industry (those not supporting the investigation) showed a positive performance from 2008 to the end of the PoI. Moreover, the EU's assertion that the Commission found that the non-cooperating EU producers did not cause injury is troublesome in view of the facts before it.[23] Specifically, the market share of the non-cooperating EU producers was significantly higher than that of the subject imports during the PoI (e.g., 16% and 10.2%, respectively, at the end of the PoI). Pakistan thus fails to understand why the increasing production and market share of the subject imports caused injury, while the more significant increasing production and market share of the non-cooperating EU producers did not. Because the Commission failed properly to assess the injurious effects of the competition from these non-cooperating EU producers, the Commission's causation analysis is inconsistent with Article 15.5 of the SCM Agreement.

### 5.5 Conclusion and request for findings

5.13. For the reasons set out above, Pakistan requests the Panel to find that the causation analysis in the challenged Determinations is inconsistent with Article 15.5 of the SCM Agreement.

## 6 PAKISTAN'S CLAIM UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE RESULTS OF THE VERIFICATION VISIT

6.1. Pakistan continues to claim that the European Union has acted inconsistently with its obligation under Article 12.6 of the SCM Agreement, because it failed either to make the results of the verification visit to Novatex available or to provide disclosure thereof as part of the disclosure of essential facts under Article 12.8.

6.2. The *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter, but that the investigating authority did not immediately consider relevant to its final determination.[24] A clear reporting of the results of the verification is essential to enable the exporter to structure its case for the rest of the investigation. Pursuant to Annex II(3) of the Anti-Dumping Agreement, which applies by analogy under the SCM Agreement[25], all information that is "verifiable" and submitted in timely and usable fashion, must be taken into account by the investigating authority. The investigating authority is "not entitled to disregard the submitted information and use information from another source to make the determination."[26] In addition, the ability of domestic courts (using their own standard of review) and of WTO panels (using the standard of review pursuant to Article 11 of the DSU) to review the determinations of investigating authorities depends on the existence of a proper disclosure of the "results" of the verification visit under Article 12.6 of the SCM Agreement.

6.3. In the investigation at issue, the Commission failed to disclose the results of the verification visit. To the extent it made an effort to comply with the requirements of Article 12.6, in this case the Commission opted to disclose the results of the verification via the disclosure of essential facts

[22] Definitive Determination, recital 118. Exhibit PAK-2.
[23] EU's response to Panel question 100, para. 33.
[24] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)
[25] See Appellate Body Report, *Mexico – Rice*, paras. 290 – 295.
[26] Panel Report, *EC – Salmon (Norway)*, para. 7.383 (see also Ibid., para. 7.347). Panel Report, *US – Steel Plate*, para. 7.57.

under Article 12.8. However, the Commission's disclosures contain no information of what occurred during the verification visit and which topics, other than the MBS, the Commission discussed with the investigated company, even though the Commission had provided the exporter with an extensive list of topics to be verified. However, there is no information whatsoever about verification on any of these issues other than the Manufacturing Bond Scheme. Hence, the EU has failed to provide any information on the results of its verification concerning all these other issues.

6.4. Beyond the list of exhibits collected at verification, the EU disclosed no information on the conduct of the verification visit, or any corrections or rectification of the information contained in the Questionnaire Response. The EU has not disclosed which particular aspect of these documents was discussed, for what purpose, or whether the Commission considered the data and information contained in this document to be verified or verifiable.

