



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

AB-2017-5

Report of the Appellate Body

Table of Contents

1 INTRODUCTION	9
2 ARGUMENTS OF THE PARTICIPANTS	13
3 ARGUMENTS OF THE UNITED STATES AS A THIRD PARTICIPANT.....	13
4 ISSUES RAISED IN THIS APPEAL	14
5 ANALYSIS OF THE APPELLATE BODY	14
5.1 European Union's claim of error regarding the expiry of the measure at issue	14
5.1.1 Background information.....	14
5.1.2 The Panel's findings	15
5.1.3 Whether the Panel erred in deciding to make findings on Pakistan's claims in this dispute after the measure at issue had expired.....	16
5.1.3.1 Review of the considerations that the Panel took into account at paragraph 7.13 of its Report	22
5.1.4 Conclusion	26
5.1.5 Separate opinion of one Appellate Body Member regarding the Panel's decision to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue	26
5.2 European Union's claim of error regarding government revenue foregone	28
5.2.1 Background information.....	29
5.2.2 The Panel's findings	31
5.2.3 Whether the Panel erred in its interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes II and III to the SCM Agreement.....	34
5.2.4 Conclusion	45
5.3 Pakistan's claim of error regarding the Commission's causation analysis	46
5.3.1 Background information.....	46
5.3.2 The Panel's findings	48
5.3.3 Whether the Panel erred in its interpretation and application of Article 15.5 of the SCM Agreement.....	50
5.3.3.1 Interpretation of Article 15.5 of the SCM Agreement	51
5.3.3.2 Analysis of the Panel's findings	54
5.3.4 Conclusion	63
6 FINDINGS AND CONCLUSIONS.....	64

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
Commission	European Commission
Council	Council of the European Union
Definitive Determination	Council Implementing Regulation (EU) No. 857/2010 of 27 September 2010 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, <i>Official Journal of the European Union</i> , L Series, No. 254 (29 September 2010)
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU Basic CVD Regulation	Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community, <i>Official Journal of the European Union</i> , L Series, No. 188 (18 July 2009)
GATT 1994	General Agreement on Tariffs and Trade 1994
investigation period	12-month period from 1 July 2008 to 30 June 2009
LTF-EOP	Long Term Financing of Export-Oriented Projects
MBS	Manufacturing Bond Scheme
MBS New Rules	Amendments to the Customs Rules 2001 of Pakistan through Notification S.R.O. 601(I)/2010, published on 28 June 2010
MBS Old Rules	Chapter XV of the Customs Rules 2001 of Pakistan through Notification S.R.O. 450(I)/2001, published on 18 June 2001
Novatex	Novatex Limited, Karachi
Panel Report	Panel Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/R
Panel Request	Request for the Establishment of a Panel by Pakistan, WT/DS486/2
period considered	Period from 1 January 2006 to the end of the investigation period (30 June 2009)
PET	polyethylene terephthalate
Provisional Determination	Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, <i>Official Journal of the European Union</i> , L Series, No. 134 (1 June 2010)
SCM Agreement	Agreement on Subsidies and Countervailing Measures
verification system	System or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Exhibit Number	Short Title (if applicable)	Description
EU-2	MBS Old Rules	Chapter XV of the Customs Rules 2001 of Pakistan through Notification S.R.O. 450(I)/2001, published on 18 June 2001
EU-3	MBS New Rules	Amendments to the Customs Rules 2001 of Pakistan through Notification S.R.O. 601(I)/2010, published on 28 June 2010
EU-5		Submission of the Government of Pakistan of 21 December 2009 to the European Commission
PAK-1	Provisional Determination	Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, <i>Official Journal of the European Union</i> , L Series, No. 134 (1 June 2010)
PAK-2	Definitive Determination	Council Implementing Regulation (EU) No. 857/2010 of 27 September 2010 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, <i>Official Journal of the European Union</i> , L Series, No. 254 (29 September 2010)
PAK-8		Exhibit 6 from the verification visit (BCI)
PAK-15		European Commission, Notice of initiation of an anti-subsidy proceeding concerning imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, <i>Official Journal of the European Union</i> , C Series, No. 208 (3 September 2009)
PAK-33		Definitive company-specific disclosure to Novatex, dated 26 July 2010 (BCI)

CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, p. 515
<i>Argentina – Textiles and Apparel</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, p. 16
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, p. 2985

Short Title	Full Case Title and Citation
<i>Canada – Wheat Exports and Grain Imports</i>	Appellate Body Report, <i>Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain</i> , WT/DS276/AB/R, adopted 27 September 2004, DSR 2004:VI, p. 2739
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
<i>China – Broiler Products</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
<i>China – Electronic Payment Services</i>	Panel Report, <i>China – Certain Measures Affecting Electronic Payment Services</i> , WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
<i>China – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, p. 7425
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Reports, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, p. 591
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7

Short Title	Full Case Title and Citation
<i>EC and certain member States – Large Civil Aircraft (Article 21.5 – US)</i>	Panel Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS316/RW and Add.1, circulated to WTO Members 22 September 2016
<i>EU – Biodiesel (Argentina)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Argentina</i> , WT/DS473/AB/R and Add.1, adopted 26 October 2016
<i>EU – Fatty Alcohols (Indonesia)</i>	Appellate Body Report, <i>European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia</i> , WT/DS442/AB/R and Add.1, adopted 29 September 2017
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585
<i>EU – PET (Pakistan)</i>	Panel Report, <i>European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan</i> , WT/DS486/R, Add.1 and Corr.1, circulated to WTO Members 6 July 2017
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>India – Additional Import Duties</i>	Panel Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/R, adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R, DSR 2008:XX, p. 8317
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, p. 9
<i>India – Solar Cells</i>	Appellate Body Report, <i>India – Certain Measures Relating to Solar Cells and Solar Modules</i> , WT/DS456/AB/R and Add.1, adopted 14 October 2016
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, p. 277
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, p. 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, p. 4391
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, p. 5
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>Mexico – Taxes on Soft Drinks</i>	Appellate Body Report, <i>Mexico – Tax Measures on Soft Drinks and Other Beverages</i> , WT/DS308/AB/R, adopted 24 March 2006, DSR 2006:I, p. 3
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869

Short Title	Full Case Title and Citation
US – Carbon Steel	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel (India)	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Certain EC Products	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, p. 373
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Countervailing Measures (China)	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
US – Countervailing Measures (China)	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R
US – FSC	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations"</i> , WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, p. 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, p. 55
US – Gasoline	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
US – Hot-Rolled Steel	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Lamb	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
US – Large Civil Aircraft (2 nd complaint)	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Lead and Bismuth II	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, p. 2595
US – Poultry (China)	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010, DSR 2010:V, p. 1909
US – Softwood Lumber IV	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Tyres (China)	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Upland Cotton	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299

Short Title	Full Case Title and Citation
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
<i>US – Wool Shirts and Blouses</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343

WORLD TRADE ORGANIZATION
APPELLATE BODY

**European Union – Countervailing Measures
on Certain Polyethylene Terephthalate
from Pakistan**

European Union, *Appellant/Appellee*
Pakistan, *Other Appellant/Appellee*

China, *Third Participant*
United States, *Third Participant*

AB-2017-5

Appellate Body Division:

Servansing, Presiding Member
Bhatia, Member
Van den Bossche, Member

1 INTRODUCTION

1.1. The European Union and Pakistan each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*¹ (Panel Report). The Panel was established on 25 March 2015 to consider a complaint by Pakistan² with respect to countervailing measures imposed by the European Union on imports of certain polyethylene terephthalate (PET³) from Pakistan.⁴

1.2. In its countervailing duty investigation, the European Commission (Commission) investigated several schemes that allegedly involved the granting of subsidies by the Government of Pakistan, including the Manufacturing Bond Scheme (MBS).⁵ The MBS permits the import of duty-free material on condition that it is used as an input in the manufacture of goods that are subsequently exported.⁶

1.3. On 31 May 2010, the Commission issued a regulation imposing provisional countervailing duties on imports of PET originating in Iran, Pakistan, and the United Arab Emirates (Provisional Determination).⁷ In its Provisional Determination, the Commission found the MBS to be a countervailable subsidy contingent in law upon export performance.⁸ The Commission also found that the subsidized imports of PET from Iran, Pakistan, and the United Arab Emirates had caused material injury to the EU industry.⁹ In carrying out its causation analysis, the Commission examined factors other than the subsidized PET imports¹⁰ but found that none of these other factors had contributed to the injury to the EU industry to the extent that they had broken the causal link between the subsidized PET imports and the injury.¹¹

1.4. On 27 September 2010, the Council of the European Union (Council) issued a regulation imposing definitive countervailing duties and collecting definitively the provisional duty imposed on

¹ WT/DS486/R, 6 July 2017.

² Request for the Establishment of a Panel by Pakistan, WT/DS486/2 (Panel Request).

³ PET is a chemical product that is normally used in the plastics industry for the production of bottles and sheets. (Commission Regulation (EU) No. 473/2010 of 31 May 2010 imposing a provisional countervailing duty on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, *Official Journal of the European Union*, L Series, No. 134 (1 June 2010) (Provisional Determination) (Panel Exhibit PAK-1), recitals 16-17)

⁴ Panel Report, para. 2.1.

⁵ Provisional Determination (Panel Exhibit PAK-1), recital 59.

⁶ Panel Report, para. 7.29; Provisional Determination (Panel Exhibit PAK-1), recital 60.

⁷ Panel Report, para. 2.1 (referring to Provisional Determination (Panel Exhibit PAK-1)). The provisional countervailing duty rate for imports from Pakistan was 9.7%. (Provisional Determination (Panel Exhibit PAK-1), recital 307)

⁸ Provisional Determination (Panel Exhibit PAK-1), recitals 73-77. See also Panel Report, para. 7.57.

⁹ Provisional Determination (Panel Exhibit PAK-1), recital 264.

¹⁰ These other factors included: the export activity of the EU industry; imports from Korea and other third countries; competition from the non-cooperating EU producers; the 2008 economic downturn and the accompanying contraction in demand; the geographical location of the European Union; and the lack of vertical integration. (Provisional Determination (Panel Exhibit PAK-1), recitals 246-261)

¹¹ Panel Report, para. 7.118; Provisional Determination (Panel Exhibit PAK-1), recital 263.

imports of PET originating in Iran, Pakistan, and the United Arab Emirates¹² (Definitive Determination).

1.5. Additional factual aspects of this dispute are set forth in the Panel Report¹³ and in subsequent sections of this Report.¹⁴

1.6. Following consultation with the parties, the Panel adopted its Working Procedures and Additional Working Procedures on Business Confidential Information on 15 March 2016 and 14 April 2016, respectively.¹⁵

1.7. Before the Panel, Pakistan claimed that the countervailing measures imposed by the European Union are inconsistent with several provisions of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994). In particular, Pakistan challenged the findings by the Commission that Pakistan's MBS and its Long Term Financing of Export-Oriented Projects (LTF-EOP) were countervailable subsidies contingent upon export performance.¹⁶ Pakistan also claimed that, in its causation analysis, the Commission acted inconsistently with Article 15.5 of the SCM Agreement.¹⁷ Additionally, Pakistan claimed that the Commission acted inconsistently with Article 12.6 of the SCM Agreement in connection with its obligation to disclose the results of the verification visit to the exporting producer in Pakistan.¹⁸

1.8. On 3 March 2016, the European Union submitted a request for a preliminary ruling asking the Panel to cease all work in this dispute because the relevant EU countervailing measures on PET from Pakistan had expired on 30 September 2015. If the Panel denied the request to cease all work in this dispute, then the European Union requested the Panel to find instead that certain of Pakistan's claims were outside the Panel's terms of reference under the standards set forth in Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).¹⁹

1.9. On 19 May 2016, the Panel sent a communication to the parties denying the European Union's request that the Panel cease all work in this dispute.²⁰ The Panel provided the reasons for its decision in its Report.²¹ The Panel also addressed, in its Report, the European Union's request for a preliminary ruling concerning the Panel's terms of reference under Article 6.2 of the DSU.²²

1.10. The Panel circulated its Report to Members of the World Trade Organization (WTO) on 6 July 2017. Pursuant to the Panel's Additional Working Procedures on Business Confidential Information, the Panel redacted certain information from its Report that it considered to be business confidential information (BCI). In its Report:

- a. with respect to the European Union's request for a preliminary ruling concerning the Panel's terms of reference under Article 6.2 of the DSU:
 - i. the Panel found that Pakistan's claim that the Commission acted inconsistently with Annex II(II)(1) and/or Annex III(II)(2) to the SCM Agreement "because it failed to

¹² Panel Report, para. 2.1 (referring to Council Implementing Regulation (EU) No. 857/2010 of 27 September 2010 imposing a definitive countervailing duty and collecting definitively the provisional duty imposed on imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, *Official Journal of the European Union*, L Series, No. 254 (29 September 2010) (Definitive Determination) (Panel Exhibit PAK-2)). The definitive countervailing duty rate for imports from Pakistan was 5.1%. (Definitive Determination (Panel Exhibit PAK-2), recital 169)

¹³ Panel Report, paras. 2.1, 7.29-7.30, 7.57, 7.62, 7.72-7.90, 7.107, 7.122-7.124, 7.136, 7.156, and 7.179-7.180.

¹⁴ See paras. 5.66-5.74 and 5.146-5.155 below.

¹⁵ Panel Report, paras. 1.7 and 1.9 and Annexes A-1 and A-2.

¹⁶ Panel Report, para. 3.1.a and b.

¹⁷ Panel Report, para. 3.1.c.

¹⁸ Panel Report, para. 3.1.d.

¹⁹ Panel Report, paras. 7.1 and 7.9.

²⁰ Panel Report, para. 7.12.

²¹ Panel Report, para. 7.13.

²² Panel Report, paras. 7.14-7.28.

- examine the 'generally accepted commercial [practices]' prevailing in Pakistan when examining the verification system and procedures under the MBS" was outside the Panel's terms of reference as Pakistan had failed to present the problem clearly in its request for the establishment of a panel (Panel Request)²³;
- ii. the Panel rejected the European Union's objection to Pakistan's claim under Article 1.1(a)(1)(ii) of the SCM Agreement, and thus found that this claim was within the Panel's terms of reference²⁴; and
 - iii. the Panel rejected the European Union's objection to Pakistan's claim under Article 12.6 of the SCM Agreement, and thus found that this claim was within the Panel's terms of reference²⁵;
- b. with respect to Pakistan's claims regarding the MBS, the Panel found that:
- i. the Commission acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement²⁶; and
 - ii. the Commission also acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance²⁷;
- c. with respect to Pakistan's claims regarding the LTF-EOP, the Panel found that:
- i. the Commission acted inconsistently with Article 14(b) of the SCM Agreement by failing to properly identify what Novatex Limited, Karachi (Novatex) would have paid on a "comparable commercial loan" in calculating the benefit conferred by the LTF-EOP Loan²⁸;
 - ii. the Commission acted inconsistently with Article 1.1(b) of the SCM Agreement as a consequence of having acted inconsistently with Article 14(b) of the SCM Agreement²⁹; and
 - iii. the Commission acted inconsistently with the *chapeau* of Article 14 of the SCM Agreement by failing to transparently and adequately explain how it identified a "comparable commercial loan"³⁰;

²³ Panel Report, para. 8.1.a.i. See also para. 7.22.

²⁴ Panel Report, para. 8.1.a.ii. See also para. 7.24.

²⁵ Panel Report, para. 8.1.a.iii. See also paras. 7.27-7.28. The Panel found that the remaining objections raised by the European Union had become moot and therefore did not address them. (*Ibid.*, para. 8.1.a.iv. See also para. 7.18)

²⁶ Panel Report, para. 8.1.b.i. See also para. 7.60.

²⁷ Panel Report, para. 8.1.b.ii. See also para. 7.60. In addition, the Panel exercised judicial economy or found that, for other reasons, it did not need to address Pakistan's claims that the Commission: (a) failed to investigate whether Pakistan's duty drawback system verification mechanisms were based on generally accepted commercial practices in Pakistan; (b) failed to provide Pakistan with the opportunity to assist the Commission's determination of the excess amount; (c) failed to take into account evidence regarding the amount of any excess drawback; (d) failed to make normal allowance for waste; (e) violated Annexes II(II) and III(II) to the SCM Agreement "as a whole"; (f) violated Annex I(i) to the SCM Agreement; (g) violated Articles 1.1(b), 10, 19, and 32 of the SCM Agreement; and (h) violated Article VI of the GATT 1994. (*Ibid.*, para. 8.1.b.iii. See also para. 7.61)

²⁸ Panel Report, para. 8.1.c.i. See also para. 7.102.

²⁹ Panel Report, para. 8.1.c.ii. See also para. 7.102.

³⁰ Panel Report, para. 8.1.c.iii. See also para. 7.104. In addition, the Panel exercised judicial economy with respect to Pakistan's claims that, as a result of violating Article 14(b) of the SCM Agreement and/or the *chapeau* of Article 14 of the SCM Agreement, the Commission acted inconsistently with Articles 10, 19, and 32 of the SCM Agreement and Article VI of the GATT 1994. (*Ibid.*, para. 8.1.c.iv. See also para. 7.105)

- d. with respect to Pakistan's claims under Article 15.5 of the SCM Agreement, the Panel found that:
- i. Pakistan failed to establish that the Commission's use of the "break the causal link" methodology in this case was inconsistent with Article 15.5³¹;
 - ii. Pakistan failed to establish that the Commission acted inconsistently with Article 15.5 by failing to conduct a proper non-attribution analysis of imports from Korea³²;
 - iii. Pakistan failed to establish that the Commission acted inconsistently with Article 15.5 by failing to conduct a proper non-attribution analysis of the economic downturn³³;
 - iv. the Commission acted inconsistently with Article 15.5 with respect to its analysis of competition from non-cooperating producers³⁴; and
 - v. the Commission acted inconsistently with Article 15.5 with respect to its analysis of oil prices³⁵; and
- e. with respect to Pakistan's claim under Article 12.6 of the SCM Agreement, the Panel found that the Commission acted inconsistently with Article 12.6 because it failed to adequately provide the "results" of the verification visit to Novatex.³⁶

1.11. The Panel explained that, given that the measures at issue in this dispute had expired, it would make no recommendation to the Dispute Settlement Body (DSB) pursuant to Article 19.1 of the DSU.³⁷

1.12. On 30 August 2017, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal³⁸ and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review³⁹ (Working Procedures).

1.13. On 4 September 2017, Pakistan notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal⁴⁰ and an other appellant's submission pursuant to Rule 23 of the Working Procedures.

1.14. On 18 September 2017, Pakistan and the European Union each filed an appellee's submission.⁴¹ On 20 September 2017, the United States filed a third participant's submission.⁴² On the same day, China notified its intention to appear at the oral hearing as a third participant.⁴³

1.15. On 27 October 2017, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision.⁴⁴ The Chair of the Appellate Body explained that this was due to a number of factors including a substantially enhanced workload in 2017 with several appeals proceeding in parallel and the demands that these concurrent appeals place on the WTO Secretariat's translation services,

³¹ Panel Report, para. 8.1.d.i. See also para. 7.127.

³² Panel Report, para. 8.1.d.ii. See also para. 7.135.

³³ Panel Report, para. 8.1.d.iii. See also para. 7.145.

³⁴ Panel Report, para. 8.1.d.iv. See also para. 7.152.

³⁵ Panel Report, para. 8.1.d.v. See also para. 7.160.

³⁶ Panel Report, para. 8.1.e. See also para. 7.182.

³⁷ Panel Report, para. 8.3. See also fn 33 to para. 7.13.

³⁸ WT/DS486/6.

³⁹ WT/AB/WP/6, 16 August 2010.

⁴⁰ WT/DS486/7.

⁴¹ Pursuant to Rules 22 and 23(4), respectively, of the Working Procedures.

⁴² Pursuant to Rule 24(1) of the Working Procedures.

⁴³ Pursuant to Rule 24(2) of the Working Procedures.

⁴⁴ WT/DS486/8.

scheduling issues arising from an increasing overlap in the composition of the Divisions hearing the different appeals owing to the current vacancies on the Appellate Body, and the shortage of staff in the Appellate Body Secretariat. On 7 May 2018, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated no later than 16 May 2018.⁴⁵

1.16. On 17 October 2017, Pakistan and the European Union jointly requested the Appellate Body Division hearing this appeal to adopt additional procedures for the protection of BCI in these appellate proceedings. In their joint request, the participants sought protection for any information that was submitted by the participants as BCI in the context of the Panel proceedings, including any information that was treated as such by the Panel. On the same day, the Division invited the third participants to comment in writing on the joint request. By letter dated 19 October 2017, the United States commented on the joint request. China did not comment. On 25 October 2017, the Division issued a Procedural Ruling informing the participants of its decision to accord additional protection to the information that the Panel had treated as BCI in its Report and on the Panel record.⁴⁶

1.17. On 14 November 2017, the Division informed the participants and third participants that the oral hearing in this appeal was scheduled to take place on 12 and 13 February 2018. By letter dated 28 November 2017, Pakistan and the European Union jointly requested the Division to reschedule the date of the hearing. On 29 November 2017, the Division invited the third participants to comment on the request by the participants. Neither of the third participants commented on the request. On 4 December 2017, the Division issued a Procedural Ruling under Rule 16 of the Working Procedures informing the participants and third participants of its decision to reschedule the date of the hearing.⁴⁷

1.18. The oral hearing in this appeal was held on 8 and 9 February 2018. The participants and third participants made oral statements and responded to questions posed by the Division.

1.19. On 24 November 2017, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had notified the Chair of the DSB of its decision to authorize Appellate Body Member Mr Peter Van den Bossche to complete the disposition of this appeal, as his second term of office was due to expire before the completion of the appellate proceedings.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.⁴⁸ The Notices of Appeal and Other Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS486/AB/R/Add.1.

3 ARGUMENTS OF THE UNITED STATES AS A THIRD PARTICIPANT

3.1. The arguments of the United States are reflected in the executive summary of its written submission provided to the Appellate Body⁴⁹, which is contained in Annex C of the Addendum to this Report, WT/DS486/AB/R/Add.1.

⁴⁵ WT/DS486/9.

⁴⁶ The Procedural Ruling of 25 October 2017 is contained in Annex D-1 of the Addendum to this Report, WT/DS486/AB/R/Add.1.

⁴⁷ The Procedural Ruling of 4 December 2017 is contained in Annex D-2 of the Addendum to this Report, WT/DS486/AB/R/Add.1.

⁴⁸ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

⁴⁹ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether the Panel acted inconsistently with Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue (raised by the European Union);
- b. whether the Panel erred in finding that, in making its determination that the MBS was a countervailable subsidy contingent upon export performance, the European Union acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement (raised by the European Union). In particular, whether the Panel erred in finding that:
 - i. the "excess remissions principle" provides the legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constitute a financial contribution in the form of government revenue foregone that is otherwise due within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement; and
 - ii. even if, pursuant to Annex II and/or Annex III to the SCM Agreement, an investigating authority establishes that the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product and, in the absence of a further examination by the exporting Member of that issue, the investigating authority should still determine whether an excess remission occurred; and
- c. whether the Panel erred in its interpretation and application of Article 15.5 of the SCM Agreement in finding that Pakistan failed to establish that the Commission's use of the "break the causal link" approach in this case was inconsistent with Article 15.5 (raised by Pakistan).

5 ANALYSIS OF THE APPELLATE BODY

5.1 European Union's claim of error regarding the expiry of the measure at issue

5.1. The European Union claims that the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue during the Panel proceedings.⁵⁰ The European Union requests us to reverse the entirety of the Panel Report and to declare moot and of no legal effect the findings and legal interpretations contained therein.⁵¹

5.2. In order to situate the European Union's claim under Article 11 of the DSU in its proper context, we begin by providing, as background information, the relevant aspects of the communication between the parties and the Panel concerning the expiry of the measure at issue. We also include a summary of the relevant Panel findings before addressing the merits of the European Union's claim under Article 11 of the DSU.

5.1.1 Background information

5.3. At its meeting on 25 March 2015, the DSB established a panel at the request of Pakistan.⁵² On 13 May 2015, the parties agreed on the composition of the Panel.⁵³

⁵⁰ European Union's Notice of Appeal, p. 1; appellant's submission, paras. 2 and 24.

⁵¹ European Union's Notice of Appeal, p. 2; appellant's submission, paras. 2 and 53.

⁵² Panel Report, para. 1.3 (referring to Pakistan's Panel Request).

⁵³ Panel Report, para. 1.5.

5.4. Five years after the imposition of the definitive duties, on 26 September 2015, a notice of expiry of the relevant countervailing measures was published in the *Official Journal of the European Union*. The notice indicated that, as "no duly substantiated request for a review" had been lodged, the countervailing measure prescribed by the Definitive Determination would expire at midnight on 30 September 2015.⁵⁴ By letter dated 1 October 2015, before the Panel began its work⁵⁵, the European Union informed the Panel and Pakistan that the measure at issue had expired. In view of this development, and subject to Pakistan's agreement, the European Union requested the Panel to terminate its work. On 15 October 2015, the Panel invited Pakistan to respond to the European Union's letter. By letter dated 11 November 2015, Pakistan indicated that it did not agree with the European Union's request and asked the Panel to continue its work in this dispute.

