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EUROPEAN UNION – COUNTERVAILING MEASURES ON CERTAIN POLYETHYLENE TEREPHTHALATE FROM PAKISTAN

(WT/DS486)

REPORT OF THE PANEL

Addendum

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

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

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

WORKING PROCEDURES OF THE PANEL

ADOPTED ON 15 MARCH 2016

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

General

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

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

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

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

Submissions

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

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

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

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

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

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

Questions

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

Substantive meetings

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

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

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

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

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

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

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

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

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

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

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

Third parties

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

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

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

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

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

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

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

Descriptive part

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

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

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

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

Interim review

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

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

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

Service of documents

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

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

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

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

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

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

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

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

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

ANNEX A-2

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

ADDITIONAL WORKING PROCEDURES ON BUSINESS CONFIDENTIAL INFORMATION

ADOPTED ON 14 APRIL 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX B

ARGUMENTS OF THE EUROPEAN UNION

ANNEX B-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

1 INTRODUCTION

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

2 THE MEASURES AT ISSUE AND FACTUAL BACKGROUND

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

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

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

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

2.1 Original investigation

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

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

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

2.2 Legal challenge and amendment of the countervailing duty amounts

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

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

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

2.3 Termination of the countervailing duties

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

3 LEGAL ARGUMENT

3.1 Claims relating to the MBS programme

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.2 Claims relating to the LTF-EOP programme

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3.4.1 Legal standard under Article 12.6 of the SCM Agreement

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

3.4.2 Factual Background

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

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

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

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

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

4 CONCLUSIONS

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

ANNEX B-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

1. INTRODUCTION

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

2. LEGAL ARGUMENTS

2.1. ARTICLE 6.2 DSU / TERMS OF REFERENCE ISSUES

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

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

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

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

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

2.2. CLAIMS RELATING TO THE MBS PROGRAMME

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

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

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

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

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

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

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

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

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

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

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

2.3. CLAIMS RELATING TO THE LTF-EOP PROGRAMME

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4.1. The Commission's method in the causation analysis

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

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

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

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

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

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

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

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

2.4.2. The Commission's analysis of specific known factors

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.5.3. Pakistan was informed of the result

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

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

3. CONCLUSIONS

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

ANNEX C

ARGUMENTS OF PAKISTAN

ANNEX C-1

FIRST INTEGRATED EXECUTIVE SUMMARY OF PAKISTAN

Prepared with the cooperation of the Advisory Centre on WTO Law

1. INTRODUCTION AND OVERVIEW

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

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

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

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

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

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

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

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[1] EU's Request for a Preliminary Ruling, para. 41.
[2] Panel Report, *China – Broiler Products*, para. 7.521.
[3] Appellate Body Report, *Thailand – H-Beams*, para. 90; and Panel Report, *Thailand – H-Beams*, para. 7.36.
[4] EU's Request for a Preliminary Ruling, para. 43.
[5] EU's Request for a Preliminary Ruling, para. 43.

2.6. Thus, the EU disagrees with Pakistan on whether the "problem" described by Pakistan is capable of violating the WTO provisions cited in the panel request. This is, however, a matter to be dealt with on the merits of this dispute. In fact, in response to similar objections, the Appellate Body has stated that "the question of whether the measures identified in the panel request can violate, or cause the violation of, [a WTO] obligation [] is a substantive issue to be addressed and resolved on the merits".[6]

2.7. At any rate, the EU's objection cannot be upheld because the narrative of Pakistan's panel request clearly reflects the wording of, for instance, the *chapeau* of Article 14 of the SCM Agreement. Moreover, the EU's objection unduly parses out the distinction between substantive and procedural violations in the realm of trade remedies. The Appellate Body has consistently stated that substantive violations are to be assessed against the explanation given by the authority, and that a lack of appropriate explanation "enables panels to determine" an inconsistency with the substantive provisions.[7] For these reasons, the EU's objection cannot stand.

2.8. The EU makes three additional objections to the panel request. In response, first, Articles 10, 19.1 and 32 of the SCM Agreement were explicitly referred to in the panel request. Second, even though Article 32 has been referred to generally, the narrative in the panel request makes clear that Pakistan referred to the first paragraph only. Pakistan fails to see how the EU was somehow prevented from understanding that Pakistan was referring to Article 32.1. Third, even if Article 1.1(b) of the SCM Agreement was not explicitly mentioned in the panel request, a violation of this provision follows automatically from a violation of Article 1.1(a)(1)(ii), given that revenue forgone or not collected is tantamount to providing a benefit and no separate analysis of a benefit is thereby required.

2.9. Finally, the EU has also argued that Pakistan's claim under Article 12.6 is not properly specified because Pakistan did not identify which of the two options for disclosing verification results the EU chose. This assertion is illogical. Pakistan argues that the EU adopted neither of the two alternative means of disclosure under Article 12.6. Moreover, at the time of drafting the panel request, Pakistan could not have known which of the two permissible alternative approaches the EU would argue it adopted during the investigation.

3. PAKISTAN'S CLAIM CONCERNING THE MANUFACTURING BOND SCHEME (MBS)

3.1 Introduction

3.1. The EU acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), 10, 19.1, 32.1 and Annexes I(i), II(II) as a whole, II(II)(1) and II(II)(2) of the SCM Agreement, as well as Article VI:3 of the GATT 1991. The core of the issue is that the EU incorrectly determined that a subsidy existed in the form of the totality of the duties drawn back/remitted, rather than only the excess drawback/remission, if any. Moreover, in reaching that incorrect subsidy determination, the EU failed to observe the prescribed analytical process set out in Annexes II and III of the SCM Agreement and violated a number of other related requirements enshrined in the above-mentioned provisions.

3.2 A duty drawback scheme gives rise to a subsidy only if there is an excess drawback

3.2. A subsidy under a duty drawback/remission scheme within the meaning of Footnote 1 and Annex I(i) to the SCM Agreement can exist only if there is an excess drawback or remission. As a matter of legal principle, under the SCM Agreement, the totality of the duties drawn back is never the subsidy. For instance, Footnote 1 of the SCM Agreement states that duties drawn-back or remitted not in excess are deemed not to be a subsidy. However, under the EU's reading, Footnote 1 is a conditional exception (a "carve-out") to the otherwise applicable rules of the SCM Agreement and this exception may or may not apply, depending on whether the duty-drawback regime of the exporting Member satisfies certain conditions set out in Annexes II and III.

[6] Appellate Body Report, *Australia – Apples*, paras. 423-425.
[7] Appellate Body Report, *US – Steel Safeguards*, paras. 301-303.

3.3. This is demonstrably incorrect. Footnote 1, together with the Ad Note Article XVI of the GATT 1994, Annex I(i), and Annexes II and III, reflect a special rule applicable to duty drawback systems. This rule stipulates that only the excess drawback can constitute a subsidy. There are no other (default) rules applicable to duty drawback schemes. The principle that only the excess drawback or remission can be a subsidy is also explicitly set out in Annex I(g) and I(h), which like Annex I(i) relate to *indirect* taxes or charges. In contrast, Annex I(e), which relates to *direct* charges, considers any exemption or remission as a subsidy.

3.3 Footnote 1 is not a conditional carve-out and the EU's reading of the "in accordance with" introductory clause is nonsensical

3.4. The EU is incorrect in reading the "In accordance with" introductory clause under Footnote 1 as a condition for the applicability of the remainder of the footnote. The EU would have the Panel read the clause as "If the facts are in accordance with … ". However, the "[i]n accordance with" phrase does not express any conditionality, but instead clarifies that the provisions listed therein (the Ad Note Article XVI, and Annexes I through III) reflect the same cardinal and decades-old principle as the second part of Footnote 1, that is, that only an excess drawback or remission can be a subsidy. The correct reading of the words "in accordance with" in Footnote 1 is therefore "as stated in", "as stipulated in", "in harmony with", "as provided in".

3.5. In this regard, the grammar and syntax of Footnote 1 are similar to, for instance, Article 19.2 of the DSU, Article 4.1(b) of the Agreement on Safeguards and numerous other provisions in the covered agreements. If these provisions were given the reading proposed by the EU for Footnote 1 – that of a condition for the application of the rest of the provision – they would become entirely nonsensical. Moreover, the ordinary meaning of the words "in accordance with" is not to create a condition, as the EU's interpretation would require. When the drafters wished to create a conditionality, and make the applicability of a provision dependent on compliance with another provision, they used words or phrasing such as "if", "when", "provided that", "unless that", etc. This can be seen, for instance, in Article 1.2 of the SCM Agreement, Article 2.9 of the TBT Agreement or other provisions throughout the covered agreements.

3.4 The drafting history confirms Pakistan's reading of Footnote 1

3.6. The drafting history of the SCM Agreement during the Uruguay Round confirms Pakistan's reading of the phrase "in accordance with". As late as 1990, the draft text of the SCM Agreement contained an introductory ("In accordance with") clause that referred only to the Ad Note to Article XVI, and not also to Annexes I to III. Because the text of the Ad Note is identical to the second clause of the Footnote, the words "in accordance with" must have the meaning argued by Pakistan, namely, "as stated in", "as stipulated in", "in harmony with", "as provided in".

3.7. In the final version of the SCM Agreement, the drafters chose to include also Annexes I through III in the "in accordance with" clause. Thus, the drafters obviously must have considered that the reference to Annexes I through III fitted within the existing meaning, structure and thrust of the sentence, which defined the subsidy as the excess remission or drawback only. The drafters cannot have intended to change fundamentally, at the last minute, a clear definition found in GATT/WTO law since the 1950s, by creating conditions for the applicability of that definition.

3.5 The EU's reading of footnote 1 contains additional logical problems

3.8. The EU's reading of Footnote 1 also creates several logical problems. First, Annexes II and III apply *only in a countervailing duty investigation*. It is therefore not clear how the EU's logic would apply when a *direct challenge* is brought against a subsidy in a WTO dispute under Article 3 of the SCM Agreement, and when no prior CVD investigation has taken place. Second, Annexes II and III contain *obligations on an investigating authority* to adopt a certain analytical approach, in a certain sequence. If the investigating authority fails to comply with these requirements, the exporting Member and its companies would then suffer the adverse consequences. Third, it is not clear how a WTO panel, in a direct WTO challenge against a subsidy, could comply with a definitional provision such as Annex I(i), as a condition for applying another definitional provision.

3.6 Pakistan was not required to make its claim under Article 1.1(b) or 14 of the SCM Agreement

3.9. The EU also argues that Pakistan accepts that a financial contribution existed and that it takes issue only with the Commission calculation of the amount of the subsidy. This, in the EU's view means that Pakistan should have brought its claim under the provisions relevant for benefit, that is, Articles 1.1(b) and 14 of the SCM Agreement.

3.10. The EU's assertions are without merit. A subsidy consists of a financial contribution and a benefit element. These two elements are separate and must not be confused. In the case of duty drawback systems, determining the existence of an excess drawback is part of the definition of a financial contribution. Footnote 1, one the key provisions in this dispute, is attached to Article 1.1(a)(1)(ii), which is concerned with the determination of the financial contribution. For some subsidies, such as grants or government revenue foregone, identifying the financial contribution, for all practical purposes, has the effect of quantifying the benefit also, and relevant WTO caselaw confirms this.[8] However, this does not undermine the conceptual distinction between the two elements. Pakistan's case rests primarily on the issue of identifying the financial contribution.

3.7 There is no basis for the EU's argument that the investigating authority is entitled to assume that the entirety of the duty remission is a subsidy

3.7.1 Introduction

3.11. The EU relies on a range of arguments to argue that an investigating authority has discretion to "assume" that the entirety of the drawn-back duties constitute the excess amount.[9] This discretion would be triggered by a determination that the exporting Member's monitoring mechanism is not adequate, and when no additional investigation by the exporting Member has been undertaken.

3.12. However, in this case, the Commission failed to provide the Government of Pakistan with an opportunity to conduct that further examination. The absence of the allegedly required information is therefore the EU's own responsibility. Second, even if no additional investigation was conducted, there was nevertheless record evidence on which the Commission could have relied to examine the existence and amount of any excess. Third, all provisions at issue make clear that, even where a monitoring system is considered inadequate, the resulting subsidy can only be the amount of any excess remission. Nothing in these provisions suggests that *all amounts* remitted (including those that are clearly not in excess) may be treated as a financial contribution.

3.7.1 The EU has failed to provide Pakistan with the opportunity to conduct the "further examination"

3.13. The EU claims the right to "assume"[10] that the entirety of refunded duties constitute a subsidy, in part because there was "no reliable information provided by [Pakistan] about the actual amounts of imported materials incorporated into the exported products".[11] However, the investigating authority must provide a meaningful opportunity for the exporting Member to conduct the "further examination", which comes only after the monitoring mechanism has been found to be inadequate.

3.14. It is common sense that the exporting Member cannot conduct this investigation *before* it has been apprised of the ruling of the investigating authority about the monitoring mechanism. Similarly, an investigating authority cannot determine *at the same time* that the verification system is insufficient and that the exporting Member has failed to conduct the "further examination". Finally, the exporting Member requires at least *some time* to conduct that examination and subsequently communicate the results to the investigating authority.

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[8] Panel Report, *US – Aircraft*, paras. 7.115 – 7.167; Panel Report, *US – FSC (21.5),* paras. 8.3 – 8.43; Appellate Body Report, *US – FSC (21.5)*, para. 106.

[9] EU's first written submission, paras. 91 and 92.

[10] EU's first written submission, paras. 91 and 92.

[11] EU's first written submission, para. 98.

3.15. In this case, the EU made a simultaneous finding, in its Preliminary Determination, that the monitoring mechanism was inadequate and that Pakistan "had failed" to conduct the further examination. An investigating authority that was genuinely open to seeing the exporting Member conduct the "further examination", and was open to relying on the results, would not have used the language used by the Commission. Therefore, faced with the Commission's determination and tis failure to ask Pakistan to conduct an examination, Pakistan could reasonably conclude only that there was no scope for any such "further examination", because the EU was simply not interested in the results. This is confirmed by the subsequent parts of the Determination, in which the Commission refers only to its finding that the monitoring mechanism was not adequate, not to any failure of Pakistan to follow up. These statements reveal, in essence, that the EU considered the mandated "further examination" as a dispensable and ultimately not relevant part of the investigation. In these circumstances, the Commission's reference to Pakistan's alleged failure to conduct the "further examination" appears at most to pay lip service to the legal text, rather than being a proper application of the analytical steps of Annexes II and III.

3.16. In any event, the Commission was also obliged to inform the exporter of: the type of information the investigating authority would accept as output of the "further examination"; the form and format in which the results of the "further examination" had to be reported; the required procedural steps taken during the "further examination" and any required communication with the investigating authority prior to the conclusion of the "further examination"; and the time frame for the further examination and the deadline by which the exporting Member was required to report to the investigating authority the results of the "further examination". This obligation is analogous to that in Article 12.1 of the SCM Agreement, which requires an investigating authority to "give notice" to "[i]nterested Members and all interested parties" "of the information which the authorities require".

3.7.2 Following the procedures of Annexes II and III does not entitle the investigating authority to disregard the investigation record

3.17. The EU also argues that Annexes II and III provide for certain investigative steps, but that they do not address "how" an analysis of the excess should be undertaken.[12] The EU also argues that Annexes II and III do not address the consequences of the various intermediate conclusions that an investigating authority might reach under these procedures. In the EU's apparent view, these perceived "gaps" under Annexes II and III entitle the investigating authority to "assume" that the entire refunded amount, rather than just the excess, amounts to a subsidy.

