

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

**(DS486)**

**THIRD PARTY SUBMISSION  
OF THE UNITED STATES OF AMERICA**

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## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding on *European Union – Countervailing Duty Measures on PET from Pakistan* (DS486). In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* (the “SCM Agreement”) and the *General Agreement on Tariffs and Trade 1994* (the “GATT 1994”) as relevant to certain issues in this dispute.

## II. PAKISTAN’S CLAIMS REGARDING ITS “MBS” DUTY REMISSION PROGRAM UNDER ARTICLES 1 AND 3 OF THE SCM AGREEMENT

2. Pakistan claims that the European Union acted inconsistently with Articles 1 and 3 and Annex I of the SCM Agreement in finding an export subsidy to exist with respect to Pakistan’s Manufacturing Bond Scheme (“MBS”) – an import duty remission program.<sup>1</sup> The European Commission found that the MBS program provides a financial contribution in the form of revenue foregone because it “permits the import of duty-free input material under the condition that it is used for subsequent exports.”<sup>2</sup> Based on a finding that Pakistan had “no effective implementation and monitoring system” to verify the amount of duty-free inputs actually used in subsequent exports nor proof of actual transactions, the Commission treated the entire amount of import duties otherwise payable as revenue foregone.<sup>3</sup>

3. Relying in large part on footnote 1 of the SCM Agreement, Pakistan asserts that the MBS program does not constitute a subsidy except to the extent that duties are remitted “in excess of those which have accrued.”<sup>4</sup> Pakistan relies also on similar language in Annex I, items (i) and (h), Annex II, and Annex III to argue that the Commission failed to investigate and ascertain the extent to which an excess remission of duties paid on imports occurred.<sup>5</sup>

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

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<sup>1</sup> See Pakistan First Written Submission, para. 5.3; Commission Regulation 473/2010, Imposing a Provisional Countervailing Duty on Imports of Certain Polyethylene Terephthalate Originating in Iran, Pakistan and the United Arab Emirates, 2010 O.J. (L 134/25), para. 74 (Provisional Disclosure); Council Implementing Regulation 857/2010, Imposing a Definitive Countervailing Duty and Collecting Definitely the Provisional Duty Imposed on Imports of Certain Polyethylene Terephthalate Originating in Iran, Pakistan and the United Arab Emirates, 2010 O.J. 254/10, para. 53 (Final Disclosure).

<sup>2</sup> Provisional Disclosure, paras. 60-66; EU First Written Submission, para. 40.

<sup>3</sup> Definitive Measure, paras. 44, 50; see also Provisional Measure, paras. 67-72; see also EU First Written Submission, paras. 45-47.

<sup>4</sup> Pakistan First Written Submission, paras. 5.32-33.

<sup>5</sup> See Pakistan First Written Submission, paras. 5.20-30.

United States submits that this question should be answered in the affirmative under the relevant provisions of the SCM Agreement and the GATT 1994.

5. Article 1.1(a)(1)(ii) of the SCM Agreement provides that “a subsidy shall be deemed to exist if: . . . government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits).”

6. Footnote 1 to that provision explains:

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

7. The United States agrees with the parties’ observations that the language of footnote 1 is based “almost verbatim on the language of the Ad Note to Article XVI of the GATT 1994, to which it refers.”<sup>6</sup>

8. Both footnote 1 to the SCM Agreement and the Ad Note to Article XVI of the GATT 1994 contemplate that a duty drawback scheme “shall not be deemed to be a subsidy” so long as there is no “excess” remission of duties or taxes from those which have accrued. Consequently, if a duty drawback system were to provide for exemption or remission of duties or taxes in amounts that exceed the amounts of “duties or taxes that have accrued,” then such a system may be “deemed to be a subsidy” under the terms of Article 1.1 of that Agreement.<sup>7</sup>

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

10. Annex I to the SCM Agreement, providing an “illustrative list” of export subsidies, elaborates that the “[t]he remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste)” would constitute an “export subsidy.”<sup>8</sup> Again, this suggests that an export subsidy exists in cases where there is such an excess.