5.5. On 3 March 2016, the European Union filed a request for a preliminary ruling, asking, *inter alia*, that the Panel cease all work in this dispute because the measure at issue had expired.⁵⁶ On 19 May 2016, the Panel sent a communication to the parties denying the European Union's request and indicating that it would provide the reasons for its decision in due course. The Panel provided its reasons for denying the request by the European Union in its Report.⁵⁷

5.1.2 The Panel's findings

5.6. The European Union requested that the Panel cease all work in this dispute because the measure at issue had expired.⁵⁸ The European Union referred to Articles 3.4, 3.7, and 11 of the DSU in support of its assertion that the role of a panel is to make recommendations or rulings when these contribute to securing a positive solution to a dispute. According to the European Union, as the measure at issue had expired, it could be understood to have been "withdrawn" within the meaning of Article 3.7 of the DSU, and thus a positive solution had been secured.⁵⁹

5.7. Pakistan asked the Panel to reject the European Union's request, arguing that it lacked any basis in the text of the DSU or the practice of panels and the Appellate Body. Relying on past Appellate Body reports, Pakistan asserted that the expiry of a measure does not limit a panel's jurisdiction to issue findings regarding that measure, and that a panel cannot decline to rule on the entirety of the claims over which it has jurisdiction.⁶⁰ Pakistan indicated that the present dispute involved a number of claims that, although directed at the specific measure at hand, were nevertheless also of systemic importance to Pakistan. In particular, Pakistan informed the Panel that the MBS was the subject of other countervailing duty investigations by other WTO Members, including the United States, and that these other Members had relied on the European Union's Definitive Determination at issue in this dispute as one of the reasons for the initiation of their respective countervailing duty investigations.⁶¹

5.8. The Panel acknowledged that the measure at issue had expired on 30 September 2015, at which time the countervailing duties on certain PET from Pakistan had been removed. Thus, the Panel considered that the measure at issue had ceased to have legal effect. For the Panel, this meant that it was not possible for the European Union to "withdraw" the measure at issue within the meaning of Article 3.7 of the DSU.⁶² Taking note of WTO panel and Appellate Body jurisprudence stating that panels have discretion in deciding whether to make findings regarding

⁵⁴ Notice of the expiry of certain countervailing measures, *Official Journal of the European Union*, C Series, No. 319 (26 September 2015).

⁵⁵ Panel Report, para. 1.7. The Panel began its work on this case later than it would have wished to due to staff constraints in the WTO Secretariat. (Ibid.)

⁵⁶ Panel Report, para. 7.9.

⁵⁷ Panel Report, para. 7.12.

⁵⁸ Panel Report, para. 7.9.

⁵⁹ Panel Report, para. 7.10 (referring to European Union's request for a preliminary ruling, paras. 14-15).

⁶⁰ Panel Report, para. 7.11 (referring to Pakistan's response to the European Union's request for a preliminary ruling, paras. 1.3, 4.14 (quoting Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 46), and 4.36).

⁶¹ Pakistan's response to the European Union's request for a preliminary ruling, paras. 4.60-4.62.

⁶² Panel Report, para. 7.13 and fn 33 thereto.

expired measures, the Panel indicated that it had not identified any reason to depart from this jurisprudence.⁶³

5.9. In deciding how to exercise its discretion, the Panel first noted that the measure at issue expired after the Panel had been established. Second, the Panel took into account the fact that Pakistan continued to request that the Panel make findings with respect to the expired measure. Third, the Panel considered it a reasonable possibility that the European Union could impose countervailing measures on Pakistani goods in a manner that could give rise to certain potential WTO inconsistencies that would be the same as, or materially similar to, those alleged in this dispute. In particular, the Panel took note of Pakistan's assertion that a wide range of Pakistani exports benefit from the MBS, and of the fact that the parties disputed, on a fundamental level, how investigating authorities should determine the extent to which duty drawback schemes like the MBS may constitute countervailable subsidies within the meaning of the SCM Agreement.⁶⁴

5.10. For these reasons, the Panel decided to proceed with its work in this dispute.⁶⁵

5.1.3 Whether the Panel erred in deciding to make findings on Pakistan's claims in this dispute after the measure at issue had expired

5.11. The European Union submits that the measure at issue had expired and had ceased to have any legal effect before the Panel commenced its work, thereby rendering the Panel proceeding moot. The European Union contends that the Panel disregarded its basic obligations under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to make findings on Pakistan's claims despite the expiry of the measure at issue. Consequently, the European Union requests us to reverse the entirety of the Panel Report and to declare moot and of no legal effect the findings and legal interpretations contained therein.⁶⁶

5.12. The European Union's claim under Article 11 of the DSU raises issues relating to a panel's jurisdiction to hear disputes and, specifically, the limits of a panel's discretion in the exercise of that jurisdiction. In this regard, we note that the European Union prefaces its arguments in support of its claim under Article 11 of the DSU by emphasizing that it does not question that, once a panel is established, it has jurisdiction to rule on the matter before it. However, the European Union maintains that a panel having "jurisdiction" or "authority" on the matter before it "does not mean that the exercise of such an authority is boundless".⁶⁷ For the European Union, the Panel "wrongly exercised its alleged discretion in breach of Article 11 of the DSU when making findings in this dispute".⁶⁸

5.13. Article 6.1 of the DSU provides that the DSB has the authority to establish a panel at the request of the complaining Member. Article 6.2 of the DSU sets forth the requirements applicable to a complaining Member's request for the establishment of a panel. A panel request must meet, *inter alia*, two distinct requirements: (i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint (or the claims). Together, the two elements referred to in Article 6.2 of the DSU – the specific measures at issue and the claims – comprise the "matter referred to the DSB", which forms the basis for a panel's terms of reference under Article 7.1 of the DSU once the panel is established by the DSB.⁶⁹ Thus, by establishing a panel, the DSB also establishes the jurisdiction of that panel to adjudicate the "matter" before it, as circumscribed by the panel's terms of reference.⁷⁰

⁶³ Panel Report, para. 7.13 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270; *China – Raw Materials*, para. 263; Panel Reports, *US – Poultry (China)*, para. 7.54; *EC – IT Products*, para. 7.165).

⁶⁴ Panel Report, para. 7.13.

⁶⁵ Panel Report, para. 7.13.

⁶⁶ European Union's appellant's submission, paras. 2, 4, 6, 41, and 53.

⁶⁷ European Union's appellant's submission, para. 40.

⁶⁸ European Union's appellant's submission, para. 24.

⁶⁹ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.6; *US – Carbon Steel*, para. 125; *Guatemala – Cement I*, paras. 69-76.

⁷⁰ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186. As the Appellate Body has explained, this "vesting of jurisdiction in a panel is a fundamental prerequisite for lawful panel proceedings". (Appellate Body Report, *US – 1916 Act*, para. 54)

5.14. Once a panel's jurisdiction is established, the panel is required to address the "matter" before it in accordance with Article 11 of the DSU, which sets out the function of panels.⁷¹ Article 11 of the DSU states:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

5.15. Article 11 of the DSU describes the function of panels as assisting the DSB in discharging its responsibilities under the DSU and the covered agreements. To this end, "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." In addition, a panel should "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". Thus, panels carry out their adjudicative mandate, as set out in Article 11 of the DSU, so as to assist the DSB in discharging its responsibilities under the DSU and the covered agreements.

5.16. WTO panels have certain powers that are inherent in their adjudicative function under Article 11 of the DSU. For instance, panels have the authority to determine whether they have jurisdiction in a given case and to determine the scope and limits of that jurisdiction, as defined by their terms of reference.⁷² Panels also have "a margin of discretion to deal, always in accordance with due process, with specific situations that may arise in a particular case and that are not explicitly regulated."⁷³

5.17. Thus, a panel has a margin of discretion in the exercise of its inherent adjudicative powers. However, as the Appellate Body cautioned in *Mexico – Taxes on Soft Drinks*, it does not necessarily follow from the existence of these inherent adjudicative powers that, once jurisdiction has been validly established, a WTO panel has the authority to decline to exercise jurisdiction entirely in a case that is properly before it.⁷⁴ The Appellate Body noted, in that case, that a decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of the complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU.⁷⁵ Pakistan refers to these Appellate Body's statements in *Mexico – Taxes on Soft Drinks* in support of its argument that, "if a panel does not at all address measures validly placed before it, it is tantamount to improperly denying a complainant its WTO rights."⁷⁶ We recall that the issue in *Mexico – Taxes on Soft Drinks* concerned a request by Mexico that the panel in that dispute decline to exercise its jurisdiction entirely so that the matter could be heard, in the context of a "broader dispute", by a panel established under the North American Free Trade Agreement (NAFTA).⁷⁷ The panel's rejection of that request was then appealed by Mexico. Thus, in that dispute, the Appellate Body was addressing a situation in which the responding Member was requesting a WTO panel to refrain from exercising its compulsory jurisdiction entirely in favour of a different adjudicative forum. Indeed, in that dispute, the Appellate Body highlighted that it was "[m]indful of the precise scope of Mexico's appeal", and expressed "no view as to whether there

⁷¹ We note that the panel's jurisdiction, once established by the DSB, remains valid throughout the panel proceedings and may be curtailed in only two instances, both of which are described in detail in paragraph 5.18 below.

⁷² Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45 and fn 90 thereto (referring to Appellate Body Reports, *US – 1916 Act*, fn 30 to para. 54; *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 36 and 53).

⁷³ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45 and fn 91 thereto (quoting Appellate Body Report, *EC – Hormones*, fn 138 to para. 152; referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 247-248).

⁷⁴ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, paras. 46, 52, and 53.

⁷⁵ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53.

⁷⁶ Pakistan's appellee's submission, para. 3.54 (referring to Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 53).

⁷⁷ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 54.

may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it".⁷⁸

5.18. In this vein, we observe that there are instances, explicitly provided for in the DSU, in which a panel whose jurisdiction has been validly established by the DSB is precluded from ruling on the merits of the claims that are before it. For example, where the parties to a dispute arrive at a mutually satisfactory solution, Article 12.7 of the DSU provides that "the report of the panel shall be confined to a brief description of the case and to reporting that a solution has been reached." Similarly, pursuant to Article 12.12 of the DSU, a panel may suspend its work at the request of a complaining party. If the work of the panel is then suspended for more than 12 months, Article 12.12 states that "the authority for establishment of the panel shall lapse", thereby terminating the panel's jurisdiction. These provisions illustrate that there may be instances where a panel would be precluded from ruling on the merits of the matter before it.

5.19. Moreover, with respect to the dispute before us, we take note of the European Union's assertion that it does not question that the Panel in this dispute had jurisdiction to rule on the matter before it.⁷⁹ Instead, the European Union argues that the Panel, in the exercise of its jurisdiction, "wrongly exercised its alleged discretion in breach of Article 11 of the DSU when making findings in this dispute"⁸⁰, notwithstanding the expiry of the measure at issue. We recall that a panel has a margin of discretion in the exercise of its inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue.⁸¹ We recall that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure.⁸² Rather, among its inherent adjudicative powers is the authority of a panel to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue. Hence, we would draw a distinction between a situation in which a WTO panel declines to exercise its jurisdiction entirely at the outset of a proceeding in favour of a different adjudicative forum and a situation in which a panel, in the exercise of its jurisdiction, objectively assesses whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue.

5.20. Similarly, we stress that a situation in which a panel is precluded from addressing⁸³, or declines to address, the merits of all of the claims before it is distinct from a situation where a panel exercises judicial economy. Judicial economy refers to the discretion of a panel to address only those claims that must be addressed "in order to resolve the matter in issue in the dispute".⁸⁴ It follows that a panel can exercise judicial economy only after it has addressed some of the claims before it, particularly those claims that must be addressed in order to resolve the matter. If a panel were to decline to address the merits of all of the claims before it, the occasion for exercising judicial economy would not arise. As the Appellate Body has explained, the discretion of a panel to exercise judicial economy is consistent with the aim of the WTO dispute settlement mechanism, as articulated in Article 3.7 of the DSU, to "secure a positive solution to a dispute".⁸⁵ In this regard, we recall that, in its opening statement at the hearing, the European Union suggested that a panel's decision not to rule on the entirety of the claims before it owing to the

⁷⁸ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 54.

⁷⁹ European Union's appellant's submission, para. 40.

⁸⁰ European Union's appellant's submission, para. 24.

⁸¹ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.180 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

⁸² Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

⁸³ See para. 5.18 above.

⁸⁴ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340. See also Appellate Body Reports, *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; *Japan – Agricultural Products II*, para. 111.

⁸⁵ Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *India – Patents (US)*, para. 87; *Brazil – Retreaded Tyres*, para. 257; *Canada – Wheat Exports and Grain Imports*, para. 133; *US – Lead and Bismuth II*, paras. 71 and 73; *Argentina – Footwear (EC)*, para. 145; *Australia – Salmon*, para. 223; *Japan – Agricultural Products II*, para. 111.

expiry of the measure at issue is akin to a panel's exercise of judicial economy.⁸⁶ However, as explained above, given that a panel can exercise judicial economy only after it has addressed some of the claims, and thereby resolved the matter before it, we consider the European Union's suggestion to be inapposite.

5.21. Bearing these considerations in mind, we recall that the European Union's claim under Article 11 of the DSU raises issues concerning the limits of a panel's discretion in the exercise of its jurisdiction to adjudicate disputes. As stated above, the European Union does not question that the Panel established in this dispute had jurisdiction to rule on the matter before it.⁸⁷ However, the European Union maintains that a panel having "jurisdiction" or "authority" on the matter before it "does not mean that the exercise of such an authority is boundless".⁸⁸ For the European Union, the Panel "wrongly exercised its alleged discretion in breach of Article 11 of the DSU when making findings in this dispute".⁸⁹ In response to questioning at the hearing, the European Union clarified that its claim is that, by exercising its discretion in deciding to make findings on the measure at issue after it had expired, the Panel failed in its duty under Article 11 of the DSU to assist the DSB in discharging its responsibilities under the DSU. For the European Union, these "responsibilities" referred to in Article 11 of the DSU are identified in Article 3 of the DSU.⁹⁰

5.22. Indeed, the European Union's arguments in support of its claim under Article 11 on appeal primarily rely on the provisions of Article 3 of the DSU. In particular, the European Union highlights Articles 3.3, 3.4, 3.7, 3.8, and 3.9 as informing its claim under Article 11 of the DSU.⁹¹ The European Union asserts that Article 11 of the DSU regulates a panel's exercise of its discretion. For the European Union, in exercising its discretion, a panel must take into account the purpose that the WTO dispute settlement mechanism serves, as set out in Article 3 of the DSU.⁹² The European Union makes no arguments under Article 11 of the DSU that are independent of its arguments under Article 3. Accordingly, we examine how the specific paragraphs of Article 3 referred to by the European Union inform a panel's exercise of its function under Article 11 of the DSU.⁹³

5.23. The European Union argues that Article 3.3 of the DSU, which indicates that "[t]he prompt settlement of situations ... is essential to the effective functioning of the WTO", suggests that the settlement of disputes after the expiry of the measure at issue, when there is no longer any measure impairing any benefit, "is both non-essential and contrary to the very objectives of the WTO dispute settlement system".⁹⁴ In response to questioning at the hearing, Pakistan highlighted that Article 3.3, like Article 3.7 of the DSU, emphasizes the self-regulating nature of the right of WTO Members to bring disputes.

5.24. Article 3.3 of the DSU states that "the prompt settlement of situations" in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member "is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members." The fact that a Member may initiate a WTO dispute whenever it considers that any

⁸⁶ See also European Union's appellant's submission, para. 36.

⁸⁷ European Union's appellant's submission, para. 40.

⁸⁸ European Union's appellant's submission, para. 40.

⁸⁹ European Union's appellant's submission, para. 24.

⁹⁰ Article 3 of the DSU, which bears the title "General Provisions", sets out, in 12 paragraphs, principles that underpin the WTO dispute settlement mechanism, its rules, and its procedures.

⁹¹ European Union's appellant's submission, paras. 31-38.

⁹² European Union's appellant's submission, para. 36.

⁹³ On 30 August 2017, the European Union filed its Notice of Appeal in the present dispute. On 5 September 2017, the Appellate Body circulated its report in *EU – Fatty Alcohols (Indonesia)* to WTO Members. The panel in that dispute had made rulings with respect to an anti-dumping measure that had expired during the panel proceedings. On appeal, the Appellate Body rejected a request by the European Union, supported by arguments relating to Article 3 of the DSU, to declare moot and of no legal effect all of the findings and conclusions made by that panel. (Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, paras. 5.175-5.186 and 6.6) As the Appellate Body report in *EU – Fatty Alcohols (Indonesia)* was circulated after the European Union filed its appeal in this dispute, the European Union's Notice of Appeal and appellant's submission do not take into account the relevant Appellate Body findings in *EU – Fatty Alcohols (Indonesia)*.

⁹⁴ European Union's appellant's submission, para. 31.

benefits accruing to it are being impaired by measures taken by another Member, pursuant to Article 3.3 of the DSU, "implies that that Member is entitled to a ruling by a WTO panel".⁹⁵

5.25. Moreover, as stated by the Appellate Body in *EU – Fatty Alcohols (Indonesia)*, with respect to a challenged measure that expired during the panel proceedings, there is contextual support in Article 3.3 of the DSU for interpreting the words "measures at issue" in Article 6.2 of the DSU⁹⁶ as not excluding expired measures from its scope. Article 3.3 connects the words "prompt settlement", not to "existing" measures or measures "currently in force", but to "measures taken" by a Member, which include measures taken in the past.⁹⁷ Thus, the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure⁹⁸, or how it can or should do so "promptly". Accordingly, we are not convinced by the European Union's contention that the settlement of disputes after the expiry of the measure at issue "is both non-essential and contrary to the very objectives of the WTO dispute settlement system".⁹⁹

5.26. The European Union also contends that, in accordance with Article 3.4 of the DSU, a "satisfactory settlement of the matter" was achieved in this dispute when the European Union terminated the countervailing measure at issue. Similarly, referring to Article 3.7 of the DSU, the European Union contends that, in the present dispute, "a positive solution to the dispute", being the expiry of the measure at issue, "was already achieved and this is the first objective of the dispute settlement system".¹⁰⁰

5.27. These arguments by the European Union reflect the proposition that a dispute no longer exists after the expiry of the measure at issue. However, the Appellate Body has expressly rejected the proposition that the repeal of a measure necessarily constitutes, without more, a "satisfactory settlement of the matter"¹⁰¹ within the meaning of Article 3.4, or a "positive solution to the dispute" within the meaning of Article 3.7. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure.¹⁰²

5.28. In this regard, we recall that the "matter" before a panel under Article 11 of the DSU is the "matter referred to the DSB" by the complaining Member within the meaning of Article 7.1 of the DSU. As discussed at paragraph 5.13 above, this "matter" comprises the specific measures at issue and the claims.¹⁰³ Indeed, in addition to the duty under Article 11 of the DSU to make an objective assessment of the facts of the case, a panel is charged with the duty to "make an objective assessment of ... the applicability of and conformity with the relevant covered agreements". Hence, the expiry of the measure at issue, on its own, while relevant, does not dispense with the "matter" that a panel is tasked with examining. As Article 7.2 of the DSU stipulates, "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." Hence, in our view, the expiry of the measure at issue after the Panel was established in this dispute did not, without more, render it unnecessary for the Panel to exercise its function under Article 11 of the DSU to make findings with respect to the claims raised by Pakistan.¹⁰⁴

⁹⁵ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 52. (emphasis omitted) See also paras. 5.17- 5.20 above.

⁹⁶ As discussed at paragraph 5.13 above, the jurisdiction of a panel established by the DSB is prescribed by a panel's terms of reference, as governed by Articles 6.2 and 7 of the DSU.

⁹⁷ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.182 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 264; *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 268).

⁹⁸ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

⁹⁹ European Union's appellant's submission, para. 31.

¹⁰⁰ European Union's appellant's submission, paras. 32-33. (emphasis omitted)

¹⁰¹ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Report, *US – Upland Cotton*, para. 270).

¹⁰² Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

¹⁰³ Appellate Body Report, *US – Carbon Steel*, para. 125 (referring to Appellate Body Report, *Guatemala – Cement I*, paras. 69-76).

¹⁰⁴ See Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179.

5.29. The European Union further argues that the fact that the measure at issue had expired constituted at least a *prima facie* rebuttal of the presumption that the measure was continuing to have an adverse impact within the meaning of Article 3.8 of the DSU.¹⁰⁵ In these circumstances, the European Union maintains that proceeding towards retaliation is pointless, because there is and will be no nullification or impairment to quantify.¹⁰⁶ In response to questioning at the hearing, Pakistan pointed out that Article 3.8 applies to a situation where a panel has already made a finding that there has been "an infringement of the obligations assumed under a covered agreement" by the respondent. For this reason, Pakistan contends that Article 3.8 does not support the European Union's position that a panel can decide not to make any findings at all addressing the matter before it, and it is therefore not relevant to the issues raised in this appeal.

5.30. By placing emphasis on quantifying the "nullification or impairment", the European Union appears to read Article 3.8 in the inverse. While the "infringement of the obligations assumed under a covered agreement" creates a rebuttable presumption of nullification or impairment, demonstrating nullification or impairment is not a prerequisite for bringing a dispute under the DSU.¹⁰⁷ Moreover, while the European Union posits that where a measure has expired "proceeding towards retaliation is pointless"¹⁰⁸, we consider that such a view stands at odds with Article 3.7 of the DSU. Article 3.7 provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute" and identifies the suspension of concessions and obligations (referred to by the European Union as "retaliation") as "[t]he last resort", which the DSU provides to the complaining Member in case a WTO-inconsistent measure is not withdrawn.¹⁰⁹

5.31. The European Union also posits that WTO dispute settlement proceedings are intended to secure a positive solution to a dispute and should not serve as a vehicle to obtain "advisory opinions" on legal matters.¹¹⁰ Pointing to Article 3.9 of the DSU, the European Union submits that there are other procedures that allow Members to obtain an authoritative interpretation of particular provisions of a covered agreement.¹¹¹

5.32. In the present dispute, Pakistan did not request an interpretation of the relevant provisions of the covered agreements in the abstract. Instead, the Panel's legal interpretations and reasoning were made in the context of addressing Pakistan's claims that specifically challenged a measure that was in existence at the time that the DSB established the Panel and set out its terms of reference.¹¹² Hence, we consider the European Union's arguments relating to Article 3.9 of the DSU to be inapposite.

5.33. For these reasons, we consider that none of the European Union's arguments relating to Articles 3.3, 3.4, 3.7, 3.8, and 3.9 of the DSU demonstrate that, by deciding to make findings after the measure at issue had expired, the Panel failed to comply with its function under Article 11 of the DSU of adjudicating the "matter" before it so as to assist the DSB in discharging its responsibilities under the DSU and the covered agreements.

¹⁰⁵ Article 3.8 of the DSU states:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

¹⁰⁶ European Union's appellant's submission, para. 34.

¹⁰⁷ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.183.

¹⁰⁸ European Union's appellant's submission, para. 34.

¹⁰⁹ Still in this regard, we take note that Article 3.7 of the DSU provides that, "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." Given the expiry of the measure at issue in this dispute before the Panel could make a determination regarding its WTO consistency, as the Panel noted, it would not have been possible for the European Union to "withdraw" the measure at issue within the meaning of Article 3.7 of the DSU. (Panel Report, fn 33 to para. 7.13)

¹¹⁰ European Union's appellant's submission, paras. 46 and 51-52.

¹¹¹ European Union's appellant's submission, para. 37 (referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *Japan – Apples*, para. 215).

¹¹² See also Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.185.

5.34. Beyond its specific arguments under Articles 3.3, 3.4, 3.7, 3.8, and 3.9 of the DSU, the European Union maintains that, in the present dispute, contrary to what the Panel found, there were no "compelling factors" for the Panel to make findings, and none of the factors mentioned by the Panel to exercise its alleged discretion pointed towards the need to make findings to secure a positive solution to this dispute.¹¹³

5.35. We recall that the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure.¹¹⁴ As a general matter, it is within the panel's discretion to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue.¹¹⁵

5.36. The Panel in this dispute acknowledged that the measure at issue had expired and had "ceased to have legal effect".¹¹⁶ For the Panel, this meant that it was not possible for the European Union to "withdraw" the challenged measure within the meaning of Article 3.7 of the DSU. Nor did the Panel consider it possible to issue meaningful recommendations under Article 19.1 of the DSU that the European Union bring its measure into conformity with the relevant covered agreements if the Panel were to find the measure to be inconsistent with the relevant provisions of the covered agreements.¹¹⁷ Importantly, the Panel emphasized the fact-specific nature of its conclusions.¹¹⁸ We note that, on appeal, neither the European Union nor Pakistan questions the Panel's decision not to make a recommendation to the DSB in this dispute.¹¹⁹

5.37. Having acknowledged that the measure at issue had expired, the Panel reasoned that this expiry did not affect its jurisdiction to issue findings with respect to this measure.¹²⁰ The Panel considered that it had discretion as to whether to make findings with respect to this measure. In deciding how to exercise its discretion, the Panel took note of certain "circumstances surrounding this dispute".¹²¹ We review below the Panel's assessment of these "circumstances", bearing in mind our discussion above on the considerations that a panel has to take into account in carrying out its function under Article 11 of the DSU.

5.1.3.1 Review of the considerations that the Panel took into account at paragraph 7.13 of its Report

5.38. First, the Panel noted that the measure at issue had expired only after panel establishment. The Panel observed that, while some past panels have declined to make findings with respect to a measure that had expired *before* panel establishment, no panel has declined to hear the entirety of a dispute due to the expiry of the challenged measure after panel establishment.¹²² On appeal,

¹¹³ European Union's appellant's submission, para. 44.

¹¹⁴ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

¹¹⁵ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.180 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270).

¹¹⁶ Panel Report, para. 7.13.

¹¹⁷ Panel Report, fn 33 to para. 7.13 (referring to Appellate Body Report, *US – Certain EC Products*, paras. 80-82) and para. 8.3.

¹¹⁸ Panel Report, fn 33 to para. 7.13 (referring to Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.831-6.838).