3.18. There is no basis for this view. First, as Pakistan has demonstrated, whatever the outcomes of the prescribed analytical steps under Annexes II and III, the underlying legal principle remains that only the excess remission or drawback can be a subsidy. Second, Pakistan does not agree with the EU's reading of certain parts of Annexes II and III. By way of example, contrary to the EU's assertions, if a monitoring mechanism is found effectively to apply, a presumption exists that no subsidy exists even under Annex II, which is less explicit on this particular point than Annex III.

3.19. Third, nothing in Annexes II and III relieves the investigating authority of its obligation to actually analyse the data before it or to explain why the data is considered unreliable. Rather than making "assumptions" without any basis on record evidence, the authority must base its decision on any other available record evidence, or third-source information. The investigating authority can address any data deficiencies in the same manner as it would for any other subsidy in a countervailing duty investigation, including by relying on facts available.[13]

3.20. Annexes II and III provide for *additional* rules that apply together with the normal rules and principles. This cumulative application of legal provisions is one of the cardinal rules of WTO law.[14] Hence, application of Annexes II and III does not mean that other rules cease to apply.

3.21. Finally, the investigation concerns an exporter, and not the government; and any CVD action is imposed on the exporter, and not the government. The investigating authority cannot equate misgivings about a government's documents or actions with misgivings about an exporter's

[12] EU's first written submission, paras. 72 and 74.
[13] Appellate Body, *Mexico – Anti-Dumping Measures on Rice*, paras. 290 - 295.
[14] See, for instance, Appellate Body Report, *Korea – Dairy*, para. 74. See also Panel Report, *Indonesia – Autos*, para. 14.56.

data. The authority cannot "punish" an exporter for any real or perceived flaws in the government's regulatory system or the government's actions in the investigation.

3.7.3 Record evidence does not suddenly become unreliable because the investigating authority has determined that the monitoring mechanism is not adequate

3.22. The EU also appears to believe that, when the investigating authority finds that the monitoring mechanism is not adequate, all the remaining information on the record, from whatever source, is no longer reliable. But that cannot be correct. The monitoring mechanism under a duty drawback scheme relates to how a government operates an overarching system that applies to multiple companies. It is separate from the data and financial records of individual companies that operate under that regime. The drafters of the SCM Agreement also saw these two as separate, since both Annex II and III envisage a "further examination" on the basis of "actual inputs"[15] or "actual transactions involved".[16] In this investigation, the use of the "input/output" ratio in the context of the duty drawback scheme – the main reason why the Commission considered the MBS monitoring mechanism unsatisfactory – says nothing about how the company in its own records tracks its actual stocks, the quantities produced and exported, and the prices of its inputs.

3.23. In certain prior investigations in which it found that a monitoring mechanism did not exist or was inadequate, however, the Commission went on to find that the company was able to demonstrate that no excess remission had occurred.[17] Moreover, in this case, the Commission continued to rely extensively on information and data provided by the company, despite its misgivings about the government's monitoring mechanism. The Commission relied, for instance, on the volume and value of PTA imports imported by Novatex into the MBS, as well as the volume and value of Novatex' exports out of the MBS. Furthermore, the Commission conducted a parallel anti-dumping investigation on the same product. Both preliminary AD and CVD determinations were published on the same day. In the dumping determination, the Commission relied on a broad range of Novatex's data, including cost of production data that tracked separate raw input for domestic and for export production that could have been used in determining whether an excess existed.

3.7.4 There was extensive record evidence that the Commission could have relied on in order to estimate any alleged excess remission

3.24. Even though the Commission did not properly investigate, there was record evidence on which the Commission could have relied to estimate any alleged excess remission. Contrary to what the EU claims, Pakistan's arguments on this point do not mean that Pakistan admits that there was in fact an actual excess, within the meaning of Footnote 1 and Annex I(i).

3.25. Finally, the evidence suggests that it was highly unlikely that all of the duties remitted were an "excess". Novatex made substantial exports during the PoI, implying that, at the very least, a very high proportion of the imported inputs were actually exported. They must have been incorporated into the final exported product. Consequently, the EU could – if at all – countervail only a (small) proportion of the refunded/drawn-back duties as a subsidy.[18]

3.26. Contrary to what the EU argues, there is not a shred of evidence that Novatex diverted duty-free (MBS) imported PTA into the domestic market. Indeed, Novatex was legally precluded from doing so, unless it paid the import duty. The Commission's determination speaks a different language, in that it reflects acceptance of the fact that imported inputs were used for production for export. The Commission's criticism of the MBS revolves largely around the input/output ratio.

3.27. Moreover, the Commission had before it extensive evidence that showed how Novatex traced raw inputs throughout its production chain. Specifically, in response to the Commission's third deficiency letter[19], Novatex filed over 1,000 pages of documentation relating to the MBS, for two sample months in the PoI selected by the Commission. This included examples of the type of

[15] Annex II(II)(2).
[16] Annex III(II)(3).
[17] Commission Regulation (EC) No 1411/2002 of 29 July 2002 and Commission Decision No 284/2000/ECSC of 4 February 2000.
[18] Pakistan's first written submission, paras. 5.47 – 5.48.
[19] Exhibit PAK-20.

documentation that Novatex presented to Pakistani customs upon the exportation of PET, in order to claim the release of securities posted on imports of raw materials.[20] These documents link the final exported PET to the imported raw materials, including PTA, consumed in the production of the exported PET. The Commission never mentioned, let alone analysed, that evidence. An investigating authority cannot expressly request such extensive highly relevant information and then simply act as if that evidence were never part of the investigation record.

3.28. In addition, there was substantial evidence on the record to confirm whether an excess remission was taking place. For instance, the company traced its actual consumption data and, on its own initiative, periodically reported any differences to the input/output ratio-based consumption data to the Pakistani authorities. The Commission explicitly acknowledged this practice by the company in its Determination. Novatex conducted a similar exercise for the Commission during the investigation, by presenting it with its actual consumption data for the period of investigation. This data showed a deviation of 0.71% and 1.16%, respectively, for the two key raw materials.[21] Although this difference was only temporary and would have been later accounted for (and therefore was not a real "excess"), the Commission could have used this figure to estimate the amount of any perceived excess. The Commission could have estimated that the drawback was 1%, rather than 100% under its unsupported "assumption". This would have meant a subsidization margin (from the MBS programme) of 0.0384%, rather than 2.57%. Instead, the Commission simply ignored the data.[22]

3.29. Pakistan also pointed to other evidence, such as data from a pre-PoI analytical exercise through which Novatex's input/output ratio was revised and adjusted. The relevant data pointed to a difference, again, in the range of 1-2% of an excess (rather than the 100% assumed by the Commission), which would have yielded a subsidization margin of well below 0.1%, instead of the 2.57% calculated by the Commission.

3.8 Conclusion and request for findings

3.30. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraphs 5.133 to 5.135 of Pakistan's first written submission.[23]

4. PAKISTAN'S CLAIM CONCERNING THE LTF-EOP PROGRAMME

4.1. The EU violated Articles 1.1(b), the chapeau of Article 14, Article 10, 14(b), 19.1, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it applied a single (and ill-suited) commercial interest rate benchmark to Novatex's multi-tiered LTF-EOP loan, because it failed to explain the application of the methods enshrined in its domestic law and because it failed to analyse whether a comparable commercial loan existed in order to calculate the amount of the subsidy.

4.1 The structure of the LTF-EOP loan

4.2. The basic structure of the LTF-EOP loan was as follows. In 2005, Novatex obtained a loan from a consortium of five Pakistani banks. Disbursement of the principal took place in tranches. When a particular tranche was drawn down, the interest rate set by the Pakistani Government for that year got "locked in" for that particular tranche, for the remainder of the duration of the loan. Hence, even if the interest rate increased or decreased in subsequent years, this change would affect only the tranches drawn down in each subsequent year. Tranches drawn down in previous years remained subject to the interest rate prevailing at the time of draw-down of each tranche.

4.3. The loan agreement was executed on 9 June 2005, and the funds became effectively available on 16 June 2005 (the "Facility Effective Date"). At least half of the total authorized amount of **[***]** rupees was to be drawn down within **[***]** months of the Facility Effective Date,

[20] Novatex' Response to the Commission's Third Deficiency Letter, dated 10 December 2009. Exhibit PAK-51.
[21] Pakistan's first written submission, para. 5.110.
[22] See Exhibit PAK-11.
[23] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

and the rest within **[***]** months of the Facility Effective Date. The **[***]**-month deadline was extended several times due to unforeseen circumstances, such that Novatex made its last draw-downs during the PoI.

4.4. The principal repayment terms were "up to seven and a half years (90 months)", to be made in "up to twelve consecutive, equal, semi-annual instalments", with an 18-month grace period before the first repayment of principal. The vast majority (over 90%) of funds outstanding during the PoI had been drawn down in years prior to the PoI, in periods when the commercial interest rate was significantly lower than the commercial interest rate during the PoI.

4.5. In its Questionnaire response, Novatex reported to the Commission all of the amounts outstanding during the PoI, that is, amounts drawn down prior to the PoI as well as amounts drawn down during the PoI.

4.2 The EU's changing position on the monetary amounts countervailed wholly undermines its credibility on this issue

4.6. During these proceedings, the Commission has changed its description of how it understood the facts during the investigation. In its first written submission, the Commission stated emphatically that it countervailed only the amounts drawn down **during** the PoI, to the exclusion of amounts drawn down **prior to** the PoI. The EU continued to make these assertions in its Opening Statement at the Panel meeting.[24] These assertions are demonstrably incorrect, as the spreadsheets used included amounts drawn down prior to and during the PoI. The Commission was thus under a mistaken impression as to what exactly it had calculated.

4.7. In a complete reversal of its previous argument, the EU in its oral responses to the Panel's questions at the meeting began to claim that it knew all along that the spreadsheet contained all amounts outstanding during the PoI, including drawdowns prior to the PoI. In Pakistan's view, this change in the EU's factual description affects the credibility of all of the EU's arguments on this issue.

4.3 The Commission countervailed the entire amount outstanding during the PoI, not only the amounts drawn down during the PoI

4.8. Pakistan explained in detail that the loan amounts listed by Novatex in its Questionnaire Response, separately for each of the banks involved in the LTF-EOP loan, were the total amounts outstanding during the PoI. Novatex had been requested to inform the Commission about the loan amounts that it "used" during the PoI. In Pakistan's view, this language can only be read as including amounts drawn down prior to the PoI. The term "use" in Pakistan's view clearly includes all amounts from which the company was drawing some benefit during the PoI, which includes amounts drawn down prior to the PoI, but not yet repaid prior to the PoI.

4.9. The "Opening" amount in each of the bank-specific worksheets show the total cumulative amount drawn down prior to the PoI. This is obvious not only from the ordinary meaning of the term "Opening" (balance), which a sophisticated investigating authority such as the EU Commission must have understood. These figures also match the "closing" amounts for each of those banks in Novatex' financial statements, which the Commission had itself requested Novatex to file. Moreover, other columns in the spreadsheets make clear that movements in principal (drawdowns or repayments) were marked in an altogether different column. All these facts meant that the Commission either should have known that the amounts indicated all prior draw-downs or at the very least could not have assumed that the amounts had all been drawn down during the PoI, without asking Novatex at least some relevant questions. Indeed, whenever the Commission applied its mind to any issue, it had no difficulties asking additional questions to Novatex.

4.4 The Commission was not entitled to apply the same interest rate for all outstanding amounts

4.10. In a reversal of its previous arguments, the EU now accepts that the Commission was aware that the reported amounts reflected the total amounts outstanding during the PoI, and not only amounts drawn down during the PoI. However, the EU now argues that it was entitled to apply one

[24] See for instance EU's opening statement at the first panel hearing, paras. 29 and 30.

single interest rate to these entire outstanding amounts, even though the majority of the funds - the tranches drawn-down prior to the PoI – were subject to interest rates locked in in previous years.

4.11. This is entirely incorrect. The EU is asking the Panel for license to ignore the most fundamental difference between the terms of loans, whether they have a fixed interest rate or a variable interest rate. Novatex's loan is a bundle of fixed-rate tranches and had to be treated as such. Thus, the Commission was required to identify the commercial interest rate benchmark for a particular year and use it to calculate the amount of the subsidy with respect to the tranches drawn down during that year. However, the Commission could not use, for instance, the commercial interest rate from 2008 in calculations for amounts drawn down during 2007. For amounts drawn down during 2007, the Commission was required to use a commercial interest rate from 2007.

4.12. If the Commission's position were to prevail, investigating authorities could start treating any fixed-term loan as a subsidy, not because it was granted at a preferential interest rate at the time of disbursement, but rather only because, in a subsequent year, the commercial interest rate happened to change. This cannot be correct. An investigating authority must respect the basic terms and conditions of the subsidized loan when identifying a commercial interest rate benchmark. Distinguishing between a fixed-rate and variable-rate loan is one of the most fundamental terms and conditions, and an investigating authority cannot be permitted to ignore it.

4.5 The Commission is incorrect in arguing that Novatex's loan was not a loan, but a line of credit

4.13. The Commission argues that it determined that Novatex's loan was not a standard loan, but rather a line of credit. This finding, in the Commission's view, justifies the application of a single commercial interest rate benchmark from the PoI, rather than multiple interest rate benchmarks that would respect the fact that different parts of Novatex's loan were drawn down in different years.

4.14. The EU is incorrect in its characterization of Novatex's loan. Pakistan is not aware that the explanation in the Commission's Determination contains a finding on this issue, nor did the Commission explain in any way to the investigated company that the Commission's subsidy calculation methodology would depend on this distinction. Thus, the EU's arguments on this point appear to be an *ex post* rationalization.

4.15. In any event, Novatex's loan is not a line of credit, in the sense that the company – as the EU incorrectly insinuates – had the right to draw down any amount at any time. The initial terms and credits made clear that 50% of the principal had to be drawn down within 9 months, and the totality of the principal had to be drawn down within the first 11 months of the entry into force of the loan agreement. Each drawdown had to be repaid within 7.5 years. Pakistan fails to see how this kind of arrangement could be equated to, for instance, a revolving line of credit, where withdrawals and repayments could be made at any time at the discretion of the borrower. The subsequent extensions of the draw-down period came about due to unforeseen circumstances. In any event, the Commission never investigated this point and never asked Novatex any questions on this topic, even though as a diligent authority that had studied the terms and conditions of the agreement, it would have been aware of the extensions of the strict draw-down deadlines.

4.16. In any event, Pakistan is not aware that the term line of credit is a term of art for purposes of CVD investigations that would enable an investigating authority to ignore the terms and conditions of the loan agreement/arrangement, especially that the interest rate was locked in for a fixed term, and to proceed to apply an interest rate that does not mirror the structure of the loan agreement/arrangement. Put differently, even if the Commission were correct that the loan agreement could be characterized as a line of credit, this does not mean that the Commission could apply the PoI commercial interest rate to tranches drawn down in previous years, for which the locked-in interest rate is the rate applicable in the year of draw-down.

4.6 The Commission failed to explain the applied methodology in the light of its own domestic law

4.17. The Commission's internal rules (the so-called "Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations") require the Commission to undertake a series of analytical steps when calculating the benefit on a subsidized loan. These Guidelines are modelled on Article 14 of the SCM Agreement. However, none of these steps is discernible in any way in the Commission's Determination. Therefore, the Commission failed to provide the explanation required by the chapeau of Article 14.

4.18. First, the Commission made no effort to identify a comparable commercial loan. The Commission failed to mention, let alone to analyse, the fact that Novatex proposed several comparable commercial loans. The Commission also made no effort to identify the interest normally payable on that loan. Nor did the Commission attempt to identify the interest payable on a comparable loan to companies in a similar financial situation in the same sector of the economy or to identify the interest payable on a comparable loan to companies in any sector of the economy. Instead, without any explanation, the Commission used the so-called Karachi Interbank Offered Rate (KIBOR) that the Commission itself identified on the internet. The KIBOR is an average of several lending rates in effect in the relevant period for loans of one day, one week, one month, one year, two years, and three years' duration. The Commission failed to explain why this rate would be appropriate for a loan with a tenor of 7.5 years for every tranche from the date of its draw-down.