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<sup>6</sup> Pakistan First Written Submission, para. 5.32; EU First Written Submission, paras. 70-71 (“it contains the same reference to the carve-out”); *see also* Ad Note to Article XVI of the GATT 1994 (“The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy”).

<sup>7</sup> The European Union appears to share the U.S. reading of footnote 1. *See* EU First Written Submission, para. 69 (“[a] natural *a contrario* reading of such provision would indicate that when the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties *in amounts in excess of those which have accrued*, shall be deemed to be a subsidy”).

<sup>8</sup> Article 3.1(a) explains that subsidies that are contingent upon export performance, “including those illustrated in Annex I,” are “prohibited,” although those referenced in Annex I as not constituting export subsidies are not

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

12. Pakistan contends that the MBS is an Annex II drawback system because it is not a substitution drawback scheme under Annex III.<sup>9</sup> Therefore, the United States focuses on the guidance in Annex II to aid the Panel’s interpretation. Regardless, the guidance provided in Annex III regarding substitution drawback systems, where that guidance would apply, is similar to that contained in Annex II.<sup>10</sup>

13. As mentioned above, for a duty drawback system to operate so as not to provide for excess remission of import duties, Annexes II and III provide for procedures to check the system of the exporting Member.<sup>11</sup> Annex II(II)(1) provides that the investigating authority should first determine whether the exporting Member has in place an adequate system or procedure to monitor which inputs are consumed in the production of the exported product and in what amounts. Again Annex I(i) states that the amount of “excess” is a direct function of how much of the imported input is “consumed in the production of the exported product.” Thus, Annex II(II)(1) explains that:

Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the investigating authorities should first determine whether the government of the exporting Member has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the investigating authorities should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The investigating authorities may deem it necessary to carry out, in accordance with

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prohibited. Annexes II and III also clarify that duty drawback systems can constitute export subsidies to the extent they allow for excess remission or drawback of import charges. *See* Annex II(I)(2) (“Pursuant to paragraph (i) [of Annex I], drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product . . . normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product”); Annex III(I) to the SCM Agreement (“substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed”).

<sup>9</sup> Pakistan First Written Submission, para. 5.42 n.63. The European Union does not appear to contest this characterization of the MBS.

<sup>10</sup> *See* Pakistan First Written Submission, para. 5.42 n.63.

<sup>11</sup> Although Annex III is not squarely applicable to this dispute, Annex III(II)(1) identifies the importance of this precision: “[t]he existence of a verification system or procedure is important because it enables the government of the exporting Member to ensure and demonstrate that the quantity of imports for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question”).

paragraph 6 of Article 12, certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

14. Annex II(II)(2) contemplates an additional analysis by the exporting Member absent satisfaction of the condition under Annex II(II)(1). That paragraph states that:

Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting Member based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with paragraph 1.

15. Therefore, the United States agrees with the European Union that where an exporting Member has a duty drawback scheme in place that does not satisfy the requirements for such a scheme to “not be deemed to be a subsidy,”<sup>12</sup> then an investigating authority would be permitted to consider the full amount of the financial contribution as a subsidy under the terms of Article 1.1. The conditions for a duty drawback scheme to be considered within the scope of footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement are established by reference to Annex II(II)(1)-(2).

16. In addition, Pakistan argues that it later “suitably amended the rules for Manufacturing Bond scheme” to create “more elaborately laid out and strict/mandatory implementation, monitoring and verification” procedures.<sup>13</sup> However, Pakistan concedes that the “Old Rules” “were subsequently modified during the course of the Commission’s investigation.”<sup>14</sup> Thus, to the extent these amendments to the MBS (or what Pakistan refers to as the “New Rules”) post-dated the Commission’s period of investigation, the Commission would not have been required to consider them, but only the system or procedure that was in place during the period of investigation. An investigating authority need not consider information that post-dates the period of investigation in trade remedy proceedings.<sup>15</sup>

### **III. PAKISTAN’S CLAIMS REGARDING ITS “LTF-EOP” EXPORT FINANCING PROGRAM UNDER ARTICLES 1.1(B) AND 14 OF THE SCM AGREEMENT**

17. Pakistan claims that the European Union acted inconsistently with Article 1.1(b) and the chapeau and subsection (b) of Article 14 of the SCM Agreement in calculating the benefit under the Long-Term Financing of Export-Oriented Projects (LTF-EOP) scheme.<sup>16</sup> The LTF-EOP

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<sup>12</sup> Footnote 1 to Article 1.1(a)(1)(ii) of the SCM Agreement.