6.5. In its submissions, the EU continues to attempt to conflate the concept of the results of the verification with the results of the investigation. The EU argues that the results of the verification were the facts that the investigating authority had decided to include in the essential facts disclosure as those on which it intended to base its final determination. Pakistan has explained how this approach necessarily deprives exporters of their rights and ability to defend themselves. It means that the results of the verification would be only those the investigating authority considers to be important or to support its final determination. The results of the verification would not include outcomes of the verification to which the exporter may attach greater importance than the investigating authority or outcomes on which the exporter thinks the investigating authority *should* base its final determination. In its answers to the Panel's questions, Pakistan provided examples, both specific to this investigation and generic, illustrating how the exporter's interests could be negatively affected by a failure to provide information about what happened at the verification that goes beyond the investigating authority's subsequent, subjective decision as to what evidence supports its final determination.[27]

6.6. Moreover, in its answers to the Panel's questions, the EU "takes the position that the term 'result' does not include information, for example, about whether the Commission requested additional documents, whether Novatex provided requested documents or whether the Commission asked questions during the verification visit".[28] This is an extraordinary proposition. The EU considers that its investigating authority could ask for and receive (or, indeed, not receive) key information regarding the exporter's questionnaire responses and business operations and subsequently simply ignore that fact or evidence in its final determination. This would mean, for instance, that the investigating authority could have asked for clarification in the verification that the term "Opening" balance in the spreadsheet of interest amounts paid on loans subject to the LTF-EOP programme during the PoI included principal amounts drawn down before the PoI, received that clarification, and simply ignored that fact in reporting on the results of the verification.[29]

6.7. The EU appears to acknowledge that further information about the results of the verification may be required to be provided "when such information is indispensable for interested parties to defend their interests with respect to essential facts … (e.g. in the case of the use of facts available …)".[30] There are, however, two problems with this statement. First, the same problem remains that it would be the EU, not the exporter itself, which would determine what information would be "indispensable" to the defence of the exporter's interests. There is no textual basis in Article 12.6 for the EU's position that the "results" of the verification are only those matters that the *investigating authority* considers to be relevant to the defence of the exporter's interests.

6.8. In addition, there is no reason why the logic behind requiring more information in cases involving facts available would not also apply to other situations in which the exporter might consider that additional information about the outcome of the verification might be "indispensable for interested parties to defend their interests".[31] There is no reason why more or less information should be disclosed about the outcome of the verification visit on one issue rather than the other. Certainly, there is textual basis in Article 12.6 for the EU's position that the meaning of the

[27] Pakistan's response to Panel Question No. 80, paras. 5.1 – 5.9.
[28] EU's response to Panel Question No. 84, para. 124.
[29] See, for instance, Pakistan's response to Panel Question No. 38(c), para. 278.
[30] EU's response to Panel Question No. 84, para. 121.
[31] EU's response to Panel Question No. 84, para. 121.

"results" of the verification may be the information at issue or the uses to which it may be put by the investigating authority.

6.9. In its responses to the Panel's questions, the EU refers to two "examples" of how it disclosed the results of the verification visit in the disclosure of the essential facts.[32] First, the EU refers to the statements regarding the MBS in its company-specific disclosures.[33] However, Pakistan, in its own responses to the Panel's questions, has explained how the EU's disclosure of the results of the verification visit with respect to the MBS was at best incomplete and left open important issues that affected Novatex's and Pakistan's ability to defend their interests before reviewing courts and this Panel.[34] Second, the EU refers to the fact that it disclosed "Novatex's turnover figures".[35] It is not clear how the "turnover figures" represented a sufficiently significant "result" of the verification to merit such different treatment than other data that was reviewed during the verification. If the turnover figures merited disclosure as a "results" of the verification, surely so too did the other matters to which Pakistan has referred in its answers to the Panel's questions.

6.10. The EU also overlooks that one option of disclosing the verification results is a separate report that will typically be issued well before the authority decides what the essential facts are. Choosing the option of later disclosure, when the authority has decided on what the essential facts are, cannot mean that the universe of verification results has suddenly become smaller. If this were accepted, the authority could manipulate the scope of its obligations, and the rights of companies, simply by waiting.

6.11. Another pillar of the EU's defence is the mantra that an investigating authority is not required to provide written "minutes" of the verification visit. By means of the label "minutes", the EU tries to discredit and misrepresent Pakistan's argument as requiring some sort of excessive and administratively burdensome level of detail from the investigating authority.