4.19. The Commission also failed to reflect in its analysis the particular multi-tranche structure of the loan at issue by applying a single rate to all of the outstanding amounts, rather than differentiating between the sub-amounts depending on when they were drawn down.

4.7 The Commission acted inconsistently with Article 14(b) because it failed to identify, nor did it attempt to identify, a comparable commercial loan as benchmark for its benefit calculations analysis

4.20. Article 14(b) instructs the investigating authority to undertake a "progressive search" to identify a comparable commercial loan, so as to identify the proper benchmark, for an allegedly subsidized loan.[25] The Commission failed to conduct such a progressive search. It failed to make any effort to identify a comparable commercial loan; it failed to acknowledge that Novatex submitted a number of commercial loans it had itself concluded, by way of identifying the proper commercial interest rate benchmark, much less explained why it did not use these loans. All of the EU's statements on this point before the Panel are impermissible ex post rationalizations.

4.21. The Commission also violated Article 14(b) because it applied the KIBOR, which is a blend of interest rates for tenors of up to 3 years, which is much shorter than the 7.5 years under Novatex's LTF-EOP loans. The Commission failed to explain why, these differences notwithstanding, the KIBOR was not only an appropriate interest rate benchmark, but also was better than any other commercial interest rate benchmark available to the Commission.

4.22. With respect to the EU's procedural objection that the requirement to "explain" is contained only in the chapeau of Article 14(b), the requirement to provide a reasoned and adequate explanation permeates most of the substantive disciplines of the SCM Agreement. This explanation is the vehicle by which an investigating authority demonstrates compliance with its substantive obligations, including that under Article 14(b). In the absence of any explanation of, for instance, how the authority identified, or sought to identify a comparable commercial loan, there is no basis for a WTO panel to find that the authority acted consistently with its obligations.

4.8 Conclusion and request for findings

4.23. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraph 6.101 of Pakistan's first written submission.[26]

[25] Appellate Body Report, *US – AD/CVD (China)*, para. 486.
[26] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

5. THE COMMISSION'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLE 15.5 OF THE SCM AGREEMENT

5.1. Pakistan submits that the analysis of the existence of a "causal link" between the subject imports and the alleged injury to the domestic industry is inconsistent with Article 15.5 of the SCM Agreement. Pakistan's allegations are two-fold in this respect.

5.1 The Commission's approach to causation is inconsistent with Article 15.5 of the SCM Agreement

5.1.1 The Commission's finding of a causal link conflated the distinct analytical steps in Article 15

5.2. The Commission's causation analysis conflated the distinct analytical steps that an investigating authority is required to follow under Article 15. In this respect, the Appellate Body has observed that there is a "logical progression" in paragraphs 2, 4 and 5 of Article 15.[27] Article 15.2 enquires into the effects of the subject imports on the prices of the domestic product, notably whether such effects take the form of significant price undercutting, price depression or price suppression. Article 15.4 requires an assessment of the relationship between the subject imports and the state of the domestic industry. Finally, and importantly, Article 15.5 requires an enquiry into the relationship between the subject imports and the injury to the domestic industry.

5.3. In the challenged Determinations, the Commission found, as an initial matter, that the volumes of the subject imports had increased over the PoI[28], and that the subject imports had undercut the prices of the EU producers.[29] Moreover, the Commission found that certain indicators of the domestic industry's performance showed a modest decline, while others showed a deterioration.[30] Turning to its causation analysis, the Commission recalled its finding that the subject imports had undercut the prices of the EU producers. On that basis, alone, the Commission found that "a causal link exists between those imports and the Union industry's injury".[31] Finally, the Commission assessed whether the other known factors were capable of "breaking the causal link" previously found.[32]

5.4. The Commission's causation analysis thus conflated the "logical progression" set out in Articles 15.2, 15.4 and 15.5. Particularly, the Commission assumed that its finding of the effects of the subject imports on the prices of the domestic product (price undercutting) constituted, without more, a causal link between the subject imports and the injury. By so doing, the Commission conflated the analysis required under Article 15.2 with that required under Article 15.5.

5.5. Pakistan recalls the Appellate Body's understanding of the "logical progression" set out in Article 15 of the SCM Agreement to the effect that the outcome of the analyses under Articles 15.2 and 15.4 are not dispositive, but rather "form the basis", of the subsequent causation analysis under Article 15.5.[33] In other words, the findings under Articles 15.2 and 15.4 do not automatically lead to the conclusion that there exists a causal link between the subject imports and the injury to the domestic industry within the meaning of Article 15.5 of the SCM Agreement. Rather, under Article 15.5, an investigating authority is required to assess whether, through the effects of the subsidies (the effects previously found under both Articles 15.2 and 15.4), the subject imports are causing injury.

5.6. As shown below, by conflating the distinct analytical steps in Article 15, the Commission prejudged its causation analysis.

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[27] Appellate Body Report, *China – GOES*, para. 128.
[28] Preliminary Determination, recital 211. Exhibit PAK-1.
[29] Preliminary Determination, recital 217. Exhibit PAK-1.
[30] Preliminary Determination, recital 239. Exhibit PAK-1.
[31] Preliminary Determination, recital 245. Exhibit PAK-1.
[32] Preliminary Determination, recitals 246-261. Exhibit PAK-1.
[33] Appellate Body Report, *China – GOES*, para. 149.

5.1.2 The Commission's finding of a "causal link" prior to assessing the effects of "other known factors" is inconsistent with Article 15.5

5.7. The Appellate Body has laid out a three-step analysis of causation. First, an investigating authority must ensure that "the injurious effects caused to the domestic industry by increased imports are distinguished from the injurious effects caused by other factors".[34] In "separating and distinguishing"[35] the effects of these other factors from those of the subject imports, an investigating authority must provide a "meaningful explanation of the nature and extent of the injurious effects".[36] Second, once the effects of all factors, including those of the subject imports, are separated and distinguished, an investigating authority must "attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports".[37] Third, an investigating authority must determine, based on the proper attribution of the injury, whether "a causal link" exists between the subject imports and the injury to the domestic industry—that is, "a genuine and substantial relationship of cause and effect between these two elements".[38]

5.8. The Commission's approach to finding, first, a "causal link" between the subject imports and the alleged injury, and then ascertaining whether other factors could "break the causal link" is inconsistent with Article 15.5 and with the three-step causation analysis laid out by the Appellate Body. The Commission should in the first place have separated and distinguished the injurious effects of all the relevant factors including those of the subject imports. Having properly separated and distinguished all such effects, the Commission should then have attributed to the subject imports the actual injury that they were causing. This analysis is what Pakistan called a "simultaneous analysis" in response to Panel Question No. 73. Finally, only once the Commission had attributed the actual injury caused by the subject imports, would it have been in a position to determine whether a "causal relationship" between these elements existed. Importantly, a finding of causation required ascertaining, not any causal link however remote or insignificant, but a "genuine and substantial relationship of cause and effect" between the subject imports and the alleged injury to the domestic industry.[39]

5.9. Accordingly, the finding of a "causal link" should have been made at the third step of the causation analysis. Yet, by making this finding upfront, the Commission prejudged its later non-attribution analysis. By the time it turned to the analysis of the other factors, the Commission had already found a "causal link" by virtue of its earlier finding of significant price undercutting. Pakistan questions how under this approach the Commission could ever find that an "other factor" could undo its earlier finding of the existence of a causal link between the subject imports and the injury to the domestic industry.

5.2 The Commission's analysis of "other factors" is inconsistent with Article 15.5

5.10. The methodological flaws explained above prejudged, and rendered meaningless, the Commission's non-attribution analysis of at least four "other factors".

5.11. First, in the case of the imports from Korea, the Commission merely pointed out that "it cannot be excluded" that these imports "contributed to the injury suffered by the Union industry". The words "cannot be excluded" amount to no more than a speculative statement made without any effort to probe the nature and extent of the contribution of those factors to the alleged injury. Instead, the Commission should have assessed the injurious effects of the price undercutting of Korean imports. In principle, there is no reason to exclude the proposition that this price undercutting had a downward effect on domestic prices similar to that of the effects of the subject imports, all the more so when (1) both imports from Korea and the subject imports had similar market shares during the PoI; and (2) imports from Korea grew by almost 150% during the same period. If the Commission believed that the price undercutting by the Korean imports did not have the same injurious effects as the price undercutting by the subject imports, it should have found so explicitly, following an appropriate analysis and explanation. Accordingly, the Commission's

[34] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[35] Appellate Body Reports, *US – Hot – Rolled Steel*, para. 228; and *US – Wheat Gluten*, para. 68.
[36] Appellate Body Reports, *US – Pipe Line*, para. 215; and *US – Lamb Safeguard*, para. 186.
[37] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[38] Appellate Body Report, *US – Wheat Gluten*, para. 69.
[39] Appellate Body Report, *US – Wheat Gluten*, para. 69.

analysis of the imports from Korea cannot constitute a "meaningful explanation of the nature and extent of [its] injurious effects".

5.12. Second, in the case of the 2008 economic downturn, the Commission stated that, regardless of its nature and extent, any injury it caused was in any event "exacerbated by the increased subsidised imports from the countries concerned, which undercut the prices of the Union industry".[40] Thus, the Commission based its dismissal of this factor on its previous price undercutting finding. In other words, regardless of the magnitude of the injurious effects of the 2008 economic downturn on the domestic industry, this factor could never have been sufficient to break the causal link, as the Commission had already found the alleged price undercutting of the subject imports. Importantly, The Commission failed to explain what "exacerbate" means and the extent to which the subject imports "exacerbated" the negative effects of the 2008 economic downturn. This question remained unresolved because the Commission did not separate and distinguish the injurious effects of the 2008 economic downturn from those of the subject imports. Moreover, the Commission partly dismissed the 2008 economic downturn on the grounds that the EU industry had suffered injury prior to 2008. This statement was unsubstantiated because its injury finding was by reference to the period 2008-June 2009. Thus, the Commission's statement that the EU industry was suffering injury prior to 2008 lacked supporting analysis. It is all the more puzzling since a large number of injury indicators actually showed a positive performance up to 2008 and it was only then that they began to languish.

5.13. Third, in the case of low prices of crude oil, the Commission again recognized the (at least potential) negative effects of this factor on the domestic industry. However, it did not separate and distinguish these effects, or provide a "meaningful explanation of the nature and extent of [its] injurious effects".[41] It merely dismissed this "other factor" by recalling its previous finding that the subject imports undercut the prices of the EU producers. The Commission thus failed to ascertain the extent of the impact of this factor, if any, on the domestic industry. In fact, it recognized that prices of PET depend to some extent on prices of crude oil, but failed to address the argument that low prices of PET in the EU were a function of the low prices of crude oil. Rather, it gave an off-the-point explanation about the volatility of world prices and how this cannot explain "why imports of PET were subsidised and therefore undercut the Union producers' prices".[42]

5.14. Fourth, the Commission should have addressed the reasons why a part of the EU industry, which did not cooperate, improved their performance from 2008 to the end of the PoI. This period coincided with the contraction of global demand and with the expansion of the EU demand. It is at least intriguing that the subject imports only affected one part of the EU industry (those supporting the investigation), whereas the other part of the EU industry (those not supporting the investigation) showed a positive performance from 2008 to the end of the PoI. The Commission failed to explain why a certain part of the overall domestic industry was able to recover market share and sales from 2008 to the end of the PoI, while another part of the same domestic industry experienced injury during the same period.

5.3 Conclusion and request for findings

5.15. For the reasons set out above, Pakistan requests the Panel to find that the causation analysis in the challenged Determinations is inconsistent with Article 15.5 of the SCM Agreement.

6. PAKISTAN'S CLAIM UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE RESULTS OF THE VERIFICATION VISIT

6.1. Pakistan claims that the European Union has acted inconsistently with its obligation under Article 12.6 of the SCM Agreement, because it failed either to make the results of the verification visit to Novatex available or to provide disclosure thereof as part of the disclosure of essential facts under Article 12.8.

6.2. Article 12.6 requires the investigating authority to provide the companies subject to a verification visit with the "results" of these verification visits. It provides, in relevant part:

[40] Preliminary Determination, recital 254. Exhibit PAK-1.
[41] Appellate Body Report, *US – Lamb*, para. 186.
[42] Definitive Determination, recital 118. Exhibit PAK-2.

> Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

6.3. Article 12.6 thus requires the investigating authority to disclose the "results" of the verification visits, by means of one or other of two different avenues: the investigating authority may either (i) "make available" a separate report containing the results of the verification visits, or (ii) "provide disclosure" of the results as part of the disclosure of the essential facts under Article 12.8. Regardless of which avenue is chosen, however, the investigating authority must disclose the same thing – the "results" of the verification visit.

6.4. The term "result" is defined, in relevant part, as "a thing that is caused or produced by something else; a consequence or outcome".[43] In *US – Steel Safeguards*, the Appellate Body has stated that the term "result" is to be read as "an effect, issue, or outcome from some action, process or design".[44] The "result" of any given activity is closely linked to the conduct, content and the purpose of that activity. Thus, the "result" of a verification visit is closely linked to the conduct, content and purpose of that verification visit. Annex VI(7) of the SCM Agreement defines the purpose of a verification visit as to "verify the information provided or to obtain further details". As noted, the purpose, conduct, and content of a verification visit is to verify the information provided by the investigated firms in their questionnaire responses and to enable the investigating authority to obtain, and the investigated exporter to provide, additional information or explanations regarding the exporter's submitted questionnaire responses.

6.5. In the normal course of events, during a verification visit, an investigating authority will request the investigated company to provide access to its accounting system and other records, including all of the worksheets and source documents used to prepare the questionnaire responses. During the verification visits, the investigating authority normally reviews these documents and cross-checks them against the data provided in the questionnaire responses. The investigating authority also uses the opportunity to clarify any areas of doubt regarding the contents of the questionnaire responses. As part of this process, the investigating authority may, for instance, request access to an entire category of documents or data or focus on certain specific documents.

6.6. It is important to note here that the investigating authority normally does not take any final decisions during the verification as to how the verification will affect the investigating authority's determinations of subsidization and injury in the investigation until they have returned home and had the opportunity to consult with their superiors and other colleagues on any issues arising during the verification. The verification is, therefore, in essence a fact-gathering and a fact-checking exercise. The results of this exercise, therefore, relate to what facts have been gathered and checked and, by implication, what facts have not been gathered or checked. However, the results of the verification do not include any subsequent determinations by the investigating authority as to how to use the results of the verification, and other items in the record, to calculate subsidization margins for the exporter in accordance with the SCM Agreement. The subsequent decision how to determine the subsidization margins is the result of the *investigation*, not the result of the *verification*.

6.7. Thus, the *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter, but that the investigating authority did not immediately consider relevant to its final determination. This is precisely the conclusion reached by the panel in *Korea – Certain Paper*, which stated that "results" of verifications include "adequate information regarding *all aspects of the verification*, including a description of the *information which was not verified* as well as of *information which was verified successfully*".[45]

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[43] Oxford English Dictionary Online, available at http://oxforddictionaries.com/definition/english/result?q=result

[44] Appellate Body Report, *US – Steel Safeguards*, para. 315. (original emphasis)

[45] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)

6.8. A clear reporting of the results of the verification is essential to enable the exporter to structure its case for the rest of the investigation. Pursuant to Annex II(3) of the Anti-Dumping Agreement, which applies by analogy under the SCM Agreement[46], all information that is "verifiable" and submitted in timely and usable fashion, must be taken into account by the investigating authority. The investigating authority is "not entitled to disregard the submitted information and use information from another source to make the determination."[47] This means that any information that is verifiable – which includes information that has actually been verified by the investigating authority – must be taken into consideration by the investigating authority.

