



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

AB-2017-5

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to D to the Report of the Appellate Body circulated as document WT/DS486/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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**ANNEX A**

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**ANNEX A-1****EUROPEAN UNION'S NOTICE OF APPEAL\***

Pursuant to Articles 16.4 and Article 17 of the DSU the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan* (WT/DS486). Pursuant to Rule 20(1) of the Working Procedures for Appellate Review, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

The European Union is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Non-appeal of an issue does not signify agreement therewith.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse the findings and conclusions of the Panel, with respect to the following errors contained in the Panel Report:<sup>1</sup>

- The Panel failed to comply with its tasks under Article 11 of the DSU, as informed by Article 3 of the DSU, when wrongly deciding to make findings on Pakistan's claims in this case.<sup>2</sup> Since even Pakistan agreed that the countervailing duties at issue had ceased to have legal effects when the Panel was in a position to commence its work, and absent any lingering effects and an imminent risk of re-imposing the same or a similar measure in the near future, the panel proceedings lost their purpose, i.e. there was no longer a need to adjudicate on the matter in order to "secure a positive solution to the dispute". Thus, the Panel issued a mere "advisory opinion". Therefore, the European Union requests the Appellate Body to *reverse* the entirety of the Panel's findings and conclusions in its report (as summarised in Section 8 of the Panel Report) and declare moot and with no legal effect any of the findings and legal interpretations contained therein.
- If the Appellate Body does not grant the relief requested in the preceding bullet point, the European Union respectfully submits that the Panel erred in the interpretation of Article 1(1)(a)(1)(ii), footnote 1, and Annexes I to III of the SCM Agreement with respect to the EU's determination regarding the MBS.<sup>3</sup> By finding that investigating authorities have the burden to determine, on the basis of the available evidence, the excess remission in case of duty drawback systems – even where the exporting Member has no proper monitoring system or procedure in place and did not carry out a further examination based on the actual transactions involved – the Panel rendered the relevant provisions of the SCM Agreement, and in particular the elements included in Annexes II and III for duty drawback systems, moot and without legal effect. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.33–7.56 of its Report. Since the measures at issue were withdrawn a long time ago, and with a view to limiting the Appellate Body's review, the European Union does not request the Appellate Body to complete the analysis in the present case; rather, the European Union requests the Appellate Body to declare moot and with no legal effect the entirety of the Panel's findings with respect to the MBS, since the Panel applied the wrong legal standard.<sup>4</sup>

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\* This notification, dated 30 August 2017, was circulated to Members as document WT/DS486/6.

<sup>1</sup> Pursuant to Rule 20(2)(d)(iii) of the Working Procedures for Appellate Review this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

<sup>2</sup> Panel Report, para. 7.13.

<sup>3</sup> Panel Report, paras. 7.33-7.56.

<sup>4</sup> Panel Report, paras. 7.57-7.60 and 8.1(b)(i) and 8.1(b)(ii).

**ANNEX A-2****PAKISTAN'S NOTICE OF OTHER APPEAL\***

Pursuant to Articles 16.4 and 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 23(1) of the Working Procedures for Appellate Review, Pakistan hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law and legal interpretation covered in the Panel Report entitled *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan* (WT/DS486/R), which was circulated on 6 July 2017 (the "Panel Report"). Pursuant to Rule 23(1) of the Working Procedures for Appellate Review, Pakistan is simultaneously filing this notice of other appeal and its other appellant's submission with the Appellate Body Secretariat.

For the reasons further elaborated in its submission to the Appellate Body, Pakistan appeals and requests the Appellate Body to reverse the findings, conclusions, and recommendations of the Panel, with respect to the error contained in the Panel Report described below.<sup>1</sup>

**I. THE PANEL'S FINDING UNDER ARTICLE 15.5 OF THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)**

1. The Panel erred in its interpretation and application of Article 15.5 of the SCM Agreement when rejecting Pakistan's claim that the European Commission's approach of finding a causal link between the subject imports and the observed injury and then inquiring whether any injury attributable to other factors "breaks the causal link" previously found (the "breaking the causal link" approach) was inconsistent with Article 15.5.<sup>2</sup>

2. In particular, and without prejudice to the arguments developed in Pakistan's other appellant's submission, the Panel incorrectly interpreted and applied Article 15.5 of the SCM Agreement by finding that it did "not see how [the breaking the causal link] approach, in this case, led to the disregard of a relevant legal standard"<sup>3</sup> under Article 15.5 of the SCM Agreement—that is, whether the causal link between the subject imports and the observed injury constitutes "a genuine and substantial relationship of cause and effect".<sup>4</sup>

**II. REQUEST FOR FINDINGS AND COMPLETION OF THE ANALYSIS**

3. Pakistan respectfully requests the Appellate Body to reverse the Panel's finding contained in paragraphs 7.120 and 8.1.d.i of the Panel Report, that Pakistan failed to establish that the European Commission's use of the "breaking the causal link" analytical approach was inconsistent with Article 15.5 of the SCM Agreement.

4. In addition, Pakistan requests the Appellate Body to complete the legal analysis and find that the European Commission acted inconsistently with Article 15.5 of the SCM Agreement by using the "breaking the causal link" approach in its causation/non-attribution analysis. The factual findings contained in the Panel Report, as well as the undisputed facts on the record in the determinations of the European Commission, constitute a sufficient basis to find that the measures at issue were inconsistent with Article 15.5 of the SCM Agreement.

