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PAKISTAN – ANTI-DUMPING MEASURES ON BIAXIALLY ORIENTED POLYPROPYLENE FILM FROM THE UNITED ARAB EMIRATES

REPORT OF THE PANEL

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US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report WT/DS296/AB/R, DSR 2005:XVII, p. 8243
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, p. 521
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001 modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, p. 4769
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US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
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US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short title	Description/Long title
ARE-1	Notice of final determination (2015)	NTC, Notice of final determination and levy of definitive antidumping duties on imports of biaxially oriented poly propylene film into Pakistan originating in and/or exported from the People's Republic of China, Sultanate of Oman, Kingdom of Saudi Arabia and United Arab Emirates (9 April 2015)
ARE-2	Report on final determination (2013), public version	NTC, Report on the final determination final determination and levy of definitive antidumping duties on imports of biaxially oriented poly propylene film into Pakistan originating in and/or exported from the People's Republic of China, Sultanate of Oman, Kingdom of Saudi Arabia and United Arab Emirates (4 February 2013)
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ARE-5	Notice of initiation (2012)	NTC, Notice of initiation of anti-dumping investigation against alleged dumping of BOPP film originating in and/or exported from the People's Republic of China, Sultanate of Oman, Kingdom of Saudi Arabia and United Arab Emirates (23 April 2012)
ARE-6	NTC's letter of 27 April 2012	Letter dated 27 April 2012 from NTC to Taghleef requesting to add any information to that already provided in first questionnaire response
ARE-8	Taghleef's letter of 25 June 2012	Letter dated 25 June 2012 from Taghleef responding to NTC's decision to re-initiate and to use old questionnaire response data
ARE-9	Report on preliminary determination	NTC, Report on preliminary determination and levy of provisional antidumping duties on imports of biaxially oriented poly propylene film into Pakistan originating in and/or exported from the People's Republic of China, Sultanate of Oman, Kingdom of Saudi Arabia and United Arab Emirates (10 August 2012)
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ARE-12	Summary of Tri-Pack Films' application for initiation	Tri-Pack Films Limited, Summary of application under the Antidumping Duties Ordinance 2000 for initiation of an investigation and imposition of antidumping measures for the protection of the domestic industry producing biaxially oriented polypropylene film against dumped imports of biaxially oriented polypropylene film originating in and or exported from China, Oman, Saudi Arabia and UAE
ARE-13	Taghleef's post-hearing submission	Taghleef's written submission following a hearing held at the NTC on 19 November 2012 (29 November 2012)
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ARE-17	Third deficiency letter	Letter dated 22 February 2011 from NTC to Taghleef requesting additional information and clarification concerning questionnaire response
ARE-18	Taghleef's response to third deficiency letter, redacted version	Letter dated 1 March 2011 from Taghleef responding to the NTC's deficiency letter of 22 February 2011 (redacted version)
ARE-18b (BCI)	Taghleef's response to third deficiency letter	Letter dated 1 March 2011 from Taghleef responding to the NTC's deficiency letter of 22 February 2011
ARE-18c (BCI) (revised)	Taghleef's response to third deficiency letter	Letter dated 1 March 2011 from Taghleef responding to the NTC's deficiency letter of 22 February 2011 (revised)

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ARE-20	Taghleef's response to second deficiency letter, redacted version	Letter dated 24 January 2011 from Taghleef responding to the NTC's deficiency letter of 17 January 2011 (redacted version)
ARE-20b (BCI)	Taghleef's response to second deficiency letter	Letter dated 24 January 2011 from Taghleef responding to NTC's deficiency letter of 17 January 2011
ARE-22 (BCI)	Taghleef's letter of 31 May 2011	Letter dated 31 May 2011 from Taghleef to NTC on level of trade adjustments
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ARE-30	Notice of initiation of sunset review	NTC, Notice of initiation of sunset review of anti-dumping duties levied on dumped imports of BOPP film originating in and/or exported from the People's Republic of China, Sultanate of Oman, Kingdom of Saudi Arabia and United Arab Emirates (4 August 2015)
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PAK-8 (BCI) (revised)	Tri-Pack Films' letter of 9 October 2010	Letter dated 9 October 2010 from Tri-Pack Films to the NTC concerning additional data for antidumping investigation of BOPP film
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PAK-12B (BCI)	Appendix to Taghleef's email of 18 December 2012	Appendix to Taghleef's email dated 18 December 2012
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PAK-27	Ordinance No. LXV of 2000	The Anti-Dumping Duties Ordinance, 2000, Ordinance No. LXV of 2000 (22 December 2000)
PAK-28	Amendment of the Ordinance No. LXV of 2000	Act No. XXIII of 2011, Act to amend The Anti-Dumping Duties Ordinance, 2000
PAK-29	Anti-Dumping Duties Rules	Anti-Dumping Duties Rules, 2001
PAK-31	Order of Islamabad High Court	Order of the Islamabad High Court, W.P. No. 2098 of 2011, Metatex Pvt. Ltd. v. NTC
PAK-37	NTC's blank exporter questionnaire	NTC, antidumping questionnaire for exporters/foreign producers of BOPP film
PAK-39 (BCI)	Annexure-XVI, calculations of landed cost	Annexure-XVI, calculations of landed cost
PAK-49	Report on final determination (2015), public version	NTC, Report on final determination an levy of definitive antidumping duties on imports of biaxially oriented poly propylene film into Pakistan originating in and/or exported from the People's Republic of China, Sultanate of Oman, Kingdom of Saudi Arabia and United Arab Emirates (9 April 2015)
PAK-50	Taghleef's response to deficiency letter	Letter dated 23 December 2010 from Taghleef to the NTC's deficiency letter of 20 December 2010

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
BOPP	biaxially oriented polypropylene
CIF	cost, insurance, freight
COP	cost of production
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GAAP	generally accepted accounting principles
GATT 1994	General Agreement on Tariffs and Trade 1994
NTC	National Tariff Commission
PKR	Pakistani Rupees
POI	period of investigation
PRAL	Pakistan Revenue Automation Limited
ROI	return on investment
SG&A	administrative, selling, and general costs
Taghleef	Taghleef Industries LLC Taghleef LLC, Dubai Taghleef LLC Taghleef Dubai
Taghleef SAOC	Taghleef Industries SAOC Taghleef Industries SAOG Taghleef SAOC, Oman Taghleef Oman
Ti Group	Taghleef Industries Group
Tri-Pack Films	Tri-Pack Films Limited

1 INTRODUCTION

1.1 Consultations

1.1. On 24 January 2018, the United Arab Emirates (UAE) requested consultations with Pakistan pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII:1 of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Articles 17.2 and 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 27 March 2018 but did not resolve the dispute.

1.2 Panel establishment and composition

1.3. On 15 May 2018, the United Arab Emirates requested the establishment of a panel pursuant to Article 6 of the DSU, Article XXIII of the GATT 1994, and Article 17.4 of the Anti-Dumping Agreement, with standard terms of reference.[2] Based on this request, in accordance with Article 6 of the DSU, the Dispute Settlement Body (DSB) established a panel at its meeting of 29 October 2018.[3]

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

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United Arab Emirates in document WT/DS538/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 7 May 2019, the parties agreed that the panel would be composed as follows:

Chairperson:	Ms Luz Elena Reyes de la Torre
Members:	Mr Paul O'Connor Mr Wilhelm Meier

1.6. Afghanistan, China, the European Union, Japan, Oman, the Russian Federation, the Kingdom of Saudi Arabia, and the United States notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.7. After consultation with the parties, on 25 September 2019 the Panel adopted its Working Procedures[5], Additional Working Procedures on Business Confidential Information[6], and timetable. The Panel subsequently revised the timetable on 5 March 2020, 20 May 2020, and 21 July 2020.

1.8. The United Arab Emirates submitted its first written submission on 18 October 2019, and Pakistan submitted its first written submission on 13 December 2019.[7] The Panel held its first substantive meeting with the parties on 5 and 6 February 2020. A session with the third parties took place on 6 February 2020. Both parties submitted their second written submissions on 25 March 2020.

[1] Request for consultations by the United Arab Emirates, WT/DS538/1 (United Arab Emirates' consultations request).
[2] Request for the establishment of a Panel by the United Arab Emirates, WT/DS538/2 (United Arab Emirates' panel request).
[3] DSB, Minutes of Meeting held on 29 October 2018, WT/DSB/M/420.
[4] Constitution note of the Panel, WT/DS538/3.
[5] Working Procedures of the Panel (Annex A-1).
[6] Additional Working Procedures of the Panel on Business Confidential Information (Annex A-2).
[7] See para. 7.663 below.

1.9. In view of the various restrictions imposed on gatherings and international travel in relation to the COVID-19 pandemic, holding the second substantive meeting in the manner and at the time initially envisaged in the timetable became impossible. Therefore, on 14 April 2020, the Panel consulted the parties on the possibility of hearing them through a written procedure, while reserving the possibility of convening a meeting at a later date.[8] The parties provided comments on the Panel's proposal on 17 April 2020. The United Arab Emirates agreed with the proposed course of action[9], whereas Pakistan suggested that the Panel delay its decision and reassess the situation in mid-May, taking into account the evolution of restrictions related to the pandemic.[10] On 23 April 2020, the Panel decided to reassess the situation in mid-May and to announce its decision to the parties on 20 May 2020.[11]

1.10. As significant restrictions on international travel and meetings as a result of the COVID-19 pandemic were still in place in mid-May, it became clear that holding the second meeting with the parties would not be possible in the near future. To avoid the risk of further delays, the Panel decided on 20 May 2020 to hear the parties through a written procedure in lieu of the second substantive meeting. The Panel reserved the possibility to convene an in-person meeting at a later date, if it considered it necessary to effectively discharge its mandate.[12] The parties did not object to this decision. The written procedure in lieu of the second substantive meeting took place from 9 June to 17 July 2020.[13] Following the completion of the written procedure, on 21 July 2020 the Panel decided that an additional in-person meeting was not necessary to effectively discharge its mandate.[14]

1.11. On 4 September 2020, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 6 November 2020. The Panel issued its Final Report to the parties on 14 December 2020.

2 FACTUAL ASPECTS: THE MEASURES AT ISSUE

2.1. On 12 April 2010, Tri-Pack Films Limited (Tri-Pack Films) filed an application with Pakistan's anti-dumping authority, the National Tariff Commission (NTC), to initiate an investigation into imports of biaxially oriented polypropylene (BOPP) film from, among others, the United Arab Emirates.[15] On 27 September 2010, the NTC initiated an investigation on the basis of that application.[16]

2.2. On 6 July 2011, the Islamabad High Court ordered the NTC to suspend its investigation.[17] On 6 March 2012, the Islamabad High Court voided the NTC's 27 September 2010 initiation due to a defect in the composition of the NTC. In the same decision, the court held that the NTC "may proceed with the complaint pending before [it]".[18] As a result, on 23 April 2012 the NTC initiated a second investigation into BOPP film, on the basis of Tri-Pack Films' 12 April 2010 application.[19]

2.3. The NTC issued the preliminary determination in its second investigation of imports of BOPP film (i.e. the investigation that was initiated on 23 April 2012) on 14 August 2012.[20] The NTC issued the Notice of final determination in that investigation on 7 February 2013[21], having set forth its findings in a separate report dated 4 February 2013 (Report on final determination of

[8] Panel communication to the Parties (14 April 2020) (Annex A-3).
[9] United Arab Emirates' comments on the Panel's communication of 14 April 2020.
[10] Pakistan's comments on the Panel's communication of 14 April 2020.
[11] Panel communication to the Parties (23 April 2020) (Annex A-4).
[12] Panel communication to the Parties (20 May 2020) (Annex A-5).
[13] Arrangements relating to the second substantive meeting in light of the COVID-19 pandemic (Annex A-6).
[14] Panel communication to the Parties (21 July 2020) (Annex A-7).
[15] Report on final determination (2013), public version, (Exhibit ARE-2), section 5.1.
[16] Report on final determination (2013), public version, (Exhibit ARE-2), section 5.2.
[17] Report on final determination (2013), public version, (Exhibit ARE-2), section 5.2.
[18] Order of Islamabad Hight Court, (Exhibit PAK-31). See also Pakistan's response to Panel question No. 14; and Report on final determination (2013), public version, (Exhibit ARE-2), section 5.2.
[19] Notice of initiation (2012), (Exhibit ARE-5).
[20] Report on final determination (2013), public version, (Exhibit ARE-2), section 19. The Report on preliminary determination is dated 10 August 2012. (Report on preliminary determination, (Exhibit ARE-9)).
[21] Notice of final determination (2013), (Exhibit ARE-10). On the date of final determination, see fn 26 below.

4 February 2013).[22] The NTC found that BOPP film from the United Arab Emirates was being dumped in the Pakistani market, and imposed definitive anti-dumping duties at the rate of 29.70% for one UAE exporter, Taghleef Industries LLC (Taghleef), and 57.09% for all other UAE exporters, with effect until 14 August 2015.[23]

2.4. On 23 January 2015, the Anti-Dumping Appellate Tribunal of Pakistan set aside the final determination of 4 February 2013 and "remand[ed]" it to the NTC[24], because the mandate of one of the members of the NTC had expired at the time the determination had been adopted.[25]

2.5. On remand, the NTC adopted a final determination on 9 April 2015, which "ratified" its findings of 4 February 2013 and the consequent "imposition of duty"[26], at the same rate and with the same end date as under the final determination of 4 February 2013.[27] The separate report that accompanied the final determination of 9 April 2015 (Report on final determination of 9 April 2015) also physically incorporated, as annex-I, the Report on final determination of 4 February 2013.[28]

2.6. On 4 August 2015, following the receipt of an application from the domestic industry, the NTC initiated a sunset review of the anti-dumping measures on imports of BOPP film from, among others, the United Arab Emirates.[29] Subsequently, in the context of proceedings relating to other anti-dumping measures, the Lahore High Court found that one member of the NTC did not meet the applicable qualification requirements.[30] Following that ruling, the NTC also suspended the BOPP sunset review until 5 September 2016.[31] The NTC then issued its sunset determination on 1 December 2016[32], extending the anti-dumping duties, at the same rates, for five more years.[33] The NTC had adopted the separate report on this sunset determination on 28 November 2016 (Report on sunset determination of 28 November 2016).[34]

2.7. As set out below, the United Arab Emirates challenges (a) the final determination of 9 April 2015, which "ratified" the final determination of 4 February 2013 and incorporated the Report on final determination of 4 February 2013; and (b) the sunset review determination of 1 December 2016.

[22] Report on final determination (2013), (Exhibit PAK-1 (BCI) (revised)); Report on final determination (2013), public version, (Exhibit ARE-2). In the proceedings at issue in this dispute, the NTC accompanied its notices of final determination with a separate report setting forth its findings in more detail. The parties have submitted to the Panel both a public version and a version containing BCI of the Report on final determination (2013). The Panel has considered both the BCI and public versions of the Report on final determination (2013) in making its assessment. However, whenever doing so does not have an impact on its ultimate findings, in its Report the Panel has chosen to refer to the public version, with the aim of making the meaning of the Panel Report as accessible as possible also in its public version.

[23] Notice of final determination (2013), (Exhibit ARE-10), pp. 1-2; Report on final determination (2013), public version, (Exhibit ARE-2), pp. 51-52.

[24] Report on final determination (2015), public version, (Exhibit PAK-49), p. 2; Judgment of the Anti-Dumping Appellate Tribunal, (Exhibit PAK-10).

[25] Judgment of the Anti-Dumping Appellate Tribunal, (Exhibit PAK-10), paras. 7 and 9.

[26] Report on final determination (2015), public version, (Exhibit PAK-49), p. 3; Notice of final determination (2015), (Exhibit ARE-1), p. 2. We note that both documents refer to the earlier final determination as being dated *4* February 2013 (i.e. the date of the *Report* on final determination), even though we understand that the determination was in fact made public with the *notice* of *7* February 2013. This difference of three days is not material to the dispute before us. We therefore refer to that determination as being dated 4 February 2013.

[27] Notice of final determination (2015), (Exhibit ARE-1), p. 2. See also para. 2.3 above.

[28] Report on final determination (2015), public version, (Exhibit PAK-49), p. 3; Pakistan's response to Panel question No. 95, para. 48.

[29] Notice of initiation of sunset review, (Exhibit ARE-30); Report on sunset determination, public version, (Exhibit ARE-4), para. 3.

[30] Judgment of Lahore High Court, (Exhibit PAK-22), para. 12.

[31] Report on sunset determination, public version, (Exhibit ARE-4), paras. 3-4 (referring to Judgment of Lahore High Court, (Exhibit PAK-22), paras. 12 and 14).

[32] Notice of conclusion of sunset review, (Exhibit ARE-3).

[33] Notice of conclusion of sunset review, (Exhibit ARE-3), pp. 1-2.

[34] Report on sunset determination, public version, (Exhibit ARE-4); Report on sunset determination, (Exhibit PAK-2 (BCI) (revised)). The parties have submitted to the Panel both a public version and a version containing BCI of the Report on sunset determination. The Panel has considered both the BCI and public versions of the Report on sunset determination in making its assessment. However, whenever doing so does not have an impact on its ultimate findings, in its Report the Panel has chosen to refer to the public version, with the aim of making the meaning of the Panel Report as accessible as possible also in its public version.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United Arab Emirates requests that the Panel find that Pakistan's final determination of 9 April 2015, which "ratified" the final determination of February 2013, is inconsistent with:

a. Articles 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 5.2, 5.3, 5.8, 5.10, 6.2, 9.1, 9.3, 11.1, 12.1, and 12.2 of the Anti-Dumping Agreement; and

b. as a consequence, Articles 1 and 18.1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994.

3.2. The United Arab Emirates further requests the Panel to find that Pakistan's sunset review determination of 1 December 2016 is inconsistent with:

a. Articles 11.1, 11.3, 11.4, 12.2, and 12.3 of the Anti-Dumping Agreement; and

b. as a consequence, Articles 1 and 18.1 of the Anti-Dumping Agreement.

3.3. The United Arab Emirates requests that, pursuant to Article 19.1 of the DSU, the Panel recommend that Pakistan bring its measures into conformity with its obligations under the Anti-Dumping Agreement and the GATT 1994.[35] Further, the United Arab Emirates requests that, pursuant to Article 19.1 of the DSU, the Panel suggest that Pakistan "terminate the duties imposed" and "refund the anti-dumping duties collected", in order to bring the measures into conformity with its WTO obligations.[36]

3.4. Pakistan requests that the Panel find that the United Arab Emirates' claims under Articles 12.1, 12.2, and 12.3 of the Anti-Dumping Agreement are outside the Panel's terms of reference[37], and that the Panel reject the United Arab Emirates' claims in this dispute in their entirety.[38] In the event that the Panel finds that the United Arab Emirates has established any of the claimed inconsistencies, Pakistan requests the Panel to reject the United Arab Emirates' request for suggestions under Article 19.1 of the DSU.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 23 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of the European Union, Japan, and the United States are reflected in their executive summaries, provided in accordance with paragraph 26 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, and C-3). Afghanistan, China, Oman, the Russian Federation, and the Kingdom of Saudi Arabia did not provide the Panel with a third-party submission and did not make an oral statement at the third-party session of the first substantive meeting with the Panel.

6 INTERIM REVIEW

6.1. On 18 November 2020, the parties submitted written requests for the review of precise aspects of the Interim Report. Neither party requested an interim review meeting. On 30 November 2020, the parties submitted written comments on each other's requests for review. The Panel's discussion and disposition of the parties' requests for review are set out in Annex A-8.

[35] United Arab Emirates' first written submission, para. 622.
[36] United Arab Emirates' first written submission, paras. 623 and 626.
[37] Pakistan's first written submission, para. 3.729.
[38] Pakistan's first written submission, para. 4.1.

7 FINDINGS

7.1. This dispute concerns anti-dumping measures that Pakistan has imposed on BOPP film from the United Arab Emirates. On 4 February 2013, Pakistan adopted a final determination imposing duties on BOPP film from the United Arab Emirates. In January 2015 that determination was set aside. Pakistan then issued, on 9 April 2015, a final determination that "ratified" the determination of 4 February 2013, including the imposition of the duties, and incorporated the findings on which the determination of 4 February 2013 was based. On 1 December 2016, Pakistan issued a sunset determination that extended the duties on BOPP film for five years.[39]

7.2. In the first part of our findings, we review the United Arab Emirates' claims against the final determination of 9 April 2015, which ratified the previous determination of 4 February 2013 (sections 7.1-7.11).

7.3. We begin by examining the United Arab Emirates' claims under Articles 5.3, 2.1, and 3.1 of the Anti-Dumping Agreement, relating to the temporal scope of the evidence that Pakistan relied upon (a) to initiate the investigation, (b) to determine dumping, and (c) to determine injury, respectively. These claims relate to the foundation on which the challenged measures were built, and in each instance the United Arab Emirates' arguments centre on the allegation that the evidence, taking into account all relevant circumstances, was too remote (sections 7.1-7.3). We exercise judicial economy on the United Arab Emirates' claims under Articles 9.1, 9.3, and 11.1 relating to the temporal scope of the evidence to determine dumping and injury (sections 7.2.3 and 7.3.4).

7.4. We then examine the United Arab Emirates' claims under Articles 2.2, 2.2.1, 2.2.1.1, 2.2, and 2.4 of the Anti-Dumping Agreement, relating to Pakistan's choice of cost data to ascertain whether sales were in the ordinary course of trade, and Pakistan's rejection of a request for a level of trade adjustment (sections 7.4 and 7.5).

7.5. Next, we review the United Arab Emirates' other claims and arguments relating to Pakistan's determination of injury and causation under Articles 3.1, 3.2, 3.4, and 3.5 (sections 7.6-7.9).

7.6. We then examine whether the United Arab Emirates has established that Pakistan exceeded the time-limits for original investigations under Article 5.10 (section 7.10), or violated parties' due process rights under Article 6.2 (section 7.11).

7.7. In the second part of our findings, we review the claims against the sunset determination of 1 December 2016 (sections 7.12-7.14).

7.8. We examine the United Arab Emirates' claims that Pakistan determined that injury was likely to continue or recur inconsistently with Article 11.3 (section 7.12), and that Pakistan completed the sunset review in more than 12 months in the absence of abnormal circumstances, inconsistently with Article 11.4 (section 7.13). We exercise judicial economy on the United Arab Emirates' claim that the sunset review determination was inconsistent with Article 11.1 (section 7.12.5).

7.9. We also exercise judicial economy on certain claims brought against the final determination of 9 April 2015, the sunset determination of 1 December 2016, or both, to the effect that Pakistan acted inconsistently with certain transparency obligations in Article 12 of the Anti-Dumping Agreement (section 7.14), and that, as a consequence of the other claimed inconsistencies, Pakistan acted inconsistently with Articles 1 and 18.1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994 (section 7.15).

7.10. In making our assessment, we have been mindful of the standard of review set forth for us in Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU, which provide, respectively:

> [I]n its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the

[39] Section 2 above.

> evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned[.][40]
>
> 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.[41]

7.1 Temporal scope of the evidence underlying initiation: Articles 5.2, 5.3, and 5.8 of the Anti-Dumping Agreement

7.11. Pakistan first initiated an investigation into imports of BOPP film from, among others, the United Arab Emirates in September 2010, based on an application filed in April 2010, which contained data up to December 2009.[42] At the NTC's request, the applicant filed additional injury data on 9 October 2010, covering the period from January to June 2010.[43] The Islamabad High Court suspended that first investigation in 2011 and terminated it in 2012. In its ruling the court held that the NTC could "proceed with the complaint pending before [it]".[44] As a result, on 23 April 2012 the NTC initiated a new investigation into BOPP film. It did so on the basis of the data in the original application, supplemented by the additional injury data ending in June 2010.[45]

7.12. The United Arab Emirates argues that Pakistan acted inconsistently with Articles 5.2, 5.3, and 5.8 of the Anti-Dumping Agreement by initiating an investigation based on data that ended about two years earlier, in circumstances that did not justify doing so, and without explaining its decision to initiate based on remote data or acknowledging that the data were remote.[46]

7.13. Pakistan responds that under Article 5.3 even somewhat dated evidence can be sufficiently informative of dumping and injury to justify initiation, and that the NTC's decision to initiate must be viewed in light of the circumstances. In particular, Pakistan argues that a domestic court had ordered the NTC to proceed on the basis of the complaint filed in 2010, and that the NTC saved time by not changing the temporal scope of the evidence. According to Pakistan, when these circumstances are taken into account, the conclusion must be that the evidence was sufficient for purposes of Article 5.3.[47] Regarding Articles 5.2 and 5.8, Pakistan argues that they "do not address the UAE's concern".[48]

7.14. As set out below, we find that the United Arab Emirates has established that Pakistan acted inconsistently with Article 5.3 of the Anti-Dumping Agreement, and we exercise judicial economy on the United Arab Emirates' claims under Articles 5.2 and 5.8.

7.15. We structure our discussion as follows: first, we set out the applicable requirements of Article 5.3 (section 7.1.1); second, we apply those requirements to the facts of this case to assess whether Pakistan acted inconsistently with Article 5.3, and we conclude that it did (section 7.1.2); and last, we explain that we therefore exercise judicial economy under Articles 5.2 and 5.8 (section 7.1.3).

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[40] Article 17.6(i) of the Anti-Dumping Agreement.
[41] Article 11 of the DSU.
[42] Summary of Tri-Pack Films' application for initiation, (Exhibit ARE-12).
[43] Tri-Pack Films' letter of 9 October 2010, (Exhibit PAK-8 (BCI) (revised)). See also Pakistan's response to Panel question No. 26. The additional data for January to June 2010, filed on 9 October 2010, were limited to injury and did not cover dumping.
[44] Order of Islamabad High Court, (Exhibit PAK-31); Pakistan's response to Panel question No. 14.
[45] Initiation memorandum, (Exhibit PAK-9), para. 12; Pakistan's response to Panel question No. 26.
[46] United Arab Emirates' first written submission, section V.1; opening statement at the first meeting of the Panel, section II; response to Panel question No. 27; second written submission, section III.1; and opening statement in the written procedure replacing the second meeting of the Panel (written opening statement), section II.1.
[47] Pakistan's first written submission, section 3.2; second written submission, section 2.1; and opening statement in the written procedure replacing the second meeting of the Panel (written opening statement), section 2. See also Pakistan's response to Panel question No. 31.
[48] Pakistan's second written submission, para. 2.2.

7.1.1 The applicable requirements of Article 5.3

7.16. The parties' arguments raise the question whether Article 5.3 imposes requirements on the temporal scope of the evidence on which initiation is based.

7.17. We note that Article 5.3 of the Anti-Dumping Agreement provides that:

> The authorities shall examine the accuracy and adequacy of the *evidence* provided in the application to determine whether there is sufficient *evidence* to justify the initiation of an investigation.[49]

7.18. Article 5.3 thus requires investigating authorities to "determine whether there is sufficient evidence to justify the initiation of an investigation" and, in doing so, to "examine the accuracy and adequacy of the evidence".[50]

7.19. The ordinary meaning of "evidence" includes "[i]nformation (in the form of personal or documented testimony or the production of material objects), *tending or used to establish facts* in a legal investigation".[51] Thus, inherent in the very meaning of evidence is its relationship to the facts that it tends to establish, i.e. its relevance.[52] Information that does not tend to establish the facts called for does not fit this definition. The context of Article 5.3 confirms that evidence must be relevant: Article 5.2, which provides context for the interpretation of Article 5.3, explicitly requires the evidence in the application to be "relevant".

7.20. Turning to the attributes that the authorities must examine, "accuracy" and "adequacy" are "the state or quality" of being "accurate"[53] and "adequate"[54], respectively. In turn, the ordinary meaning of "accurate" includes "exact, precise; conforming exactly with the truth or with a given standard; free from error"[55], and the ordinary meaning of "adequate" includes "fully satisfying what is required; quite sufficient, suitable, or acceptable in quality or quantity".[56] Thus, the authority must examine whether the evidence is exact, precise, and suitable, acceptable.

7.21. Further, regarding the requirement that the authorities determine whether the evidence is "sufficient … to justify the initiation of an investigation", we note that the ordinary meaning of sufficient includes: "[o]f a quantity, extent, or scope adequate to a certain purpose or object".[57] That "purpose or object" is set forth in Article 5.3 itself, i.e. sufficient "to justify the initiation of an investigation".

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[49] Underlining and italics added.

[50] We agree in this regard with the statement in the Panel Report, *Guatemala – Cement II*, para. 8.31 ("[i]t is … the sufficiency of the evidence, and not its adequacy and accuracy per se, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation").

[51] Oxford Dictionaries online, definition of "evidence" https://www.oed.com/view/Entry/65368?rskey=t5Pija&result=1&isAdvanced=false#eid (accessed 12 October 2020), n., meaning 4.a. (emphasis added)

[52] In plain English, "relevant" is "bearing on or connected with the matter in hand". (Oxford Dictionaries online, definition of "relevant" https://www.oed.com/view/Entry/161893?redirectedFrom=relevant#eid (accessed 12 October 2020), meaning 2.a).

[53] Oxford Dictionaries online, definition of "accuracy" https://www.oed.com/view/Entry/1281?redirectedFrom=accuracy#eid (accessed 12 October 2020), n., meaning 1.

[54] Oxford Dictionaries online, definition of "adequacy" https://www.oed.com/view/Entry/2298?redirectedFrom=adequacy#eid (accessed 12 October 2020), n., meaning 1.

[55] Oxford Dictionaries online, definition of "accurate" https://www.oed.com/view/Entry/1283?redirectedFrom=accurate#eid (accessed 12 October 2020), adj., meaning 3 ("[e]sp. of information, measurements, or predictions").

[56] Oxford Dictionaries online, definition of "adequate" https://www.oed.com/view/Entry/2299?rskey=KTs110&result=1&isAdvanced=false#eid (accessed 12 October 2020), adj., meaning 3.

[57] Oxford Dictionaries online, definition of "sufficient" https://www.oed.com/view/Entry/193543?redirectedFrom=sufficient#eid (accessed 12 October 2020), n., meaning 1.a.

7.22. As to the *subject matter* of the necessary evidence, i.e. *what* that evidence must tend to establish[58], the text and context of Article 5.3 indicate that Article 5.3 requires sufficient evidence of dumping, injury, and a causal link between them, that is, the same elements that must be demonstrated to impose anti-dumping measures. We note, first, that Article 5.3 refers to "the evidence provided in the application". Article 5.2 requires the application to contain evidence of (a) "dumping", for which Article 2, in turn, provides a single definition for the purpose of the Anti-Dumping Agreement[59]; of (b) "injury within the meaning of Article VI of GATT 1994 as interpreted by [the Anti-Dumping] Agreement"; and (c) a causal link between them. Further, we note that the evidence must be sufficient "to justify … initiation", and Article 5 sets forth two bases on which an investigation may be initiated. One such way is "upon a written application"[60], which must include, pursuant to Article 5.2, evidence of dumping, injury, and a causal link between them; the second way is on the investigating authority's own motion, which, again, requires "sufficient evidence of dumping, injury and a causal link, as described in paragraph 2 [of Article 5]".[61] These textual and contextual elements confirm that initiation requires evidence of the same three elements as those whose existence must be ascertained in order to impose anti-dumping measures.[62]

7.23. Thus, the difference between the evidence that must sustain a determination and the evidence needed for initiation is not one of subject matter but of degree, or, as other panels have described it, of "quantity and quality". The "*quantity and quality*" of the evidence needed to initiate an investigation are lesser than required to impose anti-dumping measures.[63] However, it is still evidence of those *same elements* that is necessary to justify initiation of an investigation.[64]

7.24. We further note that the context of Article 5.3, provided by other provisions of the Anti-Dumping Agreement as well as Article VI of the GATT 1994, indicates that the WTO disciplines on anti-dumping set forth a corrective scheme, i.e. one that is meant to remedy a current situation. In particular, Article VI:2 of the GATT 1994 provides that an anti-dumping duty may be imposed only "*to offset* or prevent dumping".[65] Article 11.1 of the Anti-Dumping Agreement provides that an anti-dumping duty "shall remain in force only as long as and to the extent necessary *to counteract* dumping which is causing injury".[66] And Articles 2.1 and 3.5 speak of dumping causing injury in the present tense.[67] Thus, under the corrective scheme set out in the Anti-Dumping Agreement and Article VI of the GATT 1994, anti-dumping measures may only be imposed to counteract *current* dumping causing injury: the three elements necessary for imposing anti-dumping measures are thus *current* dumping, current injury, and a causal link between them.[68] This, therefore, must also be the subject matter of the evidence underlying initiation.

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[58] See para. 7.19 above.

[59] See also Panel Report, *Guatemala – Cement II*, para. 8.35.

[60] Article 5.1 of the Anti-Dumping Agreement.

[61] Article 5.6 of the Anti-Dumping Agreement.

[62] See also Panel Reports, *Guatemala – Cement II*, para. 8.35; *Mexico – Steel Pipes and Tubes*, para. 7.21; *US – Softwood Lumber V*, para. 7.77; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.61.

[63] See also Panel Reports, *Guatemala – Cement II*, para. 8.35 ("certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward"); and *Mexico – Steel Pipes and Tubes*, para. 7.22.

[64] See also Panel Reports, *Guatemala – Cement II*, paras. 8.35-8.39 and 8.45; *Argentina – Poultry Anti-Dumping Duties*, paras. 7.61 and 7.80; and *Mexico – Steel Pipes and Tubes*, para. 7.21. The former two panels held that in establishing whether there was sufficient evidence of dumping and injury, the authorities "cannot entirely disregard the elements that configure" dumping and injury under Articles 2 and 3; the latter panel then summarized these findings as being that "the meanings of the concepts of 'dumping', 'injury' and 'causation' in Article 5 are the same as those in the relevant substantive provisions of the Agreement (i.e. Article 2 for dumping and Article 3 for injury and causation)". (Panel Reports, *Guatemala – Cement II*, para. 8.35; *Mexico – Steel Pipes and Tubes*, para. 7.21).

Some panels have also described the "type" or "subject matter" of the evidence (as opposed to its quantity and quality) as having to be the same. (Panel Report, *Mexico – Corn Syrup*, para. 7.97; see also Panel Report, *Guatemala – Cement I*, para. 7.77 (reversed on procedural grounds)).

[65] Emphasis added. See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165 (quoting Article VI:2 of the GATT 1994).

[66] Emphasis added. See also Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.57 (quoting Article 11.1 of the Anti-Dumping Agreement).

[67] See also Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.57 (referring to Article 3.5 ("[i]t must be demonstrated that the dumped imports *are* … *causing injury* within the meaning of this Agreement" (emphasis original))).

[68] See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165 ("the current situation"), there with reference to Article 3.1 of the Anti-Dumping Agreement.

7.25. Information that does not speak to current dumping causing injury, therefore, does not relate to the required subject matter: it is thus not "evidence" in the sense of being relevant to the facts to be established[69], and it is not "sufficient" in the sense of being "of a … scope adequate" "to justify the initiation of an investigation".[70]

7.26. The mere fact that data relate to the *past* does not, however, mean that they cannot be used to establish the existence of current injurious dumping. To the contrary, the data on which initiation decisions and preliminary and final determinations are based are necessarily from a past period. However, more recent data are likely to provide better indications about current dumping causing injury, and vice versa.[71] This means that all things equal, the more remote the data, the less likely it is to speak to current injurious dumping. Since under Article 5.3 an authority must assess "whether there is sufficient evidence to justify … initiation", whether and to what extent the data are remote for purposes of Article 5.3 should be assessed with reference to the date of initiation.

7.27. We are of the view that the relationship in time between the data on which initiation is based and the date of initiation is not, alone, dispositive of whether the data relate to *current* injurious dumping. Instead, whether the data relate to current injurious dumping must be assessed taking also into account the other relevant circumstances surrounding the investigating authority's decision.[72] This was also the approach taken by panels and the Appellate Body in assessing whether the data relied upon in injury determinations provided evidence of the "current situation".[73]

7.28. For example, in *Mexico – Anti-Dumping Measures on Rice*, the panel and the Appellate Body assessed the temporal gap existing in that case between the end of the injury POI and both initiation and final determination in light of the following circumstances: (a)the POI was that proposed by the applicant; (b) Mexico had not established "that practical problems necessitated this particular [POI]"; (c) Mexico had not argued "that updating the information was not possible"; (d) "no attempt was made to update the information"; and (e) Mexico had provided no reason for not seeking more recent information.[74] In that case, these factors together with the considerable temporal gap between the end of the POI, on the one hand, and initiation and the final determination, on the other, led the panel and the Appellate Body to conclude that the data did not relate to current injury.[75]

7.29. To sum up, therefore, for evidence to be "sufficient evidence to justify the initiation of an investigation" under Article 5.3, it must pertain to *current* dumping, injury, and causation. The more recent the data are at the time of initiation, the more likely they will be to provide evidence of current dumping, injury, and causal link, and vice versa. Whether a temporal gap between the date of initiation and the evidence on which initiation is based means that the evidence does not relate to current dumping, injury, and causation, must be assessed case by case in light of the relevant circumstances.

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[69] See para. 7.19 above.

[70] See para. 7.21 above.

[71] To the same effect, see Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166. At issue in that case was the requirement for "positive evidence" under Article 3.1 of the Anti-Dumping Agreement; however, the Appellate Body observed that positive evidence, *at a minimum*, had to be *relevant*, and it found that evidence that did not relate to the current situation was *not relevant*. We also note that the Recommendation on Periods of Data Collection adopted in 2000, while not a binding instrument, is consistent with the view that data ending as close as possible to initiation provide the most appropriate basis to decide on initiation. (Recommendation concerning the periods of data collection for anti-dumping investigations, G/ADP/6, paras. 1(a) and 1(c)).

[72] We note that while accepting that Article 5.3 of the Anti-Dumping Agreement does discipline the temporal scope of the evidence relied upon to initiate, Pakistan emphasizes the importance of considering all the relevant circumstances when assessing whether the authority has complied with Article 5.3. (E.g. Pakistan's second written submission, paras. 2.3-2.18).

[73] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 165 and 167; Panel Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.58 and 7.64-7.65; and *Mexico – Steel Pipes and Tubes*, paras. 7.233-7.237.

[74] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.64.

[75] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.65; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice,* para. 172.

7.30. Finally, we note that Article 5.3 also speaks to a different element of the analysis that is relevant in the present case, i.e. *where* the evidence must be found: in determining whether there is sufficient evidence under Article 5.3, must the authority limit itself to the evidence in the application? Although Article 5.3 refers to the accuracy and adequacy of the evidence "provided *in the application*", the ultimate question for the authority under Article 5.3 is "whether *there is sufficient evidence* to justify the initiation of an investigation". As a result of this latter clause, an investigating authority is not precluded from taking into account additional information submitted by the applicant upon the authority's request to ensure that "there is sufficient evidence to justify the initiation".[76]

7.1.2 Whether Pakistan acted inconsistently with Article 5.3

7.31. In this section, we apply the standard set out above to the facts of the case. We first identify the body of evidence that is relevant to the assessment under Article 5.3 (section 7.1.2.1); we then assess whether the NTC acted inconsistently with this provision by initiating the investigation on the basis of that body of evidence, and we conclude that it did (section 7.1.2.2).

7.1.2.1 The relevant body of evidence: whether the NTC was entitled to consider evidence not contained in the application

7.32. A first point of disagreement between the parties is whether, for purposes of Article 5.3, the NTC had to limit itself to the data contained in the application, which went from January 2007 to December 2009, or whether it was proper for the NTC to also consider the additional injury data filed by the applicant on 9 October 2010, which covered six more months, up to June 2010.[77]

7.33. The United Arab Emirates submits that since Article 5.3 refers to "the evidence provided in the application", the authority could not rely on evidence external to the application to comply with Article 5.3, and therefore the Panel cannot take into account the additional data in assessing whether the NTC acted consistently with Article 5.3.[78]

7.34. As just set out at paragraph 7.30 above, the ultimate question under Article 5.3 is whether "there is sufficient evidence" to justify the initiation of an investigation. On this basis, we consider that the NTC was not precluded from taking into account additional information submitted by the applicant upon the NTC's request. The NTC was therefore entitled to rely on the additional injury data covering the first half of 2010 when reviewing the evidence for purposes of Article 5.3.

7.1.2.2 Whether the NTC properly determined that the evidence was sufficient

7.35. We now turn to the central question under Article 5.3, i.e. whether an unbiased and objective investigating authority, looking at the facts before it, could have determined that the data ending in December 2009 (for dumping) and June 2010 (for injury), in light of all relevant circumstances, were "sufficient evidence to justify the initiation of an investigation" on 23 April 2012. Specifically, as set out in section 7.1.1 above, if in light of all relevant circumstances the data could not be said to relate to "current" dumping, injury, and causation, then the authority could not have determined that there was sufficient evidence to justify initiation within the meaning of Article 5.3.

7.36. To make our assessment, we consider, first, the temporal gap between the data, on the one hand, and the date of initiation, on the other; and second, the relevant circumstances surrounding the authority's determination that there was sufficient evidence to justify initiation.

7.37. We begin with the temporal gap between the data and initiation: for dumping, this was more than 27 months; for injury, the gap was almost 22 months. While the temporal gap alone is not enough to conclude that the data did not provide evidence of current dumping causing injury, these gaps are quite considerable, ranging from slightly less to slightly more than two full years.

[76] Article 5.3 of the Anti-Dumping Agreement (emphasis added). See also e.g. Panel Report, *US – Softwood Lumber V*, para. 7.76.
[77] See para. 7.11 above.
[78] United Arab Emirates' second written submission, paras. 26 and 43.

7.38. We turn to the circumstances surrounding the NTC's examination that, according to the parties, are relevant to our assessment.

7.39. First, Pakistan argues that under domestic law, the court order directing the NTC to initiate the investigation obligated the NTC to proceed on the basis of the original application.[79] According to Pakistan, this is a "practical constraint[]" that must be taken into account as a factual matter when assessing the NTC's conduct under Article 5.3.[80] The United Arab Emirates disagrees that this is a relevant fact, because a Member may not invoke domestic law to justify a failure to comply with its obligations under the WTO agreements. The United Arab Emirates also disputes Pakistan's interpretation of the Pakistani court order.[81]

7.40. A Member is responsible for the acts of all of its organs, including the judiciary.[82] Therefore, whether the NTC was abiding by the instructions of a Pakistani court or acting in its own discretion does not affect the scope of Pakistan's obligations under Article 5.3 of the Anti-Dumping Agreement.[83]

7.41. Second, Pakistan argues that because a gap of almost two years between the end of the POI and a *final determination* "would be quite normal"[84], such a gap "must, in principle, be acceptable for purposes of the initiation decision".[85] The United Arab Emirates considers this "absurd", and points out that it is "precisely because" there is a gap between initiation and final determination that the information on which initiation is based needs to be sufficiently recent.[86]

7.42. It is true that an investigation takes time, leading to a gap between the end of the POI and the date of *final determination*. This, however, does not suggest that it is necessarily appropriate to *initiate* an investigation on the basis of evidence that is already remote at the time of initiation.

7.43. The two factors invoked by Pakistan, therefore, do not explain the NTC's assessment, in April 2012, that evidence ending in December 2009 and June 2010 was "sufficient evidence to justify the initiation of an investigation", within the meaning of Article 5.3.

7.44. The United Arab Emirates, for its part, asks us to take into account that the NTC did not give any consideration in its Initiation memorandum or other record documents to the temporal gap between the data and initiation, let alone explain why the data nonetheless constituted sufficient evidence to justify initiation or why it did not seek more recent evidence.[87]

[79] Pakistan's first written submission, paras. 3.68-3.69; second written submission, paras. 2.3 and 2.14.
[80] Pakistan's second written submission, para. 2.14.
[81] United Arab Emirates' second written submission, paras. 48-51; Pakistan's second written submission, paras. 2.14-2.17.
[82] See e.g. Appellate Body Reports, *US – Shrimp*, para. 173; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 182; Panel Report, *Brazil – Tyres*, para. 7.305; Anti-Dumping Agreement, Article 18.4; and WTO Agreement, Article XVI:4. A similar question has been treated in the same way by other international tribunals. See e.g. International Court of Justice, Advisory Opinion of 29 April 1999, Differences Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (1999), para. 62.
[83] We also note that, as the Panel pointed out during the first substantive meeting, there are inconsistencies in Pakistan's argument regarding compliance with the Pakistani court order: Pakistan argues that the NTC was obligated by the court order to proceed on the basis of the application received, but in fact it included six additional months in its assessment, which contradicts Pakistan's argument that it could not rely on updated evidence. (Summary of Tri-Pack Films' application for initiation, (Exhibit ARE-12), p. 2; Order of Islamabad High Court, (Exhibit PAK-31); Initiation memorandum, (Exhibit PAK-9), section 12; and Pakistan's response to Panel question No. 29).
[84] Pakistan's first written submission, para. 3.63.
[85] Pakistan's first written submission, para. 3.65; second written submission, para. 2.3.
[86] United Arab Emirates' second written submission, para. 46.
[87] See e.g. United Arab Emirates' second written submission, para. 26. Pakistan admits that "[a]t the time of re-initiation, there is no explicit mention in the investigation record or in the NTC's pronouncements of the temporal aspect of the evidence". (Pakistan's response to Panel question No. 30).

7.45. We note that the NTC did not discuss or acknowledge the issue of the temporal scope of the evidence in its Initiation memorandum (including when referring to the court order that Pakistan relies on in its arguments before us[88]) or in any other record document before us.[89]

7.46. The fact that the NTC does not appear to have considered the question of the temporal scope of the data, despite the fact that they were two years old at the time of initiation, leads us to conclude that the NTC did not fulfil its obligation to determine that there was "sufficient evidence" for purposes of Article 5.3. The NTC gave no reasons for not updating the evidence and made no apparent attempt to do so. According to Pakistan, it failed to do so because a court order directed it to rely on the data in the original application. No such explanation, however, is discernible from the record[90] and in any case, as we discuss above, this order did not relieve Pakistan of its obligation to abide by its commitments under the Anti-Dumping Agreement.[91]

7.47. We also recall the circumstances that, in *Mexico – Anti-Dumping Measures on Rice*, contributed to the conclusion that the authority did not base its injury determination on evidence of "current" injury.[92] We agree that those are relevant circumstances, and we note the similarities with the circumstances surrounding the NTC's determination that there was sufficient evidence to justify initiation: in 2012 the NTC did not demand more recent evidence, did not explain its choice, and largely relied on the data period proposed by the applicant, and Pakistan has not demonstrated that it was not possible to seek more recent evidence.

7.48. Therefore, when we consider *both* the temporal gap of approximately two years between the data underlying initiation and initiation itself, *and* the circumstances surrounding the authority's determination that the data were sufficient, we find that the NTC could not have determined that the data underlying initiation pertained to current dumping causing injury. Therefore, the NTC acted inconsistently with Article 5.3 by failing to assure itself that there was sufficient evidence to justify initiation of an investigation.

7.1.3 Judicial economy under Articles 5.2 and 5.8

7.49. A panel may exercise judicial economy, and thus decline to review one or more claims, if three conditions are met, namely (a) having already found that the same measure (b) is inconsistent with one or more provisions of the covered agreements and, further, that (c) findings under the additional claims are not necessary to resolve the dispute.[93]

7.50. In this case, the United Arab Emirates' Articles 5.2 and 5.8 claims challenge the same measure as its Article 5.3 claim, and indeed the same aspect of that measure. The United Arab Emirates argues that the evidence underlying initiation was around two years old at the time of initiation, and yet the NTC did not even consider the question of the temporal scope of the evidence. Having already found that, for those reasons, Pakistan acted inconsistently with Article 5.3, we exercise judicial economy on the United Arab Emirates' claims under Articles 5.2 and 5.8.

7.2 Temporal scope of the evidence underlying the determination of dumping: Articles 2.1, 9.1, 9.3, and 11.1 of the Anti-Dumping Agreement

7.51. When initiating the investigation on 23 April 2012, the NTC selected January 2009 to June 2010 as the period of investigation (POI) for dumping. On 4 February 2013, the NTC made its final determination of dumping on the basis of the data for this POI.[94]

[88] See para. 7.39 above.
[89] Initiation memorandum, (Exhibit PAK-9); Pakistan's response to Panel question No. 28. See also Report on preliminary determination, (Exhibit ARE-9); and Report on final determination (2013), (Exhibit PAK-1 (BCI)), which also entirely fail to discuss the temporal scope of the evidence underlying initiation.
[90] Even when the Initiation memorandum refers to the court order in question, it does not mention the issue of the temporal scope of the evidence. (Initiation memorandum, (Exhibit PAK-9), paras. 2.2-2.3).
[91] See para. 7.40 above.
[92] See para. 7.28 above.
[93] See e.g. Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.
[94] Report on final determination (2013), (Exhibit PAK-1 (BCI)), para. 13.3.

7.52. The United Arab Emirates argues that in so doing, the NTC acted inconsistently with Articles 2.1, 9.1, 9.3, and 11.1 of the Anti-Dumping Agreement, because of the following, taken together: the temporal gap between the end of the POI, on the one hand, and the dates of initiation and of final determination, on the other hand; and other relevant factors, such as the fact that the NTC failed to explain its choice and made no attempt at updating the evidence.[95]

7.53. Pakistan responds that Articles 9.1, 9.3, and 11.1 do not discipline the choice of POI.[96] As regards Article 2.1, Pakistan accepts that it can be read as requiring that "a determination of dumping be based on data that bears a sufficiently proximate temporal link to the time of determination", but argues that when the circumstances surrounding the NTC's selection of the POI are taken into account, it becomes apparent that the NTC did not act inconsistently with Article 2.1.[97]

7.54. As set out below, we find that the United Arab Emirates has established that Pakistan has acted inconsistently with Article 2.1, and we exercise judicial economy on the United Arab Emirates' claims under Articles 9.1, 9.3, and 11.1.

7.55. We structure our discussion as follows: (a) we set out the applicable requirements of Article 2.1 (section 7.2.1); (b) we apply that standard to the facts of this case to assess whether Pakistan acted inconsistently with Article 2.1, and we conclude that it did (section 7.2.2); and (c) we exercise judicial economy under Articles 9.1, 9.3, and 11.1 (section 7.2.3).

7.2.1 The applicable requirements of Article 2.1

7.56. Article 2.1 of the Anti-Dumping Agreement provides that:

> For the purpose of this Agreement, a product is to be considered as *being dumped* … if the export price … *is* less than the comparable price … for the like product when destined for consumption in the exporting country.[98]

7.57. Article 2.1 defines dumping in the present tense: "a product is to be considered as *being dumped* … if the export price … *is* less than …".[99] In other words, under this definition, dumping is a present occurrence. Turning to the context of Article 2.1, we note that Article VI:2 of the GATT 1994 and Article 11.1 of the Anti-Dumping Agreement provide, respectively, that anti-dumping measures may be imposed to "offset" or "counteract" dumping causing injury. As we have discussed above (paragraph 7.29) and as has been observed in past disputes, these provisions make it clear that the WTO disciplines on anti-dumping set forth a corrective scheme that is concerned with a current situation[100], confirming the reading of Article 2.1 as defining dumping in the present.