¹¹⁹ In this regard, we recall the Appellate Body's observation that the expiry of the measure may affect what recommendations a panel may make. Thus, while some panels have found it inappropriate or unnecessary to make a recommendation to the DSB after they found that the measure was no longer in force, the Appellate Body has also clarified that, where a measure has expired, a panel is not legally precluded from making a recommendation on that measure. (See Appellate Body Reports, *EU – Fatty Alcohols (Indonesia)*, para. 5.200; *US – Upland Cotton*, para. 272; *US – Certain EC Products*, para. 81; *China – Raw Materials*, para. 264. See also Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.359-7.363, 7.389-7.393, and 7.415-7.419; *US – Poultry (China)*, para. 8.7)

¹²⁰ Panel Report, fn 34 to para. 7.13 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)*, para. 270; *China – Raw Materials*, para. 263; Panel Reports, *US – Poultry (China)*, para. 7.54; *EC – IT Products*, para. 7.165).

¹²¹ Panel Report, para. 7.13.

¹²² Panel Report, para. 7.13 and fn 35 thereto (referring to Panel Reports, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343; *Indonesia – Autos*, para. 14.9; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, paras. 7.1307-7.1308; *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, paras. 6.4 and 6.12-6.13).

the European Union appears to overlook this temporal distinction, stating that the "case-law shows, however, a mixed picture regarding whether panels and/or the Appellate Body have made 'findings' in cases where the measure at issue expired or was terminated before or during the WTO proceedings."¹²³

5.39. We recall that, pursuant to Article 7 of the DSU, a panel's terms of reference are governed by the complaining Member's panel request.¹²⁴ In addition to establishing the jurisdiction of the panel, a panel's terms of reference fulfil an important due process objective by giving the respondent and third parties sufficient information concerning the claims at issue in the dispute, and granting the respondent an opportunity to respond to the complainant's case.¹²⁵ As the Appellate Body has explained, generally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a "moving target".¹²⁶ Hence, if a panel were to decline to make findings with respect to a measure that expired after the DSB had established the panel and set out the panel's terms of reference, on the grounds of expiry of that measure alone, this may have the unintended consequence of providing a tool for shielding measures from scrutiny by a panel, or indeed by the Appellate Body.¹²⁷ For these reasons, we do not consider the Panel to have erred by giving importance to the fact that, in the present dispute, the measure expired after the DSB had established the Panel.

5.40. As discussed above, by establishing a panel, the DSB also establishes the jurisdiction of that panel to adjudicate the "matter" before it. In exercising their jurisdiction, panels "have certain powers that are inherent in their adjudicative function".¹²⁸ In our view, among these powers is the authority of a panel to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined. This is especially so in a situation like in the present dispute where the measure at issue has expired and has ceased to have legal effect.

5.41. In addition to the timing of the expiry of the measure at issue, the Panel took into account the fact that Pakistan had continued to request the Panel to make findings with respect to the expired measure at issue.¹²⁹ On appeal, the European Union posits that the fact that Pakistan continued asking for findings, on its own, could not be a determinative factor for the Panel to continue to make findings in this dispute. According to the European Union, the Panel should have looked into whether there was an "actual need" to adjudicate the matter.¹³⁰

5.42. We observe that the Panel considered Pakistan's continued request for findings as one of three explicitly identified considerations in deciding whether to proceed to make findings in this dispute. Hence, the Panel did not consider Pakistan's continued request for findings, on its own, to be dispositive of the Panel's need to make findings in this dispute. We further recall that, pursuant to Article 3.3 of the DSU, a Member may initiate WTO dispute settlement proceedings whenever it considers that any benefits accruing to it are being impaired by measures taken by another Member. Similarly, pursuant to Article 3.7, Members are expected to be largely self-regulating in deciding if any action under the DSU would be "fruitful".¹³¹ This means that a complaining Member's continued request for findings following the expiry of the measure at issue is a relevant consideration.

¹²³ European Union's appellant's submission, para. 26. See also paras. 27-30.

¹²⁴ Article 6.2 of the DSU. See also Appellate Body Reports, *US – Carbon Steel*, para. 125; *Guatemala – Cement I*, paras. 69-76.

¹²⁵ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, p. 186.

¹²⁶ Appellate Body Report, *Chile – Price Band System*, para. 144.

¹²⁷ Appellate Body Report, *Chile – Price Band System*, para. 144. We do not suggest that this is what occurred in the present dispute.

¹²⁸ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 45.

¹²⁹ Panel Report, para. 7.13 and fn 36 thereto (referring to Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18-5.19; Panel Reports, *US – Wool Shirts and Blouses*, para. 6.2; *Indonesia – Autos*, paras. 14.134-14.135; *Dominican Republic – Import and Sale of Cigarettes*, para. 7.343).

¹³⁰ European Union's appellant's submission, para. 46.

¹³¹ Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.179 (referring to Appellate Body Report, *EC – Bananas III*, para. 135).

5.43. Nonetheless, the deference accorded to a Member's exercise of its judgement in bringing a dispute is not entirely boundless.¹³² Rather, as discussed at paragraph 5.40 above, where a measure expires in the course of the panel proceedings, the panel should, in the exercise of its jurisdiction, objectively assess whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined. Thus, we agree with the European Union that a panel's considerations should go beyond a complainant's continued request for findings and assess whether there still remains a "matter" with respect to which a positive solution is required, notwithstanding the expiry of the measure at issue.¹³³

5.44. In this vein, we recall that, in addition to making an objective assessment of the facts of the case, under Article 11 of the DSU, a panel is charged with the duty to "make an objective assessment of ... the applicability of and conformity with the relevant covered agreements". As noted above, the expiry of the measure at issue, on its own, while relevant, does not dispense with the "matter" that a panel is tasked with examining. As Article 7.2 of the DSU stipulates, "[p]anels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." The extent to which a panel needs to address these treaty provisions is not boundless and is necessarily informed by the specific circumstances of the case before it, including the specific aspects of the measure at issue that are the subject of the complaining Member's claims. Therefore, the expiry of the measure at issue does not mean that the measure and the specific aspects thereof that have been challenged cease to serve as the necessary framework within which the panel will, pursuant to Article 7.2, address the relevant WTO provisions cited by the parties. Hence, the measure at issue, notwithstanding its expiry, continues to serve as the framework for the panel's duty, under Article 11 of the DSU, to assess objectively "the applicability of and conformity with the relevant covered agreements".

5.45. Turning to the case before us, we observe that the Panel considered it a "reasonable possibility" that the European Union could impose countervailing measures on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.¹³⁴ In particular, the Panel took note of Pakistan's assertion, not contested by the European Union, that a wide range of Pakistani exports benefit from the MBS. The Panel also took account of the fact that the parties disagreed, "on a fundamental level", on how investigating authorities should determine the extent to which the MBS may constitute a countervailable subsidy within the meaning of the SCM Agreement.¹³⁵

5.46. The European Union challenges the Panel's consideration of the "reasonable possibility" that the European Union could impose countervailing measures on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.¹³⁶ The European Union submits that, in the last decade, the only countervailing duties imposed by the European Union against products from Pakistan were those under the measure at issue in this dispute.¹³⁷ According to the European Union, the Panel failed to examine the record of EU countervailing duty investigations against Pakistan and lightly assumed that there was a "risk" of re-imposition of the expired measure. The European Union, however, maintains that there was no such risk with respect to PET or any other product from Pakistan.¹³⁸ For the European Union,

¹³² Panel Report, fn 36 to para. 7.13 (referring to Appellate Body Report, *Peru – Agricultural Products*, paras. 5.18-5.19).

¹³³ Indeed, as we observed at paragraph 5.25 above, the reference in Article 3.3 of the DSU to the "measures taken" by another Member in Article 3.3 includes measures *taken* in the past. Hence, the fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure.

¹³⁴ Panel Report, para. 7.13 and fn 37 thereto (referring to Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, para. 6.14; *India – Additional Import Duties*, paras. 7.69-7.70; *US – Poultry (China)*, para. 7.55; *EC – IT Products*, para. 7.1159; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, para. 7.1310).

¹³⁵ Panel Report, para. 7.13.

¹³⁶ Panel Report, para. 7.13 and fn 37 thereto (referring to Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, para. 6.14; *India – Additional Import Duties*, paras. 7.69-7.70; *US – Poultry (China)*, para. 7.55; *EC – IT Products*, para. 7.1159; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, para. 7.1310).

¹³⁷ We consider the European Union's assertion that it has imposed only one set of countervailing measures on Pakistan in the last decade to be irrelevant to the issues raised in this appeal.

¹³⁸ European Union's appellant's submission, para. 50.

the Panel sought to clarify existing provisions of the SCM Agreement outside the context of resolving a particular matter at issue in the dispute.¹³⁹

5.47. We note the Panel's consideration of the "reasonable possibility" that the European Union could impose countervailing measures on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute.¹⁴⁰ To the extent that this statement by the Panel could be read as suggesting that the Panel considered it a "reasonable possibility" that the European Union could re-impose the very same measure that had expired and had ceased to have legal effect, we would disagree with such a consideration. As the European Union asserts, the Commission would first need to initiate a new countervailing duty investigation within the meaning of Article 11 of the SCM Agreement. This new countervailing duty investigation would necessarily cover a different investigation period from that covered by the countervailing duty investigation at issue.¹⁴¹

5.48. However, we do not understand the Panel's statement to suggest that the European Union could re-impose the same measure that had expired and had ceased to have legal effect. Rather, the Panel was concerned with the "reasonable possibility that the European Union could impose CVDs on Pakistani goods in a manner that may give rise to certain of the same, or materially similar, WTO inconsistencies that are alleged in this dispute".¹⁴² Thus, whereas the European Union's arguments focus on the likelihood of re-imposition of the expired countervailing measure on PET originating from Pakistan, the Panel's preoccupation in its consideration of the "reasonable possibility" appears to have been different.¹⁴³ In our view, the Panel was concerned with the correct interpretation of the relevant provisions of the SCM Agreement and the GATT 1994, and the conformity, with this correct interpretation, of the Commission's reasoning and findings underpinning the now expired measure. While the Panel specifically identified the Commission's findings relating to the MBS in its explanation of what the parties were in disagreement about¹⁴⁴, we note that, in its Report, the Panel addressed several additional aspects of the Commission's findings, including the Commission's analysis of causation.¹⁴⁵ Hence, the measure at issue, notwithstanding its expiry, continued to serve as the framework for the Panel's duty, under Article 11 of the DSU, to assess objectively "the applicability of and conformity with the relevant covered agreements" as invoked by the complainant.

5.49. From our consideration of the arguments of the parties before the Panel, and the Panel's reasoning as discussed above, it is apparent that there still existed a dispute between the parties on the "applicability of and conformity with the relevant covered agreements"¹⁴⁶ as regards the Commission's findings underpinning the measure at issue, despite its expiry. As noted, the Panel referred to the "WTO inconsistencies that are alleged in this dispute" and recognized that the parties still disagreed on how investigating authorities should determine the extent to which the MBS may constitute a countervailable subsidy within the meaning of the SCM Agreement.¹⁴⁷ Therefore, the "matter" within the jurisdiction of the Panel was not fully resolved by the expiry of the measure. Given that the Panel objectively determined that a dispute still persisted between the parties as regards the "applicability of and conformity with the relevant covered agreements" with respect to the expired measure at issue, the Panel would not have fulfilled its duty under Article 11 of the DSU if it had declined to exercise its validly established jurisdiction and abstained from

¹³⁹ European Union's appellant's submission, para. 51 (referring to Appellate Body Reports, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340; *India – Solar Cells*, para. 5.161; *Japan – Apples*, para. 21).

¹⁴⁰ Panel Report, para. 7.13 and fn 37 thereto (referring to Panel Reports, *US – Gasoline*, para. 6.19; *Argentina – Textiles and Apparel*, para. 6.14; *India – Additional Import Duties*, paras. 7.69-7.70; *US – Poultry (China)*, para. 7.55; *EC – IT Products*, para. 7.1159; *China – Electronic Payment Services*, para. 7.227; *EC – Approval and Marketing of Biotech Products*, para. 7.1310).

¹⁴¹ European Union's request for a preliminary ruling, para. 21.

¹⁴² Panel Report, para. 7.13.

¹⁴³ In this regard, we recall that, in response to questioning at the hearing, the European Union contended that the failure by the Panel to attribute significance to the absence of a risk of re-imposition of the expired PET measure was a failure on the part of the Panel to make "an objective assessment of the facts of the case" as required by Article 11 of the DSU. However, in light of our reasoning at paragraphs 5.47-5.49, we consider it unnecessary to address further this argument by the European Union.

¹⁴⁴ Panel Report, para. 7.13.

¹⁴⁵ See e.g. Panel Report, section 7.5.

¹⁴⁶ Article 11 of the DSU.

¹⁴⁷ Panel Report, para. 7.13.

making any finding on the "matter" before it.¹⁴⁸ Accordingly, we do not agree with the European Union that the Panel's reasoning, findings, and conclusions contained in its Report in relation to the expired measure at issue were made "outside the context of resolving [this] particular dispute".¹⁴⁹

5.50. For all of these reasons, we find that the European Union has not demonstrated that the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding, at paragraph 7.13 of its Report, to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue.

5.1.4 Conclusion

5.51. Panels have a margin of discretion in the exercise of their inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure. Rather, a panel, in the exercise of its jurisdiction, has the authority to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue. In our view, the Panel in this dispute made an objective assessment that "the matter" before it still required to be examined because the parties continued to be in disagreement as to the "applicability of and conformity with the relevant covered agreements" with respect to the Commission's findings underpinning the expired measure at issue.

5.52. Accordingly, we find that the European Union has not demonstrated that the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding, at paragraph 7.13 of its Report, to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue.

5.53. We therefore reject the European Union's request that we reverse the entirety of the Panel Report and declare moot and of no legal effect the findings and legal interpretations contained therein.

5.1.5 Separate opinion of one Appellate Body Member regarding the Panel's decision to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue

5.54. At the outset, I would like to clarify that I agree with the legal interpretation and reasoning, set out in section 5.1.3 above, regarding a panel's terms of reference, jurisdiction, its margin of discretion in deciding how to take into account the expiry of a measure, and the parameters that should guide a panel's objective assessment of whether a "matter" before it has been fully resolved or still requires to be adjudicated. This separate opinion is limited to the question of whether, in the specific circumstances of this case, the Panel's reasoning, contained in paragraph 7.13 of its Report, reflects an objective assessment of whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, had been fully resolved or still required to be examined, following the expiry of the measure at issue. The majority's response to this question is contained in section 5.1.3.1 above.

5.55. I recall that, in its Report, the Panel acknowledged that the measure at issue had expired on 30 September 2015, at which time the countervailing duties on certain PET from Pakistan had been removed. A panel's decision to proceed to make findings in a dispute following the expiry of the measure at issue should not be taken lightly. In my view, having acknowledged that the measure at issue in this dispute had expired and had ceased to have legal effect¹⁵⁰, the Panel was required to undertake a diligent assessment of the central question, i.e. whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, had been fully resolved or still required to be examined.

¹⁴⁸ Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51.

¹⁴⁹ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, p. 340.

¹⁵⁰ Panel Report, para. 7.13 and fn 33 thereto.

5.56. In this regard, I observe that the Panel took note of WTO panel and Appellate Body jurisprudence stating that panels have a margin of discretion in exercising their inherent adjudicative powers to decide whether to make findings regarding expired measures. The Panel indicated that it had not identified any reason to depart from this jurisprudence.¹⁵¹ In deciding how to exercise its adjudicative powers within its margin of discretion, the Panel first noted that the measure at issue expired after the Panel had been established. Second, the Panel took into account the fact that Pakistan continued to request that the Panel make findings with respect to the expired measure. Third, the Panel considered it a reasonable possibility that the European Union could impose countervailing measures on Pakistani goods in a manner that could give rise to certain of the same, or materially similar, WTO inconsistencies that were alleged in this dispute. In particular, the Panel took note of Pakistan's assertion, not contested by the European Union, that a wide range of Pakistani exports benefit from the MBS, and of the fact that the parties disagreed, on a fundamental level, on how investigating authorities should determine the extent to which duty drawback schemes like the MBS may constitute countervailable subsidies within the meaning of the SCM Agreement.¹⁵² For these reasons, the Panel decided to proceed with its work in this dispute.¹⁵³

5.57. As I see it, the Panel's ruling on whether it needed to continue to make findings with respect to the claims challenging the expired measure at issue was essentially based on the possibility of re-imposition of the same or similar measure, as well as the fact that such investigations had been initiated in other jurisdictions, and that a wide range of Pakistani exports other than PET benefit from the MBS. In this regard, I consider that the Panel did not properly engage with the European Union's argument that the expired measure at issue could not be easily re-imposed. According to the European Union, the Commission would first need to initiate a new countervailing duty investigation on the MBS within the meaning of Article 11 of the SCM Agreement. This new countervailing duty investigation would necessarily cover a different investigation period from that covered by the countervailing duty investigation at issue. At the time when the European Union requested that the Panel cease its work on this dispute, the European Union had not received any application to initiate such an investigation.¹⁵⁴ Moreover, as the European Union points out on appeal, the MBS Old Rules that the Commission examined in the context of the countervailing duty investigation at issue have since been replaced by the MBS New Rules.¹⁵⁵ As such, any new investigation concerning the MBS would be focused on the MBS New Rules.¹⁵⁶ Therefore, I consider the European Union's assertion – that there was no reasonable possibility for the European Union to affect Pakistan's imports of PET in the near future on issues involving the same or similar WTO inconsistencies that were alleged in the present dispute – to be *prima facie* credible.¹⁵⁷ The European Union's assertion, regarding the absence of a risk of re-imposition of the same measure, therefore warranted a detailed examination by the Panel. Yet the Panel dismissed this assertion summarily.

5.58. That said, I recognise that, as the majority seems to suggest, the Panel Report may be read as suggesting that the Panel was concerned with the correct interpretation of the relevant provisions of the SCM Agreement and the GATT 1994, and the conformity, with this correct interpretation, of the Commission's reasoning and findings underpinning the now expired measure. However, such a reading of the Panel Report is anchored in a single sentence in paragraph 7.13 of the Report by the Panel acknowledging the parties' disagreement "on a fundamental level" about the Commission's findings as to what extent duty drawback schemes like the MBS may constitute countervailable subsidies.¹⁵⁸ As discussed at paragraph 5.19 above, among its inherent adjudicative powers is the authority of a panel to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined, following the expiry of the measure at issue. A panel should make this assessment before undertaking its duty under Article 11 of the DSU to "make an objective

¹⁵¹ Panel Report, para. 7.13 (referring to Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)* / *EC – Bananas III (Article 21.5 – US)*, para. 270; *China – Raw Materials*, para. 263; Panel Reports, *US – Poultry (China)*, para. 7.54; *EC – IT Products*, para. 7.165).

¹⁵² Panel Report, para. 7.13.

¹⁵³ Panel Report, para. 7.13.

¹⁵⁴ European Union's request for a preliminary ruling, para. 21.

¹⁵⁵ See paragraph 5.70 and fn 176 thereto below.

¹⁵⁶ European Union's appellant's submission, para. 50.

¹⁵⁷ European Union's appellant's submission, para. 50.

¹⁵⁸ Panel Report, para. 7.13.

assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Turning to the case before us, I do not see any reasoning in the Panel Report demonstrating an objective assessment by the Panel of whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, had been fully resolved or still required to be examined, following the expiry of the measure at issue.

5.59. Thus, in my view, none of the three considerations relied upon by the Panel, at paragraph 7.13 of its Report sufficiently demonstrates that the Panel objectively assessed whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, had been fully resolved or still required to be examined, following the expiry of the measure at issue in this dispute.

5.60. For these reasons, I disagree with the finding of the majority that the European Union has not demonstrated that in the circumstances of this case, the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding, at paragraph 7.13 of its Report, to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue.

5.61. Nonetheless, acknowledging that the majority's decision carries the day, I agree with and fully endorse the legal analyses, findings, and conclusions in this Report concerning: (i) the European Union's claim of error on appeal concerning government revenue foregone within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement; and (ii) Pakistan's claim of error on appeal under Article 15.5 of the SCM Agreement concerning the Commission's approach to its causation analysis.

5.2 European Union's claim of error regarding government revenue foregone

5.62. The European Union appeals the Panel's interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes I to III to the SCM Agreement, in connection with the Commission's finding that the MBS is a countervailable subsidy contingent upon export performance.¹⁵⁹ In particular, the European Union challenges the Panel's finding that, in the context of duty drawback schemes, a subsidy exists only when an "excess" remission occurs representing government revenue foregone that is otherwise due within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement.¹⁶⁰

5.63. The Panel considered that, in the context of duty drawback schemes, the financial contribution, in the form of government revenue foregone, is limited to the excess amount of the remission. The Panel referred to this as the "excess remissions principle".¹⁶¹ The Panel concluded that the excess remissions principle "provides the legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constitute[] a financial contribution in the form of revenue forgone otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement".¹⁶²

5.64. The European Union requests us to reverse this interpretation by the Panel of the relevant provisions of the SCM Agreement.¹⁶³ Owing to the expiry of the measure at issue, and "with a view to limiting the Appellate Body's review", the European Union does not request us to complete the legal analysis in the present case.¹⁶⁴ Instead, the European Union requests us to declare moot and

¹⁵⁹ European Union's Notice of Appeal, p. 2; appellant's submission, para. 54 (referring to Panel Report, para. 7.56).

¹⁶⁰ European Union's Notice of Appeal, p. 2; appellant's submission, para. 54; Panel Report, paras. 7.37 and 7.56.

¹⁶¹ Panel Report, para. 7.37. On appeal, both participants used the term "excess remissions principle" in their submissions to convey the same understanding as that of the Panel. (See e.g. European Union's appellant's submission, paras. 68-69; Pakistan's appellee's submission, paras. 2.35, 2.49, 2.61, 2.84, and 2.88-2.89)

¹⁶² Panel Report, para. 7.56.

¹⁶³ European Union's Notice of Appeal, p. 2; appellant's submission, para. 54 (referring to Panel Report, paras. 7.33-7.56).

¹⁶⁴ European Union's Notice of Appeal, p. 2; appellant's submission, para. 54.

of no legal effect the entirety of the Panel's findings with respect to the MBS on the grounds that the Panel applied the wrong legal standard.¹⁶⁵

5.65. Before commencing our analysis of the issues raised on appeal, we provide, as background information, the relevant aspects of the countervailing duty investigation and the measure at issue. We also include a summary of the relevant Panel findings.

5.2.1 Background information

5.66. On 3 September 2009, pursuant to Article 10 of Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community¹⁶⁶ (EU Basic CVD Regulation), the Commission initiated a countervailing duty investigation concerning imports of PET¹⁶⁷ originating in Iran, Pakistan, and the United Arab Emirates.¹⁶⁸ The investigation of subsidization and injury covered the 12-month period from 1 July 2008 to 30 June 2009 (investigation period). The examination of trends relevant for the assessment of injury covered the period from 1 January 2006 to the end of the investigation period (period considered).¹⁶⁹

5.67. The investigated exporting producer from Pakistan was Novatex.¹⁷⁰ During the countervailing duty investigation, the Commission carried out an on-the-spot investigation at Novatex's premises.¹⁷¹

5.68. The Commission investigated several schemes that allegedly involved the granting of subsidies by the Government of Pakistan, including the MBS. The MBS permits the import of duty-free material on condition that it is used as an input in the manufacture of goods that are subsequently exported.¹⁷² Systems like the MBS are commonly referred to as duty drawback schemes. Duty drawback schemes allow domestic producers to obtain exemptions or remissions of import duties otherwise payable on production inputs, if such inputs are consumed in the manufacture of finished goods destined for export.¹⁷³

5.69. During the investigation period, Novatex obtained duty exemptions under the MBS in connection with its importation of inputs for the manufacture of PET.¹⁷⁴ The main inputs consumed in the production of PET are purified terephthalic acid and mono ethylene glycol.¹⁷⁵

¹⁶⁵ European Union's Notice of Appeal, p. 2; appellant's submission, para. 54 (referring to Panel Report, paras. 7.57-7.60 and 8.1.b.i-ii).

¹⁶⁶ European Union's first written submission to the Panel, para. 19 and fn 6 thereto (referring to Council Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community, *Official Journal of the European Union*, L Series, No. 188 (18 July 2009), available at <http://eur-lex.europa.eu/%20LexUriServ/LexUriServ.do?uri=OJ:L:2009:188:0093:0126:EN:PDF>).

¹⁶⁷ *Supra*, fn 3 to para. 1.1.

¹⁶⁸ European Commission, Notice of initiation of an anti-subsidy proceeding concerning imports of certain polyethylene terephthalate originating in Iran, Pakistan, and the United Arab Emirates, *Official Journal of the European Union*, C Series, No. 208 (3 September 2009) (Panel Exhibit PAK-15), pp. 7-8.

¹⁶⁹ Provisional Determination (Panel Exhibit PAK-1), recital 15.

¹⁷⁰ Provisional Determination (Panel Exhibit PAK-1), recitals 12-14. See also Panel Report, para. 7.161. Pakistan informed the Commission that Novatex is the only Pakistani company involved in the production and sale of PET in the domestic and international markets. (Submission of the Government of Pakistan of 21 December 2009 to the European Commission (Panel Exhibit EU-5), para. 16)

¹⁷¹ Provisional Determination (Panel Exhibit PAK-1), recitals 12-14. See also Panel Report, para. 7.161.

¹⁷² See para. 1.2 above.