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\* This notification, dated 4 September 2017, was circulated to Members as document WT/DS486/7.

<sup>1</sup> Pursuant to Rule 23(2)(ii)(C) of the Working Procedures for Appellate Review, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Pakistan's right to refer to other paragraphs of the Panel Report in the context of its other appeal.

<sup>2</sup> Panel Report, paras. 7.117-7.120 and 8.1.d.i.

<sup>3</sup> Panel Report, para. 7.119.

<sup>4</sup> Appellate Body Report, *US – Wheat Gluten*, para. 69.

**ANNEX B**

ARGUMENTS OF THE PARTICIPANTS

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**ANNEX B-1****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION<sup>1</sup>**

1. The European Union considers that, when making findings on Pakistan's claims in this case, the Panel failed to comply with its tasks under Article 11 of the DSU as informed by Article 3 of the DSU. Indeed, the countervailing duties at issue had been terminated five months before the Panel effectively began its work. Since even Pakistan agreed that the measures at issue ceased to have legal effects, the panel proceedings lost their purpose, i.e., there was no longer a need to adjudicate on the matter in order to "secure a positive solution to the dispute". Absent any lingering effects and an imminent risk of re-imposing the same or a similar measure in the near future, the Panel issued a mere "advisory opinion", even when the Appellate Body has already warned panels to refrain from issuing such "advisory opinions". Therefore, the European Union requests the Appellate Body to reverse the entire Panel's findings and conclusions in its report (as summarised in Section 8 of the Panel Report) and declare them moot and with no legal effect.
2. Subsidiarily, in case the Appellate Body were to reject the first ground of the EU's appeal, the European Union considers that the legal interpretation made by the Panel when examining the EU's determination in relation to the MBS was incorrect. The Panel's interpretation of, especially footnote 1 of the SCM Agreement, left the relevant provisions of the SCM Agreement, and in particular the elements included in Annexes II and III, largely moot and without effect. Following the Panel's interpretation, exporting Members could disregard at will – and without any negative consequence – the elements contained in Annexes II and III in the context of alleged duty drawback systems because, in the Panel's view, investigating authorities would in any event bear the burden to determine, on the basis of the available evidence, the excess remission – even where the exporting Member has no proper monitoring system whatsoever and/or refuses to conduct a further examination based on actual transactions. The exporting Members could save themselves the administrative burden and let the investigating authority do the work for them, in full knowledge that the investigating authority may at most countervail the actual excess remissions which may be even lower than if a monitoring system would be in place since the evidence may be insufficient for the investigating authority to establish the actual (higher) excess remissions. It is therefore imperative that if an exporting Member neither establishes a monitoring system nor carries out an examination based on the actual transactions involved as provided in Annexes II and III, the entire amount of remissions can be countervailed by the investigating authority as the exporting Member no longer benefits from the special disciplines crafted for proper duty drawback schemes. Simply put, if the conditions in Annex II and III are not complied with, any remission of import duties upon the exportation of the product at issue amounts to a prohibited export subsidy. Thus, the European Union requests the Appellate Body to reverse the legal interpretations of the relevant provisions made by the Panel, and declare moot and with no legal effect the entirety of the Panel's findings with respect to the MBS, since the Panel applied the incorrect legal standard.

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<sup>1</sup> Total number of words (including footnotes but excluding executive summary) = 14 973; total number of words of the executive summary = 565.

## **ANNEX B-2**

### **EXECUTIVE SUMMARY OF PAKISTAN'S OTHER APPELLANT'S SUBMISSION**

#### **1 INTRODUCTION<sup>1</sup>**

1.1. Pakistan appeals the Panel's finding that the European Union (EU) did not act inconsistently with Article 15.5 of the SCM Agreement by using the "breaking the causal link" approach in its causation/non-attribution analysis.

1.2. In its investigation, the European Commission (Commission) found certain countervailable subsidies programmes in Pakistan. The Commission found injury based on six economic factors showing negative performance and found a causal link between the subject imports and the observed injury.

1.3. The Commission then assessed whether each of the ten known non-attribution factors was able, individually, to "break the causal link" between the subject imports and the observed injury. The Commission acknowledged that at least four of these factors contributed to the injury but that none of them, individually, did so to such an extent as to "break the causal link". The Commission thus concluded that "the imports from the countries concerned have caused material injury to the Union industry".

#### **2 THE ISSUE BEFORE THE PANEL**

2.1. Pakistan argued that the "breaking the causal link" approach was inconsistent with the causation standard in Article 15.5 of the SCM Agreement because it was logically untenable. Under this test, once the Commission found a causal link between injury and the subject imports, it would be impossible for other factors to "break" that link: if the injuries caused by those factors were sufficient to "break" the link, the link should not have been found to exist in the first place.

2.2. The Commission also examined whether each of the non-attribution factors "broke" the causal link between the subject imports and the injury, rather than whether the effects of these factors attenuated that causal link to the point of rendering it "too distant, remote or insubstantial".

2.3. The EU responded that authorities have discretion under Article 15.5 to choose their causation methodology. The EU also argued that its approach enabled the Commission to conclude that the other factors "broke the causal link" if such other factors were "the true cause of injury".