7.58. Article 2.1 has sometimes been regarded as merely definitional, i.e. as not itself imposing obligations.[101] However, the text of this provision evidences that the definition it sets out is directed at an authority's determination. Article 2.1 uses the wording "a product *is to be considered* as being dumped"[102]: the entity that "considers" whether a product is being dumped is the investigating

[95] United Arab Emirates' first written submission, paras. 123-135 and 137-139; opening statement at the first meeting of the Panel, section III; response to Panel question No. 35; second written submission, section III.2; and written opening statement, section II.2. In setting forth its arguments, the United Arab Emirates does not clearly distinguish its claims relating to the dumping POI from those relating to the injury POI. Some of these claims relate only to the dumping POI (Articles 2.1 and 9.3) or the injury POI (Article 3), but others may relate to both (Articles 9.1 and 11.1). In this section, we limit our consideration of the United Arab Emirates' claims to the dumping POI. We address the injury POI separately, in section 7.3 below.

[96] Pakistan's first written submission, paras. 3.95 (for Articles 9.1 and 9.3) and 3.96-3.97 (for Article 11.1); second written submission, section 2.2; and written opening statement, para. 21.

[97] Pakistan's responses to Panel question Nos. 32-33; second written submission, paras. 2.24-2.31.

[98] Emphasis added.

[99] Emphasis added.

[100] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58. See also para. 7.24 above.

[101] Appellate Body Report, *US – Zeroing (Japan)*, para. 140; Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.120.

[102] Emphasis added.

authority, and ultimately the Member imposing anti-dumping measures. We therefore consider that Members are bound by the definition that Article 2.1 sets out.

7.59. Therefore, with reference to the specific interpretive question raised by the United Arab Emirates' claim, we consider that to act consistently with Article 2.1 a Member's determination of dumping must pertain to current dumping. Whether this is the case will depend, first, on the temporal scope of the evidence relative to the dates of initiation and final determination. In this regard, as we found above in respect of the data underlying initiation, we agree that the more recent the data, the more likely it is to be relevant to the current situation, and vice versa.[103] Second, we are of the view that temporal scope is not, alone, dispositive, and that therefore we must assess the authority's choice of the POI for dumping in light of all the relevant circumstances surrounding the authority's decision at the time. In this regard, we consider that depending on the facts of each case, circumstances such as those taken into account in assessing the temporal scope of the evidence of injury in *Mexico – Anti-Dumping Measures on Rice* are also relevant to the requirements of Article 2.1.

7.60. Both parties to the case before us take the view that, in the words of Pakistan, Article 2.1 "can be read as requiring that a determination of dumping be based on data that bears a sufficiently proximate temporal link to the time of determination".[104] Both parties also agree that whether the data relied upon by an authority bear this sufficiently proximate temporal link – i.e. relates to current dumping – depends not just on the temporal scope of the evidence, in itself, but also on all the attendant circumstances, as also set forth in *Mexico – Anti-Dumping Measures on Rice* with reference, there, to the determination of injury under Article 3.1.[105]

7.2.2 Whether Pakistan acted inconsistently with Article 2.1

7.61. There are two points of contention between the parties under Article 2.1, and we discuss each of these below: first, what is the relevant date of final determination against which the temporal scope of the evidence must be assessed; and second, whether Pakistan acted inconsistently with Article 2.1 by determining dumping on the basis of a POI ending in June 2010, taking into account all relevant circumstances. We discuss these in turn.

7.2.2.1 The relevant date of final determination

7.62. To assess whether the evidence on which the determination is based relates to current dumping, we consider, among other elements, the temporal scope of that evidence relative to the date of final determination.[106] That is, how remote was the evidence from the date the final determination was made? In the case before us, the parties disagree as to the relevant date of final determination, and we address that disagreement here.

7.63. To recall, in the investigation initiated on 23 April 2012, which is at issue here, the NTC first adopted a final determination on 4 February 2013.[107] A Pakistani court subsequently set aside that final determination due to a defect in the composition of the NTC and, on remand, the NTC adopted a formally distinct but substantively identical final determination on 9 April 2015, which "ratified" the findings of February 2013 and continued the anti-dumping measures at the rates and for the time provided for in the February 2013 determination.[108]

[103] See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166; and Panel Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58; *Mexico – Steel Pipes and Tubes*, para. 7.228.

[104] Pakistan's response to Panel question No. 33; see also ibid. No. 32. According to the United Arab Emirates, a Member that fails to base its determination on evidence that speaks to current injury acts inconsistently with Article 2.1 because it fails "to make a proper finding of the product 'being dumped'". (United Arab Emirates' second written submission, para. 59).

[105] See e.g. Pakistan's responses to Panel question Nos. 32-33; and United Arab Emirates' second written submission, para. 58.

[106] See para. 7.59 above.

[107] See para. 2.3 above.

[108] See paras. 2.4-2.5 above.

7.64. According to the United Arab Emirates, the relevant date of final determination to assess the temporal scope of the evidence is 9 April 2015[109], whereas, according to Pakistan, it is 4 February 2013.[110] The United Arab Emirates emphasized that the final determination of February 2013 was set aside, and that the final determination of 9 April 2015 was a fresh start and only imposed duties with prospective effect.[111] Pakistan, on the other hand, pointed out that the determination of 9 April 2015 was based on the findings set out in the determination of February 2013 and merely "ratified" that previous decision.[112]

7.65. The final determination of April 2015 formally replaced the final determination of 2013, and indeed the United Arab Emirates' claims are directed at the determination of April 2015 as the measure at issue. The question before us under Article 2.1, however, is whether the POI selected by the NTC for purposes of its determination of dumping pertained to current dumping. In our view, this must be assessed with reference to the time at which the NTC actually made that determination, i.e. February 2013, when the NTC adopted the final determination in the original investigation. The fact that because of a ministerial defect under domestic law a new determination had to be adopted in April 2015 does not change this assessment: the final determination of April 2015 merely "ratified" the determination of February 2013, incorporating all of its analysis and findings and providing for anti-dumping duties at the same rate and until the same time as set forth in the February 2013 determination.[113] It does not, therefore, change the point of reference for the assessment of the temporal scope of the POI.

7.66. Therefore, we consider that the date of final determination that is relevant to our assessment of the temporal scope of the evidence under Article 2.1 is 4 February 2013.[114]

7.2.2.2 Whether the NTC failed to determine current dumping

7.67. We now turn to whether the NTC acted inconsistently with Article 2.1 by determining dumping on the basis of data that did not pertain to *current* dumping. To answer this question, we begin by considering the temporal scope of the POI relative to the dates of initiation and final determination. In this case, the POI for dumping ran from January 2009 to June 2010. There was thus a temporal gap of approximately 22 months between the end of that POI and initiation (23 April 2012), and a gap of 31 months between the end of the POI and the final determination on 4 February 2013.

7.68. To assess whether data for such a POI were evidence of current dumping, we next turn to the other factors surrounding the authority's selection of the POI.

7.69. First, Pakistan asks the Panel to take into account that a domestic court order directed the NTC to proceed with the complaint before it, which, according to Pakistan, meant it could not change the temporal scope of the evidence.[115] However, as we have already noted, a WTO Member is responsible for the WTO-consistency of the acts of all of its organs, including the judiciary, and therefore whether the NTC was abiding by the instructions of a Pakistani court or acting in its own discretion does not change our assessment under the Anti-Dumping Agreement.[116] Moreover, the argument is even more difficult to follow when one considers that the court order now invoked by Pakistan referred to proceeding "with the complaint before [the NTC]", whereas Pakistan invokes it

[109] See e.g. United Arab Emirates' first written submission, para. 121; responses to Panel question Nos. 23-25, paras. 17-20 and 22-27; and second written submission, paras. 57 and 81-87. The United Arab Emirates argues, in the alternative, that there is an inconsistency also if the relevant date of final determination is February 2013. (United Arab Emirates' second written submission, para. 57).

[110] See e.g. Pakistan's first written submission, para. 2.14; responses to Panel question Nos. 23 and 25. See also Pakistan's first written submission, paras. 3.106-3.108; and second written submission, para. 2.35, in the context of Pakistan's arguments under Article 5.10.

[111] See e.g. United Arab Emirates' first written submission, para. 121; and responses to Panel question Nos. 23-25, paras. 17-20 and 22-27. See also para. 7.516 below.

[112] See e.g. Pakistan's response to Panel question No. 23 (referring to Notice of final determination (2015), (Exhibit ARE-1)).

[113] See para. 2.5 above.

[114] Concerning the exact date, we recall that the although the Notice of final determination was issued on 7 February 2013, record documents refer to the date of adoption of the Report on final determination, i.e. 4 February 2013, as the date of final determination. (See fn 26 above). This three days' difference does not have an impact on our assessment of the temporal scope of the evidence underlying the determination.

[115] Pakistan's second written submission, paras. 2.26-2.27; response to Panel question No. 28.

[116] See para. 7.40 above.

to explain its use of the POI selected in a first, interrupted investigation, which was not identical[117] to the period covered in the "complaint" in question.

7.70. Second, Pakistan argues that maintaining the POI first selected in 2010 allowed the NTC to complete the investigation faster, in little more than nine months[118], which also limited the ultimate temporal gap between the end of the POI and the final determination.[119] The United Arab Emirates responds that this is not a pertinent consideration. Among the third parties, the United States too takes the view that expediency is not a pertinent consideration, and that the authority must select a POI as close as possible to the date of initiation.[120]

7.71. We disagree with Pakistan's argument. Pursuant to Article 2.1, it is incumbent upon an authority to ascertain the existence of current dumping. The selection of a POI that was almost two years old already at the time of initiation cannot be explained by the fact that the investigating authority already had on file data relating to that POI, and could therefore save some time in its investigation. Moreover, even with the purported "time saving"[121], the overall gap between the end of the POI and the date of final determination was two years and seven months.

7.72. Third, we turn to the factors that the United Arab Emirates has asked us to take into account. The United Arab Emirates argues that, similar to *Mexico – Anti-Dumping Measures on Rice*, "(i) the selected POI was essentially what was proposed by the applicant; (ii) the NTC did not establish that practical problems necessitated this particular POI; (iii) the NTC never established that updating the information was not possible; (iv) the NTC made no attempt at updating the information although there was no lack of cooperation from interested parties; and (v) the NTC provided no reason why it was not seeking more recent information."[122] As we have noted above, we agree that these factors are relevant to an assessment under Article 2.1.

7.73. As regards the allegation that the POI was that proposed by the applicant, Pakistan responds that the NTC added six months to the proposed POI, namely January to June 2010. However, we note that the dumping POI still encompassed the full year proposed by the applicant (2009), only with the addition of six more months – despite the fact that by the time of initiation in April 2012, two more calendar years had elapsed.

7.74. Further, the NTC did not establish that practical problems necessitated this particular POI and that it was not possible to update the data, and provided no reason for not seeking more recent information. The NTC did not discuss the remoteness of the POI in its Initiation memorandum of 2012, in its provisional and final determinations of 2012 and 2013, or elsewhere in the record[123], even though Taghleef directly raised the matter in various submissions to the NTC.[124] The NTC did cite the court order that now Pakistan describes as barring it from updating the evidence[125]; however, in doing so, the NTC does not appear to have acknowledged the issue of the temporal gap between the end of the POI and initiation, nor to have explained that the court order in question required it to rely on the previously selected POI.[126]

7.75. Similarly, the NTC does not appear to have made any attempt to update the evidence. Pakistan points out that, in April 2012, the NTC gave parties the opportunity to "add some information to the data already provided" in response to the questionnaires sent in 2010.[127]

[117] See fn 83 above.
[118] Pakistan's first written submission, paras. 3.89-3.90; second written submission, para. 2.28.
[119] Pakistan's first written submission, para. 3.90; response to Panel question No. 28. Pakistan explains that this was not a consideration that motivated the NTC's choice when initiating the investigation in 2012 but that the Panel should, in its assessment, take into account the time saved by not updating the POI. (Pakistan's response to Panel question No. 28).
[120] United States' response to Panel question No. 1. The other third parties, while referring to a relevant prior WTO dispute, did not ultimately take a stance on the substance of the Panel's question.
[121] Pakistan's response to Panel question No. 28.
[122] United Arab Emirates' second written submission, para. 58 (referring to United Arab Emirates' first written submission, paras. 127-133).
[123] Pakistan's response to Panel question No. 30; Initiation memorandum, (Exhibit PAK-9); Report on preliminary determination, (Exhibit ARE-9); and Report on final determination (2013), (Exhibit PAK-1 (BCI)).
[124] Taghleef's letter of 25 June 2012, (Exhibit ARE-8), pp. 1-2; Taghleef's post-hearing submission, (Exhibit ARE-13), p. 6.
[125] Initiation memorandum, (Exhibit PAK-9), sections 2 and 12.
[126] Initiation memorandum, (Exhibit PAK-9), sections 2 and 12. Moreover, see fn 83 above.
[127] NTC's letter of 27 April 2012, (Exhibit ARE-6); Pakistan's response to Panel question No. 30.

However, the NTC had already defined the dumping POI as January 2009 to June 2010[128], and this opportunity for parties to "add some information" would not even necessarily be understood as allowing the submission of data postdating the POI.

7.76. To sum up, therefore, the NTC relied on a dumping POI that was almost two years old by the time of initiation and two years and seven months old by the time of the final determination, it made no attempt to update it and, during the proceedings, it provided no discussion whatsoever of this choice. For these reasons, we find that in making its determination of dumping, the NTC failed to ascertain the existence of current dumping, as required by Article 2.1.

7.2.2.3 Conclusion under Article 2.1

7.77. We therefore conclude that Pakistan's final determination was inconsistent with Article 2.1 of the Anti-Dumping Agreement.

7.2.3 Judicial economy under Articles 9.1, 9.3, and 11.1

7.78. We refer to paragraph 7.49 above, on the conditions under which a panel may exercise judicial economy.

7.79. In this case, the United Arab Emirates' claims under Articles 9.1, 9.3, and 11.1 are directed at the same measure as the claim under Article 2.1, and indeed at the same aspect of that measure, i.e. the selection of the dumping POI.[129] Having already found that Pakistan acted inconsistently with Article 2.1 because of the selection of the dumping POI, we exercise judicial economy on the United Arab Emirates' claims under Articles 9.1, 9.3, and 11.1.

7.3 Temporal scope of the evidence underlying the determination of injury: Articles 3.1, 3.2, 3.4, 3.5, 9.1, and 11.1 of the Anti-Dumping Agreement

7.80. When initiating the investigation on 23 April 2012, the NTC selected January 2007 to June 2010 as the POI for injury, and made its final determination of injury on the basis of evidence for this POI.[130]

7.81. The United Arab Emirates argues that in so doing, the NTC acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5, 9.1, and 11.1 of the Anti-Dumping Agreement, because of the temporal gap between the end of the POI, on the one hand, and the dates of initiation and of final determination, on the other hand, together with other relevant factors, such as the fact that the NTC failed to explain its choice and made no attempt at updating the evidence.[131]

7.82. Pakistan responds that, as made clear in *Mexico – Anti-Dumping Measures on Rice*, a temporal gap alone does not give rise to an inconsistency. Instead, other relevant factors must be considered; and, when the relevant factors are considered in this case, the conclusion must be that there is no inconsistency with Article 3.1 and, consequently, no inconsistency with Articles 3.2, 3.4, and 3.5.[132]

7.83. As set out below, we find that the United Arab Emirates has established that Pakistan acted inconsistently with Article 3.1 of the Anti-Dumping Agreement; we do not address the United Arab Emirates' argument that, as a consequence, Pakistan also acted inconsistently with Articles 3.2, 3.4, and 3.5; and we exercise judicial economy on the United Arab Emirates' claims under Articles 9.1 and 11.1.

7.84. We structure our discussion as follows: first, we set out the applicable requirements of Article 3.1 (section 7.3.1); second, we apply that standard to the facts of this case to assess whether Pakistan acted inconsistently with Article 3.1, and we conclude that it did (section 7.3.2); and last, we explain that we do not address the United Arab Emirates' consequential arguments under

[128] Notice of initiation (2012), (Exhibit ARE-5).
[129] We address the injury POI separately. (See fn 95 above).
[130] Report on final determination (2013), public version, (Exhibit ARE-2), para. 13.3.
[131] See e.g. United Arab Emirates' first written submission, paras. 123-134 and 136; and second written submission, paras. 55-68.
[132] See e.g. Pakistan's first written submission, paras. 3.80-3.82, 3.86-3.91, and 3.98; and second written submission, paras. 2.24-2.31.

Articles 3.2, 3.4, and 3.5 and we exercise judicial economy under Articles 9.1 and 11.1 (sections 7.3.3 and 7.3.4).

7.3.1 The applicable requirements of Article 3.1

7.85. Article 3.1 requires a "determination of injury" to be "based on *positive evidence* and involve an objective examination"[133] of the volume of dumped imports, their effect on prices, and their consequent impact on the domestic industry.

7.86. We have considered the ordinary meaning of "evidence" at paragraph 7.19 above, observing that the *relevance* of the evidence to the facts to be established is inherent in that ordinary meaning. The ordinary meaning of "positive" includes "admitting no question; stated, express, definite, precise; emphatic"[134] (with the phrase "proof positive" meaning "definite, absolute, or incontrovertible proof"[135]), and "providing support for a particular hypothesis, esp[ecially] one concerning the presence or existence of something".[136]

7.87. In this regard we agree with the panel in *Mexico – Anti-Dumping Measures on Rice* that "positive evidence is in the first place evidence which is material to the case at hand, in other words it is to be *relevant* and pertinent with respect to the issue to be decided", and it is these traits that "make it 'evidence' as opposed to unrelated facts".[137] That is, again, the notion of relevance is inherent in the very meaning of "evidence", and in Article 3.1 the requirement for the evidence to be relevant is underlined by the addition of the adjective "positive": as pointed out by others before us, to meet the "positive evidence" standard, evidence must, at a minimum, be "relevant … to the issue to be decided".[138]

7.88. The context provided by other provisions of the Anti-Dumping Agreement and Article VI of the GATT 1994 helps to clarify what "the issue to be decided" is, i.e. what the evidence must be relevant to. As we have observed in paragraph 7.24 above, Article VI:2 of the GATT 1994 and Articles 11.1, 2.1, and 3.5 of the Anti-Dumping Agreement show that WTO disciplines on anti-dumping set forth a scheme for remedying a *current* situation of injurious dumping.[139] Thus, for evidence to meet the requirement of "positive evidence" under Article 3.1, it must, at a minimum, pertain to that *current* situation, i.e. it must be evidence of current injury.[140]

7.89. In our view, whether the evidence on which the authority has based its determination of injury relates to current injury will depend, first, on the temporal scope of the evidence relative to the dates of initiation and of final determination. The more recent the data, the more likely they are to be relevant to current injury.[141] Second, it also depends on the relevant circumstances surrounding the authority's choice of the POI for injury.

7.90. In reaching this view we note that, addressing the same question in *Mexico – Anti-Dumping Measures on Rice*, the panel and Appellate Body also took into account the following circumstances: (a) the POI was that proposed by the applicant; (b) Mexico had not established "that practical problems necessitated this particular [POI]"; (c) Mexico had not argued "that updating the information was not possible"; (d) no attempt was made to update the information; and (e) Mexico

[133] Emphasis added.
[134] Oxford Dictionaries online, definition of "positive" https://www.oed.com/view/Entry/148318?rskey=vGamb6&result=1&isAdvanced=false#eid (accessed 12 October 2020), adj., meaning A.I.2, specifying that "positive" with this meaning is used chiefly in the phrase "proof positive n. at proof n. 1a", which, in turn, is defined as "definite, absolute, or incontrovertible proof".
[135] See fn 134 above.
[136] Oxford Dictionaries online, definition of "positive" https://www.oed.com/view/Entry/148318?rskey=vGamb6&result=1&isAdvanced=false#eid (accessed 12 October 2020), adj., meaning A.II.4.c.
[137] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.55. (emphasis added)
[138] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165.
[139] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165; Panel Reports, *Mexico – Anti-Dumping Measures on Rice,* paras. 7.57-7.61; and *Mexico – Steel Pipes and Tubes*, paras. 7.226-7.227.
[140] See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165 ("the conditions to impose an anti-dumping duty are to be assessed with respect to the current situation").
[141] See para. 7.26 above; see also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 166.

had provided no reason for failing to seek more recent information.[142] Based on the temporal gap between the POI and the dates of initiation and final determination, together with these additional circumstances, the panel and the Appellate Body in that case found that the investigating authority had failed to base its determination of injury on evidence that was relevant to the current situation, and had therefore acted inconsistently with Article 3.1.[143]

7.91. To summarize, then, Article 3.1 requires a determination of injury to be based on positive evidence. This means, at a minimum, that the evidence must be relevant, and therefore it must pertain to current injury at the time the determination is made. Whether this requirement is complied with depends not only on the temporal scope of the evidence *vis-à-vis* the dates of initiation and final determination, but also on any other relevant circumstances surrounding the authorities' determination, such as, for example, whether the authority made any attempts to update remote evidence or whether it was possible to do so.

7.3.2 Whether Pakistan acted inconsistently with Article 3.1

7.92. Similar to Article 2.1, the parties disagree on the relevant date of final determination against which the temporal scope of the evidence must be assessed. For the reasons we have already set out in section 7.2.2.1 above, which are equally applicable to the determination of injury, we find that the relevant date of final determination relative to which the temporal scope of the evidence must be assessed is 4 February 2013, and we will not repeat our reasoning here.

7.93. We therefore turn to the core question before us, which is whether Pakistan acted inconsistently with Article 3.1 by basing its determination of injury on evidence ending in June 2010, taking into account all relevant circumstances.

7.94. We begin by considering the temporal scope of the evidence relative to the dates of initiation and final determination. In this case, the POI for injury ran from January 2007 to June 2010. There was thus a temporal gap of approximately 22 months between the end of that POI and initiation (23 April 2012), and a gap of 31 months between the end of the POI and the final determination of 4 February 2013.

7.95. To assess whether evidence for such a POI was "positive evidence" and therefore, at a minimum, evidence that was relevant to the current situation, we must turn to the other circumstances surrounding the authority's selection of the POI.

7.96. First, Pakistan asks the Panel to take into account that a domestic court order directed the NTC to proceed with the complaint before it, which, according to Pakistan, meant it could not change the temporal scope of the evidence.[144] We have addressed this argument when discussing the dumping POI at paragraph 7.69 above, and the same considerations are valid here.

7.97. Second, Pakistan argues that maintaining the POI first selected in 2010 allowed the NTC to complete the investigation faster, in little more than nine months.[145] Again, we have addressed this argument at paragraphs 7.70-7.71 above. Similar to what we have observed there with regard to Article 2.1, Article 3.1 imposes an obligation on Members to base their determination of injury on "positive evidence", and mere expediency – without, for example, an explanation as to why updating the evidence was not possible – cannot explain the choice to base a determination of injury on evidence that was already almost two years old at the time of initiation, and two years and seven months old at the time of the final determination.

7.98. Third, we turn to the factors that the United Arab Emirates has asked us to take into account. The United Arab Emirates argues that, similar to *Mexico – Anti-Dumping Measures on Rice*, "(i) the selected POI was essentially what was proposed by the applicant; (ii) the NTC did not establish that

[142] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.
[143] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.64-7.65. In *Mexico – Steel Pipes and Tubes*, where the data were less remote, the panel concluded that in light of all the relevant circumstances the complainant had not established an inconsistency with Article 3.1. (Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.231-7.240).
[144] Pakistan's second written submission, paras. 2.26-2.27; response to Panel question No. 28.
[145] Pakistan's first written submission, paras. 3.89-3.90; second written submission, para. 2.28.

practical problems necessitated this particular POI; (iii) the NTC never established that updating the information was not possible; (iv) the NTC made no attempt at updating the information although there was no lack of cooperation from interested parties; and (v) the NTC provided no reason why it was not seeking more recent information".[146] We have addressed these circumstances at paragraphs 7.72-7.75 above, and identical considerations are valid here, when assessing the consistency of the determination of injury with Article 3.1.

7.99. Summing up, the NTC based its determination of injury on evidence that ended almost two years before initiation, and two years and seven months before the final determination. The NTC made no attempt to update that evidence and, during the anti-dumping proceedings, it provided no discussion whatsoever of this choice. For these reasons, we find that Pakistan failed to base its determination of injury on "positive evidence", thus acting inconsistently with Article 3.1 of the Anti-Dumping Agreement.

7.3.3 Arguments on temporal scope under Articles 3.2, 3.4, and 3.5

7.100. We have found that the final determination of 9 April 2015, which ratified the final determination of February 2013, is inconsistent with Article 3.1 because the NTC did not base the determination of injury on evidence of current injury. The United Arab Emirates argues that, as a consequence, the same measure is also inconsistent with Articles 3.2, 3.4, and 3.5.[147]

7.101. We do not address this UAE argument under Articles 3.2, 3.4, and 3.5. Later, however, we examine the merits of other arguments of the United Arab Emirates under Articles 3.2, 3.4, and 3.5, and we find that the United Arab Emirates has established that the final determination of 9 April 2015 is inconsistent with Articles 3.2, 3.4, and 3.5.[148]

7.3.4 Judicial economy under Articles 9.1 and 11.1

7.102. We refer to paragraph 7.49 above, on the conditions allowing a panel to exercise judicial economy.

7.103. In this case, the United Arab Emirates' claims under Articles 9.1 and 11.1 are directed at the same measure as the claim under Article 3.1, and at the same aspect of that measure, i.e. the temporal scope of the evidence on which the NTC based its determination of injury. Having already found that Pakistan acted inconsistently with Article 3.1, we exercise judicial economy on the United Arab Emirates' claims under Articles 9.1 and 11.1.

7.4 The NTC's choice of cost data: Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2

7.104. The United Arab Emirates claims that Pakistan acted inconsistently with its obligations under Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement, because the NTC evaluated whether Taghleef's domestic sales were made in the ordinary course of trade by examining certain "general 'cost to make and sell'"[149] data that Taghleef submitted to the NTC, instead of examining what the United Arab Emirates considers to be more specific record data[150] related to the cost of production (COP) and sale of the product under consideration[151], without providing a reasoned and adequate explanation for doing so.[152] The United Arab Emirates asserts that the decision to use this more "general" data led the NTC to incorrectly determine that a significant number of Taghleef's sales were made outside of the ordinary course of trade, and thus to erroneously establish normal value based on a subset of sales.[153]

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[146] United Arab Emirates' second written submission, para. 58.
[147] See e.g. United Arab Emirates' first written submission, para. 136.
[148] See sections 7.6, 7.7, 7.8, and 7.9 below.
[149] United Arab Emirates' first written submission, para. 175.
[150] United Arab Emirates' first written submission, paras. 175, 201, and 207-208; second written submission, para. 92.
[151] United Arab Emirates' first written submission, paras. 175-176.
[152] United Arab Emirates' first written submission, paras. 214-215, 217, and 221-224.
[153] United Arab Emirates' second written submission, para. 92 (asserting that the NTC improperly rejected "large volumes of Taghleef's domestic sales as allegedly not being in the ordinary course of trade

7.105. Pakistan denies these allegations for a number of reasons. Among other things, Pakistan asserts that the NTC was within its discretion[154] to rely on and use Taghleef's more "general" data because the company (a) provided this information to the NTC in response to a request to provide "per unit COP information for each type of [investigated product]" that reflects "actual costs"[155]; (b) did not amend, point to perceived flaws in this data[156], or dispute that it reflected the company's financial statements[157]; (c) affirmatively stated that the "cost to make" BOPP was the same for its domestic and export sales[158]; and (d) did not substantiate certain differences in selling costs that it alleged existed across different markets.[159] Pakistan also asserts that the "alternative" COP data that the United Arab Emirates highlights "could not be reconciled" with Taghleef's financial accounts.[160]

7.106. Given this, Pakistan argues that the "NTC was within the bounds of its discretion to determine" that the more general data that Taghleef provided were "by far the more plausible and reliable … in terms of reflecting the actual costs of production of the investigated product", and that the NTC's decision to use this data was reasonable and grounded in the objective characteristics of the evidence before it.[161]

7.107. We structure our discussion as follows: first, we review the salient facts underlying the United Arab Emirates' claims (section 7.4.1); second, we set out the applicable requirements of Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 (section 7.4.2); we then apply that standard to the facts of this dispute to assess whether the United Arab Emirates has established that Pakistan acted inconsistently with the requirements of Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 (section 7.4.3); and last, we conclude that it has not (section 7.4.3.3).

7.4.1 Factual overview

7.108. The United Arab Emirates' arguments, and Pakistan's response, centre on the parties' disagreement about the manner in which the NTC evaluated Taghleef's cost data during the investigation. Because the resolution of these claims requires us to examine the circumstances surrounding the NTC's cost analysis in some detail, we summarize below the key facts that are at issue in this analysis.

7.4.1.1 Exporter questionnaire

7.109. A key point of contention underlying the United Arab Emirates' Article 2.2 claims revolves around the parties' disagreement about the relative quality of two different sets of data that Taghleef provided to the NTC when the company responded to two different sections of the NTC's questionnaire for exporting producers ("exporter questionnaire"). The sections of the exporter questionnaire at issue can be found at subsection D-3 and section F.

7.110. Subsection D-3 of the exporter questionnaire asked Taghleef to provide the NTC with, among other things, the "[p]er unit total cost of production (cost of production plus administrative, selling

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because of the use of cost data that were not specific to the domestic sales of the product under consideration"); response to Panel question No. 38, paras. 41-42 (asserting that the NTC's decision to use less specific "cost data that did not reasonably reflect the costs associated with the production and sale" of BOPP film caused the NTC to find that certain sales were outside the ordinary course of trade and thus to erroneously establish normal value on a "relatively small subset of sales"); and comments on Pakistan's response to Panel question No. 87, p. 3 (observing that the United Arab Emirates' claim "focuses on the NTC's decision to use Taghleef's general cost data from Appendix 2 of Section F … and not its specific domestic cost data from Section D-3", which in turn caused the NTC to find that certain sales were not made in the ordinary course of trade "and the consequent erroneous establishment of normal value").

[154] Pakistan's first written submission, para. 3.233; second written submission, para. 2.53.

[155] Pakistan's first written submission, para. 3.143; see also Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), p. 29.

[156] Pakistan's first written submission, para. 3.147.

[157] Pakistan's first written submission, para. 3.147.

[158] Pakistan's first written submission, para. 3.156; see also Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), p. 2.

[159] Pakistan's first written submission, paras. 3.157-3.162.

[160] Pakistan's first written submission, paras. 3.140 and 3.231.

[161] Pakistan's second written submission, para. 2.53.

and financial expenses)" associated with each sale that Taghleef made in the domestic market.[162] Section D-3 appears in section D of the exporter questionnaire. Section D is titled "Domestic Sales of the [investigated product]". Section D instructed Taghleef to "please provide specific information on all your sales of the [investigated product] in your domestic market during the POI". The relevant portion of subsection D-3 reads as follows:

> **D-3 Information on Domestic market customers**
>
> Following information should be provided for each transaction separately in a table form. This information should also be supplied on CD ROM. These data files should be compatible to the US versions in EXCEL format.
>
> | **Information Required** | | **Field Name** |
> |---|---|---|
> | A | Sequential number for the transaction | **S. No.** |
> | … | | |
> | AK | Per unit total cost of production (cost of production plus administrative, selling and financial expenses) for this transaction | **COP** |

7.111. Section F of the exporter questionnaire, which is titled "Cost of Production", asked Taghleef to "report per-unit COP information for each type of [investigated product] in Appendix No. 2" and specified that the amounts that were to be reported in appendix 2 "should be based on the actual costs incurred" by Taghleef as recorded in the company's "normal accounting system".[163]

7.112. Taghleef responded to these requests by providing the NTC with two different spreadsheets.

7.113. The first spreadsheet responded to subsection D-3 of the exporter questionnaire by including a column with the requested "total cost of production" data for each domestic sale. We refer to this information as the "appendix D-3" data. The exporter questionnaire did not ask Taghleef to break down the elements of the COP associated with each of Taghleef's sales (i.e. into a separate breakout of administrative, selling, and general costs (SG&A) and profit, for example), and Taghleef did not provide such a breakdown in appendix D-3.[164]

7.114. The second spreadsheet responded to section F of the exporter questionnaire with data that Taghleef provided in appendix 2 to section F. We refer to this data as the "appendix 2" data. The appendix 2 data break down the costs associated with the production of BOPP film into a number of categories, including the cost of raw materials, packing material, salaries and wages, manufacturing overhead, administrative expenses, selling and distribution expenses, financial expenses, and wholesaler's profit. The appendix 2 data did not, however, segment these costs on a market-by-market basis.[165]

7.115. Taghleef did not provide audited financial statements to the NTC.[166] Notwithstanding this, Taghleef asserted that the appendix 2 data mirrored the company's audited financial statements.[167] Taghleef did not make a similar assertion with respect to the appendix D-3 data.

7.116. The NTC and Taghleef had several follow-on communications related to Taghleef's cost data, including in the context of a deficiency letter, a letter related to the dumping calculation, the

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[162] NTC's blank exporter questionnaire, (Exhibit PAK-37), pp. 16-17; Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), pp. 25-26.

[163] NTC's blank exporter questionnaire, (Exhibit PAK-37), p. 18; Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), p. 29.

[164] Appendix D-3 to Taghleef's response to exporter questionnaire, (Exhibit PAK-14 (BCI)). This exhibit provides a single COP for each transaction.

[165] Appendix 2 to Taghleef's response to exporter questionnaire, (Exhibit PAK-13 (BCI)).

[166] Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), p. 29 (stating that [[***]], and that [[***]]).

[167] United Arab Emirates' second written submission, para. 105 (referring to Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 2). Taghleef's letter of 30 November 2012 states: [[***]]).

preliminary determination, an email exchange in which Taghleef bifurcated some of the appendix 2 data that it had previously provided to the NTC, the statement of essential facts, and the final determination. The parties dispute the contents and quality of the information contained in these exchanges, which are summarized below.

7.4.1.2 Deficiency letter

7.117. On 22 February 2011, the NTC sent a deficiency letter to Taghleef in which the NTC requested Taghleef, in relevant part:

a. To provide cost to make and sell on a quarterly basis in appendix 2 format.

b. To confirm that the cost to make and sell reported at appendix 2 related to overall production of BOPP film only, and to bifurcate those costs if they did not relate to production of BOPP film only.

c. To "work out" costs to make and sell BOPP film for domestic sales and export sales separately.[168]

7.118. On 1 March 2011, Taghleef responded to the NTC's deficiency letter as follows:

a. Taghleef attached the cost to make and sell on a quarterly basis in appendix-2 format. In addition, Taghleef drew the NTC's "attention to the cost of production given in Appendix D-3". Taghleef stated that these costs (i.e. the appendix D-3 costs) were "based on the Company's quarterly average of 'standard costs', which should be used for any calculations for the Company".[169]

b. Taghleef confirmed that the cost to make and sell data that the company provided in appendix 2 related to the production of BOPP film.[170]

c. Taghleef stated that there were no differences between the cost to make BOPP film[] for domestic and export sales, but indicated that there were some differences in the cost of sales between the domestic and export market, which Taghleef asserted were "clearly provided" in appendices C-3 and D-3.[171]

7.119. Taghleef's 1 March 2011 reply did not provide additional information related to the differences that Taghleef stated existed with respect to the company's domestic and export sales.

7.4.1.3 Preliminary determination

7.120. On 10 August 2012, the NTC issued its preliminary determination, in which it used Taghleef's appendix 2 data to calculate the company's costs.[172]

7.121. On 30 November 2012, Taghleef commented on the preliminary determination. It pointed out that the NTC had used the appendix 2 data, which included [[***]].[173] For this reason, Taghleef opined that these costs were not representative of the costs associated with domestic sales. Taghleef stated that it was more appropriate for the NTC to use the separate costs that it had provided in appendix D-3.[174]

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[168] Third deficiency letter, (Exhibit ARE-17), p. 1.
[169] Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), p. 2, para. A3. Taghleef repeated this statement in a 30 November 2012 letter to the NTC commenting on the NTC's dumping calculations. (Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 2).
[170] Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), p. 2, para. A4.
[171] Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), p. 2, para. A4.
[172] Pakistan's first written submission, para. 3.167.
[173] Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 1.
[174] Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), pp. 2-3. See also United Arab Emirates' first written submission e.g. paras. 198, 208, 213, and 225; and Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), p. 2, para. A3.

7.4.1.4 Email of December 2012

7.122. On 18 December 2012, Taghleef sent an email to the NTC in which it reiterated its position that the data used by the NTC to calculate Taghleef's costs did not correctly represent the cost to make and sell in the domestic market. Taghleef attached files in which it split the appendix 2 data by territory into Pakistan, Dubai, Oman, and the rest of the world, and suggested that these files showed how the appendix D-3 data were to be reconciled with the appendix 2 data.[175] These files, however, did not appear to allocate to domestic sales a number of fixed costs (e.g. manufacturing salaries and wages, depreciation, etc.).[176]

7.4.1.5 Taghleef's comments on the statement of essential facts

7.123. On 17 January 2013, Taghleef commented on the NTC's statement of essential facts. In its letter, Taghleef stated that the NTC had "chosen to ignore what Taghleef [had] repeatedly stated in its response to the exporter's questionnaire, deficiency letters, detailed letters and submissions … that the information representing the cost to make and sell for domestic sales is what was provided in [appendix] D-3 rather than Appendix 2".[177]

7.4.1.6 The NTC's response in the Report on final determination

7.124. In its 2013 Report on final determination, responding to Taghleef's comment on the NTC's statement of essential facts, the NTC stated that the appendix D-3 data failed to allocate to domestic sales certain fixed costs. In light of this, the NTC concluded that the cost allocation method in appendix D-3 did not present a "true and fair picture of cost of production. Hence the [NTC] calculated cost of production of Taghleef Oman [*sic*] on the basis of information provided by it in Appendix 2".[178]

7.4.2 The applicable requirements of Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2

7.4.2.1 Article 2.2 of the Anti-Dumping Agreement

7.125. Article 2.2 of the Anti-Dumping Agreement dictates the manner in which an investigating authority must determine normal value in the event the authority cannot use sales data from the exporting country's domestic market to calculate the dumping margin.[179] Specifically, it provides, in relevant part, that:

> When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country … the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of

[175] Taghleef's email of 18 December 2012, (Exhibit PAK-12A (BCI)), (explaining: "[y]ou will see a highlighted cell (H48) in each of the sheets and these would reconcile with the quarterly COP numbers provided in Annexure D3").

[176] Taghleef's email of 18 December 2012, (Exhibit PAK-12A (BCI)). On this point, see also fn 241 below.

[177] Taghleef's comments on statement of essential facts, (Exhibit ARE-25), section 2.

[178] Report on final determination (2013), public version, (Exhibit ARE-2), pp. 72-73. We note that page 72 of the report uses the term "Taghleef Oman" rather than Taghleef Industries or Taghleef LLC. When the Panel asked Pakistan to explain this apparent discrepancy, Pakistan asserted that the reference to Taghleef Oman was a typographical error. Pakistan supported this assertion by noting, among other things, that (a) this specific reference to Taghleef Oman appears in a section of the report that is titled "Comments of Taghleef Industries"; and (b) Taghleef Industries and Taghleef Oman were frequently referred to in a combined or collective manner during the investigation. (Pakistan's written opening statement, paras. 51-54; response to Panel question No. 83, p. 37; comments on United Arab Emirates' request for interim review, para. 3.22). Given this, and as we discuss in our response to the comments that the United Arab Emirates submitted on this issue in the Interim Report, we accept that the reference to Taghleef Oman that appears on page 71 of the 2013 Report on final determination is a typographical error.

[179] See e.g. Panel Report, *US – Softwood Lumber V*, para. 7.278 (observing that the provision "concerns the establishment of an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country when that price cannot be used").

> production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

7.126. In such circumstances, Article 2.2 mandates ("shall be determined") that an investigating authority select between one of two types of data to determine normal value in the event there are no sales of the like product that were made in the ordinary course of trade: either third country sales, or the COP in the country of origin. When an authority elects to determine normal value based on the COP, the authority must add a "reasonable" amount for SG&A and profits to the identified production costs.[180]

7.4.2.2 Article 2.2.1 of the Anti-Dumping Agreement

7.127. Article 2.2.1 of the Anti-Dumping Agreement provides that:

> Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.[181]

7.128. Article 2.2.1 establishes an analytic framework to verify whether an investigating authority may disregard certain below-cost sales when determining normal value. Specifically, the framework provides that an investigating authority may disregard certain below-cost sales that the authority determines to have been made outside the ordinary course of trade.[182] The first sentence of this provision sets out two steps that investigating authorities must follow when applying this framework to determine whether particular below-cost sales may be disregarded as being outside the ordinary course of trade.

7.129. First, the investigating authority must ascertain that a sale or sales have been made at "prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs". Second, the investigating authority must determine that such below-cost sales have been made (a) within an extended period of time, (b) in substantial quantities, and (c) at prices which do not provide for the recovery of all costs within a reasonable period of time.

7.4.2.3 Article 2.2.1.1 of the Anti-Dumping Agreement

7.130. Article 2.2.1.1 of the Anti-Dumping Agreement provides that[183]:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.
>
> Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs.

[180] See e.g. Panel Report, *US – Softwood Lumber V*, para. 7.278.
[181] Fns omitted.
[182] See e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 147.
[183] We set out the sentences separately for ease of reference.

> Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.

7.131. Article 2.2.1.1 establishes three rules for investigating authorities to follow in the event that an authority determines to construct normal value under Article 2.2 of the Anti-Dumping Agreement.

7.132. First, the first sentence of Article 2.2.1.1 establishes a general preference for an authority to use an exporter or producer's own records to determine a company's costs, so long as those records have been kept in accordance with generally accepted accounting principles (GAAP) and the records "reasonably reflect" the costs that the company incurs to produce and sell the product under consideration.

7.133. This means, conversely, that an authority need not necessarily use a company's records to calculate its costs where those records do not reflect GAAP due to their potential lack of reliability. The same is true where the authority determines that a company's records do not "reasonably reflect" the company's costs.

7.134. The phrase "reasonably reflect" is not defined in the Anti-Dumping Agreement. The ordinary meaning of the word "reasonably", however, includes: "justly, properly, fairly"; "[f]airly or pretty well"; and "sufficiently, suitably".[184] The ordinary meaning of the word "reflect" includes "[t]o display as if in a mirror" and "to reproduce, esp. faithfully or accurately".[185]

7.135. Other dispute proceedings, which we find persuasive, have interpreted the phrase "reasonably reflect" to mean "to mirror, reproduce, or correspond to something suitably and sufficiently".[186] This condition has been deemed to be met when, for example, the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce the costs that the company incurred to produce and sell the product under consideration.[187]

7.136. Those proceedings have also observed that the manner in which an exporter or producer records its costs in financial statements may not necessarily correspond to how the product under consideration is defined for purposes of a specific anti-dumping investigation. Consequently, how an exporter or producer registers its costs in its financial statements may not "reasonably reflect the costs associated with the production and sale of the product under consideration" in a specific anti-dumping investigation.[188]

7.137. Investigating authorities are, of course, free to examine and test the reliability and accuracy of a producer's or exporter's recorded costs, i.e. to determine for example: whether the records accurately reflect all categories of costs; whether the costs that a company claims to have incurred have been over or understated; and whether the allocations made are appropriate and in accordance with proper accounting standards.[189]

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[184] Oxford Dictionaries online, definition of "reasonably" https://www.oed.com/view/Entry/159074?redirectedFrom=reasonably#eid (accessed 15 October 2020), adv., meanings 1-2.

[185] *Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2506; Oxford Dictionaries online, definition of "reflect" https://www.oed.com/view/Entry/160912?rskey=FxHC69&result=3&isAdvanced=false#eid (accessed 15 October 2020), v., meaning 6.b.

[186] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.20.

[187] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26.

[188] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.21 and fn 127 (observing that "the exporter or producer under investigation may export or produce a number of different products", "[w]hile the product under consideration in a particular anti-dumping investigation may be limited to a single model, size, type or specification of a product", and that the records of such exporter or producer may not allocate costs on a "product-by-product or model-by-model basis").

[189] Panel Report, *EU – Biodiesel (Argentina)*, fn 400:

> However, we do not understand the phrase "reasonably reflect" to mean that whatever is recorded in the records of the producer or exporter must be automatically accepted. Nor does it mean … that the words "reasonably reflect" are limited only to the "allocation" of costs. The investigating

7.138. Second, the second sentence of Article 2.2.1.1 establishes a general rule governing the scope of evidence that an authority must weigh when determining how to properly allocate a producer or exporter's costs. Specifically, the sentence requires authorities to "consider all available evidence on the proper allocation of costs", including evidence that a producer or exporter provides during the course of the investigation, so long as the company can demonstrate that its allocation criteria reflect the company's past allocation practices.

7.139. The Anti-Dumping Agreement does not specifically define either the word "consider" or the phrase "proper allocation".

7.140. The ordinary meaning of the word "consider" includes: "[t]o look attentively"; "[t]o contemplate mentally, fix the mind upon", "to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of"; "[t]o think, reflect, take note"; and "to regard, make allowance for".[190]

7.141. After analysing the ordinary meaning of the word, another dispute proceeding which we find relevant understood the term "consider" in the context of this sentence to mean that an investigating authority is required to "reflect on" and to "weigh the merits of" all available evidence on the proper allocation of costs.[191] The parameters of this obligation will vary case by case. In instances where there is compelling evidence that more than one allocation methodology may be appropriate to ensure there is a "proper" allocation of costs, the same dispute proceeding concluded that an investigating authority may be required to "reflect on" and "weigh the merits of" evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to "consider all available evidence".[192]

7.142. Finally, the third sentence of Article 2.2.1.1 requires an authority to adjust a company's costs to ensure that that the construction of normal value is not distorted by certain exceptional non-recurring or start-up costs.

7.143. Prior dispute proceedings have interpreted the second and third sentences of Article 2.2.1.1 to encompass "the understanding that the inquiry envisaged under Article 2.2.1.1 is one relating to the circumstances of each investigated exporter or producer in the exporting country".[193] Article 2.2.1.1 has also been read to permit an authority to reject an allocation methodology that would exclude certain costs that in fact pertain to the product under investigation.[194] As such, Article 2.2.1.1 has been interpreted to allow an investigating authority to "obtain a more precise calculation of the costs associated with the product under consideration for the specific exporter or producer by ensuring or verifying that there is a genuine relationship between the costs reflected in the exporter's or producer's records and the costs associated with the production and sale of the specific product under consideration".[195] We agree with these interpretations.

7.144. The text of Article 2.2.1.1 does not specify how an investigating authority is to demonstrate that it has fulfilled the article's requirement to calculate costs on the basis of the records of a producer or exporter, and that it has considered all available evidence on the proper allocation of

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authorities are certainly free to examine the reliability and accuracy of the costs recorded in the records of the producers/exporters, and thus, whether those records "reasonably reflect" such costs. In particular, the investigating authorities are free to examine whether all costs incurred are captured and none has been left out; they can examine whether the actual costs incurred have been over or understated; and they can examine if the allocations made, for example for depreciation or amortization, are appropriate and in accordance with proper accounting standards. They are also free to examine non-arms-length transactions or other practices which may affect the reliability of the reported costs. But, in our view, the examination of the records that flows from the term "reasonably reflect" in Article 2.2.1.1 does not involve an examination of the "reasonableness" of the reported costs themselves, when the actual costs recorded in the records of the producer or exporter are otherwise found, within acceptable limits, to be accurate and faithful.

[190] Oxford Dictionaries online, definition of "consider" https://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid (accessed 15 October 2020), v., meanings 2, 3, 4, and 7.

[191] Appellate Body Report, *US – Softwood Lumber V*, para. 133.

[192] Appellate Body Report, *US – Softwood Lumber V*, para. 138.

[193] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.22.

[194] Panel Report, *US – Softwood Lumber V*, para. 7.258 (referring to SG&A costs).

[195] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.22.

costs. Further, prior proceedings that have considered the scope of an authority's obligation to explain its conduct under Article 2.2.1.1 have generally done so when an authority has used external cost data, after determining that a party's records are either inconsistent with GAAP or do not reasonably reflect the costs associated with the production and sale of the product under consideration.[196] We note that those circumstances are different from the circumstances in the present dispute, given that the evidence in the present dispute indicates that the NTC did use Taghleef's records in its cost analysis.

7.145. Finally, we note that while the text of Article 2.2.1.1 states that its terms apply to Article 2.2, other proceedings have observed that Article 2.2.1.1 is "applicable to determining whether, pursuant to Article 2.2.1, sales in the domestic market of the exporting country are at prices below per-unit costs and therefore not in the ordinary course of trade by reason of price".[197] We agree with this observation.

7.4.2.4 Article 2.2.2 of the Anti-Dumping Agreement

7.146. Article 2.2.2 of the Anti-Dumping Agreement states that:

> For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:
>
> (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
>
> (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7.147. Article 2.2.2 thus establishes a two-tiered data hierarchy that an authority is expected to follow when determining what administrative, selling, and general costs, and profit figures should be used in the construction of normal value.[198] Specifically, the first sentence of this article requires that, if actual data for SG&A costs and profits in the ordinary course of trade exist for the exporter under investigation, then the authority must use that actual data to calculate normal value. If actual data are not available, an authority may determine SG&A costs and profits using one of the three other methods outlined in the second sentence of this provision.[199]

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[196] Panel Report, *China – Broiler Products*, para. 7.164:
> In sum, the Panel is of the view that although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so.

(emphasis original)

[197] See e.g. Panel Report, *EU – Biodiesel (Argentina)*, fn 376.

[198] See also, Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.25; *EC – Tube or Pipe Fittings*, para. 97.

[199] The parties to this dispute have not raised any issues regarding the second sentence of Article 2.2.2.

7.148. The Anti-Dumping Agreement does not define the term "actual"; the ordinary meaning of the word includes "[e]xisting in fact, real".[200]

7.4.3 Whether Pakistan acted inconsistently with the requirements of Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2

7.149. In this section we apply the standard set out above to the particular facts of this dispute.

7.150. In doing so we note that United Arab Emirates' written submissions periodically refer to its Article 2.2 claims either collectively (by asserting, for example, that the "NTC acted inconsistently with its obligations under Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2")[201] or in pairs (by asserting, for example, that the "NTC acted inconsistently with Articles 2.2.1.1 and 2.2.2" when it determined to use costs that were "not associated with … domestic sales", and that the NTC improperly "rejected and replaced verifiable cost data … in violation of Articles 2.2 and 2.2.1").[202]

7.151. While these submissions thus do not always specify precisely how the United Arab Emirates believes the NTC's conduct to be inconsistent with Pakistan's obligations under Article 2.2, 2.2.1, 2.2.1.1, or 2.2.2 standing alone, we understand the United Arab Emirates to make two interrelated arguments under different combinations of these provisions.