¹⁷³ Panel Report, para. 7.29. Before the Panel, Pakistan emphasized that the MBS is a duty drawback scheme and not a substitution drawback scheme. The European Union did not dispute Pakistan's assertion during the Panel proceedings. Furthermore, the Panel found no basis on its record upon which to conclude that the MBS is a substitution drawback scheme. (*Ibid.*, fn 94 to para. 7.37) On appeal, in response to questioning at the hearing, the European Union confirmed that the facts of the MBS subject to the countervailing duty investigation at issue corresponded to a duty drawback scheme rather than a substitution drawback scheme.

¹⁷⁴ Panel Report, para. 7.30; Provisional Determination (Panel Exhibit PAK-1), recital 67.

¹⁷⁵ Pakistan's first written submission to the Panel, para. 5.97; Exhibit 6 from the verification visit (Panel Exhibit PAK-8 (BCI)), p. 1. Novatex identified eight other input goods that it used in the manufacture of PET. (Exhibit 6 from the verification visit (Panel Exhibit PAK-8 (BCI)), p. 1)

5.70. During the investigation period, the domestic legal bases for the MBS in Pakistan were Section 219 (Chapter XX) of the Customs Act 1969, as amended on 30 June 2008, and Chapter XV of the Customs Rules 2001 through Notification S.R.O. 450(I)/2001, published on 18 June 2001 (MBS Old Rules).¹⁷⁶ Pursuant to the MBS Old Rules, in order to obtain the remission of import duties under the MBS, at the time of importation of the inputs, the producing company must deposit with the Pakistan Customs Department an indemnity bond and post-dated cheques covering the total amount of the customs duty and sales tax that would be applied to such imported inputs, valid for a period of three years.¹⁷⁷

5.71. At the time of exportation, the producing company prepares a declaration certifying that the finished goods destined for export are from the manufacturing bond. A consumption sheet of the inputs used in manufacturing the finished goods for export is attached to the Goods Declaration form. After examining all of the aspects of the Goods Declaration form, the Pakistani customs official allows the exportation of the finished goods.¹⁷⁸ In addition, once the Pakistani customs official is satisfied, on the basis of documentary evidence presented by the producing company, that the imported inputs were used to manufacture the finished exported goods, (s)he releases the indemnity bond and the post-dated cheques deposited at the time of the importation of the inputs.¹⁷⁹

5.72. In its Provisional Determination, the Commission considered that, in practice, the Pakistani authorities did not apply a proper verification system to monitor the amount of duty-free imported inputs consumed in the production of the exported finished goods. The Commission found "serious discrepancies and malfunctions" in how the system operated in practice as compared to the duty drawback system provided for under the MBS Old Rules.¹⁸⁰ Accordingly, the Commission considered the MBS to be an impermissible duty drawback system within the meaning of Article 3(1)(a)(ii) of the EU Basic CVD Regulation because it did not conform to the rules laid down in Annexes I to III to the EU Basic CVD Regulation, owing to the failures or malfunctions in the Government of Pakistan's system of verification.¹⁸¹

5.73. For these reasons, the Commission considered the MBS to be a countervailable subsidy contingent in law upon export performance.¹⁸² The Commission explained that, in the absence of a permitted drawback system, the benefit consisted of the remission of total import duties normally due upon importation of inputs. The Commission noted that, according to Article 3(1)(a)(ii) and Annex I(i) to the EU Basic CVD Regulation, only an excess remission of duties can be countervailed, "provided" that the conditions of Annexes II and III to the EU Basic CVD Regulation are met. However, according to the Commission, these conditions were not fulfilled in this case. Thus, the exception for drawback schemes was not applicable, and the normal rule of countervailing the amount of revenue foregone, in the form of all the unpaid duties, applied.¹⁸³

5.74. On 29 September 2010, the Council published its Definitive Determination.¹⁸⁴ In its Definitive Determination, the Council confirmed the Commission's position in the Provisional Determination that no effective implementation and monitoring system existed for the MBS.¹⁸⁵

¹⁷⁶ Provisional Determination (Panel Exhibit PAK-1), recital 61. The MBS Old Rules were submitted to the Panel as Exhibit EU-2. On 28 June 2010, before the European Union published its Definitive Determination in the countervailing duty investigation at issue, Pakistan published amendments to the MBS Old Rules through Notification S.R.O. 601(I)/2010 (MBS New Rules). The MBS New Rules were submitted to the Panel as Exhibit EU-3.

¹⁷⁷ Provisional Determination (Panel Exhibit PAK-1), recitals 62-63.

¹⁷⁸ Provisional Determination (Panel Exhibit PAK-1), recital 65.

¹⁷⁹ Provisional Determination (Panel Exhibit PAK-1), recital 66.

¹⁸⁰ Provisional Determination (Panel Exhibit PAK-1), recital 68.

¹⁸¹ Provisional Determination (Panel Exhibit PAK-1), recitals 73-75. The content of Annexes I, II, and III to the EU Basic CVD Regulation is similar to the content of Annexes I, II, and III to the SCM Agreement.

¹⁸² Provisional Determination (Panel Exhibit PAK-1), recitals 73-77. See also Panel Report, para. 7.57.

¹⁸³ Provisional Determination (Panel Exhibit PAK-1), recital 78. See also Panel Report, paras. 7.30 and 7.57-7.58. The subsidy rate established in the Provisional Determination with respect to the MBS amounted to 2.57%. (Provisional Determination (Panel Exhibit PAK-1), recital 80)

¹⁸⁴ Definitive Determination (Panel Exhibit PAK-2).

¹⁸⁵ Definitive Determination (Panel Exhibit PAK-2), recital 44.

Consequently, the Council confirmed the finding in the Provisional Determination that the MBS constitutes a countervailable subsidy contingent upon export performance.¹⁸⁶

5.2.2 The Panel's findings

5.75. Before the Panel, Pakistan argued that by finding that all duties remitted under the MBS, rather than only the excess remission, constituted a financial contribution and thus a countervailable subsidy, the European Union acted inconsistently with, *inter alia*, Articles 1.1(a)(1)(ii) and 3.1(a) of the SCM Agreement. Pakistan asserted that, when examining duty drawback schemes like the MBS to determine whether a financial contribution exists in the form of government revenue foregone otherwise due, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, footnote 1 of the SCM Agreement limits the financial contribution that may be found to exist to the excess remission.¹⁸⁷

5.76. The European Union argued that footnote 1 and Annexes I to III to the SCM Agreement contain no requirement that investigating authorities, with respect to duty drawback schemes, must always equate excess remissions with the amount of the subsidy. The European Union agreed with Pakistan that footnote 1 describes a subsidy in terms of excess remissions. However, the European Union maintained that, if the conditions set out in Annexes II and III are not satisfied, footnote 1 cannot be interpreted to mean that a subsidy can exist only by reason of excess remissions.¹⁸⁸

5.77. The Panel recalled the Appellate Body's statement that Article 1.1(a)(1)(ii) requires a comparison between the challenged measure and a "defined, normative benchmark".¹⁸⁹ The Panel observed that the text of Article 1.1(a)(1)(ii) is silent regarding what should be compared to determine whether import duty remissions obtained by a company under a duty drawback scheme like the MBS constitute government revenue foregone that is otherwise due. However, the Panel considered that footnote 1, which attaches to this provision, offers guidance on this issue.¹⁹⁰

5.78. The Panel observed that footnote 1 identifies two situations that "shall not be deemed to be a subsidy": (i) the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption; and (ii) the remission of such duties or taxes in amounts not in excess of those which have accrued.¹⁹¹ In this regard, the Panel noted the explanation in Annex II(I)(2) to the SCM Agreement that, pursuant to Annex I(i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Thus, the Panel considered the "duties ... which have accrued" within the meaning of footnote 1 to be those import duties accrued on imported inputs consumed in the production of a subsequently exported product.¹⁹²

5.79. Hence, the Panel considered the comparison required under Article 1.1(a)(1)(ii) to be one between the remission of duties obtained by a company under a duty drawback scheme, on the one hand, and the duties that accrued on imported production inputs used by that company to produce a subsequently exported product, on the other hand. For the Panel, a subsidy, in the form of government revenue foregone that is otherwise due, exists only insofar as the former exceeds

¹⁸⁶ Definitive Determination (Panel Exhibit PAK-2), recital 53. The subsidy rate established in the Definitive Determination with respect to the MBS amounted to 2.57%. (Definitive company-specific disclosure to Novatex, dated 26 July 2010 (Panel Exhibit PAK-33 (BCI)), p. 2)

¹⁸⁷ Panel Report, para. 7.31 (referring to Pakistan's first written submission to the Panel, para. 5.3; opening statement at the first Panel meeting, paras. 3.2-3.3). Pakistan further claimed that the European Union acted inconsistently with Annexes I(i), II(II), and III(II) to the SCM Agreement. Pakistan also raised claims that were consequential to the other alleged violations of the SCM Agreement. Specifically, Pakistan contended that the European Union acted inconsistently with Articles 1.1(b), 10, 19, and 32 of the SCM Agreement and Article VI of the GATT 1994. (*Ibid.*, para. 7.61)

¹⁸⁸ Panel Report, para. 7.32 (referring to European Union's first written submission to the Panel, para. 98; second written submission to the Panel, para. 20).

¹⁸⁹ Panel Report, para. 7.36 and fn 88 thereto (quoting Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 808).

¹⁹⁰ Panel Report, para. 7.36.

¹⁹¹ Panel Report, para. 7.37.

¹⁹² Panel Report, para. 7.37 and fn 94 thereto.

the latter, i.e. where an "excess" remission occurs. The Panel referred to this as the "excess remissions principle".¹⁹³

5.80. The Panel observed that the first part of footnote 1 of the SCM Agreement states: "In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement". The Panel noted that the word "accordance" is synonymous with "agreement", "conformity", and "harmony".¹⁹⁴ Thus, the Panel understood footnote 1 to indicate that the excess remissions principle identified therein is equally in agreement with each of the other provisions cited in that footnote.¹⁹⁵ The Panel rejected the European Union's proposition that the cited provisions in footnote 1, particularly Annex II(II)(2) and Annex III(II)(3) to the SCM Agreement, limit the situations in which the excess remissions principle applies. For the Panel, one provision could not be said to be in agreement with another if the latter provision potentially eliminates the principle underpinning the former provision. Moreover, the Panel found no instance in which the SCM Agreement uses the term "in accordance with" to create an exception to an otherwise stated rule by cross-referencing another provision. Rather, the Panel noted that such exceptions are generally achieved by using the word "except".¹⁹⁶

5.81. Turning to the provisions mentioned in footnote 1¹⁹⁷, the Panel took account of the *Ad Note* to Article XVI of the GATT 1994, which provides, *inter alia*, that the remission of duties or taxes in amounts not in excess of those which have accrued shall not be deemed to be a subsidy. The Panel considered it significant that the *Ad Note* to Article XVI states the excess remissions principle "without qualification".¹⁹⁸

5.82. As regards Annex I to the SCM Agreement, the Panel noted that paragraph (i) addresses situations involving drawback schemes of the type at issue in this dispute. In particular, Annex I(i) identifies, as an export subsidy, the "remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)".¹⁹⁹ The Panel considered this to be a restatement of the excess remissions principle.²⁰⁰

5.83. The Panel then noted that Annex II(I)(2) to the SCM Agreement states that, pursuant to Annex I(i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. The Panel considered that Annex II(I)(2) contains no language restricting the application of the excess remissions principle in any relevant way.²⁰¹

5.84. In addition, the Panel observed that Annex II(II) provides guidance to investigating authorities on how to determine whether inputs are consumed in the production of the exported product. According to the Panel, pursuant to Annex II(II)(1), this guidance applies only 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. For the Panel, this language assumes the operation of the excess remissions principle.²⁰²

5.85. The Panel noted that Annex II(II)(2) addresses the situation in which, pursuant to the inquiries performed under Annex II(II)(1), it is determined that the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product. In

¹⁹³ Panel Report, para. 7.37.

¹⁹⁴ Panel Report, para. 7.39 (quoting *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 15).

¹⁹⁵ Panel Report, para. 7.39.

¹⁹⁶ Panel Report, para. 7.40 and fn 97 thereto.

¹⁹⁷ The Panel highlighted that the European Union had argued that Annex II(II)(2) and Annex III(II)(3) limit the availability of the excess remissions principle. The European Union had not referred to the other provisions identified in footnote 1 of the SCM Agreement. (Panel Report, para. 7.40 and fn 98 thereto)

¹⁹⁸ Panel Report, paras. 7.41-7.42.

¹⁹⁹ Fn omitted.

²⁰⁰ Panel Report, paras. 7.43-7.44.

²⁰¹ Panel Report, para. 7.47.

²⁰² Panel Report, paras. 7.49-7.50.

this scenario, "a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred." The Panel further observed that Annex II(II)(2) operates "in the context of determining whether an excess payment occurred", reinforcing the idea that Annex II is focused on identifying excess remissions. However, the Panel recognized that Annex II(II)(2) does not indicate what would happen if an exporting Member did not carry out the envisaged further examination. The Panel noted that, according to the European Union, this "silence" meant that the excess remissions principle ceases to apply. The European Union argued that different principles apply such that an investigating authority – like the Commission in this investigation – may find that the entire sum of drawn back duties, rather than excess, is a countervailable subsidy.²⁰³

5.86. The Panel disagreed with the European Union's view that this "silence" means that the excess remissions principle ceases to apply. While acknowledging that Annex II provides incomplete guidance as to how to investigate a particular issue in this context, the Panel saw no reasonable basis on which to interpret that silence as a directive to read footnote 1 out of the SCM Agreement.²⁰⁴ In the Panel's view, this "silence" in Annex II(II)(2) does not mean that other portions of Annex II cease to speak. Nor did the Panel interpret such "silence" as disturbing the provisions that the otherwise intact SCM Agreement provides, including footnote 1.²⁰⁵

5.87. The Panel noted that Annex III to the SCM Agreement applies to substitution drawback schemes. While such a scheme is not at issue in this dispute²⁰⁶, the Panel remarked on the similarities between Annex II and Annex III. In particular, the Panel pointed out that, like Annex II(II)(2), Annex III(II)(3) provides guidance that is designed to allow investigating authorities to identify excess remissions. The Panel observed that the European Union had put forward the same argument with respect to Annex III(II)(3) as it had with respect to Annex II(II)(2). For the same reasons, the Panel rejected the European Union's argument.²⁰⁷

5.88. For all of these reasons, the Panel concluded that the excess remissions principle provides the legal standard for determining whether remissions of import duties obtained under a duty drawback scheme constitute a financial contribution in the form of government revenue foregone that is otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The Panel rejected the European Union's position that Annex II and/or Annex III provides a relevant reason to depart from the excess remissions principle. The Panel considered that, even if an exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product, and in the absence of a further examination by the exporting Member of that issue, investigating authorities must still determine whether an excess remission occurred.²⁰⁸

5.89. Turning to the facts of this case, the Panel noted the Commission's conclusion that the MBS is an export subsidy in the form of government revenue foregone, which confers a benefit upon Novatex.²⁰⁹ The Panel also observed that the Provisional Determination made it clear that the financial contribution was not the excess remissions but rather the total amount of unpaid duties.²¹⁰ The Panel took note of the Commission's explanation that its approach was justified because: (i) Pakistan did not effectively apply its verification system; and (ii) Pakistan did not carry out a further examination, based on actual inputs involved.²¹¹ The Panel found this approach

²⁰³ Panel Report, para. 7.51.

²⁰⁴ Panel Report, paras. 7.51-7.52.

²⁰⁵ Panel Report, para. 7.52.

²⁰⁶ The Panel reiterated that it had found no basis on its record to conclude that the MBS is a substitution drawback scheme. (Panel Report, fn 109 to para. 7.53)

²⁰⁷ Panel Report, paras. 7.54-7.55.

²⁰⁸ Panel Report, para. 7.56. In arriving at this conclusion, the Panel emphasized that it did not *a priori* exclude the possibility that an investigating authority might permissibly reject a company's characterization of monies obtained from a government as remissions obtained under a duty drawback scheme. However, the Panel considered that the facts of this case did not lend themselves to such a possibility. (Ibid., fn 114 to para. 7.56)

²⁰⁹ Panel Report, para. 7.57 (quoting Provisional Determination (Panel Exhibit PAK-1), recital 73).

²¹⁰ Panel Report, para. 7.57 and fn 118 thereto (quoting Provisional Determination (Panel Exhibit PAK-1), recital 78).

²¹¹ Panel Report, para. 7.58 (quoting Provisional Determination (Panel Exhibit PAK-1), recital 76).

by the Commission to be problematic, given that none of the reasons proffered by the Commission could justify its departure from the excess remissions principle.²¹²

5.90. The Panel also addressed the European Union's concern that its decision would require investigating authorities essentially to administer another Member's duty drawback system in the event that the system is found to be deficient under Annex II(II). In the Panel's view, if an exporting Member's system is found to be wanting under Annex II(II), the amount of the excess remissions would need to be determined on the basis of information available to the investigating authority, including the possibility of relying on facts available, pursuant to Article 12.7 of the SCM Agreement.²¹³

5.91. The Panel concluded that, by failing to provide a reasoned and adequate explanation for why the entire amount of unpaid duties was a financial contribution and that those duties were "in excess of those which have accrued", within the meaning of footnote 1 of the SCM Agreement, the Commission acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement.²¹⁴ Owing to its finding that the Commission had incorrectly identified the existence of a subsidy, the Panel also found that the Commission acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.²¹⁵

5.2.3 Whether the Panel erred in its interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes II and III to the SCM Agreement

5.92. The MBS, the programme of the Government of Pakistan that is at the heart of this issue on appeal, operates as a duty drawback scheme.²¹⁶ With duty drawback schemes as the kind of measure at issue, the European Union's claim of error on appeal concerns the financial contribution element of that subsidy.²¹⁷ Specifically, the European Union challenges the Panel's reasoning that, in the context of duty drawback schemes, the financial contribution, in the form of government revenue foregone, is limited to the excess amount of the remission. As noted at paragraph 5.63 above, the Panel referred to this as the "excess remissions principle"²¹⁸, and found that:

the Excess Remissions Principle provides the legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constitute[] a financial contribution in the form of revenue forgone otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement, and reject the European Union's position that Annex II and/or Annex III provides a relevant reason to depart from the Excess Remissions Principle. Thus, even if the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product and in the absence of a further examination by the exporting Member of that issue, investigating authorities should still determine if an excess remission occurred.²¹⁹

5.93. The European Union supports its claim of error by arguing that the Panel attributed a wrong meaning to the words "in accordance with" in footnote 1 of the SCM Agreement²²⁰, and incorrectly

²¹² Panel Report, para. 7.58.

²¹³ Panel Report, para. 7.59 and fn 120 thereto (referring to Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.178-4.179).

²¹⁴ Panel Report, paras. 7.58 and 7.60.

²¹⁵ Panel Report, para. 7.60.

²¹⁶ See para. 5.68 above. We recall that the Panel did not *a priori* exclude the possibility that an investigating authority might permissibly reject a company's characterization of monies obtained from a government as remissions obtained under a duty drawback scheme. However, as the Panel noted, the Commission's findings in the countervailing duty investigation at issue in this dispute did not concern this possibility. (Panel Report, fn 114 to para. 7.56)

²¹⁷ Article 1.1 of the SCM Agreement explains that a subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member, or if there is any form of income or price support in the sense of Article XVI of the GATT 1994, and a benefit is thereby conferred. Thus, the "financial contribution" and "benefit" are two separate legal elements in Article 1.1 of the SCM Agreement, which together determine whether a subsidy exists. (Appellate Body Report, *Brazil – Aircraft*, para. 157)

²¹⁸ Panel Report, para. 7.37.

²¹⁹ Panel Report, para. 7.56. (fn omitted)

²²⁰ European Union's appellant's submission, para. 69.

interpreted the alleged "silence" in Annexes II and III to the SCM Agreement.²²¹ The European Union further argues that the Panel's interpretation would in essence relieve WTO Members from "making any efforts" to establish a reliable and effective monitoring system in order to comply with Annexes I to III.²²²

5.94. In appealing this finding by the Panel, the European Union's claim of error and its arguments in support thereof raise the question of what, in the context of duty drawback schemes, constitutes the financial contribution element of the subsidy within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement.

5.95. Article 1.1(a)(1)(ii) of the SCM Agreement provides:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

...

(ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits)[.]
(fn omitted)

5.96. The foregoing (or non-collection) of revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, implies that less (or no) revenue has been raised by the government than would have been raised in a different situation, and the word "foregone" suggests that the government has given up an entitlement to raise revenue that it could "otherwise" have raised.²²³ This implies that there must be "some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'".²²⁴ Given that "Members, in principle, have the sovereign authority to determine their own rules of taxation"²²⁵, the comparison under Article 1.1(a)(1)(ii) should be between the rules of taxation applied by the Member concerned to the alleged subsidy recipients, on the one hand, and the rules of taxation applied by the same Member to comparably situated taxpayers that are not recipients of the alleged subsidy, on the other hand.²²⁶

5.97. One of the ways that governments generate revenue is through the imposition of duties or taxes. The exemption from, or the remission²²⁷ of, these duties or taxes, such as those referred to in paragraphs (g), (h), and (i) of Annex I to the SCM Agreement, may be found to meet the definition of government revenue foregone in Article 1.1(a)(1)(ii) of the SCM Agreement.²²⁸ In this regard, while Article 1.1(a)(1)(ii) provides a general description of revenue foregone, footnote 1, appended thereto, identifies specific instances of revenue foregone that "shall not be deemed to

²²¹ European Union's appellant's submission, paras. 69 and 74.

²²² European Union's appellant's submission, paras. 70, 78, and 80. The European Union also argues that Article 14 of the SCM Agreement supports its view that an investigating authority is entitled to countervail the full amount refunded in a situation where the monitoring system is ineffective. (Ibid., paras. 76-77) The issue raised in this appeal focuses on the financial contribution element of the subsidy, whereas Article 14 of the SCM Agreement concerns the benefit conferred to the recipient. Hence, we consider the European Union's argument relating to Article 14 to be inapposite and find it unnecessary to address this argument further.

²²³ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 806 (referring to Appellate Body Report, *US – FSC*, para. 90).

²²⁴ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 806 (quoting Appellate Body Report, *US – FSC*, para. 90).

²²⁵ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 808.

²²⁶ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 808 and 812.

²²⁷ Footnote 58 of the SCM Agreement explains that the "remission" of taxes includes the refund or rebate of taxes.

²²⁸ By way of example, in *Canada – Autos*, the Appellate Body found that, by operating an import duty exemption on the importation of motor vehicles, Canada had ignored the "defined, normative benchmark" that it established for itself for import duties on motor vehicles under its normal most-favoured nation rate and, in so doing, had foregone "government revenue that is otherwise due". (Appellate Body Report, *Canada – Autos*, para. 91. See also Panel Report, *Indonesia – Autos*, para. 14.155)

be" subsidies. Footnote 1 deals with the exemption or remission of duties or taxes on exported products.²²⁹ Footnote 1 provides:

In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

5.98. The "duties or taxes" referred to in footnote 1 include duties or taxes directly borne by the exported product.²³⁰ At the same time, the "duties or taxes" referred to in footnote 1 also include the duties or taxes levied on inputs consumed in the production of the exported product.²³¹ Importantly, Annex I(i) to the SCM Agreement makes it clear that duty drawback schemes are concerned with the "import charges"²³² that are "levied on imported inputs that are consumed in the production of the exported product". Thus, with respect to duty drawback schemes, the government revenue foregone that is described in footnote 1 of the SCM Agreement is concerned with the "duties or taxes" in the form of "import charges" on inputs that are consumed in the production of goods destined for export.

5.99. Additionally, the language of footnote 1 identifies certain aspects that are all vital to the understanding of what constitutes the financial contribution element of a subsidy, in the form of government revenue foregone that is otherwise due, particularly as it relates to duty drawback schemes.

5.100. The first aspect relates to the comparison to be made under Article 1.1(a)(1)(ii) between the rules of taxation applied by the Member concerned to the alleged subsidy recipients, on the one hand, and the rules of taxation applied by the same Member to the comparably situated taxpayers that are not recipients of the alleged subsidy, on the other hand.²³³ With particular respect to duty drawback schemes as defined in Annex I(i), footnote 1 of the SCM Agreement highlights that the comparison to be made is between the tax treatment of the inputs imported under the duty drawback scheme that are consumed in the production of the goods destined for export, on the one hand, and the "duties or taxes borne by the like" imported input "when destined for domestic consumption", on the other hand.

5.101. Second, as regards the definition of a subsidy, footnote 1 identifies what falls outside this definition. Footnote 1 indicates that "the exemption", or remission, of duties or taxes in amounts "not *in excess* of those which have accrued" shall not be deemed to be a subsidy.²³⁴

5.102. Third, footnote 1 is prefaced by the words "in accordance with", followed by a list of several provisions of the GATT 1994 and the SCM Agreement: "Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III to this Agreement". The significance of this third reference in footnote 1 is a key point of contention between the participants.

5.103. For the European Union, the first part of footnote 1, "[i]n accordance with the provisions of ... Annexes I through III", refers to "the elements that must be taken into account to determine whether the said situation benefits from the 'carve-out'" reflected in the second part of footnote 1, i.e. that the financial contribution, in the form of government revenue foregone, is limited to the

²²⁹ Appellate Body Report, *Canada – Autos*, para. 92.

²³⁰ For instance, paragraph (g) of Annex I to the SCM Agreement identifies, as an export subsidy, the exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

²³¹ For instance, paragraph (h) of Annex I to the SCM Agreement refers to prior stage cumulative taxes on goods or services used directly or indirectly in the production of exported products. Similarly, substitution drawback schemes provided for in Annexes I(i), II, and III to the SCM Agreement concern charges on the inputs consumed in the production process of an exported product.

²³² Footnote 58 of the SCM Agreement defines "import charges" as "tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports".