#### **3 THE PANEL'S ANALYSIS**

3.1. The Panel considered that, by finding an initial causal link between the subject imports and the injury, and then inquiring whether other factors broke the causal link, the Commission allowed for the possibility that its non-attribution analysis "negated" its initial consideration that a causal link existed. The Panel considered that this approach enabled the Commission properly to separate and distinguish the injurious effects of the other factors from those of the subject imports. The Panel concluded that the "breaking the causal link" approach was not inconsistent with Article 15.5.

#### **4 THE LEGAL STANDARD UNDER ARTICLE 15.5**

4.1. The Appellate Body has held that the "primary objective" of a causation analysis is to determine whether there exists a "genuine and causal relationship of cause and effects" between the subject imports and the injury. An investigating authority must separate and distinguish the injurious effects of other known factors from those of the subject imports. Only then will the

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<sup>1</sup> This executive summary contains a total of 1,077 words. Pakistan's other appellant's submission contains a total of 10,684 words (including footnotes).



authority be able to evaluate whether the effects of these other factors "attenuated" or "diluted" the causal link between the subject imports and the observed injury to the point of not being a "genuine and substantial relationship of cause and effect".

## **5 THE PANEL ERRED IN UPHOLDING THE "BREAKING THE CAUSAL LINK" APPROACH**

5.1. The "breaking the causal link" approach is inconsistent with Article 15.5 because the Commission considered other factors to be relevant only if they were sufficiently strong to break the link between the subject imports and the injury. In contrast, the correct legal standard under Article 15.5 requires that non-attribution factors be relevant in a causation analysis if their (properly separated and distinguished) effects *attenuate* or *dilute* the causal link "such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect".

5.2. First, logically, if factors other than the subject imports are capable of breaking the causal link, this causal link should never have existed in the first place. Otherwise, the initial determination of the existence of a causal link would lack any basis. Following a question from the Panel, the EU was unable to point to any determinations where the Commission, using the "breaking the causal link" approach, first found a causal link and then found that that causal link had been broken.

5.3. Second, the Commission assessed the effects of each factor one by one against the effects of the subject imports *plus* the effects of the remaining non-attribution factors. There was never a point at which the Commission assessed the effects of the subject imports alone, without the presence of the effects of some other factors. Accordingly, in examining each non-attribution factor, the Commission misattributed the effects of the remaining factors to the subject imports.

5.4. Third, the Commission considered a non-attribution factor to be relevant only if it was "the true cause" of the injury. However, for the Commission it was sufficient that the subject imports be a contributing factor in order to find a causal link. The "breaking the causal link" approach thus skewed the analysis by having a low causation threshold for subsidized imports (a contributing cause) and a much higher threshold for the other factors (the true cause). However, the Commission was required to assess the effects of both the subject imports and the other factors even-handedly with a view to ascertaining how subject imports and other factors played out in the six the economic factors showing negative performance.

5.5. Fourth, in applying the "breaking the causal link" approach, the Commission examined whether the four non-attribution factors that contributed to the injury were so strong as to break the causal link. However, the Commission failed to inquire whether the effects of these factors attenuated or diluted that link to the point of not being "genuine and substantial". Therefore, the Commission failed to apply the correct legal standard under Article 15.5.

## **6 CONCLUSION AND REQUEST FOR FINDINGS**

6.1. Pakistan requests the Appellate Body to reverse the Panel's finding that the Commission's "breaking the causal link" approach is not inconsistent with Article 15.5. Pakistan requests the Appellate Body to complete the analysis and find that the Commission's "breaking the causal link" approach was inconsistent with Article 15.5 of the SCM Agreement.

**ANNEX B-3****EXECUTIVE SUMMARY OF PAKISTAN'S APPELLEE'S SUBMISSION****1 THE EU'S APPEAL AGAINST THE PANEL'S FINDING ON THE MBS SHOULD BE REJECTED<sup>1</sup>**

1.1. The Panel's legal interpretation that Footnote 1 and Annex I(i) of the SCM Agreement define a subsidy under a duty drawback system as the amount of any "excess" drawback for all purposes is correct and should be upheld by the Appellate Body in its entirety.

1.2. The Commission determined that, because Pakistan's Manufacturing Bond Scheme (MBS) system did not have a satisfactory monitoring/verification mechanism, the "normal rule" for determining the subsidy as the "excess remission" did not apply and that therefore the Commission could assume that the entirety of the duties remitted was the subsidy. The Commission also determined in the *provisional determination* that the Government of Pakistan had failed to perform a "further investigation".

1.3. Before the Panel, Pakistan argued that as Footnote 1 and Annex I(i) of the SCM Agreement define a subsidy under a duty drawback system as an excess duty drawback for all purposes, the Commission should have investigated the existence and amount of any excess remission. The Commission also failed to provide the Government of Pakistan with an opportunity to conduct the further investigation.

1.4. The Panel fully agreed with Pakistan's legal interpretation. Based exclusively on a rigorous *Vienna Convention*-based legal analysis, and without the need to consider any factual issues, the Panel identified in a number of provisions what it called the "Excess Remission Principle". This principle stipulates that a duty drawback scheme could therefore give rise to a subsidy only and only if there was an "excess" remission. Neither insufficient verification mechanisms nor any other situation would render this principle inapplicable.