7.152. First, under Articles 2.2.1.1 and 2.2.2, we understand the United Arab Emirates to challenge the NTC's decision to use Taghleef's appendix 2 data rather than its appendix D-3 data and the NTC's alleged failure to provide a reasoned and adequate explanation for doing so. Second, we understand the United Arab Emirates to make a consequential claim that Pakistan acted inconsistently with Articles 2.2 and 2.2.1 based on the premise that, if the NTC *had* used Taghleef's appendix D-3 data, Taghleef's overall costs would likely have been lower, which, in turn, would have led the NTC to determine that more of Taghleef's domestic sales had been made in the ordinary course of trade, which, in turn "would have resulted in a lower dumping margin".[203]

7.153. We consider these challenges in turn.

7.4.3.1 The NTC's decision to use the data that Taghleef provided in appendix 2 rather than appendix D-3

7.4.3.1.1 Article 2.2.1.1

7.154. The parties do not dispute that the data in either appendix 2 or appendix D-3 were drawn from "records kept" by Taghleef. The parties also have not questioned whether Taghleef's records were prepared in accordance with GAAP. The central question that thus presents itself under the United Arab Emirates' Article 2.2.1.1 claim (and that impacts all of the United Arab Emirates' related claims) is: could an unbiased and objective authority have elected, as the NTC did, to use the cost information contained in appendix 2 instead of appendix D-3 to evaluate whether Taghleef's domestic sales were made in the ordinary course of trade?

7.155. The answer to this question turns on whether (a) an objective and unbiased authority could, in accordance with Article 2.2.1.1, determine that Taghleef's appendix 2 cost data "reasonably reflect[ed]" the costs associated with the production of BOPP; and (b) the NTC "consider[ed] all available evidence" on the proper allocation of costs when it decided to rely on the appendix 2 data to measure Taghleef's costs.

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[200] Oxford Dictionaries online, definition of "actual" https://www.oed.com/view/Entry/1972?redirectedFrom=actual#eid (accessed 15 October 2020), adj., meaning 2.

[201] United Arab Emirates' first written submission, para. 227; see also second written submission, para. 98 (claiming that "[b]y using costs that were not associated with the domestic sales in the UAE for establishing the normal value, the NTC acted inconsistently with Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement").

[202] United Arab Emirates' first written submission, paras. 214 and 227.

[203] United Arab Emirates' second written submission, para. 97.

7.156. We begin with the *reasonably reflect* element: Did the appendix 2 data "reasonably reflect" Taghleef's costs?

7.157. Pakistan asserts that the NTC was within its discretion[204] to rely on and use Taghleef's appendix 2 cost data because (a) Taghleef submitted the appendix 2 data in response to section F of the NTC's exporter questionnaire request to provide "per-unit COP information for each type of [investigated product]", which should reflect "actual costs"[205]; (b) Taghleef did not seek to amend its appendix 2 data nor dispute that it reflected its financial statements[206]; (c) Taghleef, when asked by the NTC to "bifurcate" the costs associated with its domestic and export sales, affirmatively stated that the "cost to make" BOPP in either instance was the same[207]; and (d) while Taghleef alleged that certain differences in selling costs existed, it did not substantiate those differences, and therefore the NTC could not rely on them.[208]

7.158. The United Arab Emirates does not appear to dispute points (a)-(c) above. The United Arab Emirates does, however, challenge the premise that Taghleef had an obligation to support its appendix D-3 cost allocation by providing additional material to further substantiate and explain the numerical information contained in the appendix D-3 spreadsheet.[209] Specifically, the United Arab Emirates asserts that the cells labelled "Other 1", "Other 2", and "Other 3" in appendix D-3[210] explain the differences between the appendix 2 and appendix D-3 cost figures, and that these differences were "clearly provided"[211] to the NTC.

7.159. Pakistan disagrees, noting that "there was no evident basis to understand the origins of these figures".[212] Pakistan also observes that "in contrast to Taghleef's explicit assertion that the Appendix 2 data 'mirror[ed]' the company's financial statements", Taghleef "never asserted that the Appendix D-3 data could be reconciled with its financial statements".[213]

7.160. We observe that the ordinary meaning of the phrase "reasonably reflect" as it is used in Article 2.2.1.1 indicates that when the records of a producer or exporter are used to calculate costs, those records must fairly reproduce the actual costs that are incurred in the production and sale of the product under consideration.

7.161. In this particular dispute, we note that the United Arab Emirates, and Taghleef in the underlying proceeding, have suggested that Taghleef's appendix D-3 data were superior to the costs that it recorded in appendix 2 because appendix D-3 contained "specific … cost data that directly applied to … the production and sale"[214] of BOPP film, and because the "costs given in [appendix] D-3 … are based on the Company's quarterly average of 'standard costs'".[215] By contrast, the United Arab Emirates asserts that Taghleef's appendix 2 data "w[ere] not representative of the costs affiliated with domestic sales, as it included certain non-relevant costs for selling to markets other than in the UAE".[216]

7.162. We also observe, however, that the COP section of the NTC's exporter questionnaire instructed Taghleef to report the company's "per-unit COP information for each type of [investigated product] in Appendix No. 2" and further instructed Taghleef that the "amounts reported in

[204] Pakistan's second written submission, para. 2.53.
[205] NTC's blank exporter questionnaire, (Exhibit PAK-37), p. 18; Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), p. 29.
[206] Pakistan's first written submission, para. 3.147.
[207] Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), p. 2.
[208] Pakistan's first written submission, paras. 3.157-3.160 and 3.162.
[209] United Arab Emirates' response to Panel question No. 46, paras. 51-52 (asserting, among other things, that nothing in the Anti-Dumping Agreement "requires an interested party to submit replies to … questionnaires accompanied by 'evidence'" and that "the NTC never made any request to provide 'evidence' to support the COP number given in response to the questionnaire as Appendix D-3").
[210] United Arab Emirates' response to Panel question No. 42, para. 50.
[211] Taghleef's response to third deficiency letter, (Exhibit ARE-18b (BCI)), para. A4.
[212] Pakistan's second written submission, para. 2.71.
[213] Pakistan's response to Panel question No. 44.
[214] United Arab Emirates' first written submission, para. 192.
[215] United Arab Emirates' first written submission, para. 208.
[216] United Arab Emirates' first written submission, para. 198; see also ibid. para. 213 (stating that the appendix 2 data "include many extraordinary and abnormal cost items … such as promotional costs for sales to European and American markets and carrying costs of investment and cost of shared services rendered to Ti Group").

Appendix 2 should be based on the actual costs incurred by your company as recorded in your normal accounting system".[217] We further observe that Taghleef stated that the cost information that it provided to the NTC in appendix 2 mirrored the company's audited financial statements.[218] Taghleef does not appear to have made a similar statement regarding the appendix D-3 data.

7.163. Given this, we are of the view that the various cost information that Taghleef provided to the NTC both in its responses to the questionnaire and in follow-on exchanges, and the representations that Taghleef made to the NTC related to this data appear to be somewhat conflicted.

7.164. This conflict might have been capable of being resolved by the NTC had it had the opportunity to evaluate the appendix 2 and appendix D-3 data against Taghleef's audited financial statements. In this instance, however, Taghleef declined to provide its audited financial statements to the NTC[219], noting that, [[***]].[220]

7.165. The United Arab Emirates acknowledges that the NTC advised Taghleef of this issue in both the NTC's preliminary and final report.[221] Specifically, the United Arab Emirates acknowledges that the NTC advised Taghleef that it had "'not provided a copy of the audited accounts' and that such a copy is 'required for cross checking the cost of production [of the] investigated products while determining ordinary course of trade'".[222] Notwithstanding this, the United Arab Emirates suggests that these statements are irrelevant[223] to resolving whether the data that the NTC elected to use to determine that some of Taghleef's sales were made in the ordinary course of trade reasonably reflected Taghleef's costs.

7.166. We are of the view that when an authority is presented with what appear to be conflicting sets of company cost data, the phrase "reasonably reflect" in Article 2.2.1.1 provides the authority with a degree of discretion to select the data that correspond better to the company's actual costs, absent evidence that demonstrates that a particular dataset is clearly superior (for example data reflected in audited financial statements). While the exact scope of this discretion will vary depending on the specific facts of each proceeding, in this instance we conclude that the NTC acted within the bounds of its discretion when it elected to use Taghleef's appendix 2 data to conduct its dumping analysis.

7.167. We now turn to the *consideration* element: Did the NTC "consider all available evidence on the proper allocation" of Taghleef's costs when it determined to use Taghleef's appendix 2 cost data?

7.168. The United Arab Emirates asserts that the NTC "never engaged with the COP information in Appendix D-3".[224]

7.169. Pakistan counters this assertion by noting that the NTC stated in the Report on final determination that, "[t]he cost of production stated at [appendix] D-3 has been calculated by allocating fixed costs to export markets other than Pakistan. Similarly fixed cost has not been allocated to cost of production for domestic sales. This method of cost allocation does no[t] present [a] true and fair picture of cost of production. Hence the [NTC] calculated cost of production … on the basis of information provided" by Taghleef in appendix 2.[225]

7.170. We appreciate that the United Arab Emirates takes the view that the NTC should have relied upon Taghleef's appendix D-3 data when determining how to properly allocate the company's costs. We disagree, however, with the suggestion that the NTC failed to consider this information. To the

[217] NTC's blank exporter questionnaire, (Exhibit PAK-37), p. 18; Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), p. 29.
[218] United Arab Emirates' second written submission, para. 105 (referring to Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 2); see also Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 2.
[219] Pakistan's response to Panel question No. 44.
[220] Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), p. 29.
[221] United Arab Emirates' first written submission, para. 223.
[222] United Arab Emirates' first written submission, para. 223 (referring to and quoting Report on preliminary determination, (Exhibit ARE-9), para. 15.2.5; and Report on final determination (2013), public version, (Exhibit ARE-2), para. 15.2.5).
[223] United Arab Emirates' first written submission, para. 232.
[224] United Arab Emirates' second written submission, para. 96.
[225] Report on final determination (2013), (Exhibit PAK-1 (BCI)), pp. 72-73.

contrary, we note that the NTC's Report on final determination both summarizes and responds to the cost-related arguments that Taghleef submitted to the NTC regarding the appendix D-3 and appendix 2 data.[226] While this portion of the Report on final determination is not lengthy, we believe that it is sufficient to demonstrate that the NTC did in fact, contemplate, think over, take note of, and regard[227] – or, stated differently, "consider" – Taghleef's appendix D-3 material when determining how to properly allocate Taghleef's costs.

7.171. In sum, given that (a) Taghleef made arguably conflicting statements about the nature of its data; (b) Taghleef provided arguably incomplete and conflicting information in response to the NTC's deficiency request that Taghleef separate and "work out" its costs to "make and sell … BOPP film" in the domestic and export market; (c) absent these clarifications, the NTC did not have the means to separately evaluate whether the appendix D-3 data were objectively superior to appendix 2 because the NTC could not weigh this data against the company's audited financial statements; and (d) the Report on final determination demonstrated that the NTC considered Taghleef's appendix D-3 arguments, we conclude that the NTC's establishment of the facts surrounding Taghleef's cost data was proper and that its evaluation of those facts was unbiased and objective. We therefore find that the United Arab Emirates has not established that the NTC's decision to use Taghleef's appendix 2 data was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

7.4.3.1.2 Article 2.2.2

7.172. The facts and arguments underlying the United Arab Emirates' Article 2.2.2 claim, and Pakistan's response to this claim, are virtually indistinguishable from the facts and arguments put forward in the context of the United Arab Emirates' Article 2.2.1.1 claim. Both claims are data-oriented and take issue with the NTC's decision to use the information that Taghleef provided to the NTC in appendix 2 rather than appendix D-3, to ascertain whether sales were in the ordinary course of trade. The only apparent difference between the two is that the United Arab Emirates' Article 2.2.2 allegation is premised on the suggestion that appendix D-3 reflected "actual data" within the meaning of Article 2.2.2, whereas appendix 2 did not.[228]

7.173. As noted above, when an investigating authority determines normal value under Article 2.2, Article 2.2.2 requires the authority to use a party's "actual" SG&A cost and profit data "pertaining to production and sales in the ordinary course of trade".

7.174. The United Arab Emirates claims that Pakistan acted inconsistently with this requirement because, by using what it considers was more general information contained in appendix 2 rather than more "specific per unit" cost data contained in appendix D-3, the NTC "used cost data for SG&A that were not based on actual data".[229]

7.175. Pakistan responds that Taghleef's appendix 2 data were the relevant source of information to determine the company's SG&A costs and profits and was, in fact, "actual data"[230] pertaining to Taghleef's domestic sales "taken from [Taghleef's] audited financial statements whereas the Appendix D-3 were standard costs".[231]

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[226] Report on final determination (2013), (Exhibit PAK-1 (BCI)), pp. 72-73 (reproducing Taghleef's comments in which the company reiterated its position "that the [NTC]'s methodology for the determination of dumping in the [preliminary determination] is not in accordance with the information provided by Taghleef and thus in contravention of the Ordinance", and asserted that the "[NTC] has chosen to ignore what Taghleef has repeatedly stated in its response to the Exporter's Questionnaire, deficiency letters, detailed letters and submissions etc., that the information representing cost to make and sell for domestic sales is what was provided in [appendix] D-3 rather than Appendix 2"). See also fn 241 below.

[227] See para. 7.140 above (reviewing the meaning of the word "consider").

[228] United Arab Emirates' first written submission, paras. 207 and 224 (asserting that the cost data used by the NTC was not "actual data" and that the NTC rejected Taghleef's "actual data on costs"); second written submission, para. 93 (asserting that the NTC used "cost data for SG&A that were not based on actual data pertaining to the production and sale of the like product in the home market"); responses to Panel question No. 38, para. 42 (same); No. 49, para. 58 (same) and No. 87, para. 6 (same); and comments on Pakistan's response to Panel question No. 87, p. 3.

[229] United Arab Emirates' second written submission, para. 93.

[230] Pakistan's first written submission, para. 3.224.

[231] Pakistan's second written submission, para. 2.75.

7.176. The Panel notes that in support of its Article 2.2.2 claim, the United Arab Emirates has not pointed to any additional evidence not described above that would lead us to conclude that the information that Taghleef provided to the NTC when it replied to section F of the exporter questionnaire was not "actual data", or that Taghleef's appendix D-3 information better reflected the company's "actual" SG&A costs and profits. We again observe that (a) the instructions that were provided in the exporter questionnaire that the NTC issued to Taghleef requested the company to base the "per-unit COP" amounts that it reported in appendix 2 on the "actual costs" that Taghleef incurred "for each type of [investigated product]"; (b) Taghleef asserted that its appendix 2 data mirrored the company's audited financial statements; and (c) the NTC was unable to evaluate Taghleef's datasets against the company's audited financial statements.[232]

7.177. Based on this, and given the conflicting statements that Taghleef made with respect to its data that we describe above, we conclude that the United Arab Emirates has not established that the NTC's decision to use Taghleef's appendix 2 information to determine the company's SG&A costs and profits was inconsistent with Pakistan's obligations under Article 2.2.2 of the Anti-Dumping Agreement.

7.4.3.1.3 The NTC's explanation in the Report on final determination

7.178. Together with the arguments noted above, the United Arab Emirates argues that Pakistan acted inconsistently with its obligations under Articles 2.2.1.1 and 2.2.2 of the Anti-dumping Agreement because the NTC failed to adequately explain its decision not to use Taghleef's appendix D-3 information.

7.179. We understand that the United Arab Emirates' arguments that the NTC failed to adequately explain its decision centre on Articles 2.2.1.1 and 2.2.2[233], in that they challenge the NTC's alleged failure to explain why it did not use "the most relevant cost data"[234] or why Taghleef's "actual data" on sales (i.e. the appendix D-3 data) could not be used in the NTC's dumping analysis. The United Arab Emirates supports this allegation by observing that the panel in *China – Broiler Products* determined that an authority "must set forth its reasons" for declining to use information on the basis that it does not have a genuine relationship with the production and sale of the specific product under consideration.[235]

7.180. The United Arab Emirates also asserts that the NTC "made no finding, or provided other explanation, that would indicate that" the fact that the appendix 2 data reflected Taghleef's financial accounts "informed the way in which" the NTC elected to establish normal value.[236]

7.181. Pakistan responds that the United Arab Emirates "fails to mention, let alone properly address or engage with, the NTC's explanation of why it rejected" Taghleef's appendix D-3 data.[237] Specifically, Pakistan notes that the Report on final determination stated that:

> The cost of production stated at [appendix] D-3 has been calculated by allocating the fixed costs to export markets other than Pakistan. Similarly fixed costs has not been allocated to cost of production for domestic sales. This method of cost allocation does not present true and fair picture of cost of production. Hence the NTC calculated cost of production of Taghleef Oman on the basis of information provided by it in appendix 2.[238]

7.182. As we consider this particular set of arguments, we note that the United Arab Emirates does not appear to have completely captured the scope of the panel's reasoning in the *China – Broiler*

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[232] We also note that, despite our questions, the United Arab Emirates has not pointed us to the profit data that it alleges the NTC has disregarded. (United Arab Emirates' response to Panel question No. 49).

[233] United Arab Emirates' first written submission, paras. 214-215 and 217-222 (referring to Article 2.2.1.1 and Article 2.2.2 and reviewing, in light of the NTC's conduct, the requirement that an investigating authority provide a reasoned and adequate explanation for its actions).

[234] United Arab Emirates' first written submission, para. 215.

[235] United Arab Emirates' first written submission, paras. 216-217.

[236] United Arab Emirates' second written submission, para. 105.

[237] Pakistan's first written submission, para. 3.237.

[238] Pakistan's first written submission, para. 3.238 (quoting Report on final determination (2013), (Exhibit PAK-1 (BCI)), pp. 72-73). See also fn 178 above.

Products proceeding. For ease of reference, the complete statement that the United Arab Emirates references in *China – Broiler Products* reads as follows:

> In sum, the Panel is of the view that although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall normally be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so.[239]

7.183. A close reading of this paragraph makes clear that the *Broiler Products* panel stated that an authority must "set forth its reasons" in the event that it "derogates from the norm" by declining to use a respondent's books and records to determine normal value. That is not the circumstance here. In this instance, the NTC did use Taghleef's records to determine normal value, just not the records that Taghleef and the United Arab Emirates believe the NTC should have used.[240]

7.184. Recognizing this, the question that would seem to be properly before the Panel is not whether the NTC acted inconsistently with its Article 2 obligations because it failed to explain why it did not use Taghleef's records at all. The question is, instead, whether the NTC acted inconsistently with Pakistan's obligations by not explaining why it used some of Taghleef's records but not others.

7.185. In this instance, we are of the view that the NTC did explain why it elected to use Taghleef's appendix 2 data rather than its appendix D-3 data.[241] In particular, we observe that the Report on final determination stated that the NTC took the view that Taghleef's appendix D-3 data allocated certain "fixed costs to export markets other than Pakistan". The Report on final determination also stated that "[s]imilarly fixed cost has not been allocated to cost of production for domestic sales".[242]

7.186. While this explanation is brief, it does explain "why" the NTC elected to use Taghleef's appendix 2 data instead of its appendix D-3 data. Based on this, we find that the United Arab Emirates has not established that Pakistan acted inconsistently with its Articles 2.2.1.1 and 2.2.2 obligations to adequately explain its decision not to use Taghleef's appendix D-3 information.

7.187. The fact that the NTC did not explicitly state that it "preferred the [a]ppendix 2 data because it 'mirrored the company's financial accounts'"[243] does not alter this analysis. While investigating authorities must of course provide a reasoned and adequate explanation for their decisions, authorities need not explicitly address each and every argument that is presented to them to fulfil this requirement, as long as the rationale for a particular decision can be inferred from the record of the proceeding.[244] In this case, as also noted above, the NTC twice advised Taghleef that it had "not provided [a] copy of [its] audited accounts" and that this information was "required for cross checking the cost of production [of the] investigated product … while determining [the] ordinary course of trade for domestic sales".[245] When we consider this exchange in concert with the arguably conflicting and incomplete information and statements described above that Taghleef provided to the NTC, and in concert with the record of this proceeding, we believe it reasonable to infer that, when it was determining which dataset better reflected Taghleef's costs, the NTC considered the fact

[239] Panel Report, *China – Broiler Products*, para. 7.164.

[240] See e.g. Pakistan's first written submission, para. 3.137 (stating that "the UAE does not deny that the NTC used Taghleef's own COP figures … . Rather, the UAE argues that the NTC should have used *another* set of figures from Taghleef's Questionnaire response" (emphasis original)).

[241] We note that in response to our question asking the United Arab Emirates to explain the manner in which Taghleef allocated different cost items across different markets, the United Arab Emirates asserted that those costs were not allocated to any specific market. This explanation was not provided to the NTC. (United Arab Emirates' response to Panel question No. 48).

[242] Report on final determination (2013), public version, (Exhibit ARE-2), annexure-IV, pp. 72-73.

[243] United Arab Emirates' second written submission, para. 105.

[244] See e.g. Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 164 and 186; and Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.8.

[245] Report on final determination (2013), (Exhibit PAK-1 (BCI)), para. 15.2.5.

that Taghleef stated that its appendix 2 data mirrored the company's financials to be a relevant factor in its analysis.

7.4.3.2 Consequential claims under Articles 2.2 and 2.2.1

7.188. Lastly, the United Arab Emirates claims that Pakistan acted inconsistently with Articles 2.2 and 2.2.1 on the grounds that, if the NTC had used Taghleef's appendix D-3 data, Taghleef's overall costs would have been lower and that this, in turn, would have led the NTC to determine that more of the company's domestic sales were made in the ordinary course of trade.[246]

7.189. Pakistan contests the premise of these consequential claims, and asserts that the NTC did not err in using Taghleef's appendix 2 cost data.

7.190. The United Arab Emirates' claims under Articles 2.2 and 2.2.1 are based on the premise that the NTC acted inconsistently with Articles 2.2.1.1 and 2.2.2 in electing to rely on the appendix 2 data instead of the appendix D-3 data. Because we find that the United Arab Emirates has not established that the NTC's decision to use Taghleef's appendix 2 data was inconsistent with Articles 2.2.1.1 and 2.2.2, we find that the United Arab Emirates has not established that, as a consequence, the NTC also acted inconsistently with Articles 2.2 and 2.2.1.

7.4.3.3 Conclusion under Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2

7.191. We conclude that the United Arab Emirates has not established that the NTC's decision to use Taghleef's appendix 2 data was inconsistent with Pakistan's obligations under Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2. We also find that the United Arab Emirates has not established that the explanation that the NTC provided when taking this action was inconsistent with Pakistan's obligations under these articles.

7.5 Level of trade adjustment: Article 2.4 of the Anti-Dumping Agreement

7.192. Taghleef requested an adjustment for differences in level of trade on the basis that in Pakistan it sold mainly to distributors, whereas on the domestic market it sold mainly to converters. According to Taghleef, its prices to distributors were lower than its prices to converters, because Taghleef was giving distributors discounts to compensate them for their distribution costs.[247] After a number of exchanges with Taghleef, the NTC rejected Taghleef's request as unsubstantiated.

7.193. The United Arab Emirates argues that Pakistan acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because (a) Taghleef substantiated its request with evidence and arguments in "no less than five submissions", but the NTC rejected the request without a reasoned and adequate explanation[248]; and (b) the NTC did not indicate what information reasonably available to Taghleef was required to substantiate a request for a level of trade adjustment[249], and the NTC imposed an unreasonable burden of proof on Taghleef.[250]

7.194. Pakistan responds that the NTC repeatedly instructed Taghleef on what information it required, but Taghleef either ignored the NTC's instructions, or was unable to substantiate its assertions.[251]

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[246] See e.g. United Arab Emirates' first written submission, para. 227; second written submission, paras. 92-93 and 97-98.

[247] United Arab Emirates' first written submission, paras. 238-239, 241, and 243. See also section 7.5.2.1.2 below.

[248] United Arab Emirates' first written submission, paras. 240, 248-249, and 253-255; opening statement at the first meeting of the Panel, paras. 89 and 92; second written submission, paras. 120, 123, 125, and 131; written opening statement, paras. 54 and 57; and response to Pakistan's written opening statement, paras. 29-30.

[249] United Arab Emirates' first written submission, paras. 248 and 250; second written submission, paras. 120 and 131. See also United Arab Emirates' first written submission, para. 257; written opening statement, para. 54; response to Pakistan's written opening statement, para. 27; and comments on Pakistan's response to Panel question No. 88, p. 7.

[250] United Arab Emirates' first written submission, paras. 251 and 257; second written submission, para. 121; and written opening statement, para. 55.

[251] Pakistan's first written submission, e.g. paras. 3.245, 3.324, and 3.329.

7.195. In this section, we first recall the applicable requirements of Article 2.4 of the Anti-Dumping Agreement (section 7.5.1). We then apply those requirements to the facts of this case (section 7.5.2) and find that the United Arab Emirates has not established that Pakistan acted inconsistently with Article 2.4 (section 7.5.3).

7.5.1 The applicable requirements of Article 2.4

7.196. Article 2.4 provides, in relevant part:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in … levels of trade … and any other differences which are also demonstrated to affect price comparability. … The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[252]

7.197. Article 2.4 requires that investigating authorities make a fair comparison between the export price and the normal value, and sets forth certain requirements that must be complied with in order to ensure that the comparison is fair.

7.198. In particular, Article 2.4 requires that investigating authorities make "[d]ue allowance … in each case, on its merits, for differences *which affect price comparability*".[253] Article 2.4 is thus explicit that the relevant differences are those "which affect price comparability", and we agree with the Appellate Body that "this refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices of the transactions".[254]

7.199. Article 2.4 provides an illustrative list of differences that may affect price comparability, which includes "differences in … levels of trade". However, the existence of one of the differences listed in Article 2.4 does not automatically mean that price comparability has been affected, as "there may be situations when those differences do not affect price comparability".[255]

7.200. The last sentence of Article 2.4 requires that investigating authorities "indicate to the parties in question what information is necessary to ensure a fair comparison". Investigating authorities must thus indicate what information they will need in order to ensure a fair comparison "so that the interested parties will be in a position to make a request for adjustments".[256] In addition, the last sentence of Article 2.4 requires that investigating authorities "not impose an unreasonable burden of proof on those parties".[257]

7.201. Although investigating authorities are under the obligation to ensure that the comparison is fair, we agree with the Appellate Body and panels in previous disputes that "exporters bear the burden of substantiating, 'as constructively as possible', their requests for adjustments" under Article 2.4.[258] Therefore, if exporters request an adjustment but fail to demonstrate the existence of

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[252] Fn omitted.
[253] Emphasis added.
[254] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.22 (referring to Appellate Body Report, *US – Zeroing (EC)*, para. 157).
[255] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.23. We thus also agree with the panel in *US – Softwood Lumber V* that "Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability". (Panel Report, *US – Softwood Lumber V*, para. 7.165 (emphasis original)).
[256] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.165 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 489).
[257] We note the panel's observation in *US – Softwood Lumber V* "that the requirement in the last sentence of Article 2.4 that the authorities 'shall not impose an unreasonable burden of proof' on interested parties does not remove the burden from interested parties to substantiate their assertions concerning claimed adjustments". (Ibid. para. 7.167). See also Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157.
[258] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.204 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 488). See also Panel Reports, *EC – Tube or Pipe Fittings*, para. 7.158; and *Korea – Certain Paper*, para. 7.147.

a difference that affects price comparability, the investigating authorities are entitled to reject the requested adjustment.[259] At the same time, the investigating authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".[260]

7.5.2 Whether Pakistan acted inconsistently with Article 2.4

7.202. In light of the parties' arguments, we consider that in order to resolve the United Arab Emirates' claim under Article 2.4, we need to examine: (a) the NTC's assessment of the evidence, namely whether the NTC rejected a request that was duly substantiated, without a reasoned and adequate explanation for doing so (section 7.5.2.1); and (b) the NTC's requests for evidence, namely whether the NTC failed to indicate what information was necessary to substantiate a request for a level of trade adjustment and imposed an unreasonable burden of proof on Taghleef (section 7.5.2.2).

7.5.2.1 The NTC's assessment of the evidence

7.203. The United Arab Emirates argues that "[i]n no less than five submissions, Taghleef provided arguments and evidence to support the need for an adjustment related to the differences in the level of trade, which were demonstrated to affect price comparability"[261], "but the NTC ignored this evidence and rejected the request for an adjustment".[262] The United Arab Emirates submits that "the NTC effectively found that absent evidence of additional costs on the side of the distributors in Pakistan no adjustment was warranted".[263] The United Arab Emirates contends that the NTC "disregarded the fact that evidence was presented by Taghleef that distributors necessarily incurred certain additional costs for which compensation was required in the form of price reductions".[264] The United Arab Emirates argues that the NTC failed to provide a reasoned and adequate explanation of why, despite the evidence presented by Taghleef, it denied the adjustment.[265]

7.204. Pakistan responds that "Taghleef failed to provide any meaningful evidence to substantiate its assertions"[266], and that it "either ignored the multiple information requests of the NTC or it was compelled to acknowledge that it was unable to provide the requisite information".[267] In particular, Pakistan argues that Taghleef did not provide "information on the precise amounts that formed the basis for the discounts granted to the Pakistani distributors".[268] According to Pakistan, "the NTC provided a reasoned and adequate explanation why it had no choice but to reject" the request for a level of trade adjustment.[269]

7.205. To make our assessment, we turn first to the explanation provided by the NTC in its Report on final determination, and then to the evidence that, according to the United Arab Emirates, supported Taghleef's request but was "ignored" by the NTC.

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[259] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.204; *EC – Fasteners (China)*, para. 488; and Panel Report, *Korea – Certain Paper*, para. 7.147.

[260] Appellate Body Reports, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.204; *EC – Fasteners (China)*, para. 488; and Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158.

[261] United Arab Emirates' first written submission, para. 240. The five submissions referred to by the United Arab Emirates in paragraphs 240-246 of its first written submission are: Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)); Taghleef's response to second deficiency letter, (Exhibits ARE-20 (redacted)/ARE-20b (BCI)); Taghleef's response to third deficiency letter, (Exhibits ARE-18 (redacted)/ARE-18b (BCI)/ARE-18c (BCI) (revised)); Taghleef's letter of 31 May 2011, (Exhibit ARE-22 (BCI)); and Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)).

[262] United Arab Emirates' opening statement at the first meeting of the Panel, para. 89; see also second written submission, para. 123.

[263] United Arab Emirates' first written submission, para. 248; second written submission, para. 131. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 91.

[264] United Arab Emirates' first written submission, para. 248; second written submission, para. 131.

[265] United Arab Emirates' first written submission, paras. 253 and 255; second written submission, para. 125. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 92; written opening statement, para. 57; and response to Pakistan's written opening statement, para. 29.

[266] Pakistan's first written submission, para. 3.324.

[267] Pakistan's first written submission, para. 3.329.

[268] Pakistan's first written submission, para. 3.308.

[269] Pakistan's first written submission, para. 3.340. See also ibid. para. 3.6; and second written submission, para. 2.119.

7.5.2.1.1 The NTC's explanation in the Report on final determination

7.206. In its Report on final determination, the NTC provided the following explanation for denying Taghleef's request for a level of trade adjustment:

> [**a**] The [NTC] has rejected the level of trade adjustment on the ground that same level of trade adjustment has not been offered for domestic sales. The level of trade adjustment is given in view of saving in the cost of transactions. The [NTC] asked as to what price differential is available in domestic market, which justify the level of trade adjustment in export price. In reply it was stated that there is no differential in level of trade in the domestic market. [**b**] However, different price is given to different categories of importers in view of their additional cost hence this adjustment is claimed. But no evidence of additional cost of importer has been given by the exporter. The adjustment of level of trade is given for reasons of cost saving of the exporters and not on account of additional cost of importers. The [NTC] has disregarded the adjustment on the grounds, if it is accepted that adjustment is given on the account of additional cost, it should be supported by essential data plus it cannot be different for different exporters as shown below.
>
> **Table – III**
> **Different Level of Trade claimed**
>
> | Distributor Name | Taghleef SAO[C] | | Taghleef LLC | |
> |---|---|---|---|---|
> | | Status | Per Unit Adjustment Claimed [[***]] | Status | Per Unit Adjustment Claimed [[***]] |
> | Multi Traders | Distributor | [[***]] | Distributor | [[***]] |
> | Adnan Brothers | Distributor | [[***]] | Distributor | [[***]] |
> | Glamour International | Distributor | … | Distributor | [[***]] |
> | Trade Line International | Distributor | [[***]] | … | … |
> | Sony Trading CO | Distributor | [[***]] | … | … |
>
> It is also added that the costs of distributors have not been established through evidence.[270]

7.207. There are thus two parts to Taghleef's explanation, which for ease of reference we have identified by adding "a" and "b" in the quotation above: (a) Taghleef could not demonstrate the need for an adjustment in the manner usually preferred by the NTC, namely based on differences in level of trade on the domestic market; and (b) Taghleef sought an adjustment on a different basis, namely additional costs incurred by distributors, but the NTC found that Taghleef had not substantiated that request with evidence of the additional costs.

7.208. Thus, in the first part of its explanation the NTC noted that Taghleef had not based its request for a level of trade adjustment on differences in prices between different levels of trade on the domestic market, which the exporter questionnaire described as the NTC's preferred method for demonstrating the existence of a difference in levels of trade affecting price comparability.[271] Ultimately, however, this was not material because the NTC entertained Taghleef's proposal of an alternative basis for substantiating the need for an adjustment, even though the NTC then concluded that Taghleef had not provided sufficient evidence to support its request.[272]

7.209. In the second part of its explanation, the NTC addressed Taghleef's request as formulated by Taghleef. The NTC noted that Taghleef's position was that its prices to "different categories of importers" were different because of the additional costs those importers (i.e. distributors[273]) incurred, and that Taghleef was requesting an adjustment on the basis of these additional costs. The NTC then explained that, however, "no evidence of additional cost of importer has been given

[270] Report on final determination (2013), (Exhibit PAK-1 (BCI)), paras. 29.2.3-29.2.4 (emphasis original). See also Report on final determination (2013), public version, (Exhibit ARE-2), paras. 29.2.3-29.2.4.
[271] See para. 7.240 below.
[272] Report on final determination (2013), public version, (Exhibit ARE-2), para. 29.2.3.
[273] See e.g. Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), section C-1.1.

by the exporter"; "if it is accepted that adjustment is given on the account of additional cost, it should be supported by essential data"; and "the costs of distributors have not been established through evidence".[274]

7.210. We understand these statements to mean that the NTC denied the adjustment because, although Taghleef was requesting an adjustment for differences in level of trade *on the basis of* additional costs allegedly incurred by distributors in Pakistan, Taghleef had not provided the evidence necessary to substantiate its request, such as evidence of the alleged additional costs on which the request for an adjustment *was based*.

7.211. The United Arab Emirates however argues that Taghleef did provide the necessary evidence but the NTC ignored it, effectively finding "that absent evidence of additional costs on the side of the distributors in Pakistan no adjustment was warranted", and failing to provide a reasoned and adequate explanation for rejecting the request for an adjustment in light of the evidence before it.[275] We therefore review the arguments and evidence of Taghleef that the United Arab Emirates refers to, to test whether, in light of that evidence and of the standard in Article 2.4, the NTC's explanations and conclusions are reasoned and adequate. We review Taghleef's arguments and evidence in the following order: Taghleef's questionnaire response (section 7.5.2.1.2); Taghleef's subsequent submissions regarding the additional costs of distributors (section 7.5.2.1.3); and Taghleef's agreement with one distributor (section 7.5.2.1.4).

7.5.2.1.2 Taghleef's response to the exporter questionnaire

7.212. In requesting an adjustment for level of trade in its response to the exporter questionnaire, Taghleef stated as follows:

> [[***]].[276]

7.213. As a point of clarification, we note that Taghleef's questionnaire response and subsequent submissions contained certain contradictory statements on the categories of customers to which it sold in its domestic market.[277] However, Taghleef clarified in response to a deficiency letter that during the POI, all its domestic market sales were to converters and traders, and none to distributors and end-users.[278]

7.214. Thus, in its questionnaire response, Taghleef was arguing that its price to distributors in Pakistan was lower than its price to converters and traders in the domestic market to compensate

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[274] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 29.2.3-29.2.4. The NTC also stated "plus [the adjustment] cannot be different for different exporters, as shown below", and the United Arab Emirates takes issue with this statement. We note that table-III, which follows immediately "below", shows that two different exporters, Taghleef LLC, Dubai and Taghleef SAOC, Oman indeed claimed adjustments in significantly different amounts for the same Pakistani distributors. Pakistan explains that the NTC made this observation because the fact that the two exporters requested level of trade adjustments in different amount for sales to the *same distributor* in Pakistan is inconsistent with Taghleef's narrative that the discounts were driven by the distributors' costs. The United Arab Emirates argues that this explanation by Pakistan constitutes an *ex post* justification. However, as this relates to a reason that the NTC made explicit in its explanation, we reject the United Arab Emirates' argument that this is an *ex post* justification. The United Arab Emirates has not shown to us that this reasoning was not proper. (Report on final determination (2013), public version, (Exhibit ARE-2), para. 29.2.3 and table-III; United Arab Emirates' written opening statement, paras. 56-57 and fn 68; response to Pakistan's written opening statement, para. 28; Pakistan's first written submission, paras. 3.313 and 3.318; second written submission, paras. 2.218 and 2.137; written opening statement, paras. 60-62; and response to United Arab Emirates' written opening statement, para. 30).

[275] See para. 7.203 above.

[276] Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), sections C-1.1 and D-2.4 (emphasis added). See also Taghleef's response to second deficiency letter, redacted version, (Exhibit ARE-20), paras. A2:1 and A6; Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), para. A1; and Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 3.

[277] For instance, at section C-1.1 of its questionnaire response, Taghleef stated that its domestic market sales had been made mostly to end-users (Taghleef's questionnaire response, (Exhibit ARE-16 (BCI))), whereas appendix D-3 to the questionnaire response indicated that, during the POI, Taghleef's domestic sales had been made to converters and traders. (Appendix D-3 to Taghleef's response to exporter questionnaire, (Exhibit PAK-14 (BCI))).

[278] Taghleef's response to second deficiency letter, redacted version, (Exhibit ARE-20), para. A2:3.

for "distribution costs and margin" of the distributors. On that basis, in appendix C-3 of the questionnaire, Taghleef included an upward adjustment to the price of its export sales to distributors in Pakistan[279], to reflect the additional costs and margin of the distributors as compared with converters and traders.

7.215. The United Arab Emirates refers to the questionnaire response as one of the five submissions in which Taghleef allegedly "provided arguments and evidence to support the need for an adjustment related to the differences in the level of trade".[280] The questionnaire response, while including statements to the effect that sales on the domestic market and sales to Pakistan were at different levels of trade, and stating the amount of the adjustment sought by Taghleef, did not contain evidence of the difference in levels of trade or of the basis for the adjustment sought. The NTC therefore sought evidence and clarifications from Taghleef, to which we now turn.

7.5.2.1.3 Taghleef's submissions regarding the additional costs of distributors

7.216. Following receipt of the questionnaire response, in a deficiency letter dated 17 January 2011 the NTC requested Taghleef to "provide documentary evidence of expenses incurred by distributors against the allowance provided to them under allowance for level of trade".[281] The NTC also asked Taghleef whether it had agreements with its distributors "that it will compensate [them] in their distribution cost and profit margin", and if so, to provide a copy "in respect of each distributor".[282]

7.217. Taghleef responded that it was "not possible for the Company to provide the documentary evidence of the expenses incurred by other companies" and that "distributors in Pakistan are independent companies and they do not share their costs and profits margins with the Company".[283] Taghleef added that it had agreements to compensate distributors for their additional costs and margin and submitted a copy of an agreement with one distributor[284], which we discuss separately below.

7.218. In a further deficiency letter, dated 22 February 2011, the NTC requested that Taghleef "share the basis of estimation of such costs incurred by distributors and the cost incurred by each distributor".[285]

7.219. Taghleef answered that "[t]he adjustment value has been arrived [at] by subtracting the average selling price to distributors from the average selling price to converters".[286] In the same letter, Taghleef also listed certain "differentiating cost elements" incurred by distributors in Pakistan, although without stating the value of those costs, and without providing any explanation.[287]

[279] Appendix C-3 to Taghleef's response to exporter questionnaire, (Exhibits ARE-36 (BCI)/PAK-33 (BCI)).
[280] United Arab Emirates' first written submission, paras. 240-241.
[281] Second deficiency letter, (Exhibit PAK-18 (BCI) (revised)), para. 7.
[282] Second deficiency letter, (Exhibit PAK-18 (BCI)), para. 3.
[283] Taghleef's response to second deficiency letter, redacted version, (Exhibit ARE-20), para. A6. Taghleef also explained that the "'allowance for difference in level of trade' is solely based on business convention, general practice of trade and the Company's experience with the distribution set up in the domestic and external markets". (Ibid.)
[284] Purchase agreement, (Exhibit ARE-34 (BCI)); Taghleef's response to second deficiency letter, (Exhibit ARE-20b (BCI)), para. A2 and annexure 1. In a subsequent deficiency letter, the NTC reiterated its request for agreements with all distributors to which Taghleef sold the investigated product. (Third deficiency letter, (Exhibit ARE-17), para. 2(ii)). Taghleef responded that it only had one agreement, which it had already submitted, and that it was giving the price discounts to all distributors irrespective of whether an agreement had been signed or not. (Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), para. A1(ii)).
[285] Third deficiency letter, (Exhibit ARE-17), para. 2(iii).
[286] Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), para. A1(iii).
[287] Those costs, as they appear in Taghleef's response letter are: [[***]]. (Taghleef's response to third deficiency letter, (Exhibit ARE-18c (BCI)), para. A1(iii)).

7.220. In a subsequent letter to the NTC dated 31 May 2011, Taghleef provided the following table setting out a breakdown of the distributors' costs and profit margin underlying the price reductions[288]:

[[***]][289]

7.221. In arguing that there was evidence before the NTC to support Taghleef's request for a level of trade adjustment, the United Arab Emirates repeatedly cites this breakdown of distributors' costs provided by Taghleef.[290] In the United Arab Emirates' view, this was a substantiated breakdown of the distributors' costs for which discounts were given.[291]

7.222. Pakistan responds that "this piece of evidence is of essentially no evidentiary value"[292], as the cost figures provided by Taghleef appear to be an estimate only, and Taghleef did not explain how it arrived at those figures.[293] According to the United Arab Emirates, Pakistan's arguments that the breakdown of the distributors' costs does not constitute credible evidence are "inadmissible *ex post* justifications", because they did not feature in the explanation given by the NTC in its report.[294] However, the NTC stated in its report, *inter alia*, that "no evidence of additional cost of importer has been given by the exporter"[295], that "the costs of distributors have not been established through evidence"[296], and that "if it is accepted that adjustment is given on the account of additional cost, it should be supported by essential data".[297] We therefore do not consider that Pakistan is providing "inadmissible *ex post* justifications".

7.223. We also note that Taghleef did not accompany the breakdown of costs with an explanation of how it arrived at those figures, or with any supporting evidence. In response to our questioning, the United Arab Emirates indicated that the "grand total" of [[***]] presented in the table approximated the difference between the weighted average price of sales to distributors on the one hand, and to converters on the other hand, in Pakistan.[298] However, Taghleef did not explain its "breakdown of costs" to the NTC in this way during the proceedings; in fact, as we will see next, Taghleef stated in a subsequent submission that it had "calculated" this "[m]argin … based on the [[***]]".[299]

7.224. In its subsequent communication of 30 November 2012, following the NTC's preliminary determination, Taghleef reiterated its explanation that, in Pakistan, it sold mainly to distributors, which "incur additional costs … and profit margin", and that "[k]nowing this, Taghleef Dubai sells the investigated product to distributors at a price that takes into account their additional costs".[300] In other words, Taghleef reiterated the assertions contained in its original questionnaire response, of which the NTC had subsequently sought clarifications and evidence.

[288] United Arab Emirates' first written submission, paras. 245 and 250; second written submission, para. 120.

[289] Taghleef's letter of 31 May 2011, (Exhibit ARE-22 (BCI)), annex-I. (emphasis original)

[290] United Arab Emirates' first written submission, paras. 245 and 250; second written submission, paras. 120 and 126; opening statement at the first meeting of the Panel, para. 90; written opening statement, para. 54; response to Pakistan written opening statement, para. 27; and comments on Pakistan's response to Panel question No. 88, p. 7.

[291] United Arab Emirates' response to Pakistan's written opening statement, para. 27.

[292] Pakistan's first written submission, paras. 3.320-3.321. See also Pakistan's second written submission, para. 2.137.

[293] Pakistan's first written submission, paras. 3.310 and 3.320. Pakistan also points out that Taghleef did not attempt to tie the figures it submitted, including the total of [[***]], to the discounts allegedly granted to distributors or to the requested adjustments, as listed in the spreadsheets annexed to Taghleef's questionnaire response. (Pakistan's first written submission, para. 3.321; see also response to Panel question No. 88, fn 13).

[294] United Arab Emirates' written opening statement, para. 57 (referring to Pakistan's second written submission, para. 2.137).

[295] Report on final determination (2013), public version, (Exhibit ARE-2), para. 29.2.3.

[296] Report on final determination (2013), public version, (Exhibit ARE-2), para. 29.2.4.

[297] Report on final determination (2013), public version, (Exhibit ARE-2), para. 29.2.3.

[298] United Arab Emirates' responses to Panel question No. 51, paras. 63-64, and No. 52, para. 67.

[299] Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 3.

[300] Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 3. This is the fifth of the "five submissions" that the United Arab Emirates refers to; see fn 261 above.

7.225. As just noted, Taghleef added that it had calculated the "margin" of the additional costs and profits "based on the [[***]]".[301] Again, it provided no supporting evidence.

7.226. Thus, although Taghleef did repeat in a number of submissions that its distributors incurred additional costs (and added a margin), and that Taghleef charged them lower prices to compensate for those additional costs and margin, it did not provide evidence of the amount of those additional costs or of the amount of the consequent price reductions. In answer to the NTC's third deficiency letter, Taghleef provided a breakdown of costs resulting in a [[***]] total, but provided no evidence of how it had arrived at those figures.

7.227. Taghleef provided one item of documentary evidence that it presented as going to the *existence* of the policy of compensating distributors for their additional costs and margin (and not to the *amount* of the price reduction), and we turn to that next.

7.5.2.1.4 Taghleef's agreement with a Pakistani distributor

7.228. In its deficiency letter of 17 January 2011, the NTC had also asked Taghleef to explain its stated policy of compensating distributors for their distribution costs and margin and whether it had agreements with its distributors to this effect; in the event Taghleef had such agreements, the NTC requested a copy of those agreements.[302]

7.229. Taghleef submitted a copy of one agreement with an unrelated distributor in Pakistan, [[***]].[303] The United Arab Emirates argues that this agreement "demonstrated … the arrangement for compensating the distributor for incurring additional costs when subsequently selling the BOPP film to end-users in Pakistan", and that this "is sufficient to establish that there was a price difference owing to the specific level of trade".[304] The United Arab Emirates submits that the agreement in question "expressly provided for price 'concessions' to account for the distributor's" costs.[305]

7.230. Pakistan responds that the agreement with Taghleef's distributor [[***]] does not substantiate Taghleef's assertion that it had a policy[306] of giving price discounts to distributors as compensation for their distributions costs[307], because that agreement concerned only one distributor[308]; the discounts it contemplated appeared to be volume-driven rather than based on the level of trade[309]; and the agreement provided that granting the discounts was entirely within Taghleef's discretion.[310] Pakistan also notes that the text of the agreement indicates that the precise amount of the discount would be determined in light of information pertaining to individual transactions "at that point in time", and alleges that this implied that the distributor would periodically provide Taghleef with information on its costs. Pakistan points out that Taghleef stated

[301] Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)), p. 3.
[302] Second deficiency letter, (Exhibit PAK-18 (BCI)), para. 3.
[303] Purchase agreement, (Exhibit ARE-34 (BCI)); Taghleef's response to second deficiency letter, (Exhibit ARE-20b (BCI)), para. A2 and annexure 1.
[304] United Arab Emirates' first written submission, para. 251; see also second written submission, para. 121.
[305] United Arab Emirates' first written submission, para. 250; second written submission, para. 120. See also United Arab Emirates' second written submission, para. 128.
[306] We note that Taghleef argued before the NTC that it was offering distributors a price that took it into account the costs they incurred for the sale of the product "*as a matter of policy*". (Taghleef's response to third deficiency letter, redacted version, (Exhibit ARE-18), para. A1 (emphasis added)).
[307] Pakistan's response to Panel question No. 88, para. 12. See also ibid. paras. 16-17; first written submission, paras. 3.299-3.3302; second written submission, para. 2.138; and response to United Arab Emirates' written opening statement, para. 32.
[308] Pakistan's second written submission, para. 2.138; response to United Arab Emirates' written opening statement, para. 32; and response to Panel question No. 88, paras. 12 and 17. See also Pakistan's first written submission, paras. 3.295-3.298 and 3.328.
[309] Pakistan's second written submission, para. 2.138; response to Panel question No. 88, paras. 12 and 17. See also Pakistan's first written submission, paras. 3.299 and 3.301. Pakistan points out that "quantity discounts are a different type of adjustment than [level of trade] adjustments". (Pakistan's first written submission, para. 3.301).
[310] Pakistan submits that according to the agreement, the granting of the discount was entirely within Taghleef's discretion, which implies that Taghleef reserved its right to refuse to grant the discount or to vary its amount. In Pakistan's view, this contradicts the notion that Taghleef had a consistent pricing policy of giving discounts to compensate distributors for their costs. (Pakistan's first written submission, paras. 3.300 and 3.302; second written submission, para. 2.138; and response to Panel question No. 88, para. 17).

before the NTC that it did not have access to such data, and this contradicts the content of the agreement.[311]

7.231. The United Arab Emirates submits that Pakistan's arguments concerning Taghleef's agreement with the Pakistani distributor are *ex post* justifications, as the reasons provided by Pakistan for the NTC's dismissal of the agreement do not feature in the NTC's explanation.[312] In our view, however, these arguments by Pakistan, i.e. that Taghleef's agreement with the Pakistani distributor does not demonstrate Taghleef's asserted policy, are connected to the NTC's explanation, in its final determination, that Taghleef's request was not supported by evidence, and specifically by evidence of the distributors' costs.[313] The NTC's correspondence with Taghleef also bears out that, in asking for Taghleef's agreements with its distributors, the NTC was seeking evidence that Taghleef consistently granted the alleged compensation for distributors' costs.[314] Therefore, we do not consider these arguments by Pakistan to be *ex post* rationalizations.

7.232. We note that the agreement submitted by Taghleef provides for [[***]].[315] The agreement specifies that [[***]].[316]

7.233. Although the agreement stipulates that the [[***]], it also stipulates that the [[***]].[317]

7.234. In light of the contents of the agreement, we reject the United Arab Emirates' argument that the agreement Taghleef submitted to the NTC was "sufficient to establish that there was a price difference owing to the specific level of trade".[318] We note that the agreement characterizes the price concessions as based on volume of sales, emphasizes that any price concession is discretionary, and gives no indication of the magnitude of any such concession.