6.9. In addition, the ability of domestic courts (using their own standard of review) and of WTO panels (using the standard of review pursuant to Article 11 of the DSU) to review the determinations of investigating authorities depends on the existence of a proper disclosure of the "results" of the verification visit under Article 12.6 of the SCM Agreement. A failure to disclose the results of the verification, or an incomplete disclosure, will thus significantly undermine a domestic court's or WTO panel's ability to examine, in a "critical and searching" fashion, the establishment and evaluation of the facts by the investigating authority.

6.10. In the investigation at issue, the Commission failed to disclose the results of the verification visit. To the extent it made an effort to comply with the requirements of Article 12.6, in this case the Commission opted to disclose the results of the verification via the disclosure of essential facts under Article 12.8. However, the Commission's disclosures contain no information of what occurred during the verification visit and which topics, other than the MBS, the Commission discussed with the investigated company, even though the Commission had provided the exporter with an extensive list of topics to be verified. However, there is no information whatsoever about verification on any of these issues other than the Manufacturing Bond Scheme. Hence, the EU has failed to provide any information on the results of its verification concerning all these other issues.

6.11. Beyond the list of exhibits collected at verification, the EU disclosed no information on the conduct of the verification visit, or any corrections or rectification of the information contained in the Questionnaire Response. The EU has not disclosed which particular aspect of these documents was discussed, for what purpose, or whether the Commission considered the data and information contained in this document to be verified or verifiable.

6.12. In its submissions, the EU attempts to conflate the concept of the results of the verification with the results of the investigation. In its opening statement at the first meeting of the Panel with the parties, for example, the EU explained that the results of the verification were the facts that the investigating authority had decided to include in the essential facts disclosure as those on which it intended to base its final determination.

6.13. This approach would deprive exporters of their rights and ability to defend themselves. Under this approach, the results of the verification would be only those the investigating authority *subjectively* considers to be important or to support its final determination. The results of the verification would not include outcomes of the verification to which the exporter may attach greater importance than the investigating authority or outcomes on which the exporter thinks the investigating authority *should* base its final determination. This would undermine the exporter's ability to obtain review of the investigating authority's determination in domestic courts and the exporting Member's ability to obtain review from a WTO panel.

6.14. The results of the verification and the results of the verification are *not* the same thing. The SCM Agreement imposes separate legal obligations governing each of these concepts. Effect must be given to these textual differences in the references to the results of the verification and the disclosure of the essential facts.

6.15. Moreover, these are also different concepts from a practical point of view. Pakistan has also provided to the Panel examples from both this particular investigation and a generic or hypothetical cases illustrating how the EU's conflation of the results of the verification with the results of the investigation would negatively affect the ability of interested parties to defend their interests, both in this investigation and more generally. These examples make clear that disclosure

[46] See Appellate Body Report, *Mexico – Rice*, paras. 290 – 295.
[47] Panel Report, *EC – Salmon (Norway)*, para. 7.383 (see also Ibid., para. 7.347). Panel Report, *US – Steel Plate*, para. 7.57.

of the essential facts of the investigation does not, in itself, satisfy the EU's obligation to provide a clear and objective disclosure of the results of the verification.

6.2 Conclusion and request for findings

6.16. For the reasons set out above, Pakistan requests the Panel to find that the EU's failure to disclose the results of the verification visit is inconsistent with Article 12.6 of the SCM Agreement.

ANNEX C-2

SECOND INTEGRATED EXECUTIVE SUMMARY OF PAKISTAN

1 INTRODUCTION AND OVERVIEW

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

1.2. This executive summary summarizes Pakistan's submissions since the filing of Pakistan's responses to the Panel's first set of questions, that is, Pakistan's second written submission, Pakistan's opening and closing statements at the second meeting of the panel with the parties, Pakistan's responses to the Panel's second set of questions, and Pakistan's comments on the EU's responses to the Panel's second set of questions.

2 PAKISTAN'S ARGUMENTS UNDER ARTICLE 6.2 OF THE DSU

2.1. The EU has "confirm[ed] that it no longer objects to Pakistan's claim under the chapeau of Article 14 of the SCM Agreement with respect to the LTF-EOP programme". The EU nevertheless claims that, to the extent that Pakistan argues that "the determinations at issue fail to properly explain e.g. its reasons for not using certain private loan information", the claim "would pertain to the obligations in Article 22 of the SCM Agreement, which Pakistan has decided not to pursue in this case".[1] However, this reflects a disagreement that boils down to the applicability of Article 14 of the SCM Agreement. This is an issue that goes to the merits and not to the Panel's jurisdiction.

2.2. The EU also continues to insist that the reference to Article VI of the GATT 1994 in Pakistan's panel request is not sufficiently precise so as to be a reference to Article VI:3. However, based on the description of Pakistan's claim in the panel request, the only conceivably relevant sub-paragraph of Article VI could be sub-paragraph 3. Pakistan has also listed a large number of disputes in which a reference to Article VI of the GATT 1994 was deemed to be sufficient as a reference to Article VI:3. None of these disputes has been addressed by the EU.

2.3. Next, contrary to the EU's arguments, Pakistan's reference to Article 32 of the SCM Agreement can only be read as a reference to Article 32.1. The EU argues that Pakistan's claim could also have fallen under Articles 32.5 and 32.6, because "Pakistan could have claimed that the Commission applied a method that was not foreseen in its municipal law and, thus, its administrative procedures were not in accordance with the SCM Agreement".[2] But the narrative description in the panel request makes clear that Pakistan did not make that claim. Rather, the explanation is clear that Pakistan takes issue with the "specific action against a subsidy of another Member" within the meaning of Article 32.1 of the SCM Agreement. Consequently, the reference to Article 32 unequivocally means Article 32.1 of the SCM Agreement. Upholding the EU's objection would erroneously elevate form over substance.

2.4. Finally, the EU continues to argue that Pakistan's claim under Article 12.6 was not sufficiently clear, because Pakistan did not indicate which of the two options under Article 12.6 Pakistan considers the EU did not satisfy. The EU continues to argue that Article 12.6 contains two separate obligations, which are "alternatives", and that Pakistan was aware that the EU would argue that it opted for the second "alternative" (disclosure of the verification results together with the essential facts disclosure), but failed to specify this "alternative" in the panel request.

2.5. The EU misunderstands the structure of Article 12.6. Article 12.6 contains two alternative "pathways" for achieving compliance with an overarching obligation. These two pathways are not two "separate obligations", because neither has to be complied with if the other has been complied with. Moreover, from a practical perspective, a complainant cannot know in advance which of the

[1] EU's response to Panel Question No. 13, para. 5.
[2] EU's response to Panel Question No. 15(b) para. 10.

two options the defendant will argue it took and complied with; indeed, the defendant may argue, as the EU has overtime done in this case, that it used *both* options. The EU now argues that disclosure of verification results occurred not only through the "essential facts" disclosure, but also at or after verification in the form of the list of documents collected during verification, that is, outside the context of the essential facts disclosure.

2.6. The EU's view is also untenable because the complainant may also have incomplete information, since disclosure of verification results may occur through confidential, company-specific documents. In any event, under the EU's approach, a complainant would argue that both alleged "obligations" have been violated, which would effectively be the same as Pakistan has done in this case, and would not provide any greater level of information to the defendant.

3 PAKISTAN'S CLAIM CONCERNING THE MANUFACTURING BOND SCHEME (MBS)

3.1 Introduction

3.1. The EU acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), 3.1(a), 10, 19.1, 32.1 and Annexes I(i), II(II) as a whole, II(II)(1) and II(II)(2) of the SCM Agreement, as well as Article VI:3 of the GATT 1994. The core of the issue is that the EU incorrectly determined that a subsidy existed in the form of the totality of the duties drawn back/remitted, rather than only the excess drawback/remission, if any. Moreover, in reaching that incorrect determination, the EU failed to observe the prescribed analytical process set out in Annexes II and III of the SCM Agreement and violated a number of other related requirements enshrined in the above-mentioned provisions.

3.2 A duty drawback scheme gives rise to a subsidy only if there is an excess drawback

3.2. The EU continues to deny that a subsidy under a duty drawback/remission scheme within the meaning of Footnote 1 and Annex I(i) to the SCM Agreement can exist only if there is an excess drawback or remission. As before, the EU argues that Footnote 1 describes a "situation" – that is, a situation in which a duty drawback system and the monitoring system under that system is to the liking of an investigating authority – and if that situation is found to exist, only an excess drawback will constitute a subsidy. If the monitoring system does not please the investigating authority, the alleged "carve-out" does not apply. In contrast, Pakistan continues to argue that this is not what Article 1 and footnote of the SCM Agreement state. The limitation of a financial contribution to the "excess" only, as opposed to the entirety of the drawn-back duties, is not conditional on anything. Rather, it is the definition of this type of subsidy.

3.3. The EU views the limitation of a financial contribution/subsidy to the *excess* drawback (as opposed to the *totality* of the drawback) as some kind of a privilege for the exporting Member that must be earned. The exporting Member enjoys the privilege only if the exporting government's monitoring system is to the satisfaction of the investigating authority. As the key element of this argument, the EU points to the "[i]n accordance with" phrase in Footnote 1 and argues that this clause is to be read, effectively, as "*[i]f the duty drawback scheme is in accordance with*". Only if that is the case should the remainder of the Footnote 1 apply. Otherwise, the totality of the drawn-back duties constitutes the financial contribution.

3.4. Pakistan has provided extensive arguments, including numerous references to other WTO provisions, to refute the EU's position. Pakistan has referred to no less than 15 provisions throughout the covered agreements that demonstrate that the EU's reading of Footnote 1 is incorrect. These include provisions that use an "in accordance with" clause like that in Footnote 1 that have a meaning different from the meaning postulated by the EU. Moreover, the provisions listed by Pakistan demonstrate that, where the drafters wished to express the kind of reading proposed by the EU, they used different formulations. The Panel has explicitly asked the EU to respond to these arguments. However, the EU has not addressed a single one of the provisions listed by Pakistan. Instead, the EU merely asserts that Pakistan draws an "artificial distinction" between provisions that contain a condition and other types of provisions. What the EU labels "artificial distinction[s]" are, however, essential steps in the process of treaty interpretation under the Vienna Convention on the Law of Treaties.

3.5. Pakistan notes that the EU has also so far not provided any response to Pakistan's argument that Annexes II and III apply only in CVD investigations and not in a direct subsidy challenge in the WTO; that Annexes II and III contain obligations on the investigating authority, compliance with which the exporting Member has no control of; and that Footnote 1 refers, in part, to definitional provisions. It is not clear how a WTO panel can be said to act consistently or inconsistently with definitional provisions. The EU's reading of Footnote 1 is convoluted and leads to logical impasses.

3.6. The EU's interpretation of the footnote also continues to ignore the fundamental historical context of the principle that only the "excess" drawback can constitute a subsidy, including the Report of the Working Party on Border Tax Adjustments. This Report and the Illustrative List of Export subsidies, which dates from the 1960s, reveal that the limitation of a subsidy to an "excess" drawback is a long-standing, decades-old principle in GATT law, as well as in the OECD where the original Illustrative List was developed. The "excess" principle is enshrined in several other items of the Illustrative List that address so-called indirect taxes or charges – that is, charges imposed on products. These charges have historically been considered as eligible for border tax adjustment. This is in contrast to so-called direct charges/taxes (e.g. income taxes or social security charges), which are not eligible for border tax adjustment. For direct charges, any exemption, remission or deferral are considered a subsidy – not just the excess drawback, as shown by Annex I(e). These principles were never intended to be subject to qualifications of the type the EU now postulates.

3.7. Moreover, the EU's argument would create an inexplicable asymmetry in how the SCM Agreement treats (finished) products and the inputs for those products. Annex I(g) refers to indirect tax drawbacks or remissions on final products, whereas Annexes I(h) and I(i) refer to indirect taxes or tariffs on inputs. However, for final products, there are no additional "guidelines" like in Annexes II and III, presumably because determining the excess remission on those products is a less complex determination. The EU's arguments would mean that the definition of a subsidy as consisting of the excess would apply only *sometimes* for subsidies under Annex I(h) and I(i) (namely, in situations of compliance with Annexes II and III), but would apply *always* for subsidies under Annex I(g), because there is no Annex II and III to comply with. There is no logical reason for this difference, nor anything in the text or negotiating history of the Ad Note, the documents concerning border-tax adjustments, or Footnote 1 to justify such a difference.

3.3 Pakistan was correct in bringing a challenge to a financial contribution determination and not a benefit determination

3.8. The EU continues to assert that Pakistan should have brought its claim under provisions pertaining to the benefit calculation. The EU argues that "the excess remission … amounts to a financial contribution [under] Article 1.1(a)(1)(ii)", that "[t]his element is easy to be found" and is binary (yes/no),[3] whereas the determination of benefit involves determining a "quantum".

3.9. Pakistan does not doubt that the EU found it "easy" in this investigation to determine the existence of a financial contribution, because it conveniently resorted to an unsupported "assumption" rather than examining the extensive relevant record evidence before it. However, an investigating authority that actually follows the SCM Agreement will not necessarily find it "easy" to determine the existence of an excess. Similarly, it is not clear what the EU means by saying that the question behind financial contribution "is not about its *quantum*, but about their (yes or no) existence". That is not correct, because some financial contributions require the determination of a "quantum". For instance, a grant of $ 0 is not a financial contribution; a grant of $ 1'000 is. Similarly, it may not be true for other types of financial contribution, such as government revenue foregone or a duty drawback scheme. This principle applies also in the context of duty drawback schemes, where only the excess remission is a financial contribution. Here, an investigating authority must compare the total amount of duties (definitively) drawn back with the amount that the exporter was entitled to receive. The investigating authority must necessarily come up with a "quantum" to determine the existence of a financial contribution.

3.10. As Pakistan has already explained, this means that indeed for some forms of financial contributions, the benefit analysis is for all practical purposes a foregone conclusion. A grant of $ 1'000 will virtually always result in a benefit that corresponds precisely to that amount.

[3] EU's response to Panel Question No. 30, para. 24.

3.4 The EU failed to examine relevant evidence, such as the documents contained in Exhibit PAK-58

3.11. The EU also continues to argue that it was entitled to resort to an unsubstantiated assumption or conclusion that the entirety of duties was an excess remission because there was no reliable record evidence. However, in this investigation, the Commission had before it extensive evidence submitted by Novatex in direct response to the Commission's explicit requests. This evidence pertained to how Novatex traces its raw materials through the production process and how individual specific export consignments are linked to specific import consignments of raw materials; and how Novatex traces its actual consumption data, in order to perform annual reconciliation exercises, to adjust for any difference between the "standard" input-output ratio and actual output. Moreover, in the parallel anti-dumping investigation, the Commission also had before it cost-accounting data that tracked separately raw inputs for, respectively, the production of export products and the production of products for the domestic market.

3.12. There is no discussion whatsoever of this evidence in the Commission's determination. Whatever the substantive merits of this evidence, the Commission could not ignore it without providing a corresponding "reasoned and adequate" explanation. The entirety of the EU's arguments on these matters before this Panel is inadmissible *ex post facto* rationalisations.