**1.1 The EU's interpretation of the words "in accordance with" has been proven to be incorrect**

1.5. Pakistan agrees with the Panel's analysis that the words "in accordance with" in Footnote 1 do not create a condition for the definition of the subsidy as an "excess" remission to apply. Instead, the phrase means that the Excess Remissions Principle is in agreement with each of the provisions listed in Footnote 1. As the Panel stated, it is incongruous to say that a principle is in agreement with a provision when the provision potentially eliminates the principle. The Panel also correctly stated that there were no other instance in the SCM Agreement in which the term "in accordance with" had the EU's proposed meaning. The EU has failed to address any of these arguments.

**1.2 The "silence" of Annexes II and III on a narrow set of circumstances does not support the EU's reading**

1.6. The EU argues that Annexes II and III do not provide complete guidance on what happens when the "monitoring system in place was improper" and there is no "further verification by the exporting Member." But as the Panel stated, there is no reason why this "incomplete guidance" should mean that the definition of the fundamental subsidy definition in Footnote 1 and Annex I(i) should be read out of the agreement.

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<sup>1</sup> This executive summary contains a total of 1,778 words. Pakistan's appellee's submission contains a total of 18,683 words (including footnotes).

### **1.3 The EU's arguments that the Panel's interpretation relieves the exporting Member of its "duty" to maintain a monitoring system does not withstand scrutiny**

1.7. The EU argues incorrectly that the Panel's interpretation provides an incentive for Members not to observe their duty to operate adequate monitoring mechanisms. But under Pakistan's and the Panel's interpretation, exporting governments have every incentive to operate proper monitoring systems, so as to avoid multilateral and national actions against export subsidies. The reference to a functioning monitoring mechanism in Annexes II and III merely serves to create a presumption, or an analytical shortcut, that no excess exists.

### **1.4 The EU is incorrect to characterize the need to calculate the excess remission as a "burden" on the investigating authority**

1.8. Pakistan fails to understand the EU's assertion that a uniquely exceptional "burden" should exist when investigating authorities investigate excess remissions under duty drawback systems. Also, the Panel correctly rejected the EU's "burden" argument. If necessary, the investigating authority can have recourse to facts available.

### **1.5 There are additional reasons why the EU's arguments are incorrect**

1.9. The EU also ignores the historical background, including the genesis of Footnote 1 and Annexes II and III to the SCM Agreement, all of which confirm Pakistan's and the Panel's reading of the SCM Agreement.

1.10. The EU also invokes the "neutrality principle" in support of its views. But this principle, together with the destination principle, underpins the WTO legal concept of "border tax adjustment". Both for exports and imports, an "excess" adjustment can give rise to multilateral action or domestic measures; but the existence of an "excess" does not remove a WTO Member's fundamental right to make the adjustment.

1.11. The EU also does not address the argument that, when the drafters of the SCM Agreement wished to permit the countervailing of an entire remission of taxes or duties, they did so explicitly, for instance in Annex I(e) and Annex III(II)(5).

1.12. The EU's proposed reading of Footnote 1 and Annexes II and III would also give rise to inconsistencies of logic. Annexes II and III apply *only in a countervailing duty investigation*. But the definition of a subsidy, including Footnote 1, must be the same *for all circumstances in which the SCM Agreement applies*. As another example, the EU's approach would give rise to an unwarranted asymmetry in how the SCM Agreement treats (finished) products and the inputs for the production of those products, under Annex I(g), I(h) and I(i).

## **2 THE APPELLATE BODY SHOULD REJECT THE EU'S APPEAL OF THE PANEL'S DECISION TO EXERCISE JURISDICTION**

2.1. The Appellate Body should also reject in its entirety the EU's appeal against the Panel's exercise of jurisdiction over the measure at issue. The EU's arguments assume that a dispute disappears with the expiry or removal of the measure after panel establishment. But the Appellate Body has stated explicitly that one cannot equate the withdrawal or expiry of a measure with the termination of the dispute. Most recently, in *EU – Fatty Alcohols (Indonesia)*, the Appellate Body rejected the proposition that the repeal of a measure necessarily constitutes, without more, a "satisfactory settlement of the matter", because benefits accruing to a Member may be impaired by measures whose legislative basis has expired.

2.2. In addition, if the EU were correct that expiry of a measure removes a dispute and no "matter" exists, all of the reports in which panels made findings on expired measures would be improper "advisory opinions", contrary to Article 11 of the DSU. Moreover, panels maintain jurisdiction on measures that expire after panel establishment because defending WTO Members must not be permitted to avoid multilateral scrutiny simply by withdrawing a challenged measure after initiation of a panel process.

2.3. The EU argues that this case presents "unique circumstances", because the measure at issue expired before the Panel began its work. However, the key jurisdictional bright line is the time of panel establishment, not the subsequent point in time when the panel begins its work. Moreover, the EU's approach in this dispute would create an incentive for WTO Members to avoid multilateral scrutiny by withdrawing a measure immediately after panel establishment.

2.4. In this dispute, the panel proceedings were effectively halted for over 11.5 months after panel establishment, due to a shortage of WTO Secretariat lawyers. The blame for this does not lie with Pakistan. Under normal circumstances, the Panel Report would have been circulated less than 1.5 months after the expiry of the measure.