6.12. Under this argument, the EU would allow an investigating authority to pay lip-service to Article 12.6 with generic, boilerplate statements that in reality do not disclose anything meaningful. For the EU, stating that, for instance, "documents relating to the company's financial accounts were verified" would be enough to satisfy Article 12.6.[36] This cannot be so. The disclosed results must be sufficiently specific so that the exporter can subsequently make submissions relating to (i) what specific information or which specific document was verified, (ii) against which other document or other information the original document or information was examined, (iii) for what purpose a given document or information was considered, and (iii) which final conclusion the investigating authority drew.[37]

6.13. The EU also argues that "accuracy of the information" is not part of the results of the verification visit.[38] This is wholly untenable. The accuracy of the information and hence its reliability for use in the determinations, and the views of the authority on this point, are the very core of the verification and therefore are key to the results. This is illustrated well by the questions surrounding the LTF-EOP loan. Pakistan argues that, had the EU properly reported the results of the verification, the Panel would not be required today to seek to divine what the EU thought and how its individual investigators read and understood the term "opening" amount in the LTF-EOP spreadsheets.

6.14. Yet another line of EU arguments is that the results of the verification are a "summary of the summary of the information that was checked during the verification visit"[39]. In Pakistan's view, the word "summary" is not a particularly useful tool to gauge compliance with Article 12.6. The requirement in Article 12.6 is to disclose the "results of the verification". Thus, the word or concept of "summary" is not treaty language and is thus a potential red herring in discerning the meaning of Article 12.6, to the extent that it may divert the analysis from discerning the meaning of the treaty term "results".

[32] EU's response to Panel Question No. 84, paras. 114 – 119.
[33] EU's response to Panel Question No. 84, para. 114.
[34] Pakistan's response to Panel Question No. 80, paras. 5.4 – 5.5.
[35] EU's response to Panel Question No. 83, para. 115.
[36] See the EU's second written submission, para. 193.
[37] See for instance Pakistan's first written submission, para. 8.41, referring *inter alia* to Panel Report, *Korea – Certain Paper*, para. 7.68.
[38] EU's second written submission, para. 208.
[39] EU's opening statement at the second meeting of the Panel, para. 73.

6.15. Finally, in its answers to questions, as in its opening statement at the Panel's meeting with the parties, the EU posits the possibility that no verification visit might take place (as such visits are not required). The EU elaborates on what information might or might not have been disclosed as essential facts in the event that no verification visit had taken place and suggests that the amount of information that must be disclosed under the SCM Agreement does (or should) not vary depending on whether a verification visit has taken place.[40] However, as Pakistan explained in its own answers to the Panel's questions, there is a separate multilateral obligation to report the results of any verification visit. The obligation in Article 12.6 of the SCM Agreement cannot be rendered inutile by suggesting that it should not result in a different disclosure than if no verification visit had occurred.

6.16. With respect to the list of documents collected at the verification visit, as reflected in Exhibit EU-10, this list was not given to Novatex by the EU officials, although the documents on that list match the company-internal list of documents in the company records of the verification visit. In any event, the list does not disclose the content of the document nor the purpose for which the document was inspected and collected. The list does not even make clear whether a given document was collected as part of the CVD investigation or the parallel anti-dumping investigation.

6.17. For the reasons above, Pakistan requests the Panel to find that the EU acted inconsistently with its obligations under Article 12.6 of the SCM Agreement, by failing to disclose the results of the verification in accordance with that provision.

[40] EU's response to Panel Question No. 83, paras. 117-119.