²³³ See para. 5.96 above.

²³⁴ Emphasis added.

excess amount of the remission.²³⁵ The European Union posits that, if an exporting Member fails to comply with all of the elements of the guidelines in Annexes II and III to the SCM Agreement, the investigating authority need not identify the *excess* amount of the remission as indicated in footnote 1. Instead, the investigating authority may consider the *entire* amount of the remission to be the financial contribution that may be countervailed.²³⁶

5.104. Pakistan considers that the words "in accordance with" mean "in agreement with" in the sense of "by reference to". Pakistan does not agree with the European Union that the words "in accordance with" can be used to create an exception to the rule that only remissions in excess may be countervailed when an exporting Member does not comply with the elements of the guidelines in Annexes II and III. Pakistan agrees with the Panel that footnote 1, along with the other provisions identified therein, defines a subsidy under a duty drawback system as the excess remission. For Pakistan, this definition applies always and is not subject to any conditions, and the existence of any excess must be determined on the basis of facts.²³⁷

5.105. The word "accordance" means "agreement, conformity, harmony".²³⁸ It follows, therefore, that the words "in accordance with" in footnote 1 may be understood as implying that footnote 1 is to be read "in agreement", "in conformity", or "in harmony" with all of the provisions referred to therein. Thus, the words "in accordance with" are a reference that can be properly understood only in context when regard is had to the provisions that follow these words. This suggests that all of the provisions identified in footnote 1, along with the content of footnote 1, together inform the understanding of what shall constitute the financial contribution, in the form of government revenue foregone that is otherwise due within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement. This is consonant with the obligation of a treaty interpreter to read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.²³⁹ Thus, a proper reading of Article 1.1(a)(1)(ii), footnote 1, and the relevant paragraphs of Annexes I to III to the SCM Agreement and the *Ad Note* to Article XVI of GATT 1994 must be one that gives meaning to all of these provisions.²⁴⁰ Accordingly, we examine each of the provisions referred to in footnote 1 of the SCM Agreement.

5.106. The *Ad Note* to Article XVI of the GATT 1994 states:

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.

5.107. The language of the *Ad Note* to Article XVI of the GATT 1994 is identical to the second part of footnote 1 of the SCM Agreement. Like footnote 1, the *Ad Note* is explicit in limiting the financial contribution element of the subsidy to the *excess* amount of the remission, as opposed to the *entire* amount of the remission. The *Ad Note* reflects this focus on the excess amount of the remission without making any reference to any other provisions of the covered agreements.

5.108. We recall the European Union's argument that the focus, in the second part of footnote 1 of the SCM Agreement, on the excess amount of the remission as the limit of the financial contribution element of the subsidy "is qualified by the first part" of footnote 1, which begins with the words "in accordance with" and is followed by a list of provisions, including the *Ad Note* to Article XVI of the GATT 1994. According to the European Union, this first part of footnote 1 refers to "the elements that must be taken into account to determine whether the said situation benefits from the 'carve-out'" reflected in the second part of footnote 1, i.e. the focus on the excess amount of the remission.²⁴¹ However, the absence of a reference in the *Ad Note* to Article XVI to

²³⁵ European Union's appellant's submission, para. 71.

²³⁶ European Union's appellant's submission, paras. 69 and 71.

²³⁷ Pakistan's appellee's submission, paras. 2.1-2.4 and 2.54-2.58.

²³⁸ *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 15; Appellate Body Report, *Korea – Various Measures on Beef*, para. 111; Panel Report, para. 7.39.

²³⁹ Appellate Body Report, *Argentina – Footwear (EC)*, para. 81.

²⁴⁰ We highlight that, in response to questioning at the hearing, both the European Union and Pakistan expressed the view that there is no conflict between the *Ad Note* to Article XVI of the GATT 1994 and the other provisions of the SCM Agreement referred to in footnote 1 thereto.

²⁴¹ European Union's appellant's submission, para. 71.

any such "qualification" appears to undermine the suggestion by the European Union that there are "elements" in the provisions referred to in the first part of footnote 1 that remove the focus on the excess amount of the remission as the limit of the financial contribution element of the subsidy.²⁴²

5.109. Annex I to the SCM Agreement provides an illustrative list of export subsidies. We observe, as the Panel did, that paragraphs (g), (h), and (i) of that Annex all refer to exemptions or remissions "in excess", thus mirroring the language of footnote 1 of the SCM Agreement.²⁴³ Annex I(i) is of particular relevance to this dispute, as it concerns duty drawback schemes. Annex I(i) and footnote 58 thereto state:

The remission or drawback of import charges⁵⁸ in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years. This item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Annex II and the guidelines in the determination of substitution drawback systems as export subsidies contained in Annex III.

⁵⁸ For the purpose of this Agreement:

...
The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;
...
"Remission" of taxes includes the refund or rebate of taxes;
"Remission or drawback" includes the full or partial exemption or deferral of import charges.

5.110. Like footnote 1 of the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994, the first sentence of Annex I(i) of the SCM Agreement identifies, as an export subsidy, "the remission or drawback of import charges *in excess* of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)".²⁴⁴ The wording of this first sentence of Annex I(i) confirms that, for duty drawback schemes, the focus on the excess amount of the remission or drawback underpins the definition of the subsidy, and in particular the financial contribution element thereof, in the form of government revenue foregone.

5.111. The second sentence of Annex I(i) explicitly states that it "shall be interpreted in accordance with the guidelines" in Annexes II and III to the SCM Agreement.²⁴⁵ Annex II contains guidelines on the consumption of inputs in the production process. Annex III contains guidelines on the determination of substitution drawback schemes. Both Annexes provide guidance to investigating authorities and exporting Members, as the case may be, on how to ascertain the precise level of the excess amount of remission or drawback. To this extent, Annexes II and III inform the understanding of duty and substitution drawback schemes as defined in Annex I(i), and their focus on the excess amount of remission or drawback.²⁴⁶

²⁴² The Panel also noticed the absence of any such "qualification" in the *Ad Note* to Article XVI of the GATT 1994. (Panel Report, para. 7.42)

²⁴³ Panel Report, para. 7.43.

²⁴⁴ Fn omitted; emphasis added.

²⁴⁵ Pursuant to Article 32.8 of the SCM Agreement, the Annexes constitute an integral part of the Agreement.

²⁴⁶ We recall that the Panel found no basis on its record upon which to conclude that the MBS is a substitution drawback scheme. (Panel Report, fn 94 to para. 7.37) Accordingly, the guidelines in Annex III to the SCM Agreement on the determination of substitution drawback schemes as export subsidies are not directly implicated in this case. Nonetheless, in our view, this does not obviate the contextual relevance of Annex III to footnote 1 of the SCM Agreement. Accordingly, with respect to the financial contribution element of the subsidy, in the form of government revenue foregone that is otherwise due, as identified in footnote 1 and Annex I(i) to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994, we discuss the provisions of Annex III, jointly with those of Annex II, to the extent that the provisions of Annex III are relevant context to the interpretative issues raised in this appeal.

5.112. We note that Annex II and Annex III are labelled as "Guidelines". Moreover, the *chapeau* of Annex II(II) states that "[i]n examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities *should* proceed on the following basis".²⁴⁷ Similarly, the *chapeau* of Annex III(II) states that, "[i]n examining any substitution drawback system as part of a countervailing duty investigation pursuant to this Agreement, investigating authorities *should* proceed on the following basis".²⁴⁸ Indeed, the use of the word "should" is rife in both Annexes. The labelling of both Annexes as "Guidelines" and the extensive use of the word "should" therein suggest that the content of Annexes II and III, while crucial to the understanding of duty drawback schemes and substitution drawback schemes, ought not to be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance"²⁴⁹ with respect to the assessment of such schemes. Bearing this in mind, we examine the content of these two Annexes.

5.113. Both Annex II and Annex III have two parts. Annex II(I) and Annex III(I) provide descriptions of the export subsidies in Annex I to which the guidelines in the respective Annex II or III apply. Annex II(II) sets out how, in conducting its countervailing duty investigation, an investigating authority should proceed when examining whether inputs are consumed in the production of the exported product. Annex III(II) sets out how an investigating authority should proceed when examining any substitution drawback system as part of a countervailing duty investigation.

5.114. Annex II(I)(1) recognizes that drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Importantly, Annex II(I)(2) reiterates that, pursuant to Annex I(i), drawback schemes can constitute an export subsidy "to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product." This statement in Annex II(I)(2) is in harmony with footnote 1 and the *Ad Note* to Article XVI of the GATT 1994, both of which indicate that, absent the excess remission, the drawback "shall not be deemed to be" a subsidy. This statement is also in harmony with Annex I(i), which identifies, as an export subsidy, "the remission or drawback of import charges *in excess* of those levied on imported inputs that are consumed in the production of the exported product".²⁵⁰ Hence, Annex II recognizes that, for drawback schemes, an export subsidy exists only if there is remission or drawback of import charges "in excess" of those actually levied on inputs consumed in the production of the exported product. This lends further credence to the view that, for duty drawback schemes, the focus is on the excess amount of the remissions. Moreover, as the Panel observed, Annex II contains no language providing for a deviation from this focus.²⁵¹

5.115. Annex II(II) outlines how an investigating authority should proceed when examining whether inputs are consumed in the production of the exported product²⁵² "[w]here it is alleged that ... a drawback scheme ... conveys a subsidy by reason of ... excess drawback of ... import charges on inputs consumed in the production of the exported product".²⁵³ Thus, in the context of duty drawback schemes, the examination into the consumption of inputs is an intermediate task in the investigating authority's inquiry into whether there was excess drawback of import charges. To this extent, this inquiry is aligned with the focus on the excess amount of the remissions as the limit of the financial contribution element of the subsidy, reflected in footnote 1, Annex I(i), and Annex II(I) to the SCM Agreement, and the *Ad Note* to Article XVI of the GATT 1994.

5.116. Pursuant to Annex II(II)(1), an investigating authority 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 (verification system). Where such a verification system is determined to be applied, the investigating authorities should then examine the verification system to see whether it is

²⁴⁷ Emphasis added.

²⁴⁸ Emphasis added.

²⁴⁹ Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.147; *US – Softwood Lumber IV*, para. 92 (in the context of the use of the word "guidelines" in Article 14 of the SCM Agreement).

²⁵⁰ Emphasis added.

²⁵¹ Panel Report, para. 7.47.

²⁵² See the *chapeau* of Annex II(II) to the SCM Agreement.

²⁵³ Annex II(II)(1) to the SCM Agreement.

reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export.²⁵⁴ For ease of reference, we describe this examination by the investigating authority "to see whether [a verification system] is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export" as an examination into whether the verification system is "fit for purpose". Moreover, the last sentence of Annex II(II)(1) provides that an investigating authority may deem it necessary to carry out, in accordance with Article 12.6 of the SCM Agreement²⁵⁵, "certain practical tests" in order to verify the accuracy of the information or to satisfy itself that the verification system is being effectively applied.²⁵⁶

5.117. The guidance in Annex II(II)(1), as described above, underscores the importance of the exporting Member having a properly functioning verification system.²⁵⁷ In this regard, we take note of Annex III(II)(1), which states:

The existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

5.118. This provision highlights that the primary function of a verification system, and particularly one that is fit for purpose, is to ensure that there is no excess drawback of import charges on inputs. In the same vein, Annex III(II)(2) indicates that, to the extent that an investigating authority determines that a verification system is fit for purpose and is effectively applied, "no subsidy should be presumed to exist".²⁵⁸ This presumption further reinforces the explanation set out in Annex III(II)(1) that a verification system is aimed at ensuring that an exporting Member's substitution drawback scheme does not result in a drawback of import charges "in excess" of those originally levied.

5.119. We underline that no such presumption is explicitly provided for in Annex II(II)(1) with respect to duty drawback schemes. In response to questioning at the hearing, the participants agreed that the practical consequences of an exporting Member effectively applying a verification system that is fit for purpose would be the same for duty drawback schemes and substitution drawback schemes. We share the participants' view and find support for this view in the first sentence of Annex II(II)(2). This provision refers to "a further examination by the exporting Member based on the actual inputs involved ... in the context of determining whether an excess payment occurred." Pursuant to the first sentence of Annex II(II)(2), such "further examination", aimed at determining "whether an excess payment occurred", would need to be carried out only if there is no verification system in place, or a verification system is in place but is not fit for

²⁵⁴ Annex II(II)(1) to the SCM Agreement.

²⁵⁵ Article 12.6 of the SCM Agreement states, in relevant part:

The investigating authorities may carry out investigations in the territory of other Members as required, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (a) the firm so agrees and (b) the Member in question is notified and does not object. ... Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

²⁵⁶ As described in footnote 255 above, Article 12.6 of the SCM Agreement permits investigating authorities to carry out on-the-spot investigations. In *EU – Fatty Alcohols (Indonesia)*, the Appellate Body explained that the disclosure of the results of an on-the-spot investigation must be "in sufficient detail and in a timely manner" to allow the investigated company and the exporting Member the opportunity to defend effectively their interests in the remaining stages of the investigation. (Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.140) In that dispute, the Appellate Body was addressing Article 6.7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Given the similarity in language and scope between Article 6.7 of the Anti-Dumping Agreement and Article 12.6 of the SCM Agreement, we consider that the Appellate Body's reasoning in *EU – Fatty Alcohols (Indonesia)* is also relevant to Article 12.6 of the SCM Agreement.

²⁵⁷ The language of Annex III(II)(2) is similar to that of Annex II(II)(1).

²⁵⁸ We recall that, in arriving at this determination, an investigating authority may deem it necessary to carry out, in accordance with Article 12.6 of the SCM Agreement, on-the-spot investigations in order to verify the accuracy of the information or to satisfy itself that the verification system is being effectively applied.

purpose, or it has not been applied effectively. This suggests that, in a countervailing duty investigation concerning a duty drawback scheme, if an investigating authority determined – including through carrying out on-the-spot investigations pursuant to Article 12.6 of the SCM Agreement where necessary – that the exporting Member had effectively applied a verification system that was fit for purpose, the duty drawback scheme under investigation would not result in a drawback of import charges "in excess" of those originally levied. Consequently, the investigating authority would need not continue its line of inquiry into whether there was excess drawback of import charges on inputs. This understanding is in harmony with the description in footnote 1 and Annex I(i) to the SCM Agreement, and the *Ad Note* to Article XVI of the GATT 1994, limiting the financial contribution element of the subsidy to the excess amount of the remission.

5.120. At the heart of the European Union's claim of error on appeal is its contention that Annex II(II)(2) does not prescribe what happens in the event that an exporting Member does not carry out the "further examination" prescribed in the first sentence of this provision, or where such "further examination" is unsatisfactory. The European Union refers to this absence of prescription as a "silence", the consequence of which is that the remission of import duties no longer qualifies as a duty drawback scheme and the entire amount of duties refunded or not collected upon exportation can be countervailed by the investigating authority.²⁵⁹ Pakistan disagrees with the significance that the European Union attributes to this perceived "silence". Moreover, in response to questioning at the hearing, Pakistan opined that the investigating authority has a duty to give the exporting Member the opportunity to conduct a "further examination", as provided for in the first sentence of Annex II(II)(2), before proceeding to engage with the perceived "silence" that follows this provision. Before addressing this alleged "silence" highlighted by the European Union, we first examine what Annex II(II)(2) provides for and its relationship to the first step of the inquiry articulated in Annex II(II)(1), discussed in paragraph 5.116 above.

5.121. Pursuant to the first sentence of Annex II(II)(2), the need for a "further examination by the exporting Member" prescribed therein does not arise in each countervailing duty investigation. Such need only arises in a situation where the investigating authority has determined, from its inquiry under Annex II(II)(1), that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member.²⁶⁰

5.122. Should an investigating authority determine that a "further examination" by the exporting Member needs to be carried out pursuant to the first sentence of Annex II(II)(2), it follows that the investigating authority has the responsibility of informing the exporting Member of this need. In our view, the investigating authority should inform the exporting Member of the need for a "further examination" in sufficient detail and in a timely manner. When an investigating authority provides this information to the exporting Member in a timely manner, it permits the exporting Member to carry out a "further examination", in accordance with the first sentence of Annex II(II)(2), before the conclusion of the authority's investigation. In so doing, this allows the exporting Member, and indeed the investigated company, the opportunity to defend effectively their interests in the remaining stages of the countervailing duty investigation. This is of particular importance bearing in mind that the further examination by the exporting Member is aimed at establishing whether "an excess payment occurred" – a crucial element in the investigating authority's determination of whether the duty drawback scheme under investigation "conveys a subsidy by reason of ... excess drawback of ... import charges on inputs".²⁶¹

5.123. Beyond Annex II(II)(2) and Annex III(II)(3), these two Annexes do not provide for specific procedural steps on what is to happen if no "further examination" by the exporting Member is carried out, or if an investigating authority is still unsatisfied with the results of a "further examination". This leads us to the "silence" argument by the European Union in support of its claim of error.

5.124. As discussed above, the European Union submits that the Panel incorrectly interpreted footnote 1 and Annexes II and III to the SCM Agreement when considering that the words

²⁵⁹ European Union's appellant's submission, paras. 69 and 80-81 (referring to Panel Report, para. 7.56).

²⁶⁰ See also Panel Report, fn 107 to para. 7.51.

²⁶¹ Annex II(II)(1) to the SCM Agreement.

"in accordance with the provisions" in those Annexes, together with the "silence" in cases where the verification system in place was not functioning effectively and there was no further examination by the exporting Member, mean that investigating authorities should still determine whether an excess remission occurred. For the European Union, such "silence" can only mean that, if there is no verification system in place or the investigating authority concludes that the system in place is not functioning effectively, and the exporting Member fails to conduct a further examination based on the actual inputs involved, then "the Excess Remissions principle ceases to apply" because such remission was not granted "in accordance with" (i.e. in conformity with) the conditions listed in those Annexes.²⁶² Consequently, the European Union contends that, in such circumstances, the remission of import duties no longer qualifies as a duty drawback scheme and the entire amount of duties refunded or not collected upon exportation can be countervailed by the investigating authority.²⁶³

5.125. Pakistan disagrees with the European Union's proposition that the perceived "silence" in Annexes II and III to the SCM Agreement means that the "excess remissions principle" ceases to apply.²⁶⁴ Pakistan avers that the subsidy is defined as the excess remission, and not as the entire amount of the remission. Annexes II and III provide detailed procedural guidance on how to calculate this excess remission. Referring to the Panel's finding, Pakistan maintains that there is no reason why the incomplete guidance on the procedural steps in Annexes II and III should mean that the definition of the subsidy, in footnote 1 and Annex I(i), should change or be read out of the Agreement.²⁶⁵

5.126. We recall that the guidelines in Annexes II and III emphasize that the focus of the investigating authority's inquiry is to determine whether there has been a drawback of the import charges "in excess" of those originally levied on the inputs consumed in the production of the exported product.²⁶⁶ Thus, we agree with the Panel that any perceived "silence" connected to the procedural step in Annex II(II)(2) "does not mean that other portions of Annex II cease to speak, and [the Panel] recall[ed] that the entirety of Annex II(II)(2) only operates in the presence of an allegation that a 'drawback scheme[] conveys a subsidy by reason of over-rebate or excess drawback'".²⁶⁷

5.127. In this vein, we emphasize that this perceived "silence" referred to by the European Union is not one that pertains to the definition of the subsidy, and in particular to what constitutes the financial contribution element of the subsidy. In that respect, Annex II(I)(2) is unambiguous in stating that "drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges *in excess* of those actually levied on inputs that are consumed in the production of the exported product."²⁶⁸ This echoes the limitation of the financial contribution to the excess amount of the remission, articulated in footnote 1 and Annex I(i) to the SCM Agreement, and the *Ad Note* to Article XVI of the GATT 1994. Instead, the perceived "silence" referred to by the European Union relates only to a procedural step in the context of an investigating authority's inquiry into whether the excess remission or drawback occurred.

5.128. Moreover, we do not consider what the European Union perceives as "silence" to be without cure in the SCM Agreement.²⁶⁹ According to the European Union, this perceived "silence" relates to a situation where an investigating authority determines that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member, and where the subsequent "further examination" that needs to be carried out by the exporting Member, at the behest of the investigating authority, is not undertaken or is unsatisfactory. In our view, this

²⁶² European Union's appellant's submission, para. 69.

²⁶³ European Union's appellant's submission, paras. 69 and 80-81 (referring to Panel Report, para. 7.56).

²⁶⁴ Pakistan's appellee's submission, paras. 2.60-2.61 (quoting European Union's appellant's submission, para. 69).

²⁶⁵ Pakistan's appellee's submission, paras. 2.62 and 2.66 (referring to Panel Report, para. 7.52).

²⁶⁶ We further recall that Annex III(II)(1) provides that the existence of a verification system is aimed at ensuring that there is no drawback of import charges "in excess" of those originally levied on the imported inputs in question.

²⁶⁷ Panel Report, para. 7.52.

²⁶⁸ Emphasis added.

²⁶⁹ European Union's appellant's submission, paras. 69, 73-75, and 78-81.

situation finds accommodation in Article 12.7 of the SCM Agreement, which envisages instances "in which any interested Member or interested party refuses access to, or otherwise does not provide, *necessary information* within a reasonable period".²⁷⁰ In the context of duty drawback schemes, the "necessary information" relates to the consumption of inputs in the production process, and this information is aimed at determining whether the duty drawback scheme under investigation conveys a subsidy by reason of excess drawback on import charges on inputs.²⁷¹

5.129. Article 12.7 therefore provides an investigating authority with the alternative of filling the gaps of missing information with "facts available". As the Panel observed²⁷², pursuant to Article 12.7, an investigating authority may use the facts available on its record to replace the missing "necessary information" in order to assess whether the inputs imported under the drawback scheme were consumed in the production process of the finished exported product, as part of the larger inquiry into whether there is "excess drawback of ... import charges".²⁷³

5.130. This reliance, pursuant to Article 12.7, on the "facts available" on the investigation record is in keeping with the provisions of the SCM Agreement and the GATT 1994 that govern the imposition of countervailing duties.²⁷⁴ These provisions all encompass a requirement for an investigating authority "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record".²⁷⁵ Thus, in conducting its investigation, an investigating authority "must actively seek out pertinent information" and may not remain "passive in the face of possible shortcomings in the evidence submitted".²⁷⁶ In the context of duty drawback schemes, the second sentence of Annex II(II)(2) lends further credence to this view that an investigating authority may not remain passive, by providing that, "[i]f the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1".²⁷⁷

5.131. For these reasons, we consider that the European Union's argument regarding the significance of the perceived "silence" in Annexes II and III to the SCM Agreement to be inapposite. This perceived "silence" is not one that pertains to the definition of the subsidy and, in particular, to what constitutes the financial contribution element of the subsidy. Instead, the perceived "silence" relates to a procedural step in the context of an investigating authority's inquiry into whether the excess remission or drawback occurred. As regards the procedural step in question, we recall that it relates to a situation where an investigating authority determines that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member, and where a further examination by the exporting Member has not been undertaken or is considered unsatisfactory by the investigating authority. In such a situation, it is true that Annexes II and III

²⁷⁰ Emphasis added. Article 12.7 of the SCM Agreement provides:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

²⁷¹ In such a situation, Article 12.7 permits the use of facts on the record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination. To this end, the Appellate Body has emphasized that there has to be a connection between the necessary information that is missing and the particular facts available on which a determination under Article 12.7 is based. Thus, an investigating authority must use those "facts available" that "reasonably replace" the information that an interested party failed to provide, with a view to arriving at an accurate determination. The "facts available" refer to those facts that are in the possession of the investigating authority and on its written record. (See Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.416-4.417; *US – Countervailing Measures (China)*, para. 4.178; *Mexico – Anti-Dumping Measures on Rice*, paras. 293-294)

²⁷² Panel Report, para. 7.59.

²⁷³ Annex II(II)(1) to the SCM Agreement.

²⁷⁴ These provisions include Article 10 and Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

²⁷⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602).

²⁷⁶ Appellate Body Report, *US – Washing Machines*, para. 5.268 (quoting Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55; referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; Panel Report, *China – Broiler Products*, para. 7.261).

²⁷⁷ The third sentence of Annex III(II)(3) contains similar language in the context of substitution drawback schemes.

do not explicitly provide for the steps to be taken by an investigating authority. However, the SCM Agreement, as a whole, is not silent, and the perceived "silence" in Annexes II and III does not grant an investigating authority the liberty to depart from these other disciplines of the SCM Agreement. In particular, Article 12.7 of the SCM Agreement allows an investigating authority to rely on the facts available on its record to replace the missing "necessary information" in its assessment of whether the inputs imported under the drawback scheme were consumed in the production of the finished exported product, as part of the larger inquiry into whether there is "excess drawback of ... import charges on inputs consumed in the production of the exported product".²⁷⁸

5.132. As an additional line of argument, albeit one closely related to the one discussed above, the European Union opines that, by limiting the financial contribution to the excess remission, irrespective of whether the conditions of Annexes I to III are met, the Panel's interpretation would in essence relieve WTO Members from "making any efforts" to establish a reliable and effective monitoring system in order to comply with Annexes I to III.²⁷⁹ Pakistan disagrees, underlining that the continued threat of either multilateral or unilateral action against an export subsidy is a "powerful incentive" to ensure adequate monitoring of duty drawback systems, an incentive that exists independently of Annexes II and III.²⁸⁰

5.133. We take note of the participants' debate regarding the incentives attached to the exporting Member's operation of a verification system that is fit for purpose.²⁸¹ Annex II(II)(1) and Annex (III)(II)(2) appear to suggest that exporting Members should have in place and apply verification systems that are fit for purpose. Annex II(II)(2) and III(II)(3) also indicate that, where an exporting Member either does not have a verification system, or the existing verification system is not fit for purpose or was not effectively applied, such exporting Member may be faced with the additional burden of carrying out a "further examination" based on the actual inputs to determine whether an excess payment occurred. However, these roles of the exporting Member as reflected in Annexes II and III do not void an investigating authority's obligation "to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record."²⁸² Instead, as discussed above, an investigating authority "must actively seek out pertinent information" and may not remain "passive in the face of possible shortcomings in the evidence submitted".²⁸³ To this end, Article 12.7 of the SCM Agreement serves as an essential tool²⁸⁴, allowing an investigating authority to complete its inquiry into whether a duty "drawback scheme conveys a subsidy by reason of ... excess drawback of ... import charges on inputs consumed in the production of the exported product."²⁸⁵

5.134. In sum, a harmonious reading of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994 confirms that duty drawback schemes can constitute an export subsidy that can be countervailed only if they result in a remission or drawback of import charges "in excess" of those actually levied on the imported inputs that are consumed in the production of the exported product. Thus, in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is limited to the excess remission or drawback of import charges and does not encompass the entire amount of the remission or drawback of import charges.