2.5. The EU disagrees with the Panel's finding that there is "reasonable possibility" that the EU could impose CVDs on Pakistani goods in a manner that may give rise to the same or materially similar WTO inconsistencies. But the EU fails to address the criteria on which the Panel relied and puts forward other, unpersuasive criteria.

2.6. The EU also incorrectly characterizes existing case law on jurisdiction over expired measures. All previous panels faced with measures that expired after panel establishment exercised their jurisdiction and made findings. The EU is thus requesting the Appellate Body to reverse 20 years of consistent case law and suggest that a panel should have declined a complainant's request to exercise its validly-established jurisdiction over a measure that expired *after* panel establishment.

2.7. The EU also fails to present the appropriate arguments required for an appeal under Article 11 of the DSU. The EU cannot merely disagree with *individual elements* and the *result* of the Panel's analysis. The EU also fails to provide any "cogent reasons" for why the Panel should have departed from previous case law by relying on different criteria. Moreover, the Appellate Body has previously indicated that it agrees with the criteria previously developed by panels and has occasionally made explicit findings consistent with the existing panel case law.

2.8. The EU also argues that the Panel should have examined the "lingering effects" of the measure. This is incorrect and, even if required, there are "lingering effects" here. Pakistan continues to be affected by the EU's measures even after they have been withdrawn, as evidenced by CVD investigations conducted by the US and Canadian authorities.

### 3 CONCLUSION AND REQUEST FOR RULINGS

3.1. For these reasons, Pakistan respectfully requests that the Appellate Body reject the EU's other appeal in its entirety.

3.2. The Appellate Body should affirm the Panel's finding in paragraphs 7.60 and 8.1(b)(i) and (ii) of its Report that the EU acted inconsistently with Articles 1.1(a)(1)(ii) and 3.1(a) of the SCM Agreement. In the event that the Appellate Body were to reverse the Panel's legal standard and its finding of violation, Pakistan requests the Appellate Body to complete the Panel's legal analysis and provide detailed guidance on the proper legal standard. Pakistan also requests the Appellate Body to complete the Panel's legal analysis by applying its legal standard and finding that the EU violated Articles 1.1(a)(1)(ii), 3.1(a), 10, 19.1, and 32, and Annexes I(i), II(I)(1), II(I)(2), II(II)(1), II(II)(2), III(I), and III(II)(1), III(II)(2), III(II)(3) of the SCM Agreement, as well as Article VI:3 of the GATT 1994 because it failed to provide the Government of Pakistan with an opportunity to conduct the "further investigation" as required by Annex II(II)(2) and Annex III(II)(3) and because it failed to make proper allowance for waste, as required by Annex I(i) and Annex II(II)(4).

3.3. The Appellate Body should also reject the EU's appeal against the Panel's exercise of its jurisdiction under Article 11 of the DSU and reject the EU's request to reverse the entirety of the Panel's findings and conclusions and declare them to be moot and of no legal effect.

**ANNEX B-4****EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION<sup>1</sup>**

1. The Panel was correct to reject outright Pakistan's claims against the Commission's "breaking the causal link" analysis in the present case. According to well established case law there must be "a genuine and substantial relationship of cause and effect" between the subsidized imports and the observed injury.<sup>2</sup> Importantly, the subsidized imports must neither be the sole cause of injury nor the only substantial cause of injury.<sup>3</sup> Investigating authorities must also "separate and distinguish" the injurious effects of other known factors from those of the alleged subsidized imports.<sup>4</sup> Investigating authorities must not attribute injurious effects of other factors to the subsidized imports.<sup>5</sup> There is no prescribed method for assessing causation.<sup>6</sup>
2. In the determinations in dispute, the Commission first established injury of the Union industry and then assessed whether, on a preliminary basis, the subsidized imports constituted a causal link for this injury. It then assessed for each other known factor whether it broke (or attenuated, diluted, negated etc.) that causal link to the effect that the subsidized imports would not be a genuine and substantial causal link for injury. Only then did the Commission conclude on causation. This approach is fully in line with the legal requirements.
3. Pakistan claims that the European Union's "breaking the causal link" method is illogical because a causal link that is broken should never have existed in the first place. This argument is of a purely semantic nature. A causal link that is broken is not necessarily inexistent but fails to meet the "genuine and substantial" standard required under the case law. And even if an initial causal link would be found to be inexistent because of other factors, this would not be illogical but simply a consequence of the Commission's order of analysis whereby a causal link is first established, on a preliminary basis, and then other known factors are assessed which may reverse that result. This is precisely the reason why the Commission's method would have been perfectly capable of coming to a different conclusion as regards causation in the present case, if the factual circumstances would have been different. The European Union notes that the Commission's order of analysis is the same that the panel (as confirmed by the Appellate Body) followed in *US – Upland Cotton*, a case which Pakistan cites in support of its position. In *US – Upland Cotton*, the panel first assessed the existence of a causal link – on a preliminary basis – and only subsequently examined if other factors would attenuate that causal link (or if they would render not "significant" the effect of the subsidy). The only difference between the Commission's and the Panel's method is that the Panel used the term "attenuating" the causal link instead of "breaking" the causal link. Pakistan's appeal should therefore be rejected.
4. Pakistan also argues that the Commission at no point assessed the effects of the subsidized imports alone but only together with the effects of some other known factors. This is simply factually incorrect. The Commission assessed the effects of the subsidized imports in a separate section in paragraphs 242 to 245 of the provisional determination – prior to and independent of the assessment of any other known factor.
5. There is also no legal basis for the standard of "even-handedness" purported by Pakistan nor is it correct that the Commission applied a higher standard of causation for the other known factors than for the establishment of a causal link. Similarly, there is no legal basis for Pakistan's proposition to require that the Commission should have assessed the impact of each other known factor with regard to those economic factors or indices that showed a negative performance.