7.5.2.1.5 Conclusion on the NTC's assessment that the evidence was insufficient

7.235. The record thus shows that Taghleef requested an adjustment for level of trade on the basis that its distributors in Pakistan incurred "an additional cost … and add a margin" and that Taghleef's price to them was set to compensate for the additional costs and margin. The NTC, in various communications, asked Taghleef to provide evidence of its allegations, such as copies of Taghleef's agreements to that effect with its distributors, if it had such agreements, and evidence of the amount of the additional costs, either in the form of direct evidence of those costs or in the form of evidence of the basis for estimating such costs. By way of evidence, Taghleef was only able to produce an agreement with a distributor that envisaged price concessions linked to the volume of sales, described the concessions as discretionary, and gave no indication as to the amount of any such concessions; and a "breakdown of costs" of distributors for which Taghleef gave no supporting evidence or explanation as to how it had derived it. In its final determination, the NTC set out the basis on which Taghleef had requested the adjustment and explained that, absent evidence of the facts on the basis of which the adjustment was sought, it could not grant the adjustment.

7.236. We therefore do not consider that the United Arab Emirates has shown that the NTC erred when it rejected Taghleef's request for a level of trade adjustment on the basis that Taghleef had not substantiated its request with evidence, or that the NTC did so without a reasoned and adequate explanation.

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[311] Pakistan's response to Panel question No. 88, paras. 14 and 17. See also Pakistan's first written submission, fn 151 and paras. 3.311-3.312; and second written submission, para. 2.138.

[312] United Arab Emirates' written opening statement, para. 57 and fn 58 (referring to Pakistan's second written submission, para. 2.138); comments on Pakistan's response to Panel question No. 88, p. 7 (referring to Pakistan's response to Panel question No. 88, para. 17).

[313] Report on final determination (2013), (Exhibit PAK-1 (BCI)), paras. 29.2.3-29.2.4. See also Report on final determination (2013), public version, (Exhibit ARE-2), paras. 29.2.3-29.2.4.

[314] Second deficiency letter, (Exhibit PAK-18 (BCI)), para. 3.

[315] Purchase agreement, (Exhibit ARE-34 (BCI)).

[316] Purchase agreement, (Exhibit ARE-34 (BCI)). (emphasis added)

[317] Purchase agreement, (Exhibit ARE-34 (BCI)). (emphasis added)

[318] United Arab Emirates' first written submission, para. 251; see also second written submission, para. 121.

7.5.2.2 The NTC's requests for evidence

7.237. The United Arab Emirates argues that the NTC acted inconsistently with the last sentence of Article 2.4 by not indicating what information that was reasonably available to Taghleef was required in support of the request for the level of trade adjustment[319], and by imposing an unreasonable burden of proof on Taghleef.[320] The United Arab Emirates submits that if the NTC wanted more evidence it should have engaged with Taghleef in order to identify reasonably available additional evidence, but it did not do so.[321] The United Arab Emirates contends that by requesting evidence on the distributors' costs, the NTC imposed an unreasonable burden of proof on Taghleef, as Taghleef could not provide documentary evidence of the actual expenses incurred by unrelated companies, which do not share with Taghleef evidence of their costs and profit margins.[322]

7.238. Pakistan responds that the NTC provided precise instructions in the exporter questionnaire on what evidence it required and requested further information from Taghleef by means of two deficiency letters.[323]

7.239. At the outset, we note that the record does not reflect the United Arab Emirates' allegation that the NTC demanded evidence of Taghleef's distributors' costs as a necessary condition to grant the level of trade adjustment.

7.240. The NTC indicated in the exporter questionnaire what an exporter normally needed to demonstrate in support of a request for a level of trade adjustment, and listed the information it required from the exporter. Thus, section D-2.4 of the NTC's exporter questionnaire reads, in relevant part:

> An adjustment for differences in levels of trade … can be made where, in relation to the distribution chain in both markets, it is shown that the export price … is at a different level of trade from the normal value and the difference has affected price comparability which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different level of trade in the domestic market of the exporting country.
>
> However, in circumstances not envisaged in the paragraph above, when an existing difference in level of trade cannot be quantified because of the absence of the relevant levels on the domestic market of the exporting country … a special adjustment may be granted.
>
> If you claim a level of trade adjustment the following information should be provided:
>
> - a detailed description of the functions of each level of trade both on the domestic market and Pakistani market.
>
> - a detailed description of the method used to determine the amount of adjustment.
>
> - evidence showing that prices differ consistently for the different levels of trade on the domestic market.

[319] United Arab Emirates' first written submission, para. 250; second written submission, para. 120. See also United Arab Emirates' first written submission, paras. 248 and 257; second written submission. para. 131; written opening statement, para. 54; response to Pakistan's written opening statement, para. 27; and comments on Pakistan's response to Panel question No. 88, p. 7.

[320] United Arab Emirates' first written submission, paras. 251 and 257; second written submission, para. 121; and written opening statement, para. 54.

[321] United Arab Emirates' first written submission, paras. 250 and 257; opening statement at the first meeting of the Panel, para. 93; second written submission, paras. 120 and 127; written opening statement, para. 54; and response to Pakistan's written opening statement, para. 27.

[322] United Arab Emirates' first written submission, para. 251; second written submission, paras. 121 and 126; and written opening statement, para. 55.

[323] Pakistan's first written submission, para. 3.339. See also ibid. paras. 3.322-3.329; and second written submission, para. 2.131.

- report in the transaction-by-transaction listing (at point D-3 below) the market value of the difference in level of trade.[324]

7.241. The NTC's exporter questionnaire thus indicated that, as a rule, the NTC grants adjustments for differences in level of trade where the investigated exporter demonstrates that those differences have "affected price comparability which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different level of trade in the domestic market of the exporting country", and it further listed the evidence to be provided, including "a detailed description of the functions of each level of trade" and "a detailed description of the method used to determine the amount of adjustment". In its questionnaire, the NTC added that where a difference cannot be demonstrated on that basis because of the absence of the relevant levels on the domestic market of the exporting country, "a special adjustment could be granted".[325]

7.242. Taghleef did not seek an adjustment based on differences in level of trade in the domestic market (the NTC's preferred approach according to the questionnaire), but on an alternative basis.[326] That is, in its questionnaire response, Taghleef requested an adjustment for differences in level of trade on the basis that its sales to Pakistan were mainly to distributors, "distributors incur additional cost … and add a margin", and Taghleef sells to distributors "at a price to compensate distribution costs and margin".[327] It is after Taghleef formulated its request on this basis that the NTC sought evidence and clarifications from Taghleef about what *Taghleef itself* had described as the basis for its request for a level of trade adjustment, i.e. the existence of additional costs incurred by distributors, and its practice of compensating for such costs through price concessions.

7.243. Specifically, in its deficiency letter of 17 January 2011, the NTC asked Taghleef, *inter alia*: to "explain the policy of granting trade concession claimed under level of trade adjustment"[328]; whether it had agreements with its distributors that it will compensate them for their distribution costs and profit margin, and if so to provide copies of those agreements[329]; and to "provide documentary evidence of the expenses incurred by distributors against the allowance provided to them under allowance for level of trade".[330]

7.244. In its deficiency letter of 22 February 2011, the NTC made further requests for information related to Taghleef's claim for a level of trade adjustment. Among other requests, the NTC reiterated its request for copies of agreements with all Pakistan distributors to which Taghleef sold the investigated product.[331] The NTC did not reiterate its request for "*documentary evidence*" of the distributors' costs and instead asked Taghleef to "share the basis of estimation of such costs incurred by distributors and the cost incurred by each distributor".[332]

7.245. The evidence on the record of the Panel, thus, shows that the NTC indicated from the outset (i.e. in the exporter questionnaire) what information it required to assess a request for a level of trade adjustment[333], and that it subsequently took steps to achieve clarity with respect to Taghleef's request for an adjustment by sending Taghleef the two deficiency letters. The record also shows that it was Taghleef that indicated that its request for a level of trade adjustment was based on the additional costs incurred by distributors, for which its prices allegedly compensated. In its subsequent requests, the NTC was demanding evidence of Taghleef's own assertions.

7.246. Given that Taghleef's request for a level of trade adjustment was premised on the proposition that distributors incurred additional costs and that Taghleef had a policy of giving price discounts to distributors as compensation for those costs, we do not consider that the NTC imposed an unreasonable burden of proof on Taghleef by requiring that it provide evidence of those costs, or

[324] NTC's blank exporter questionnaire, (Exhibit PAK-37), section D-2.4; Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), section D-2.4.
[325] NTC's blank exporter questionnaire, (Exhibit PAK-37), section D-2.4; Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), section D-2.4.
[326] This is also reflected in the explanation provided by the NTC in its Report on final determination; see para. 7.206 above. See also para. 7.208 above.
[327] See para. 7.212 above.
[328] Second deficiency letter, (Exhibit PAK-18 (BCI)), para. 3.
[329] Second deficiency letter, (Exhibit PAK-18 (BCI)), para. 3.
[330] Second deficiency letter, (Exhibit PAK-18 (BCI)), para. 7.
[331] Third deficiency letter, (Exhibit ARE-17), para. 2(ii).
[332] Third deficiency letter, (Exhibit ARE-17), para. 2(iii).
[333] Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)), section D-2.4.

that it at least provide evidence of the existence of its stated policy of compensating for the distributors' additional costs and explain how it estimated those costs.

7.247. We therefore find that the United Arab Emirates has not established that the NTC failed to indicate what information it required in support of a request for a level of trade adjustment, or that it imposed an unreasonable burden of proof on Taghleef. We thus conclude that the United Arab Emirates has not established that the NTC acted inconsistently with the last sentence of Article 2.4.

7.5.3 Conclusion under Article 2.4

7.248. We conclude that the United Arab Emirates has not established that the NTC erred when it rejected Taghleef's request for a level of trade adjustment on the basis that Taghleef had not substantiated its request with evidence, or that it failed to provide a reasoned and adequate explanation for doing so, failed to indicate what information it required in support of a request for a level of trade adjustment, or imposed an unreasonable burden of proof on Taghleef.

7.249. Therefore, we conclude that the United Arab Emirates has not established that Pakistan acted inconsistently with Article 2.4 of the Anti-Dumping Agreement in denying Taghleef's request for an adjustment for differences in the level of trade.

7.6 Consideration of the volume of dumped imports: Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.250. As part of its injury analysis, the NTC found that, during the POI, the volume of dumped imports had increased significantly in absolute terms and relative to domestic production of the like product.[334]

7.251. The United Arab Emirates argues that both of these findings are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement on three grounds. With regard to the volume of imports in absolute terms and relative to domestic production, the United Arab Emirates argues, first, that the NTC based its findings on the single year of the POI in which the volume of dumped imports increased, and disregarded the fact that the volume of dumped imports decreased during the rest of the POI, including its most recent period[335]; and second, that the NTC failed to objectively evaluate and adequately explain whether the increases were significant.[336] Third, the United Arab Emirates argues that the NTC erred by not considering also whether the volume of dumped imports had increased relative to domestic consumption.[337]

7.252. Pakistan responds that: first, the NTC considered data from the entire POI, but attached more analytical significance to data relating to 2009 because that was the most recent full year in the POI[338]; second, the NTC adequately considered the increase in the absolute volume of dumped imports to be significant, the data on its record supported such a finding, and the NTC could have easily found the increase in the volume of dumped imports relative to domestic production to be significant[339]; and third, the NTC was not required to consider whether the volume of dumped imports had also increased relative to domestic consumption.[340]

7.253. As set out below, we find that the United Arab Emirates has established that the NTC's consideration of the volume of dumped imports was inconsistent with Articles 3.1 and 3.2.

7.254. We structure our discussion as follows: first, we set out the applicable requirements of Articles 3.1 and 3.2 (section 7.6.1); second, we apply those requirements to the facts of this case

[334] Report on final determination (2013), public version, (Exhibit ARE-2), para. 35.7.
[335] United Arab Emirates' first written submission, paras. 300-305.
[336] United Arab Emirates' first written submission, paras. 307-311.
[337] United Arab Emirates' first written submission, para. 306; response to Panel question No. 59.
[338] Pakistan's first written submission, paras. 3.357-3.359; second written submission paras. 2.144-2.162.
[339] Pakistan's first written submission, paras. 3.360-3.362; second written submission paras. 2.163-2.167.
[340] Pakistan's response to Panel question No. 59.

to assess whether Pakistan acted inconsistently with Articles 3.1 and 3.2 (section 7.6.2); and third, we conclude that Pakistan acted inconsistently with those provisions (section 7.6.3).

7.6.1 The applicable requirements of Articles 3.1 and 3.2, first sentence

7.255. Article 3.1 of the Anti-Dumping Agreement provides:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

7.256. Article 3.1 thus requires a "determination of injury" to be "*based on positive evidence* and *involve an objective examination*"[341] of the volume of dumped imports, their effect on prices, and their consequent impact on the domestic industry.

7.257. As noted earlier, the ordinary meaning of "evidence" includes: "[i]nformation (in the form of personal or documented testimony or the production of material objects), tending or used to establish facts in a legal investigation".[342] The ordinary meaning of "positive" includes "admitting no question; stated, express, definite, precise; emphatic"[343] and "providing support for a particular hypothesis, esp[ecially] one concerning the presence or existence of something"[344], and, as noted by the Appellate Body, affirmative, objective, verifiable, and credible.[345] Further, "based on" means "place[d] on … a foundation, fundamental principle, or underlying basis".[346] Thus, Article 3.1 requires that a determination of injury be "based on", i.e. have as its foundation, "evidence" that is affirmative, definite, and capable of supporting such a determination.

7.258. As for the requirement that the determination of injury "involve an objective examination", this relates to the approach taken by the authority to the evidence and its analysis. The ordinary meaning of examination includes the "[i]nvestigation of or inquiry into a subject, situation … etc.; critical analysis"[347], and the ordinary meaning of "objective" includes "not influenced by personal feelings or opinions in considering and representing facts; impartial, detached".[348] Thus, the enquiry and analysis leading to a determination of injury must be one that is impartial, i.e. not influenced by personal feelings and not favouring any interested party.[349] For example, to perform an objective examination the authority must also take into account the evidence that appears to conflict with its own hypotheses, and explain how it has reconciled conflicting evidence in reaching its conclusions.[350]

7.259. The overarching requirements to conduct an objective examination and to base the determination of injury on positive evidence, as set forth in Article 3.1, apply to every aspect of the determination of injury. Articles 3.2, 3.4, and 3.5, in turn, set forth more detailed requirements

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[341] Emphasis added.
[342] See para. 7.19 above.
[343] Oxford Dictionaries online, definition of "positive" https://www.oed.com/view/Entry/148318?rskey=3r7q5h&result=1&isAdvanced=false#eid (accessed 13 October 2020), adj., meaning A.I.2, specifying that "positive" with this meaning is used chiefly in the phrase "proof positive n. at proof n. 1a", which, in turn, is defined as "definite, absolute, or incontrovertible proof".
[344] Oxford Dictionaries online, definition of "positive" https://www.oed.com/view/Entry/148318?rskey=3r7q5h&result=1&isAdvanced=false#eid (accessed 13 October 2020), adj., meaning A.II.4.c.
[345] Appellate Body Reports, *US – Hot-Rolled Steel*, para. 192; *China – GOES*, para. 126.
[346] Oxford Dictionaries online, definition of "base" https://www.oed.com/view/Entry/15856?rskey=rBVVi9&result=10&isAdvanced=false#eid (accessed 13 October 2020), v.3, meaning 2.
[347] Oxford Dictionaries online, definition of "examination" https://www.oed.com/view/Entry/65580?redirectedFrom=examination#eid (accessed 13 October 2020), n., meaning 6.a.
[348] Oxford Dictionaries online, definition of "objective" https://www.oed.com/view/Entry/129634?redirectedFrom=objective#eid (accessed 13 October 2020), adj., meaning 8.a.
[349] See also e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.
[350] See also e.g. Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93-94 and 97.

relating to the examination of the volume of the dumped imports (Article 3.2), their effect on prices in the domestic market of the like product (Article 3.2), the consequent impact of these imports on domestic producers of such products (Article 3.4), and the demonstration that it is the dumped imports that are causing injury (Article 3.5).

7.260. Beginning with Article 3.2, the first sentence sets out further requirements for the examination of the volume of dumped imports, which is the aspect of the NTC's determination that we are reviewing here.

7.261. The first sentence of Article 3.2 provides:

> With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member.

7.262. Article 3.2 requires an investigating authority to "consider" whether there has been a significant increase in dumped imports. As we discussed at paragraph 7.140 above, the ordinary meaning of "consider" includes "[t]o view or contemplate attentively, to survey, examine" and "[t]o contemplate mentally, fix the mind upon; to think over, meditate or reflect on, bestow attentive thought upon, give heed to, take note of".[351] Thus Article 3.2 requires an investigating authority to assess whether there has been an increase in the volume of dumped imports, and to take those findings into account.[352]

7.263. What the investigating authority must consider is whether there has been an increase in the volume of dumped imports that is "significant", i.e. "noteworthy; consequential, influential".[353] Article 3.2 does not set out a minimum threshold for what qualifies as a "significant" increase; whether an increase is "significant" will depend on the specific circumstances of the case.[354]

7.264. Article 3.2 sets forth three perspectives from which an increase may be assessed: "either in absolute terms or relative to production or consumption in the importing Member". The use of the disjunctives "either … or … or" makes it clear that these are alternative, i.e. an investigating authority may rely on one, two, or all three in its consideration of the volume of dumped imports.[355]

7.6.2 Whether the NTC's consideration of the volume of dumped imports is inconsistent with Articles 3.1 and 3.2

7.265. Below, we assess first the NTC's consideration of the evolution of the volume of dumped imports in absolute terms (section 7.6.2.1); second, the NTC's consideration of the volume of dumped imports relative to domestic production (section 7.6.2.2); and third, whether the United Arab Emirates has established that the NTC was also required to consider whether there had been an increase in the volume of imports relative to domestic consumption (section 7.6.2.3).

7.6.2.1 The evolution of the volume of dumped imports in absolute terms

7.266. To recall[356], the United Arab Emirates makes two sets of arguments on the NTC's consideration of the volume of dumped imports in absolute terms: first, that the NTC focused on 2009, the only year showing an increase on the previous year, and disregarded the evidence

[351] Oxford Dictionaries online, definition of "consider" https://www.oed.com/view/Entry/39593?redirectedFrom=consider#eid (accessed 13 October 2020), v., meaning 3.a.
[352] See also e.g. Appellate Body Report, *China – GOES*, para. 130.
[353] Oxford Dictionaries online, definition of "significant" https://www.oed.com/view/Entry/179569?redirectedFrom=significant#eid (accessed 13 October 2020), adj., meaning 4.a. See also Panel Reports, *China – Cellulose Pulp*, para. 7.40; and *Thailand – H-Beams*, para. 7.163.
[354] See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.
[355] See also Panel Report, *China – Cellulose Pulp*, para. 7.39. A previous panel took the same view when addressing the similarly worded Article 15.2 of the SCM Agreement. (Panel Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 7.233-7.234).
[356] See para. 7.251 above.

relating to the rest of the POI, including its most recent period[357]; and second, that the NTC in any event failed to consider whether the increase in imports in absolute terms was significant.[358]

7.267. Pakistan responds that the NTC in fact considered data from the entire POI, but attached particular significance to the 2009 data for a number of reasons. First, 2009 was the most recent full year in the POI[359]: the earlier years of the POI were too remote in time and therefore less reliable[360], and data relating to the last six months "cannot be as reliable and as revealing as full-year data".[361] Second, the decline in volume of dumped imports observed in January to June 2010 could not offset the increase observed in 2009.[362]

7.268. To make our assessment, we turn to the NTC's determination. We recall that the injury POI ran from January 2007 to June 2010.[363]

7.269. We note that the NTC found that the volume of dumped imports in absolute terms had decreased by 12.96% in 2008 compared with 2007, increased by 56.86% in 2009 compared with 2008 and decreased by 47.91% in the first six months of 2010 compared with the first six months of 2009.[364] Specifically, imports in absolute terms decreased by [[***]] metric tonnes in 2008 (from [[***]] metric tonnes in 2007), increased by [[***]] metric tonnes in 2009, and decreased by [[***]] metric tonnes during January to June 2010 compared with the previous half-year.[365] The NTC noted the fluctuations, but observed that the increase in 2009 was at a "higher rate" than the subsequent decrease.[366] It then concluded that the volume of dumped imports in absolute terms had increased significantly during the POI.[367]

7.270. Thus, although the NTC described the evolution of imports including the fact that they had decreased during the first and last part of the POI, it then based its finding on the single year in which they had increased, i.e. 2009, and it dismissed the decreases simply stating that the increase in 2009 had been at a "higher rate" than the decrease in the first half of 2010.[368]

7.271. We note that Article 3 does not preclude an investigating authority from attaching more weight to certain data on its record. However, even in doing so, an investigating authority must not ignore other relevant data[369], and must explain how it took into account evidence that conflicted with its conclusions.[370]

7.272. The NTC provided one comment that appears intended at explaining its focus on 2009 rather than other years; namely, that the increase in the volume of imports in 2009 had been at a "higher rate" than the decrease in the first half of 2010.[371] We note however that the rate of decrease observed in January to June 2010 (47.91%) is close in magnitude to the rate of the previous increase (56.86%) and that, moreover, the absolute volume of decrease in the first six months of 2010

[357] United Arab Emirates' first written submission, paras. 300-303 and 305; opening statement at the first meeting of the Panel, para. 46; and written opening statement, para. 59.
[358] United Arab Emirates' first written submission, para. 307; second written submission, para. 143; and written opening statement, para. 60.
[359] Pakistan's first written submission, para. 3.359; second written submission, paras. 2.145-2.151; and response to United Arab Emirates' written opening statement, paras. 35-42.
[360] Pakistan's second written submission, para. 2.150 (referring to Appellate Body Reports, *US – Steel Safeguards*, para. 388; and *US – Lamb*, para. 137).
[361] Pakistan's second written submission, paras. 2.145-2.146 and 2.150-2.151 (referring to Appellate Body Reports, *US – Lamb*, para. 137; *Mexico – Anti-Dumping Measures on Rice*, paras. 166-167; and Panel Report, *Ukraine – Passenger Cars*, para. 7.179); written opening statement, para. 71. See also Pakistan's written opening statement, paras. 73-74; and response to United Arab Emirates' written opening statement, paras. 35-42.
[362] Pakistan's first written submission, paras. 3.357 and 3.359; second written submission, para. 2.145.
[363] See para. 7.80 above.
[364] Report on final determination (2013), public version, (Exhibit ARE-2), table-VII.
[365] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VII and para. 35.6.
[366] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 35.3 and 35.6.
[367] Report on final determination (2013), public version, (Exhibit ARE-2), para. 35.7.
[368] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VII and para. 35.6.
[369] Panel Reports, *Russia – Commercial Vehicles*, para. 7.41; *China – Broiler Products (Article 21.5 – US)*, paras. 7.152-7.153.
[370] See para. 7.258 above.
[371] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VII and para. 35.6.

[[***]] was larger than the absolute volume of increase in the full year 2009 [[***]].[372] Therefore, the NTC's comment does not, in our view, adequately explain its decision to focus on the rate of increase in 2009 and disregard the conflicting evidence on the evolution of imports during earlier and later periods of the POI.

7.273. As noted, Pakistan argues that it was reasonable for the NTC to attach more significance to 2009 because the earlier years of the POI were too remote in time and therefore less reliable, and data relating to the last six months "cannot be as reliable and as revealing as full-year data".[373] However, Pakistan has not pointed us to any evidence that these explanations formed part of the NTC's own reasoning in the domestic proceedings, and we therefore cannot rely on them in assessing the NTC's determination.

7.274. Pakistan also maintains that Article 3.2 only requires authorities to "consider whether there has been a significant increase in dumped imports", and not to determine or conclude that there was.[374] We note however that this does not exempt authorities from the requirement to make an "objective examination" when considering whether there has been a significant increase in dumped imports, which is what was lacking in this case.

7.275. Therefore, we find that the NTC failed to make an objective examination in considering whether there had been a significant increase in dumped imports in absolute terms, because it focused selectively on the only year in which imports increased and did not explain how it took into account the conflicting evidence pertaining to the rest of the POI, including the most recent period. By so doing, the NTC acted inconsistently with Articles 3.1 and 3.2. Having so found, we do not examine the United Arab Emirates' further argument that the NTC failed to consider whether the increase in the absolute volume of imports, if any, was significant.

7.6.2.2 The evolution of the volume of dumped imports relative to domestic production

7.276. The United Arab Emirates makes two sets of arguments on the NTC's consideration of the volume of dumped imports relative to domestic production: first, that the NTC focused on 2009, the only year showing an increase on the previous year, and disregarded the evidence relating to the rest of the POI[375]; and second, that the NTC in any event failed to consider whether the increase in imports relative to domestic production was significant.[376]

7.277. Regarding the NTC's reliance on the increase in 2009, Pakistan responds that the decline in the volume of dumped imports relative to domestic production observed in January to June 2010 was not sufficient to offset the increase observed in the full year 2009.[377] As to the NTC's consideration of significance, Pakistan responds that the NTC chose to focus "on import volumes in absolute terms", was not required to consider whether also the increase in relative terms was significant, and in any event "could have easily found" the relative increase of 6 percentage points observed in 2009 to be significant, "in the light of the precarious state of the domestic industry".[378]

7.278. To make our assessment, we turn to the NTC's determination. The NTC observed that the dumped imports were 11.80%, 10.30%, 16.41%, and 14.84% of the domestic production in the years 2007, 2008, 2009, and January to June 2010, respectively.[379] The NTC then concluded that the volume of dumped imports had "increased significantly … relative to production of the domestic like product during [the] POI".[380]

7.279. Thus, the NTC was faced with fluctuating trends: a *decrease* of 1.5 percentage points in 2008, an *increase* of 6.1 percentage points in 2009, and a *decrease* of 1.6 percentage points in

[372] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VII.
[373] See para. 7.267 above. We recall that the NTC itself, in April 2012, chose to cut off the injury POI at the end of June 2010. See para. 7.80 above.
[374] Pakistan's first written submission, paras. 3.353-3.354.
[375] United Arab Emirates' first written submission, para. 304.
[376] United Arab Emirates' first written submission, para. 310.
[377] Pakistan's second written submission, para. 2.148.
[378] Pakistan's second written submission, paras. 2.165-2.167. We also recall Pakistan's overarching argument addressed in para. 7.274 above.
[379] Report on final determination (2013), public version, (Exhibit ARE-2), para. 35.5.
[380] Report on final determination (2013), public version, (Exhibit ARE-2), para. 35.7.

January to June 2010. The NTC described those trends and then, without more, concluded that the volume of dumped imports relative to domestic production had "*increased significantly*" during the POI. We note Pakistan's explanation to us that the NTC focused on the increase in 2009 because the later decrease did not offset that increase[381]; however, Pakistan has not pointed us to evidence from the record of the domestic proceedings showing that this was indeed the NTC's reasoning.

7.280. Thus, in finding that imports relative to domestic production had "increased significantly", the NTC did not explain how it reconciled the conflicting trends in the data before it to reach its conclusion. Specifically, it did not explain how the sequence of downward and upward movements it observed led it to conclude that the increase in imports relative to domestic production was "significant". Indeed, Pakistan's arguments acknowledge that the NTC did not discuss whether the increase was significant.[382]

7.281. We further note Pakistan's argument that the NTC was entitled to focus on the increase in the absolute volume of imports and did not need to consider also whether the increase in the volume of imports relative to domestic production was "significant".[383] However, the NTC *did* conclude that the increase in the volume of imports relative to domestic production was significant[384], and it relied on that conclusion as part of the basis for its determination of injury[385]; in doing so, it was subject to the requirements of Articles 3.1 and 3.2.

7.282. We therefore find that in concluding that the volume of dumped imports relative to domestic production had increased "significantly", the NTC acted inconsistently with Articles 3.1 and 3.2, because it did not explain how it reconciled the conflicting trends before it and in particular it did not explain how those conflicting trends supported its conclusion that the increase was "significant".[386]

7.6.2.3 The evolution of the volume of dumped imports relative to domestic consumption

7.283. The NTC did not consider whether there had been an increase in dumped imports relative to domestic consumption.

7.284. The United Arab Emirates argues that, given the "contradictory trends" observed, the NTC was required to consider also whether there had been a significant increase in the volume of dumped imports relative to domestic consumption, in order to perform an objective examination under Articles 3.1 and 3.2.[387]

7.285. Pakistan responds that Article 3.2 confers discretion on the investigating authority to analyse whether the volume of dumped imports has increased in absolute terms, *or* relative to domestic production, *or* relative to domestic consumption, and does not require authorities to consider more than one of these metrics.[388] Therefore, Pakistan argues that having already examined the evolution of the volume of dumped imports in absolute terms and relative to domestic production, the NTC was not required to consider also whether there had been a significant increase in the volume of imports relative to domestic consumption.[389]

7.286. We recall that Article 3.2 uses the disjunctives "either … or … or" when listing the different manners in which an authority may consider whether dumped imports have increased significantly, making it clear that these are alternative and not cumulative.[390] Therefore, we reject the United Arab Emirates' argument that the NTC was required to examine the evolution of the volume

[381] See para. 7.277 above.
[382] Pakistan's second written submission, paras. 2.165-2.167.
[383] See para. 7.277 above.
[384] Report on final determination (2013), public version, (Exhibit ARE-2), para. 35.7.
[385] Report on final determination (2013), public version, (Exhibit ARE-2), para. 47.2.
[386] See paras. 7.258, 7.262, and 7.263 above.
[387] United Arab Emirates' first written submission, para. 306; response to Panel question No. 59.
[388] Pakistan's response to Panel question No. 59.
[389] Pakistan's second written submission, paras. 2.171-2.173.
[390] See para. 7.264 above.

of imports relative to domestic consumption, in addition to examining the evolution of the volume of imports in absolute terms and relative to domestic production.[391]

7.6.3 Conclusion on the NTC's consideration of the volume of dumped imports under Articles 3.1 and 3.2

7.287. In sum, we find that the NTC acted inconsistently with Articles 3.1 and 3.2 because it failed to make an objective examination in considering whether there had been a significant increase in imports in absolute terms and relative to domestic production.

7.7 Consideration of the effect of dumped imports on prices: Articles 3.1 and 3.2 of the Anti-Dumping Agreement

7.288. As part of its injury analysis, the NTC found that the effects of the dumped imports on the prices of the domestic industry were significant price undercutting and significant price depression.[392] The United Arab Emirates claims that the NTC's consideration of whether there had been significant price undercutting and significant price depression was inconsistent with Articles 3.1 and 3.2.

7.289. We structure our discussion as follows: first, we set out the applicable requirements of Article 3.2 (section 7.7.1), having already discussed Article 3.1 in section 7.6.1 above; second, we assess whether the United Arab Emirates has established that the NTC's consideration of price undercutting was inconsistent with the requirements of Articles 3.1 and 3.2, and find that it has so established (section 7.7.2); third, we assess whether the United Arab Emirates has established that the NTC's consideration of price depression was inconsistent with those requirements, and find that it has so established (section 7.7.3).

7.7.1 The applicable requirements of Article 3.2, second sentence

7.290. The second sentence of Article 3.2 sets out requirements for the examination of the effect of dumped imports on prices. It provides that:

> With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

7.291. The second sentence of Article 3.2 imposes on an investigating authority the obligation to "consider" the effect of dumped imports on prices. As we discussed at paragraph 7.262 above, the ordinary meaning of "consider" includes "view or contemplate attentively … examine", "take something into account in reaching its decision", and does not require an authority to make a definitive determination.[393]

7.292. Article 3.2 refers to three types of price effects, two of which are the subject of the United Arab Emirates' challenge, namely price undercutting and price depression.

7.293. With regard to price undercutting, Article 3.2 requires authorities to "consider whether there has been a significant price undercutting by the dumped imports as *compared with the price* of a like product of the importing Member".[394] That is, Article 3.2 requires a comparison between the prices of the dumped imports and those of a domestic like product.[395] As has been observed in the

[391] We note that this is separate from the question whether the NTC's examination of the evolution of dumped imports in absolute terms and relative to domestic production was itself consistent with Articles 3.1 and 3.2, which we have considered above.
[392] Report on final determination (2013), public version, (Exhibit ARE-2), sections 36.1 and 36.2.
[393] Appellate Body Report, *China – GOES*, para. 130.
[394] Emphasis added.
[395] See also Appellate Body Reports, *China – GOES*, para. 136; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.158.

past, when the investigating authority must compare prices, "price comparability necessarily arises as an issue".[396]

7.294. The text of Article 3.2, which uses the present perfect ("has been") and the present participle ("undercutting"), in its context, suggests that what is at issue are price effects that continue over time, and are not limited to an isolated instance.[397]

7.295. With regard to price depression, the question is "whether the effect of [the dumped] imports is … to depress prices to a significant degree". The ordinary meaning of "depress" includes "[t]o press down … to lower"[398], while the ordinary meaning of "depression" includes "[t]he action of pressing down, or fact of being pressed down".[399] In the context of Article 3.2, an investigating authority is thus required to consider whether the prices of domestic like products are being pressed down by the dumped imports.

7.296. For both types of price effects at issue here, the investigating authority must consider whether they are "significant", i.e. "important, notable, consequential". This will depend on the circumstances of the case.[400]

7.297. Further, the question under the second sentence of Article 3.2 is whether "the effect of the dumped imports" has been one (or more) of these price phenomena. Article 3.2 thus links the dumped imports and the price depression and contemplates consideration of the relationship between the two.[401]

7.298. Beyond these requirements and the overarching requirements in Article 3.1, Article 3.2 does not prescribe a specific methodology to be relied upon in a price undercutting or depression analysis, thus affording a certain level of discretion to the investigating authority.[402]

7.7.2 Whether the NTC's consideration of price undercutting was inconsistent with Articles 3.1 and 3.2

7.299. The United Arab Emirates makes five arguments in support of its claim that the NTC's consideration of price undercutting was inconsistent with Articles 3.1 and 3.2. The United Arab Emirates argues: first, that the NTC failed to rely on positive evidence by using import price data from Pakistan Revenue Automation Limited (PRAL), the data processing arm of the Federal Board of Revenue of the Government of Pakistan[403]; second, that the NTC failed to ensure price comparability[404]; third, that the NTC focused on 2009, the single year of the POI during which

[396] Panel Report, *China – GOES*, para. 7.530; Appellate Body Report, *China – GOES*, para. 200. See also Panel Report, *China – Broiler Products*, paras. 7.475-7.478.

[397] See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.159, reasoning that "a proper reading of 'price undercutting' under Article 3.2 suggests that the inquiry requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI). An examination of such developments and trends includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices".

[398] Oxford Dictionaries online, definition of "depress" https://www.oed.com/view/Entry/50442?rskey=ThDTSn&result=2&isAdvanced=false#eid (accessed 14 October 2020), v. meaning 2.

[399] Oxford Dictionaries online, definition of "depression" https://www.oed.com/view/Entry/50451?redirectedFrom=depression#eid (accessed 14 October 2020), n. meaning 1.

[400] See para. 7.263 above.

[401] See also e.g. Appellate Body Reports, *China – GOES*, paras. 136, 144, and 152; *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.161.

[402] See also Panel Reports, *China – Broiler Products*, para. 7.474; and *China – X-Ray Equipment*, para. 7.41.

[403] United Arab Emirates' first written submission, para. 317; second written submission, para. 160; and written opening statement, para. 67. For Pakistan's response, see Pakistan's first written submission, paras. 3.374-3.376; response to Panel question No. 60; and written opening statement, paras. 76-78.

[404] United Arab Emirates' first written submission, paras. 318-322; second written submission, para. 161; and written opening statement, para. 68. For Pakistan's response, see Pakistan's first written submission, paras. 3.381-3.386; and response to Panel question No. 61.

undercutting was found, disregarding conflicting evidence from the rest of the POI[405]; fourth, that the NTC failed to consider whether price undercutting was significant[406]; and fifth, that the NTC did not take into account the global financial crisis.[407] We consider these arguments in turn.

7.7.2.1 The NTC's use of PRAL data

7.300. The United Arab Emirates argues that the NTC used data from official import statistics maintained by PRAL to establish the price of dumped imports for purposes of its undercutting analysis, disregarding without any explanation the export price information provided by cooperating exporters.[408]

7.301. Pakistan responds that the NTC established the price ("weighted average landed cost") of the dumped imports using the price data submitted by the cooperating exporters as its primary source of information, and used PRAL data only for non-cooperating exporters. Pakistan acknowledges that a passage in the Report on final determination refers only to PRAL as the source of the data, but maintains that is because of a clerical error.[409]

7.302. We note that in a footnote to table-VIII on price undercutting, the NTC stated that the sources of the data underlying the price undercutting analysis were "[a]pplicant *and cooperating exporters*".[410] Elsewhere in its report, the NTC stated that it had "used import data obtained from PRAL in addition to the information provided by the Applicant *and the exporters/foreign producers*".[411]

7.303. Pakistan presented to us the NTC's calculation of the prices of the dumped imports. In those calculations, the NTC appears to have, indeed, calculated weighted average prices using data from cooperating exporters, including Taghleef, and PRAL data for other exporters.[412] The NTC's statements in its report, together with its calculations of export price, support Pakistan's explanation that it used price data from cooperating exporters where available, and that the NTC's statement suggesting that landed costs were calculated only from PRAL data was in error.

7.304. We therefore find that the United Arab Emirates has not established, as a matter of fact, that the NTC did not use the available price data from cooperating exporters.

7.305. The United Arab Emirates further argues that even if the NTC combined the data from cooperating exporters and PRAL, it is "doubtful" that this ensured "an objective examination based on positive evidence"[413], the NTC provided "zero explanation" and there are "serious questions" about reliance on this commingled data.[414] However, the United Arab Emirates has not further substantiated its "doubts" and "questions", and we therefore consider that it has not established that the fact of combining data from the cooperating exporters with PRAL data for non-cooperating exporters, in itself, gave rise to an inconsistency with Articles 3.1 and 3.2.

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[405] United Arab Emirates' first written submission, paras. 323-334; opening statement at the first meeting of the Panel, paras. 48-50; second written submission, para. 163; and written opening statement, para. 69. For Pakistan's response, see Pakistan's first written submission, paras. 3.393-3.395; and second written submission, paras. 2.179-2.184.

[406] United Arab Emirates' first written submission, para. 330; opening statement at the first meeting of the Panel, para. 53; and second written submission, para. 162. For Pakistan's response, see Pakistan's first written submission, paras. 3.388-3.390; response to Panel question No. 63; and second written submission, paras. 2.186-2.189.

[407] United Arab Emirates' first written submission, paras. 326 and 328. For Pakistan's response, see Pakistan's first written submission, paras. 3.397-3.399.

[408] United Arab Emirates' first written submission, para. 317; second written submission, paras. 145 and 160; and written opening statement, para. 67. The United Arab Emirates refers to Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.1.1.

[409] Pakistan's first written submission, paras. 3.374-3.376; response to Panel question No. 60.

[410] Report on final determination (2013), public version, (Exhibit ARE-2), table-VIII. (emphasis added)

[411] Report on final determination (2013), public version, (Exhibit ARE-2), para. 14.8. (emphasis added)

[412] Annexure-XVI, calculations of landed cost, (Exhibit PAK-39 (BCI)). This was annexure-XVI to the Report on final determination (2013), (Exhibit PAK-1 (BCI)).

[413] United Arab Emirates' second written submission, para. 160.

[414] See also United Arab Emirates' response to Pakistan's written opening statement, para. 33.

7.7.2.2 Price comparability (product mix)

7.306. The United Arab Emirates argues that the NTC failed to ensure that the prices it was comparing were comparable: although there were two different types of the product under consideration, namely metallized and non-metallized BOPP film, with "significant differences in import volumes and prices"[415] between the two, the NTC compared the aggregate price of dumped imports with the aggregate price of domestic BOPP film without distinguishing the metallized and non-metallized type.[416] The United Arab Emirates maintains that the NTC bore the obligation to ensure price comparability, even though Taghleef did not raise this issue during the domestic proceedings.[417]

7.307. Pakistan responds that the NTC considered the product mix on either side of the price comparison and concluded that the prices were comparable because the proportions of metallized and non-metallized BOPP film on either side were "not different".[418] Pakistan adds that the proportion of the cheaper, non-metallized BOPP film was slightly greater on the domestic side than on the side of dumped imports, and therefore the use of average figures in the comparison understated the magnitude of undercutting.[419] Pakistan concedes that the NTC did not explicitly discuss this analysis on the record, but asserts that the NTC was not required to do so, because it had the discretion on how to undertake the analysis, and no interested party raised these arguments during the investigation.[420]

7.308. It is not disputed that the exporters (including Taghleef) and the domestic industry sold two types of BOPP film in different proportions in the Pakistani market: non-metallized BOPP film and metallized BOPP film.[421] There were pricing differences between the two types of BOPP film, with the metallized type priced higher than the non-metallized type.[422] In its undercutting analysis, the NTC calculated a single weighted average price of imports for each year of the POI, and compared that average price to the weighted average price of the domestic like product.[423] Pakistan is offering explanations for this choice but has not pointed us to anything in the record of the domestic proceedings indicating that those explanations were the NTC's own.

7.309. We note that the existence of two types of the product that differed in price and quantities raised concerns of comparability. We recall that the text of Article 3.2 stipulates that a price undercutting analysis is a price comparison. Whether the prices under comparison are comparable is core to the objectivity of the analysis. Therefore, investigating authorities are required to ensure that prices are comparable, whether or not investigated exporters raise such concerns during the investigation.[424] Failure to do so falls short of an objective examination of price undercutting.

7.310. Therefore, we find that by simply calculating an average price for the dumped imports and an average price for the like domestic product, without addressing the concerns for comparability that were posed by the existence of two different product types, the NTC failed to undertake an objective examination in considering price undercutting. It thus acted inconsistently with Articles 3.1 and 3.2.

7.7.2.3 The NTC's focus on 2009

7.311. The United Arab Emirates argues that the NTC based its finding that there had been price undercutting during the POI on the single year in which the prices of dumped imports were lower

[415] United Arab Emirates' first written submission, para. 319.
[416] United Arab Emirates' first written submission, paras. 318-321; second written submission, para. 161; and written opening statement, para. 68.
[417] United Arab Emirates' first written submission, para. 322 (referring to Appellate Body Report, *China – GOES*, para. 200). See also United Arab Emirates' response to Pakistan's written opening statement, para. 34.
[418] Pakistan's first written submission, paras. 3.381-3.382.
[419] Pakistan's first written submission, para. 3.384; response to Panel question No. 61.
[420] Pakistan's first written submission, paras. 3.381-3.386; response to Panel question No. 61.
[421] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 12.2.1-12.2.2 and 28.2.2; Pakistan's first written submission, para. 3.379.
[422] NTC's dumping calculations, (Exhibit ARE-31 (BCI)); United Arab Emirates' first written submission, para. 319; and Pakistan's first written submission, para. 3.381.
[423] Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.1.1.
[424] Appellate Body Report, *China – GOES*, para. 201; Panel Report, *China – Broiler Products*, paras. 7.475-7.478.

than the prices of the domestic like product (2009), without taking into account the conflicting evidence from the rest of the POI, including the fact that the rate of undercutting in 2009 was lower than the rate of overselling in 2007 and 2008 and close to the rate level of overselling in January to June 2010.[425]

7.312. Pakistan responds that the NTC considered data from the entire POI, but attached particular significance to that relating to 2009 because it was the most recent full year in the POI[426], and that the level of overselling in January to June 2010 did not offset the level of undercutting in 2009.[427] However, we note that the record before us does not establish that these explanations were the NTC's.

7.313. To make our assessment, we turn to the NTC's discussion of whether there had been price undercutting. The NTC first set out the aggregate price of the dumped imports and of the domestic like product during each year of the injury POI, an exercise that showed undercutting only in 2009.[428] In percentage terms, undercutting was 4.35% in 2009, whereas overselling was [[***]] in 2007, [[***]] in 2008, and 3% in January to June 2010.[429] The NTC then stated that the prices of dumped imports and domestic like products had both increased in 2008, that the price of dumped imports undercut prices of domestic like products in 2009[430], and that while the price of dumped imports was higher than that of domestic like products during January to June 2010, the "magnitude of the price undercutting [in 2009] was overwhelming".[431] The NTC then concluded that there was price undercutting during the POI.[432]

7.314. Thus, the data before the NTC showed undercutting in 2009 by a margin of 4.35%, whereas during the rest of the POI, including the most recent period of the POI, the import prices exceeded those of the domestic like product by similar margins.[433] Yet, the NTC did not explain how it took this conflicting evidence into account, other than to state that although the domestic price was lower than the price of imports in January to June 2010, the magnitude of price undercutting in 2009 was "overwhelming".[434] We also note that this cursory statement does not appear to be supported by the data, because the magnitude of the undercutting in 2009 was in fact similar to the magnitude of the overselling in January to June 2010.[435]

7.315. We recall that to make an objective examination as required by Article 3.1, the investigating authority must not disregard relevant evidence that may conflict with its findings, and must instead explain how it has taken this evidence into account.[436] We further recall that the requirement to consider "whether there *has been* a significant price *undercutting*" is not satisfied "by a static examination" at a single point in time.[437] By basing its conclusion of price undercutting solely on 2009, without explaining how it had taken into account conflicting evidence, including from the most recent period of the POI, the NTC acted inconsistently with Articles 3.1 and 3.2.

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[425] United Arab Emirates' first written submission, paras. 323-329; opening statement at the first meeting of the Panel, paras. 48-50; and written opening statement, para. 69.

[426] Pakistan's first written submission, paras. 3.393-3.395; second written submission, paras. 2.179-2.180; and response to Panel question No. 55.

[427] Pakistan's second written submission, para. 2.180. See also Pakistan's response to United Arab Emirates' written opening statement, para. 43.

[428] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VIII; Report on final determination (2013), public version, (Exhibit ARE-2), table-VIII.

[429] For 2009, Report on final determination (2013), public version, (Exhibit ARE-2); for 2010, United Arab Emirates' response to Panel question No. 90 and Pakistan's comments on United Arab Emirates' response to Panel question No. 90; for the other years, percentages derived from Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VIII. In absolute terms, the margins were [[***]]. (Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VIII).

[430] The Report on final determination refers to the "POI for dumping"; in the course of the proceedings, Pakistan clarified that this was meant to be a reference to 2009. (Pakistan's response to Panel question No. 57).

[431] Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.1.2.

[432] Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.1.3.

[433] We refer to fn 429 above, for the exact magnitudes. [[***]]

[434] See fn 431 above.

[435] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-VIII; see also Report on final determination (2013), public version, (Exhibit ARE-2), table-VIII.

[436] See para. 7.258 above.

[437] Emphasis added. See para. 7.294 and fn 397 above.

7.7.2.4 "Significance" of price undercutting

7.316. The United Arab Emirates argues that the NTC did not consider whether the price undercutting was "significant", as required under Article 3.2.[438]

7.317. Pakistan responds that the magnitude of price undercutting observed by the NTC in 2009 (4.35%) was sufficient to support a finding of significance in the circumstances of this case: the investigated product is a commodity product whose competition is primarily based on price, and therefore, even small price differences influence consumer decisions.[439] We note, however, that this explanation is not reflected in the record of the investigation. Pakistan points out that during the investigation Taghleef itself referred to BOPP Film as a "commodity"[440]; in our view, however, this does not demonstrate that the explanation put forward by Pakistan was the NTC's reasoning in the underlying proceedings. Therefore, we cannot rely on this explanation in making our assessment, notwithstanding Pakistan's assertion that "it is common industry knowledge that the subject product is a commodity".[441]

7.318. The Report on final determination observes that the prices of dumped imports undercut prices of the domestic like product by 4.35% in 2009, then adds that the domestic price was lower than the price of dumped imports in January to June 2010, but that the "magnitude of the price undercutting [in 2009] was overwhelming".[442] That is the entirety of the NTC's consideration of this issue, and Pakistan has not shown otherwise.

7.319. We therefore find that the United Arab Emirates has established that the NTC did not consider whether there had been "significant" price undercutting, and thus acted inconsistently with Article 3.2.

7.7.2.5 The global financial crisis

7.320. The United Arab Emirates also argues that by not considering the price undercutting observed in 2009 in the context of the global financial crisis, the NTC failed to make an objective examination of whether that undercutting was the effect of the dumped imports. The United Arab Emirates points out that in 2009 the prices of BOPP film followed the world market trend for non-energy commodity prices.[443] Pakistan responds that the NTC was not required to take into account the global financial crisis in its price undercutting analysis.[444]

7.321. Having already found, on other grounds, that the NTC's consideration of price undercutting was inconsistent with Articles 3.1 and 3.2, we do not consider this additional argument by the United Arab Emirates.

7.7.2.6 Conclusion on the NTC's consideration of price undercutting under Articles 3.1 and 3.2

7.322. We find that the NTC's consideration of price undercutting was inconsistent with Articles 3.1 and 3.2 because the NTC failed to ensure that the prices it was comparing were comparable, relied on data for a single year of the POI without adequately explaining why it disregarded conflicting evidence from the rest of the POI, including its most recent period, and failed to consider whether price undercutting was significant.

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[438] United Arab Emirates' first written submission, para. 330. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 53.

[439] Pakistan's first written submission, paras. 3.387-3.390; second written submission, paras. 2.186-2.189; and comments on the United Arab Emirates' response to the Panel question No. 90.

[440] Pakistan's second written submission, paras. 2.187-2.188 (referring to Taghleef's post-hearing submission, (Exhibit ARE-13), p. 17).

[441] Pakistan's response to Panel question No. 63.

[442] Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.1.2. See also ibid. table-VIII.

[443] United Arab Emirates' first written submission, paras. 326 and 328.

[444] Pakistan's first written submission, paras. 3.397-3.399.

7.7.3 Whether the NTC's consideration of price depression was inconsistent with Articles 3.1 and 3.2

7.323. The United Arab Emirates argues that the NTC acted inconsistently with Articles 3.1 and 3.2 in considering price depression, because, first, the NTC focused on the price decline in 2009 alone, without explaining how it had taken into account conflicting evidence from the rest of the POI, including its most recent period[445]; second, the NTC did not consider whether the price depression was "significant"[446]; third, the NTC did not consider whether the price depression was "the effect of" dumped imports, given that the decline in prices tracked the decline in costs[447]; and, fourth, the NTC did not reconcile its finding of price depression with the finding that there was no price suppression.[448] We consider these arguments in turn.

7.7.3.1 The NTC's focus on 2009

7.324. The United Arab Emirates argues that the NTC failed to make an objective examination in considering price depression, because it based its finding on the single year in which domestic prices had decreased, and disregarded the fact that during the rest of the POI, including the period January to June 2010, prices of the domestic like product increased.[449]

7.325. Pakistan responds that the NTC considered trends from the entire POI but gave more weight to 2009, because the increase in January to June 2010 was less pronounced than the preceding decline, and 2009 was the most recent full year of the POI.[450]

7.326. We note that the NTC set out the evolution of domestic prices in each year and the last half-year of the POI, namely a price increase of 27.44% in 2008, a price decrease of 13.24% in 2009, and a price increase of 11.5% in January to June 2010.[451] The NTC then stated that the price decrease observed in 2009 was "overwhelming"[452], and concluded that the domestic industry had suffered price depression due to dumped imports.[453] The NTC did not explain how it took into account the conflicting indications provided by the data for 2008 and 2010. Beyond asserting that the price decrease in 2009 was "overwhelming", it did not explain this assertion in light of the trends observed during the rest of the POI, namely the fact that the price decrease in 2009 was more contained than the price increase in 2008 and was very close to the price increase in the first half of 2010.[454]

7.327. We recall that to perform an objective examination, the authority must also take into account the evidence that appears to conflict with its findings, and explain how it has reconciled this evidence

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[445] United Arab Emirates' first written submission, paras. 336-346; second written submission, para. 164; opening statement at the first meeting of the Panel, para. 51; and written opening statement paras. 70-72. For Pakistan's response, see Pakistan's first written submission, paras. 3.410-3.414; and second written submission, paras. 2.196-2.200.