²⁷⁸ Annex II(II)(1) to the SCM Agreement.

²⁷⁹ European Union's appellant's submission, para. 70.

²⁸⁰ Pakistan's appellee's submission, paras. 2.70-2.74.

²⁸¹ In addressing these arguments by the participants, we are mindful that our "interpretation must be based above all upon the text of the treaty" and that we are required to "read and interpret the words actually used by the agreement under examination". (See Appellate Body Reports, *Japan – Alcoholic Beverages II*, p. 11, DSR 1996:1, p. 105; *EC – Hormones*, para. 181)

²⁸² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 602).

²⁸³ Appellate Body Report, *US – Washing Machines*, para. 5.268 (quoting Appellate Body Report, *US – Wheat Gluten*, paras. 53 and 55; referring to Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 199; *US – Anti-Dumping and Countervailing Duties (China)*, para. 344; Panel Report, *China – Broiler Products*, para. 7.261).

²⁸⁴ Panel Report, *US – Countervailing Measures (China)*, para. 7.308.

²⁸⁵ Annex II(II)(1) to the SCM Agreement.

5.135. For all of these reasons, we find that the European Union has not demonstrated that the Panel erred in finding that:

the Excess Remissions Principle provides the legal standard under which to determine whether remissions of import duties obtained under a duty drawback scheme constitute[] a financial contribution in the form of revenue forgone otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement, and reject the European Union's position that Annex II and/or Annex III provides a relevant reason to depart from the Excess Remissions Principle. Thus, even if the exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product and in the absence of a further examination by the exporting Member of that issue, investigating authorities should still determine if an excess remission occurred.²⁸⁶

5.136. We recall that, on appeal, in addition to the European Union's request that we reverse the Panel's articulation of the applicable legal standard, quoted above, the European Union also requests us to declare moot and of no legal effect the entirety of the Panel's findings with respect to the MBS on the grounds that the Panel applied the wrong legal standard.²⁸⁷ However, the European Union does not raise separate and distinct arguments challenging the Panel's review of the Commission's findings concerning the MBS, beyond its claim that the Panel applied the wrong legal standard to the facts of this case.²⁸⁸

5.137. Having rejected the European Union's claim that the Panel erred with respect to its articulation of the applicable legal standard, we find that the European Union has not demonstrated that the Panel erred in finding that, by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties, which the Commission found to be the financial contribution, was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement, the Commission acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement. For the same reason, we find that the European Union has not demonstrated that the Panel erred in concluding that the Commission acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.²⁸⁹

5.2.4 Conclusion

5.138. A harmonious reading of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994 confirms that duty drawback schemes can constitute an export subsidy that can be countervailed only if they result in a remission or drawback of import charges "in excess" of those actually levied on the imported inputs consumed in the production of the exported product. Thus, in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is limited to the excess remission or drawback of import charges on inputs and does not encompass the entire amount of the remission or drawback of import charges.

5.139. Furthermore, the perceived "silence" in Annexes II and III to the SCM Agreement, referred to by the European Union, is not one that pertains to the definition of the subsidy, and in particular to what constitutes the financial contribution element of the subsidy, in the form of government revenue foregone. Instead, the perceived "silence" relates to a procedural step in the context of an investigating authority's inquiry into whether the excess remission or drawback of import charges occurred. As regards this procedural step, where an investigating authority determines that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member, and where a further examination by the exporting Member has not been undertaken or is considered unsatisfactory by the investigating authority, it is true that Annexes II and III do not explicitly provide for what should happen next. Nonetheless, the SCM Agreement, as a whole, is not silent, and the perceived "silence" in Annexes II and III does not grant an investigating authority the

²⁸⁶ Panel Report, para. 7.56. (fn omitted)

²⁸⁷ European Union's Notice of Appeal, p. 2; appellant's submission, paras. 54 and 82-83 (referring to Panel Report, paras. 7.57-7.60 and 8.1.b.i-ii).

²⁸⁸ Indeed, in response to questioning at the hearing, the European Union confirmed that its appeal raises an interpretative question only.

²⁸⁹ Panel Report, para. 7.60.

liberty to depart from these other disciplines of the SCM Agreement. In particular, Article 12.7 of the SCM Agreement allows an investigating authority to rely on the "facts available" on its investigation record to complete its inquiry into whether a duty drawback scheme conveys a subsidy by reason of excess drawback of import charges on inputs.

5.140. Accordingly, we find that the European Union has not demonstrated that the Panel erred in its interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994, as summarized at paragraph 7.56 of its Report.

5.141. The European Union does not challenge the Panel's review of the Commission's findings on the MBS, beyond the European Union's claim that the Panel applied the wrong legal standard to the facts of this case.

5.142. Accordingly, we find that the European Union has not demonstrated that the Panel erred in its application of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement to the facts of this case.

5.143. Consequently, we uphold the Panel's findings, in paragraphs 7.60 and 8.1.b.i of its Report, that the Commission erred under Article 1.1(a)(1)(ii) of the SCM Agreement by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement; and, in paragraphs 7.60 and 8.1.b.ii of its Report, that the Commission acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.

5.3 Pakistan's claim of error regarding the Commission's causation analysis

5.144. Pakistan challenges the Panel's rejection of Pakistan's claim that the Commission's use of the "break the causal link" approach²⁹⁰ in this case was inconsistent with Article 15.5 of the SCM Agreement because this approach had precluded the Commission from satisfying the non-attribution requirements of this provision.²⁹¹ Consequently, Pakistan requests us to reverse the Panel's finding that Pakistan had failed to establish that the Commission's use of the "break the causal link" approach in this case was inconsistent with Article 15.5.²⁹² Pakistan also requests us to complete the legal analysis and find that the Commission acted inconsistently with Article 15.5 by using the "break the causal link" approach in its causation analysis.²⁹³

5.145. Before turning to our analysis of the issues raised on appeal, we provide, as background information, the relevant aspects of the Commission's determination of injury and causation in the countervailing duty investigation at issue. We also include a summary of the relevant Panel findings.

5.3.1 Background information

5.146. The Commission's analyses of injury and causation in the countervailing duty investigation at issue are set out in sections 4 and 5 of the Provisional Determination and in sections 4 and 5 of the Definitive Determination.²⁹⁴

²⁹⁰ We note that, while the Commission used the phrase "break the causal link" in its analysis of the effects of other known factors in its determination, there is no reference in the EU Basic CVD Regulation to the notion of "breaking the causal link" or to a "break the causal link" approach or methodology. Thus, we understand the terms "'break the causal link' approach" or "'break the causal link' methodology" used by the parties and the Panel as shorthand to refer to the specific manner in which the Commission conducted its causation analysis in the countervailing duty investigation at issue. We use the term "'break the causal link' approach" in the same manner.

²⁹¹ Pakistan's other appellant's submission, para. 1.2 (referring to Panel Report, paras. 7.117-7.120).

²⁹² Pakistan's other appellant's submission, para. 4.1 (referring to Panel Report, paras. 7.120 and 8.1.d.i).

²⁹³ Pakistan's other appellant's submission, para. 4.2.

²⁹⁴ The Definitive Determination was issued by the Council based on the proposal submitted by the Commission. (Definitive Determination (Panel Exhibit PAK-2), p. 1)

5.147. In section 4 of the Provisional Determination (entitled "Injury"), the Commission began its analysis by stating that, for the purpose of its injury and causation determination, it would examine the subsidized imports from Iran, Pakistan, and the United Arab Emirates cumulatively.²⁹⁵ The Commission then examined the evolution of the volume and prices of the subsidized imports and of various economic indicators pertaining to the state of the EU industry.

5.148. The Commission observed that the volume and market share of the subsidized imports increased approximately five times²⁹⁶ during the period considered²⁹⁷, whereas the EU producers lost their market share by about 10 percentage points during the same period.²⁹⁸ The Commission also observed that, during the investigation period, the subsidized imports undercut the sales prices of the domestic producers by 3.2% on a weighted-average basis.²⁹⁹

5.149. With respect to the state of the EU industry, the Commission observed that the following six economic indicators showed negative trends during the period considered: production; sales; market share; profitability; return on investment; and cash flow. The Commission thus concluded that the EU industry had suffered material injury.³⁰⁰

5.150. In section 5 of the Provisional Determination (entitled "Causation"), the Commission examined whether the subsidized imports had "caused" the observed material injury to the EU industry.³⁰¹ The Commission carried out its causation analysis in two steps.³⁰² First, the Commission examined the relationship between the subsidized imports and the observed injury by considering the "[e]ffect of the subsidised imports".³⁰³ The Commission recalled that, during the period considered, the volume and market share of the subsidized imports increased significantly, while their prices undercut the domestic prices.³⁰⁴ The Commission considered that, given that "PET is a commodity and competition takes place mainly via price"³⁰⁵, the subsidized imports exerted a downward pressure on prices, preventing the EU industry from keeping its sales prices to realize a profit.³⁰⁶ The Commission therefore stated that "it is considered that a causal link exists between those imports and the [EU] industry's injury".³⁰⁷

5.151. Second, the Commission examined the "[e]ffect of other factors"³⁰⁸ that could have injured the EU industry at the same time as the subsidized imports. The Commission examined each of the following "other factors" in turn: (i) the export activity of the EU industry; (ii) imports from Korea and other third countries; (iii) competition from the non-cooperating producers in the European Union; (iv) the economic downturn in 2008 and the contraction in demand that accompanied this downturn; (v) the geographical location of the EU industry; and (vi) the lack of vertical integration.³⁰⁹

5.152. The Commission found that the export activity of the EU industry³¹⁰, imports from third countries other than Korea³¹¹, competition from the non-cooperating producers³¹², the geographical location of the European Union³¹³, and the lack of vertical integration³¹⁴ had not contributed to the injury observed. With respect to imports from Korea³¹⁵, and the 2008 economic

²⁹⁵ Provisional Determination (Panel Exhibit PAK-1), recital 210.

²⁹⁶ Provisional Determination (Panel Exhibit PAK-1), Table 2 at recital 211.

²⁹⁷ See para. 5.66 above.

²⁹⁸ Provisional Determination (Panel Exhibit PAK-1), Table 7 at recital 224.

²⁹⁹ Provisional Determination (Panel Exhibit PAK-1), recital 217.

³⁰⁰ Provisional Determination (Panel Exhibit PAK-1), recital 240.

³⁰¹ Provisional Determination (Panel Exhibit PAK-1), recital 241.

³⁰² Provisional Determination (Panel Exhibit PAK-1), recital 241.

³⁰³ Provisional Determination (Panel Exhibit PAK-1), section 5.2.

³⁰⁴ Provisional Determination (Panel Exhibit PAK-1), recitals 242-243.

³⁰⁵ Provisional Determination (Panel Exhibit PAK-1), recital 243.

³⁰⁶ Provisional Determination (Panel Exhibit PAK-1), recital 245. See also recital 262.

³⁰⁷ Provisional Determination (Panel Exhibit PAK-1), recital 245. See also recitals 242-243 and 262.

³⁰⁸ Provisional Determination (Panel Exhibit PAK-1), section 5.3.

³⁰⁹ Provisional Determination (Panel Exhibit PAK-1), recitals 246-261.

³¹⁰ Provisional Determination (Panel Exhibit PAK-1), recital 246.

³¹¹ Provisional Determination (Panel Exhibit PAK-1), recital 251.

³¹² Provisional Determination (Panel Exhibit PAK-1), recital 252.

³¹³ Provisional Determination (Panel Exhibit PAK-1), recital 259.

³¹⁴ Provisional Determination (Panel Exhibit PAK-1), recital 261.

³¹⁵ Provisional Determination (Panel Exhibit PAK-1), recital 249.

downturn and the contraction in demand that accompanied this downturn³¹⁶, the Commission found that each of these factors contributed to the EU industry's injury, but only to a limited degree, and, therefore, these factors did not "break the causal link" found between the subsidized imports and the injury to the EU industry.

5.153. Consequently, in section 5.4 of the Provisional Determination (entitled "Conclusion on causation"), the Commission "provisionally concluded that the imports from the countries concerned have caused material injury to the [EU] industry".³¹⁷

5.154. In its Definitive Determination, the Council confirmed the Commission's overall analyses and conclusions on injury and causation contained in the Provisional Determination.³¹⁸ However, it made certain adjustments to the calculation of the price-undercutting margin for the subsidized imports³¹⁹ and found that the weighted-average undercutting margin of those imports after the adjustment was 2.5%.³²⁰ In addition, with respect to the non-attribution analysis, the Council addressed arguments concerning certain other factors alleged to be causing injury that had been advanced by some interested parties following the Provisional Determination, namely: (i) low prices of crude oil; (ii) financial and technical problems of some EU producers; (iii) contraction in demand during the investigation period; and (iv) lack of investment by the EU PET producers.³²¹

5.155. The Council found that oil prices³²², financial and technical problems of some EU producers³²³, and lack of investment by the EU PET producers³²⁴ did not materially contribute to the injury observed. In addition, while the Council acknowledged that the contraction in demand "was a factor contributing to the injury suffered", it confirmed the Commission's finding in the Provisional Determination that the impact of this factor seen in the context of the 2008 economic downturn "did not break the causal link".³²⁵

5.3.2 The Panel's findings

5.156. Before the Panel, Pakistan submitted two claims under Article 15.5 of the SCM Agreement. First, Pakistan claimed that the Commission's "approach to causation", and specifically its use of the "break the causal link" approach, was inconsistent with the requirements of Article 15.5.³²⁶ Second, Pakistan argued that the Commission had failed to conduct a proper non-attribution analysis with respect to four specific other known factors, namely: (i) imports from Korea; (ii) the economic downturn in 2008; (iii) competition from non-cooperating EU producers; and (iv) oil prices.³²⁷ On appeal, Pakistan challenges only the Panel's finding on its first claim.

5.157. In support of its first claim, Pakistan argued, *inter alia*, that the Commission's approach had "prejudged" its non-attribution analysis.³²⁸ Pakistan asserted that this approach led to a disregard of "the correct legal standard, ... [i.e.] whether the injurious effects of ... other factors were such as to render the causal link between the subject imports and the alleged injury too distant, remote or insubstantial".³²⁹ Pakistan also stated that the "causal link" that the Commission

³¹⁶ Provisional Determination (Panel Exhibit PAK-1), recitals 254 and 256.

³¹⁷ Provisional Determination (Panel Exhibit PAK-1), recital 264.

³¹⁸ Definitive Determination (Panel Exhibit PAK-2), recitals 116 and 126.

³¹⁹ Definitive Determination (Panel Exhibit PAK-2), recitals 108 and 165.

³²⁰ Definitive Determination (Panel Exhibit PAK-2), recital 110. The individual undercutting margin for imports from Pakistan was 0.5%.

³²¹ Definitive Determination (Panel Exhibit PAK-2), recitals 118-125.

³²² Definitive Determination (Panel Exhibit PAK-2), recital 118.

³²³ Definitive Determination (Panel Exhibit PAK-2), recital 119.

³²⁴ Definitive Determination (Panel Exhibit PAK-2), recital 125.

³²⁵ Definitive Determination (Panel Exhibit PAK-2), recital 120 (referring to Provisional Determination (Panel Exhibit PAK-1), recitals 254-256).

³²⁶ Panel Report, paras. 7.106-7.107.

³²⁷ Panel Report, paras. 7.106 and 7.128.

³²⁸ Panel Report, para. 7.117 (referring to Pakistan's opening statement at the second Panel meeting, para. 4.4). See also Pakistan's second written submission to the Panel, para. 4.7.

³²⁹ Panel Report, para. 7.117 (quoting Pakistan's opening statement at the second Panel meeting, para. 4.4).

had found at the start of its causation analysis was "used to dismiss the significance of the non-attribution factors the Commission purported to analyze".³³⁰

5.158. The Panel began its analysis of Pakistan's claim by setting out its understanding of the relevant legal standard. The Panel explained that Article 15.5 requires an investigating authority to demonstrate the existence of a causal link between the subsidized imports and the injury to the domestic industry, and this "causal link" must involve a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury.³³¹ The Panel also stated that the non-attribution language in the third sentence of Article 15.5 calls for an assessment that involves separating and distinguishing the injurious effects of other known factors from the injurious effects of the subsidized imports. The third sentence also requires an investigating authority to provide a satisfactory explanation of the nature and extent of the injurious effects of other known factors, as distinguished from the injurious effects of the subsidized imports.³³²

5.159. With respect to Pakistan's argument that the Commission's finding of a "causal link" prejudged its non-attribution analysis, the Panel observed that, in the introduction to the causation section of the Provisional Determination, the Commission referred to its non-attribution analysis as forming part of its analysis of the existence of a "causal link" between the subsidized imports and the injury to the EU industry.³³³ The Panel further noted that the Commission "considered" that a "causal link" existed between the subsidized imports and the observed injury to the EU industry before it examined whether other known factors "broke the causal link".³³⁴ The Panel observed that it was only after the assessment of the other known factors that the Commission "concluded" that the subsidized imports had caused material injury to the EU industry.³³⁵ On this basis, the Panel found it "evident" that the Commission "allowed for the possibility that the analysis of other known factors could have negated its initial consideration that a causal link existed between subject imports and the observed injury to the domestic industry".³³⁶

5.160. The Panel further explained that it failed to see how the Commission's approach had led to a disregard of the relevant legal standard "in this case" or how this approach had precluded the Commission from separating and distinguishing the injurious effects of any other known factors from those of the subsidized imports.³³⁷ The Panel recalled that Pakistan had raised separate claims pertaining to purported deficiencies in the Commission's analysis of four specific non-attribution factors.³³⁸ While the Panel, in later sections of its Report, found the Commission's analysis of two of those specific factors (i.e. competition from non-cooperating EU producers and oil prices) to be inconsistent with the requirements in Article 15.5³³⁹, it did not consider that the use of the overall "break the causal link" framework had necessarily led to such inconsistency.³⁴⁰ In addition, the Panel considered that its finding that the Commission had sufficiently separated and distinguished the effects of the remaining two non-attribution factors (i.e. imports from Korea and the 2008 economic downturn) from the effects of the subsidized imports illustrated that the Commission did not dismiss the role of the other known factors simply because it had earlier considered that a "causal link" existed between the subsidized imports and the EU industry's injury.³⁴¹

³³⁰ Panel Report, para. 7.117 (quoting Pakistan's opening statement at the second Panel meeting, para. 4.4).

³³¹ Panel Report, para. 7.111.

³³² Panel Report, para. 7.111 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.125).

³³³ Panel Report, para. 7.118 (referring to Provisional Determination (Panel Exhibit PAK-1), recital 241).

³³⁴ Panel Report, para. 7.118 (referring to Provisional Determination (Panel Exhibit PAK-1), recital 245).

³³⁵ Panel Report, para. 7.118 (referring to Provisional Determination (Panel Exhibit PAK-1), recitals 245 and 264).

³³⁶ Panel Report, para. 7.118.

³³⁷ Panel Report, para. 7.119 (referring to Appellate Body Reports, *US – Tyres (China)*, para. 191; *EC and certain member States – Large Civil Aircraft*, para. 1376; *EU – Biodiesel (Argentina)*, para. 6.125; Panel Report, *EU – Footwear (China)*, para. 7.489).

³³⁸ These non-attribution factors were: (i) imports from Korea; (ii) the economic downturn in 2008 and the contraction in demand that accompanied this downturn; (iii) competition from non-cooperating producers; and (iv) oil prices. (Panel Report, para. 7.128)

³³⁹ Panel Report, paras. 7.128, 7.152, and 7.160.

³⁴⁰ Panel Report, para. 7.119.

³⁴¹ Panel Report, para. 7.119. See also paras. 7.135 and 7.145.

5.161. In light of the foregoing, the Panel rejected Pakistan's argument that the Commission's "break the causal link" approach had precluded the Commission from satisfying the non-attribution requirements of Article 15.5 of the SCM Agreement in this case.³⁴² Having also rejected Pakistan's other arguments in support of its claim³⁴³, the Panel concluded that Pakistan had failed to demonstrate that the Commission's use of the "break the causal link" approach in this case was inconsistent with Article 15.5 of the SCM Agreement.³⁴⁴

5.3.3 Whether the Panel erred in its interpretation and application of Article 15.5 of the SCM Agreement

5.162. On appeal, Pakistan submits that the Panel erred in rejecting Pakistan's claim that the Commission's use of the "break the causal link" approach in this case was inconsistent with Article 15.5 of the SCM Agreement because this approach had precluded the Commission from satisfying the non-attribution requirements of this provision. Pakistan asserts that the Panel failed to apply the "correct legal standard" under Article 15.5 when assessing the WTO consistency of the "break the causal link" approach used by the Commission in its causation analysis.³⁴⁵

5.163. Pakistan argues that the "primary objective" of a causation analysis under Article 15.5 is to determine whether there exists a "genuine and substantial relationship of cause and effect" between the subsidized imports and the observed injury.³⁴⁶ Pakistan refers to WTO jurisprudence regarding the causation analysis under Articles 5 and 6 of the SCM Agreement and argues that a proper test for determining the existence of a causal relationship is whether other known factors "attenuate" or "dilute" the link found between the subsidized imports and the injury such that this link cannot be characterized as a "genuine and substantial relationship of cause and effect".³⁴⁷ Pakistan thus considers that the Panel erred in "endors[ing]"³⁴⁸ the Commission's "break the causal link" approach because, instead of examining whether each of the other known factors individually "broke" the causal link between the subsidized imports and the injury, the Commission should have examined whether those factors "attenuated" or "diluted" such a causal link.

5.164. The European Union submits that Pakistan takes issue with the terminology of the Commission's approach while ignoring its practical operation.³⁴⁹ The European Union contends that, in the countervailing duty investigation at issue, the Commission properly separated and distinguished the effects of the other known factors and ensured that their injurious effects were not attributed to the subsidized imports. In the European Union's view, whether the Commission used the word "breaking" instead of "attenuating" or "diluting" the causal link is purely a matter of semantics.³⁵⁰

5.165. We address Pakistan's claim of error by first setting out our interpretation of Article 15.5 of the SCM Agreement. Thereafter, we review the Panel's findings and examine whether the Panel erred in rejecting Pakistan's claim that the Commission's use of the "break the causal link" approach precluded the Commission from satisfying the requirements of Article 15.5 of the SCM Agreement.

³⁴² Panel Report, para. 7.120.

³⁴³ Panel Report, paras. 7.116 and 7.126.

³⁴⁴ Panel Report, para. 8.1.d.i.

³⁴⁵ Pakistan's other appellant's submission, para. 1.3.

³⁴⁶ Pakistan's other appellant's submission, para. 3.12 (referring to Appellate Body Reports, *US – Lamb*, para. 179; *US – Large Civil Aircraft (2nd complaint)*, para. 914).

³⁴⁷ Pakistan's other appellant's submission, paras. 3.7-3.12 (referring to Panel Reports, *US – Upland Cotton*, para. 7.1363; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.252; Appellate Body Reports, *US – Upland Cotton*, para. 458; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 379; *EC and certain member States – Large Civil Aircraft*, para. 725; *US – Large Civil Aircraft (2nd complaint)*, para. 914).

³⁴⁸ Pakistan's other appellant's submission, para. 3.24.

³⁴⁹ European Union's appellee's submission, para. 25.

³⁵⁰ European Union's appellee's submission, paras. 2-3 and 30.

5.3.3.1 Interpretation of Article 15.5 of the SCM Agreement

5.166. Article 15 of the SCM Agreement (entitled "Determination of Injury"³⁵¹) sets out disciplines that apply to an investigating authority's determination of injury caused by subsidized imports in a countervailing duty investigation. The paragraphs of this provision provide an investigating authority with the relevant framework and disciplines for conducting such an analysis and contemplate a "logical progression" of inquiry leading to an investigating authority's ultimate injury and causation determination.³⁵² Article 15.1 sets forth the "overarching obligation"³⁵³ that an investigating authority must comply with in carrying out its injury determination and provides that a determination of injury shall be based on positive evidence and involve an objective examination of: (a) the volume of the subsidized imports and their effects on domestic prices; and (b) the consequent impact of these imports on the domestic industry. Article 15.2 specifies the content of an investigating authority's consideration regarding the volume of subsidized imports and their price effects. Articles 15.4 and 15.5 concern the consequent impact of the subsidized imports on the domestic industry. Article 15.4 sets out the economic factors that must be evaluated in the examination of the impact of the subsidized imports on the domestic industry. Article 15.5, which is at issue in this appeal, requires that an investigating authority establish that the subsidized imports are "causing" injury to the domestic industry and, in doing so, ensure that the injuries caused by factors other than the subsidized imports are not attributed to the subsidized imports.