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<sup>1</sup> Total number of words (including footnotes but excluding executive summary) = 7684; total number of words of the executive summary = 758.

<sup>2</sup> Appellate Body Report, *US – Lamb*, para. 179.

<sup>3</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914.

<sup>4</sup> Appellate Body Report, *US – Line Pipes*, para. 215.

<sup>5</sup> Article 15.5, 3rd sentence SCM Agreement.

<sup>6</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

6. Lastly, Pakistan's argument that the "breaking the causal link" method would prevent the Commission from properly distinguishing and separating the effects of the non-attribution factors is entirely speculative and unsupported by any facts.
7. The European Union also notes that compliance of the European Union's method with the requirements of Article 15.5 SCM Agreement was already confirmed by previous panels as the Panel correctly noted.<sup>7</sup>
8. The European Union therefore requests the Appellate Body to reject Pakistan's claim.

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<sup>7</sup> Panel Report, para. 7.119 with references.

**ANNEX C**

ARGUMENTS OF THE THIRD PARTICIPANTS

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**ANNEX C-1****EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION****I. THE EUROPEAN UNION'S CLAIM THAT THE PANEL ERRED IN CONSIDERING EXPIRED MEASURES**

1. The expiration of a measure after panel establishment is not relevant to the Panel's analysis of WTO consistency, nor to its obligation under the DSU to make recommendations with respect to any measures found to be inconsistent with a Member's obligations.

2. Under the DSU, the task of a panel is to determine whether the measure at issue is consistent with the relevant obligations "*at the time of establishment of the Panel.*" It is thus the challenged measures, as they existed at the time of the panel's establishment, when the "matter" was referred to the panel, that are properly within the panel's terms of reference and on which the panel should make findings.

3. Therefore, the panel in this dispute was authorized and charged by the DSU to make a finding with respect to the measures within its terms of reference found to be WTO-inconsistent, i.e., the challenged measures, as they existed at the time of the Panel's establishment. The expiration or withdrawal of one of the legal instruments identified in Pakistan's panel request does not alter the scope of the Panel's terms of reference, nor the Panel's mandate under the DSU. The United States thus agrees with Pakistan that the Panel acted in accordance with its obligations under the DSU by making findings with respect to the EU's measure, notwithstanding the expiry of that measure.

4. Having found an inconsistency, however, the United States considers that the Panel was obligated under Article 19.1 of the DSU also to issue a recommendation with respect to the WTO-inconsistent measure. Therefore, if the Appellate Body finds the EU measure to be inconsistent with the SCM Agreement, it must recommend that the EU bring its measure into compliance, as required under Article 19.1, unless the parties agree that not issuing a recommendation will assist them in securing a positive resolution to this dispute.

**II. THE EUROPEAN UNION'S CLAIMS OF ERROR WITH REGARD TO THE SCM AGREEMENT**

5. 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.

6. Importantly, footnote 1 also notes that this standard 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."

7. Annex II(II) is key to interpreting footnote 1; Annex I, item (i); and Annex II(I). This is because a determination of what inputs are consumed directly informs the analysis of whether there is any excess remission of import duties in connection with those inputs.

8. Annex II(II)(1)-(2) contemplates a system that in itself can demonstrate that there is no excess remission on the part of the exporting Member. In that respect, the United States agrees with the EU that "[l]imiting classification as a 'subsidy' solely to the excess remitted or refunded" in all circumstances "*presupposes* that the system for remission or exemption of import duties is compatible with the Annexes I to III, since in those cases exporters are indeed 'entitled' to drawback in respect of duties on the inputs used in the exported products."



9. For this reason, where a purported remission of duties does not satisfy the requirements found in the Annexes, an investigating authority is permitted to examine that measure as a financial contribution under Article 1.1 as it would any other measure, and, if appropriate, to countervail the full amount of the financial contribution.

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**ANNEX D**

PROCEDURAL RULINGS

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**ANNEX D-1**

## PROCEDURAL RULING OF 25 OCTOBER 2017

1.1. On 17 October 2017, Pakistan and the European Union jointly addressed a letter ("joint request") to the Director of the Appellate Body Secretariat requesting that the Appellate Body adopt additional procedures for the protection of business confidential information (BCI) in these appellate proceedings.

1.2. In their joint request, the participants sought BCI protection for any information that was submitted by the participants as BCI in the context of the Panel proceedings, as well as any information that was treated as such by the Panel, including in its Report. The participants explained that their submissions to the Panel, as well as the Panel Report, contain sensitive commercial data, such as sales and production data, financial information, and expenses for the individual companies. According to the participants, any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies that submitted the information. The participants also suggested the inclusion, in the additional procedures, of a provision concerning the resolution of any potential disagreement between the participants as regards the BCI designation of any information.