3.13. The EU also continues to point to the misgivings expressed by the investigating authority about the use of the input/output ratio used by Novatex and the GoP as part of the MBS management, to argue that the use of this ratio also means Novatex was unable to trace its imported inputs throughout the production chain. That is incorrect, because one does not exclude the other. The input/output ratio is very close to the actual consumption, and the variance between the actual input/output ratio and the approved (or "standard") analysis card ratio was between 1% and 2%. Pakistan has made this point repeatedly, but the EU has never responded.

3.14. The practical reason, in layman's terms, why a producer such as Novatex might use a standard input/output ratio is that the production process at issue involves pouring bags of various raw materials into a melting pot, processing them, and pouring the end product out of the melting pot. It is expected that there will be some wastage in the pouring, in the pot in terms of burn off or residue, and spillage when pouring the final product out of the pot. All of these residues, spillages, and waste will be very small. It would not make business sense to measure them on a bag-by-bag basis. This is precisely why businesses and governments (including the GOP) use input/output ratios. In these circumstances, the Commission should have relied on Novatex's actual production records and accounting records and systems, to determine whether an excess remission occurred. The Commission could have easily done this based on the ample information provided by Novatex to the Commission in respect of actual consumption ratios that were achieved.

3.15. Moreover, the use of standard costs/costing ratios that are converted to actual costs by means of a variance is a standard accounting practice with which the Commission is very familiar. Pakistan has provided two examples of EU antidumping determinations in which normal value was constructed on the basis of standard costs. In contrast, in this case, the Commission failed to review or consider the same type of information.

3.5 The EU failed to apply facts available

3.16. The EU was not entitled to reject the manifold record evidence that was presented by Novatex and that would have enabled the Commission to approximate the excess drawback. Even if the EU had been entitled to do so, it should have provided an explanation for why the information was deemed to be unreliable.

3.17. An investigating authority in a trade remedy investigation, including in a CVD investigation, is required to make its determinations on the basis of record evidence. The record evidence consists primarily of data and information submitted by the investigated companies and other interested parties, as well as of data and information collected by the investigating authority itself. The rules of evidence, including on the conditions under which an investigating authority may depart from evidence submitted by an investigated party and instead use other evidence, are practically the same under the Anti-Dumping Agreement and under the SCM Agreement. The

Anti-Dumping Agreement contains detailed rules in Annex II concerning the use of facts available. The Appellate Body has found that these rules in Annex II of the Anti-Dumping Agreement apply – by analogy – also under the SCM Agreement.

3.18. Annex II(3) of the Anti-Dumping Agreement defines the conditions under which submitted information must be taken into account. To the extent that the authority wishes to depart from the evidence submitted by an investigated company, Annex II(6) sets forth specific rules, in particular that the investigating authority inform the company and provide it with an opportunity to provide further explanations.

3.19. In this investigation, the Commission had before it extensive evidence submitted by Novatex in direct response to the Commission's explicit requests. This evidence pertained to, for instance, how Novatex traces its raw materials through the production process and how individual specific export consignments are linked to specific import consignments of raw materials; and how Novatex traces its actual consumption data, in order to perform annual reconciliation exercises, to adjust for any difference between the "standard" input-output ratio and actual output. In the parallel anti-dumping investigation, the Commission also had before it cost-accounting data that tracked separately raw inputs for, respectively, the production of export products and the production of products for the domestic market.

3.20. There is no discussion whatsoever of this evidence in the Commission's determination. There is not even an acknowledgement that this evidence had been submitted. The EU was, first and foremost, obliged to use the record evidence before it supplied by the investigated company. If the EU considered this information unreliable, it was required to explain the reasons therefor to the company, provide the company with the opportunity to provide further explanation and then make a final decision concerning that evidence. This deliberative process must be discernible from the authority's determination and explanation.

3.21. Only if the investigating authority has, in this process, properly determined that the data and information supplied by the investigated company was unreliable, can the investigating authority have recourse to facts available, e.g. second-source information. However, even then the investigating authority cannot, in principle, resort to unwarranted "assumptions" without any evidentiary support and must seek, to the greatest extent possible, to rely on *some* evidence for its determination.

3.22. In this investigation, the EU failed to explain why it could not use the information and data provided by Novatex. Even assuming that the EU would have been entitled to reject Novatex' record evidence, the EU would then have to apply the best other information available, rather than jumping to an unwarranted "assumption" that the totality of the duties constituted a subsidy.

3.6 The EU failed to provide the Government of Pakistan with an opportunity to conduct the "further examination"

3.23. An investigating authority has the obligation to structure its investigation such that there is an effective opportunity for the exporting government to conduct the "further examination". At the very minimum, the investigating authority cannot make statements – like the Commission did in this investigation – that require the exporting government to do the impossible and that effectively signal to the exporting Member that the investigating authority is not interested in any such "further examination" or the results thereof.

3.24. The Commission found that Pakistan had "failed" to conduct the "further examination", even though logically this was impossible for Pakistan to have done so prior to being informed about the Commission's decision on the monitoring mechanism. The EU now tries to imply that Pakistan should have known *before* the Provisional Determination that its monitoring mechanism would be found deficient. This argument should, of course, be rejected because it was only in the Provisional Determination that the Commission determined that the monitoring system was inadequate. The EU also repeatedly points to the Government of Pakistan's effort to convince the EU of the merits of its monitoring regime, as if that somehow proved that Pakistan was not willing to conduct the "further examination". Clearly, Pakistan would have done so had the Commission given it a proper opportunity to do so and informed it of what was needed.

3.25. An investigating authority has a duty, analogous to Article 12.1 of the SCM Agreement (and for instance Annex II(1) to the Anti-Dumping Agreement), to provide certain information to the exporting Member explaining what information is required, in which format, how the further examination was to be conducted and within which timeframe. This is because the required scope of the "further examination" will vary on a case-by-case basis. For instance, the precise scope of the investigation could depend on the precise deficiencies that have been found in the monitoring system; the authority may be required to point to precise aspects or elements of the "actual inputs" or "actual transactions" that should be examined; the exporting Member might require access to some of the confidential information that the investigated exporters have provided to the investigating authority, but that the exporting Member does not have. The investigating authority might also have to provide the relevant information to the *investigated company*. The due process rights of an investigated company – whether it is access to information, the ability to request hearings, the ability to submit evidence, etc. – must be safeguarded also in the context of the "further examination". Finally, the "further examination" might require the exporting Member to consider documents or information of the investigated company that have not been previously submitted, either with the Questionnaire Response or in subsequent stages of the investigation.

3.7 The EU's arguments about the alleged unreliability of Novatex's records and bookkeeping

3.26. The EU also continues to argue that Novatex's records and data were unreliable and therefore could be rejected whole-sale by the Commission. These arguments are an *ex post facto* explanation provided by the EU in these proceedings. The EU also appears to argue that, because it ruled that the monitoring mechanism was inadequate and unreliable, this implicitly also meant that all information and data provided by Novatex was also inadequate and unreliable. However, real or perceived deficiencies in a monitoring scheme say nothing about the reliability of a company's data and records. Moreover, the drafters of Annexes II and III clearly considered that, as a general rule, a company's records remain a reliable source of information even if a monitoring scheme is considered to be deficient. Finally, the rules on the use of facts available require a clear statement by the investigating authority to the affected company as to why information is not deemed reliable.

3.27. The Commission's refusal to engage with the evidence provided by Novatex, to analyse that evidence and – at the very least – to explain why this information could not be used or deemed reliable, is *particularly inappropriate in this particular investigation* where Novatex's data addressed the alleged problems in the monitoring system. Even assuming for a moment that the Commission's misgivings about the input/output ratio are justified, these concerns should have been addressed – at least in principle – by the record evidence regarding the company's *actual consumption data*. In any event, as demonstrated by Exhibit PAK-58, Novatex provided records showing how it could trace a given set of raw materials throughout the production chain.

3.8 Pakistan's approach to Footnote 1 and Annexes II and III does not create a risk of abuse by exporting governments nor impose an "unreasonable burden" on investigating authorities

3.28. The EU is also incorrect in arguing that its approach to Footnote 1 and Annexes I through III is the only manner to avoid abuse by exporting governments or individual companies, or that Pakistan's approach would impose an undue burden on the investigating authorities. Under Pakistan's approach, an investigating authority can always ensure that inadequately monitored duty drawback schemes do not enjoy the presumption created by Annexes II and III (namely, the presumption that an adequately monitored regime does not give rise to an excess drawback). Indeed, even upon a finding that a monitoring mechanism is adequate, an investigating authority may still proceed to examine the exporting company's records to determine whether an excess exists, as the EU itself argues. Thus, when an investigating authority finds that the monitoring mechanism is inadequate and then examines the company's own records, it is merely doing what it could/should be doing in any event. Thus, no new burden or requirement is imposed on the investigating authority.

3.29. In other words, the investigating authority is simply asked to proceed like it would in any other CVD, anti-dumping or safeguard investigation. It must base itself on record evidence provided by interested parties. Depending on the circumstances, the investigating authority may be required to become active and gather evidence on its own. Of course, in the case of duty-

drawback schemes, the authority must additionally observe the supplementary rules that the drafters chose to include in the SCM Agreement. But at the same time, the investigating authority enjoys the same rights that it has in any trade remedy investigation. It can reject evidence and data as unreliable if they so are, in accordance with the applicable rules of evidence and subject to the requirement of providing a transparent, reasoned and adequate explanation. This also means that the authority can resort to facts available, in order to remedy any data deficiencies.

3.9 Request for findings

3.30. For all of the above reasons, Pakistan requests the Panel to find that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraphs 5.133 to 5.135 of Pakistan's first written submission.[4]

4 PAKISTAN'S CLAIM CONCERNING THE LTF-EOP PROGRAMME

4.1. The EU violated Articles 1.1(b), the chapeau of Article 14, Article 10, 14(b), 19.1, and 32.1 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it applied a single (and ill-suited) commercial interest rate benchmark to Novatex's multi-tiered LTF-EOP loan, because it failed to explain the application of the methods enshrined in its domestic law and because it failed to analyse whether a comparable commercial loan existed in order to calculate the amount of the subsidy.

4.1 The structure of the LTF-EOP loan

4.2. The structure of the LTF-EOP loan is described in Pakistan's first integrated executive summary.

4.2 The EU's defence has shifted multiple times throughout these proceedings

4.3. The EU's defence against Pakistan's claim has changed several times since Pakistan filed its first written submission. At first, the EU argued that it did not countervail the entirety of the outstanding loan amounts, but rather only the amounts drawn down during the PoI. During the first panel hearing, the EU then argued that it had known all along that it had based its calculations on the full outstanding amount, that is, including pre-PoI amounts, and not only the amounts actually drawn down during the PoI. However, according to the EU, the Commission was nevertheless entitled to apply the interest rate prevailing during the PoI, because Novatex's loan was akin to a "line of credit", rather than a standard fixed rate loan. Then, in its Responses to the Panel's questions, the EU changed its arguments *again* and argued that that it considered the amounts reported by Novatex to have been exclusively amounts drawn down during the PoI. In the second panel hearing, the EU admitted that this was erroneous.

4.4. These shifts in the EU's position alone demonstrate that the EU cannot have provided a reasoned and adequate explanation for its determination. Where the respondent member is uncertain as to what its investigating authority actually did; and where a determination is so vague that it permits multiple shifting of key arguments; this cannot satisfy the requirement of a "reasoned and adequate" explanation.

4.3 It is also irrelevant whether the Commission's error was "excusable"

4.5. Contrary to what the EU has argued, and to what at least one question by the Panel suggests, it does not matter whether the Commission "should … have been reasonably expected" to understand Novatex's spreadsheet. It is abundantly clear from the evidence cited by Pakistan that the Commission committed an error, and indeed that was explicitly admitted by the EU during the second panel meeting with the parties. An error by an investigating authority that results in a violation of the covered agreements remains an error even if one were to consider that error excusable. Pakistan is not aware of any such "excusable error" doctrine that could somehow justify

[4] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

a violation of a provision of the SCM Agreement, such as Article 14(d) or Article 1, by the investigating authority.[5]

4.4 Pakistan fails to understand what the EU's labelling of the LTF-EOP loan as a "line of credit" is meant to achieve

4.6. Having admitted definitively that the Commission erred in its understanding of the facts, as reported in Novatex's spreadsheet, the EU has chosen to center its defence on the argument that Novatex's LTF-EOP loan was not a loan, but a "line of credit"; and that, therefore, the Commission was entitled to apply the KIBOR rate as a commercial interest rate benchmark from the PoI.

4.7. No matter what label the EU chooses to unilaterally apply to a financing arrangement, it must respect the basic parameters of that arrangement when identifying and applying a commercial interest rate benchmark. Any financing arrangement has to define at least three major parameters: how much, for how long, at which interest rate. Where the investigating authority is looking for a commercial benchmark interest rate, it must choose a benchmark rate that best approximates or reflects these fundamental parameters. This is also why Article 14(b) refers to a "comparable commercial loan" (underlining added). The arrangement that is chosen as a commercial benchmark must be "comparable". In this case, the evidence is clear that the interest rate for each tranche was fixed or locked in on the date on which the tranche was drawn down. Furthermore, the interest rate for each tranche was fixed on that date for the duration of the term of that tranche. It is not clear why the EU believes that simply relabelling the loan would mean that the Commission can start ignoring the basic parameters of Novatex's financing arrangement.

4.4.1 In any event, the Commission's determinations do not state that it determined that the LTF-EOP loan was a "line of credit" and there is no such concept in EU law

4.8. If, as the EU now argues, the question of whether the loan was a "line of credit" has such fundamental impact on the choice of the commercial interest rate benchmark, the Commission was required to make this point very clear to the investigated company, disclose it as part of the essential facts, and provide the company with an opportunity to make representations on this point. In response to Panel's Question 54, the EU refers to several passages in the Commission's determinations where it allegedly "specifically determine[d] that the LTF-EOP loan to Novatex was best considered a 'line of credit', rather than a traditional loan." However, none of the passages to which the EU refers even remotely resemble such a determination.

4.9. More fundamentally, simple logic suggests that the Commission did not make this determination. As the EU admits, the Commission erroneously assumed that all reported amounts were drawn down during the PoI. By definition, therefore, in its analysis during the investigation, the Commission was not concerned with any amounts drawn down pre-PoI. The issue of the alleged "line of credit" – and its alleged differences to a "standard commercial loan" – did not arise and had no reason to be on the Commission's mind. It is not surprising, therefore, that nothing even remotely related to this point, including the concept of a "line of credit", can be found in the Commission's Determination. The EU is now simply creating reasoning that cannot be found in the Determinations.

4.10. The EU's allegations about the LTF-EOP loan as a "line of credit" is belied also by the EU's own domestic law. The EU's Guidelines for the Calculation of the Amount of Subsidy in Countervailing Duty Investigations (98/C 394/04) contain a separate detailed section entitled "Loans", which provides detailed instructions for an investigating authority in identifying a comparable commercial loan. These Guidelines even contain separate criteria for "specific cases", that is, particular "loan" arrangements that warrant special attention in the identification of a commercial interest rate benchmark. There is no reference whatsoever to a "line of credit", nor is there any trace of a distinction between this alleged category of "line of credit" as compared to a "standard loan".

[5] Pakistan notes that, for instance, the "negligible error" doctrine was rejected in *Guatemala – Cement II*. Panel Report, *Guatemala – Cement II*, para. 8.22.

4.5 The EU mischaracterizes the core features of the LTF-EOP loan

4.11. The EU's characterization of the LTF-EOP arrangement also contains other significant inaccuracies. For instance, the EU argues that "Novatex could choose when to draw down money under the credit facility and could thereby also choose the applicable interest rate". The Commission also argues that the "disbursement terms were also not established in 2004 – 2005".[6] These statements are demonstrably incorrect, and contradict explicit clauses of the LTF-EOP loan. Similarly, the EU is also incorrect to state that "it [was] not possible to know *ex ante* with precision the duration of the repayment".[7] There was no doubt about the duration of the LTF-EOP arrangement. The duration of the repayment was fixed at 7.5 years, with an initial grace period of 18 months for the principal repayment (but not interest payment).