# ANNEX D

## ARGUMENTS OF THE THIRD PARTIES

## ANNEX D-1*

ARGUMENTS OF CHINA

THIRD PARTY ORAL STATEMENT OF CHINA

### I. Introduction

1. Mr. Chairman, Members of the Panel, China welcomes this opportunity to present its views on *European Union – Countervailing Duty Measures on PET from Pakistan (DS486)*. In this session, China will only touch upon two claims by Pakistan under Article 1, Annex II (II) and Article 14 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

### II. Pakistan's Claims Regarding "MBS" Duty Remission Program under Article 1 and Annex II(II) of the SCM Agreement

2. One of the core issues, for which China takes no position on the merits of the factual allegations, in this dispute is whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as an export subsidy under Article 1.1. Put it into more detail, it consists of two parts: (1) Would the lack of an effective system or procedure in the duty drawback system by the exporting Member to monitor the inputs consumed in the production of the exported product directly form the basis for a determination of existence of subsidy; and (2) assuming that a further examination regarding the actual inputs involved in determining whether an excess payment occurred has been failed to carry out, could the entire amount of import duties be treated as an export subsidy?

3. These questions should be answered under the relevant provisions of the SCM Agreement and the GATT 1994. Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement as well as the Ad Note to Article XVI of the GATT 1994 state that "a subsidy shall be deemed to exist if: … government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)", and "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 or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

4. The text itself makes it clear that only when a drawback system leads to excessive drawback could a subsidy then be deemed to exist. Despite footnote 1 refers to "In accordance with…the provision of Annexes I through III of this Agreement", the effectiveness of the duty drawback system cannot replace the criterion for deciding the existence of subsidy. According to the Annex II(II)(1) and (2) of the SCM Agreement, "Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, 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", and "Where… [such system or procedure] is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1". From this, the fact of non-existence effective system or procedure to monitor the inputs consumed in the production of the exported product alone is not decisive for determination of existence of an export subsidy. What the investigating authorities should do is to decide the existence of a subsidy on the ground that the criterion provided in the SCM Agreement has been met.

* The deadline for the third parties to submit their executive summaries was 7 October 2016. China did not submit an executive summary by this time. On 9 December 2016, China was informed that if China did not submit its executive summary by 16 December 2016, China's third party oral statement dated 22 September 2016 would be annexed to the Panel report as the description of China's arguments. China did not submit an executive summary by 16 December 2016. Thus, we attach China's referenced oral statement here.

5. Furthermore, even under the situation that it is determined a drawback system conveys a subsidy by reason of excess drawback of import duties on inputs consumed in the production of the exported product, it does not mean that the entirety of the duties remitted or drawn back are in "excess" and constitute a subsidy. Rather, the excess amount remitted or drawn back which reflects the subsidy provided to the recipient needs to be ascertained, to ensure that the countervailing duty levied does not excess to the amount of the subsidy found to exist. Consequently, it is suggested that the Panel should consider whether the investigating authorities' determination, that one hundred percent of drawn back of import duties constitutes a subsidy, was based on positive evidence and involved an objective examination.

## III. Pakistan's Claims Regarding Its "LTF-EOP" Export Financing Program under Articles 14 of the SCM Agreement

6. Additionally, Pakistan claims that the EU acted inconsistently with Article 1.1(b), the chapeau and subsection (b) of Article 14 of the SCM Agreement in calculating the benefit under the Long-Term Financing of Export-Oriented Projects (LTF-EOP) scheme.[1] In examining whether the Commission's choice of a national interest rate as the benchmark to calculate the benefit of the LTF-EOP loan was in legal error, namely, whether that benchmark is a "comparable" commercial loan benchmark[2], it is necessary to analyze whether the Commission had considered all the relevant evidence and adequately explained the application of its own analytical method.