1.3. On 17 October 2017, the Appellate Body Division hearing this appeal invited the third participants to comment on the joint request. China did not comment on the joint request. By letter dated 19 October 2017, the United States commented on the suggested provision regarding the resolution of any disagreement on the BCI designation of information. The United States asserted that such a provision would have no practical value and, if applied, would only serve to delay these appellate proceedings. The United States also expressed doubts as to the consistency of such a provision with the Appellate Body's mandate to consider issues of law and legal interpretation.

1.4. We recall that the provisions of Articles 17.10 and 18.2 of the DSU, as well as those set out in paragraph VII:1 of the Rules of Conduct for the DSU, apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding.<sup>1</sup> However, as the Appellate Body has observed, these confidentiality requirements are stated at a high level of generality that may need to be particularized in situations in which the nature of the information provided requires more detailed arrangements to protect adequately the confidentiality of that information.<sup>2</sup>

1.5. While it is for the participants to request and justify the need for additional protection of confidential information, pursuant to Article 17.9 of the DSU and Rule 16(1) of the Working Procedures, it is for the Appellate Body, relying upon objective criteria, to determine whether the information submitted by the participants deserves additional protection, as well as the degree of protection that is warranted.<sup>3</sup> As the Appellate Body explained in *EU – Fatty Alcohols (Indonesia)*, any additional procedures adopted by the Appellate Body to protect sensitive information must conform to the requirement in Rule 16(1) of the Working Procedures that such procedures not be inconsistent with the DSU, the other covered agreements, or the Working Procedures themselves.<sup>4</sup> Furthermore, a relationship of proportionality must exist between the risks associated with disclosure and the measures adopted. The measures should go no further than required to guard against a determined risk of harm that could result from

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<sup>1</sup> Appellate Body Reports, *Brazil – Aircraft*, para. 123; *Canada – Aircraft*, para. 145.

<sup>2</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.1; *China – HP-SSST (EU)*, para. 5.315; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

<sup>3</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.2; *China – HP-SSST (EU)*, para. 5.311; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, paras. 10 and 15.

<sup>4</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 8.

disclosure.<sup>5</sup> Moreover, the Appellate Body must ensure that an appropriate balance is struck between the need to guard against the risk of harm that could result from the disclosure of particularly sensitive information, on the one hand, and the integrity of the adjudicative process, the participation rights of third participants, and the rights and systemic interests of the WTO membership at large, on the other hand.<sup>6</sup>

1.6. Importantly, when additional procedures to protect BCI are adopted, the Appellate Body must adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential.<sup>7</sup> In this regard, we recall the Appellate Body's observation that the question of whether information warrants BCI protection may evolve over the course of dispute settlement proceedings. Thus, while the fact that a domestic investigating authority and a panel granted BCI protection to the information at issue is relevant, it is not dispositive as to whether that information still warrants BCI protection at the appellate review stage.<sup>8</sup> Hence, whether information submitted under the confidentiality requirements generally applicable in WTO dispute settlement should receive additional confidential treatment as BCI is to be determined in each case by the WTO adjudicator.

1.7. Turning to the case before us, we note that on 14 April 2016, following consultations with the parties, the Panel adopted Additional Working Procedures Concerning Business Confidential Information (Panel's BCI Procedures).<sup>9</sup> The first paragraph of those procedures defined BCI as:

- 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<sup>10</sup> 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.<sup>11</sup>

1.8. The Panel's BCI procedures set out a number of modalities concerning how the parties, third parties, and the Panel would treat BCI in the course of the Panel proceedings. Pursuant to those procedures, the Panel redacted certain BCI from the version of its Report that was circulated to WTO Members on 6 July 2017.

1.9. On 30 August 2017, the European Union appealed certain issues of law and legal interpretation covered in the Panel Report. On 4 September 2017, Pakistan filed a Notice of Other

<sup>5</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 9.

<sup>6</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3; *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15.

<sup>7</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3; *China – HP-SSST (EU)*, para. 5.311.

<sup>8</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.10.

<sup>9</sup> Panel Report, para. 1.9. The Panel's BCI Procedures are attached, as Annex A-2, to its Report.

<sup>10</sup> Paragraph 3 of the Panel's BCI Procedures provided that:

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.

<sup>11</sup> The Panel's BCI Procedures are contained in Annex A-2 of the Addendum to the Panel Report.

Appeal and an other appellant's submission. On 18 September 2017, Pakistan and the European Union each filed an appellee's submission. On 20 September 2017, the United States filed its third participant's submission. We observe that none of the participants or third participants has indicated that any of their submissions contain information that was treated by the Panel as BCI. Nonetheless, we are cognisant that this does not preclude the participants or third participants from referring to the information treated by the Panel as BCI in any further communication, including at the oral hearing.