<sup>13</sup> Pakistan First Written Submission, para. 5.81.

<sup>14</sup> Pakistan First Written Submission, para. 5.4. The European Union explains that the “Old Rules” “(dating from 2001) were in place during the period of investigation,” and that the “New Rules” came into force “*well after* the investigation period of the investigation.” See EU First Written Submission, para. 56. The Commission also suggested that these administrative changes post-dated the period of investigation. See Final Disclosure, para. 49 (“The [Government of Pakistan] provided *very recent* administrative changes in relation to this scheme. It has introduced a more detailed definition of the Manufacturing Bond in the legislation and has taken steps to enhance the relevant authority’s control of the scheme”) (emphasis added).

<sup>15</sup> See *EC – Tube or Pipe Fittings (AB)*, paras. 80-81.

<sup>16</sup> Pakistan First Written Submission, para. 6.2.

scheme “enable[s] financial institutions to provide financing activities on attractive terms and conditions to borrowers for import of machinery, plant, equipment and accessories thereof.”<sup>17</sup>

18. According to Pakistan, company respondent Novatex obtained a loan under the LTF-EOP scheme in 2005, the principal amount of the loan was issued in “tranches” over time, and a specific interest rate was “locked in” for each tranche once the particular tranche was drawn down.<sup>18</sup> Also as stated by Pakistan, the “vast majority (over 90 per cent) of funds outstanding during the [period of investigation] had been drawn down in years prior to the [period of investigation] when the commercial interest rate was significantly lower than the commercial interest rate during the [period of investigation].”<sup>19</sup> Finally, according to Pakistan, the Commission calculated the benefit of this LTF-EOP loan based on a national interest rate loan benchmark in place during the period of investigation.<sup>20</sup>

19. Pakistan contends that the Commission’s benefit calculation was in legal error for two overarching reasons: (1) the Commission failed to consider the multi-tranche structure of the LTF-EOP loan in identifying a “comparable” commercial loan benchmark<sup>21</sup> and that each tranche had a specific locked-in interest rate,<sup>22</sup> and (2) the Commission ignored factual evidence concerning otherwise available loans for Novatex as possible benchmarks that Pakistan contends were more suitable than the selected benchmark.<sup>23</sup>

20. In response, the European Union points out that the Commission viewed the LTF-EOP loan as “a special financing instrument similar to a line of credit,” where “the borrower is free to withdraw parts of the committed amounts” at will “at a fluctuating, indexed interest rate.”<sup>24</sup> The European Union argues that Pakistan’s claims under the chapeau of Article 14 of the SCM Agreement are unfounded and that the Commission complied with its own municipal law in accordance with that chapeau.<sup>25</sup> With regard to Pakistan’s claims under Article 14(b), the European Union contends that the Commission “carefully assessed” Novatex’s alternative benchmark loans and found them “not comparable,”<sup>26</sup> and that the benchmark the Commission relied on was a suitable “proxy” given “the absence of a suitable comparable loan.”<sup>27</sup> Moreover, the European Union claims that Pakistan’s arguments against the use of a loan benchmark contemporaneous in time with the period of investigation are “based on an incorrect understanding of how the Commission determined the amount of benefit.”<sup>28</sup> On this latter point, the European Union clarifies that “[f]or the calculation of the subsidy amount, the Commission

<sup>17</sup> Provisional Disclosure, para. 117; *see also* Pakistan First Written Submission, paras. 6.5-6.6.

<sup>18</sup> Pakistan First Written Submission, paras. 6.8-6.16, 6.18; *see also* Final Disclosure, para. 73 (“[t]he financing negotiated in 2004/2005 was drawn down in tranches by the exporter concerned”). The EU appears to share this understanding of the structure of the LTF-EOP loan. *See* EU First Written Submission, para. 115 (“[t]he actual interest payable, therefore, is determined *only* at the moment the company draws down any money under the regime”) (emphasis in original).