7. Specifically, in identifying the benefit of a preferential loan program, the approach of Articles 14(b) is a straightforward comparison of the interest paid with "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market". Although the use of the conditional tense, "could", suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can in fact be obtained in the market[3], the Appellate Body has "observe[d] that the Panel reasoned that the identification of an appropriate benchmark under Article 14(b) can be seen as a 'series of concentric circles', where the investigating authorities should first seek commercial loans to the same borrower that are identical or nearly identical to the investigated loan. ….In the absence of an identical or nearly identical loan, an investigating authority should seek, in turn, other similar commercial loans held by the same borrower, then similar commercial loans granted to another borrower with a similar credit risk profile to the investigated borrower. ….Yet, there may be situations where the actual differences between any of the existing commercial loans and the investigated government loan are so significant that it is not realistically possible to address them through adjustments. In such situations, the Panel considered that an investigating authority should be allowed to use proxies as benchmarks."[4]

8. Thus, China does not intend to deny the discretion possessed by the investigating authority in selecting an appropriate benchmark. However, the application of the methods set out in national legislation or regulations to a situation in which the borrower has no comparable commercial loans and a benchmark must be found must be transparent and adequately explained in accordance with the chapeau of Article 14 of the SCM Agreement. Namely, it is important to examine whether the investigating authority fulfil its obligation to provide a transparent and adequate explanation for why it selected a particular benchmark, in which the parties to the investigation can adequately and timely defend their interests.

## IV. Conclusion

9. China thanks the Panel for its consideration of these comments.

[1] Pakistan First Written Submission, para. 6.2.
[2] *See* Pakistan First Written Submission, paras. 6.28-6.56.
[3] *US – Anti-Dumping and Countervailing Duties (China) (AB), para. 674.*
[4] *US – Anti-Dumping and Countervailing Duties (China) (AB), para. 676.*

# ANNEX D-2

## ARGUMENTS OF THE UNITED STATES

## EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

### 1. INTRODUCTION

1. In this submission, the United States presents its views on the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") as relevant to certain issues in this dispute.

### 2. CLAIMS REGARDING ARTICLES 1 AND 3 OF THE SCM AGREEMENT

2. The United States, while taking no position on the merits of the factual allegations made by either party, submits the following comments. The core disagreement between the parties is whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as a financial contribution under Article 1.1 where the exporting Member: (1) does not have an effective system or procedure in place to monitor the inputs consumed in the production of the exported product and (2) has failed to carry out a further examination based on the actual inputs involved in determining whether an excess payment occurred under the duty drawback scheme. The United States submits that this question should be answered in the affirmative under the relevant provisions of the SCM Agreement and the GATT 1994.

3. Both footnote 1 to the SCM Agreement and the Ad Note to Article XVI of the GATT 1994 contemplate that a duty drawback scheme "shall not be deemed to be a subsidy" so long as there is no "excess" remission of duties or taxes from those which have accrued. Consequently, if a duty drawback system were to provide for exemption or remission of duties or taxes in amounts that exceed the amounts of "duties or taxes that have accrued," then such a system may be "deemed to be a subsidy" under the terms of Article 1.1 of that Agreement.

4. Importantly, footnote 1 also notes that this standard (that "the remission of such duties or taxes in amounts not in excess of those which have accrued" shall "not be deemed to be a subsidy") is "[i]n accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement." Article 32.8 of the SCM Agreement provides that "[t]he Annexes to this Agreement constitute an integral part thereof."

5. Annex I to the SCM Agreement, providing an "illustrative list" of export subsidies, elaborates that the "[t]he remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)" would constitute an "export subsidy." Again, this suggests that an export subsidy exists in cases where there is such an excess.

6. In determining whether a duty drawback scheme provides for remission of import duties in amounts that in fact exceed a permitted limit, the procedures described in Annexes II and III are pertinent. The standard in footnote 1 to the SCM Agreement is "in accordance with" Annexes II and III, which each addresses a particular duty drawback scheme. 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 and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III."

7. For a duty drawback system to operate so as not to provide for excess remission of import duties, Annexes II and III provide for procedures to check the system of the exporting Member. Annex II(II)(1) provides that the investigating authority should first determine whether the exporting Member has in place an adequate system or procedure to monitor which inputs are consumed in the production of the exported product and in what amounts. Annex II(II)(2)

contemplates an additional analysis by the exporting Member absent satisfaction of the condition under Annex II(II)(1).

