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

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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

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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
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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

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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
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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]

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[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]

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[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

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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".

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[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.

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[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).

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[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

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[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]

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[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

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[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

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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.
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> [*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

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[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.

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[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:

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[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

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[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%

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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".

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[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.

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[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]

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[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.