1.10. The participants justify their joint request on the grounds that the information in respect of which they seek additional protection concerns sensitive commercial data from individual companies and that any disclosure of such data could reasonably be expected to have an adverse impact on the competitive interests of the companies concerned. The Appellate Body has identified "the degree of potential harm in the event of disclosure", as an objective criterion that may be examined in determining whether the information submitted by participants deserves additional protection.<sup>12</sup> In this regard, we consider it significant that the participants agree that the disclosure of the information in question could harm the competitive interests of the companies that submitted the information. Likewise, we consider it relevant that the information covered by the joint request was treated as BCI in the Panel proceedings, and was previously treated as confidential by the European Commission in the underlying countervailing duty investigation.

1.11. With respect to the due process rights of the third participants, we note that the procedures proposed by the participants contemplate providing the third participants with access to all the confidential information. Thus, according additional protection to the information in question would not undermine the rights of the third participants. As regards the systemic interests of the WTO Membership at large, we recognise that all Members have a right to access reasoning that discloses the basis for our findings and conclusions in a manner that is understandable.<sup>13</sup> Any procedures to protect the confidentiality of the sensitive information in this dispute should be compatible with this right and should go no further than necessary to guard against the potential risk of harm identified by the participants.<sup>14</sup>

1.12. For the above reasons, and in light of the previous rulings by the Appellate Body on the issue of additional protection of BCI, we have decided to accord additional protection to the information that the Panel treated as BCI in its Report and in the Panel record. The additional protection for BCI in these appellate proceedings is provided according to the following terms, bearing in mind that the participants and third participants have already filed their written submissions:

- a. No person may have access to information that qualifies as BCI for purposes of these appellate proceedings, except a member of the Appellate Body or the staff of the Appellate Body Secretariat, an employee of a participant or third participant, or an outside advisor for the purposes of this dispute to a participant or third participant. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of the products that were the subject of the underlying countervailing duty investigation in this dispute.
- b. A participant or third participant having access to BCI shall treat it as confidential, and shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each participant and third participant shall have responsibility in this regard for its employees as well as for any outside advisors employed for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose.

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<sup>12</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.3 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, Annex III, Procedural Ruling of 10 August 2010, para. 15).

<sup>13</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.8; *Japan – DRAMS (Korea)*, para. 279.

<sup>14</sup> Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, Annex D-1, Procedural Ruling of 13 June 2017, para. 3.9; *China – HP-SSST (EU)*, para. 5.311.

- c. A participant or third participant that submits a document containing BCI to the Appellate Body after the adoption of these BCI procedures shall clearly identify such information in the document filed. Submissions filed prior to the adoption of these BCI procedures will not be marked retroactively. The participant or third participant shall mark the cover and/or first page of the document containing BCI, and each subsequent page of the document, to indicate the presence of such information. The specific information in question shall be placed within double brackets, as follows: [[...]].
- d. A participant or third participant that intends to make an oral statement at the hearing containing BCI shall inform the Division in advance, such that the Division can ensure that only persons authorized to have access to BCI pursuant to these procedures are in the room to hear that statement. At the hearing, the participant or third participant shall clearly identify the elements of such oral statement that constitute BCI.
- e. The Appellate Body 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 Appellate Body may, however, make statements of conclusion drawn from that information.
- f. Before circulating its Report to the Members, the Appellate Body will decide whether to adopt further modalities, for example to verify the designation of certain information as BCI, and to ensure both the non-disclosure of BCI in the Report to be circulated and that the analysis and findings set out in that Report can be readily understood notwithstanding the redaction of any BCI.

**ANNEX D-2**

**PROCEDURAL RULING OF 4 DECEMBER 2017**

1. On 14 November 2017, the Appellate Body Division hearing this appeal informed the participants and third participants that the oral hearing in this appeal was scheduled to take place on 12 and 13 February 2018.
2. On 28 November 2017, Pakistan and the European Union (the participants) jointly addressed a letter to the Director of the Appellate Body Secretariat requesting that the Division reschedule the date of the hearing. The participants explained that they both faced difficulties regarding the availability of key staff, including legal counsel, during the week of 12 February 2018 due to conflicting commitments and travel arrangements already made for that period. The participants indicated that their efforts to find alternative solutions to accommodate the suggested dates for the hearing had not been fruitful. For these reasons, the participants requested that the hearing take place during the week of 5 February 2018, or any other date suitable for the Division after 19 February 2018. The participants further requested that, if the Division chose a date after 19 February, the resulting delay be minimized so as not to extend further the present appellate proceedings.
3. On 29 November 2017, the Division invited the third participants to comment on the joint request by the participants by 1 December 2017. None of the third participants commented on the joint request.
4. The Division considers the reasons identified by the participants to be relevant to our assessment of the joint request. The Division also takes into account the fact that none of the third participants has raised any concern with respect to the proposed change to the hearing dates. The Division bears in mind the significant workload of the Appellate Body, the overlaps in the composition of the various Divisions hearing concurrent appeals, and the resultant impact on the availability of the Members of the Division hearing this appeal. In addition, the Division is cognisant of the logistical and administrative implications of changing the hearing dates, and is keen to minimize any inconveniences resulting therefrom.
5. Taking into account all of the foregoing, and in accordance with Rule 16 of the Working Procedures for Appellate Review, the Division has decided to reschedule the date of the hearing. The oral hearing in this appeal will commence on the morning of Thursday, 8 February 2018 at 9.30 a.m. and continue on Friday, 9 February 2018 at the Centre William Rappard, Geneva. Further details regarding the hearing will be sent to participants in due course.

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