8. Therefore, where an exporting Member has a duty drawback scheme in place that does not satisfy the requirements for such a scheme to "not be deemed to be a subsidy," then an investigating authority would be permitted to consider the full amount of the financial contribution as a subsidy under the terms of Article 1.1. The conditions for a duty drawback scheme to be considered within the scope of footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement are established by reference to Annex II(II)(1)-(2).

9. Finally, an investigating authority need not consider information that post-dates the period of investigation in trade remedy proceedings.

## 3. CLAIMS REGARDING ARTICLES 1.1(B) AND 14 OF THE SCM AGREEMENT

10. Because the title of Article 14 indicates that it sets out "guidelines" for determining benefit, there exists "a certain degree of flexibility … under Article 14(b) in the selection of benchmarks." The selection of an appropriate benchmark under Article 14(b) is guided by the terms "comparable," "commercial," and a "loan which the firm could actually obtain on the market."

11. Of particular relevance to this dispute, the comparable commercial loan benchmark must be contemporaneous in time with the alleged subsidized loan. For example, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that investigating authorities must rely on a benchmark "that would have been available to the recipient firm at the time it received the government loan," such that the comparison to determine the benefit "is to be performed as though the loans were obtained at the same time." This contemporaneity factor accords with the principle that "[t]he investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.)."

12. Finally, Article 14(b) also describes a benchmark loan as reflecting one "which the firm could actually obtain on the market." The Appellate Body has explained that "[t]he use of the conditional tense, 'could', suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can in fact be obtained in the market." The Appellate Body has also observed that "could" refers "'first and foremost' to the borrower's risk profile, that is, whether the benchmark loan is one that could be obtained by the borrower receiving the investigated government loan." Given these findings, the United States agrees with Pakistan's observation that "the investigating authority must, at the very least as the starting point of its analysis, first seek to identify a comparable loan that the *specific firm* under investigation would pay."

13. In light of the guideline of comparing the transaction to one the loan recipient might have obtained on the market, an investigating authority might well examine the transaction and rely on a benchmark that is contemporaneous with when the loan disbursement terms were established. This is because the investigating authority could take the view that each tranche is merely a part of the one overall loan. The investigating authority might also examine the transaction and apply a loan interest rate benchmark that is contemporaneous in time with when each tranche of the investigated loan was drawn down, as Pakistan proposes, because the authority might determine that each tranche should be considered as a distinct loan. These considerations will depend on the factual circumstances concerning the terms of the loan.

14. Finally, the United States observes that an investigating authority has an obligation to provide a transparent and adequate explanation for why it selected a particular benchmark. One reason is so the parties to the investigation can adequately and timely defend their interests.

## 4. CLAIMS REGARDING ARTICLE 12.6 OF THE SCM AGREEMENT

15. The last sentence of Article 6.7 of the AD Agreement largely mirrors the last sentence of Article 12.6 of the SCM Agreement. The last sentence of Article 6.7 of the AD Agreement requires investigating authorities "to inform the investigated exporters of the verification results," *i.e.*, the results of the verification visit. The disclosure of the results of a verification visit are important both in enabling exporters and WTO Members to seek judicial review of the investigating

authority's determination under Article 23 of the SCM Agreement, and to protect exporters' rights to prepare and present their cases under Article 12.3 of the SCM Agreement.

16. The meaning of the term "results" in the last sentence of Article 12.6 of the SCM Agreement informs the extent of what the investigating authority must provide to "the firms to which they pertain." The ordinary meaning of "result" is "an effect, issue, or outcome *from* some action, process or design." The "results" envisaged by Article 12.6 of the SCM Agreement are the "outcome" of the verification visit, which under Annex VI(7) is an on-the-spot investigation "to verify information provided or to obtain further details."