4.12. The EU's misleading description of the LTF-EOP loan – that is, as some sort of variable-rate line of credit from which Novatex could draw funds entirely at its discretion – is also contradicted by the manner in which the Government of Pakistan designed and described the LTF-EOP programme in the underlying policy documents.

4.6 The EU is incorrect about the legal standard under Article 14(b)

4.13. The EU also attempts to justify the use of a commercial interest benchmark from the PoI for all tranches under Article 14(b). Pakistan fails to see how Article 14(b) justifies the EU's approach. The EU argues, for instance, that the Commission countervailed the amount that was "effectively used" or enjoyed by Novatex in 2008-2009 and "hence, it was appropriate to also apply a benchmark for that same period".[8] This argument makes no sense. The fact that Novatex was "effectively us[ing]" funds during the PoI cannot mean that the Commission could use an interest rate from the PoI. If the EU were correct, then any not-yet-repaid fix-term loan taken in the past could be measured against today's commercial interest rate, because the money is still being "used" by the debtor.

4.14. The EU argues that "amounts under the LTF-EOP programme continued to be drawn down during the IP which further confirms the close nexus between the benchmark chosen by the Commission and the LTF-EOP programme."[9] Pakistan never disputed that the Commission could use the PoI benchmark (leaving aside Pakistan's misgivings about KIBOR) for amounts drawn down during the PoI. However, it makes no sense to use the PoI KIBOR for amounts drawn down in previous years, when a different KIBOR was applicable. As indicated in the preceding paragraph, the EU's approach would deprive the term "comparable" of any meaning.

4.15. Similarly, the EU's assertion that the LTF-EOP scheme was a "single scheme" constitutes no basis for applying a single interest rate. It is perfectly possible – as was the case here – that a "single scheme" contains multiple tranches each one of which is subject to a different interest rate from a different period. Thus, the label "single scheme" is an essentially meaningless term.

4.7 The EU misrepresents the Commission's determination of the commercial benchmark interest rate

4.16. In response to a Panel question, the EU also misrepresents several aspects related to the nature of the commercial benchmark interest rate applied by the Commission. The EU argues that this rate was the KIBOR, and that Novatex itself had suggested that the KIBOR rate be used.

4.17. First, neither Novatex nor the GOP suggested the use of this rate. The evidence cited by the EU in this regard is inapposite. Second, while "KIBOR" has been used in these proceedings as a convenient short-hand for the Commission's interest rate, and that rate is in the numerical vicinity of the KIBOR, the Commission did not apply the KIBOR. Instead, the Commission obtained the benchmark interest rate by selecting, from a wide range of choices, data from the website of the State Bank of Pakistan (SBP), made its own calculations and then applied this rate, without providing even the most basic explanation of how it had derived this benchmark interest rate. Due to their sophistication and knowledge of the SBP data, the Government of Pakistan and Novatex

[6] EU's response to Panel Question No. 55, para. 80.
[7] EU's response to Panel Question No. 55, para. 80.
[8] EU's response to Panel Question No. 55, para. 81.
[9] EU's response to Panel Question No. 55, para. 81.

were able to reverse engineer this rate and comment on it. However, an uninitiated reader would have no basis to even begin to understand how the Commission derived its benchmark interest rate.

4.8 The EU confirmed to the Panel that it failed to follow the analytical process required both by its Guidelines and by Article 14(b)

4.18. Pakistan has argued that the EU failed to explain why it rejected the loan benchmark interest rates provided by Novatex. In addition, in its responses to Panel questions 58, 59, 60 and 61, the EU has confirmed to the Panel that – once the Commission rejected Novatex's proposed commercial interest rates – it did not attempt to identify the interest normally payable on a comparable commercial loan to Novatex; and did not attempt to identify the interest payable on a commercial loan to companies in a similar financial situation in the same sector of the economy. It also did not attempt to identify the interest rate payable on a comparable loan to companies in any sector of the economy, nor did it attempt to identify a proxy that reflected the duration of the subject loan.

4.19. This amounts, in effect, to an admission that the Commission failed to comply with the chapeau of Article 14 and with Article 14(b) and the "progressive search" required by the Appellate Body under that provision.[10]

4.9 The EU's responses contain additional misrepresentations and factual inaccuracies

4.20. The EU attempts to argue, for instance, that Novatex paid the same interest on the total outstanding amount and that this somehow puts into question "the alleged separate nature of each tranche." That is incorrect. The fact that the annually-locked in interest rate happened to be similar in certain successive years does not compromise the separate nature of each tranche.

4.21. The EU also claims that that Novatex's data were not sufficiently disaggregated into the various tranches (or the tranches aggregated by years) and that the Commission therefore would have been unable, on the basis of Novatex's Questionnaire response alone, to apply multiple interest rate benchmarks and to calculate the respective subsidization amounts.[11] That is correct. In order to perform the analysis correctly, the Commission would have had to request Novatex to provide more disaggregated data. The reason why Novatex did not provide the data in that format was because the Commission's **questionnaire template did not permit it to do so** and also because Novatex could not know the analytical approach that would be ultimately adopted by the Commission. Novatex also took a view that an altogether different benchmark was appropriate. It was the responsibility of the Commission as the investigating authority, in response to the Questionnaire response, to choose the appropriate analytical approach and to request additional data from the company, if the Commission considered that it needed this additional data.

4.10 Conclusion and request for findings

4.22. For all of the above reasons, Pakistan requests that the Commission has acted inconsistently with its multilateral obligations under the SCM Agreement and the GATT 1994, as set out in detail in paragraph 6.101 of Pakistan's first written submission.[12]

5 THE COMMISSION'S CAUSATION ANALYSIS IS INCONSISTENT WITH ARTICLE 15.5 OF THE SCM AGREEMENT

5.1. The Commission's analysis of the existence of a "causal link" between the subject imports and the alleged injury to the domestic industry is inconsistent with Article 15.5 of the SCM Agreement for the following reasons.

[10] Appellate Body Report, *US – AD/CVD (China)*, para. 486.
[11] EU's response to Panel Question No. 55, para. 81.
[12] All references to Article 32 of the SCM Agreement are to be read as references to Article 32.1 of the SCM Agreement.

5.2 The Commission's "breaking the causal link" approach is inconsistent with Article 15.5 of the SCM Agreement

5.2. The Commission's "breaking the causal link" approach is inconsistent with Article 15.5 of the SCM Agreement. Pakistan submits that, as a matter of logic, the Commission could not possibly first establish a causal link (i.e. a relationship of cause and effect) between the alleged imports and the subsidized imports and subsequently find that one or more other factors "break" that causal link. If an "other factor" is capable of breaking the causal link, this causal link should never have existed in the first place. In response to this argument, the EU referred to four anti-dumping determinations where the Commission made a negative finding of causation. In none of these four determinations did the Commission make a finding at the outset of its causation analysis that a causal link existed and then examine whether other factors "broke" that link. By not making that finding at the start in those determinations, the Commission was able to assess properly the injurious effects of all the relevant factors on the domestic industry, including those of the subject imports, and then determine that the subject imports "in isolation" could not have caused material injury.[13] Thus, the EU has not provided any instances on which to base its assertion that the Commission can find that a causal link between investigated imports and alleged injury existed but that the injury caused by other factors "broke" that link.

5.3. The Commission's "breaking the causal link" approach effectively vitiated the non-attribution analysis in the challenged Determinations. The causal link found at the start of its causation analysis was not "preliminary", as the EU suggests.[14] Rather, this causal link was exactly the same link that was used to dismiss the significance of the non-attribution factors that the Commission purportedly analysed. This explains why, even if the Commission accepted that at least three other factors might have been causing injury, it ultimately rejected them because they did not "break" the causal link. Had the Commission applied the correct legal standard, it would have examined whether the injurious effects of these other factors were such as to render any link between the subject imports and the alleged injury too distant, remote or insubstantial.

5.4. For these reasons, the EU is incorrect that there is similarity between the Commission's "breaking the causal link" approach and Pakistan's understanding of the proper legal standard in Article 15.5.[15] Under the "breaking the causal link" approach, the Commission failed to analyse the injurious effects of the subject imports and the other known factors *independently* and *objectively*. Rather, under this approach, the Commission merely assessed these other factors against the previously found causal link between the subject imports and the alleged injury. This approach effectively pre-judges the issue of non-attribution: it appears to be impossible as a matter of logic to "break" a causal link once it has been established. This is also evident from the challenged Determinations, where the Commission identified certain injurious effects of at least three non-attribution factors but dismissed them on the grounds that these factors could not "break the causal link". Because the "breaking the causal link" approach vitiated the analysis of the non-attribution factors, the Commission's causation analysis is inconsistent with Article 15.5 of the SCM Agreement.

5.3 The Commission merely *assumed* the existence of a causal link based on its finding of increased imports which undercut prices

5.5. The Commission simply *assumed* the existence of a causal link based on its previous finding that the investigated imports were undercutting the prices of the domestic product. The Commission found its causal link based on nothing more than a "coincidence in time" between increased imports, which allegedly undercut the price of the domestic product, and the deterioration in the condition of the domestic industry.[16]

5.6. The Commission should have gone beyond the mere identification of a *coincidence* and provided some analysis of *causation.* By assuming the existence of a causal link based merely on a temporal coincidence, the Commission failed to conduct the analysis required under Article 15.5

[13] Commission Decision 2008/227/EC. Exhibit PAK-63; Commission Decision, 2007/214/EC, para. 138. Exhibit PAK-64. Commission Decision 1999/55/EC. Exhibit PAK-65; and Commission Decision 2005/289/EC. Exhibit PAK-67.
[14] EU's second written submission, paras. 179, 180 and 182.
[15] EU's second written submission, para. 164.
[16] Preliminary Determination, para. 262. Exhibit PAK-1.

and footnote 47 of the SCM Agreement of how the subject imports had a bearing on the negative performance of five economic factors identified by the Commission.[17]

5.7. Also, as matter of fact, the Commission's finding of a temporal coincidence was incomplete and one-sided. The Commission found that five industry indicators showed negative performance: production, sales, profitability, return on investment and cash flow.[18] All five indicators showed positive or neutral performance from 2006 to 2007, and deteriorated *only* in 2008 and the first semester of 2009 (i.e., towards end of the PoI).[19] However, this is also the same time period in which other known factors had their greatest effects on the condition of the domestic industry: the 2008 economic downturn broke out only in 2008; imports from Korea increased by 76% in 2008 and during the first semester of 2009; and non-cooperating EU producers were able to regain significant sales and market share in the first semester of 2009.

5.8. There is, therefore, the same temporal coincidence between the other known factors and the alleged injury. This coincidence was just as compelling as the coincidence between the subject imports and the alleged injury. The Commission, however, improperly attributed greater value to the "coincidence" between the subject imports and the injury than to the other coincidence between several non-attribution factors and the same injury, without providing a reasoned and adequate explanation of why it did so.

5.4 The Commission's analysis of "other factors" is inconsistent with Article 15.5

5.9. The Commission's analysis of other factors was also inconsistent with Article 15.5. First, in the case of the imports from Korea, the Commission merely stated that "it cannot be excluded" that these imports "contributed to the injury suffered by the Union industry". The words "cannot be excluded" admit that this factor may have been a cause of injury. However, the Commission made no effort to probe the nature and extent of the contribution of those factors to the alleged injury. In principle, this price undercutting could have had a similar or even greater downward effect on domestic prices than the subject imports, given that (1) both imports from Korea and the subject imports had similar market shares during the PoI; and (2) imports from Korea grew by almost 150% during the same period. In these circumstances, the Commission's cursory analysis of the imports from Korea cannot constitute a "meaningful explanation of the nature and extent of [its] injurious effects".

5.10. Second, the Commission stated that any injury caused by the 2008 economic downturn it caused was in any event "exacerbated by the increased subsidised imports from the countries concerned, which undercut the prices of the Union industry".[20] In other words, regardless of the magnitude of the injurious effects of the 2008 economic downturn, this factor could never have broken the causal link, as the Commission had already found price undercutting by the subject imports. Importantly, the Commission failed to explain what "exacerbate" means and the extent to which the subject imports "exacerbated" the negative effects of the 2008 economic downturn. This question remained unresolved because the Commission did not separate and distinguish the injurious effects of the 2008 economic downturn from those of the subject imports. Moreover, the Commission partly dismissed the relevance of the 2008 economic downturn on the grounds that the EU industry had suffered injury prior to 2008. However, the Commission's statement that the EU industry was suffering injury prior to 2008 lacked supporting analysis. In addition, the Commission's statement is all the more puzzling since a large number of injury indicators actually showed a positive performance up to 2008 and it was only then that they began to languish.

5.11. Third, the Commission again recognized the (at least potential) negative effects of the low prices of crude oil on the domestic industry. However, it did not separate and distinguish these effects, or provide a "meaningful explanation of the nature and extent of [its] injurious effects".[21] It merely dismissed this "other factor" by recalling its previous finding that the subject imports undercut the prices of the EU producers. The Commission thus failed to ascertain the extent of the impact of this factor, if any, on the domestic industry. In fact, it recognized that prices of PET

[17] Preliminary Determination, paras. 238-239. Exhibit PAK-1. (production, sales, return on investment, profitability and cash flow)
[18] Preliminary Determination, paras. 238-239. Exhibit PAK-1.
[19] Preliminary Determination, paras. 220, 223, 233 and 235. Exhibit PAK-1.
[20] Preliminary Determination, recital 254. Exhibit PAK-1.
[21] Appellate Body Report, *US – Lamb*, para. 186.

depend to some extent on prices of crude oil, but failed to address the argument that low prices of PET in the EU were a function of the low prices of crude oil. Rather, it gave an off-the-point explanation about the volatility of world prices and how this cannot explain "why imports of PET were subsidised and therefore undercut the Union producers' prices".[22] Of course, the question is not whether the low prices explain why imports of PET might have been subsidized, but rather whether they explain the alleged injury to the domestic industry.

5.12. Fourth, the Commission should have addressed the reasons why a part of the EU industry, which did not cooperate, improved its performance from 2008 to the end of the PoI. This period coincided with the contraction of global demand and with the expansion of demand in the EU market. It is intriguing to say the least that the subject imports had negative effects on only one part of the EU industry (those supporting the investigation), while the other part of the EU industry (those not supporting the investigation) showed a positive performance from 2008 to the end of the PoI. Moreover, the EU's assertion that the Commission found that the non-cooperating EU producers did not cause injury is troublesome in view of the facts before it.[23] Specifically, the market share of the non-cooperating EU producers was significantly higher than that of the subject imports during the PoI (e.g., 16% and 10.2%, respectively, at the end of the PoI). Pakistan thus fails to understand why the increasing production and market share of the subject imports caused injury, while the more significant increasing production and market share of the non-cooperating EU producers did not. Because the Commission failed properly to assess the injurious effects of the competition from these non-cooperating EU producers, the Commission's causation analysis is inconsistent with Article 15.5 of the SCM Agreement.

5.5 Conclusion and request for findings

5.13. For the reasons set out above, Pakistan requests the Panel to find that the causation analysis in the challenged Determinations is inconsistent with Article 15.5 of the SCM Agreement.

6 PAKISTAN'S CLAIM UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE RESULTS OF THE VERIFICATION VISIT

6.1. Pakistan continues to claim that the European Union has acted inconsistently with its obligation under Article 12.6 of the SCM Agreement, because it failed either to make the results of the verification visit to Novatex available or to provide disclosure thereof as part of the disclosure of essential facts under Article 12.8.