5.167. Article 15.5 and footnote 47 thereto provide:

It must be demonstrated that the subsidized imports are, through the effects⁴⁷ of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

⁴⁷ As set forth in paragraphs 2 and 4.

5.168. Article 15.5 requires an investigating authority ultimately to establish that the subsidized imports are "causing" injury to the domestic industry or, in other words, the existence of a "causal relationship between the subsidized imports and the injury to the domestic industry". While the SCM Agreement does not provide a definition of the term "causal relationship", the Appellate Body has held that a showing of a "causal relationship" between the subsidized imports and the injury requires the existence of a "genuine and substantial relationship of cause and effect" between those elements.³⁵⁴

5.169. Article 15.5 recognizes that there may be factors other than the subsidized imports that are injuring the domestic industry "at the same time". Hence, in order for a "genuine and substantial" causal relationship to exist between the subsidized imports and the injury to the

³⁵¹ Footnote 45 of the SCM Agreement defines the term "injury" as material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry. In the countervailing duty investigation at issue in this dispute, the Commission found that the domestic industry had suffered material injury. (Provisional Determination (Panel Exhibit PAK-1), recital 264; Definitive Determination (Panel Exhibit PAK-2), recital 126)

³⁵² Appellate Body Report, *China – GOES*, para. 128. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.140 (in the context of Article 3 of the Anti-Dumping Agreement).

³⁵³ Appellate Body Report, *China – GOES*, para. 127.

³⁵⁴ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 132. See also Appellate Body Reports, *US – Wheat Gluten*, para. 69; *US – Lamb*, para. 179 (addressing the causation standard under Article 4.2(b) of the Agreement on Safeguards); *US – Upland Cotton*, para. 438; *US – Large Civil Aircraft (2nd complaint)*, para. 913 (addressing the causation standard under Articles 5 and 6 of the SCM Agreement).

domestic industry, such imports need not be the *sole* cause of that injury.³⁵⁵ Rather, the existence of a "genuine and substantial" causal relationship is a function of *both*: (i) the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry; and (ii) the comparative significance of such a link in relation to the contributions of other known factors to that injury. As the Appellate Body has explained, the "genuine" component of the "genuine and substantial" causation test requires that the nexus between the causal agent and the consequence at issue be "real" or "true". The "substantial" component of the test concerns the "relative importance" of the causal agent in bringing about the consequence.³⁵⁶ As such, Article 15.5 requires an investigating authority to determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.

5.170. The four sentences of Article 15.5 refer to the specific elements that an investigating authority must consider in reaching an overall conclusion as to the existence of a "causal relationship" between the subsidized imports and the injury to the domestic industry. The first two sentences of Article 15.5, read together with footnote 47 to the first sentence, require that the demonstration of a causal relationship be carried out by following the analyses set forth in Articles 15.2 and 15.4 for examining the "effects" of the subsidized imports.³⁵⁷ Such an examination concerns: (i) whether there has been a significant increase in subsidized imports; (ii) the effect of the subsidized imports on prices; and (iii) the consequent impact of the subsidized imports on the domestic industry.³⁵⁸

5.171. The third and fourth sentences of Article 15.5, in turn, refer to the "non-attribution" requirement, stipulating that an investigating authority must not attribute to the subsidized imports the injuries caused by other known factors and providing an illustrative list of such factors. This analysis involves separating and distinguishing the injurious effects of other known factors from the injurious effects of the subsidized imports.³⁵⁹ By doing so, an investigating authority can ensure that the injury it ascribes to the subsidized imports is actually caused by those imports, rather than by the other factors.³⁶⁰ Importantly, an investigating authority must provide a satisfactory explanation of the nature and extent of the injurious effects of the other known factors, as distinguished from the injurious effects of the subsidized imports.³⁶¹

5.172. The language of Article 15.5 makes clear that an investigating authority must separate and distinguish the injurious effects of other known factors from the injurious effects of the subsidized imports *before* it reaches an overall conclusion as to the existence of a "causal relationship" between the subsidized imports and the injury to the domestic industry.³⁶² However, Article 15.5 does not prescribe any particular methodology or approach that an investigating authority must

³⁵⁵ With respect to the causation standard under Article 4.2(b) of the Agreement on Safeguards, the Appellate Body has held that this provision does not require that increased imports be the *sole* cause of the serious injury. (Appellate Body Report, *US – Wheat Gluten*, para. 67) In addition, with respect to the causation analysis under Articles 5 and 6 of the SCM Agreement, the Appellate Body has stated that, in order for a "genuine and substantial relationship of cause and effect" to exist, the causal agent need not be the *sole* cause of its alleged consequence or even the *only* substantial cause of that consequence. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 914)

³⁵⁶ Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, fns 1865-1866 to para. 913 (addressing the causation standard under Articles 5 and 6 of the SCM Agreement) (referring to *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 1094; Vol. 2, p. 3088).

³⁵⁷ In *Japan – DRAMs (Korea)*, the Appellate Body held that the phrase "through the effects of subsidies" in the first sentence of Article 15.5 requires an examination of the effects of the *subsidized imports* as set forth in paragraphs 2 and 4 of the same Article. However, the Appellate Body stated that there is no separate requirement that an investigating authority must examine the effects of the *subsidies* as distinguished from the effects of the subsidized imports. (Appellate Body Report, *Japan – DRAMs (Korea)*, paras. 263-264)

³⁵⁸ Appellate Body Report, *Japan – DRAMs (Korea)*, para. 263.

³⁵⁹ Appellate Body Report, *China – GOES*, para. 151 (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 223).

³⁶⁰ Appellate Body Reports, *US – Hot-Rolled Steel*, para. 223; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283 (in the context of Article 3.5 of the Anti-Dumping Agreement).

³⁶¹ Appellate Body Report, *US – Hot-Rolled Steel*, para. 226 (in the context of Article 3.5 of the Anti-Dumping Agreement).

³⁶² See Appellate Body Report, *US – Wheat Gluten*, para. 69 (addressing the causation standard under Article 4.2(b) of the Agreement on Safeguards).

adhere to in carrying out its analysis.³⁶³ Thus, provided that an investigating authority does not attribute the injuries caused by other known factors to the subsidized imports, an investigating authority is free to choose the methodology it will use in determining the existence of a "causal relationship" between the subsidized imports and the injury.³⁶⁴

5.173. There are different approaches to assessing causation while accounting for the injurious effects of other known factors. For example, it is possible for an investigating authority to address the two components of the causation analysis in two separate steps, by first examining the existence and extent of a causal link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports, and then by conducting an assessment of the injurious effects of other known factors. Alternatively, an investigating authority could, as appropriate in the specific investigation, choose a single-step "counterfactual" causation analysis, whereby it assesses whether and to what extent the state of the domestic industry would have been better off in the absence of the effects of the subsidized imports while the effects of other known factors remain. This "unitary" analysis directly evaluates the significance of the impact of the subsidized imports alone and, thus, there is no need for a separate non-attribution analysis.³⁶⁵

5.174. When an investigating authority chooses a two-step approach to assessing causation, it may consider, on the basis of the first step of its analysis, that a "causal link" exists between the subsidized imports and the injury suffered by the domestic industry. Such consideration, however, will not in itself qualify as a "demonstration of a causal relationship" within the meaning of Article 15.5. This is because Article 15.5 also requires that an assessment of the effects of other known factors be completed before an overall conclusion as to the existence of a "causal relationship" can be reached.³⁶⁶

5.175. In addition, while an investigating authority need not show that the subsidized imports are the *sole* cause of the injury suffered by the domestic industry in order to make a finding of a "causal relationship" between such imports and the injury, it must establish that the subsidized imports, on their own, qualify as a "genuine and substantial" cause of the injury. Hence, when the subsidized imports and *several* other factors are simultaneously injuring the domestic industry, an investigating authority must ensure that the contribution of the subsidized imports to the injury is "genuine and substantial" in light of the effects of *all* of these other factors. In our view, an investigating authority can discharge its obligation under Article 15.5 in different ways depending on the specific circumstances of the case.

5.176. For example, in a situation where multiple other known factors, taken together, have a significant impact on the state of the domestic industry – while the impact of each of them in isolation may be only insignificant – an investigating authority may be required to assess whether the effects of all of these factors, collectively, are so significant that the subsidized imports cannot be characterized as a "genuine and substantial" cause of the injury.³⁶⁷

5.177. There may also be circumstances in which an investigating authority's assessment of the *individual* effects of each of the other known factors already provides a sufficient basis to conclude that the subsidized imports are a "genuine and substantial" cause of the injury despite the effects of those other factors. This may be the case where an investigating authority's assessment of the individual effects of the other known factors reveals that only a limited number of those other

³⁶³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 224 (in the context of Article 3.5 of the Anti-Dumping Agreement).

³⁶⁴ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 189.

³⁶⁵ See Appellate Body Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375; *EC and certain member States – Large Civil Aircraft*, para. 1265.

³⁶⁶ See Appellate Body Reports, *US – Wheat Gluten*, para. 69; *US – Lamb*, para. 178 (addressing the causation standard under Article 4.2(b) of the Agreement on Safeguards).

³⁶⁷ In *EC – Tube or Pipe Fittings*, the Appellate Body acknowledged such possibility by agreeing with the statement by the panel in that case that "multiple 'insignificant factors' might *collectively* constitute a significant cause of injury such as to sever the link between dumped imports and injury". (Appellate Body Report, *EC – Tube or Pipe Fittings*, fn 232 to para. 192 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.369) (emphasis original)) It should be noted, however, that, given that the subsidized imports need not be the *sole* cause of the injury, the mere fact that multiple other known factors, taken together, constitute a "significant" cause of the injury would not necessarily preclude the conclusion that the subsidized imports are at the same time a "genuine and substantial" cause of the injury.

factors contribute to the injury, and each of them to a limited degree. Thus, as the Appellate Body has explained with respect to identical non-attribution language in Article 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), an investigating authority may not be required, in each and every case, to carry out an assessment of the *collective* effects of the other known factors *in addition to* examining those factors' individual effects.³⁶⁸

5.178. In any event, the core question in reviewing the appropriateness of an investigating authority's causation analysis is whether the authority has objectively determined that the subsidized imports qualify as a "genuine and substantial" cause of the injury suffered by the domestic industry having taken into consideration the injurious effects of other known factors. This question must be answered on a case-specific basis.

5.3.3.2 Analysis of the Panel's findings

5.3.3.2.1 Whether the Commission's initial consideration of a "causal link" is compatible with the requirements of Article 15.5 of the SCM Agreement

5.179. We recall that the Panel rejected Pakistan's proposition that the Commission's approach to causation had prejudged its non-attribution analysis merely because it had found a "causal link" to exist between the subsidized imports and the injury before it turned to an assessment of the other known factors. According to the Panel, while the Commission "considered" that a "causal link" existed between the subsidized imports and the injury to the EU industry before turning to its non-attribution analysis, such consideration was not final, and it was only after its examination of the effects of the other known factors that the Commission "concluded" that the subsidized imports caused material injury to the EU industry.³⁶⁹ The Panel thus considered it "evident" that the Commission had allowed for the possibility that the analysis of the other known factors could have negated its "initial consideration" that a causal link existed between the subsidized imports and the injury.

5.180. We agree with the Panel's interpretation of Article 15.5 of the SCM Agreement that an investigating authority's "initial consideration" of a "causal link" before completing its non-attribution analysis is compatible with the requirements of this provision. As we have noted at paragraph 5.173 above, it is permissible for an investigating authority to carry out its causation analysis in two steps, by first examining the causal link between the subsidized imports and the injury, and by then examining the injurious effects of other known factors. While Article 15.5 requires an investigating authority to complete the non-attribution analysis *before* it reaches an overall conclusion as to the existence of a "causal relationship" within the meaning of this provision, the mere fact that an investigating authority has considered a "causal link" to exist based only on the first step of its analysis does not amount to a violation of Article 15.5. On the contrary, provided that such consideration is made only on a preliminary basis and its validity is verified against the significance of the injurious effects of the other known factors before an overall conclusion on causation is reached, such an approach is consistent with the requirements of Article 15.5.

5.181. We also agree with the Panel's application of the above interpretation, in particular its reading of the language used by the Commission in recital 245 of the Provisional Determination. As the Panel observed, the use of the verb "consider" in that recital appears to suggest that the Commission did not, at this stage, reach a final conclusion as to the existence of a causal relationship – i.e. a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury. Rather, it expresses the Commission's initial or preliminary view regarding the existence of a causal relationship between the subsidized imports and the injury. This is confirmed by the Commission's turning to its analysis of the other known factors under the subheading "Effect of other factors"³⁷⁰ immediately after its statement that a "causal link" existed between the subsidized imports and the injury. Only subsequently did the Commission, under the

³⁶⁸ Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 190-191.

³⁶⁹ Panel Report, para. 7.118 (referring to Provisional Determination (Panel Exhibit PAK-1), recitals 241 and 264).

³⁷⁰ Provisional Determination (Panel Exhibit PAK-1), recitals 246-261.

heading "Conclusion on causation", state its overall conclusion regarding causation.³⁷¹ Understood in this way, the language in recital 245 does not suggest that the further examination of the other known factors conducted by the Commission was necessarily "prejudged" by its prior finding of a "causal link".

5.182. Accordingly, we do not consider that the Panel erred in rejecting Pakistan's proposition that the Commission's approach to causation had prejudged its non-attribution analysis merely because the Commission had considered a "causal link" to exist before it examined the effects of the other known factors.

5.3.3.2.2 Whether the Commission's approach led to a disregard of the correct causation standard

5.183. We recall that the Panel also stated that the Commission's "break the causal link" approach had not necessarily precluded the Commission from properly separating and distinguishing the injurious effects of specific other known factors from the injurious effects of the subsidized imports in this case. The Panel noted in particular that, while it acknowledged that the Commission had failed to separate and distinguish properly the effects of some of the other known factors³⁷², it found no reason to think that the use of the overall "break the causal link" framework had necessarily led to those deficiencies.³⁷³

5.184. On appeal, Pakistan suggests that the Panel's reasoning is insufficient. According to Pakistan, even if the Panel were correct in finding that the Commission's approach allowed for a proper separation and distinction of the injurious effects of individual other known factors, "the question is what the Commission was required to assess after properly separating and distinguishing these effects."³⁷⁴

5.185. Pakistan argues that the primary objective of a causation analysis is to determine whether there exists a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury³⁷⁵, and, for this purpose, an investigating authority must examine whether the effects of other known factors "attenuate" or "dilute" the link between the subsidized imports and the injury such that those imports cannot be considered a "genuine and substantial" cause of the injury.³⁷⁶ Pakistan considers that the Commission's "break the causal link" approach fell short of this standard and, thus, the Panel erred by "endors[ing]" such an approach.³⁷⁷

5.186. Pakistan explains that its claim against the Commission's approach to causation or the Panel's "endorsement" thereof is "not just about semantics" and raises four arguments as to why its claim goes beyond the difference between the words "break" and "attenuate" or "dilute".³⁷⁸ Specifically, according to Pakistan, the Commission's "break the causal link" approach:

- a. was "illogical" because, if factors other than the subsidized imports are capable of breaking the causal link, this causal link should never have existed in the first place³⁷⁹;
- b. precluded the Commission from assessing the effects of the subsidized imports *alone* because, by examining whether each non-attribution factor *individually* broke the causal link, the Commission assessed the effect of each non-attribution factor against the

³⁷¹ Provisional Determination (Panel Exhibit PAK-1), recitals 262-264.

³⁷² These factors are competition from non-cooperating EU producers and oil prices.

³⁷³ Panel Report, para. 7.119.

³⁷⁴ Pakistan's other appellant's submission, para. 3.24. (emphasis original)

³⁷⁵ Pakistan's other appellant's submission, para. 3.12 (referring to Appellate Body Reports, *US – Lamb*, para. 179; *US – Large Civil Aircraft (2nd complaint)*, para. 914).

³⁷⁶ Pakistan's other appellant's submission, paras. 3.7-3.12 (referring to Panel Reports, *US – Upland Cotton*, para. 7.1363; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.252; Appellate Body Reports, *US – Upland Cotton*, para. 458; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 379; *EC and certain member States – Large Civil Aircraft*, para. 725; *US – Large Civil Aircraft (2nd complaint)*, para. 914).

³⁷⁷ Pakistan's other appellant's submission, para. 3.17.

³⁷⁸ Pakistan's other appellant's submission, para. 3.25. (emphasis omitted)

³⁷⁹ Pakistan's other appellant's submission, paras. 3.26-3.32.

compounded effects of the subsidized imports *plus* the effects of the remaining other factors³⁸⁰;

- c. was not "even-handed" and skewed the Commission's causation analysis because it required each non-attribution factor to be "the cause" of the injury, while requiring the subsidized imports to be only "a contributing cause" of the injury³⁸¹; and
- d. tainted the Commission's analysis of non-attribution factors and precluded the Commission from properly separating and distinguishing the effects of those factors.³⁸²

5.187. The European Union rebuts the four arguments raised by Pakistan by stating, in essence, that:

- a. Pakistan's first argument only takes issue with the specific terminology used by the Commission in its causation analysis, and the difference between the words "break" and "attenuate" or "dilute" is of no legal relevance³⁸³;
- b. Pakistan's argument that the Commission assessed the effect of each non-attribution factor against the compounded effects of the subsidized imports *plus* the effects of the remaining other factors is contradicted by the facts on the investigation record³⁸⁴;
- c. the concept of "even-handedness" as argued by Pakistan has no legal basis in WTO jurisprudence³⁸⁵; and
- d. to the extent that Pakistan's fourth argument repeats an argument rejected by the Panel regarding the necessity of an assessment of the collective effects of all of the other known factors³⁸⁶ or takes issue with the specific wording used by the Commission, such argument lacks any valid basis.³⁸⁷

5.188. We recall that Pakistan appeals only the Panel's finding that Pakistan failed to demonstrate that the Commission's "break the causal link" approach had precluded the Commission from satisfying the non-attribution requirements of Article 15.5 of the SCM Agreement in this case.³⁸⁸ However, by raising the four alleged deficiencies in the Commission's approach, described at paragraph 5.186 above, Pakistan does not directly engage with the Panel's reasoning that led to the above finding but seems to reargue why the Commission's "break the causal link" approach was deficient and fell short of the requirements of Article 15.5 of the SCM Agreement.³⁸⁹ We examine below each of the four deficiencies in the Commission's approach alleged by Pakistan to the extent that they pertain to the Panel's finding under appeal.³⁹⁰

5.3.3.2.2.1 Pakistan's first alleged flaw in the Commission's approach to causation

5.189. Pakistan argues that the Commission's use of the "break the causal link" approach was "illogical" because, if factors other than the subsidized imports are capable of breaking the causal link, this causal link should never have existed in the first place.³⁹¹

³⁸⁰ Pakistan's other appellant's submission, paras. 3.33-3.40.

³⁸¹ Pakistan's other appellant's submission, paras. 3.41-3.48.

³⁸² Pakistan's other appellant's submission, paras. 3.49-3.56.

³⁸³ European Union's appellee's submission, paras. 25 and 27.

³⁸⁴ European Union's appellee's submission, paras. 31-32.

³⁸⁵ European Union's appellee's submission, para. 38.

³⁸⁶ Panel Report, para. 7.142. Pakistan has not appealed this Panel finding.

³⁸⁷ European Union's appellee's submission, para. 44.

³⁸⁸ Pakistan's Notice of Other Appeal, pp. 1-2 (referring to Panel Report, paras. 7.117-7.120 and 8.1.d.i); other appellant's submission, para. 1.2 (referring to Panel Report, paras. 7.117-7.120).

³⁸⁹ See Panel Report, paras. 7.117-7.120.

³⁹⁰ Panel Report, paras. 7.120 and 8.1.d.i.

³⁹¹ Pakistan's other appellant's submission, para. 3.26 (referring to Pakistan's response to Panel question No. 74, para. 4.27). (emphasis omitted) See also para. 3.30.

5.190. We note that the verb "break" may mean, *inter alia*, "[s]ever, fracture, part; shatter, crush, destroy".³⁹² Thus, a possible reading of the phrase "break the causal link" used by the Commission might be that, when carrying out its non-attribution analysis, the Commission examined whether the injurious effects of each non-attribution factor were so significant that they *eliminate* the link between the subsidized imports and the injury.³⁹³ Such an approach would be inconsistent with the correct causation standard under Article 15.5 of the SCM Agreement, which requires an examination of whether, in light of the injurious effects of other known factors, the link found between the subsidized imports and the injury can be considered a "genuine and substantial" causal relationship.³⁹⁴ It would also have been illogical for the Commission to find first a certain "link" to exist between the subsidized imports and the injury and then question the very existence of that link.

5.191. That said, an investigating authority's use of a single phrase or verb should not be, by itself, dispositive of whether an investigating authority's overall causation analysis was appropriate. As noted, the core obligation that an investigating authority must discharge in establishing the existence of a "causal relationship" within the meaning of Article 15.5 is to examine whether, in light of the significance of the injurious effects of other known factors, the contribution of the subsidized imports to the injury can be considered "genuine and substantial". Thus, to the extent that a contextual reading of the explanation provided by an investigating authority reveals that it has discharged such an obligation, an investigating authority's use of a particular verb or phrase such as "break the causal link" will not detract from the validity of the authority's overall causation analysis.

5.192. Turning to the facts of this case, we note that the Commission recognized that only the following two other known factors³⁹⁵ had contributed to the injury suffered by the EU industry: (i) imports from Korea³⁹⁶; and (ii) the 2008 economic downturn and the contraction in demand that accompanied this downturn.³⁹⁷ In addition, the Commission examined the extent of the contribution of each of these factors to the injury and found that the contribution of each factor was only limited compared to the impact of the subsidized imports.

5.193. Specifically, with respect to imports from Korea, the Commission stated that, while the imports from Korea had contributed to the injury, the degree of such contribution was "only limited" compared to the impact of the subsidized imports, taking into account that the average price of the Korean imports remained higher than the prices of the subsidized imports.³⁹⁸ The

³⁹² *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 286.

³⁹³ By contrast, the phrases "attenuate the (causal) link" and "dilute the (causal) link" referred to by the Appellate Body suggest that the impact of other known factors leaves the link between the subsidized imports and the injury intact while diminishing its relative significance. (See e.g. Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 725; *US – Large Civil Aircraft (2nd complaint)*, para. 914; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 375) The meaning of the verb "attenuate" includes "[m]ake thin" and "[w]eaken; reduce in force, effect, value, etc." (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 148) The meaning of the verb "dilute" includes "[w]eaken; take away the strength or force of, esp. by addition". (Ibid., p. 685)

³⁹⁴ See para. 5.169 above.

³⁹⁵ In its other appellant's submission, Pakistan states that the Commission found the following *four* non-attribution factors to have contributed to the injury suffered by the EU industry: imports from Korea; the 2008 economic downturn; the geographical location; and the contraction in demand. (Pakistan's other appellant's submission, para. 3.36) However, with respect to the geographical location, we note that the Commission explained that "the investigation and the verified data from the sampled [EU] producers ... did not show any significant correlation between the geographical location and the economic performance of the [EU] producers". (Provisional Determination (Panel Exhibit PAK-1), recital 258) Thus, the Commission found that "geographical location did not materially contribute to the injury suffered by the [EU] industry to a material extent". (Ibid., recital 259) With respect to the contraction in demand, the Commission considered this factor to be only one aspect of the 2008 economic downturn, rather than a factor separate from the economic downturn. (Ibid., recitals 253-254. See also Definitive Determination (Panel Exhibit PAK-2), recital 120)

³⁹⁶ Provisional Determination (Panel Exhibit PAK-1), recital 249.

³⁹⁷ Provisional Determination (Panel Exhibit PAK-1), recitals 254 and 256; Definitive Determination (Panel Exhibit PAK-2), recital 120.

³⁹⁸ Provisional Determination (Panel Exhibit PAK-1), recital 249.

Panel found this conclusion to be "reasonable" given that the EU PET market is characterized by price competition.³⁹⁹

5.194. With respect to the 2008 economic downturn and the contraction in demand that accompanied this downturn, the Commission acknowledged that these factors "clearly had an effect on the overall performance of the [EU] industry".⁴⁰⁰ However, such negative effects were "exacerbated" by the lower priced subsidized imports with an increasing volume, rather than those negative effects "diminish[ing] the damaging injurious effects of low priced subsidised imports".⁴⁰¹ In the Commission's view, the EU industry should have been able to limit the negative effects of any decrease in the growth of consumption by maintaining its prices at an acceptable level had it not been for the unfair competition with the low-priced imports.⁴⁰² In addition, the Commission noted that the economic downturn in 2008 could not have had any impact on the injury suffered before the last quarter of 2008.⁴⁰³ Thus, the Commission appears to have considered that the injurious effects of the 2008 economic downturn and the accompanying contraction in demand were distinguishable from, and limited compared to, the injurious effects of the subsidized imports in terms of *both* their magnitude and temporal duration.

5.195. These explanations contained in the Provisional Determination suggest that the Commission evaluated the significance of the injurious effect of each of the above-mentioned other known factors compared to the impact of the subsidized imports, rather than determining whether the impact of each factor was so overwhelming as to negate the existence of *any* link between the subsidized imports and the injury. Moreover, for each of those factors, the Commission explained why the impact of each factor did not materially diminish the relative significance of the subsidized imports for that injury.

5.196. Under these circumstances, we acknowledge that the Commission's choice of the particular phrase "break the causal link" in its determination was rather unfortunate. However, we do not consider that the Commission's use of this phrase, when read within the context of the further considerations in its Provisional Determination, means that the Commission failed to comply with Article 15.5 of the SCM Agreement in conducting its causation analysis in this case.