[446] United Arab Emirates' first written submission, paras. 347-350; second written submission, para. 165. For Pakistan's response, see Pakistan's first written submission, para. 3.416; second written submission, paras. 2.201-2.204; and response to Panel question No. 63.

[447] United Arab Emirates' first written submission, paras. 340-342; second written submission, para. 165; opening statement at the first meeting of the Panel, para. 52; and written opening statement para. 71. For Pakistan's response, see Pakistan's first written submission, paras. 3.413-3.414; second written submission, paras. 2.199-2.200; and response to United Arab Emirates' written opening statement, paras. 47-48.

[448] United Arab Emirates' first written submission, para. 343; response to Panel question No. 62. Pakistan's first written submission, para. 3.415; response to Panel question No. 64; and second written submission, para. 2.209.

[449] United Arab Emirates' first written submission, paras. 336-337; second written submission, para. 164; opening statement at the first meeting of the Panel, para. 51; and written opening statement, paras. 70-71.

[450] Pakistan's first written submission, para. 3.411; second written submission, paras. 2.196 and 2.206.

[451] Report on final determination (2013), public version, (Exhibit ARE-2), table-IX. For 2010, the percentage increase is specified at para. 36.3.2. See also Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-IX.

[452] Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.2.1.

[453] Report on final determination (2013), public version, (Exhibit ARE-2), para. 32.2.4.

[454] Report on final determination (2013), public version, (Exhibit ARE-2), table-IX. The percentage increase in January to June 2010 was derived from Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-IX.

in reaching its conclusions.[455] In considering whether there had been significant price depression, the NTC failed to do so, and focused on the only year supporting its conclusion of price depression, without explaining how it had taken into account the evidence relating to the rest of the POI.

7.328. Although Pakistan argues that the NTC attached significance to the data for 2009 (to the exclusion of earlier and later data) because 2009 was the most recent full-year, it could not point us to record evidence establishing that this was the NTC's reasoning.

7.329. We therefore find that the NTC acted inconsistently with Articles 3.1 and 3.2 in considering price depression, because, by focusing solely on data for the one year supporting its conclusion and by not explaining how it took into account conflicting evidence, it failed to make an objective examination.

7.7.3.2 "Significance" of price depression

7.330. The United Arab Emirates asserts that the NTC did not consider whether the price depression was significant, as is required by Article 3.2. The United Arab Emirates adds that the NTC did not support its assertion that the "magnitude of the decrease [in 2009] was overwhelming", in the context of the subsequent increase in prices.[456]

7.331. Pakistan responds that it was reasonable for the NTC to consider a 13% decrease in prices of the domestic like product to be "significant" because BOPP film is a commodity that is extremely price-sensitive.[457] Pakistan concedes that the NTC did not characterize BOPP film as a commodity product in its price depression analysis, but asserts that it "is common industry knowledge that the subject product is a commodity" which has "obvious implications for competitive conditions in the BOPP market".[458] Pakistan adds that Taghleef itself referred to BOPP film as a commodity during the investigation.[459]

7.332. We recall that Article 3.2 does not provide a quantitative threshold for what qualifies as "significant" price depression. Whether the magnitude of depression is significant depends on the specific circumstances of each case. However, we also note that the NTC's analysis was limited to identifying the trends during the POI and asserting that the domestic price "recovered during the last six months of [the] POI but [the] magnitude of the decrease [in 2009] was overwhelming".[460]

7.333. While Pakistan argues that the NTC considered the price decline in the context of the competitive effect of BOPP film as a commodity product, it has not pointed us to information from the record of the domestic proceedings indicating that this was the NTC's reasoning.

7.334. We therefore find that the NTC did not consider whether the dumped imports had depressed prices "to a significant degree", as required by Article 3.2.

7.7.3.3 Whether the absence of price suppression contradicted the finding of price depression

7.335. The United Arab Emirates argues that the NTC's findings that there was no price suppression but there was price depression are contradictory. The United Arab Emirates asks, "if dumped imports did not stop domestic prices from increasing as much as they otherwise would have, how can dumped imports be blamed for having decreased prices?"[461]

7.336. Pakistan responds that the NTC's practice is to consider that price suppression exists when a producer is unable to increase prices in response to an *increase in* production *costs*. In 2009, when

[455] See para. 7.258 above.
[456] United Arab Emirates' first written submission, paras. 347-350 (referring to Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.2.1).
[457] Pakistan's first written submission, para. 3.416.
[458] Pakistan's response to Panel question No. 63; second written submission, paras. 2.203-2.204.
[459] Pakistan's second written submission, paras. 2.187-2.189 (referring to Taghleef's post-hearing submission, (Exhibit ARE-13), p. 17).
[460] Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.2.1.
[461] United Arab Emirates' first written submission, para. 343; response to Panel question No. 62.

the NTC found price depression, the NTC did not consider there to be price suppression because *costs decreased*.[462]

7.337. Under Article 3.2, consideration of price depression and price suppression entails related but different enquiries – price depression exists when prices are "pushed down", while price suppression exists when dumped imports "prevent price increases, which otherwise would have occurred".[463] The Report on final determination reflects Pakistan's explanation that the NTC considers that there is price suppression only if the domestic industry cannot recover *increases in costs*, and there were no such increases in 2009.[464]

7.338. Therefore, the United Arab Emirates has not established that the NTC's finding of price depression in 2009 was contradicted by its finding that there was no price suppression that year.

7.7.3.4 Decrease in costs

7.339. The United Arab Emirates argues that the NTC failed to consider whether the price depression was the effect of dumped imports, because the price decrease in 2009 tracked closely the decrease in costs, and yet the NTC merely stated that the "price depression was partly due to decrease in cost and partly due to dumping".[465] Pakistan responds that the NTC considered that the magnitude of price decrease was mathematically greater than the cost decrease, and thus, dumping was a "co-causal" factor in the price decline.[466]

7.340. We note that in 2009, the price of the domestic like product declined by [[***]] PKR/metric tonnes (13.24%)[467] while costs declined by [[***]] PKR/metric tonnes[468] (13.4%[469]). In its Report on final determination, the NTC stated that the prices of inputs had also reduced in 2009, but the "reduction in prices was more than reduction in cost". The NTC then concluded that there was price depression during the POI for dumping "partly due to decrease in cost and partly due to dumping".[470]

7.341. We recall that Article 3.2 requires an investigating authority to consider "whether *the effect of* [the dumped] imports is … to depress prices".[471] We agree with Pakistan that price depression need not be exclusively the effect of dumping.[472] However, where there is evidence that other elements may explain the price depression, an objective investigating authority would need to consider such evidence to understand whether the dumped imports have indeed depressed the domestic prices.[473]

7.342. In this case, prices of the domestic like product tracked costs closely both in percentage and absolute terms, and Taghleef had pointed out these facts during the investigation.[474] In our view, in these circumstances, it was not sufficient merely to assert that the price depression was the effect of dumped imports and other factors. The NTC's statements that "the reduction in prices was more than reduction in cost" and that therefore "price depression was partly due to decrease in cost and partly due to dumping", are conclusory and fall short of a reasoned an adequate explanation. In our

[462] Pakistan's response to Panel question No. 64.
[463] Appellate Body Report, *China – GOES*, para. 141.
[464] Report on final determination (2013), (Exhibit PAK-1 (BCI)), para. 36.3.2.
[465] United Arab Emirates' first written submission, paras. 339-342; opening statement at the first meeting of the Panel, para. 52; and written opening statement, paras. 71 and 78 (referring to Report on final determination (2013), public version, (Exhibit ARE-2), para. 36.2.1). See also United Arab Emirates' response to Panel question No. 91.
[466] Pakistan's first written submission, para. 3.414; second written submission, paras. 2.197-2.200 and 2.210. See also Pakistan's response to the United Arab Emirates' written opening statement, para. 47; response to Panel question No. 91; and comments on United Arab Emirates' response to Panel question No. 91.
[467] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-IX and para. 36.2.1.
[468] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-X.
[469] United Arab Emirates' response to Panel question No. 91.
[470] Report on final determination (2013), public version, (Exhibit ARE-2), para. 32.2.4.
[471] Emphasis added.
[472] Pakistan's second written submission, para. 2.200.
[473] See also Appellate Body Report, *China – GOES*, para. 152, calling for an examination into whether dumped imports have a "depressive … effect on domestic prices".
[474] Taghleef's post-hearing submission, (Exhibit ARE-13), p. 18.

view, to perform an objective examination, the NTC was required to explain why, in light of the facts on its record, it considered that the price depression was "the effect of" the dumped imports.

7.343. We therefore find that the NTC acted inconsistently with Articles 3.1 and 3.2 because it did not explain why it considered that the price depression was the effect of the dumped imports in light of the fact that the decline in prices tracked extremely closely the decrease in the domestic industry's costs.

7.7.3.5 Conclusion on the NTC's consideration of price depression under Articles 3.1 and 3.2

7.344. We find that the NTC's price depression analysis was inconsistent with Articles 3.1 and 3.2 because: the NTC based its conclusion of price depression on the only year of the POI that supported that conclusion, without explaining how it took into account the conflicting evidence from earlier and later parts of the POI; the NTC did not consider whether the price depression was "significant"; and the NTC did not explain why it considered that the price depression was "the effect of" the dumped imports in light of the fact that the decline in prices tracked extremely closely the decrease in the domestic industry's costs.

7.8 Examination of the impact of the dumped imports on the domestic industry: Articles 3.1 and 3.4 of the Anti-Dumping Agreement

7.345. The United Arab Emirates challenges the NTC's examination of the impact of the dumped imports on the domestic industry as inconsistent with Articles 3.1 and 3.4. First, the United Arab Emirates submits that the NTC failed to evaluate the magnitude of the margin of dumping, which is one of the factors explicitly listed in Article 3.4. Second, the United Arab Emirates submits that the NTC did not objectively evaluate seven of the economic factors and indices having a bearing on the state of the industry. Third, the United Arab Emirates argues that the NTC failed to adequately explain why it concluded that overall, the domestic industry had been injured, in light of several factors that exhibited positive trends.

7.346. Pakistan asks the Panel to reject the United Arab Emirates' claims.

7.347. As set out below, we find that the United Arab Emirates has established that Pakistan's examination of the impact of the dumped imports on the domestic industry was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

7.348. We structure our discussion as follows: first, we set out the applicable requirements of Article 3.4 (section 7.8.1), having already discussed Article 3.1 in section 7.6.1 above; second, we apply those requirements to the facts of this case to assess whether Pakistan acted inconsistently with Articles 3.1 and 3.4 (section 7.8.2); and third, we conclude that Pakistan acted inconsistently with those provisions (section 7.8.3).

7.8.1 The applicable requirements of Article 3.4

7.349. We recall that pursuant to Article 3.1, a determination of injury must involve an objective examination of, *inter alia*, the impact of dumped imports on domestic producers of the like product. Article 3.4 sets forth requirements for this examination of the impact of the dumped imports. It provides that:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.350. Article 3.4 requires that an investigating authority evaluate *all* relevant economic factors and indices that have a bearing on the state of the domestic industry, and lists 15 such factors. The list

is not exhaustive, i.e. an investigating authority must examine all the listed factors but may also be required to evaluate other relevant factors based on the facts and circumstances of the particular proceeding.

7.351. The ordinary meaning of "evaluate" includes to "determine the significance, worth, or condition of usually by careful appraisal and study".[475] We agree with previous panels that have understood the obligation to "evaluat[e]" under Article 3.4 to require an analysis and interpretation of the data relating to the economic factors and indices, and an assessment of the "role, relevance and relative weight of each factor in the particular investigation".[476] Therefore, an investigating authority may not limit itself to setting out trends relating to the economic factors and indices.[477] Instead, it must analyse and interpret the data, in a way that is then discernible from the investigation record.[478]

7.352. Article 3.4 requires an investigating authority to examine the *impact of the dumped imports on the domestic industry*. Thus, the text of Article 3.4 creates a link between dumped imports and the state of the domestic industry. Therefore, in our view, an investigating authority is required to identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations that are on its record.[479] The precise contours of this analysis will vary on a case-by-case basis, depending on the evidence and explanations on the record of the investigating authority. Where the evidence on the investigating authority's record suggests alternative readings of the trends observed, an objective examination would include considering that evidence, and reconciling it with the authority's reading of the trends it observes.[480]

7.353. While an investigating authority must assess the factors listed in Article 3.4, this provision does not require all factors to be indicative of injury. An investigating authority may find that some factors are not relevant, or have limited relevance, and explain the basis for such findings.[481] And it is possible for an investigating authority to conclude that there is injury to the domestic industry where some of the relevant individual factors are not indicative of injury, provided that the authority adequately explains how its evaluation of the relevant economic factors and indices support the overall determination of injury.[482]

7.8.2 Whether the NTC's examination of the impact of the dumped imports on the domestic industry was inconsistent with Articles 3.1 and 3.4

7.354. As we outlined at paragraph 7.345 above, the United Arab Emirates argues that the NTC acted inconsistently with Articles 3.1 and 3.4 on three grounds. Below, we discuss the merits of each of the three grounds in turn, as follows: first, whether the NTC failed to evaluate the "magnitude of the margin of dumping" (section 7.8.2.1); second, whether the NTC failed to evaluate seven of the injury factors objectively and based on positive evidence (section 7.8.2.2); and third, whether the

[475] Merriam-Webster Dictionary online, definition of "evaluate" www.merriam-webster.com, v., meaning 2.

[476] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162. See also Panel Report, *Egypt – Steel Rebar*, paras. 7.43-7.44.

[477] Panel Report, *Korea – Certain Paper*, para. 7.268.

[478] Previous panels and the Appellate Body have considered that an investigating authority is not required to include a separate record of the evaluation of each of the injury factors listed in Article 3.4. Whether there is sufficient and credible record evidence to satisfy a panel that a factor *has* been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. (Panel Report, *Thailand – H-Beams*, para. 7.237; Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 157 and 161). Since Article 3.4 does not stipulate *how* an investigating authority shall set out its evaluation of the relevant economic factors and indices, we agree with this reasoning.

[479] Panel Report, *China – Broiler Products*, para. 7.554. See also Appellate Body Report, *China – GOES*, paras. 149-150.

[480] An examination of the impact of the dumped imports on the state of the domestic industry, under Article 3.4, is part of the overall framework of an injury analysis under Article 3. Under Article 3.4, an investigating authority is required to examine what the impact of the dumped imports on the domestic industry is, and not to *demonstrate* that the dumped imports have *caused* injury to the domestic industry: the latter is required under Article 3.5.

[481] See e.g. Panel Reports, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162; *Russia – Commercial Vehicles*, para. 7.111.

[482] See e.g. Panel Report, *Thailand – H-Beams*, paras. 7.236 and 7.249. See also Panel Report, *China – Cellulose Pulp*, para. 7.129.

NTC failed to adequately explain why it concluded that, overall, the domestic industry had suffered injury (section 7.8.2.3).

7.8.2.1 Whether the NTC failed to evaluate the "magnitude of the margin of dumping"

7.355. The United Arab Emirates argues that the NTC acted inconsistently with Article 3.4 by failing to evaluate the magnitude of the margin of dumping in its examination of the impact of the dumped imports on the domestic industry.[483] The United Arab Emirates acknowledges that the NTC set out its calculation of the margins of dumping in another section of its Report on final determination, but argues that this did not meet the required standard under Article 3.4.[484]

7.356. Pakistan agrees that the NTC did not *explicitly* analyse the magnitude of the margin of dumping in its injury analysis. However, Pakistan points us to the section of the Report on final determination in which the NTC set out the margins of dumping[485], and argues that in assessing injury the NTC *implicitly* considered the magnitude of the margins of dumping and concluded that they were indicative of injury. Pakistan asserts that the NTC's practice is to consider an explicit analysis superfluous where the margins of dumping are as high as they were in this case (24.32% to 59.67%).[486] Pakistan also argues that it is especially obvious in the context of a commodity product that dumping margins of this magnitude "will significantly contribute to material injury".[487]

7.357. We recall that Article 3.4 does not prescribe the manner in which an investigating authority must examine and present its evaluation of the relevant economic factors and indices in its published documents. An investigating authority may undertake an "implicit analysis" of a factor, provided that the record contains sufficient and credible evidence that the factor has been evaluated.[488]

7.358. We now turn to assess whether the NTC indeed undertook an implicit analysis of the magnitude of the margin of dumping.

7.359. In the portion of the Report on final determination that Pakistan points us to, towards the end of the section on "determination of dumping", the NTC lists, in a table, the margins of dumping for each relevant source.[489] There is no accompanying discussion or analysis, explicit or implicit, associated with this table. In our view, this does not satisfy the requirements of Article 3.4 because the evaluation of the factors listed in Article 3.4 requires investigating authorities to exercise their judgment, i.e. to assess the role, relevance, and relative weight of each factor.[490]

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[483] United Arab Emirates' first written submission, paras. 373-375.

[484] United Arab Emirates' first written submission, paras. 376-377; opening statement at the first meeting of the Panel, paras. 63-64; second written submission, para. 177; and written opening statement, para. 80.

[485] Pakistan's first written submission, para. 3.435 (referring to Report on final determination (2013), public version, (Exhibit ARE-2), para. 30.4).

[486] Pakistan's first written submission, paras. 3.435-3.436; response to Panel question No. 65; and second written submission, paras. 2.243-2.245.

[487] Pakistan's first written submission, para. 3.436.

[488] See fn 478 above.

[489] Report on final determination (2013), public version, (Exhibit ARE-2), para. 30.4.

[490] See para. 7.351 above; see also Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.162. Past panels have also taken this position (see, e.g. Panel Reports, *Russia – Commercial Vehicles*, para. 7.161; *China – X-Ray Equipment*, paras. 7.183-7.184; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.160). In support of its arguments, Pakistan refers to the Panel Report in *Russia – Commercial Vehicles*, in which that panel stated that Article 3.4 does not require that the magnitude of the margin of dumping be evaluated in any particular way or be given any particular weight, and that the Anti-Dumping Agreement does not provide any guidance as to how the investigating authority's evaluation should be set out in its determination. (Pakistan's response to Panel question No. 65 (referring to Panel Report, *Russia – Commercial Vehicles*, para. 7.159)). However, in that same report, the panel stated as follows:

> In the present case, in section 4.1 of the Investigation Report, the [Department for Internal Market Defence of the Eurasian Economic Commission] was addressing the issue whether the margin of dumping for each of the countries potentially subject to a cumulative assessment was greater than *de minimis* (2%). There is no discussion of the impact of dumped imports on the domestic industry, or the magnitude of the margin of dumping in that context. There is no basis for us to conclude that the analysis in section 4.1 for the purposes of Article 3.3 was relevant to, or considered in, the context of the Article 3.4 examination. Section 4.1 of the Investigation Report does not,

7.360. While Pakistan asserts that with dumping margins of this magnitude the injurious effect is obvious, especially for a commodity product, there is nothing on the NTC's record to suggest that this was, in fact, the NTC's implicit reasoning. In reaching this conclusion, we note that the table that Pakistan refers to appears in the section of the report involving the calculation of the margin of dumping, and not that on injury to the domestic industry. Moreover, the NTC does not connect that information to the injury analysis in any way.

7.361. We conclude that the NTC did not evaluate the magnitude of the margin of dumping in the context of its injury analysis, explicitly or implicitly. Therefore, we find that the NTC acted inconsistently with Article 3.4 of the Anti-Dumping Agreement, by failing to evaluate all the relevant factors listed in that provision.

7.8.2.2 Whether the NTC failed to objectively evaluate seven of the economic factors and indices having a bearing on the state of the domestic industry

7.362. The United Arab Emirates claims that the NTC's evaluation of seven of the economic factors and indices having a bearing on the domestic industry did not involve an objective examination of positive evidence. We assess the United Arab Emirates' arguments regarding each of the factors in turn.

7.8.2.2.1 Market share

7.363. The United Arab Emirates contends that the NTC acted inconsistently with Articles 3.1 and 3.4 in finding that the domestic industry had suffered injury on account of market share, because the NTC based this finding on the single year in which the domestic industry's market share declined somewhat while the market share of dumped imports increased, and disregarded the fact that the domestic industry's market share increased during the rest of the POI, including the last half year.[491] The United Arab Emirates argues that the NTC thus failed to take into account evidence contradicting its conclusions and to explain why, despite that evidence, the facts still supported its conclusions.[492]

7.364. Pakistan responds that the NTC considered data from the entire POI, and that the data supported its finding that the domestic industry's market share declined on account of dumped imports. Pakistan asserts that the NTC merely attached particular significance to data observed in 2009 (while not ignoring the rest of the POI) because it was the most recent full year in the POI.[493] Pakistan also argues that data relating to the period January to June 2010 supports the NTC's finding, because the domestic industry's market share increased at the same time as the volume of dumped imports declined.[494]

7.365. In its Report on final determination, the NTC set out the year-on-year changes in the domestic market share of the domestic industry and the sources under investigation.[495] This data showed that the domestic industry's market share increased in 2008 (from 2007) and January to June 2010 (from January to June 2009), as well as overall from the beginning of the POI (2007) to the end of the POI (January to June 2010). The NTC then commented that the domestic industry's market share had increased in 2008 but decreased in 2009, when the share held by dumped imports increased, and concluded, without more, that the domestic industry had suffered material injury on account of the dumped imports.[496]

7.366. We recall that Articles 3.1 and 3.4 require a determination to "be based on positive evidence" and "involve an objective examination" of, among others, the impact of dumped imports on the state of the domestic industry, including market share.[497] To perform an objective examination based on

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therefore, contain an evaluation of the magnitude of the margin of dumping for purposes of Article 3.4.

(Panel Report, *Russia – Commercial Vehicles*, para. 7.161 (fn omitted))

On this basis, we agree with the United Arab Emirates that the Panel Report in *Russia – Commercial Vehicles* does not support Pakistan's view.

[491] United Arab Emirates' first written submission, paras. 386-391.
[492] United Arab Emirates' first written submission, para. 391.
[493] Pakistan's first written submission, paras. 3.445-3.448.
[494] Pakistan's first written submission, para. 3.448.
[495] Report on final determination (2013), public version, (Exhibit ARE-2), table-XI.
[496] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 37.2-37.5.
[497] See paras. 7.257-7.259 and 7.349 above.

positive evidence, an investigating authority must, among other things, take into account conflicting evidence and explain how the evidence supported its conclusions.[498]

7.367. In the case before us, the NTC was faced with an increasing market share of the domestic industry during the first and last part of the POI, and a decrease in 2009; and vice versa for the market share of the dumped imports. The NTC chose to base its findings on market share exclusively on 2009, the only portion of the POI during which the domestic industry's market share decreased. We cannot find any explanation on the record of how the NTC took into account the conflicting data from the earlier and later parts of the POI. This is not consistent with the requirement to perform an objective examination pursuant to Articles 3.1 and 3.4.

7.368. Regarding data from the last portion of the POI, i.e. January to June 2010, Pakistan argues that the NTC "was … within … its … discretion to discount the upward tick" during this period because half-year data was "inherently less reliable" than the most recent full year (2009) and the increase in market share observed in January to June 2010 could not outweigh the preceding decline.[499] Further, Pakistan points out that data for this period actually showed a link between the dumped imports and domestic industry's market share, because the increase in the domestic industry's market share coincided with a decline in the market share of the dumped imports.[500] However, Pakistan has not pointed us to any evidence that these explanations formed part of the NTC's own reasoning in the domestic proceedings, and therefore we cannot rely on them in assessing the authority's determination.

7.369. We therefore find that in concluding that the domestic industry had suffered injury on account of market share, the NTC acted inconsistently with Articles 3.1 and 3.4, because it focused on the single year in which market share declined and gave no explanation of how it took into account the conflicting evidence from the rest of the POI.

7.8.2.2.2 Profits

7.370. The United Arab Emirates submits that the NTC's evaluation of "profits" was inconsistent with Articles 3.1 and 3.4 for three reasons. First, the United Arab Emirates argues that there were unexplained discrepancies between the data relied upon by the NTC and that reflected in the domestic producer's annual reports, which called into question the profit data underlying the NTC's analysis.[501] Second, the United Arab Emirates asserts that it is questionable whether the slight declines in profits and the absence of losses supported a finding of "material injury".[502] Third, the United Arab Emirates argues that the NTC failed to consider other explanations identified by Taghleef and enumerated in the domestic producer's annual reports that could have explained the declines in profits.[503]

7.371. Pakistan responds that, first, there are no discrepancies between the data relied upon by the NTC and those in the domestic producer's annual reports. Rather, the domestic producer's annual reports reflect its consolidated profit data, while the NTC's Report on final determination only reflects profit data relating to BOPP film.[504] Second, Pakistan asserts that the Anti-Dumping Agreement does not preclude the NTC from concluding that small declines in profits, and absence of losses, were indicative of injury.[505] Third, Pakistan argues that the NTC was not required to evaluate the alternative explanations for the declines in profits because the domestic producer's annual reports contained consolidated business information, and therefore the

[498] See also e.g. Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93-94 and 97.
[499] Pakistan's first written submission, paras. 3.445-3.447.
[500] Pakistan's first written submission, para. 3.448.
[501] United Arab Emirates' first written submission, para. 401 (referring to Taghleef's post-hearing submission, (Exhibit ARE-13), p. 24; 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b (revised)), pp. 1 and 10; and 2010 Tri-Pack Films' Annual Report (excerpt), (Exhibit ARE-26), pp. 14 and 17).
[502] United Arab Emirates' first written submission, para. 399; second written submission, para. 191. The United Arab Emirates subsequently conceded a finding of injury may be warranted even absent losses. (United Arab Emirates' second written submission, para. 192).
[503] United Arab Emirates' first written submission, paras. 402-403; second written submission, para. 193.
[504] Pakistan's first written submission, para. 3.463; response to Panel question No. 66.
[505] Pakistan's first written submission, paras. 3.459 and 3.462.

explanations therein did not necessarily relate to BOPP film and Taghleef had not substantiated its assertions.[506]

7.372. On the first issue, the parties agree that the profit data in the domestic producer's annual reports varied from that reflected in the Report on final determination. The parties also agree that the domestic producer's annual reports related to consolidated data.[507] However, the United Arab Emirates argues that, because the domestic producer mainly produced BOPP film, the profit data in its annual reports were relevant to BOPP film, and that, considering that Taghleef raised its concerns during the investigation, the NTC acted inconsistently with Articles 3.1 and 3.4 by not examining whether the profit data underlying its determination were accurate.[508]

7.373. We note that during the investigation Taghleef raised its concerns as to the accuracy of the profit data.[509] The NTC acknowledged these concerns in its Report on final determination[510], but did not address these particular concerns in the Report. Pakistan argues that during the verification visit the NTC verified that the profit data underlying its analysis related to BOPP film only, and that the NTC was therefore entitled to disregard Taghleef's arguments.[511]

7.374. In this regard, we note that in its Report on final determination, the NTC stated that the profit data therein were "duly adjusted (explained in on-the-spot investigation report of domestic industry)".[512] We also note that in the verification report, the NTC did not specifically explain its adjustment to profit data. The NTC did state generally that the verification report "contains mostly the information on BOPP Film in as far as it can be identified with the domestic like product (BOPP Film). In case of information or data that cannot be identified with the domestic like product the information is for the products group, which also include [cast polypropylene] Film".[513] The NTC also stated that the profit data were verified from the profit and loss statements of the domestic producer.[514]

7.375. Thus, the NTC's Report on final determination and the verification report do not clarify whether, indeed, the differences in the profit data can be explained by the supposed disaggregation of the data. In our view, Taghleef proffered sufficient evidence to substantiate[515] its assertions in order to warrant an explicit response from the NTC. Taghleef indexed the profit data in the annual reports, observed that they differed from the trends presented by the NTC in its Report on preliminary determination, and pointed out to the NTC that the two sets of data differed.[516] The NTC acknowledged these concerns in its Report on final determination[517], but does not appear to have addressed them. On this basis, we agree with the United Arab Emirates that the NTC was "put on notice"[518] of the differences in the data. In our view, failing to address Taghleef's concern regarding the accuracy of the profit data was not consistent with Articles 3.1 and 3.4.[519]

7.376. We now turn to the second issue, which is whether the NTC acted inconsistently with Articles 3.1 and 3.4 by finding that the trends in profits were indicative of injury, despite *slight* declines in profits.

7.377. We note that Article 3.4 does not necessarily preclude an investigating authority from finding the existence of material injury where it observes minor negative trends with regard to some of the individual factors. We understand the *materiality* of injury to attach to the overall state of the domestic industry, and not the individual factors. Therefore, the United Arab Emirates has not

[506] Pakistan's first written submission, para. 3.464; response to Panel question No. 67.
[507] United Arab Emirates' second written submission, para. 194.
[508] United Arab Emirates' second written submission, para. 194.
[509] Taghleef's post-hearing submission, (Exhibit ARE-13), p. 24.
[510] Report on final determination (2013), public version, (Exhibit ARE-2), p. 68.
[511] Pakistan's response to Panel question No. 67.
[512] Report on final determination (2013), public version, (Exhibit ARE-2), para. 41.1.
[513] Report on Tri-Pack Films verification visit, (Exhibit ARE-23), para. 3.2.
[514] Report on Tri-Pack Films verification visit, (Exhibit ARE-23), para. 16.
[515] Pakistan's response to Panel question No. 67.
[516] Taghleef's post-hearing submission, (Exhibit ARE-13), p. 24.
[517] Report on final determination (2013), public version, (Exhibit ARE-2), p. 68.
[518] United Arab Emirates' second written submission, para. 194.
[519] We recall that investigating authorities are required to base their determinations on "positive evidence". i.e. evidence that is, *inter alia*, accurate, affirmative, objective, verifiable, and credible. See para. 7.257 above.

established that the NTC acted inconsistently with Article 3.4 by relying on slight declines in profits in support of its finding of injury.

7.378. We now turn to the final issue, which is whether the NTC objectively evaluated whether the decline in profits was the result of the dumped imports. In its Report on final determination, the NTC set out the trends in profit and loss data, and concluded that the domestic industry had suffered material injury during the POI for dumping.[520] The United Arab Emirates argues that the NTC failed to address alternative factors that could have explained the decline in profits, i.e. the increase in raw material costs, which could not be passed onto consumers due to availability of cheap smuggled film; and the increased financial costs.[521] We note that these factors were identified in the domestic producer's annual report, which formed part of the record of the investigation[522], and were raised by Taghleef during the investigation.[523]

7.379. Pakistan concedes that the NTC did not address these arguments in its Report on final determination. However, Pakistan argues that the NTC was not required to do so because the annual reports of the domestic producer contained consolidated data, not limited to BOPP film[524], and it was therefore "clear to the NTC that Taghleef's arguments had no validity for the issue at hand".[525] We note, first, that the evidence before us does not indicate that this was the NTC's reasoning.

7.380. Second, we note that the domestic producer stated as follows in the portion of its annual report pointed to by Taghleef:

> Decline in net profit is mainly on account of increase in raw material cost which could not be fully passed on to our customers due to availability of smuggled film at cheaper rates. Our financial cost also increased as a result of higher mark-up rates and financing requirements during the current period.[526]

7.381. While the domestic producer's annual report related to its consolidated business, the same report also stated that:

> While we struggled to survive in such difficult business environment, cheap availability of *smuggled BOPP film* created an unfair competition directly hitting our domestic sales and margins.[527]

7.382. The wording of these statements indicates that they were relevant to the NTC's evaluation of the profitability of the domestic BOPP film industry during the POI. They therefore do not support Pakistan's assertion that the NTC disregarded Taghleef's argument on the basis that the statements in the domestic producer's annual report were not specific to BOPP film.

7.383. For these reasons, we are of the view that the NTC was sufficiently put on notice that the domestic producer considered that its profits from the domestic like product had declined mainly due to the increase in raw materials and financial costs; it disregarded this evidence, which conflicted with its own conclusions; and it did not offer any explanation for doing so. Therefore, by disregarding these alternative explanations when evaluating whether the decline in profits was the "impact of the dumped imports", the NTC acted inconsistently with Articles 3.1 and 3.4.

7.8.2.2.3 Sales

7.384. The United Arab Emirates submits that the NTC's analysis of the injury factor "sales" was inconsistent with Articles 3.1 and 3.4 for two reasons. First, the United Arab Emirates argues that

[520] Report on final determination (2013), public version, (Exhibit ARE-2), section 41.
[521] United Arab Emirates' first written submission, para. 402 (referring to 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 18).
[522] 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 18.
[523] Taghleef's post-hearing submission, (Exhibit ARE-13), pp. 24-25; Taghleef's comments on statement of essential facts, (Exhibit ARE-25), section 1(g) (referring to 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 18).
[524] Pakistan's first written submission, para. 3.464.
[525] Pakistan's response to Panel question No. 66.
[526] 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 18. (emphasis added)
[527] 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 17. (emphasis added)

the NTC observed only marginal declines in sales, which did not support a finding that the domestic industry had suffered "material injury".[528] Second, the United Arab Emirates argues that the NTC failed to evaluate other evidence on its record that could explain the decline in sales on the domestic market, including the domestic industry's increased *export* sales and other reasons enumerated in the domestic producer's annual reports.[529]

7.385. Pakistan responds, first, that the Anti-Dumping Agreement does not prescribe any minimum quantum of decline in the individual injury factors, and materiality of injury depends on the "overall, holistic examination of all the injury factors taken together".[530] Second, Pakistan argues that the NTC properly established that the impact of the dumped imports included the decline in sales. Pakistan asserts that the NTC's findings on "sales" must be seen in the context of its previous findings that the volume of dumped imports had increased in 2009, and that the NTC was not required to "repeat" these facts at every step of its analysis.[531]

7.386. Regarding the extent of the decline in sales, we recall that materiality of injury attaches to the overall state of the domestic industry, and not to the individual factors, and that Article 3.4 does not set a threshold below which a decline in an individual factor cannot be indicative of injury. On this basis, we are of the view that merely by invoking the limited extent of the decline in sales, the United Arab Emirates has not established that the NTC acted inconsistently with Article 3.4.

7.387. We now turn to the alternative explanations for the domestic industry's decline in sales on the domestic market, which the United Arab Emirates argues that the NTC failed to take into account.

7.388. Beginning with export sales, we note that during the investigation Taghleef noted that the domestic producer's total sales had grown during the POI, but argued that from January 2009 to June 2010 the company's *export* sales had grown at the expense of its domestic sales.[532] Taghleef relied upon the report on the domestic producer's verification visit, which indeed supported Taghleef's statement.[533]

7.389. Pakistan argues that the NTC considered the effect of the domestic industry's export sales in its non-attribution analysis.[534] We note that in the context of its non-attribution analysis, the NTC considered the domestic industry's export sales as follows:

> Export performance of the domestic industry was better in 2009 and 2010. Therefore, this to some extent diluted the effects of dumping and was not a factor causing injury to domestic industry.[535]

7.390. This statement is premised on the assumption by the NTC that injury was the effect of dumped imports, and asserts that increased export sales diluted the injurious effects of those dumped imports. It does not reflect a consideration of whether, in the first place, the decrease in domestic sales was "the impact of the dumped imports", as envisaged by Article 3.4, or whether it rather reflected a shifting of sales to export markets.

7.391. Given the above, the record in this dispute indicates that the NTC did not address information and argument that Taghleef submitted to the NTC that suggested that the decline in domestic sales could be attributed to factors other than dumping. In order to comply with the obligations of Articles 3.1 and 3.4, the NTC would have been required to take into account this alternative explanation in its evaluation of whether the decline in sales was "the impact of the dumped imports". By not doing so, the NTC acted inconsistently with the requirement to make an "objective

[528] United Arab Emirates' first written submission, para. 393; second written submission, para. 188.
[529] United Arab Emirates' first written submission, para. 395 (referring to Report on Tri-Pack Films verification visit, (Exhibit ARE-23), section 10; 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 17); and second written submission, para. 190.
[530] Pakistan's first written submission, paras. 3.453-3.454; second written submission, paras. 2.226-2.227.
[531] Pakistan's first written submission, para. 3.455.
[532] Taghleef's post-hearing submission, (Exhibit ARE-13), p. 21 (referring to Report on Tri-Pack Films verification visit, (Exhibit ARE-23), section 10).
[533] Report on Tri-Pack Films verification visit, (Exhibit ARE-23), section 10.
[534] Pakistan's first written submission, para. 3.456 (referring to Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1).
[535] Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1(vi).

examination" of "the impact of the dumped imports on the domestic industry", pursuant to Articles 3.1 and 3.4.

7.392. Next, the United Arab Emirates argues that other explanations for the domestic industry's decline in sales were set forth in the domestic producer's annual report and raised by Taghleef during the investigation[536], but the NTC did not take these into account, either. Specifically, the United Arab Emirates notes that in its annual report, the domestic producer indicated that it "struggled to survive" in 2009 because of "deteriorating economy, electricity crisis, rupee devaluation, uncertain political situation and security conditions", compounded by "cheap availability of smuggled BOPP film … directly hitting our domestic sales and margins".[537]

7.393. Again, this evidence suggested that the decline in sales might not have been "the impact of the dumped imports" and yet the NTC neither acknowledged nor addressed it. In our view, this is not consistent with the requirement for an objective examination of the impact of the dumped imports, set forth in Articles 3.1 and 3.4.[538]

7.8.2.2.4 Productivity

7.394. The United Arab Emirates argues that the NTC's evaluation of the "productivity" factor was inconsistent with Articles 3.1 and 3.4 for two reasons. First, the United Arab Emirates asserts that the NTC did not make a finding that the domestic industry suffered injury on account of productivity, but then listed this factor as supporting the overall injury determination.[539] Second, the United Arab Emirates asserts that in evaluating productivity the NTC failed to address the constituent factors of productivity, namely production and employment[540]: although the increase in employment appeared to explain the decrease in productivity, the NTC assumed that this was due to the dumped imports instead.[541]

7.395. In response to the United Arab Emirates' first argument, Pakistan maintains that it was clear from the "content and thrust" of the NTC's analysis that the NTC considered the decline in productivity to be indicative of injury.[542] In response to the United Arab Emirates' second argument, Pakistan maintains that the decline in productivity coincided with an increase in dumped imports, and therefore "it was not necessary for the NTC to repeat" the "crucial role played" by the increase in dumped imports during the "most significant part of the POI"[543]; and that the NTC was not required to analyse the constituents of productivity in its evaluation of the factor "productivity".[544]

7.396. We begin by considering the United Arab Emirates' second argument, namely that the NTC erred by disregarding the fact that the decrease in productivity was directly related to the increase in number of employees of the domestic industry.

7.397. The NTC observed that productivity declined through the POI[545], and then included the "negative effect on productivity" in the list of factors that supported its findings that the domestic industry had suffered material injury.[546]

7.398. We note that the NTC calculated productivity as production per worker.[547] During the POI, the level of production remained rather stable, whereas the number of employees increased steadily,

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[536] Taghleef's post-hearing submission, (Exhibit ARE-13), pp. 21-22 (referring to 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 17).
[537] 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 17.
[538] We have addressed at paras. 7.381-7.382 above Pakistan's objection that the annual report refers to the domestic producer's consolidated business.
[539] United Arab Emirates' first written submission, para. 407.
[540] United Arab Emirates' first written submission, para. 409.
[541] United Arab Emirates' first written submission, paras. 407-412; second written submission, paras. 170 and 196.
[542] Pakistan's first written submission, para. 3.468.
[543] Pakistan's first written submission, para. 3.469.
[544] Pakistan's first written submission, para. 3.470.
[545] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 43.2 and 43.4.
[546] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 47.1(vii) and 50(vi); Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-XX and para. 47.2(vii).
[547] Report on final determination (2013), public version, (Exhibit ARE-2), p. 45.

directly resulting in the decrease in productivity observed by the NTC.[548] Yet, in discussing productivity, the NTC did not acknowledge the increase in the number of employees, and did not consider how it should affect its consideration of "productivity" as "the impact of the dumped imports".

7.399. Pakistan argues that the NTC based this part of its analysis on productivity alone, not its constituent parts (production and employment), which it examined separately.[549] This argument is unconvincing. Indeed, the NTC did observe (in the same section in which it discussed productivity) that employment increased, and that the domestic industry did not suffer injury on account of employment.[550] However, when observing (in the sentence that immediately followed) that during the same period productivity decreased, it failed even to acknowledge the link between the increase in number of employees and the decrease in productivity.

7.400. This failure to address evidence that conflicted directly with its own reading of the data was not consistent with the NTC's duty to carry out an objective examination of the impact of dumped imports under Articles 3.1 and 3.4. Having reached this finding, we do not address the United Arab Emirates' argument that the NTC did not even make a finding that productivity was a negative injury factor.

7.8.2.2.5 Salaries and wages

7.401. The United Arab Emirates submits that the NTC's evaluation of salaries and wages was inconsistent with Articles 3.1 and 3.4 for two reasons. First, the United Arab Emirates asserts that the NTC did not make a finding as to whether the increase in salaries and wages observed during the POI was indicative of injury, but listed this factor as supporting the overall injury determination.[551] Second, the United Arab Emirates asserts that the NTC failed to explain why it considered an increase in salaries and wages to be indicative of injury.[552]

7.402. Pakistan responds, first, that the totality of the NTC's analysis of the evolution of salaries and wages reveals that the NTC effectively concluded that the trends were indicative of injury[553]; and, second, that an increase in salaries and wages increases the COP of a company, and is therefore indicative of injury to the domestic industry.[554]

7.403. We begin with the United Arab Emirates' second line of argument, namely that the NTC failed to explain how an increase in salaries and wages could be indicative of injury. We note that in its Report on final determination, the NTC found that salaries and wages per unit of production increased across the POI.[555] Without more, the NTC then listed "negative effect on salaries & wages" as one of the factors on account of which the domestic industry had suffered material injury.[556]

7.404. Thus, the NTC did not provide any discussion or analysis of how the increase in salaries and wages was indicative of injury. Yet, increased wages and salaries may be a sign of a prosperous domestic industry. Thus, an objective examination under Articles 3.1 and 3.4 would have required at least an explanation of how an apparently positive trend could be regarded as supporting a finding of injury.

7.405. Pakistan asserts that the NTC considered increases in salaries and wages per unit of production to be indicative of injury because they increased the COP. However, Pakistan does not point us to any part of the NTC's record from which we can infer that the explanation it presents was the NTC's own reasoning.

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[548] Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-XVII.
[549] Pakistan's first written submission, para. 3.470.
[550] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 43.2 and 43.4.
[551] United Arab Emirates' first written submission, para. 414.
[552] United Arab Emirates' first written submission, paras. 415-416; second written submission, paras. 170 and 197.
[553] Pakistan's first written submission, para. 3.473.
[554] Pakistan's first written submission, para. 3.474; response to Panel question No. 70.
[555] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 43.3-43.4. The confidential version of the report indicates the magnitude of the increase.
[556] Report on final determination (2013), public version, (Exhibit ARE-2), para. 47.1(viii); Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-XX and para. 47.2(viii).

7.406. Therefore, we find that the United Arab Emirates has established that the NTC's evaluation of salaries and wages was inconsistent with Articles 3.1 and 3.4. We therefore do not address the United Arab Emirates' argument that the NTC did not even make a finding that salaries and wages were a negative injury factor.

7.8.2.2.6 Return on investment

7.407. The United Arab Emirates argues that the NTC's evaluation of the domestic industry's "return on investment" (ROI) was inconsistent with Articles 3.1 and 3.4 because the NTC failed to offer any analysis or explanation of the data and of how the data supported its conclusion of material injury; the narrative description of the ROI data in the Report on final determination was inconsistent with the data presented in the same report; and the data in the Report on final determination were inconsistent with the data in the Report on the verification visit.[557]

7.408. Pakistan responds that the NTC's evaluation was adequate because the data showed that the ROI decreased during the POI[558]; that the internal inconsistency in the NTC's report was due to a typographical error[559]; and that although there was a discrepancy with the data in the verification report, that discrepancy had no impact on the NTC's analysis because both datasets showed a decrease in the ROI starting in 2009.[560]

7.409. We note that as set out in the NTC's Report on final determination, the NTC's analysis was limited to the following[561]: the NTC listed a figure for each year's ROI as provided by the domestic industry, stated that ROI "decreased during the POI as compared to … 2007 and 2008", and "concluded that the domestic industry suffered material injury on account of" this factor.[562]

7.410. As we observed above[563], merely setting out data and making conclusory statements is not sufficient for purposes of Articles 3.1 and 3.4. The NTC provided no explanation, let alone a reasoned and adequate one, of how the data supported its conclusion that the domestic injury had suffered injury on account of the ROI, and thus acted inconsistently with Articles 3.1 and 3.4. Having reached this finding, we do not consider it necessary to address the United Arab Emirates' arguments regarding the inconsistencies within the Report on final determination and between the data in the Report on final determination and the data in the Report on the verification visit.

7.8.2.2.7 Cash flow

7.411. The United Arab Emirates challenges the NTC's evaluation of "cash flow" as inconsistent with Articles 3.1 and 3.4 on four grounds. First, the United Arab Emirates points out that cash flow dipped in 2008 but then returned to its 2007 level in 2009, and while decreasing again in the first half of 2010, it was still greater than in 2008; yet the NTC failed to "acknowledg[e] these trends in a fair and complete manner", finding injury merely on the basis of a "significant decrease" in cash flow in January to June 2010.[564] Second, the United Arab Emirates points out that the industry's cash flow position worsened when the allegedly dumped imports decreased, and vice versa, yet the NTC failed to explain why it nonetheless considered the changes in cash flow to be "the impact of the dumped imports".[565] Third, the United Arab Emirates argues that the cash flow data relied upon by the NTC are contradicted by the data in the domestic producer's annual reports.[566] Fourth, the

[557] United Arab Emirates' first written submission, paras. 420-422.
[558] Pakistan's first written submission, para. 3.477.
[559] The NTC report states that the ROI "increased during year 2009", though the data in the report show the opposite. (Report on final determination (2013), public version, (Exhibit ARE-2), table-XVIII and para. 44.2). According to Pakistan, "increased" was a typographical error and the report should read "decreased". (Pakistan's first written submission, para. 3.477).
[560] Pakistan's response to Panel question No. 72.
[561] In addition to the sentence that Pakistan argues contained a typographical error, and which was indeed inconsistent both with the data in the report and with Pakistan's current arguments. See fn 559 above.
[562] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 44.1-44.3.
[563] See para. 7.351 above.
[564] United Arab Emirates' first written submission, para. 426.
[565] United Arab Emirates' first written submission, paras. 426-427; second written submission, paras. 170 and 200.
[566] United Arab Emirates' first written submission, para. 428 (referring to 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 36; and 2010 Tri-Pack Films' Annual Report (excerpt), (Exhibit ARE-26), p. 18); second written submission, para. 170.

United Arab Emirates points out that the NTC changed its conclusion on cash flow between the preliminary and final determination, based on the same data and with no explanation.[567]

7.412. Pakistan responds that: there was a time lag between the increase in dumped imports and the decrease in cash flow because of the "mechanics of contractual interaction"[568]; the NTC used the domestic producer's cash flow from operating activities as set out in the annual reports[569]; and the discrepancy between preliminary and final determination was due to the fact that, the NTC had inadvertently failed to include the 2010 cash flow data in its preliminary determination.[570]

7.413. We begin with the United Arab Emirates' first argument, i.e. in summary, that the NTC failed to acknowledge trends "in a fair and complete manner". We note that, as the United Arab Emirates points out, the data in the Report on final determination showed a decidedly positive trend for cash flow in 2009, the year in which dumped imports had increased.[571] Yet the NTC dismissed this fact merely on the basis that there had been a "significant decrease" in cash flow in the first half of 2010.[572] When viewed in the context of its overall injury determination, in which the NTC systematically decided not to rely on data for January to June 2010 and to focus instead on data for 2009, the NTC's choice to do the opposite in the context of cash flow, and to provide no explanation for doing so, does not constitute an "objective examination" under Articles 3.1 and 3.4.

7.414. We now turn to the United Arab Emirates' second – and related – argument, namely that the NTC failed to evaluate "the impact of the dumped imports" on cash flow. We note that, as the United Arab Emirates points out, the NTC's data show that cash flow improved when allegedly dumped imports increased, and vice versa. Yet, the NTC entirely failed to contend with this fact. Pakistan argues that the decrease in cash flow (observed in January to June 2010) lagged behind the increase in dumped imports (observed in 2009) because of the "mechanics of contractual interactions"[573], but has been unable to point us to anything in the record evidencing that this was the NTC's reasoning. We consider that the NTC's failure to contend, at all, with evidence contradicting its conclusion that the negative trends in cash flow were the impact of the dumped imports does not constitute an objective examination as required by Articles 3.1 and 3.4.

7.415. The United Arab Emirates' third argument is that the cash flow data in the Report on final determination is contradicted by the data in the domestic producer's annual reports, which "show that its net cash flows increased considerably and consistently through 2009 and 2010".[574] Pakistan responds that it is not certain which cash flow figures the United Arab Emirates is referring to, that the NTC relied on cash flow from operating activities and that, "for instance", one can verify the accuracy of the figures for 2008 and 2009 from the 2009 annual report.[575] However, the issue that the United Arab Emirates points to is that while the NTC relied on a decrease in cash flow in 2010, which apparently led it to disregard the increase in 2009, the annual report for 2010 shows an increase in cash flow in both years.[576] Although the figures in the annual report related to the full year 2010, the fact that they showed an overall increase should have been a further reason for the NTC to explain its choice to rely so heavily on the decrease in cash flow during the first half of 2010, whereas, as seen, the NTC gave no explanation at all for its choice. Therefore, these facts confirm our finding that the NTC failed to perform an objective examination as required by Articles 3.1 and 3.4.

7.416. Having found that the NTC's consideration of cash flows was inconsistent with Articles 3.1 and 3.4, we do not consider it necessary to address the United Arab Emirates' further argument that

[567] United Arab Emirates' first written submission, para. 429.
[568] Pakistan's first written submission, para. 3.482; response to Panel question No. 68.
[569] Pakistan's first written submission, para. 3.483.
[570] Pakistan's response to Panel question No. 69.
[571] Report on final determination (2013), public version, (Exhibit ARE-2), table-XVI.
[572] Report on final determination (2013), public version, (Exhibit ARE-2), para. 42.2. Moreover, as the United Arab Emirates also points out, the NTC's own data show that cash flow during this last half year was still greater than in *full year* 2008. (Report on final determination (2013), public version, (Exhibit ARE-2), table-XVI; Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-XVI).
[573] Pakistan's first written submission, para. 3.482.
[574] United Arab Emirates' first written submission, para. 428.
[575] Pakistan's first written submission, para. 3.483.
[576] 2010 Tri-Pack Films' Annual Report (excerpt), (Exhibit ARE-26), p. 18.

the NTC failed to explain the fact that it reached opposite conclusions on cash flow in the preliminary and final determinations, based on the same data.