6.2. The *results* of a verification visit are reflected in the investigating authority's choices as to (i) which information to look at; (ii) why it looks at that information and (iii) whether it is satisfied during the verification that a given specific piece of information or document was successfully verified. However, the results of the verification may also include information that was provided and substantiated by the exporter, but that the investigating authority did not immediately consider relevant to its final determination.[24] A clear reporting of the results of the verification is essential to enable the exporter to structure its case for the rest of the investigation. Pursuant to Annex II(3) of the Anti-Dumping Agreement, which applies by analogy under the SCM Agreement[25], all information that is "verifiable" and submitted in timely and usable fashion, must be taken into account by the investigating authority. The investigating authority is "not entitled to disregard the submitted information and use information from another source to make the determination."[26] In addition, the ability of domestic courts (using their own standard of review) and of WTO panels (using the standard of review pursuant to Article 11 of the DSU) to review the determinations of investigating authorities depends on the existence of a proper disclosure of the "results" of the verification visit under Article 12.6 of the SCM Agreement.

6.3. In the investigation at issue, the Commission failed to disclose the results of the verification visit. To the extent it made an effort to comply with the requirements of Article 12.6, in this case the Commission opted to disclose the results of the verification via the disclosure of essential facts

[22] Definitive Determination, recital 118. Exhibit PAK-2.
[23] EU's response to Panel question 100, para. 33.
[24] Panel Report, *Korea – Certain Paper*, para. 7.192. (emphasis added)
[25] See Appellate Body Report, *Mexico – Rice*, paras. 290 – 295.
[26] Panel Report, *EC – Salmon (Norway)*, para. 7.383 (see also Ibid., para. 7.347). Panel Report, *US – Steel Plate*, para. 7.57.

under Article 12.8. However, the Commission's disclosures contain no information of what occurred during the verification visit and which topics, other than the MBS, the Commission discussed with the investigated company, even though the Commission had provided the exporter with an extensive list of topics to be verified. However, there is no information whatsoever about verification on any of these issues other than the Manufacturing Bond Scheme. Hence, the EU has failed to provide any information on the results of its verification concerning all these other issues.

6.4. Beyond the list of exhibits collected at verification, the EU disclosed no information on the conduct of the verification visit, or any corrections or rectification of the information contained in the Questionnaire Response. The EU has not disclosed which particular aspect of these documents was discussed, for what purpose, or whether the Commission considered the data and information contained in this document to be verified or verifiable.

6.5. In its submissions, the EU continues to attempt to conflate the concept of the results of the verification with the results of the investigation. The EU argues that the results of the verification were the facts that the investigating authority had decided to include in the essential facts disclosure as those on which it intended to base its final determination. Pakistan has explained how this approach necessarily deprives exporters of their rights and ability to defend themselves. It means that the results of the verification would be only those the investigating authority considers to be important or to support its final determination. The results of the verification would not include outcomes of the verification to which the exporter may attach greater importance than the investigating authority or outcomes on which the exporter thinks the investigating authority *should* base its final determination. In its answers to the Panel's questions, Pakistan provided examples, both specific to this investigation and generic, illustrating how the exporter's interests could be negatively affected by a failure to provide information about what happened at the verification that goes beyond the investigating authority's subsequent, subjective decision as to what evidence supports its final determination.[27]

6.6. Moreover, in its answers to the Panel's questions, the EU "takes the position that the term 'result' does not include information, for example, about whether the Commission requested additional documents, whether Novatex provided requested documents or whether the Commission asked questions during the verification visit".[28] This is an extraordinary proposition. The EU considers that its investigating authority could ask for and receive (or, indeed, not receive) key information regarding the exporter's questionnaire responses and business operations and subsequently simply ignore that fact or evidence in its final determination. This would mean, for instance, that the investigating authority could have asked for clarification in the verification that the term "Opening" balance in the spreadsheet of interest amounts paid on loans subject to the LTF-EOP programme during the PoI included principal amounts drawn down before the PoI, received that clarification, and simply ignored that fact in reporting on the results of the verification.[29]

6.7. The EU appears to acknowledge that further information about the results of the verification may be required to be provided "when such information is indispensable for interested parties to defend their interests with respect to essential facts … (e.g. in the case of the use of facts available …)".[30] There are, however, two problems with this statement. First, the same problem remains that it would be the EU, not the exporter itself, which would determine what information would be "indispensable" to the defence of the exporter's interests. There is no textual basis in Article 12.6 for the EU's position that the "results" of the verification are only those matters that the *investigating authority* considers to be relevant to the defence of the exporter's interests.

6.8. In addition, there is no reason why the logic behind requiring more information in cases involving facts available would not also apply to other situations in which the exporter might consider that additional information about the outcome of the verification might be "indispensable for interested parties to defend their interests".[31] There is no reason why more or less information should be disclosed about the outcome of the verification visit on one issue rather than the other. Certainly, there is textual basis in Article 12.6 for the EU's position that the meaning of the

[27] Pakistan's response to Panel Question No. 80, paras. 5.1 – 5.9.
[28] EU's response to Panel Question No. 84, para. 124.
[29] See, for instance, Pakistan's response to Panel Question No. 38(c), para. 278.
[30] EU's response to Panel Question No. 84, para. 121.
[31] EU's response to Panel Question No. 84, para. 121.

"results" of the verification may be the information at issue or the uses to which it may be put by the investigating authority.

6.9. In its responses to the Panel's questions, the EU refers to two "examples" of how it disclosed the results of the verification visit in the disclosure of the essential facts.[32] First, the EU refers to the statements regarding the MBS in its company-specific disclosures.[33] However, Pakistan, in its own responses to the Panel's questions, has explained how the EU's disclosure of the results of the verification visit with respect to the MBS was at best incomplete and left open important issues that affected Novatex's and Pakistan's ability to defend their interests before reviewing courts and this Panel.[34] Second, the EU refers to the fact that it disclosed "Novatex's turnover figures".[35] It is not clear how the "turnover figures" represented a sufficiently significant "result" of the verification to merit such different treatment than other data that was reviewed during the verification. If the turnover figures merited disclosure as a "results" of the verification, surely so too did the other matters to which Pakistan has referred in its answers to the Panel's questions.

6.10. The EU also overlooks that one option of disclosing the verification results is a separate report that will typically be issued well before the authority decides what the essential facts are. Choosing the option of later disclosure, when the authority has decided on what the essential facts are, cannot mean that the universe of verification results has suddenly become smaller. If this were accepted, the authority could manipulate the scope of its obligations, and the rights of companies, simply by waiting.

6.11. Another pillar of the EU's defence is the mantra that an investigating authority is not required to provide written "minutes" of the verification visit. By means of the label "minutes", the EU tries to discredit and misrepresent Pakistan's argument as requiring some sort of excessive and administratively burdensome level of detail from the investigating authority.

6.12. Under this argument, the EU would allow an investigating authority to pay lip-service to Article 12.6 with generic, boilerplate statements that in reality do not disclose anything meaningful. For the EU, stating that, for instance, "documents relating to the company's financial accounts were verified" would be enough to satisfy Article 12.6.[36] This cannot be so. The disclosed results must be sufficiently specific so that the exporter can subsequently make submissions relating to (i) what specific information or which specific document was verified, (ii) against which other document or other information the original document or information was examined, (iii) for what purpose a given document or information was considered, and (iii) which final conclusion the investigating authority drew.[37]

6.13. The EU also argues that "accuracy of the information" is not part of the results of the verification visit.[38] This is wholly untenable. The accuracy of the information and hence its reliability for use in the determinations, and the views of the authority on this point, are the very core of the verification and therefore are key to the results. This is illustrated well by the questions surrounding the LTF-EOP loan. Pakistan argues that, had the EU properly reported the results of the verification, the Panel would not be required today to seek to divine what the EU thought and how its individual investigators read and understood the term "opening" amount in the LTF-EOP spreadsheets.

6.14. Yet another line of EU arguments is that the results of the verification are a "summary of the summary of the information that was checked during the verification visit"[39]. In Pakistan's view, the word "summary" is not a particularly useful tool to gauge compliance with Article 12.6. The requirement in Article 12.6 is to disclose the "results of the verification". Thus, the word or concept of "summary" is not treaty language and is thus a potential red herring in discerning the meaning of Article 12.6, to the extent that it may divert the analysis from discerning the meaning of the treaty term "results".

[32] EU's response to Panel Question No. 84, paras. 114 – 119.
[33] EU's response to Panel Question No. 84, para. 114.
[34] Pakistan's response to Panel Question No. 80, paras. 5.4 – 5.5.
[35] EU's response to Panel Question No. 83, para. 115.
[36] See the EU's second written submission, para. 193.
[37] See for instance Pakistan's first written submission, para. 8.41, referring *inter alia* to Panel Report, *Korea – Certain Paper*, para. 7.68.
[38] EU's second written submission, para. 208.
[39] EU's opening statement at the second meeting of the Panel, para. 73.

6.15. Finally, in its answers to questions, as in its opening statement at the Panel's meeting with the parties, the EU posits the possibility that no verification visit might take place (as such visits are not required). The EU elaborates on what information might or might not have been disclosed as essential facts in the event that no verification visit had taken place and suggests that the amount of information that must be disclosed under the SCM Agreement does (or should) not vary depending on whether a verification visit has taken place.[40] However, as Pakistan explained in its own answers to the Panel's questions, there is a separate multilateral obligation to report the results of any verification visit. The obligation in Article 12.6 of the SCM Agreement cannot be rendered inutile by suggesting that it should not result in a different disclosure than if no verification visit had occurred.

6.16. With respect to the list of documents collected at the verification visit, as reflected in Exhibit EU-10, this list was not given to Novatex by the EU officials, although the documents on that list match the company-internal list of documents in the company records of the verification visit. In any event, the list does not disclose the content of the document nor the purpose for which the document was inspected and collected. The list does not even make clear whether a given document was collected as part of the CVD investigation or the parallel anti-dumping investigation.

6.17. For the reasons above, Pakistan requests the Panel to find that the EU acted inconsistently with its obligations under Article 12.6 of the SCM Agreement, by failing to disclose the results of the verification in accordance with that provision.

[40] EU's response to Panel Question No. 83, paras. 117-119.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1*

ARGUMENTS OF CHINA

THIRD PARTY ORAL STATEMENT OF CHINA

I. Introduction

1. Mr. Chairman, Members of the Panel, China welcomes this opportunity to present its views on *European Union – Countervailing Duty Measures on PET from Pakistan (DS486)*. In this session, China will only touch upon two claims by Pakistan under Article 1, Annex II (II) and Article 14 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

II. Pakistan's Claims Regarding "MBS" Duty Remission Program under Article 1 and Annex II(II) of the SCM Agreement

2. One of the core issues, for which China takes no position on the merits of the factual allegations, in this dispute is whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as an export subsidy under Article 1.1. Put it into more detail, it consists of two parts: (1) Would the lack of an effective system or procedure in the duty drawback system by the exporting Member to monitor the inputs consumed in the production of the exported product directly form the basis for a determination of existence of subsidy; and (2) assuming that a further examination regarding the actual inputs involved in determining whether an excess payment occurred has been failed to carry out, could the entire amount of import duties be treated as an export subsidy?

3. These questions should be answered under the relevant provisions of the SCM Agreement and the GATT 1994. Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement as well as the Ad Note to Article XVI of the GATT 1994 state that "a subsidy shall be deemed to exist if: … government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)", and "the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy".

4. The text itself makes it clear that only when a drawback system leads to excessive drawback could a subsidy then be deemed to exist. Despite footnote 1 refers to "In accordance with…the provision of Annexes I through III of this Agreement", the effectiveness of the duty drawback system cannot replace the criterion for deciding the existence of subsidy. According to the Annex II(II)(1) and (2) of the SCM Agreement, "Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts", and "Where… [such system or procedure] is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1". From this, the fact of non-existence effective system or procedure to monitor the inputs consumed in the production of the exported product alone is not decisive for determination of existence of an export subsidy. What the investigating authorities should do is to decide the existence of a subsidy on the ground that the criterion provided in the SCM Agreement has been met.

* The deadline for the third parties to submit their executive summaries was 7 October 2016. China did not submit an executive summary by this time. On 9 December 2016, China was informed that if China did not submit its executive summary by 16 December 2016, China's third party oral statement dated 22 September 2016 would be annexed to the Panel report as the description of China's arguments. China did not submit an executive summary by 16 December 2016. Thus, we attach China's referenced oral statement here.

5. Furthermore, even under the situation that it is determined a drawback system conveys a subsidy by reason of excess drawback of import duties on inputs consumed in the production of the exported product, it does not mean that the entirety of the duties remitted or drawn back are in "excess" and constitute a subsidy. Rather, the excess amount remitted or drawn back which reflects the subsidy provided to the recipient needs to be ascertained, to ensure that the countervailing duty levied does not excess to the amount of the subsidy found to exist. Consequently, it is suggested that the Panel should consider whether the investigating authorities' determination, that one hundred percent of drawn back of import duties constitutes a subsidy, was based on positive evidence and involved an objective examination.

III. Pakistan's Claims Regarding Its "LTF-EOP" Export Financing Program under Articles 14 of the SCM Agreement

6. Additionally, Pakistan claims that the EU acted inconsistently with Article 1.1(b), the chapeau and subsection (b) of Article 14 of the SCM Agreement in calculating the benefit under the Long-Term Financing of Export-Oriented Projects (LTF-EOP) scheme.[1] In examining whether the Commission's choice of a national interest rate as the benchmark to calculate the benefit of the LTF-EOP loan was in legal error, namely, whether that benchmark is a "comparable" commercial loan benchmark[2], it is necessary to analyze whether the Commission had considered all the relevant evidence and adequately explained the application of its own analytical method.

7. Specifically, in identifying the benefit of a preferential loan program, the approach of Articles 14(b) is a straightforward comparison of the interest paid with "the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market". Although the use of the conditional tense, "could", suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can in fact be obtained in the market[3], the Appellate Body has "observe[d] that the Panel reasoned that the identification of an appropriate benchmark under Article 14(b) can be seen as a 'series of concentric circles', where the investigating authorities should first seek commercial loans to the same borrower that are identical or nearly identical to the investigated loan. ….In the absence of an identical or nearly identical loan, an investigating authority should seek, in turn, other similar commercial loans held by the same borrower, then similar commercial loans granted to another borrower with a similar credit risk profile to the investigated borrower. ….Yet, there may be situations where the actual differences between any of the existing commercial loans and the investigated government loan are so significant that it is not realistically possible to address them through adjustments. In such situations, the Panel considered that an investigating authority should be allowed to use proxies as benchmarks."[4]

8. Thus, China does not intend to deny the discretion possessed by the investigating authority in selecting an appropriate benchmark. However, the application of the methods set out in national legislation or regulations to a situation in which the borrower has no comparable commercial loans and a benchmark must be found must be transparent and adequately explained in accordance with the chapeau of Article 14 of the SCM Agreement. Namely, it is important to examine whether the investigating authority fulfil its obligation to provide a transparent and adequate explanation for why it selected a particular benchmark, in which the parties to the investigation can adequately and timely defend their interests.

IV. Conclusion

9. China thanks the Panel for its consideration of these comments.

[1] Pakistan First Written Submission, para. 6.2.
[2] *See* Pakistan First Written Submission, paras. 6.28-6.56.
[3] *US – Anti-Dumping and Countervailing Duties (China) (AB), para. 674.*
[4] *US – Anti-Dumping and Countervailing Duties (China) (AB), para. 676.*

ANNEX D-2

ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF U.S. THIRD PARTY WRITTEN SUBMISSION

1. INTRODUCTION

1. In this submission, the United States presents its views on the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") as relevant to certain issues in this dispute.