<sup>19</sup> Pakistan First Written Submission, para. 6.18.

<sup>20</sup> Pakistan First Written Submission, paras. 6.17, 6.20; *see also* Final Disclosure, para. 73.

<sup>21</sup> *See* Pakistan First Written Submission, paras. 6.28-6.56.

<sup>22</sup> *See* Pakistan First Written Submission, paras. 6.71-6.100.

<sup>23</sup> *See* Pakistan First Written Submission, paras. 6.58-6.70.

<sup>24</sup> *See* EU First Written Submission, paras. 113-115, 122.

<sup>25</sup> *See* EU First Written Submission, paras. 140-159.

<sup>26</sup> EU First Written Submission, paras. 167-169.

<sup>27</sup> EU First Written Submission, paras. 168, 170-173.

<sup>28</sup> EU First Written Submission, paras. 181, 184-185.

did not take into account the amount *outstanding at the POI* [(period of investigation)] (i.e., including previous tranches) but only the amount *drawn down during the POI*.”<sup>29</sup>

21. The United States addresses certain of the parties’ arguments as they relate to the language of Article 14(b) and the chapeau requiring an investigating authority to use a comparable commercial loan benchmark and to provide an adequate explanation of its analysis.<sup>30</sup>

22. Article 14 of the SCM Agreement provides, in relevant part:

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

...  
(b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts.

23. In identifying the benefit of a preferential loan program, the approach of subsection (b) is a straightforward comparison of the amount paid with ‘the amount the firm would pay on a comparable commercial loan which the firm could actually obtain in the market’.” As a matter of logic, no benefit – and thus no subsidy – exists “if what the recipient pays on the government loan is equal to or higher than what it would have paid on a comparable commercial loan.”<sup>31</sup> Meanwhile, the chapeau to Article 14 “requires that ‘any’ method used by investigating authorities to calculate the benefit to the recipient shall be provided for in a WTO Member’s legislation or regulations, and it requires that its application be transparent and adequately explained.”<sup>32</sup>

24. Because the title of Article 14 indicates that it sets out “guidelines” for determining benefit, there exists “a certain degree of flexibility ... under Article 14(b) in the selection of benchmarks.”<sup>33</sup> Indeed, the Appellate Body has stated more generally that the presence of the term “guidelines” in the chapeau of Article 14 “suggests that Article 14 provides the framework within which the calculation of benefit is to be performed, although the precise detailed method

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<sup>29</sup> EU First Written Submission, paras. 155-156 (emphasis in original).

<sup>30</sup> Pakistan’s arguments rest entirely on its claims under Article 14 of the SCM Agreement. Its claims under Article 1.1(b) and other provisions of the SCM Agreement and Article VI:3 of the GATT 1994 appear to be consequential in nature. See Pakistan First Written Submission, para. 6.101; see also EU First Written Submission, para. 187. The United States has no specific comments regarding Pakistan’s claims under these other provisions.

<sup>31</sup> *EC and certain member States – Large Civil Aircraft (AB)*, para. 834.

<sup>32</sup> *US – Carbon Steel (India) (AB)*, para. 4.188; see also *id.* at paras. 4.152-4.153. The European Union shares the view that the chapeau to Article 14 “enshrines a transparency principle.” See EU First Written Submission, para. 51.

<sup>33</sup> See *US – Carbon Steel (India) (AB)*, para. 4.345 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 489).

of calculation is not determined, and that these guidelines should not be interpreted as rigid rules that purport to contemplate every conceivable factual circumstance.”<sup>34</sup>