7.8.2.3 Whether the NTC failed to make a holistic assessment of the state of the industry

7.417. The United Arab Emirates argues that the NTC failed to make a holistic assessment of the state of the domestic industry, explaining why the facts taken together supported its finding of material injury despite conflicting evidence.[577] The United Arab Emirates points out that: the NTC found that six of the factors it evaluated under Article 3.4 were not indicative of injury[578]; the other injury factors displayed only "minor negative developments"[579]; the domestic market share of the domestic industry was consistently between 80% and 85%, sales were consistently high despite reduced consumption, and ex-factory prices and production were high[580]; and yet the NTC provided no overall analysis explaining why, in light of these facts taken together, it determined that the domestic industry was suffering material injury.

7.418. Pakistan responds that: the United Arab Emirates is engaging in a "numbers game"[581]; the NTC acknowledged the positive factors[582]; an authority is not required to dissect every positive factor to explain why it does not affect its finding of injury[583]; certain factors play a "particularly pronounced role in any injury analysis", such as profits, cash flow, market share and domestic sales, and these all trended negatively in this case[584]; and the NTC included volume and price effects under Article 3.2 in its holistic analysis and these further strengthened the finding of material injury.[585]

7.419. To assess the question before us, we turn to the NTC's determination. As both parties point out, the NTC found that the domestic industry was not suffering injury on account of six of the factors it examined. In subsequently concluding that the domestic industry had suffered material injury, the NTC either did not refer to these factors at all (in the public version of its Report on final determination) or listed them as factors on account of which the domestic industry had not suffered material injury (in the confidential version of its report).[586] However, there is no indication whatsoever of how the NTC took into account these positive factors in reaching its overall conclusion.

7.420. Article 3.4 expressly provides that no particular factor "can … necessarily give decisive guidance": there is no requirement for all factors, or a defined number of factors, to display negative trends. However, faced with evidence that contradicts its conclusions, an investigating authority must at least explain how it took that evidence into account in reaching its conclusions.[587]

7.421. In this case, the NTC failed to provide *any* explanation. Pakistan argues that the factors displaying negative trends were those that play a particularly important role in an injury analysis, but this argument finds no reflection in the NTC's reasoning. Pakistan also argues that the NTC's conclusions were strengthened by its consideration of the volume and price effects pursuant to Article 3.2, but this does not excuse an authority from explaining how it has taken into account evidence that conflicts with its ultimate conclusions, here in the form of a number of injury factors displaying positive trends.

7.422. We therefore find that by failing to provide any explanation – or even indication – of how it took into account the factors displaying positive trends in reaching its conclusion that the domestic industry had suffered material injury, the NTC failed to perform an objective examination based on

[577] United Arab Emirates' first written submission, paras. 432-439.
[578] United Arab Emirates' first written submission, para. 433.
[579] United Arab Emirates' first written submission, para. 434.
[580] United Arab Emirates' first written submission, para. 436.
[581] Pakistan's first written submission, para. 3.487.
[582] Pakistan's first written submission, para. 3.490.
[583] Pakistan's first written submission, para. 3.489.
[584] Pakistan's first written submission, paras. 3.492-3.493.
[585] Pakistan's first written submission, para. 3.491.
[586] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 47.2-47.5; Report on final determination (2013), (Exhibit PAK-1 (BCI)), table-XX. This table does not appear in the public version of the Report on final determination.
[587] See also Panel Report, *Thailand – H-Beams*, para. 7.249, calling for a "compelling explanation". See also Panel Report, *China – Cellulose Pulp*, para. 7.129.

positive evidence of the impact of the dumped imports on the domestic industry, and therefore acted inconsistently with Articles 3.1 and 3.4.

7.8.3 Conclusion under Articles 3.1 and 3.4

7.423. In sum, we find that the NTC acted inconsistently with Articles 3.1 and 3.4, because it failed to evaluate the magnitude of the margin of dumping; it failed to carry out an objective examination of seven of the injury factors and to provide a reasoned and adequate explanation of its finding that the negative trends in those factors were the impact of the dumped imports; and it failed to explain how it took into account the positive trends in its evaluation of the overall impact of the dumped imports on the domestic industry.

7.9 Causation: Articles 3.1 and 3.5 of the Anti-Dumping Agreement

7.424. The United Arab Emirates claims that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5 based on three sets of arguments: first, because it was based on findings that were inconsistent with Articles 3.1, 3.2, and 3.4[588]; second, because the NTC failed to ensure that it would not attribute to the dumped imports the injury caused by other known factors, namely the global financial crisis and factors set out in the domestic producer's annual report[589]; and third, because of other flaws in the causation analysis.[590]

7.425. Pakistan responds that: first, inconsistencies with Articles 3.2 and 3.4 do not necessarily render a causation analysis inconsistent with Article 3.5[591]; second, the NTC ascertained that the global financial crisis was not injuring the domestic industry[592] and, as for the other factors, Taghleef's had not "substantiate[d] its assertions" that they were injuring the domestic industry[593]; and third, the United Arab Emirates' other allegations concerning the NTC's causation analysis are unfounded.[594]

7.426. As set out below, we find that the United Arab Emirates has established that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement based on the first two sets of arguments set out above, and we do not address the third set of arguments made by the United Arab Emirates.

7.427. We structure our discussion as follows: first, we set out the applicable requirements of Article 3.5 (section 7.9.1), having already discussed Article 3.1 in section 7.6.1 above; second, we apply those requirements to the facts of this case to assess whether Pakistan acted inconsistently with Articles 3.1 and 3.5 (section 7.9.2); and third, we conclude that Pakistan acted inconsistently with those provisions (section 7.9.3).

7.9.1 The applicable requirements of Article 3.5

7.428. Article 3.5 of the Anti-Dumping Agreement provides:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped 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 dumped imports which at the same time are injuring the domestic industry, and the

[588] United Arab Emirates' first written submission, paras. 460-462.
[589] United Arab Emirates' first written submission, paras. 469-473; second written submission, paras. 215-221.
[590] United Arab Emirates' first written submission, paras. 464-465; opening statement at the first meeting of the Panel, paras. 69-70; second written submission, paras. 213-214; and written opening statement, paras. 91-92.
[591] Pakistan's first written submission, paras. 3.515 -3.516.
[592] Pakistan's first written submission, paras. 3.541-3.545. See also Pakistan's response to Panel question No. 75.
[593] Pakistan's first written submission, paras. 3.547-3.550; second written submission, paras. 2.277-2.284.
[594] Pakistan's first written submission, paras. 3.519-3.531. See also Pakistan's second written submission, paras. 2.271-2.275.

> injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, 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.

7.429. Article 3.5 thus requires Members to ascertain whether the dumped imports are causing injury to the domestic industry ("causation") and, as part of that causation analysis, it also requires Members to ensure that they do not attribute to dumped imports the injury caused by known factors other than dumping ("non-attribution").

7.430. The first sentence of Article 3.5 requires that an investigating authority demonstrate that dumped imports are, "through the effects of dumping, as set forth in paragraphs 2 and 4", causing injury. This text thus requires the authority to bring together the findings arrived at under Articles 3.2 and 3.4 to ascertain whether "the dumped imports are … causing injury".[595]

7.431. The second sentence of Article 3.5 requires the authority to demonstrate the causal relationship between the dumped imports and injury "based on an examination of all relevant evidence before [it]".

7.432. The third sentence of Article 3.5 requires an investigating authority to examine "any known factors" that are causing injury at the same time as dumped imports, and ensure that it does not attribute the injury caused by those other factors to the dumped imports. The fourth sentence of Article 3.5 lists some of the factors other than dumped imports that "may be relevant", and makes it clear, by using the words "include, *inter alia*", that the list is not exhaustive.

7.433. Article 3.5 requires an authority to examine injurious factors other than dumping only when the factors are "known" to them. The ordinary meaning of "known" includes "[t]hat has become an object of knowledge; that is or has been apprehended mentally" and "[t]hat is known of; known to exist; that is or has come within the scope of knowledge".[596] Thus, for a factor to be "known" it must have "come within the scope of knowledge" of the authority, which is typically the case when interested parties have substantiated the existence of such a factor during the anti-dumping proceedings.[597] Consistent with this ordinary meaning, it has been observed in the past that "a factor is either 'known' to the investigating authority, or it is not 'known'; it cannot be 'known' in one stage of the investigation [such as in the dumping and injury analyses] and unknown in a subsequent stage [such as the causation analysis]".[598]

7.434. Once the other factors are "known" to it, the authority must "examine" them and "not … attribute[] to the dumped imports" "the injuries caused by these other factors".[599] This requires the authority to identify, and "separat[e] and distinguish[,] the injurious effects of the other factors from the injurious effects of the dumped imports"[600], because unless it does so, the authority will not have a rational basis to ensure that it does not attribute those injuries to the dumped imports.[601]

7.435. Article 3.5 does not set out a specific methodology for investigating authorities to follow. However, the methods applied by an investigating authority must comport with the overarching obligation in Article 3.1 to undertake an objective examination based on positive evidence[602], which we have discussed in section 7.6.1 above.

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[595] See also e.g. Appellate Body Report, *China – GOES*, para. 128.
[596] Oxford Dictionaries online, definition of "known" https://www.oed.com/search?searchType=dictionary&q=known&_searchBtn=Search (accessed 27 October 2020), adj., meanings A1a and A1b.
[597] See also, *a contrario*, Panel Reports, *China – X-Ray Equipment*, para. 7.267; *China – Autos (US)*, paras. 7.322-7.323; *Thailand – H-Beams*, para. 7.273; and *EU – Footwear (China)*, para. 7.484.
[598] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.
[599] Article 3.5 of the Anti-Dumping Agreement.
[600] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.
[601] See also e.g. Appellate Body Report, *US – Hot-Rolled Steel*, paras. 223 and 226.
[602] See also Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.141.

7.9.2 Whether the NTC's examination of causation was inconsistent with Articles 3.1 and 3.5

7.436. As we outlined at paragraph 7.424 above, the United Arab Emirates argues that the NTC acted inconsistently with Articles 3.1 and 3.5 on three grounds. Below, we discuss, first, whether the United Arab Emirates has established that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5 because it was based on findings that were, in turn, inconsistent with Articles 3.1, 3.2, and 3.4 (section 7.9.2.1). Second, we discuss whether the United Arab Emirates has established that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5 also because the NTC failed to carry out the necessary non-attribution analysis (section 7.9.2.2). Having found that the United Arab Emirates has established inconsistencies with Articles 3.1 and 3.5 on both these grounds, we do not proceed to examine the United Arab Emirates' additional arguments against the NTC's causation analysis (see section 7.9.2.3).

7.9.2.1 Whether the NTC's reliance on findings that were inconsistent with Articles 3.1, 3.2, and 3.4 renders its causation analysis inconsistent with Articles 3.1 and 3.5

7.437. The United Arab Emirates argues that because the NTC relied, in its causation analysis, on findings that are inconsistent with Articles 3.1, 3.2, and 3.4, the NTC's causation analysis is consequently inconsistent with Articles 3.1 and 3.5.[603]

7.438. Pakistan responds that inconsistencies in underlying analyses do not necessarily render the evaluation of causation inconsistent with Article 3.5, and that whether they do give rise to an inconsistency with Article 3.5 must be determined case by case.[604]

7.439. We recall that Article 3.5 requires an investigating authority to demonstrate that dumped imports are causing injury "through the effects of dumping, as set forth in paragraphs 2 and 4", which indicates that the examination of causation is based, among others, on the findings arrived at under Articles 3.2 and 3.4.

7.440. We also note that the NTC's findings of the volume of dumped imports, the effects of those imports on prices, and the impact of the dumped imports on the domestic industry are integral to its causation analysis. In its causation analysis, the NTC found a "strong time correlation" between the increased volume of dumped imports and injury to the domestic industry, particularly to each of three injury factors – market share, domestic sales and profitability. In its causation analysis, the NTC also took into account its finding that the dumped imports had depressed prices to a significant degree.[605]

7.441. We have found above[606] that the NTC's examination of each of these underlying factors was inconsistent with Articles 3.1, 3.2, and 3.4. Consequently, those errors undermine the NTC's determination of causation. On this basis, we find that the NTC's causation analysis is inconsistent with Articles 3.1 and 3.5.

7.9.2.2 Whether the NTC failed to ensure that injury caused by other factors was not attributed to the dumped imports

7.442. We now turn to the United Arab Emirates' arguments relating to non-attribution. The United Arab Emirates argues that the NTC failed to ensure that the injurious effects of (a) the global financial crisis of 2009[607], and (b) all other factors identified by Taghleef during the domestic proceedings were not attributed to the dumped imports.[608] We address these two in turn.

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[603] United Arab Emirates' first written submission, paras. 460-462.
[604] Pakistan's first written submission, paras. 3.515-3.516.
[605] Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.2.
[606] See paras. 7.287, 7.322, 7.329, and 7.344.
[607] United Arab Emirates' first written submission, paras. 468-470; second written submission, para. 221.
[608] United Arab Emirates' first written submission, paras. 471-472.

7.9.2.2.1 The global financial crisis

7.443. It is not disputed that interested parties had raised the global financial crisis of 2008 and 2009 as a factor causing injury to the domestic industry.[609]

7.444. The United Arab Emirates argues that the NTC failed to adequately evaluate whether the global financial crisis was injuring the domestic industry, and to provide a reasoned and adequate explanation of how it ensured that the injury caused by the global financial crisis was not attributed to the dumped imports.[610] The United Arab Emirates points out that the NTC's analysis was limited to an assertion that domestic demand had increased slightly in 2009, and that this demonstrated that the global financial crisis had not injured the domestic industry. The United Arab Emirates further points out that the NTC failed to evaluate the injurious effects of the global financial crisis on *prices*, particularly the price declines observed in 2009.[611]

7.445. Pakistan responds that it was reasonable for the NTC to conclude that there was no evidence that the global financial crisis had "any discernible effect" on the Pakistani market, given that the domestic market experienced minor fluctuations in 2007 and 2008, and "ultimately nudge[d] upwards"[612] in 2009, "at the height of the global crisis".[613]

7.446. To assess the question before us, we turn to the NTC's determination. The NTC's entire discussion of the effect of the global financial crisis reads:

> It may be pointed out no other factor was pointed out by any interested party which may be causing injury to domestic industry except the international crisis during 2008 and 2009. It may be noted from Table – XI that market share [*sic*] of BOPP Film reduced marginally but it increased during 2009. Hence this factor cannot be considered effecting domestic market.[614]

7.447. We understand that the NTC's reference to "market share" was a clerical error, and that the intended reference was to the size of the domestic market[615], which, in that year, increased by 0.98%.[616] Thus, the NTC took the view that the global financial crisis could not be considered to affect the domestic market solely on the basis that the size of the domestic market had increased by 0.98% in 2009, after fluctuating in the earlier part of the POI.

7.448. First, we note that the NTC provided no explanation of why the trends in the size of the domestic market led it to exclude that the global financial crisis had *any* injurious effect on the domestic market.

7.449. Second, certain exchanges between the interested parties and the NTC during the domestic proceedings indicate that the NTC was aware of the opposite, i.e. of the fact that the global financial crisis had had an injurious effect on prices. Specifically, during the domestic proceedings, Taghleef submitted that "the slight change [in the domestic industry's prices] in 2009 was due to the global financial crisis"[617] and "the reduction in prices [in 2009] was experienced by industries worldwide due to the deteriorating market conditions".[618] The NTC responded that it had "determined that price depression faced by the domestic industry was due to dumped imports *and other global economic*

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[609] In its Report on final determination, the NTC describes it as the only other factor raised. (Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1).
[610] United Arab Emirates' first written submission, para. 468.
[611] United Arab Emirates' first written submission, para. 470; second written submission, para. 221.
[612] Pakistan's first written submission, paras. 3.542-3.543 and 3.545.
[613] Pakistan's response to Panel question No. 75. See also Pakistan's written opening statement, para. 92.
[614] Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1.
[615] See e.g. Pakistan's first written submission, para. 3.542; and United Arab Emirates' first written submission, para. 470.
[616] Report on final determination (2013), public version, (Exhibit ARE-2), para. 37.2.
[617] Taghleef's post-hearing submission, (Exhibit ARE-13), p. 16.
[618] Report on final determination (2013), public version, (Exhibit ARE-2), annexure-III, p. 66. See also Taghleef's post-hearing submission, (Exhibit ARE-13), p. 18; and Taghleef's comments on statement of essential facts, (Exhibit ARE-25), section 1(e). Taghleef also stated that "the price of the Domestic Like Product recovered to previous levels as the effects of the global financial crisis lessened in the first half of 2010". (Taghleef's comments on statement of essential facts, (Exhibit ARE-25), section 1(e)).

developments".[619] In other words, in discussing price effects under Article 3.2, the NTC went so far as acknowledging that "global economic developments" had depressed the domestic prices. However, when assessing causation[620], the NTC then ruled out that the global financial crisis had any effect at all and failed to even consider its injurious effects on prices.

7.450. In its non-attribution analysis, the NTC thus failed to identify – let alone separate and distinguish – the injurious effects of the global financial crisis, although the crisis was a known factor and although elsewhere in its analysis the NTC had acknowledged that "global economic developments" had depressed the domestic industry's prices. It provided a bare assertion that the trends in the size of the domestic market showed the financial crisis had not affected the domestic industry, with no explanation. By so doing, the NTC acted inconsistently with the requirements of non-attribution and objective examination based on positive evidence set out in Articles 3.5 and 3.1.

7.9.2.2.2 Other factors set out in the domestic producer's annual report and identified by Taghleef

7.451. We recall that the NTC stated in its determination that the only other known factor that may have been causing injury to the domestic industry was the global financial crisis.[621]

7.452. The United Arab Emirates argues that other known factors were, individually or collectively, injuring the domestic industry at the same time as dumped imports. Those other known factors were the deteriorating economy, electricity crisis, rupee devaluation, uncertain political situation, heightened security conditions, and cheap availability of smuggled goods. The United Arab Emirates argues that those factors were set out in the 2009 annual report of the domestic producer, which was on the NTC's record in the domestic proceedings, and that Taghleef had specifically pointed to them, and yet the NTC disregarded them.[622]

7.453. Pakistan concedes that the NTC did not undertake a non-attribution analysis for these factors. However, Pakistan contends that the NTC was not required to make any finding with respect to these factors because Taghleef had failed to provide sufficient arguments and evidence to the effect that these other factors were injuring the domestic industry.[623] Pakistan maintains that the factors in the annual report were "generally-worded", and without further explanations or evidence from Taghleef, it was not clear how those factors injured the domestic industry.[624] Pakistan also argues that the statements in the domestic producer's annual report were not relevant because they were not made in the context of the domestic anti-dumping proceedings[625], and because the annual report related to the domestic producer's consolidated business, which was not limited to BOPP film.[626] Thus, in essence, Pakistan is arguing that the factors in question were not known to the NTC as other factors causing injury to the domestic industry.

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[619] Report on final determination (2013), public version, (Exhibit ARE-2), annexure-III, p. 66 (emphasis added). See also ibid. annexure-IV, p. 72.

[620] As noted at para. 7.433 above, when a factor is "known" to the authority in the context of one part of its analysis, it cannot then be regarded as "unknown" in the context of the causation analysis.

[621] Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1.

[622] United Arab Emirates' first written submission, paras. 471-472 (referring to Taghleef's post-hearing submission, (Exhibit ARE-13), pp. 21-22; and Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1); opening statement at the first meeting of the Panel, para. 71; and second written submission, paras. 215-221. See also United Arab Emirates' response to Pakistan's written opening statement, paras. 38 and 40.

[623] Pakistan's responses to Panel question Nos. 73 and 74 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 177-178; and Panel Reports, *China – X-Ray Equipment*, para. 7.267; *EU – Fatty Alcohols (Indonesia)*, para. 7.188); second written submission, paras. 2.277-2.279; written opening statement, paras. 87-89; and response to United Arab Emirates' written opening statement, paras. 56-61.

[624] Pakistan's response to United Arab Emirates' written opening statement, paras. 57-61.

[625] Pakistan argues that publicly-listed companies face "many potential obligations and incentives" when preparing their annual reports, and that as a result these companies may include in their annual reports "potential but unconfirmed factors that may affect the company's future performance, especially if those developments may be adverse", which makes the statements in their annual reports less relevant when not accompanied by additional evidence. (Pakistan's response to United Arab Emirates' written opening statement, paras. 57-58).

[626] Pakistan's second written submission, paras. 2.280-2.281. See also Pakistan's response to Panel question No. 73.

7.454. We note that during the domestic proceedings, Taghleef argued to the NTC that in its annual report the domestic producer had "attribute[d] the decrease in its domestic sales" to certain other factors.[627]

7.455. In the cited sections of its annual report, the domestic producer stated as follows:

> The year 2009 started with challenging business conditions. We faced deteriorating economy, electricity crisis, rupee devaluation, uncertain political situation and security conditions. While we struggled to survive in such difficult business environment, cheap availability of smuggled BOPP film created an unfair competition directly hitting our domestic sales and margins.[628]

7.456. As Pakistan submits, Taghleef referred to the factors cited in the domestic producer's annual report and did not provide *additional* explanations or evidence in support. However, we disagree with Pakistan that Taghleef made "theoretical"[629]/"bare assertions"[630] to the NTC. Taghleef's assertions were supported by evidence – the domestic producer's annual report, where the domestic producer itself identified those other factors. The domestic producer is in the best place to know what factors have injured it. Tri-Pack Films, the domestic producer, enumerated conditions that were harming its business, and did so in its annual report, which is a formal company document. In our view, these statements in the domestic producer's own annual report were sufficient evidence to require the NTC to evaluate whether the factors in question were also injuring the domestic industry.

7.457. Pakistan argues that the fact that these statements were reflected in the annual report of the domestic producer cast doubt on their probative value. Pakistan maintains that publicly listed companies like Tri-Pack face different obligations and incentives when preparing their annual reports which "might require the disclosure of certain information to shareholders, including potential but unconfirmed factors that might affect the company's future performance". Thus, Pakistan argues that these circumstances limit the value of annual reports as evidence of other causal factors, especially when presented without any further evidence.[631] This argument misses the point. The question is whether certain factors other than dumped imports were known to the authority to cause injury to the domestic industry. Taghleef raised these factors in the domestic proceedings and referred to the domestic producer's annual report as evidence. The fact that the annual report was not prepared by the domestic producer for purposes of the investigation does not disqualify it as evidence of other factors causing injury to the domestic industry. In our view, in the circumstances of this case, this evidence was sufficient, at a minimum, to warrant a consideration by the NTC.[632]

7.458. Next, Pakistan argues that the statements in the annual report were not relevant because the annual report relates to the domestic producer's consolidated business, which includes more than BOPP film. We note, however, that the quoted statement refers specifically to BOPP film. Thus, whatever other businesses the domestic producer was also referring to, the statement in question also relates to BOPP film.[633]

7.459. Moreover, taking into account the NTC's statement that "*no other factor was pointed out* by any interested party which may be causing injury to domestic industry except the international

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[627] Taghleef's post-hearing submission, (Exhibit ARE-13), pp. 21-22 (referring to 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 17).

[628] 2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 17.

[629] Pakistan's response to Panel question No. 74.

[630] Pakistan's response to United Arab Emirates' written opening statement, para. 57.

[631] Pakistan's written opening statement, para. 89; response to United Arab Emirates' written opening statement, paras. 57-58.

[632] We make this finding specifically in the circumstances of this case. We emphasise that we do not suggest that any evidence, no matter its quality, would be sufficient to warrant a non-attribution analysis. Whether evidence is sufficient must be determined on a case-by-case basis.

[633] In addition, we note that BOPP film was the predominant part of the domestic producer's business. The total installed capacity for BOPP film was 27,800 metric tonnes per annum, while that of cast polypropylene film was 7,000 metric tonnes per annum. (2009 Tri-Pack Films' Annual Report, (Exhibit ARE-24b), p. 3). See also United Arab Emirates' second written submission, para. 194).

crisis"[634], we are of the view that the explanations now provided by Pakistan, which we have dismissed, were not the NTC's own reasoning.

7.460. We therefore consider that the factors identified by the domestic producer as harming its business in 2009 were "known" to the NTC within the meaning of Article 3.5. Therefore, by failing to "examine" them and ensure that "the injuries caused by these other factors" were not "attributed to the dumped imports", the NTC acted inconsistently with Article 3.5. As a consequence, it also failed to carry out an objective examination based on positive evidence, as required by Article 3.1.

7.9.2.3 Whether the NTC otherwise failed to demonstrate a causal relationship between the dumped imports and the injury to the domestic industry

7.461. The United Arab Emirates further argues that the NTC's determination that dumping was causing injury was also inconsistent with Articles 3.1 and 3.5 because the NTC based its analysis on a "few negative trends in injury factors"; failed to take into account factors such as the high market share held by the domestic industry, its continued profitability, and the "overall lack of negative effects in the last six months of the POI"[635]; and did not objectively establish the coincidence in time of the dumped imports and the evolution of trends in the three injury factors examined in the NTC's causation analysis, namely market share, domestic sales, and profits.[636]

7.462. Pakistan responds that the NTC had assessed all injury factors in reaching its determination of injury and was not required to assess all factors again in its causation analysis, including those that did not support a finding of injury[637]; that the data on the NTC's record supported the NTC's conclusion that there was a strong correlation between the volume of dumped imports and the key injury indicators; and that the United Arab Emirates was essentially questioning the way the NTC had weighed the data before it, without demonstrating that it had exceeded its discretion.[638]

7.463. Having found that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5 on several grounds, we do not examine these additional grounds of inconsistency raised by the United Arab Emirates.

7.9.3 Conclusion under Articles 3.1 and 3.5

7.464. In sum, we find that the United Arab Emirates has established that the NTC's causation analysis was inconsistent with Articles 3.1 and 3.5, both because it was based on findings that were inconsistent with Articles 3.1, 3.2, and 3.4, and because the NTC failed to ensure that it did not attribute to the dumped imports the injury caused by other known factors.

7.10 Duration of the original investigation: Article 5.10 of the Anti-Dumping Agreement

7.465. We refer to the facts set out in paragraphs 2.1-2.5 above.

7.466. The United Arab Emirates claims that Pakistan acted inconsistently with Article 5.10 by exceeding the peremptory 18-month time-limit applying to original investigations. The United Arab Emirates makes two alternative arguments in support of this claim. The United Arab Emirates' principal argument is that the NTC initiated the investigation on 23 April 2012 and concluded it on 9 April 2015, thus taking almost exactly three years.[639]

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[634] Report on final determination (2013), public version, (Exhibit ARE-2), para. 48.1. (emphasis added)
[635] United Arab Emirates' first written submission, para. 464; second written submission, para. 208. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 69; and written opening statement, para. 91.
[636] United Arab Emirates' first written submission, paras. 464-465; second written submission, paras. 213-214. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 70; and written opening statement, para. 92.
[637] Pakistan's first written submission, para. 3.522. See also second written submission, paras. 2.271-2.272.
[638] Pakistan's first written submission, paras. 3.524-3.531; second written submission, paras. 2.265-2.275.
[639] See e.g. United Arab Emirates' second written submission, paras. 78 and 82-87; and responses to Panel question Nos. 23-24.

7.467. The United Arab Emirates' alternative argument is that the investigation started on 27 September 2010 and ended on 4 February 2013. More precisely, the United Arab Emirates argues that, should we take the view that the NTC concluded the investigation into BOPP film in February 2013, we must take into account that the NTC could not have done so without the investigative steps undertaken after the first initiation of 27 September 2010, which was subsequently declared void by the Pakistani courts. Therefore, according to the United Arab Emirates' alternative argument, the NTC took from 27 September 2010 to 7 February 2013 to conclude the investigation, i.e. a little over two years and four months.[640]

7.468. Pakistan responds that the NTC initiated the investigation on 23 April 2012 and concluded it with the final determination on 4 February 2013, thus taking little more than nine months.[641]

7.469. Below, we first set out the applicable requirements of Article 5.10 (section 7.10.1); we then apply that standard to the facts of this case, i.e. we ascertain the date of "initiation" (section 7.10.2.1) and the date the investigation was "concluded" (section 7.10.2.2); on that basis, we find that Pakistan has not exceeded the time-limits set forth in Article 5.10 (section 7.10.2.3).

7.10.1 The applicable requirements of Article 5.10

7.470. Article 5.10 provides:

> Investigations shall, except in exceptional circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.[642]

7.471. We consider that Article 5.10 "preserves predictability for the interested parties in an investigation"[643] by ensuring that when an investigation is initiated, interested parties are not left in the uncertainty about the outcome of the investigation for more than one year "and in no case more than 18 months".

7.472. The parties do not dispute the peremptory nature of the 18-month time-limit, which is apparent from the text of Article 5.10 ("in no case"[644]). Instead, the parties disagree on when the clock under Article 5.10 starts and stops.

7.473. Article 5.10 identifies the process to which the time-limit applies as "investigations", and it identifies the beginning and end of investigations, respectively, as "initiation" and the time when investigations are "concluded". The questions of legal interpretation in this case, then, are: (a) when are investigations initiated; and (b) when are investigations concluded, within the meaning of Article 5.10? We discuss these two questions in turn.

7.10.1.1 When do the time-limits in Article 5.10 start running?

7.474. Article 5.10 requires investigations to be concluded "within … in no case more than 18 months, after their *initiation*".[645] Thus, the text of this provision is clear that the starting point for the 18-month time-limit is the initiation of the relevant investigation. Footnote 1 of the Anti-Dumping Agreement defines initiation as follows:

> The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.[646]

7.475. Initiation is thus (a) a procedural action (b) by which a Member (c) formally (d) commences (e) an investigation as provided in Article 5.

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[640] See e.g. United Arab Emirates' second written submission, paras. 79 and 88-90; and response to Panel question No. 20.
[641] See e.g. Pakistan's second written submission, paras. 2.33-2.51; and responses to Panel question Nos. 20 and 23.
[642] Emphasis added.
[643] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.74.
[644] See also Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.72.
[645] Emphasis added.
[646] Emphasis added.

7.476. Beginning with this last element, i.e. what is commenced, the investigations provided for in Article 5 are those "to determine the existence, degree and effect of any alleged dumping" (Article 5.1), which are initiated following an application (Article 5.1) or on the authority's own motion (Article 5.6).

7.477. Turning to the third and fourth elements, i.e. "formally commences", the ordinary meaning of "commence" includes "to begin (an action); to enter upon; esp. in legal use, to commence an action".[647] The word "commences" in footnote 1 is qualified by the adjective "formally". The ordinary meaning of "formally" includes "in formal respects", "with regard to the form, as opposed to the matter of reasoning", "[i]n prescribed or customary form; with the formalities required to give validity or definiteness to the action", "[a]s a matter of form".[648] Thus, the focus of the definition in footnote 1 is on when "the procedural action" that commences the investigation "*as a matter of form*" has taken place.

7.478. Article 12.1 of the Anti-Dumping Agreement sheds some light on what is required "as a matter of form" for the procedural action that commences the investigation: "interested parties … shall be notified and a public notice shall be given" of initiation.

7.479. Further, footnote 1 specifies that initiation is the procedural action by which the "Member" in question commences an investigation. This makes it relevant to look into that Member's municipal law for guidance to identify the precise date of initiation, as the panel in *Guatemala – Cement II* did.[649] In that case, Mexico and Guatemala differed on what the date of initiation was. The panel relied on the definition in footnote 1 and took into account: the provisions of the domestic legal instrument underlying decisions to initiate anti-dumping investigations (which provided that the date of initiation was that of publication in the Official Journal); the text of a domestic resolution stating that initiation would take effect from the date of publication in the Official Journal; and the fact that "deadlines for interested parties to respond to the initiation were activated" on the date of publication in the Official Journal.[650] On this basis, the panel considered that "the action by which the investigation was formally commenced is the date of publication of the notice of initiation [in the Official Journal]".[651]

7.480. To sum up, the time-limits in Article 5.10 start running under the express terms of Article 5.10, from "initiation", and initiation, in turn, is the "procedural action" that "formally commences an investigation". The context provided by Article 12.1 highlights one element of what is required "as a matter of form" to commence an investigation, namely the notification to interested parties, and publication of a notice of initiation. Further, because footnote 1 refers to the procedural action "by which a Member" formally commences an investigation, domestic legislation can be among the facts that are relevant to resolve questions concerning the date of initiation.

7.481. The United Arab Emirates urges us to take into account, in our interpretation, the "interests being protected" by Article 5.10.[652] Specifically, the United Arab Emirates points out that the purpose of Article 5.10 is to ensure that parties to an anti-dumping investigation are not "left in uncertainty" for too long. We agree: as another panel before us has pointed out, Article 5.10 "preserves predictability for the interested parties in an investigation".[653] Yet, Article 5.10 sets forth the precise terms in which predictability is to be preserved, and it does so by setting, as a starting point, the procedural action that commences an investigation as a matter of form. This does not, therefore, lead us to a different interpretive result from that set out above.

[647] Oxford Dictionaries online, definition of "commence" https://www.oed.com/view/Entry/37004?rskey=Sc3jks&result=2&isAdvanced=false#eid (accessed 11 October 2020), v., meaning 1.a. (emphasis omitted)
[648] Oxford Dictionaries online, definition of "formally" https://www.oed.com/view/Entry/73440?redirectedFrom=formally#eid (accessed 11 October 2020), meanings 1, 1.a ("in logic"), 6, and 8.
[649] Panel Report, *Guatemala – Cement II*, para. 8.82.
[650] Panel Report, *Guatemala – Cement II*, para. 8.82.
[651] Panel Report, *Guatemala – Cement II*, para. 8.82.
[652] United Arab Emirates' second written submission, para. 90.
[653] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.74.

7.10.1.2 When are investigations "concluded" under Article 5.10?

7.482. The end-point of the period that must not exceed 18 months is the date on which an "investigation[]" is "concluded".

7.483. What must be "concluded" under Article 5.10 are "investigations". As we have just seen, the remainder of Article 5 provides context for identifying the investigations at issue: these are investigations "to determine the existence, degree and effect of any alleged dumping" (Article 5.1), which are initiated either on an application that includes evidence of dumping, injury, and a causal link between them (Articles 5.1 and 5.2), or on the authority's own motion if the authority has sufficient evidence of dumping, injury, and a causal link (Article 5.6). In other words, these are the original investigations to ascertain the existence of the three elements necessary to impose anti-dumping measures.

7.484. The ordinary meaning of the verb "to conclude" includes "[t]o bring to a close or end"[654] and "[t]o bring or come to a decision, settle, decide, determine". An original investigation to ascertain the existence of the three elements necessary to impose anti-dumping measures may arguably be "ended" in several ways, as illustrated by the context provided by other provisions of the Anti-Dumping Agreement.

7.485. Thus, Article 12.2.2 refers expressly to the "conclusion … of an investigation", setting forth the requirements applying to the "public notice of *conclusion … of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty* or the acceptance of a price undertaking".[655] We thus learn from this provision that an investigation may be concluded with "an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking".

7.486. Article 12.2.2 is part of the broader Article 12.2, which disciplines more generally the public notice of "any preliminary or *final determination*, whether *affirmative or negative*"[656], thus including final determinations that dumping causing injury was, or was not, established. We thus learn that an investigation may also be concluded with a "negative" determination.

7.487. Further, the Anti-Dumping Agreement does not prevent Members from terminating an investigation without reaching a final determination, "affirmative or negative", of dumping causing injury. Thus, an investigation may also be "concluded" with a decision by the Member concerned to terminate the investigation without reaching a determination regarding the existence of dumping causing injury.

7.488. Taken together, these provisions therefore indicate that an "investigation" initiated under Article 5 may be "concluded" in particular in the following ways[657]: (a) with a final affirmative determination of injurious dumping that stipulates any measures to be imposed; (b) with a final negative determination (that injurious dumping is not established); or (c) with a decision to terminate without having determined whether injurious dumping existed.

7.489. Further, the context provided by Articles 11.4 and 13 underlines the difference between the conclusion of an original investigation under Article 5.10, and further steps that may instead consist of changed circumstances or sunset reviews, as well as judicial review – a difference that is important in the current case.

7.490. Article 11.4 regulates separately the duration of changed circumstances and sunset reviews (which "shall normally be concluded within 12 months" of their initiation). This confirms that

[654] Oxford Dictionaries online, definition of "to conclude" https://www.oed.com/view/Entry/38300?rskey=Yslm9m&result=2&isAdvanced=false#eid (accessed 11 October 2020), v., meaning II.5.a (transitive).
[655] Emphasis added.
[656] Emphasis added. While Article 12 is broader in scope, the "investigations" at issue in Article 5.10 are those identified earlier in Article 5, namely, as we have already noted, "investigation[s] to determine the existence, degree and effect of any alleged dumping". (Article 5.1).
[657] We are not concerned in this case with price undertakings.

Article 5.10 pertains specifically to original investigations[658], and not generically to any investigation or review under the Anti-Dumping Agreement.

7.491. Article 13 requires Members to maintain "judicial, arbitral or administrative tribunals or procedures" for the review of, among others, "administrative actions relating to final determinations".[659] This provision thus underlines the distinction between, on the one hand, "final determinations" and, on the other, "judicial, arbitral or administrative" review of administrative actions relating to those determinations. Judicial review is a distinct process, for which Article 5.10 does not set out a time-limit – nor, indeed, does any other provision of the Anti-Dumping Agreement, including Article 13.[660]

7.492. In our view, this context confirms that the time-limits in Article 5.10 apply to original investigations, and not to a time period encompassing their possible subsequent judicial review, and that therefore it is the date of conclusion of original investigations that is the relevant date under Article 5.10.

7.10.2 Whether Pakistan exceeded the 18-month time-limit in Article 5.10

7.493. To ascertain whether Pakistan exceeded the 18-month time-limit in Article 5.10 we need to identify the date of "initiation" of the investigation and the date the investigation was "concluded".

7.10.2.1 The date of "initiation"

7.494. We recall that initiation is "the procedural action by which a Member *formally commences* an investigation", i.e. commences it "as a matter of form"[661], and that the domestic law of the Member in question is among the facts that are relevant to answer the enquiry as to what is the procedural action by which that Member formally commences an investigation.[662]

7.495. In the present case, the parties agree that the "formal date of initiation of the investigation … is … 23 April 2012"[663], i.e. that the procedural action by which Pakistan formally commenced the relevant investigation was the Notice of initiation of 23 April 2012.

7.496. As set out below, we, too, consider that the procedural action that "formally commence[d]" the relevant investigation was the publication of the Notice of initiation on 23 April 2012.

7.497. We begin by considering Pakistan's municipal law, since we must ascertain what is "the procedural action by which [Pakistan] formally commences an investigation".[664]

7.498. Pakistan has indicated, and the United Arab Emirates has not contested, that initiation is governed by the Anti-Dumping Duties Ordinance, 2000 (Ordinance of 2000), Sections 20-28, and the Anti-Dumping Duties Rules, 2001, Rules 3-6.[665] Of these, the provisions that offer the most useful guidance to the question at hand are Section 27 of the Ordinance of 2000 and Rule 6 of the Anti-Dumping Duties Rules, 2001.

7.499. First, Section 27 of the Ordinance of 2000 provides that when the NTC "has decided to initiate an investigation, it shall … publish a … notice" of initiation in at least one issue of a widely

[658] See para. 7.483 above. See also paras. 7.474-7.476 above.
[659] As well as "administrative actions relating to … reviews of determinations within the meaning of Article 11".
[660] To the contrary, though the context is not identical, footnote 20 to Article 9.3.1 contains an explicit recognition that it "may not be possible" to observe the time-limits set forth in Article 9.3.1 of the Anti-Dumping Agreement in case of "judicial review proceedings".
[661] Emphasis added. See paras. 7.474-7.477 above.
[662] See para. 7.479 above.
[663] United Arab Emirates' second written submission, para. 90; response to Panel question No. 20; and Pakistan's response to Panel question No. 20.
[664] Fn 1 of the Anti-Dumping Agreement.
[665] Ordinance No. LXV of 2000, (Exhibit PAK-27); and Anti-Dumping Duties Rules, (Exhibit PAK-29), respectively. See also Pakistan's response to Panel question No. 5. Pakistan also cited the Act No. XXIII of 2011 (amending the Ordinance of 2000: Amendment of the Ordinance No. LXV of 2000, (Exhibit PAK-28)). This Act, however, amends a provision of the Ordinance of 2000 that does not directly concern initiation. (Ibid.).

circulated newspaper in English and a widely circulated newspaper in Urdu, and initiation "shall be effective on the date" of publication in those newspapers.[666] On 23 April 2012 the NTC published a notice of initiation in the requisite newspapers[667], reciting, in accordance with Section 27, that the "[d]ate of initiation of investigation" is "[t]he date of publication of this notice in the newspapers in Pakistan".[668] Thus, on 23 April 2012, the NTC took the step by which "Pakistan formally commences" an investigation, i.e. publication of a notice of initiation in the requisite newspapers in Pakistan.

7.500. More generally, Section 27 of the Ordinance of 2000 provides that when the NTC "has decided to initiate an investigation, it shall give notice" to interested parties, including all exporters, and publish a copy of the notice in the Official Gazette, as well as in the newspapers mentioned above. In addition to publishing the Notice of initiation on 23 April 2012, the evidence before us shows that the NTC also gave notice to the investigated United Arab Emirates exporter, Taghleef[669]; we also presume, and no party has disputed, that it gave notice to other interested parties.

7.501. These steps undertaken by the NTC in April 2012, i.e. publishing and notifying the notice of initiation, are also required "as a matter of form" under WTO rules when initiating an investigation.[670]

7.502. Further, Rule 6 of the Anti-Dumping Duties Rules, 2001, sets forth the items on which the notice of initiation must contain information. These are similar to the items in Article 12.1.1 of the Anti-Dumping Agreement, and include the name of the countries of export, the identification of the product, a description of the alleged dumping and of the factors on which the allegations of injury are based, the address and time-limits for interested parties to make their views known, and the proposed schedule for the investigation. Without prejudice to an assessment of the adequacy of the information in the notice, the notice issued on 23 April 2012 does contain some mention of information regarding each of the items set forth in Rule 6.

7.503. Finally, Rule 8 of the Anti-Dumping Duties Rules, 2001, provides that "upon initiation, the [NTC] shall send questionnaires", and it shall give "at least thirty days for reply", it being deemed that the questionnaire is received "one week from the day on which it was sent"; these requirements are similar to those set out in Articles 6.1 and 6.1.1 of the Anti-Dumping Agreement. We note that indeed, four days after 23 April, on 27 April 2012, the NTC transmitted to Taghleef a questionnaire, informing Taghleef that it had 37 days from the date of "issuance" of the letter (30 days plus one week, the minimum set forth in Rule 8) to provide new information using that questionnaire.[671] Thus, formally at least[672], the NTC took the steps envisaged by Rule 8 "upon initiation".

7.504. Therefore, the initiation of 23 April 2012 bears the hallmarks envisaged in domestic law (which, in turn, is similar to the Anti-Dumping Agreement) for initiation, as "the procedural action by which [Pakistan] formally commences an investigation".[673]

7.505. However, the United Arab Emirates argues that regardless of the formal date of initiation, Pakistan subjected interested parties to a continuum of investigative steps that carried over from the first investigation, initiated on 27 September 2010, to the second investigation, initiated on 23 April 2012.[674] For this reason, the United Arab Emirates argues that the time-limit in Article 5.10 must run from 27 September 2010, the date the first investigation was initiated, regardless of "the formal date of initiation" of the second investigation, which led to the challenged measures.[675] The United Arab Emirates explains that one cannot ignore "the special and unique situation of this case, where a new investigation incorporates the results of so many investigative steps taken in another case, prior to initiation", and that to do otherwise would go against the "interests being

[666] Ordinance No. LXV of 2000, (Exhibit PAK-27), Section 27. (emphasis added)
[667] Notice of initiation (2012), (Exhibit ARE-5); Pakistan's response to Panel question No. 86.
[668] Notice of initiation (2012), (Exhibit ARE-5).
[669] In a letter to Taghleef of 27 April 2012, the NTC indicates that it has already sent the notice to Taghleef. (NTC's letter of 27 April 2012, (Exhibit ARE-6)).
[670] See paras. 7.477-7.478 above.
[671] NTC's letter of 27 April 2012, (Exhibit ARE-6).
[672] In terms of content, the questionnaire was identical to that sent out after the first initiation of 27 September 2010. (Pakistan's response to Panel question No. 22).
[673] Anti-Dumping Agreement, fn 1. See also Panel Report, *Guatemala – Cement II*, para. 8.82, for a similar conclusion.
[674] For the sequence of events, see paras. 2.1-2.3 above.
[675] United Arab Emirates' second written submission, para. 90.

protected" by Article 5.10, namely parties' interest in not being "left in uncertainty" beyond the time-limits set forth in Article 5.10.[676]

7.506. Indeed, important investigative steps were undertaken in the first investigation and relied upon in the second one. It is during the first investigation, initiated on 27 September 2010, that the NTC obtained Taghleef's questionnaire response, Taghleef's responses to three deficiency letters, and a further submission from Taghleef on level of trade adjustments, all of which the NTC relied upon in reaching its final determination in February 2013.[677] It is also during the first investigation that the NTC conducted its sole on-the-spot verification visit of the domestic applicant, Tri-Pack Films; again, the NTC relied on the results of the verification visit in reaching its final determination in February 2013.[678]

7.507. During the second investigation, the NTC did not *require* parties to submit a new questionnaire response, and relied upon Taghleef's previously submitted responses to the questionnaire and deficiency letters.[679] The new materials the NTC received from Taghleef were, with one exception, submitted after the preliminary determination in the second investigation, and to a large extent consisted of arguments that the NTC rejected, including on the choice of POI and on level of trade adjustments.[680]

7.508. The question for us, then, is which was the procedural step by which Pakistan formally commenced the relevant investigation, within the meaning of footnote 1 and therefore of Article 5.10. Neither party disputes that the *first investigation* was initiated on 27 September 2010, i.e. that, at the time, the publication of the notice of initiation was the procedural action that formally commenced that investigation. Nor do the parties dispute that that initiation was subsequently declared void by a Pakistani court, leading to a new initiation on 23 April 2012.[681]

7.509. As we have underlined in discussing the requirements of Article 5.10, the emphasis in Article 5.10, read together with footnote 1, is on the procedural action that "*formally* commences an investigation".[682] In the case before us, where a first initiation was declared void, and a new Notice of initiation was published to commence, formally, a new investigation, it is the latter – publication of the Notice of initiation on 23 April 2012 – that designates the beginning of the time period to which the deadlines in Article 5.10 apply.

7.510. Thus, we find that "initiation" within the meaning of footnote 1 and Article 5.10 took place on 23 April 2012.

7.10.2.2 The date the investigation was "concluded"

7.511. To recall, first, one of the ways in which an "investigation" initiated under Article 5 may be "concluded" is with a final affirmative determination of injurious dumping that stipulates any measures to be imposed.[683] Second, the Anti-Dumping Agreement distinguishes between investigations initiated under Article 5 and subsequent steps, including judicial reviews of the determinations that may be adopted as a result of those investigations, and it is the investigations

[676] United Arab Emirates' second written submission, para. 90.
[677] Pakistan's response to Panel question No. 85 (referring to Taghleef's questionnaire response, (Exhibit ARE-16 (BCI)); Taghleef's response to third deficiency letter, (Exhibit ARE-18c (BCI)); Taghleef's response to second deficiency letter, (Exhibit ARE-20b (BCI)); Taghleef's letter of 31 May 2011, (Exhibit ARE-22 (BCI)); and Taghleef's response to deficiency letter, (Exhibit PAK-50)).
[678] Report on Tri-Pack Films verification visit, (Exhibit ARE-23); Report on final determination (2013), public version, (Exhibit ARE-2), section 16.2.
[679] Pakistan's response to Panel question No. 85; Report on final determination (2013), public version, (Exhibit ARE-2), e.g. section 15.2.
[680] Pakistan's response to Panel question No. 85 (referring to Taghleef's letter of 25 June 2012, (Exhibit ARE-8); Taghleef's post-hearing submission, (Exhibit ARE-13); Taghleef's letter of 30 November 2012, (Exhibit ARE-19 (BCI)); Taghleef's comments on statement of essential facts, (Exhibit ARE-25); Taghleef's letter of 19 December 2012, (Exhibit ARE-40 (BCI)); Taghleef's email of 18 December 2012, (Exhibit PAK-12A (BCI)); and Appendix to Taghleef's email of 18 December 2012, (Exhibit PAK-12B (BCI))).
[681] Order of Islamabad High Court, (Exhibit PAK-31); Report on final determination (2013), public version, (Exhibit ARE-2), paras. 5.2-5.3.
[682] Emphasis added. See para. 7.477 above.
[683] See para. 7.488 above.

initiated under Article 5, and not subsequent steps, that are subject to the time-limits in Article 5.10.[684]

7.512. On 4 February 2013, the NTC adopted a Report on final determination[685] that recounted the 23 April 2012 initiation[686], set out the findings of the investigation, concluded that there was dumping, injury, and a causal link between them[687] and, on that basis, provided for the imposition of definitive anti-dumping duties.[688] On 7 February 2013, Pakistan issued a "Notice of Final Determination and levy of Definitive Antidumping Duties"[689], which set forth the NTC's conclusion of injurious dumping and imposed the definitive anti-dumping duties[690] provided for in the Report on final determination.

7.513. Thus, the notice of 7 February 2013 and the report of 4 February 2013 serve as the "public notice" and "separate report"[691], respectively, of an affirmative final determination of injurious dumping, which set forth the definitive anti-dumping duties to be imposed on that basis. Therefore, that final determination "concluded" the investigation initiated on 23 April 2012, within the meaning of Article 5.10.[692]

7.514. *After* adoption of this final determination on 4 February 2013[693], domestic judicial proceedings led to its annulment (though not to the refund of anti-dumping duties collected thereunder[694]), to remand to the NTC, and to the adoption of a new final determination on 9 April 2015. The United Arab Emirates argues that this determination of 9 April 2015, and not the determination of 4 February 2013, "concluded" the investigation within the meaning of Article 5.10.

7.515. However, as seen earlier, the Anti-Dumping Agreement distinguishes between final determinations and the judicial review of those determinations, the latter being a separate step, the duration of which is not included in the time period disciplined by Article 5.10.[695] Therefore, the fact that the final determination of 4 February 2013 was subject to judicial review and then formally replaced (though "ratified") by a determination adopted on remand does not mean that the clock under Article 5.10 continued ticking throughout judicial review.