2. CLAIMS REGARDING ARTICLES 1 AND 3 OF THE SCM AGREEMENT

2. The United States, while taking no position on the merits of the factual allegations made by either party, submits the following comments. The core disagreement between the parties is whether it is legally permissible under the SCM Agreement to treat the entire amount of import duties otherwise due on imported inputs under a duty drawback system as a financial contribution under Article 1.1 where the exporting Member: (1) does not have an effective system or procedure in place to monitor the inputs consumed in the production of the exported product and (2) has failed to carry out a further examination based on the actual inputs involved in determining whether an excess payment occurred under the duty drawback scheme. The United States submits that this question should be answered in the affirmative under the relevant provisions of the SCM Agreement and the GATT 1994.

3. Both footnote 1 to the SCM Agreement and the Ad Note to Article XVI of the GATT 1994 contemplate that a duty drawback scheme "shall not be deemed to be a subsidy" so long as there is no "excess" remission of duties or taxes from those which have accrued. Consequently, if a duty drawback system were to provide for exemption or remission of duties or taxes in amounts that exceed the amounts of "duties or taxes that have accrued," then such a system may be "deemed to be a subsidy" under the terms of Article 1.1 of that Agreement.

4. Importantly, footnote 1 also notes that this standard (that "the remission of such duties or taxes in amounts not in excess of those which have accrued" shall "not be deemed to be a subsidy") is "[i]n accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement." Article 32.8 of the SCM Agreement provides that "[t]he Annexes to this Agreement constitute an integral part thereof."

5. Annex I to the SCM Agreement, providing an "illustrative list" of export subsidies, elaborates that the "[t]he remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)" would constitute an "export subsidy." Again, this suggests that an export subsidy exists in cases where there is such an excess.

6. In determining whether a duty drawback scheme provides for remission of import duties in amounts that in fact exceed a permitted limit, the procedures described in Annexes II and III are pertinent. The standard in footnote 1 to the SCM Agreement is "in accordance with" Annexes II and III, which each addresses a particular duty drawback scheme. Annex I, item (i), also states that "[t]his item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III."

7. For a duty drawback system to operate so as not to provide for excess remission of import duties, Annexes II and III provide for procedures to check the system of the exporting Member. Annex II(II)(1) provides that the investigating authority should first determine whether the exporting Member has in place an adequate system or procedure to monitor which inputs are consumed in the production of the exported product and in what amounts. Annex II(II)(2)

contemplates an additional analysis by the exporting Member absent satisfaction of the condition under Annex II(II)(1).

8. Therefore, where an exporting Member has a duty drawback scheme in place that does not satisfy the requirements for such a scheme to "not be deemed to be a subsidy," then an investigating authority would be permitted to consider the full amount of the financial contribution as a subsidy under the terms of Article 1.1. The conditions for a duty drawback scheme to be considered within the scope of footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement are established by reference to Annex II(II)(1)-(2).

9. Finally, an investigating authority need not consider information that post-dates the period of investigation in trade remedy proceedings.

3. CLAIMS REGARDING ARTICLES 1.1(B) AND 14 OF THE SCM AGREEMENT

10. Because the title of Article 14 indicates that it sets out "guidelines" for determining benefit, there exists "a certain degree of flexibility … under Article 14(b) in the selection of benchmarks." The selection of an appropriate benchmark under Article 14(b) is guided by the terms "comparable," "commercial," and a "loan which the firm could actually obtain on the market."

11. Of particular relevance to this dispute, the comparable commercial loan benchmark must be contemporaneous in time with the alleged subsidized loan. For example, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that investigating authorities must rely on a benchmark "that would have been available to the recipient firm at the time it received the government loan," such that the comparison to determine the benefit "is to be performed as though the loans were obtained at the same time." This contemporaneity factor accords with the principle that "[t]he investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.)."

12. Finally, Article 14(b) also describes a benchmark loan as reflecting one "which the firm could actually obtain on the market." The Appellate Body has explained that "[t]he use of the conditional tense, 'could', suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can in fact be obtained in the market." The Appellate Body has also observed that "could" refers "'first and foremost' to the borrower's risk profile, that is, whether the benchmark loan is one that could be obtained by the borrower receiving the investigated government loan." Given these findings, the United States agrees with Pakistan's observation that "the investigating authority must, at the very least as the starting point of its analysis, first seek to identify a comparable loan that the *specific firm* under investigation would pay."

13. In light of the guideline of comparing the transaction to one the loan recipient might have obtained on the market, an investigating authority might well examine the transaction and rely on a benchmark that is contemporaneous with when the loan disbursement terms were established. This is because the investigating authority could take the view that each tranche is merely a part of the one overall loan. The investigating authority might also examine the transaction and apply a loan interest rate benchmark that is contemporaneous in time with when each tranche of the investigated loan was drawn down, as Pakistan proposes, because the authority might determine that each tranche should be considered as a distinct loan. These considerations will depend on the factual circumstances concerning the terms of the loan.

14. Finally, the United States observes that an investigating authority has an obligation to provide a transparent and adequate explanation for why it selected a particular benchmark. One reason is so the parties to the investigation can adequately and timely defend their interests.

4. CLAIMS REGARDING ARTICLE 12.6 OF THE SCM AGREEMENT

15. The last sentence of Article 6.7 of the AD Agreement largely mirrors the last sentence of Article 12.6 of the SCM Agreement. The last sentence of Article 6.7 of the AD Agreement requires investigating authorities "to inform the investigated exporters of the verification results," *i.e.*, the results of the verification visit. The disclosure of the results of a verification visit are important both in enabling exporters and WTO Members to seek judicial review of the investigating

authority's determination under Article 23 of the SCM Agreement, and to protect exporters' rights to prepare and present their cases under Article 12.3 of the SCM Agreement.

16. The meaning of the term "results" in the last sentence of Article 12.6 of the SCM Agreement informs the extent of what the investigating authority must provide to "the firms to which they pertain." The ordinary meaning of "result" is "an effect, issue, or outcome *from* some action, process or design." The "results" envisaged by Article 12.6 of the SCM Agreement are the "outcome" of the verification visit, which under Annex VI(7) is an on-the-spot investigation "to verify information provided or to obtain further details."

17. Article 12.6 of the SCM Agreement (as does Article 6.7 of the AD Agreement) provides two alternative mechanisms for disclosing the verification visit results: to make the results available to the firm to which the results pertain or to disclose the results as part of the essential facts which form the basis for a decision to impose definitive measures. Thus, one such option is to "'make available' a separate report containing the results of the verification visits."

18. Consequently, the Panel should consider whether Pakistan has demonstrated that the Commission's disclosure of the verification visit results was not sufficient to disclose the outcome of the verification, was not complete such that essential facts were not disclosed, or was not timely such that interested parties were not able to defend their interests.

EXECUTIVE SUMMARY OF U.S. THIRD-PARTY ORAL STATEMENT AT THE THIRD PARTY SESSION OF THE FIRST MEETING OF THE PANEL WITH THE PARTIES

5. INTRODUCTION

19. The United States appreciates the opportunity to provide our views as a third party in this dispute. The United States will focus its remarks on the interpretation and application of Article 1 of the SCM Agreement, particularly in light of issues raised by Pakistan with respect to footnote 1 of Article 1.1 and the operation of the annexes related to these provisions.

6. ARTICLE 1.1 AND FOOTNOTE 1 OF THE SCM AGREEMENT

20. Article 1.1(a)(1)(ii) is accompanied by footnote 1. Footnote 1 does two things: first, it limits the scope of Article 1.1 subparagraph (a)(1)(ii) where the remission of certain duties or taxes is not in excess of accrued amounts; and second, it requires that this limitation be read "in accordance with" Annexes I, II, and III in determining its applicability. Consequently, if a program were to provide for the exemption or remission of duties or taxes in amounts that exceed the "duties or taxes that have accrued" in a given instance, then such excess may be "deemed to be a subsidy" under the text of Article 1.1 of the SCM Agreement. To reach such a conclusion in the first place, however, the question of excess remission must be answered per the guidelines and procedures of the relevant annexes. Where that inquiry is inconclusive, the limitation found in footnote 1 does not apply and, therefore, an investigating authority may determine whether there is a financial contribution irrespective of footnote 1.

21. This interpretation is supported by the language of the annexes themselves. The procedures described in Annex II, in particular, are pertinent in determining whether there is remission of import duties in amounts that in fact exceed a permitted limit. Annex II(II) provides for a two-step analysis for investigating authorities to confirm whether the scheme in question provides for excess remission of import duties.

22. Should the system not satisfy the conditions in Annex II(II)(1), Annex II(II)(2) contemplates an additional analysis by the exporting Member. Specifically, subparagraph (II)(2) provides that the exporting Member take steps to demonstrate the validity of its system in three different scenarios. In each of those scenarios, the step of demonstrating that there is no excess remission is left to the exporting Member. Specifically, the exporting Member would need to carry out a "further examination ... based on the actual inputs involved" to determine "whether an excess payment occurred." Otherwise, the investigating authority would have to determine amounts where not possible per the annex guidelines. Such a result would not be consistent with meaning of these provisions.

23. It is for this very reason that both subparagraphs (1) and (2) to Annex II(II) require that the exporting Member ensure and demonstrate that there is no excess remission of import duties. If the exporting Member cannot demonstrate that it has an adequate system or procedure in place or that there are otherwise no excess import duties remitted, then it would be impossible for the investigating authority to make such a determination.

24. An investigating authority must be able to identify with some precision the extent to which there is excess duty remission under the system in order to determine whether the limitation provided for in footnote 1 applies to the particular financial contribution at issue. Neither the footnote, nor the referenced annexes, suggests their purpose relates to the determination of subsidy amounts. This is particularly true where the investigating authority cannot discern whether, and to what extent, there is excess remission, because the exporting Member has not been able to make the required demonstration.

25. Thus, the language of the annex supports the interpretation of the United States that footnote 1 operates to limit the definition of a financial contribution set forth in Article 1.1(a)(1)(ii). Where the criteria for this limitation are not satisfied per the guidelines of Annex II, the limitation does not apply, and the language of footnote 1 has no further bearing on the question of whether the alleged program is a financial contribution.

7. CHANGES AFTER THE PERIOD OF INVESTIGATION

26. Finally, the United States notes that an investigating authority need not consider information that post-dates the period of investigation in a trade remedy proceeding. Rather, the authority must consider the system or procedure that was in place during the period of investigation.

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27. In the context of an investigation, if the investigating authority cannot satisfy itself that the exporting Member has an adequate verification system or procedure in place under Annex II(II)(1), or the exporting Member does not demonstrate that there are otherwise no excess import duties remitted pursuant to Annex II(II)(2), then there is no textual basis for the investigating authority to make a determination *per footnote 1* that the alleged financial contribution shall "not be deemed to be a subsidy." Thus, where the inquiry posed by Annex II(II) is inconclusive, the limitation in footnote 1 to Article 1.1(a)(1)(ii) does not apply and an investigating authority may determine whether there exists a financial contribution irrespective of footnote 1.

28. Assuming an exporting Member has no "system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts," the only remaining step through which an exporting Member may comport with Annex II (and, therefore, footnote 1) is for the exporting Member to perform the "further examination" as envisioned by Annex II(II)(2). The exporting Member's opportunity to perform that examination is not contingent upon a request for such action on the part of an investigating authority.

29. In the view of the United States, the analysis under subparagraphs (II)(1) and (2) is sequential. Thus, absent satisfaction of the criteria in paragraph 1, a "further examination by the exporting Member… would need to be carried out". Nothing in the text of paragraph 2 suggests that the investigating authority must request that the exporting Member carry out the "further examination" "[w]here there is no such system or procedure" (as is assumed by the Panel's question).

30. Suppose that, prior to verification, an exporting Member has acknowledged in its questionnaire response that its duty drawback scheme lacks a verification system or procedure under Annex II(II)(1), but has also submitted evidence of the results obtained from conducting a further examination of the amount of excess remission based on actual inputs consumed, pursuant to Annex II(II)(2). In this scenario, the investigating authority could take that information into account in determining whether a subsidy exists and the extent of the benefit. During on-the-spot verification, the investigating authority would then be able to "satisfy itself" as to the veracity of the evidence already submitted.

31. By contrast, suppose that an exporting Member has asserted, prior to verification, that its duty drawback scheme comports with Annex II(II)(1), but has not undertaken "a further examination" as described by Annex II(II)(2). An investigating authority then conducting a verification to "satisfy itself" as to the veracity of the evidence already submitted would be able to spot-check the basis for the Annex II(II)(1) assertion, but would have nothing to "verify" regarding Annex II(II)(2) if no "further examination" had been conducted by the exporting Member.

32. Whether the entire amount of duty remission or an "excess" amount is countervailed would depend on the factual circumstances confronted by an investigating authority.

33. In response to the Panel's final question, generally speaking, a "line of credit" can be considered a type of loan. In considering whether a loan benchmark is "comparable," the investigating authority should consider a benchmark that "'ha[s] as many elements as possible in common with the investigated loan ...'," although "in practice, the existence of such an ideal benchmark loan would be extremely rare," and "a comparison should also be possible with other loans that present a lesser degree of similarity." As we have noted, this suggests that factual circumstances are central to the benchmark selection.

ANNEX E

INTERIM REVIEW

ANNEX E-1

INTERIM REVIEW

1 INTRODUCTION

1.1. In compliance with Article 15.3 of the DSU, this Annex sets out the Panel's discussion of the arguments made at the interim review stage. We have modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, the Panel has made certain changes of an editorial nature to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors.

1.2. Due to changes as a result of our review, certain numbering of the paragraphs and footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference.

2 SPECIFIC REQUESTS FOR REVIEW SUBMITTED BY THE PARTIES

2.1 Paragraph 7.115 (paragraph 7.115)

2.1. Pakistan asks the Panel to revise this paragraph to more accurately reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.2. Although we do not consider that the language previously used in this paragraph did not represent Pakistan's position accurately, we have decided to accommodate Pakistan's request, and also made further conforming changes to paragraphs 7.114, 7.115, and 7.116 (paragraphs 7.114, 7.115, and 7.116) to more fully account for this revision.

2.2 Paragraph 7.117 (paragraph 7.117)

2.3. Pakistan asks the Panel to revise this paragraph to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.4. We have decided to accommodate Pakistan's request, and also made conforming changes to paragraphs 7.117 and 7.118 (paragraphs 7.118 and 7.119) and footnotes thereto to more fully account for this revision.

2.3 Paragraph 7.124 (paragraph 7.125)

2.5. Pakistan asks the Panel to revise the part of the Report in which this paragraph appears to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.6. We consider that the Section of the Report that contains paragraph 7.124 (paragraph 7.125) already accurately describes and cites the arguments that Pakistan asks us to include.[1] We

[1] See paragraph 7.120 and footnotes 254 and 255 (paragraph 7.121 and footnotes 256 and 257).

therefore decline Pakistan's request. We further emphasize that the manner in which we dispose of these arguments is consistent with the manner in which Pakistan presented them in its submissions.

2.4 Paragraph 7.178 (paragraph 7.179)

2.7. Pakistan asks the Panel to revise this paragraph to more fully reflect its arguments. The European Union considers that Pakistan's request should be dismissed to the extent that Pakistan is improperly asking the Panel to modify the sections of the Report containing the Panel's assessment. The European Union suggests that where Pakistan requests the Panel to add or clarify Pakistan's arguments, such clarifications should be better made in sections of the report summarising Pakistan's arguments.

2.8. We have decided to accommodate Pakistan's request.