5.197. Pakistan also asserts that the Commission's "break the causal link" approach allowed the Commission to establish a causal link based on "the mere fact that the subject products secure[d] part of the market and somehow contributed to the overall injury".⁴⁰⁴

5.198. This argument seems to lack any support in the facts on the record. Contrary to what Pakistan argues, the Panel found that the Commission had considered a "causal link" to exist between the subsidized imports and the injury on the basis of a number of elements.⁴⁰⁵ In essence, the Commission reasoned that, given that PET is a commodity and competition takes place mainly via price⁴⁰⁶, the lower priced⁴⁰⁷ subsidized imports that had increased their volume and market share drastically⁴⁰⁸ during the period considered were responsible for the injury suffered by the EU industry, which manifested itself in, *inter alia*, negative trends in production,

³⁹⁹ Panel Report, para. 7.134.

⁴⁰⁰ Provisional Determination (Panel Exhibit PAK-1), recital 253. See also Definitive Determination (Panel Exhibit PAK-2), recital 120.

⁴⁰¹ Provisional Determination (Panel Exhibit PAK-1), recital 254.

⁴⁰² Provisional Determination (Panel Exhibit PAK-1), recital 254.

⁴⁰³ Provisional Determination (Panel Exhibit PAK-1), recital 255.

⁴⁰⁴ Pakistan's other appellant's submission, para. 3.29.

⁴⁰⁵ Panel Report, para. 7.125. The Panel stated:

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

(Ibid. (fn omitted)) Pakistan did not appeal this Panel finding.

⁴⁰⁶ Provisional Determination (Panel Exhibit PAK-1), recital 243.

⁴⁰⁷ Provisional Determination (Panel Exhibit PAK-1), recital 217.

⁴⁰⁸ Provisional Determination (Panel Exhibit PAK-1), Table 2 at recital 211.

sales, market share, and profitability.⁴⁰⁹ This clearly contradicts Pakistan's allegation that the Commission found a "causal link" based on "the mere fact that the subject products secure[d] part of the market and somehow contributed to the overall injury".⁴¹⁰

5.199. Accordingly, we disagree with Pakistan's first alleged flaw in the Commission's approach to causation in support of its claim of error on appeal.

5.3.3.2.2.2 Pakistan's second alleged flaw in the Commission's approach to causation

5.200. Pakistan takes issue with the Commission's examination of whether *each* of the other known factors *individually* broke the causal link previously established between the subsidized imports and the injury to the domestic industry. Pakistan argues that, by employing such an approach, the Commission assessed the effects of each non-attribution factor against the effects of the subsidized imports *plus* the effects of the remaining non-attribution factors.⁴¹¹

5.201. We have explained that Article 15.5 of the SCM Agreement requires an examination of whether the subsidized imports qualify as a "genuine and substantial" cause of the injury in light of the injurious effects of other known factors.⁴¹² Thus, it is inappropriate for an investigating authority to compare the effect of *each* non-attribution factor against the *compounded* effects of the subsidized imports *plus* the effects of the remaining other factors.

5.202. However, with respect to the countervailing duty investigation at issue, we see no indication on the record that the Commission undertook the type of approach described by Pakistan or that the Panel endorsed such an approach. On the contrary, the explanations contained in the Provisional Determination suggest that the Commission assessed the significance of the injurious effects of each non-attribution factor against the link that it had found to exist between the subsidized imports *alone* and the injury suffered by the EU industry.

5.203. Specifically, the Commission reached its initial consideration of a "causal link" based on its assessment of the "[e]ffect of the subsidised imports"⁴¹³ without making any reference to the other known factors.⁴¹⁴ The Commission then proceeded to examine the other known factors individually in turn, and observed that only two of those factors – i.e. imports from Korea; and the 2008 economic downturn and the contraction in demand that accompanied this downturn – had contributed to the injury. As we have observed, for each of these factors, the Commission examined the relative significance of its injurious effects compared to the injurious effects of the subsidized imports without referring to the effects of the remaining non-attribution factors.⁴¹⁵

5.204. Thus, we fail to see any basis for Pakistan's allegation that the Commission assessed the effect of each of the other known factors against the compounded effects of the subsidized imports *plus* the remaining other factors.

5.205. In addition, at the hearing, Pakistan argued that, instead of (or in addition to) examining the effect of *each* non-attribution factor *individually*, the Commission should have examined whether, after separating and distinguishing *all* the contributions of the other known factors from the injury suffered by the domestic industry, the link that emerged between the subsidized imports and the injury still qualified as a "genuine and substantial relationship of cause and effect".

5.206. We note that, before the Panel, Pakistan argued that the "specific factual circumstances" in the challenged investigation warranted a *collective* analysis of the injurious effects of all of the other known factors.⁴¹⁶ The Panel rejected this argument⁴¹⁷, and Pakistan does not appeal this

⁴⁰⁹ Provisional Determination (Panel Exhibit PAK-1), recitals 238-240.

⁴¹⁰ Pakistan's other appellant's submission, para. 3.29.

⁴¹¹ Pakistan's other appellant's submission, para. 3.34.

⁴¹² See paras. 5.169 and 5.175 above.

⁴¹³ Provisional Determination (Panel Exhibit PAK-1), section 5.2.

⁴¹⁴ Provisional Determination (Panel Exhibit PAK-1), recital 245.

⁴¹⁵ See para. 5.195 above.

⁴¹⁶ Panel Report, para. 7.137 (referring to Pakistan's second written submission to the Panel, para. 4.52).

⁴¹⁷ Panel Report, para. 7.142.

Panel finding.⁴¹⁸ Pakistan emphasized at the hearing that its argument on appeal regarding the Commission's alleged failure to assess the impact of the subsidized imports *after* separating and distinguishing *all* the injurious effects of the other known factors is distinguished from its argument before the Panel regarding the collective analysis. Nevertheless, we have difficulty understanding how these arguments differ from each other.

5.207. Furthermore, with respect to the countervailing duty investigation at issue, we have noted that the Commission found that only two of the other known factors contributed to the injury.⁴¹⁹ The Commission examined the significance of the contribution of each of these factors and explained why the impact of each factor was only limited and did not materially diminish the relative importance of the role that the subsidized imports played in bringing about the injury suffered by the EU industry.⁴²⁰ In addition, as the Panel found, the Commission reached its initial consideration of a "causal link" between the subsidized imports and the injury on a number of elements.⁴²¹

5.208. To us, these observations and explanations by the Commission regarding the significance of the injurious effects of the two other factors that it found to have contributed to the injury, coupled with the basis on which it found a "causal link" between the subsidized imports and the injury, appear to indicate that the Commission took into account *all* the injurious effects of the other known factors compared to the strength of the initial "causal link" between the subsidized imports and the injury when it reached its final conclusion that the subsidized imports had "caused" material injury to the EU industry.⁴²² Indeed, just before describing its final conclusion on causation, the Commission summarized and reviewed its evaluation of the injurious effects of each of the other known factors.⁴²³

5.209. In addition, while the Panel found that the Commission had failed to conduct a proper non-attribution analysis with respect to two of the other known factors (i.e. competition from non-cooperating EU producers and oil prices)⁴²⁴, Pakistan confirmed at the hearing that it does not posit that a proper assessment of the effects of these two factors would have invalidated the Commission's overall conclusion as to the existence of a causal relationship.⁴²⁵

5.210. Under these circumstances, we do not consider that the Commission's alleged failure to separate and distinguish the injurious effects of *all* of the other known factors in addition to its assessment of the *individual* effects of those factors amounted to a violation of its obligation not to attribute the injurious effects of other known factors to the subsidized imports or its obligation to provide a reasoned and adequate explanation for why the subsidized imports could be considered a "genuine and substantial" cause of the injury despite the injurious effects of those other factors.

5.211. Accordingly, we disagree with Pakistan's second alleged flaw in the Commission's approach to causation in support of its claim of error on appeal.

5.3.3.2.2.3 Pakistan's third alleged flaw in the Commission's approach to causation

5.212. Pakistan contends that the Commission's approach was not "even-handed" because it employed "a low causation threshold for subsidized imports (a contributing cause) and a high one for the other factors (*the cause*)".⁴²⁶

5.213. We observe that Pakistan's allegation is not supported by, and instead contradicts, the findings by the Panel and the evidence on the investigation record. In fact, with respect to the link between the subsidized imports and the injury, the Panel found that the Commission reached its

⁴¹⁸ Pakistan's other appellant's submission, para. 3.1. Pakistan also confirmed at the hearing that the necessity of a collective assessment is not at issue before us.

⁴¹⁹ See para. 5.192 above.

⁴²⁰ See paras. 5.192-5.195 above.

⁴²¹ Panel Report, para. 7.125.

⁴²² Provisional Determination (Panel Exhibit PAK-1), recital 264.

⁴²³ Provisional Determination (Panel Exhibit PAK-1), recital 263.

⁴²⁴ Panel Report, paras. 7.152, 7.160, and 8.1.d.iv-v.

⁴²⁵ Pakistan's response to questioning at the hearing.

⁴²⁶ Pakistan's other appellant's submission, paras. 3.44-3.45. (emphasis original)

initial consideration of a "causal link" on the basis of a number of elements⁴²⁷, rather than on the basis of "the mere fact that the subject products secure[d] part of the market and somehow contributed to the overall injury", as suggested by Pakistan.⁴²⁸ This undermines Pakistan's allegation that the Commission adopted "a low causation threshold" for the subsidized imports.

5.214. We also fail to see any indication on the record that the Commission required each of the other known factors to be "the cause" of the injury. On the contrary, as we have explained, a contextual reading of the relevant recitals of the Provisional Determination reveals that the Commission examined and explained the extent of the injurious effects of each non-attribution factor in comparison to the impact of the subsidized imports, rather than determining whether each non-attribution factor was the *sole* cause or a predominant cause (the cause) of the injury.⁴²⁹

5.215. We further note that Pakistan's understanding that the Commission required each non-attribution factor to be "the true" cause of the injury is based on a statement by the European Union made in the context of responding to a Panel question.⁴³⁰ However, such an isolated statement by the European Union in the course of WTO dispute settlement proceedings does not equate to a demonstration that, in the countervailing duty investigation at issue, the Commission required each non-attribution factor to be "the true" cause of the injury.

5.216. In addition, Pakistan refers to Appellate Body jurisprudence relating to the interpretation of Article 15.4 of the SCM Agreement, and notes that this provision requires an investigating authority to derive an understanding of the impact of subsidized imports on the state of the domestic industry on the basis of an evaluation of the various economic indicators referred to in this provision.⁴³¹ According to Pakistan, a consideration of "even-handed[ness]" would have required the Commission to undertake a similar type of analysis for the other known factors and to examine the impact of those factors in relation to the negative trends in the six specific economic indicators⁴³² on which the Commission based its finding of injury.⁴³³

5.217. The Appellate Body has stated that Article 15.4 requires an investigating authority to, *inter alia*, derive an understanding of the *impact* of the subsidized imports on the state of the domestic industry on the basis of an examination of "all relevant economic factors and indices having a bearing on the state of the industry".⁴³⁴ The non-attribution language of Article 15.5 of the SCM Agreement also requires an investigating authority to assess the degree of the *impact* of other known factors on the state of the domestic industry. However, we disagree with Pakistan that Article 15.5 requires an investigating authority to assess the impact of the other known factors in the *exact* same manner as its analysis of the impact of the subsidized imports under Article 15.4. Indeed, Article 15.5 does not prescribe any particular methodology that an investigating authority must use in assessing the impact of other known factors.⁴³⁵ Moreover, while the focus of Article 15.4 is to examine the state of the domestic industry and the relationship between the subsidized imports and the state of the domestic industry, the focus of the non-attribution analysis under Article 15.5 is to determine whether, in light of the injurious effects

⁴²⁷ Panel Report, para. 7.125.

⁴²⁸ Pakistan's other appellant's submission, para. 3.29.

⁴²⁹ See paras. 5.192-5.195 above.

⁴³⁰ Pakistan's other appellant's submission, para. 3.42 (referring to Panel Report, para. 7.109, in turn referring to European Union's response to Panel question No. 78, para. 111). More specifically, in its response to Panel question No. 78, the European Union stated:

No matter in which order of analysis this assessment [of other known factors] is carried out, the ultimate objective remains to separate and distinguish the various injurious effects and to identify the true cause for the injury. If the Commission considers that the other known factors break the causal link, or, in other words, are *the true* cause of the injury, the Commission's order of analysis will not prevent the Commission from reaching that conclusion.

(European Union's response to Panel question No. 78, para. 111 (emphasis added))

⁴³¹ Pakistan's other appellant's submission, para. 3.46 (referring to Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205; *China – GOES*, para. 149).

⁴³² These six economic indicators are: production; sales; market share; profitability; return on investment; and cash flow. (See para. 5.149 above)

⁴³³ Pakistan's other appellant's submission, para. 3.47.

⁴³⁴ Appellate Body Reports, *China – GOES*, para. 149. See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.205 (in the context of Article 3.4 of the Anti-Dumping Agreement).

⁴³⁵ Appellate Body Report, *US – Hot-Rolled Steel*, para. 224 (in the context of Article 3.5 of the Anti-Dumping Agreement).

of other known factors, the link found between the subsidized imports and the injury can be considered a "genuine and substantial relationship of cause and effect".

5.218. Thus, contrary to what Pakistan argues, the mere fact that the Commission did not examine the impact of the other known factors in the exact same manner as its assessment of the impact of the subsidized imports under Article 15.4 by taking into account the six specific economic indicators does not, in our view, demonstrate that the Commission's causation analysis lacked even-handedness and that it amounted to an inconsistency with the requirements of Article 15.5 of the SCM Agreement.

5.219. Accordingly, we disagree with Pakistan's third alleged flaw in the Commission's approach to causation in support of its claim of error on appeal.

5.3.3.2.2.4 Pakistan's fourth alleged flaw in the Commission's approach to causation

5.220. Lastly, Pakistan contends that the Commission's "break the causal link" approach effectively precluded it from properly separating and distinguishing the effects of the other known factors found to have contributed to the injury.⁴³⁶ Pakistan observes that, although the Commission acknowledged that some of the other known factors contributed to the injury, it failed to assess whether those factors "attenuated" or "diluted" the causal link between the subsidized imports and the injury, and instead applied the wrong standard of whether each of them individually "broke" such causal link.⁴³⁷

5.221. Pakistan's argument is not entirely clear to us but, to the extent that Pakistan takes issue with the Commission's use of the word "breaking" the causal link (as opposed to "attenuating" or "diluting" the causal link), we have observed, at paragraph 5.195 above, that, despite its use of the term "break" the causal link, the Commission assessed whether and to what extent the effects of the other known factors diminished the relative importance of the role that the subsidized imports played in bringing about the injury suffered by the EU industry. Pakistan also seems to suggest that the Commission failed to assess the impact of the subsidized imports after separating and distinguishing the effects of *all* of the other known factors. However, the Commission recognized that only two of the other known factors – i.e. imports from Korea; and the 2008 economic downturn and the contraction in demand that accompanied this downturn – had contributed to the injury.⁴³⁸ As we have observed, the Commission's reasoning as reflected in its determination indicates that, in reaching its overall conclusion on causation, the Commission took into account the injurious effects of *both* of these other known factors, which, in the Commission's view, were limited.⁴³⁹ Therefore, Pakistan's argument lacks any basis in the facts of this case.

5.222. Pakistan also takes issue with the Commission's specific explanations in its Provisional Determination pertaining to the effects of the imports from Korea⁴⁴⁰ and the 2008 economic downturn.⁴⁴¹ According to Pakistan, these explanations fell short of the required assessment of whether these factors "attenuated" or "diluted" the causal link.⁴⁴²

5.223. However, we have observed that, despite the Commission's unfortunate use of the term "break" the causal link, the Commission assessed the significance of the injurious effects of imports from Korea and the 2008 economic downturn (as well as the contraction in demand that accompanied this downturn) in relation to the impact of the subsidized imports and explained why these factors did not materially diminish the relative importance of the subsidized imports in bringing about the injury.⁴⁴³

⁴³⁶ Pakistan's other appellant's submission, para. 3.49.

⁴³⁷ Pakistan's other appellant's submission, paras. 3.51-3.56.

⁴³⁸ See para. 5.192 above.

⁴³⁹ See para. 5.208 above.

⁴⁴⁰ Pakistan's other appellant's submission, paras. 3.51-3.52 (referring to Provisional Determination (Panel Exhibit PAK-1), recitals 248-249).

⁴⁴¹ Pakistan's other appellant's submission, paras. 3.53-3.56 (referring to Provisional Determination (Panel Exhibit PAK-1), recitals 254 and 256).

⁴⁴² Pakistan's other appellant's submission, paras. 3.52 and 3.54.

⁴⁴³ See paras. 5.192-5.195 above.

5.224. In any event, we note that Pakistan claimed before the Panel that the Commission had failed to separate and distinguish properly the injurious effects of imports from Korea and the 2008 economic downturn, among others. The Panel rejected Pakistan's claims and found that the Commission properly separated and distinguished the effects of those two factors.⁴⁴⁴ Pakistan has not appealed these Panel findings.⁴⁴⁵ In these circumstances, we do not consider that Pakistan can put forward this argument again on appeal.

5.225. Accordingly, we disagree with Pakistan's fourth alleged flaw in the Commission's approach to causation in support of its claim of error on appeal.

5.3.4 Conclusion

5.226. The key objective of a causation analysis under Article 15.5 of the SCM Agreement is for an investigating authority to establish whether there is a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury to the domestic industry. A showing of such a "genuine and substantial" causal relationship entails: (i) an examination of the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports; and (ii) a non-attribution analysis of the injurious effects of other known factors. As such, an investigating authority is required under Article 15.5 to determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.

5.227. While an investigating authority must complete a non-attribution analysis before it reaches an overall conclusion as to the existence of a "causal relationship", Article 15.5 does not prescribe any particular methodology an investigating authority must use in carrying out such analysis. Thus, it is possible for an investigating authority to address the two components of causation in two separate steps. In doing so, an investigating authority can consider a "causal link" to exist between the subsidized imports and the injury on the basis of the first step of its analysis, provided that the authority compares the significance of such a "causal link" with the significance of the injurious effects of other known factors and objectively assesses whether this link qualifies as a "genuine and substantial" causal relationship in light of those other factors.

5.228. We have observed that the Panel correctly found that, while the Commission stated that a "causal link" existed between the subsidized imports and the injury before it turned to its non-attribution analysis, such consideration of a "causal link" was not a final conclusion, and it had not necessarily prejudged the Commission's assessment of the effects of the other known factors.

5.229. We have also addressed, and rejected, Pakistan's arguments regarding the four alleged flaws in the Commission's approach to causation that are raised in support of its claim that this approach precluded the Commission from satisfying the correct legal standard under Article 15.5. In particular, we have stated that it is inappropriate for an investigating authority to examine whether other known factors "break" the causal link in the sense that the injurious effects of each non-attribution factor are so significant that they eliminate the link between the subsidized imports and the injury. This is because the correct causation standard requires instead an examination of whether, in light of the significance of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury. However, with respect to the countervailing duty investigation at issue, we have observed that the Commission effectively examined whether and why the subsidized imports can be considered a "genuine and substantial" cause of the injury taking into account the injurious effects of all of the other known factors that it found to have contributed to the injury.

5.230. Accordingly, we find that the Panel did not err in its interpretation or application of Article 15.5 of the SCM Agreement in rejecting Pakistan's claim that the Commission's use of the "break the causal link" approach precluded the Commission from satisfying the non-attribution requirements of Article 15.5 in this case. Consequently, we uphold the Panel's finding, in paragraph 8.1.d.i of its Report, that Pakistan failed to establish that the Commission's approach to causation in this case was inconsistent with Article 15.5 of the SCM Agreement.

⁴⁴⁴ Panel Report, paras. 7.135 and 7.145.

⁴⁴⁵ Pakistan's other appellant's submission, para. 3.1.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

Expiry of the measure at issue

6.2. Panels have a margin of discretion in the exercise of their inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims with respect to that measure. Rather, a panel, in the exercise of its jurisdiction, has the authority to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue. In our view, the Panel in this dispute made an objective assessment that "the matter" before it still required to be examined because the parties continued to be in disagreement as to the "applicability of and conformity with the relevant covered agreements" with respect to the European Commission's findings underpinning the expired measure at issue.

6.3. Accordingly, we find that the European Union has not demonstrated that the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding, at paragraph 7.13 of the Panel Report, to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue.

6.4. We therefore reject the European Union's request that we reverse the entirety of the Panel Report and declare moot and of no legal effect the findings and legal interpretations contained therein.

Government revenue foregone

6.5. A harmonious reading of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994 confirms that duty drawback schemes can constitute an export subsidy that can be countervailed only if they result in a remission or drawback of import charges "in excess" of those actually levied on the imported inputs consumed in the production of the exported product. Thus, in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is limited to the excess remission or drawback of import charges on inputs and does not encompass the entire amount of the remission or drawback of import charges.

6.6. Furthermore, the perceived "silence" in Annexes II and III to the SCM Agreement, referred to by the European Union, is not one that pertains to the definition of the subsidy, and in particular to what constitutes the financial contribution element of the subsidy, in the form of government revenue foregone. Instead, the perceived "silence" relates to a procedural step in the context of an investigating authority's inquiry into whether the excess remission or drawback of import charges occurred. As regards this procedural step, where an investigating authority determines that there is no verification system in place in the exporting Member, or a verification system is in place but it is not fit for purpose, or it has not been applied effectively by the exporting Member, and where a further examination by the exporting Member has not been undertaken or is considered unsatisfactory by the investigating authority, it is true that Annexes II and III do not explicitly provide for what should happen next. Nonetheless, the SCM Agreement, as a whole, is not silent, and the perceived "silence" in Annexes II and III does not grant an investigating authority the liberty to depart from these other disciplines of the SCM Agreement. In particular, Article 12.7 of the SCM Agreement allows an investigating authority to rely on the "facts available" on its investigation record to complete its inquiry into whether a duty drawback scheme conveys a subsidy by reason of excess drawback of import charges on inputs.

6.7. Accordingly, we find that the European Union has not demonstrated that the Panel erred in its interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad Note* to Article XVI of the GATT 1994, as summarized at paragraph 7.56 of the Panel Report.

6.8. The European Union does not challenge the Panel's review of the European Commission's findings on the MBS, beyond the European Union's claim that the Panel applied the wrong legal standard to the facts of this case.

6.9. Accordingly, we find that the European Union has not demonstrated that the Panel erred in its application of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement to the facts of this case.

6.10. Consequently, we uphold the Panel's findings:

- a. in paragraphs 7.60 and 8.1.b.i of the Panel Report that the European Commission erred under Article 1.1(a)(1)(ii) of the SCM Agreement by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement; and
- b. in paragraphs 7.60 and 8.1.b.ii of the Panel Report that the European Commission acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.

The European Commission's causation analysis

6.11. The key objective of a causation analysis under Article 15.5 of the SCM Agreement is for an investigating authority to establish whether there is a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury to the domestic industry. A showing of such a "genuine and substantial" causal relationship entails: (i) an examination of the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports; and (ii) a non-attribution analysis of the injurious effects of other known factors. As such, an investigating authority is required under Article 15.5 to determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.

6.12. While an investigating authority must complete a non-attribution analysis before it reaches an overall conclusion as to the existence of a "causal relationship", Article 15.5 does not prescribe any particular methodology an investigating authority must use in carrying out such analysis. Thus, it is possible for an investigating authority to address the two components of causation in two separate steps. In doing so, an investigating authority can consider a "causal link" to exist between the subsidized imports and the injury on the basis of the first step of its analysis, provided that the authority compares the significance of such a "causal link" with the significance of the injurious effects of other known factors and objectively assesses whether this link qualifies as a "genuine and substantial" causal relationship in light of those other factors.

6.13. We have observed that the Panel correctly found that, while the European Commission stated that a "causal link" existed between the subsidized imports and the injury before it turned to its non-attribution analysis, such consideration of a "causal link" was not a final conclusion, and it had not necessarily prejudged the European Commission's assessment of the effects of the other known factors.

6.14. We have also addressed, and rejected, Pakistan's arguments regarding the four alleged flaws in the European Commission's approach to causation that are raised in support of its claim that this approach precluded the European Commission from satisfying the correct legal standard under Article 15.5. In particular, we have stated that it is inappropriate for an investigating authority to examine whether other known factors "break" the causal link in the sense that the injurious effects of each non-attribution factor are so significant that they eliminate the link between the subsidized imports and the injury. This is because the correct causation standard requires instead an examination of whether, in light of the significance of the injurious effects of the other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury. However, with respect to the countervailing duty investigation at issue, we have observed that the European Commission effectively examined whether and why the subsidized imports can be considered a "genuine and substantial" cause of the injury taking into

account the injurious effects of all of the other known factors that it found to have contributed to the injury.

6.15. Accordingly, we find that the Panel did not err in its interpretation or application of Article 15.5 of the SCM Agreement in rejecting Pakistan's claim that the European Commission's use of the "break the causal link" approach precluded the European Commission from satisfying the non-attribution requirements of Article 15.5 in this case.

- a. Consequently, we uphold the Panel's finding, in paragraph 8.1.d.i of the Panel Report, that Pakistan failed to establish that the European Commission's approach to causation in this case was inconsistent with Article 15.5 of the SCM Agreement.

Recommendation

6.16. As the Panel found, the measure at issue in this dispute has expired and has ceased to have legal effect. Therefore, we do not make any recommendation to the DSB under Article 19.1 of the DSU.

Signed in the original in Geneva this 27th day of April 2018 by:

Shree Baboo Chekitan Servansing
Presiding Member

Ujal Singh Bhatia
Member

Peter Van den Bossche
Member