7.516. In support of its contrary argument, the United Arab Emirates emphasizes that the determination of 9 April 2015 was a "fresh start"; that the February 2013 determination is "officially valid" only because it was "ratified" by the 9 April 2015 determination; and that the latter imposed duties only prospectively and was entitled "final determination".[696] However, none of these points would mean that the time-limit in Article 5.10 should apply to the sum total of the time taken to reach the first final determination *and* the time taken for its subsequent judicial review *and* the time taken to reach a new determination on remand, as a result of judicial review.[697]

[684] See paras. 7.489-7.492 above.
[685] Report on final determination (2013), public version, (Exhibit ARE-2); Report on final determination (2013), (Exhibit PAK-1 (BCI)).
[686] Report on final determination (2013), public version, (Exhibit ARE-2), para. 5.3.
[687] Report on final determination (2013), public version, (Exhibit ARE-2), para. 50.
[688] Report on final determination (2013), public version, (Exhibit ARE-2), paras. 51 and 54.
[689] Notice of final determination (2013), (Exhibit ARE-10).
[690] As well as collecting definitively the anti-dumping duties imposed on the basis of the provisional determination. (Notice of final determination (2013), (Exhibit ARE-10)).
[691] Article 12.2 of the Anti-Dumping Agreement.
[692] See para. 7.488 above, point (a).
[693] See fn 26 above.
[694] Pakistan's response to Panel question No. 15(b)(ii).
[695] See para. 7.491 above.
[696] United Arab Emirates' responses to Panel question Nos. 23-24.
[697] Less importantly, we note that the facts do not support the view that the 2015 determination was a "fresh start": the NTC made no new analysis and did not reopen the record, taking the view that the only step that had been set aside was the act of adopting the final determination; the duties collected under the February 2013 determination were not refunded; and the April 2015 determination only imposed duties until the end date originally envisaged in the February 2013 determination. (Report on final determination (2015), public version, (Exhibit PAK-49), paras. 3-5; Pakistan's response to Panel question No. 15(b)(ii)).

7.10.2.3 Conclusion under Article 5.10

7.517. Pakistan initiated the investigation on 23 April 2012 and concluded that investigation on 4 February 2013. Therefore, the United Arab Emirates has not established that Pakistan exceeded the 18-month time-limit set forth in Article 5.10 for investigations initiated "as provided in Article 5".

7.11 Due process rights and the 2015 determination: Article 6.2 of the Anti-Dumping Agreement

7.518. We refer to the facts set out in paragraphs 2.4-2.5 above.

7.519. The United Arab Emirates claims that in the process leading to the adoption of the determination of 9 April 2015, Pakistan failed to provide interested parties with a full opportunity for the defence of their interests as required by Article 6.2. The United Arab Emirates points out that the NTC gave parties no opportunity to make their views known and gave them no notice that it intended to reconsider its determination of 4 February 2013.[698]

7.520. Pakistan responds that the determination adopted on remand from the domestic court in April 2015 was limited to rectifying a purely formal defect, arisen under domestic law, in the February 2013 determination, with no substantive changes, and that therefore no obligation to involve interested parties was triggered under Article 6.2.[699]

7.521. Among the third parties, the European Union argues that "the type of analysis carried out on remand is determinative": Article 6.2 will not give interested parties a right to comment again if the authority "simply repeated the initial analysis", but it will if the authority "engaged in an analysis different from the original one".[700]

7.522. Below, we first set out the applicable requirements of Article 6.2 (section 7.11.1). We then apply that standard to the facts of this case, discussing whether the steps taken on remand by the NTC triggered obligations under Article 6.2 that the NTC failed to abide by, and we find that the United Arab Emirates has not established that Pakistan acted inconsistently with Article 6.2 (section 7.11.2).

7.11.1 The applicable requirements of Article 6.2

7.523. The opening clause of Article 6.2, on which the United Arab Emirates relies[701], provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests.

7.524. By providing that interested parties be given a full opportunity for the defence of their interests, Article 6.2 sets forth one of the "fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews". It provides for "liberal opportunities for respondents to defend their interests"; however, it does not provide "for 'indefinite' rights" and does not give parties the right to make submissions or otherwise participate "as and when they choose".[702]

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[698] United Arab Emirates' first written submission, para. 484; second written submission, paras. 223-225; and response to Panel question No. 23, paras. 17-20.

[699] Pakistan's first written submission, paras. 3.553-3.574; second written submission, paras. 2.287-2.296.

[700] European Union's third-party submission, para. 16; third-party statement, paras. 11-13.

[701] The remainder of Article 6.2 relates to hearings in the context of anti-dumping proceedings, with or without other parties. The United Arab Emirates does not make arguments specifically with regard to hearings.

[702] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 241.

7.525. The United Arab Emirates' arguments in this case raise the question of the extent to which Article 6.2 applies outside[703] the scope of original investigations and interim and sunset reviews.[704]

7.526. As fundamental due process rights, the rights set forth in Article 6.2 must be available in any process leading to the imposition of anti-dumping measures by a Member. However, not every step taken by an investigating authority will trigger an obligation for the authority to give parties an opportunity to submit their views.

7.527. We agree with how the panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* addressed a similar question to the one before us, in the context of a compliance redetermination.[705] That panel held that the extent to which "a procedural obligation set forth under Article 6" applied anew to the compliance redetermination depended on "the steps taken" by the domestic authority in the redetermination.[706]

7.528. The panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* relied on the fact that, in compliance proceedings, the original determination and the compliance redetermination form part of a continuum of events.[707] That panel observed that when a procedural obligation under Article 6 had already been complied with in the original proceedings, ruling that it had to be "re-observed" in the implementation proceedings would have meant the panel was imposing on the respondent "procedural obligations that had no … connection with the implementation of the DSB recommendations and rulings at issue", "*unless the steps taken by the [investigating authority of the respondent] made it necessary*". This would be the case, for example, where the investigating authority had to perform a *new analysis*, even if that analysis was based on the same facts already relied upon in the original proceedings.[708]

7.529. The reasoning in that case was specific to compliance redeterminations. However, there are commonalities with the situation before us, namely: a "first" final determination had already been adopted; it was either not contested that the authority had complied with Article 6.2 (in our case), or the complainant had not established otherwise (in the original proceedings in *Korea – Certain Paper*); a "second" final determination was then adopted, replacing the former, and the question was to what extent the authority had to take steps in adopting the second determination to ensure that parties had a full opportunity for the defence of their interests under Article 6.2. In such circumstances, we consider that also when a determination is remanded to the domestic authority as a result of domestic judicial proceedings rather than as a result of WTO dispute settlement, the question under Article 6.2 is whether *the steps taken* on remand *by the investigating authority* make it necessary to give parties a further opportunity to make their views known.

7.11.2 Whether Pakistan acted inconsistently with Article 6.2

7.530. The NTC adopted a first final determination on 4 February 2013. A Pakistani court then set aside the February 2013 determination because of a defect in the composition of the NTC at the time the determination was adopted. On remand from the court, the NTC adopted a new determination

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[703] In the second written submission, the United Arab Emirates emphasizes that Article 6.2 requires a full opportunity for parties to defend their interests "'*throughout*' [the anti-dumping] investigation". (United Arab Emirates' second written submission, para. 227 (emphasis added)). This, however, does not appear to address the question at hand, which is the extent to which Article 6.2 requires separate opportunities for comment in the context of a remand redetermination.

[704] For interim and sunset reviews, Article 11.4 expressly provides: "[t]he provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article."

[705] That is, in the context of a determination adopted to implement the recommendations and rulings of the DSB relating to anti-dumping measures adopted by Korea.

[706] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.74. In its third-party submission, the European Union points out that that panel clarified that the fact of relying on the same factual basis as relied upon in the original proceedings is not determinative, as one "cannot assume that the same factual basis would in all cases lead to the same analysis". (Ibid. para. 6.79 (quoted in Indonesia third-party submission, para. 14)).

[707] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.74 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121).

[708] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, paras. 6.74 and 6.79-6.80 (emphasis added). The panel found that this was precisely the case before it: because compliance with its recommendations and rulings under Article 3.4 required the authority to perform a new analysis, the authority was required to provide parties with an opportunity to make their views known, even though that new analysis was based on an unchanged factual record. (Ibid. para. 6.79).

on 9 April 2015, which was formally distinct but, in its own words, "ratified" the determination of February 2013, including the entirety of the underlying findings and the imposition of duties.[709]

7.531. The United Arab Emirates claims that the NTC failed to give parties a full opportunity for the defence of their interests in adopting the determination of 9 April 2015, because it gave parties no opportunity to make their views known and gave them no notice that it intended to reconsider its determination of 4 February 2013.[710]

7.532. As set out in discussing the requirements of Article 6.2 of the Anti-Dumping Agreement above, the question is whether, under this provision, the adoption of the 9 April 2015 determination in lieu of the 4 February 2013 determination triggered an obligation on the part of Pakistan to afford interested parties an additional opportunity for the defence of their interests, and specifically whether it required Pakistan to give notice of the impending adoption of a new determination and opportunities for the parties to make their views known.

7.533. The Report on final determination of 9 April 2015 states that the NTC "re-considered, re-appreciated and re-appraised the facts of the investigation".[711] Despite this language, the NTC not only did not reopen the record of the investigation, but also it carried out absolutely no new or further analysis of the facts already on the record. Instead, the NTC observed that the determination of February 2013 had been annulled solely on the basis of a formal defect in the composition of the NTC ("only on the issue of quorum"[712]), and that "only the final determination" had been set aside.[713] Therefore, the now "properly constituted"[714] NTC considered that only the last step of *adopting* a final determination had to be repeated, and it therefore "ratified" the earlier findings and the consequent imposition of duties.[715]

7.534. Thus, on the face of the determination[716], what the NTC did in April 2015 was to readopt a determination that was identical[717] to that of February 2013, but whereas in February 2013 one member of the NTC had overstayed its mandate under domestic law, in April 2015 the composition of the NTC was proper under domestic law.

7.535. On this basis, we do not consider that the United Arab Emirates has demonstrated that Article 6.2 of the Anti-Dumping Agreement required Pakistan to give parties a new opportunity to make their views know before the adoption of the 2015 determination, additional to the opportunities provided in the process that led to the adoption of the 2013 determination. We therefore find that the United Arab Emirates has not demonstrated that Pakistan acted inconsistently with Article 6.2 of the Anti-Dumping Agreement.

7.12 Sunset review: Articles 11.1 and 11.3 of the Anti-Dumping Agreement

7.536. The United Arab Emirates claims that Pakistan's sunset review determination of 1 December 2016 is inconsistent with Articles 11.1 and 11.3 of the Anti-Dumping Agreement on multiple grounds.

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[709] See paras. 2.3-2.5 above. The only substantive difference consists of the fact that the determination of 9 April 2015 only imposed duties with effect from that date. (Notice of final determination (2015), (Exhibit ARE-1), p. 2). The end date of the duties under the determinations of February 2013 and April 2015 was the same (14 August 2015), and the duties collected under the determination of February 2013 were not refunded following the annulment of that determination. (Notice of final determination (2013), (Exhibit ARE-10), p. 1; Notice of final determination (2015), (Exhibit ARE-1), p. 2; and Pakistan's response to Panel question No. 15(b)(ii)).

[710] See para. 7.519 above.

[711] Report on final determination (2015), public version, (Exhibit PAK-49), para. 4. The same language is contained in the Notice of final determination (2015), (Exhibit ARE-1), p. 1.

[712] Report on final determination (2015), public version, (Exhibit PAK-49), para. 4.

[713] Report on final determination (2015), public version, (Exhibit PAK-49), para. 3.

[714] Notice of final determination (2015), (Exhibit ARE-1), p. 1; Report on final determination (2015), public version, (Exhibit PAK-49), para. 3.

[715] Report on final determination (2015), public version, (Exhibit PAK-49), para. 4. Also the end date of the anti-dumping duties remained the same as under the determination of February 2013. See para. 2.5 above.

[716] Notice of final determination (2015), (Exhibit ARE-1); Report on final determination (2015), public version, (Exhibit PAK-49).

[717] See fn 709 above.

7.537. We begin by recalling the applicable requirements of Articles 11.1 and 11.3 of the Anti-Dumping Agreement (section 7.12.1). We then apply those requirements to the facts of this case, and we structure our discussion as follows: first, we examine whether the United Arab Emirates has established that the NTC's determination that dumping was likely to continue or recur was inconsistent with Article 11.3, and we find that it has so established (section 7.12.2); second, we examine whether the United Arab Emirates has established that the NTC's determination that injury was likely to recur was inconsistent with Article 11.3, and we find that it has so established (section 7.12.3); third, we decline to decide whether the sunset review determination is also inconsistent with Article 11.3 as a result of inconsistencies in the determination under which the anti-dumping duties were first imposed (section 7.12.4); and, finally, we exercise judicial economy under Article 11.1 (section 7.12.5).

7.12.1 The applicable requirements of Articles 11.1 and 11.3

7.538. Article 11.1 provides that:

> An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

7.539. The ordinary meaning of "counteract" includes "act against … or contrary to", "hinder or defeat by contrary action", and "neutralize the action or effect of".[718] Thus, on its face, Article 11.1 provides that an anti-dumping duty may remain in force only "as long as and to the extent" that it is necessary to act against, or neutralize the action or effect of, "dumping which is causing injury".

7.540. Article 11.1 is the first paragraph of Article 11, which is a provision on the "Duration and Review of Anti-Dumping Duties" and sets forth disciplines for so-called changed circumstances reviews and sunset reviews.[719] Thus, we agree with other panels which have taken the view that Article 11.1 establishes an overarching principle that duties may only continue to be imposed as long as they remain necessary, which is operationalized in the procedures for changed circumstances and sunset reviews set out in the remainder of Article 11.[720]

7.541. Article 11.3 is the central provision governing sunset reviews. Article 11.3 reads in relevant part:

> Any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition … *unless the authorities determine, in a review* initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, *that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.*[721]

7.542. Article 11.3 thus requires that anti-dumping duties be terminated within five years, unless an investigating authority "*determine[s],* in a *review* … that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping and injury".[722]

7.543. The ordinary meaning of "determine" includes to "bring to an end a … doubtful matter; to conclude, settle, decide, fix", to "conclude from reasoning, investigation", and to "ascertain definitely

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[718] Oxford Dictionaries online, definition of "counteract" https://www.oed.com/view/Entry/42649?redirectedFrom=counteract#eid (accessed 12 October 2020), v., meanings 1-2.

[719] Article 11.1 is followed by Articles 11.2 and 11.3, which discipline so-called changed circumstances reviews and sunset reviews; Article 11.4, which extends certain procedural provisions to both type of reviews; and Article 11.5, which explains that these disciplines also apply to the duration and review of price undertakings.

[720] Panel Reports, *US – Shrimp II (Viet Nam)*, para. 7.363; *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.567; *Ukraine – Ammonium Nitrate*, paras. 7.7, 7.34, and 7.46; *US – Corrosion-Resistant Steel Sunset Review*, paras. 7.28, 7.95, and 7.300; and *EC – Tube or Pipe Fittings*, para. 7.113. See also Panel Report, *US – DRAMS*, para. 6.41.

[721] Emphasis added.

[722] Emphasis added.

by observation, examination"[723]; and the ordinary meaning of "review" includes an "inspection, examination".[724] Further, the ordinary meaning of the word "likely" includes "having a high chance of occurring; probable", and "that looks as if it would happen, be realized, or prove to be what is alleged or suggested; probable".[725] Together, these terms indicate that a Member may not rely solely on assumption or speculation when conducting a likelihood analysis during a sunset proceeding but must, instead, conduct its examination on the basis of positive evidence so as to arrive at a reasoned determination, resting on a sufficient factual basis[726], that dumping and injury are "likely" – i.e. probable and not merely possible[727] – to continue or recur.

7.544. Regarding the likelihood that *dumping* will continue or recur, one of the questions before us is whether and to what extent Article 2 applies in the context of reviews conducted under Article 11.3. We note that Article 11.3 does not require a determination of dumping, but rather a determination that expiry of the duty would be *likely* to lead to continuation or recurrence of dumping. Thus, an investigating authority is not required to determine a margin of dumping in the context of a sunset review.[728] However, in determining likelihood of dumping, an authority may rely on margins of dumping. If it does so, those dumping margins must then conform to the requirements of Article 2, because Article 2.1 of the Anti-Dumping Agreement sets forth a single definition of dumping "[f]or the purpose of this Agreement". Similar to the view taken in previous disputes, we are therefore of the view that under Article 11.3, when an authority is in a position to rely on dumping margins, and it chooses to rely on dumping margins to determine the likelihood of continuation or recurrence of dumping, it must do so in a way that conforms to the disciplines of Article 2.[729]

7.545. Similar to dumping, we note that Article 11.3 does not require a determination of injury, but rather a determination of whether the expiry of a duty would be *likely* to lead to continuation or recurrence of injury. Therefore, in a sunset review, an investigating authority is not required to make a determination of injury within the meaning of Article 3.[730] However, to determine likelihood of injury, an authority may choose to, or even have to, evaluate certain of the factors mentioned in Article 3 and conduct analyses akin to those mandated by Article 3.[731] To that extent, the disciplines in Article 3 may be relevant to interpret the obligation to determine likelihood of injury under Article 11.3.[732]

7.546. Finally, Article 11.3 requires the authority to "determine … that the expiry of the duty *would be likely to lead to* continuation or recurrence of dumping and injury".[733] Thus, Article 11.3 requires the authority to ascertain whether there is a relationship (or "nexus"[734]) between the expiry of a duty, on the one hand, and continuation or recurrence of dumping and injury, on the other, such that the former "would be likely to lead to" the latter.

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[723] Oxford Dictionaries online, definition of "determine" https://www.oed.com/view/Entry/51244?redirectedFrom=determine#eid (accessed 8 October 2020), v., meanings II.4, II.10, and II.11.

[724] Oxford Dictionaries online, definition of "review" https://www.oed.com/view/Entry/164850?rskey=3wbCMT&result=1&isAdvanced=false#eid (accessed 8 October 2020), n., meaning I.4.a.

[725] Oxford Dictionaries online, definition of "likely" https://www.oed.com/view/Entry/108315?rskey=Wod6SQ&result=1&isAdvanced=false#eid (accessed 8 October 2020), adj., meanings II.2.a and II.2.d.

[726] Panel Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.271; *Ukraine – Ammonium Nitrate*, para. 7.16; Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, paras. 110-115; and *US – Oil Country Tubular Goods Sunset Reviews*, paras. 179-180.

[727] See also e.g. Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 111; and *US – Oil Country Tubular Goods Sunset Reviews*, para. 308.

[728] See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 123 and 127; Panel Reports, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.270; and *US – Shrimp II (Viet Nam)*, para. 7.306.

[729] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 127; *US – Zeroing (Japan)*, paras. 183-185. Panel Reports, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.270; *Ukraine – Ammonium Nitrate*, para. 7.130; and *US – Shrimp II (Viet Nam)*, para. 7.306.

[730] See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 279; and Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.166.

[731] See also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

[732] See also e.g. Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.381-7.383.

[733] Emphasis added.

[734] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 108. See also ibid. para. 123.

7.12.2 Whether the NTC's likelihood of dumping determination is inconsistent with Article 11.3

7.547. The United Arab Emirates argues that the NTC's determination that dumping from the United Arab Emirates was likely to continue or recur is inconsistent with Article 11.3 on multiple grounds. In particular, the United Arab Emirates argues that: in making its likelihood of dumping determination, the NTC relied on dumping margins that were inconsistent with Article 2 of the Anti-Dumping Agreement[735]; two of the other three factors relied upon by the NTC did not support the NTC's finding that dumping was likely to continue or recur if the duties expired[736]; and the NTC failed to take into consideration that during the period of review the prices of the subject imports had increased significantly and had consistently been higher than those of the domestic producers, even before accounting for the anti-dumping duties.[737] Below, we consider the first two of these three sets of arguments and find that the United Arab Emirates has established, on that basis, that the NTC's determination of likelihood of dumping is inconsistent with Article 11.3. We therefore do not proceed to consider the remainder of the United Arab Emirates' arguments against the NTC's likelihood of dumping determination.

7.12.2.1 Whether the NTC acted inconsistently with Article 11.3 by relying on a dumping margin that did not conform to Article 2 of the Anti-Dumping Agreement

7.548. In determining that dumping was likely to continue or recur, the NTC relied on what it called "likely dumping margins". The United Arab Emirates argues that these dumping margins[738] were inconsistent with Article 2 of the Anti-Dumping Agreement and therefore that, by relying on them to determine that dumping was likely to continue or recur, the NTC acted inconsistently with Article 11.3.[739]

7.549. Pakistan responds that the NTC did not calculate company-specific dumping margins, but "likely dumping margins" at the country level, i.e. estimates or proxies for likely country-wide pricing behaviour. Pakistan argues that, therefore, the disciplines of Article 2 do not apply.[740]

7.550. The parties' arguments raise two questions, which we examine in turn: (a) were what the NTC called "likely dumping margins" subject to the requirements of Article 2 of the Anti-Dumping Agreement; and (b) if so, were those "likely dumping margins" inconsistent with Article 2 and, therefore, with Article 11.3? We answer both questions in the affirmative.

7.12.2.1.1 Whether the NTC's "likely dumping margins" are subject to Article 2

7.551. We first consider whether what the NTC referred to as likely dumping margins are subject to the substantive requirements of Article 2, as the United Arab Emirates argues.

7.552. According to Pakistan, the NTC did not calculate individual dumping margins in the sense of Article 2[741], but rather "country-wide estimates"[742] of "the likely future pricing behaviour of exporters

[735] See e.g. United Arab Emirates' first written submission, paras. 490 and 532-538; second written submission, paras. 235-237 and 248-251.
[736] See e.g. United Arab Emirates' first written submission, para. 541; second written submission, paras. 238 and 252-254.
[737] United Arab Emirates' first written submission, para. 540; response to Panel question No. 78. See also United Arab Emirates' second written submission, para. 234; written opening statement, para. 111; and response to Pakistan's written opening statement, para. 49.
[738] Specifically, the dumping margin calculated for BOPP film from the United Arab Emirates, since the United Arab Emirates challenges the anti-dumping measures on BOPP film from the United Arab Emirates.
[739] United Arab Emirates' first written submission, paras. 532 and 534. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 78; second written submission, paras. 235 and 249; written opening statement, para. 107; response to Panel question No. 92, para. 15; and comments on Pakistan's response to Panel question No. 92, p. 11.
[740] Pakistan's first written submission, paras. 3.637-3.644; second written submission, section 2.11.2.3; written opening statement, paras. 112-119; response to United Arab Emirates' written opening statement, paras. 72-73; comments on United Arab Emirates' response to Panel question No. 92; and response to Panel question No. 92, paras. 32-33.
[741] Pakistan's first written submission, para. 3.638; second written submission, para. 2.309.
[742] Pakistan's second written submission, para. 2.307.

from the relevant countries".[743] Pakistan argues that, therefore, the NTC's calculations are not subject to the rules of Article 2.[744]

7.553. To make our assessment, we turn to the NTC's determination.

7.554. The NTC explained in its Report on sunset determination that "[t]o determine likelihood of recurrence or continuation of dumping … the [NTC] has considered"[745] several factors, among which "[l]ikelihood of dumping and *calculation of likely dumping margins* for exporters/foreign producers of the Exporting Countries".[746] It explained how it calculated these "likely dumping margins" in a section entitled "*Determination of dumping and calculation of dumping margins* for exporters/foreign producers of the Exporting Countries".[747] While the specific manner in which a Member designates its actions in domestic law does not conclusively determine how those actions can properly be characterized under the covered agreements, we note that the NTC described what it was doing as a "calculation of likely dumping margins" and a "determination of dumping".

7.555. In explaining how it determined these likely dumping margins, the NTC began by quoting Sections 4, 5, and 6(1) of the Pakistani Anti-Dumping Duties Act (2015), which define dumping (Section 4), normal value (Section 5), and alternative bases for determining normal value (Section 6(1)) in Pakistani law[748], and are similar to Articles 2.1 and 2.2 of the Anti-Dumping Agreement. The text of these provisions is also identical to that of the provisions quoted at the outset of the section on "Determination of Dumping" in the Report on final determination of 4 February 2013.[749]

7.556. After quoting Sections 4, 5, and 6(1) of the Anti-Dumping Duties Act (2015), the NTC explained in its report that it had received responses to the questionnaire from two exporters from Dubai and Oman – i.e. Taghleef (Taghleef LLC, Dubai) and Taghleef SAOC (Taghleef SAOC, Oman).[750] It further explained that the "likely normal value for Oman, Saudi Arabia, and United Arab Emirates for the [period of review] is constructed on the basis of cost to make and sell of Taghleef LLC, Dubai, and Taghleef SAOC, Oman, which they have provided in response to the questionnaire".[751] It appears that the NTC constructed a single normal value based on the combined costs to make and sell of the two cooperating exporters for the year 2014, which it then assigned to each of the three aforementioned countries.[752] The NTC then compared[753] the constructed normal value[754] with country-wide export prices determined for each country separately on the basis of import statistics obtained from PRAL.[755] The NTC also listed a number of adjustments it had made

[743] Pakistan uses various formulations. It argues that the NTC sought to analyse "likely country-wide of pricing behaviour", and to that effect calculated "proxies for likely future pricing behaviour", "country-wide estimates of likely dumping", "likely future dumping proxy figure[s]", "country-wide pricing behaviour proxies", "country-wide dumping trends", and "other dumping-type calculations". (Pakistan's first written submission, paras. 3.612, 3.639, and 3.644; second written submission, paras. 2.307, 2.311, and 2.314).

[744] Pakistan's first written submission, para. 3.639. See also ibid. para. 3.612; written opening statement, paras. 115 and 117; response to Panel question No. 92, paras. 32-33; and comments on United Arab Emirates' response to Panel question No. 92, paras. 23 and 25.

[745] Report on sunset determination, public version, (Exhibit ARE-4), para. 25.

[746] Report on sunset determination, public version, (Exhibit ARE-4), para. 25(ii). (emphasis added)

[747] Report on sunset determination, public version, (Exhibit ARE-4), section 28. (emphasis added)

[748] Report on sunset determination, public version, (Exhibit ARE-4), pp. 12-13.

[749] In the Report on final determination of 4 February 2013, the NTC quoted at the outset of the section of the report on "Determination of Dumping", among other provisions, Sections 4, 5, and 6(1) of the Anti-Dumping Duties Ordinance (2000), which are identical, word-for-word with Sections 4, 5, and 6(1) of the Anti-Dumping Duties Act (2015), as quoted in the Report on sunset determination. (Report on final determination (2013), (Exhibit PAK-1 (BCI)), pp. 22-23; Report on sunset determination, public version, (Exhibit ARE-4), pp. 12-13. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 78; second written submission, para. 248 (referring to Report on final determination (2013), (Exhibit PAK-1 (BCI)), pp. 22-24)).

[750] Report on sunset determination, public version, (Exhibit ARE-4), paras. 28.3-28.4.1.

[751] Report on sunset determination, public version, (Exhibit ARE-4), para. 28.4.2.

[752] NTC's explanation of sunset methodology, (Exhibit ARE-27 (BCI)), section 4.1; Report on sunset determination, (Exhibit PAK-2 (BCI)), annex-II and table-VI.

[753] Report on sunset determination, (Exhibit PAK-2 (BCI)), table-VI.

[754] We note that the NTC used the phrase "constructed normal value". (NTC's explanation of sunset methodology, (Exhibit ARE-27 (BCI)), section 4.1; Report on sunset determination, (Exhibit PAK-2 (BCI)), annex-II).

[755] NTC's explanation of sunset methodology, (Exhibit ARE-27 (BCI)), section 4.2; Report on sunset determination, (Exhibit PAK-2 (BCI)), para. 28.5, table-V, and annex-IV.

to the export price "to reach at ex-works level for like to like comparison of the *normal value* and ex*port price*".[756] Further, before setting out the results of its calculations of "normal value", "export price", and "dumping margin" for each of the four investigated exporting countries[757], the NTC quoted the definition of "dumping margin" from the Anti-Dumping Duties Act (2015), stating that "[t]he Act defines 'dumping margin' in relation to a product as *'the amount by which its normal value exceeds its export price'*".[758]

7.557. In support of its position that the NTC was not calculating margins of dumping, Pakistan points out that the NTC's calculations were country-wide.[759] However, as described above, the steps actually taken by the NTC to calculate the "likely dumping margins" at issue, the provisions of domestic law invoked by the NTC, and the manner in which the NTC described its determination, all indicate that the NTC calculated margins of dumping[760] and relied on these margins when determining whether dumping was likely to continue or recur. The question of the consistency of these margins with the applicable requirements is a separate one.

7.558. Pakistan also points out that it did not modify the anti-dumping duty rates to reflect the "likely dumping margins" at issue here; instead, it left anti-dumping duty rates unchanged after the sunset review.[761] However, this does not change the outcome of our analysis. If in determining whether dumping is likely to continue or recur, an authority is in a position to rely on dumping margins and chooses to do so, then Article 11.3 requires it to abide by the requirements of Article 2 in calculating those dumping margins.[762] This does not depend on whether those margins are then also used as a basis to update the anti-dumping duty rates.

7.559. Finally, Pakistan submits that the NTC would not have been able to calculate individual dumping margins because its exporter questionnaire in the sunset review did not request transaction-specific data from exporters, but rather aggregate values and volumes of domestic and export sales.[763] The UAE responds that the sunset review questionnaire required "the same categories of data … that the NTC relied on in … calculating dumping margins in the original investigation".[764] Pakistan appears to confuse the question whether Article 2 *applies*, with the separate and logically subsequent question whether the dumping margins are *consistent with* Article 2. If an authority calculates dumping margins in a manner that is not *consistent* with Article 2, that does not mean that Article 2 does not *apply*. Therefore, with reference to this specific argument by Pakistan, if an authority collects data from exporters that would not allow it to calculate dumping margins in a manner consistent with Article 2, that does not mean that Article 2 does not *apply*.

7.560. In sum, the calculations performed by the NTC, the provisions the NTC invoked and the wording it used in its determination, taken together, indicate that the NTC calculated margins of dumping and relied upon them in determining whether dumping was likely to continue or recur. Thus, the NTC first calculated normal values, and in order to do so, it turned to the questionnaire responses of the cooperating exporters and stated that it would construct normal value on the basis of the cost data submitted by those exporters. It then calculated an export price, and derived margins of dumping by comparing the normal values and export prices it had so established. In doing so, it cited provisions of domestic law concerning the definition and determination of dumping, normal value, and dumping margins. We note, in addition, that the NTC set out the results of this exercise in a table entitled "Dumping Margins".[765] All of these elements taken together, which we

[756] NTC's explanation of sunset methodology, (Exhibit ARE-27 (BCI)), section 4.2; Report on sunset determination, public version, (Exhibit ARE-4), para. 28.5. (emphasis added)
[757] Report on sunset determination, public version, (Exhibit ARE-4), table-IV.
[758] Report on sunset determination, public version, (Exhibit ARE-4), para. 28.6.1. (emphasis original)
[759] Pakistan's written opening statement, para. 117. See also ibid. paras. 114 and 118; responses to Panel question No. 87, paras. 6 and 8, and No. 92, para. 32; and comments on United Arab Emirates' response to Panel question No. 92, paras. 22-24.
[760] This is without prejudice to the question of the consistency of those margins of dumping with the applicable requirements.
[761] Pakistan's first written submission para. 3.640; second written submission, para. 2.313. See also Pakistan's written opening statement, paras. 114 and 118; response to Panel question No. 87, para. 6; and comments on United Arab Emirates' response to Panel question No. 92, para. 24.
[762] See para. 7.544 above.
[763] Pakistan's first written submission, para. 3.641; second written submission, para. 2.312; and written opening statement, para. 115.
[764] United Arab Emirates' second written submission, para. 248.
[765] Report on sunset determination, (Exhibit PAK-2 (BCI)), table-VI.

have described in more detail above, indicate that the NTC calculated margins of dumping.[766] Immediately after setting out its calculations of dumping margins, the NTC stated that "[o]n the basis of above information and analysis the [NTC] has reached the conclusion [that] there is likelihood of continuation or recurrence of dumping of the product under review if antidumping duties imposed on it are terminated"[767]: that is, it relied on those margins in determining that dumping was likely to continue or recur. While Article 11.3 does not require authorities to calculate (or otherwise rely upon) dumping margins in a sunset review, when an authority is in a position to rely on dumping margins and chooses to rely on dumping margins under Article 11.3, these must conform to the requirements of Article 2.[768] Therefore, given that the NTC chose to calculate and rely upon dumping margins in determining whether dumping was likely to continue or recur, these dumping margins are subject to the requirements of Article 2.

7.12.2.1.2 Whether the dumping margin that the NTC relied upon for the United Arab Emirates is inconsistent with Article 2

7.561. Having found that, in determining that dumping from the United Arab Emirates was likely to continue or recur, the NTC relied upon a margin of dumping that was subject to the requirements of Article 2, we now examine whether the United Arab Emirates has established that that dumping margin does not conform with the requirements of Article 2. The United Arab Emirates argues that the margin of dumping that the NTC relied upon for the United Arab Emirates was inconsistent with Article 2 for the following reasons: (a) because the NTC constructed normal value when the conditions for doing so were not met[769] or, in the alternative, because the NTC did not ensure that the costs of production it used pertained to the product sold in the United Arab Emirates[770]; (b) because the NTC established the export price using data from its official import statistics rather than data submitted by the investigated exporters[771]; and (c) because the NTC failed to ensure a fair comparison between normal value and export price.[772]

7.562. Below, we find that the NTC constructed normal value without establishing that the conditions for doing so were met. Because the resulting margin of dumping was therefore inconsistent with Article 2, the determination that dumping was likely to continue or recur was inconsistent with Article 11.3. We therefore do not proceed to examine the United Arab Emirates' additional arguments regarding the export price and the fairness of the comparison between the normal value and the export price.

7.12.2.1.2.1 Normal value

7.563. The NTC constructed a single normal value on the basis of the data submitted by Taghleef (Taghleef LLC, Dubai) and Taghleef SAOC (Taghleef SAOC, Oman), which it then assigned, among others, to the United Arab Emirates.[773] The NTC did not explain why it chose to construct normal value.

7.564. The United Arab Emirates recalls that normal value can be constructed only in one of the three situations set out in Article 2.2, which are: (a) when there are no sales in the exporting country of the like product in the ordinary course of trade; (b) when sales in the exporting country's market do not permit a proper comparison because of the particular market situation; and (c) when sales

[766] This is without prejudice to the consistency of the NTC's calculations with Article 2, which we consider in the following section.
[767] Report on sunset determination, public version, (Exhibit ARE-4), para. 28.7.
[768] See para. 7.544 above.
[769] United Arab Emirates' first written submission, para. 535. See also United Arab Emirates' second written submission, paras. 235, 249, and 251; and written opening statement, para. 107.
[770] United Arab Emirates' first written submission, para. 536; second written submission, para. 250. See also United Arab Emirates' written opening statement, para. 108.
[771] United Arab Emirates' first written submission, paras. 537-538; second written submission, paras. 237 and 250. See also United Arab Emirates' first written submission, para. 533; opening statement at the first meeting of the Panel, para. 78; written opening statement, paras. 107 and 109; response to Panel question No. 92, para. 15; and comments on Pakistan's response to Panel question No. 92, p. 11.
[772] United Arab Emirates' first written submission, para. 537; second written submission paras. 237 and 250; and written opening statement, para. 109.
[773] Report on sunset determination, public version, (Exhibit ARE-4) para. 28.4.2; Report on sunset determination, (Exhibit PAK-2 (BCI)), para. 28.4.2; and annex-II. See also NTC's explanation of sunset methodology, (Exhibit ARE-27 (BCI)), section 4.1.

in the exporting country's market do not permit a proper comparison because of their low volume. The United Arab Emirates argues that "[t]here is no evidence or explanation [of] which of these three situations justified the construction of normal value", and therefore the NTC was not justified in constructing normal value.[774]

7.565. Pakistan responds that "the NTC did not have to explain why it chose to construct the normal value proxy … or follow the rules governing when an investigating authority may rely on constructed normal value"[775], because the NTC's calculation of "likely dumping margins" was not subject to the disciplines of Article 2.

7.566. We have found above that the NTC relied upon margins of dumping that are subject to the requirements of Article 2. However, the NTC constructed normal value without establishing the existence of any of the three situations in which an authority may construct normal value pursuant to Article 2.2. Therefore, the NTC constructed normal value inconsistently with Article 2.2. It was on the basis of this normal value that the NTC calculated the margin of dumping that it relied on to determine that dumping was likely to continue or recur.[776] As a result, the NTC's determination that dumping was likely to continue or recur was inconsistent with Article 11.3.[777]

7.567. The United Arab Emirates' alternative argument that the NTC made no attempt "to ensure that the costs of production used were those for the product as sold in the United Arab Emirates and not for other markets"[778] is premised on us finding that the NTC's decision to construct normal value was justified, and we therefore do not consider it.

7.12.2.1.2.2 Conclusion on the dumping margin that the NTC relied upon

7.568. We have found that in determining that dumping from the United Arab Emirates was likely to continue or recur, the NTC relied on a margin of dumping, and that in establishing this margin of dumping the NTC constructed normal value without establishing that the conditions for doing so were met. As a result, that margin of dumping is inconsistent with Article 2 and, therefore, the determination that dumping was likely to continue or recur, which was based on that margin of dumping, is inconsistent with Article 11.3.

7.569. Having so found, we do not examine the United Arab Emirates' additional arguments regarding the export price and the fairness of the comparison between the normal value and the export price.

7.12.2.2 Whether the NTC acted inconsistently with Article 11.3 in finding that the stability of export destinations and the existence of exportable surplus supported its determination that dumping was likely to continue or recur

7.570. In addition to asserting that the NTC relied on dumping margins that were inconsistent with Article 2, the United Arab Emirates also argues that the NTC's determination that dumping was likely to continue or recur did not otherwise rest on a sufficient factual basis[779] and was not adequately explained.[780]

7.571. In addition to relying on the dumping margin discussed in the previous section, the NTC considered three other factors as part of its likelihood of dumping analysis[781]: (a) whether exports to Pakistan had continued or stopped after the imposition of duties[782]; (b) whether the exporters

[774] United Arab Emirates' first written submission, para. 535. See also United Arab Emirates' second written submission, paras. 235, 249, and 251; and written opening statement, para. 107.
[775] Pakistan's first written submission, para. 3.642. See also Pakistan's response to Panel question No. 87, para. 6.
[776] Report on sunset determination, (Exhibit PAK-2 (BCI)), para. 28.4.2 and table-VI. See also ibid. annex-II.
[777] See para. 7.544 above.
[778] United Arab Emirates' first written submission, para. 536; second written submission, para. 250. See also United Arab Emirates' written opening statement, para. 108.
[779] United Arab Emirates' first written submission, para. 531. See also ibid. paras. 489-490, 529, 539, and 544.
[780] United Arab Emirates' first written submission, para. 539.
[781] Report on sunset determination, public version, (Exhibit ARE-4), para. 25.
[782] Report on sunset determination, public version, (Exhibit ARE-4), section 27.

developed other export markets after the imposition of duties[783]; and (c) whether the exporters had an exportable surplus of the product under review.[784] The United Arab Emirates challenges the findings made by the NTC with respect to the second and third of these factors[785], arguing that they do not support a finding of likelihood of dumping.[786] We discuss them in turn, below.

7.12.2.2.1 The NTC's reliance on its finding that "major export destinations of the exporting countries remained same/similar after imposition of duties"

7.572. In assessing whether dumping was likely to continue or recur, the NTC reviewed the investigated countries' exports to their "major export destinations" in 2012 and 2015, and found that their "major export destinations … remained same/similar after imposition of anti-dumping duties".[787]

7.573. According to the United Arab Emirates, "this … confirmed that there was not going to be a reason to expect major shifts back towards the Pakistan market if duties were terminated", as it indicated that the duties had no impact on export trends.[788] The United Arab Emirates argues that the NTC "failed to incorporate this finding in its overall assessment or to explain why this fact did not detract from its likelihood determination".[789]

7.574. Pakistan responds that the stability of the export market suggests that the "exporters chose not to develop new markets for the export volumes previously destined for Pakistan while the [anti-]dumping measure was in place", which "in turn, suggests that the production capacity previously dedicated to exports to Pakistan – not having any alternative outlet market – would presumably be available and could easily be used again for exports to Pakistan if the duties were removed".[790] While this explanation may potentially have been a plausible one, it is not reflected in the NTC's determination, or in its separate report, and Pakistan has not pointed to other elements of the record showing that this was the NTC's reasoning. Hence, we are unable to accord any weight to this particular explanation.

7.575. We note that the NTC did not provide any explanation of how its finding that "major export destinations … remained same/similar"[791] supported, or related to, its final conclusion that dumping was likely to continue or recur. In reaching that conclusion, the NTC merely asserted that it was based on the "information and analysis" in the preceding paragraphs.[792] Therefore, we find that the NTC failed to provide a reasoned and adequate explanation of how its finding that major export destinations remained stable related to its final conclusion that dumping was likely to continue or recur if duties were terminated.

7.12.2.2.2 The NTC's reliance on its finding of exportable surplus

7.576. The NTC found that the exporting Members concerned had exportable surplus of the product under review and relied on this finding to support its determination that dumping was likely to continue or recur.[793]

7.577. We note that the NTC based its finding that the United Arab Emirates, among others, had exportable surplus, on:

[783] Report on sunset determination, public version, (Exhibit ARE-4), section 29.
[784] Report on sunset determination, public version, (Exhibit ARE-4), section 30.
[785] United Arab Emirates' first written submission, paras. 541-543; second written submission, paras. 238 and 252; response to Pakistan's written opening statement, paras. 55-56; and comments on Pakistan's response to Panel question No. 93, pp. 13-14.
[786] United Arab Emirates' first written submission, para. 541; second written submission, para. 238.
[787] Report on sunset determination, public version, (Exhibit ARE-4), para. 29.3.
[788] United Arab Emirates' first written submission, para. 541; second written submission, para. 238.
[789] United Arab Emirates' first written submission, para. 541.
[790] Pakistan's first written submission, para. 3.657. See also ibid. para. 3.591.
[791] Report on sunset determination, public version, (Exhibit ARE-4), para. 29.3.
[792] Report on sunset determination, public version, (Exhibit ARE-4), para. 30. See also ibid. para. 31.
[793] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.

a. a statement from the website of the Taghleef Industries Group, which we describe in more detail below[794]; and

b. a table listing the investigated countries' quantities of exports of the "*product group which includes the product under review*"[795] for 2012 and 2015.[796]

7.578. The United Arab Emirates argues that the NTC's finding of exportable surplus was not supported by sufficient facts, because it was based on a generic statement on Taghleef's website to the effect that it had grown since its inception in 2006, and on non-specific data on the export trends of the investigated countries.[797] The United Arab Emirates also argues that the NTC's finding of exportable surplus lacked a reasoned and adequate explanation.[798]

7.579. Pakistan responds that the NTC relied on statements from the exporters' websites "attesting to the increase in their productive capacity"[799] and that the "only reasonable conclusion that could be drawn from the statement [from Taghleef's website] was that Taghleef had increased its capacity during the [period of review]".[800] Pakistan further argues that the NTC did not have information on exports of BOPP film from the investigated countries and considered that export trends for the product group that included BOPP film provided "meaningful information" also with respect to BOPP film.[801]

7.580. We begin our analysis by considering the statements from the website of the Taghleef Industries Group, which includes Taghleef. After indicating that the Taghleef Industries Group was "one of the largest global manufacturers" of BOPP film and various other types of film, it read:

> Since its inception, the Ti Group has grown by both acquiring in strategic manufacturing entities around the world and investing in new capacities for its organic growth strategy. Today, Ti has nine manufacturing facilities on five continents: 2 facilities in Asia/Middle East (Dubai, Oman), 3 in Europe (Italy, Hungary and Spain) and one each in Australia (Wodonga), Africa (Egypt), USA (Indiana), and Canada (Québec).[802]

7.581. From this, the NTC inferred that Taghleef had increased its installed capacity and therefore had exportable surplus.[803] The United Arab Emirates argues that this statement does not constitute positive evidence supporting these inferences.[804] The United Arab Emirates points out, first, that Taghleef Industries Group's "inception" was in 2006, well before the period of review[805] and, second, that it has had since its inception only two "two manufacturing 'facilities in Asia/Middle East (Dubai,

[794] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.2. The NTC also relied on statements from the websites of two Saudi Arabian producers. (Ibid. paras. 30.3-30.4). Pakistan takes issue with the fact that the United Arab Emirates does not address the statements relating to Saudi Arabia in its arguments. (Pakistan's first written submission, para. 3.664). However, the United Arab Emirates' challenge is limited to anti-dumping measures on BOPP film from the United Arab Emirates. When reviewing the NTC's determination that *dumping from the United Arab Emirates* was likely to continue or recur, the website statements relating to Saudi Arabia are not relevant.

[795] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.5. (emphasis added)

[796] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.5 and table-VIII. In responding to a question from the Panel, Pakistan indicated that the NTC's finding of exportable surplus also rested on its separate finding that the exporting countries continued to export BOPP film to Pakistan, which meant they had maintained business links to Pakistan, and could increase exports to Pakistan on relatively short notice once the duties were revoked. However, this explanation is not reflected in the NTC's report. (Pakistan's response to Panel question No. 77).

[797] United Arab Emirates' first written submission, para. 542; second written submission, para. 238; and comments on Pakistan's response to Panel question No. 93, p. 13.

[798] United Arab Emirates' first written submission, para. 542; second written submission, para. 238; and comments on Pakistan's response to Panel question No. 93, p. 13.

[799] Pakistan's response to Panel question No. 93, para. 39.

[800] Pakistan' written opening statement, para. 122. See also ibid. para. 121; Pakistan's first written submission, para. 3.663; and response to Panel question No. 77.

[801] Pakistan's response to Panel question No. 77. See also Pakistan's response to Panel question No. 93, paras. 37-38.

[802] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.2.

[803] Report on sunset determination, public version, (Exhibit ARE-4), paras. 30.2 and 30.

[804] United Arab Emirates' first written submission, para. 543; second written submission, paras. 238 and 254.

[805] United Arab Emirates' first written submission, para. 543; second written submission, para. 254. See also United Arab Emirates' response to Pakistan's written opening statement, para. 55.

Oman)", and has not added any other facilities in the countries subject to the anti-dumping measures.[806]

7.582. In our view, it is not clear from the statement quoted by the NTC to what extent, when, and in which countries the Taghleef Industries Group increased its production capacity. Therefore, in the absence of further information or explanation, this statement does not constitute positive evidence supporting the NTC's finding that the United Arab Emirates had exportable surplus.[807]

7.583. In answer to a question we posed during the written exchange that replaced the second substantive meeting, Pakistan pointed out that the questionnaire replies of cooperating exporters contained data on a number of variables including production capacity, and indicated that the NTC relied on those data in reaching its finding of exportable surplus.[808] We note that the Report on sunset determination refers generically to "information" submitted by "cooperating exporters", including "Taghleef Dubai"[809], but only discusses and appears to rely upon the web site statements referred to above.[810]

7.584. We now turn to the data on exports in 2012 and 2015. The NTC listed the following data on the investigated countries' exports of a "*product group which includes the product under review* … before and after the imposition of antidumping duties"[811]:

Table-VIII

Export of the Exporting Countries (MT)

Exporting country	**2012**	**2015**
China	299,100	358,763
Oman	36,569	44,284
[Kingdom of Saudi Arabia]	80,375	84,069
UAE	58,103	47,377

Source: www.trademap.org

7.585. The United Arab Emirates argues that because the data related to a broader product group than BOPP film it did not constitute positive evidence on export trends for BOPP film[812], and that there is no explanation as to how this data supported the finding that there was an exportable surplus of BOPP film and the ultimate conclusion that dumping was likely to continue or recur.[813]

7.586. We note that the NTC indeed stated in its report that data for BOPP film alone were not available, and that it therefore relied on "broadly categorized" data for "the product group [that] includes" BOPP film, obtained from the International Trade Centre (www.trademap.org).[814]

7.587. Pakistan argues that in the absence of more precise data "the NTC concluded that the trends observed with respect to the six-digit level provided meaningful information also with respect to the eight-digit level sub-products"[815], but has not explained why this is the case, nor is such an explanation found in the report.

[806] United Arab Emirates' response to Pakistan's written opening statement, para. 55.
[807] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.
[808] Pakistan's response to Panel question No. 93, para. 35.
[809] Report on sunset determination, public version, (Exhibit ARE-4), paras. 30.1-30.2.
[810] See also United Arab Emirates' comments on Pakistan's response to Panel question No. 93.
[811] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.5 and table-VIII. (emphasis added)
[812] United Arab Emirates' first written submission, para. 542. See also United Arab Emirates' second written submission, paras. 238 and 253; and comments on Pakistan's response to Panel question No. 93, p. 13.
[813] See e.g. United Arab Emirates' second written submission, para. 253. See also United Arab Emirates' first written submission, para. 541.
[814] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.5. See also ibid. para. 29.1.
[815] Pakistan's response to Panel question No. 77, p. 33.

7.588. As already noted, in answer to a question we posed during the written exchange that replaced the second substantive meeting, Pakistan indicated that in reaching its finding of exportable surplus the NTC also relied upon certain data in the questionnaire replies of cooperating exporters, which included data on export sales.[816] However, we note that in discussing the "information on exports of the product under review from the Exporting Countries" as part of its analysis of exportable surplus, the NTC relied exclusively on the data from the International Trade Center, pertaining to a broader product group than BOPP film.[817]

7.589. We therefore find that by basing its findings on data for a broader product group than the product under review, and in the absence of any additional explanation of why those data were nonetheless representative of trends for BOPP film, the NTC failed to rely on positive evidence.

7.590. To recall, the United Arab Emirates also argues that, in any event, there is no explanation of how the data supported the finding that there was exportable surplus and the ultimate conclusion that dumping was likely to continue or recur.[818]

7.591. Pakistan submits that the data relied on by the NTC "indicates that every country that was subject to the original anti-dumping duties, except for the UAE, *increased* its exports from the beginning of the [period of review] (2012) to the end of the [period of review] (2015)".[819] Pakistan further argues that "[t]he NTC observed that even though exports increased throughout the [period of review], they increased to *existing markets* of the exporting countries".[820] According to Pakistan, the fact that the "exporters did not develop new markets to which they could export the increased quantities of BOPP Film they had at their disposal" supported the NTC's finding "that there was an increased availability in these countries of the investigated product for export sales".[821]

7.592. We note that we have been offered no record evidence that NTC explained how the data set out in table-VIII supported its finding that there was exportable surplus and therefore that dumping was likely to continue or recur, but rather merely cited that data. Therefore, we are unable to consider Pakistan's explanations on the significance of that data, made in the context of this dispute, in assessing the NTC's explanation of its findings.[822]

7.593. We therefore also find that the NTC failed to explain how the data it relied upon supported its finding that there was exportable surplus and therefore that dumping was likely to continue or recur.