25. The selection of an appropriate benchmark under Article 14(b) is guided by the terms “comparable,” “commercial,” and a “loan which the firm could actually obtain on the market.” The term “comparable” in its ordinary sense means “‘able to be compared’, ‘worthy of comparison’, and ‘fit to be compared (to)’,” such that “something can be considered ‘comparable’, when there are sufficient similarities between the things that are compared as to make that comparison worthy or meaningful.”<sup>35</sup> Therefore a “comparable commercial loan” benchmark “should have as many elements as possible in common with the investigated loan to be comparable’.”<sup>36</sup> Identifying a comparable commercial loan involves a “‘progressive search,’” “‘starting with the commercial loan that is closest to the investigated loan (a loan to the same borrower that is nearly identical to the investigated loan in terms of timing, structure, maturity, size and currency) and moving to less similar commercial loans while adjusting them to ensure comparability with the investigated loan.’”<sup>37</sup> However, the Appellate Body has also highlighted that “in practice, the existence of such an ideal benchmark loan would be extremely rare, and that a comparison should also be possible with other loans that present a lesser degree of similarity.”<sup>38</sup>

26. Of particular relevance to this dispute, the comparable commercial loan benchmark must be contemporaneous in time with the alleged subsidized loan. For example, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body explained that investigating authorities must rely on a benchmark “that would have been available to the recipient firm at the time it received the government loan,” such that the comparison to determine the benefit “is to be performed as though the loans were obtained at the same time.”<sup>39</sup> This contemporaneity factor accords with the principle that “[t]he investor will make its decision to invest on the basis of information available at the time the decision is made about market conditions and projections about how those economic conditions are likely to develop (future demand and price for the product, future costs, etc.).”<sup>40</sup>

27. Finally, Article 14(b) also describes a benchmark loan as reflecting one “which the firm could actually obtain on the market.” The Appellate Body has explained that “[t]he use of the conditional tense, ‘could’, suggests that a benchmark loan under Article 14(b) need not in every case be a loan that exists or that can *in fact* be obtained in the market.” The Appellate Body has also observed that “could” refers “‘first and foremost’ to the borrower’s risk profile, that is, whether the benchmark loan is one that could be obtained by the borrower receiving the

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<sup>34</sup> *US – Carbon Steel (India) (AB)*, para. 4.147 (citing *US – Softwood Lumber IV (AB)*, para. 92).

<sup>35</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 476.

<sup>36</sup> *US – Carbon Steel (India) (AB)*, para. 4.345 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 476).

<sup>37</sup> *US – Carbon Steel (India) (AB)*, para. 4.345 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 486); see also *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 485.

<sup>38</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 476 (citations omitted).

<sup>39</sup> *EC and certain member States – Large Civil Aircraft (AB)*, paras. 835-836, 838; see also *US – Carbon Steel (India) (AB)*, para. 4.345 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 486).

<sup>40</sup> See *EC and certain member States – Large Civil Aircraft (AB)*, para. 836.

investigated government loan.”<sup>41</sup> Given these findings, the United States agrees with Pakistan’s observation that “the investigating authority must, at the very least as the starting point of its analysis, first seek to identify a comparable loan that *the specific firm* under investigation would pay.”<sup>42</sup>

28. The United States’ understanding is that certain LTF-EOP tranches were issued prior to the Commission’s period of investigation, and that some tranches were issued during that period of investigation.<sup>43</sup> In that situation, in light of the guideline of comparing the transaction to one the loan recipient might have obtained on the market, an investigating authority might well examine the transaction and rely on a benchmark that is contemporaneous with when the loan disbursement terms were established. This is because the investigating authority could take the view that each tranche is merely a part of the one overall loan. The investigating authority might also examine the transaction and apply a loan interest rate benchmark that is contemporaneous in time with when each tranche of the investigated loan was drawn down, as Pakistan proposes, because the authority might determine that each tranche should be considered as a distinct loan.<sup>44</sup>

29. These considerations will depend on the factual circumstances concerning the terms of the loan. For example, if certain terms, such as the interest rate, are fixed and do not change for each tranche draw-down, it would be appropriate to consider a loan interest rate benchmark that is contemporaneous with the initial issuance of the loan. Conversely, if the terms of the loan agreement stipulate that each tranche will be subject to an interest rate established at the time of the draw-down, as appears to be the case with the LTF-EOP loan at issue, it would be appropriate to consider a loan interest rate benchmark that is contemporaneous with the draw-down.