17. Article 12.6 of the SCM Agreement (as does Article 6.7 of the AD Agreement) provides two alternative mechanisms for disclosing the verification visit results: to make the results available to the firm to which the results pertain or to disclose the results as part of the essential facts which form the basis for a decision to impose definitive measures. Thus, one such option is to "'make available' a separate report containing the results of the verification visits."

18. Consequently, the Panel should consider whether Pakistan has demonstrated that the Commission's disclosure of the verification visit results was not sufficient to disclose the outcome of the verification, was not complete such that essential facts were not disclosed, or was not timely such that interested parties were not able to defend their interests.

## EXECUTIVE SUMMARY OF U.S. THIRD-PARTY ORAL STATEMENT AT THE THIRD PARTY SESSION OF THE FIRST MEETING OF THE PANEL WITH THE PARTIES

### 5. INTRODUCTION

19. The United States appreciates the opportunity to provide our views as a third party in this dispute. The United States will focus its remarks 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.

### 6. ARTICLE 1.1 AND FOOTNOTE 1 OF THE SCM AGREEMENT

20. Article 1.1(a)(1)(ii) is accompanied by footnote 1. Footnote 1 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. 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.

21. 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 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.

22. 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 different scenarios. 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.

23. 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.

24. 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.

25. 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 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.

## 7. CHANGES AFTER THE PERIOD OF INVESTIGATION

26. Finally, 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.

## EXECUTIVE SUMMARY OF U.S. RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES

27. 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.

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

29. In the view of the United States, the analysis under subparagraphs (II)(1) and (2) is sequential. 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).

30. 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.

31. 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 the 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.

32. Whether the entire amount of duty remission or an "excess" amount is countervailed would depend on the factual circumstances confronted by an investigating authority.

33. In response to the Panel's final question, generally speaking, a "line of credit" can be considered a type of loan. 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 ...'," 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." As we have noted, this suggests that factual circumstances are central to the benchmark selection.

# ANNEX E

## INTERIM REVIEW

# ANNEX E-1

INTERIM REVIEW

## 1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made certain changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors.

1.2. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

## 2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

### 2.1 Paragraph 7.115 (paragraph 7.115)

2.1. Pakistan asks the Panel to revise this paragraph to more accurately reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.2. Although we do not consider that the language previously used in this paragraph did not represent Pakistan's position accurately, we have decided to accommodate Pakistan's request, and also made further conforming changes to paragraphs 7.114, 7.115, and 7.116 (paragraphs 7.114, 7.115, and 7.116) to more fully account for this revision.

### 2.2 Paragraph 7.117 (paragraph 7.117)

2.3. Pakistan asks the Panel to revise this paragraph to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.4. We have decided to accommodate Pakistan's request, and also made conforming changes to paragraphs 7.117 and 7.118 (paragraphs 7.118 and 7.119) and footnotes thereto to more fully account for this revision.

### 2.3 Paragraph 7.124 (paragraph 7.125)

2.5. Pakistan asks the Panel to revise the part of the Report in which this paragraph appears to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.6. We consider that the Section of the Report that contains paragraph 7.124 (paragraph 7.125) already accurately describes and cites the arguments that Pakistan asks us to include.[1] We

[1] See paragraph 7.120 and footnotes 254 and 255 (paragraph 7.121 and footnotes 256 and 257).

therefore decline Pakistan's request. We further emphasize that the manner in which we dispose of these arguments is consistent with the manner in which Pakistan presented them in its submissions.

### 2.4 Paragraph 7.178 (paragraph 7.179)

2.7. Pakistan asks the Panel to revise this paragraph to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.8. We have decided to accommodate Pakistan's request.

WORLD TRADE ORGANIZATION

WT/DS486/R/Corr.1

20 July 2017

(17-4009)

Page: 1/1

Original: English

# EUROPEAN UNION – COUNTERVAILING DUTIES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

REPORT OF THE PANEL

*Corrigendum*[*]

Please note that the title of the Report should be corrected to read:

# EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

[*] In English only.