7.12.2.3 Conclusion under Article 11.3 on the NTC's likelihood of dumping determination

7.594. As summarized above, the NTC relied on four factors in its analysis of likelihood of continuation or recurrence of dumping.[823] We have found deficiencies in the NTC's analysis with respect to the three of those four factors, as discussed in the preceding sections. First, we have found that the NTC's calculation of dumping margins did not conform with the requirements of Article 2 and, therefore, was inconsistent with Article 11.3.[824] Second, we have found that the NTC failed to provide any explanation of how its finding that major export destinations of the investigated countries remained the same or similar related to its conclusion that dumping was likely to continue or recur.[825] Third, we have found that the NTC's finding of exportable surplus was not based on

[816] Pakistan's response to Panel question No. 93, para. 35.
[817] Report on sunset determination, public version, (Exhibit ARE-4), para. 30.5. See also United Arab Emirates' comments on Pakistan's response to Panel question No. 93.
[818] See e.g. United Arab Emirates' first written submission, para. 542; and second written submission, para. 253. See also United Arab Emirates' first written submission, para. 541.
[819] Pakistan's response to Panel question No. 93, para. 38. (emphasis original)
[820] Pakistan's response to Panel question No. 93, para. 38 (emphasis original). We note that Pakistan appears to be referring to the NTC's finding (in a different section of the report) that the "major export destinations of the exporting countries remained same/similar after imposition of anti-dumping duties". (Report on sunset determination, public version, (Exhibit ARE-4), para. 29.3).
[821] Pakistan's response to Panel question No. 93, para. 38.
[822] Panel Reports, *US – Supercalendered Paper*, para. 7.6; *Korea – Pneumatic Valves (Japan)*, para. 7.10; *EU – PET (Pakistan)*, para. 7.7; *EU – Fatty Alcohols (Indonesia)*, para. 7.8; *Argentina – Ceramic Tiles*, para. 6.27; and *Argentina – Poultry Anti-Dumping Duties*, para. 7.48.
[823] See para. 7.571 above.
[824] See para. 7.568 above.
[825] See para. 7.575 above.

positive evidence[826], and also that the NTC failed to explain how the export data it relied upon supported its conclusion that dumping was likely to continue or recur.[827]

7.595. We therefore conclude that the NTC's determination that dumping was likely to continue or recur is inconsistent with Article 11.3 of the Anti-Dumping Agreement.

7.12.3 Whether the NTC's likelihood of injury determination is inconsistent with Article 11.3

7.596. The United Arab Emirates argues that the NTC's determination that injury was likely to recur was based on unwarranted inferences and assumptions, i.e. that the NTC failed to reach a reasoned determination based on a sufficient factual basis, and to establish that the recurrence of injury was likely rather than merely possible.[828]

7.597. In particular, the United Arab Emirates argues that the NTC acted inconsistently with Article 11.3 in determining that if duties were terminated, it was likely that imports would increase, domestic production would decrease, the market share of the domestic industry would decrease, and the domestic industry would suffer price undercutting and price depression. We examine each of these arguments in turn (sections 7.12.3.1 to 7.12.3.3), and we find that the United Arab Emirates has established that the NTC's determination of likelihood of injury is inconsistent with Pakistan's obligations under Article 11.3.

7.598. The United Arab Emirates also argues that the NTC's likelihood of injury determination was inconsistent with Article 11.3 on a number of other grounds. However, having already found multiple flaws in the NTC's analysis, we do not proceed to examine these further grounds put forward by the United Arab Emirates (section 7.12.3.4).

7.12.3.1 Likely volume of imports and effects on domestic production

7.599. The NTC found that after the imposition of anti-dumping duties, there had been a significant decline in imports from the countries subject to measures, imports from other sources remained in the same range, and domestic production had significantly increased. From this, the NTC concluded that if duties were terminated, imports of the product under review were likely to increase, which in turn would likely "affect adversely" the domestic production of the like product.[829]

7.600. The United Arab Emirates argues that these conclusions of the NTC were mere assertions, not supported by sufficient facts or analysis, and that the NTC did not establish that the increase in imports and reduction in domestic production were likely, rather than merely possible.[830]

7.601. Pakistan responds that the "NTC reasoned that import volumes had declined significantly after the introduction of the anti-dumping duties in 2013 and that, therefore, it was the anti-dumping duties that triggered the rapid decline of imports".[831] Pakistan adds that the NTC had found elsewhere that "after duty removal, exporters would seek to regain market share by lowering their prices"[832], and concluded that this would lead to an increase in import volumes[833], which in turn would result in a contraction in domestic sales and domestic production.[834] According to Pakistan,

[826] See paras. 7.582 and 7.589 above.
[827] See para. 7.593 above.
[828] United Arab Emirates' first written submission, paras. 529-530, 546, 548, 550, and 560. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 79; second written submission, paras. 239-240; written opening statement, paras. 110 and 112; and response to Pakistan's written opening statement, para. 49.
[829] Report on sunset determination, public version, (Exhibit ARE-4), paras. 34.1-34.4.
[830] United Arab Emirates' first written submission, para. 551; second written submission, para. 240. See also United Arab Emirates' opening statement at the first meeting of the Panel, para. 79; second written submission, para. 246; and written opening statement, paras. 112 and 119.
[831] Pakistan's first written submission, para. 3.679.
[832] Pakistan's first written submission, para. 3.679 (referring to Report on sunset determination, (Exhibit PAK-2 (BCI)), para. 36.1.2).
[833] Pakistan's first written submission, para. 3.680.
[834] Pakistan's first written submission, para. 3.680.

the United Arab Emirates has not demonstrated that this examination did not meet the standard of Article 11.3.[835]

7.602. We recall that, under Article 11.3, an authority must determine that the continuation or recurrence of injury is likely, and not merely possible, and that this determination must be based on positive evidence and not on assumption.[836]

7.603. We note that the NTC reasoned that, since after the imposition of anti-dumping duties imports had declined and domestic production had increased, it was likely that the opposite would happen if the duties were removed.[837] While the fact that imports declined significantly and domestic production increased significantly after the imposition of the anti-dumping duties suggests that it is *possible* that the opposite could happen upon removal of the duties, the NTC did not explain *why* it considered these developments to be *likely* to occur (and not just possible). Given the absence of any further explanation in this regard, we are of the view that the NTC's finding that "termination of antidumping duties will likely result in an increase in imports of the product under review which will affect adversely … the productions of the domestic like product"[838] was essentially conclusory in nature. We therefore find that the NTC failed to provide a reasoned and adequate explanation to support its finding that imports of BOPP film would likely increase in the event anti-dumping duties on these imports were to be removed.

7.604. We have also noted Pakistan's argument that the NTC *relied on* its conclusion reached elsewhere that exporters would seek to regain market share by *lowering their prices*, *as a basis for* finding a *likely increase in dumped imports*.[839] However, the Report on sunset determination indicates that the NTC's reasoning was the reverse: that is, the report indicates that the NTC *relied on* its finding that *imports* from the investigated countries were *likely to increase as a basis for* finding that exporters from the investigated countries were *likely to lower their prices*.[840] Moreover, we find below that that the NTC's conclusion that the investigated exporters would lower their prices was also not supported by a reasoned and adequate explanation.[841]

7.12.3.2 Likely effects on market share

7.605. The NTC found that after the imposition of anti-dumping duties, the market share of the domestic industry had increased, the market share of the dumped imports had decreased significantly, and the market share of imports from other sources had remained stable.[842] On that basis, the NTC concluded that expiry of the anti-dumping duties would likely lead to an increase in imports of the product under review and therefore in the market share of the dumped imports, and "therefore" would "likely affect adversely" the domestic industry's market share.[843]

7.606. The United Arab Emirates argues that these conclusions are not supported by analysis or evidence[844], and that the NTC did not establish that the effects in question were likely rather than merely possible.[845] The United Arab Emirates also points out that the NTC determined that the market share of the domestic industry was in the range of 94% to 97% during the period of

[835] See e.g. Pakistan's first written submission, para. 3.681.
[836] See para. 7.543 above.
[837] See para. 7.599 above, summarizing Report on sunset determination, public version, (Exhibit ARE-4), paras. 34.1-34.4.
[838] Report on sunset determination, public version, (Exhibit ARE-4), para. 34.4.
[839] See para. 7.601 above. Pakistan's first written submission, para. 3.679 (referring to Report on sunset determination, (Exhibit PAK-2 (BCI)), para. 36.1.2). See also Pakistan's first written submission, para. 3.680.
[840] Report on sunset determination, public version, (Exhibit ARE-4), para. 36.1.2.
[841] See paras. 7.614-7.615 below.
[842] Report on sunset determination, public version, (Exhibit ARE-4), paras. 35.1-35.3.
[843] Report on sunset determination, public version, (Exhibit ARE-4), para. 35.4.
[844] United Arab Emirates' first written submission, para. 552; second written submission, para. 240.
[845] United Arab Emirates' first written submission, para. 552; second written submission, para. 240.

review[846], and argues that the NTC failed to ascertain the probability of recurrence of material injury in light of this "quasi-monopoly situation".[847]

7.607. Pakistan responds that the domestic industry was already experiencing financial losses and "given the price-based competition common to commodity products like BOPP, no particular level of market share protects an industry from aggressive price competition from exporters"[848], and therefore "the domestic industry's high market share in no way insulates [it] from sudden potential injury".[849] We note that this reasoning is not reflected in the NTC's determination.

7.608. We further note that similar to its findings on imports and domestic production[850], the NTC appears to have assumed that, because dumped imports had decreased and the market share of the domestic industry had increased following the introduction of the anti-dumping duties, the opposite would happen upon removal of the duties. We therefore find that the NTC did not provide a reasoned and adequate explanation of why these developments were likely to occur, and not just possible.[851]

7.609. We do not examine the United Arab Emirates' additional argument that the NTC should also have taken into account the large market share of the domestic industry.

7.12.3.3 Likely price effects

7.610. The NTC's analysis indicates that during the period under review there had been no undercutting and no price depression, but that both would likely occur if duties were removed.[852]

7.611. The United Arab Emirates argues that the NTC was merely making assumptions and did not establish, based on facts and analysis, that it was likely that price undercutting and price depression would occur.[853]

7.612. Pakistan responds that the NTC's reasoning had been that if duties were removed, "the exporters' logical strategy to restore their previous market share would be to reduce their prices, at the expense of the domestic industry", and for this reason price undercutting and depression were likely.[854] Pakistan argues that this was reasonable given that for "a commodity like BOPP, competition is overwhelmingly price-based"[855], and that the NTC had not made this reasoning explicit in its determination only because all interested parties were aware that the market for BOPP film is a commodity market.[856] Pakistan adds that neither Taghleef nor the United Arab Emirates had offered an "alternative 'forward looking analysis'".[857]

7.613. As regards price undercutting, we note that the NTC found that during the period of review, the "landed cost of the product under review was above the price of the domestic like product even without incidence of the antidumping duties".[858] It then asserted that, "however", if duties were

[846] United Arab Emirates' first written submission, para. 531. See also United Arab Emirates' first written submission, paras. 552-553 and 558; opening statement at the first meeting of the Panel, para. 81; second written submission, paras. 240 and 256; and written opening statement, para. 111.
[847] United Arab Emirates' first written submission, paras. 552-553 and 558; second written submission, para. 240. See also United Arab Emirates' first written submission, para. 531; opening statement at the first meeting of the Panel, para. 81; second written submission, para. 256; and written opening statement, para. 111.
[848] Pakistan's first written submission, para. 3.683.
[849] Pakistan's first written submission, para. 3.683.
[850] See paras. 7.599, 7.602, and 7.603 above.
[851] See para. 7.543 above.
[852] Report on sunset determination, public version, (Exhibit ARE-4), paras. 36.1.1-36.2.3.
[853] United Arab Emirates' first written submission, para. 554; opening statement at the first meeting of the Panel, para. 80; and second written submission, paras. 240 and 247.
[854] Pakistan's first written submission, para. 3.599.
[855] Pakistan's first written submission, para. 3.687.
[856] Pakistan's second written submission, para. 2.324.
[857] Pakistan's first written submission, para. 3.688.
[858] Report on sunset determination, public version, (Exhibit ARE-4), para. 36.1.2. When *indexed*, taking the applicant's price in 2009 as 100, the landed cost of the product under review, *after* deducting the anti-dumping duty, compared with the prices of the applicant as follows: 177.40 (product under review) and 144.63 (applicant) from April 2012 to March 2013; 202.82 (product under review) and 158.19 (applicant)

removed, the volume of dumped imports was likely to increase, and therefore the price of dumped imports was likely to decrease for those imports "to get their share in the market", and there was thus "a likelihood of price undercutting".[859]

7.614. Thus, we note that faced with evidence that the price of the product under review was considerably higher than that of the domestic industry throughout the period of review, the NTC (a) referred to its earlier assumption that upon removal of the duties the imports of the product under review would likely increase[860]; (b) assumed that the sources of the product under review would decrease their prices to regain market share; and (c) assumed that the result would be price undercutting, i.e. that those prices would be reduced to a level lower than the applicant's price.

7.615. We recall that to extend duties under Article 11.3, a Member must determine, based on positive evidence, that injury is *likely* to continue or recur, and not merely that it is possible, and that this requires a reasoned determination based on positive evidence, and not solely on assumptions. Instead, every step in the reasoning that led the NTC to conclude that the removal of the duties was likely to lead to price undercutting appears to have been premised on assumption. We therefore find that the NTC failed to provide a reasoned and adequate explanation of why it considered that price undercutting was likely to occur if duties were removed.

7.616. As regards price depression, the NTC found that during the period of review there had been an overall increase[861] in the ex-factory price of the domestic like product[862], and asserted that this was due to the absence of price pressure from dumped imports.[863] The NTC then asserted that, "however", as the volume of dumped imports was likely to increase if duties were removed, there would be pressure on the domestic industry to reduce prices, and therefore price depression was likely to occur.[864]

7.617. Thus, starting from evidence that the price of the like domestic product had increased, the NTC asserted that this was due to the absence of price pressure from dumped imports; it then relied again on its earlier assumption that imports of the product under review would likely increase, and assumed that the domestic industry would likely reduce its price to retain market share, leading to price depression.

7.618. We therefore observe that, in assessing the likelihood of price depression, the NTC again appears to have relied on assumptions about how the market would develop, without grounding them in positive evidence, and without explaining why the developments it foresaw were likely, rather than merely possible. We therefore find that the NTC failed to provide a reasoned and adequate explanation to support its conclusions on the likelihood of price undercutting and price depression.

7.619. With regard to both price undercutting and price depression, we note Pakistan's explanation that the NTC's reasoning is explained by the fact that BOPP film is a commodity product.[865] Assuming that this was the NTC's own reasoning, the fact that a product is a commodity does not, alone, allow an authority to conclude that price undercutting or price depression is likely to occur based only on a series of assumptions.

7.12.3.4 Other aspects of the determination of likelihood of injury

7.620. The United Arab Emirates also argues that the NTC acted inconsistently with Article 11.3 because it found that the expiry of the duties was likely to lead to recurrence of injury, despite the

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from April 2013 to March 2014; 203.39 (product under review) and 156.50 (applicant) from April 2014 to March 2015. (Report on sunset determination, public version, (Exhibit ARE-4), para. 36.1.1 and table-IX).

[859] Report on sunset determination, public version, (Exhibit ARE-4), paras. 36.1.2-36.1.3.

[860] See paras. 7.599 and 7.603 above.

[861] Paragraph 36.2.2 of the Report on sunset determination mistakenly refers to a "decrease". (Report on sunset determination, public version, (Exhibit ARE-4), para. 36.2.2; compare with ibid. table-X).

[862] Report on sunset determination, public version, (Exhibit ARE-4), para. 36.2.2. When indexed, taking the applicant's ex-factory price in 2009 as 100, the applicant's ex-factory price developed as follows: 144.63 from April 2012 to March 2013; 158.19 from April 2013 to March 2014; and 156.50 from April 2014 to March 2015. (Report on sunset determination, public version, (Exhibit ARE-4), para. 36.2.1, table-X).

[863] Report on sunset determination, public version, (Exhibit ARE-4), para. 36.2.2.

[864] Report on sunset determination, public version, (Exhibit ARE-4), paras. 36.2.2-36.2.3.

[865] See para. 7.612 above.

fact that the domestic industry had more than doubled its production capacity during the period of review[866] and therefore any injury it was suffering was self-inflicted.[867] Pakistan responds that an investigating authority is not precluded from taking into account financial harm arising from capacity utilization[868], and that provided that there is a likelihood of injury from imports after the removal of the duties, "it does not matter that other factors, current or past, may also be part of the reason why injury would likely recur or continue".[869]

7.621. Further, the United Arab Emirates also challenges other aspects of the determination of likelihood of injury, *inter alia* arguing that the NTC considered that every factor that had developed positively during the period of review would deteriorate, and that factors that had developed negatively would also be negatively affected.[870]

7.622. However, having already found multiple flaws in the NTC's determination that injury was likely to recur, we do not proceed to examine these additional arguments.

7.12.3.5 Conclusion under Article 11.3 on the NTC's likelihood of injury determination

7.623. We thus conclude that the NTC's determination that injury was likely to recur is inconsistent with Pakistan's obligations under Article 11.3, because the NTC based its findings that expiry of the duties was likely to lead to an increase in volume of imports, a decrease in domestic production, a decrease in the domestic industry's market share, price undercutting, and price depression, on a series of assumptions that were not grounded in positive evidence, and failed to provide reasoned and adequate explanations of why the developments it foresaw were likely to occur, rather than merely possible.

7.12.4 Whether the sunset review determination is inconsistent with Article 11.3 as a consequence of the inconsistencies in the original determination

7.624. The United Arab Emirates also argues that the sunset review determination of 1 December 2016 is inconsistent with Article 11.3[871] because the determination on the basis of which anti-dumping duties on BOPP film were imposed in the first place was itself inconsistent with the Anti-Dumping Agreement.[872] Pakistan responds that inconsistencies in the original determination do not automatically result in the sunset review determination being inconsistent with Article 11.3[873], and that in any event the United Arab Emirates has failed to "articulate any cognizable claim under Article 11.3" in this regard.[874]

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[866] The NTC found that "the installed production capacity of the domestic industry increased considerably by 140 percent above the original capacity after imposition of antidumping duties", and "[c]urrently the installed production capacity of domestic industry is much more than domestic demand of the BOPP Film". (Report on sunset determination, public version, (Exhibit ARE-4), para. 37.2; see also ibid. table-XII).

[867] United Arab Emirates' first written submission, paras. 556-557. See also United Arab Emirates' opening statement at the first meeting with the Panel, para. 82; second written submission, paras. 240, 257, 259, and 261; written opening statement, paras. 111 and 120; and response to Pakistan's written opening statement, paras. 49-52.

[868] Pakistan's first written submission, para. 3.685. See also Pakistan's second written submission, para. 2.329; and written opening statement, para. 124.

[869] Pakistan's second written submission, para. 2.330. See also Pakistan's written opening statement, para. 125.

[870] United Arab Emirates' first written submission, para. 555; opening statement at the first meeting of the Panel, para. 7; and second written submission, para. 240. See also United Arab Emirates' first written submission, paras. 529, 548, 550-551, 554 and 559-560; second written submission, para. 241; and written opening statement, para. 112.

[871] The United Arab Emirates' argument that inconsistencies in the original determination also render the sunset review determination inconsistent with the Anti-Dumping Agreement is mainly made in connection with Article 11.1. However, as indicated in section 7.12.5, we exercise judicial economy on the United Arab Emirates' claim that the sunset review determination is inconsistent with Article 11.1.

[872] United Arab Emirates' first written submission, paras. 487-488 and 527; opening statement at the first meeting of the Panel, para. 73; second written submission, paras. 231-232; written opening statement, para. 105; and response to Pakistan's written opening statement, para. 45.

[873] Pakistan's first written submission, paras. 3.622, 3.625, 3.627, and 3.632; written opening statement, paras. 102-104. See also Pakistan's second written submission, paras. 2.305-2.306.

[874] Pakistan's first written submission, para. 3.631. See also ibid. paras. 3.618 and 3.630.

7.625. Having already found that the sunset review determination is inconsistent with Article 11.3 on multiple grounds, we do not proceed to examine this additional ground for inconsistency put forward by the United Arab Emirates.

7.12.5 Judicial economy under Article 11.1

7.626. We have found that the United Arab Emirates has established that the sunset review determination is inconsistent with Article 11.3 on a number of grounds. On the basis of some of the same grounds[875], the United Arab Emirates also claims that the sunset review determination is inconsistent with Article 11.1.

7.627. We have already found that the sunset determination is inconsistent with Article 11.3, and we do not consider that these additional findings sought by the United Arab Emirates under Article 11.1 are necessary to resolve the dispute.[876] We therefore exercise judicial economy on the United Arab Emirates' claim under Article 11.1.

7.13 Sunset review: Article 11.4 of the Anti-Dumping Agreement

7.628. The NTC initiated a sunset review of the anti-dumping measures on BOPP film from Pakistan on 4 August 2015 and concluded it on 1 December 2016, i.e. almost 16 months later.[877] Pakistan explains, and the NTC stated in its Report on sunset determination, that this was because domestic judicial proceedings had led to the suspension of all work of the NTC for a number of months in 2016.[878]

7.629. Specifically, following litigation in unrelated anti-dumping proceedings, on 15 March 2016[879], the Lahore High Court held that one member of the NTC did not meet the qualification requirements set forth in Pakistani law. The Lahore High Court therefore ordered the suspension of the proceedings in the context of which the domestic legal challenge had been brought.[880] The NTC decided, "by analogy", to suspend all pending anti-dumping proceedings until the defect in its composition was cured, i.e. until 5 September 2016.[881]

7.630. The United Arab Emirates argues that the NTC thus acted inconsistently with the second sentence of Article 11.4 of the Anti-Dumping Agreement, because it took more than 12 months to conclude the sunset review, in the absence of abnormal circumstances that justified

[875] These grounds are: that because the original determination was inconsistent with the Anti-Dumping Agreement, the sunset review determination extending the duties is inconsistent with Article 11.1 (United Arab Emirates' first written submission, paras. 487-488 and 524-528; opening statement at the first meeting of the Panel, paras. 73 and 77; second written submission, paras. 231-233 and 244-245; written opening statement, paras. 105 and 114; and response to Pakistan's written opening statement, paras. 45-48); and that the NTC relied on a dumping margin that was inconsistent with Article 2 (United Arab Emirates' first written submission, para. 534).

[876] See para. 7.49 above.

[877] Notice of initiation of sunset review, (Exhibit ARE-30); Notice of conclusion of sunset review, (Exhibit ARE-3). The NTC adopted its Report on sunset determination three days before issuing the Notice of conclusion, on 28 November 2016. (Report on sunset determination, public version, (Exhibit ARE-4)).

[878] Pakistan's first written submission, paras. 3.695, 3.715, and 3.726; Report on sunset determination, public version, (Exhibit ARE-4), paras. 3-4.

[879] The parties disagree as to the date of the judgment. According to the United Arab Emirates, the date of the judgment was 15 March 2016, whereas Pakistan argues it was 27 April 2016. (United Arab Emirates' response to Pakistan's written opening statement, para. 59; comments on Pakistan's response to Panel question No. 94, pp. 14-15; Pakistan's response to Panel question No. 94, paras. 42-44; see also Pakistan's response to Panel question No. 94, paras. 43-44). We note that in its own Report on sunset determination, the NTC indicated that the judgment was dated 15 March 2016. We further note that the NTC considered that the time during which the work of the NTC was suspended because of the judgment was to be considered an "injunction period" that extended the statutory time-limit for the sunset review under Pakistani law, and that the total extension thus granted (20 January 2017 instead of 3 August 2016) totalled 170 days, which is almost exactly the period between 15 March 2016 and 5 September 2016 (173 days); if the NTC had considered the date of the judgment to be 27 April 2016 rather than 15 March 2016, it would not be possible to explain the length of the extension. (Report on sunset determination, public version, (Exhibit ARE-4), paras. 3-4). We thus refer to 15 March 2016 as the date of the judgment. In any event, the precise date of the judgment does not affect our ultimate findings.

[880] Report on sunset determination, public version, (Exhibit ARE-4), para. 3; Judgment of Lahore High Court, (Exhibit PAK-22).

[881] Report on sunset determination, public version, (Exhibit ARE-4), para. 4.

doing so, and without providing a reasoned and adequate explanation of the abnormal circumstances warranting the delay.[882] Further, the United Arab Emirates argues that, for the same reasons, the NTC acted inconsistently with the requirement to carry out reviews "expeditiously", also set forth in the second sentence of Article 11.4.[883]

7.631. Pakistan responds that Article 11.4 requires sunset reviews to be completed "*normally*" within 12 months, and that the judgment leading to the suspension of all the work of the NTC was an *abnormal* circumstance, with the consequence that the NTC was allowed to take more than 12 months to conclude the sunset review.[884] Pakistan adds that Article 11.4 does not contain the separate explanation requirement that the United Arab Emirates reads into it[885], and also that, to the extent the United Arab Emirates is seeking to establish a separate inconsistency with the requirement to carry out reviews "expeditiously", the United Arab Emirates has failed to make a *prima facie* case in that regard.[886]

7.632. Below, we first set out the applicable requirements of Article 11.4 of the Anti-Dumping Agreement (section 7.13.1). We then apply those requirements to the facts of this case to assess whether Pakistan acted inconsistently with Article 11.4 (section 7.13.2), and we conclude that it did (section 7.13.3).

7.13.1 The applicable requirements of Article 11.4

7.633. The second sentence of Article 11.4 provides that any review conducted under Article 11 "shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review".

7.634. Thus, this provision requires authorities to carry out reviews under Article 11 "expeditiously", and to conclude them "normally … within 12 months" from initiation.

7.635. The ordinary meaning of "expeditiously" includes "in an expeditious manner; speedily, with expedition"[887], and in turn the ordinary meaning of "expeditious" includes "speedily performed".[888] Hence, the first clause of the second sentence of Article 11.4 provides that investigating authorities must carry out reviews under Article 11 "in an expeditious manner", "speedily".

7.636. The second clause of the second sentence of Article 11.4 lays down a specific timeframe for completion of reviews, i.e. 12 months, but qualifies it with the term "normally". The ordinary meaning of this term is "under normal or ordinary conditions; as a rule, ordinarily"[889] and, in turn, the ordinary meaning of "normal" includes "constituting or conforming to a type or standard; regular, usual, typical; ordinary, conventional".[890]

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[882] United Arab Emirates' first written submission, paras. 563, 572-577, and 587; opening statement at the first meeting of the Panel, para. 83; second written submission, paras. 264 and 266; written opening statement, paras. 123 and 125; and response to Pakistan's written opening statement, para. 57.

[883] United Arab Emirates' first written submission, paras. 574 and 587; opening statement at the first meeting of the Panel, para. 83; second written submission, paras. 265 and 277-278; written opening statement, para. 124; and response to Pakistan's written opening statement, para. 57.

[884] See e.g. Pakistan's first written submission, paras. 3.696-3.697, 3.713-3.714, and 3.726-3.727; second written submission, paras. 2.335 and 2.342; and response to Panel question No. 94, para. 46.

[885] Pakistan's first written submission, para. 3.725. See also Pakistan's response to United Arab Emirates' written opening statement, para. 84.

[886] Pakistan's first written submission, para. 3.724; written opening statement, para. 128. See also Pakistan's first written submission, paras. 3.722-3.723.

[887] Oxford Dictionaries online, definition of "expeditiously" https://www.oed.com/view/Entry/66493?redirectedFrom=expeditiously#eid (accessed 8 October 2020), adv.

[888] Oxford Dictionaries online, definition of "expeditious" https://www.oed.com/view/Entry/66492?redirectedFrom=expeditious#eid (accessed 8 October 2020), adj., meaning 1.

[889] Oxford Dictionaries online, definition of "normally" https://www.oed.com/view/Entry/128277?redirectedFrom=normally#eid (accessed 8 October 2020), adv., meaning 2.

[890] Oxford Dictionaries online, "normal" https://www.oed.com/view/Entry/128269?redirectedFrom=normal#eid (accessed 8 October 2020), adj., meaning A.I.1.a.

7.637. Therefore, the use of the term "normally" in the second sentence of Article 11.4 indicates that there are certain conditions under which the 12-month deadline may be exceeded; such conditions are those that are not "normal", i.e. not conforming to a standard, not regular, usual, typical, or ordinary.

7.638. The Appellate Body and panels in past disputes have similarly construed the use of the term "normally", as it appears in other provisions of the Anti-Dumping Agreement[891] and other WTO instruments[892], to indicate that a rule qualified by this term admits of derogation under circumstances that are not "normal or ordinary".[893]

7.639. Pakistan points out that other provisions in the Anti-Dumping Agreement lay down a time-limit that applies as a rule, while providing for some flexibility.[894] Article 5.10 provides that original investigations "shall, except in special circumstances, be concluded within one year, and in no case more than 18 months". Articles 9.3.1 and 9.3.2 provide for the determination of final liability for payment of anti-dumping duties, and refunds, to take place "normally within 12 months, and in no case more than 18 months, after … a request", with an express exception in the event of judicial review proceedings.[895] Pakistan also points out that each of these provisions sets out, in addition to a normal or non-exceptional 12-month time-limit, "a firm and unconditional outer limit of 18 months", while Article 11.4 does not.[896] We agree with this observation. In our view, however, the fact that provisions other than Article 11.4 set forth an outer limit of 18 months does not address the question that is decisive in this case, namely what circumstances are abnormal and would therefore justify exceeding the 12-month time-limit set out in Article 11.4.

7.13.2 Whether the NTC acted inconsistently with Article 11.4

7.640. It is not disputed that the NTC took more than 12 months to complete the sunset review in question, from 4 August 2015 to 1 December 2016.[897] The first question before us is whether the circumstances of this case fell within the scope of the qualifier "normally" in Article 11.4[898]: if the circumstances were "normal", then Pakistan acted inconsistently with the requirement to conclude reviews "normally … within 12 months".

7.641. Pakistan argues that the judgment of the Lahore High Court ordering the suspension of proceedings was an abnormal circumstance within the meaning of the second sentence of Article 11.4, because it was an event that was extraneous to the ordinary conduct of sunset reviews and outside the control of the investigating authority, and prevented completion of the review within 12 months.[899] Pakistan emphasizes that court proceedings are not part of the normal sequence of events during a sunset review, that the domestic legal challenge in question had been brought in the context of anti-dumping proceedings that were unrelated to those at issue before us, and that the NTC had no choice but to suspend all its work until properly composed.[900]

7.642. Pakistan argues that the context of Article 11.4, and specifically Articles 13 and footnote 20 of the Anti-Dumping Agreement, confirm that a court ruling ordering suspension is an abnormal circumstance that justifies exceeding the 12-month time-limit. According to Pakistan, by making separate provision for judicial proceedings, Article 13 "confirms that [they] do not form part of the 'normal' or 'usual' conduct of those investigations or reviews".[901] Pakistan also argues that

[891] Article 2.2.1.1 of the Anti-Dumping Agreement.
[892] Doha Ministerial Decision, para. 5.2.
[893] Panel Reports, *Australia – Anti-Dumping Measures on Paper*, para. 7.111; *EU – Biodiesel (Argentina)*, para. 7.227; and *China – Broiler Products*, para. 7.161; Appellate Body Report, *US – Clove Cigarettes*, para. 273.
[894] Pakistan's first written submission, paras. 3.693, 3.699, and 3.717.
[895] Fn 20 of the Anti-Dumping Agreement, on which see para. 7.650 below.
[896] Pakistan's first written submission, paras. 3.699 and 3.717.
[897] See fn 877 above.
[898] Having answered this question in the affirmative, we do not proceed to address the further questions raised by the United Arab Emirates' additional arguments. (See para. 7.652 below).
[899] Pakistan's first written submission, paras. 3.706-3.707, 3.709, and 3.713-3.716; second written submission, paras. 2.335 and 2.341. See also Pakistan's written opening statement, para. 135; and response to United Arab Emirates' written opening statement, paras. 79 and 82.
[900] Pakistan's first written submission, paras. 3.695 and 3.709-3.716; second written submission, para. 2.339; written opening statement, paras. 130-131; and response to United Arab Emirates' written opening statement, para. 82.
[901] Pakistan's first written submission, para. 3.710.

footnote 20, by providing that the time-limits in Articles 9.3.1 and 9.3.2 may not be complied with in case of judicial review proceedings, shows that "the Anti-Dumping Agreement recognizes explicitly that judicial proceedings may affect the ability of the investigating authority to adhere to treaty-prescribed time limits".[902]

7.643. The United Arab Emirates argues instead that the circumstances were not abnormal within the meaning of Article 11.4. According to the United Arab Emirates, "internal administrative issues such as the proper constitution of the investigating authority as a matter of domestic law, are not in principle a sufficient reason for … violating the WTO obligation to conclude the review in 12 months".[903] Referring to Article 27 of the Vienna Convention on the Law of Treaties[904], the United Arab Emirates argues that a WTO Member may not invoke domestic law to justify a failure to perform a treaty.[905]

7.644. Pakistan responds that it is not invoking domestic law to justify a violation of Article 11.4.[906] Rather, Pakistan's position is that it is pointing to the domestic judicial proceedings as a factor for determining whether the circumstances in which the sunset review was carried out were normal: if the circumstances were not normal, no violation arises and the rule of state responsibility referred to by the United Arab Emirates does not apply.[907]

7.645. The United Arab Emirates further argues that problems with the proper constitution of the NTC were not an unusual event, because in the context of the BOPP film proceedings alone, such problems had already arisen twice before, in 2011 and 2013.[908] To this, Pakistan answers that what is "normal" under Article 11.4 does not hinge on whether the relevant event has already occurred on previous occasions.[909]

7.646. We agree with Pakistan that the text of Article 11.4 does not establish an outer time-limit in which an investigating authority must conclude a sunset review. We also agree that the text of Article 11.4 does not, as a general matter, provide definitive guidance regarding the nature of the facts or circumstances that may be considered to be sufficiently "abnormal" to permit an administering authority to take longer than the "normal" 12-months period to conclude a sunset review. Given this, we are of the view that what may be considered "abnormal" in a proceeding for the purposes of Article 11.4 will depend on the unique set of facts and circumstances that are associated with the proceeding, and that those facts will necessarily vary from case to case.

7.647. Turning to the particular facts of this proceeding, we note Pakistan's argument that the NTC was justified in not completing its sunset review within the normal 12-month period because the review was the subject of judicial proceedings and rulings that were extraneous to the ordinary conduct of sunset reviews and outside of the NTC's control.[910] We also note Pakistan's statement that court proceedings are generally not part of the normal sequence of events in Pakistan during a sunset review.[911]

7.648. Notwithstanding this, we also observe that this dispute presents a unique constellation of facts that we must consider when assessing whether the specific Lahore High Court decision that Pakistan relies upon could, in fact, justify exceeding the 12-month "normal" time-limit in light of the history and circumstances of the BOPP proceeding. Specifically, we observe that: (a) Pakistan determines the composition of the NTC, through procedures governed by Pakistani law; (b) the record of this dispute indicates that the composition of the NTC was the subject of at least three

[902] Pakistan's first written submission, para. 3.711.
[903] United Arab Emirates' first written submission, para. 578. See also ibid. para. 581; opening statement at the first meeting of the Panel, para. 85; second written submission, paras. 267 and 273; and response to Pakistan's written opening statement, para. 58.
[904] Article 27 reads in relevant part: "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."
[905] United Arab Emirates' first written submission, para. 582.
[906] Pakistan's first written submission, paras. 3.718-3.719.
[907] Pakistan's first written submission, para. 3.719. See also Pakistan's second written submission, para. 2.337; and response to United Arab Emirates' written opening statement, para. 81.
[908] United Arab Emirates' first written submission, para. 585; opening statement at the first meeting of the Panel, para. 85; and second written submission, paras. 269 and 276.
[909] Pakistan's written opening statement, para. 137.
[910] See para. 7.641 above.
[911] See para. 7.641 above.

court challenges during the pendency of the BOPP film proceedings, each of which found successive defects in the composition of the NTC[912]; (c) in the BOPP film proceedings alone, these challenges led to the suspension or termination of proceedings, or to a determination being set aside, on at least three occasions[913]; and (d) the Lahore High Court decision that Pakistan relies on as "abnormal" resulted from the third in this series of court challenges. Considering all these facts taken together, we are of the view that the judgment of the Lahore High Court that led to the suspension of the sunset review proceedings cannot be considered to be a circumstance that is "abnormal" within the meaning of Article 11.4 in the context of the BOPP film proceedings as a whole.

7.649. In support of its argument that judicial review proceedings fall outside what is "normal" within the meaning of Article 11.4, Pakistan refers to Article 13 and footnote 20 of the Anti-Dumping Agreement.[914] We agree with Pakistan that Article 13 shows that the Anti-Dumping Agreement envisages judicial (or equivalent) review proceedings as separate[915] from the investigations and reviews conducted by the investigating authorities. However, Article 13 does not automatically render the acts of the judiciary "extraneous" or "outside the control of" a Member, in a way that always turns those acts into abnormal or extraordinary events within the meaning of Article 11.4.

7.650. As for footnote 20, this is an instance in which Members have expressly agreed that certain time-limits can be exceeded in case of judicial review proceedings. In the case of the reviews regulated by Article 11, Members have not included a provision equivalent to footnote 20.

7.651. We therefore find that, because of the particular constellation of facts before us in this case, the judgment of the Lahore High Court, which Pakistan invokes as an abnormal circumstance under which it could not conclude the sunset review within 12 months, does not qualify as a circumstance that is not "normal" for purposes of Article 11.4, and that Pakistan acted inconsistently with Article 11.4 by concluding the sunset review in more than the 12-month limit that "normally" applies under Article 11.4.

7.652. Having so found, we will not consider the United Arab Emirates' additional arguments to the effect that (a) Pakistan acted inconsistently with Article 11.4 by failing to provide an explanation of the abnormal circumstances that justified exceeding the time-limits; and that (b) Pakistan acted inconsistently with Article 11.4 by not carrying out the review "expeditiously".[916]

7.13.3 Conclusion under Article 11.4

7.653. We find that Pakistan acted inconsistently with Article 11.4 by concluding the sunset review in more than 12 months, in the absence of abnormal circumstances within the meaning of this provision.

7.14 Public notice and explanation of determinations: Articles 12.1, 12.2, and 12.3 of the Anti-Dumping Agreement

7.654. The United Arab Emirates claims that Pakistan's final determination of 9 April 2015, which "ratified"[917] the final determination of 4 February 2013, was inconsistent with Articles 12.1 and 12.2 of the Anti-Dumping Agreement. In support of these claims, the United Arab Emirates argues that the Notice of initiation of 23 April 2012[918] did not provide the factual basis on which dumping is

[912] See e.g. United Arab Emirates' first written submission, para. 585; second written submission, paras. 269 and 276; Report on final determination (2013), public version, (Exhibit ARE-2), para. 5.2; Order of Islamabad Hight Court, (Exhibit PAK-31); Report on final determination (2015), public version, (Exhibit PAK-49), p. 2; Judgment of the Anti-Dumping Appellate Tribunal, (Exhibit PAK-10); Report on sunset determination, public version, (Exhibit ARE-4), paras. 3-4; and Judgment of Lahore High Court, (Exhibit PAK-22).

[913] See fn 912 above.

[914] See para. 7.642 above.

[915] See also para. 7.491 above, in the context of our analysis under Article 5.10. We note that under Article 5.10, we reviewed the different question whether the time taken for judicial review of a final determination that had already been adopted should be counted against the time-limit set out in Article 5.10.

[916] See paras. 7.630 above.

[917] Report on final determination (2015), public version, (Exhibit PAK-49), para. 4; Notice of final determination (2015), (Exhibit ARE-1), p. 2.

[918] Notice of initiation (2012), (Exhibit ARE-5).

alleged, contrary to Article 12.1.1(iii)[919]; that the Notice of final determination did not disclose essential information with respect to the NTC's dumping calculation, contrary to Article 12.2[920]; and that the separate Report on final determination did not sufficiently explain the basis for the NTC's findings of dumping and injury, contrary to Article 12.2.[921]

7.655. The United Arab Emirates also claims that Pakistan's sunset review determination of 1 December 2016 was inconsistent with Articles 12.2 and 12.3. In support of these claims, the United Arab Emirates argues that the Notice of conclusion of sunset review[922] and the Report on sunset determination[923] did not provide in sufficient detail the findings and conclusions reached on material aspects of the sunset review.[924]

7.656. Pakistan responds that United Arab Emirates' claims under Articles 12.1, 12.2, and 12.3 do not fall within the Panel's terms of reference.[925] In the alternative, Pakistan argues that the NTC did not act inconsistently with Article 12.1 because, according to Pakistan, the Notice of initiation and the Initiation memorandum should be read together with the application, and the application set forth the factual basis on which dumping was alleged.[926] Pakistan also argues that the United Arab Emirates does not advance any arguments in support of its claims under Articles 12.2 and 12.3 other than those already raised with regard to its claims of inconsistency with the substantive obligations it invokes.[927]

7.657. We recall that we may exercise judicial economy under one or more claims if we have already found that the same measure is inconsistent with one or more provisions of a covered agreement, and findings under the additional claims are not necessary to resolve the dispute.[928]

7.658. We have found that Pakistan's final determination of 9 April 2015 and sunset review determination of 1 December 2016 are inconsistent with a number of provisions of the Anti-Dumping Agreement. Having reached those findings, we do not consider it necessary for the resolution of this dispute to assess whether the same determinations are also inconsistent with Articles 12.1, 12.2, and 12.3 of the Anti-Dumping Agreement, and we therefore do not decide on Pakistan's terms of reference objection regarding these claims.

7.15 Consequential claims: Articles 1 and 18.1 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994

7.659. The United Arab Emirates claims that, as a consequence of the inconsistencies that the United Arab Emirates has sought to establish, (a) Pakistan's final determination of 9 April 2015, which "ratified" the final determination of February 2013, is also inconsistent with Articles 1 and 18.1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994; and

[919] United Arab Emirates' first written submission, para. 602. See also United Arab Emirates' second written submission, para. 281.
[920] United Arab Emirates' first written submission, paras. 603-605.
[921] United Arab Emirates' first written submission, para. 606 (referring to Report on final determination (2013), public version, (Exhibit ARE-2)). In its first written submission, the United Arab Emirates argued that the NTC did not make available a separate report supporting the 2015 final determination. In the alternative, and to the extent that the 2013 Report on final determination was the relevant "separate report", that report did not provide sufficient information. (United Arab Emirates' first written submission, para. 606 (referring to Report on final determination (2013), public version, (Exhibit ARE-2)). Subsequently, the United Arab Emirates argued that the Report on final determination (2015), which Pakistan presented during these panel proceedings, was not made public and did not provide all relevant information in sufficient detail to support the final determination. (United Arab Emirates' second written submission, para. 296 (referring to Report on final determination (2015), (Exhibit PAK-26)).
[922] Notice of conclusion of sunset review, (Exhibit ARE-3).
[923] Report on sunset determination, public version, (Exhibit ARE-4).
[924] United Arab Emirates' first written submission, paras. 607-609.
[925] Pakistan's first written submission, paras. 3.736-3.738; response to Panel question No. 80; and written opening statement, paras. 143-152.
[926] Pakistan's response to Panel question No. 82; written opening statement, paras. 154-156.
[927] Pakistan's first written submission, paras. 3.748-3.750; written opening statement, para. 157.
[928] See para. 7.49 above.

(b) Pakistan's sunset review determination of 1 December 2016 is also inconsistent with Articles 1 and 18.1 of the Anti-Dumping Agreement.[929]

7.660. We refer to the conditions under which we may exercise judicial economy.[930] The United Arab Emirates' claims under Articles 1, 18.1, VI:1, and VI:2 are merely consequential on the claims we have already reviewed. They challenge the same measures and the same aspects of the same measures as the claims under which we have already reached findings of inconsistency, above. We therefore exercise judicial economy on the United Arab Emirates' claims under Articles 1, 18.1, VI:1, and VI:2.

7.16 The Panel's duty under Article 12.11 of the DSU

7.661. Article 12.11 of the DSU requires that in cases in which "one or more of the parties is a developing country Member":

> [T]he panel's report shall explicitly indicate the form in which account has been taken of relevant provisions on differential and more-favourable treatment for developing country Members that form part of the covered agreements which have been raised by the developing country Member in the course of the dispute settlement procedures.

7.662. In this dispute, Pakistan has raised Article 12.10 of the DSU[931], which provides, in relevant part:

> [I]n examining a complaint against a developing country Member, the panel shall accord sufficient time for the developing country Member to prepare and present its argumentation.

7.663. We took account of both parties' status as a developing country Member in adopting and reviewing the Working Procedures and timetable. The Panel's timetable provided Pakistan eight weeks to file its own first written submission after having received the complainant's first written submission, as requested by Pakistan, and it provided the United Arab Emirates five weeks after the organizational meeting to prepare its first written submission, as requested by the United Arab Emirates. We have also taken into account the status of the parties as developing country Members when subsequently revising the timetable and the Working Procedures, including when granting Pakistan's request for an extension to file its second written submission.

8 CONCLUSIONS

8.1. For the reasons set out in this Report, we conclude as follows:

a. The United Arab Emirates has established that the final determination of 9 April 2015, which ratified the final determination of February 2013, is inconsistent with:

   i. Article 5.3 of the Anti-Dumping Agreement, because Pakistan did not assure itself that there was sufficient evidence to justify initiation of an investigation;

   ii. Article 2.1 of the Anti-Dumping Agreement, because Pakistan made a determination of dumping without evidence of current dumping;

   iii. Article 3.1 of the Anti-Dumping Agreement, because Pakistan did not base its determination of injury on evidence of current injury;

   iv. Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because Pakistan did not objectively consider whether the volume of dumped imports in absolute terms and relative to domestic production had increased significantly during the POI, and whether

[929] United Arab Emirates' first written submission, paras. 612-621; second written submission, paras. 298-300.
[930] See para. 7.49 above.
[931] Pakistan's comments on the proposed timetable and Working Procedures of 17 September 2019.

the effect of the dumped imports on prices of the like product had been significant price undercutting and significant price depression during the POI;

v. Articles 3.1 and 3.4 of the Anti-Dumping Agreement, because Pakistan did not evaluate all the injury factors listed in Article 3.4, and did not objectively evaluate the impact of the dumped imports on the state of the domestic industry; and

vi. Articles 3.1 and 3.5 of the Anti-Dumping Agreement, because Pakistan based its causation analysis on findings that were inconsistent with Articles 3.1, 3.2 and 3.4, and did not ensure that injury caused by other known factors was not attributed to the dumped imports.

b. The United Arab Emirates has *not* established that the final determination of 9 April 2015, which ratified the final determination of February 2013, is inconsistent with:

i. Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement with regard to the cost data relied upon to determine whether sales were in the ordinary course of trade;

ii. Article 2.4 of the Anti-Dumping Agreement with regard to the denial of an adjustment for level of trade;

iii. Article 5.10 of the Anti-Dumping Agreement with regard to the duration of the original investigation; and

iv. Article 6.2 of the Anti-Dumping Agreement with regard to the adoption, in 2015, of the final determination of 9 April 2015 ratifying the final determination of February 2013.

c. We exercise judicial economy on the United Arab Emirates' claims that the final determination of 9 April 2015, which ratified the final determination of February 2013, is also inconsistent with Articles 1, 5.2, 5.8, 9.1, 9.3, 11.1, 12.1, 12.2, and 18.1 of the Anti-Dumping Agreement, and Articles VI:1 and VI:2 of the GATT 1994.

d. The United Arab Emirates has established that the sunset determination of 1 December 2016 is inconsistent with:

i. Article 11.3 of the Anti-Dumping Agreement, because in determining that dumping and injury were likely to continue or recur, Pakistan relied on a margin of dumping calculated inconsistently with Article 2, failed to rely on positive evidence, did not explain how the data supported its findings and how its findings supported its conclusions; and

ii. Article 11.4, because Pakistan did not conclude the sunset review within 12 months from initiation, in the absence of abnormal circumstances within the meaning of this provision.

e. We exercise judicial economy on the United Arab Emirates' claims that the sunset determination of 1 December 2016 is also inconsistent with Articles 1, 11.1, 12.2, 12.3, and 18.1 of the Anti-Dumping Agreement.

9 RECOMMENDATION AND SUGGESTION

9.1. Pursuant to Article 19.1 of the DSU, we recommend that Pakistan bring its measures into conformity with its obligations under the Anti-Dumping Agreement.

9.2. The United Arab Emirates also asks us to suggest ways in which Pakistan could implement this recommendation. Specifically, the United Arab Emirates asks us to suggest that Pakistan "terminate the duties imposed"[932] and "refund the anti-dumping duties collected".[933]

9.3. Pursuant to the second sentence of Article 19.1, "[i]n addition to [our] recommendations, [we] may suggest ways in which the Member concerned could implement the recommendations". Thus, we have discretion to suggest ways to implement our recommendation.[934]

9.4. Many panels before us have declined to exercise this discretion to make suggestions, observing in particular that "the implementation of DSB recommendations and rulings is left, in the first instance, to the discretion of the implementing Member".[935] Some panels, however, have chosen to exercise their discretion to suggest ways to implement their recommendations.[936] Of these, three WTO panels suggested the revocation of anti-dumping duties, having found inconsistencies that were "of a fundamental nature and pervasive".[937] On the other hand, so far, the WTO panels asked to suggest refund of anti-dumping duties have rejected such requests.[938]

9.5. In the case before us, we have found fundamental and pervasive inconsistencies, extending to the evidence on the basis of which the authority initiated the investigation, the chosen POI for the original investigation, multiple aspects of the determination of injury in the original investigation, and multiple aspects of the sunset determination.

9.6. Because of the fundamental nature and pervasiveness of the inconsistencies we have found, we suggest that Pakistan implement our recommendation by withdrawing the anti-dumping measures it has imposed on BOPP film from the United Arab Emirates. We decline however to suggest that Pakistan refund the anti-dumping duties already paid.

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[932] United Arab Emirates' first written submission, paras. 623-625.
[933] United Arab Emirates' first written submission, paras. 626-628.
[934] See also e.g. Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 466; and *US – Continued Zeroing*, para. 389.
[935] See e.g. Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 8.6.
[936] Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.3-8.7; *US – Offset Act (Byrd Amendment)*, para. 8.6; *US – Cotton Yarn*, paras. 8.4-8.5; *Guatemala – Cement II*, paras. 9.4-9.6; *US – Underwear*, paras. 8.1-8.3; *Mexico – Steel Pipes and Tubes*, paras. 8.7-8.12; *Ukraine – Passenger Cars*, paras. 8.7-8.8; *US – Lead and Bismuth II*, para. 8.2; *India – Quantitative Restrictions*, paras. 7.1-7.7; *EC – Bananas III (Article 21.5 – Ecuador)*, paras. 6.154-6.159; *EC – Trademarks and Geographical Indications (Australia)* and *EC – Trademarks and Geographical Indications (US)*, paras. 8.4-8.5; *EC – Export Subsidies on Sugar (Australia)*; *EC – Export Subsidies on Sugar (Brazil)*; *and EC – Export Subsidies on Sugar (Thailand)*, paras. 8.6-8.8.
[937] Panel Reports, *Argentina – Poultry Anti-Dumping Duties*, para. 8.6; *Guatemala – Cement II*, para. 9.6; *Mexico – Steel Pipes and Tubes*, paras. 8.9-8.12 (the latter with slightly different language). For the same rationale applied to a safeguard measure, see Panel Report, *Ukraine – Passenger Cars*, para. 8.8. The Panel in *Guatemala – Cement I* had also suggested revocation, but was reversed on other grounds. (Panel Report, *Guatemala – Cement I*, para. 8.6).
[938] Panel Reports, *US – Hot-Rolled Steel*, paras. 8.7 and 8.11-8.13; *Guatemala – Cement II*, paras. 9.6-9.7. Similarly, the panel in *US – Softwood Lumber IV (Article 21.5 – Canada)* declined to suggest the refund of countervailing duties. (Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 5.6-5.7).