30. With respect to the loan interest rate benchmark, where the specific firm has no comparable commercial loans, it would be reasonable for the investigating authority to use a national average interest rate for comparable commercial loans. Such an approach would be reasonable as it would utilize the loan experience for all such borrowers in that Member. The Appellate Body has observed that “the reference to ‘any’ method [in the chapeau of Article 14] clearly implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.”<sup>45</sup> The Appellate Body’s comment was made in the context of examining the selection of an out-of-country benchmark where suitable in-country prices are not available,<sup>46</sup> and this same principle is applicable to

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<sup>41</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 482 (quoting *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 10.113).

<sup>42</sup> Pakistan First Written Submission, para. 6.49 (emphasis in original).

<sup>43</sup> Pakistan points out in a visual chart that 8.00 percent of the total principal was issued in “2008-8,” “during the POI.” See Pakistan First Written Submission, paras. 6.74-6.75, 6.77. The Commission’s period of investigation was from July 1, 2008, through June 30, 2009. See Definitive Disclosure, para. 3. The European Union clarifies that some tranches were drawn down during the Commission’s period of investigation. See EU First Written Submission, para. 156.

<sup>44</sup> The European Union’s position as it pertains to the LTF-EOP loan at issue here appears to be consistent with this point because the Commission “did not countervail the benefits granted to Novatex out of tranches drawn down *before* the POI and for which there were outstanding repayment obligations during the POI.” EU First Written Submission, para. 156 (emphasis in original).

<sup>45</sup> *US – Carbon Steel (India) (AB)*, para. 4.188.

<sup>46</sup> *US – Carbon Steel (India) (AB)*, para. 4.189.

selecting an appropriate in-country loan benchmark as a proxy where there are no comparable commercial loans on the record of the investigation. This suggests that the investigating authority possesses discretion to select an appropriate benchmark, so long as it explains why the benchmark is, or is not, appropriate.<sup>47</sup>

31. Finally, the United States observes that an investigating authority has an obligation to provide a transparent and adequate explanation for why it selected a particular benchmark. One reason is so the parties to the investigation can adequately and timely defend their interests. In that regard, the investigating authority is already obligated under Article 12.8 of the SCM Agreement “to inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures.”<sup>48</sup> Similarly, Article 22.3 and 22.4 of the SCM Agreement require that for both preliminary and final determinations, an investigating authority is obligated to explain “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.” In addition, the application of the methods set out in national legislation to a situation in which the borrower has no comparable commercial loans and a benchmark must be found must be transparent and adequately explained in accordance with the chapeau of Article 14 of the SCM Agreement.

#### **IV. PAKISTAN’S CLAIMS UNDER ARTICLE 12.6 OF THE SCM AGREEMENT REGARDING THE EUROPEAN COMMISSION’S DISCLOSURE OF THE VERIFICATION VISIT**

32. Pakistan claims that the European Union acted inconsistently with Article 12.6 of the SCM Agreement because the Commission allegedly failed to make the results of its verifications available or to provide disclosures of the results of the verifications as part of the disclosure of its essential facts under Article 12.8 of that Agreement.<sup>49</sup> The Commission’s Provisional and Final Disclosures indicate that the Commission did not undertake an on-the-spot verification of the Government of Pakistan but did so with regard to the company respondent Novatek.<sup>50</sup> The United States observes that Pakistan’s Article 12.6 claim must be considered in light of what that provision requires of investigating authorities. The United States also has several specific observations in connection with some of the parties’ arguments, discussed below.

33. Article 12.6 provides:

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

<sup>47</sup> See *US – Carbon Steel (India) (AB)*, para. 4.188; see also *id.* at paras. 4.152-4.153.

<sup>48</sup> The United States provides further interpretative guidance for Article 12.8 of the SCM Agreement below.

<sup>49</sup> Pakistan First Written Submission, para. 8.1.

<sup>50</sup> Provisional Disclosure, para. 14.

pursuant to paragraph 8, to the firms to which they pertain and may make such results available to the applicants.

34. Central to Pakistan’s claim is the meaning of the last sentence of Article 12.6.

35. The last sentence of Article 6.7 of the AD Agreement largely mirrors the last sentence of Article 12.6 of the SCM Agreement. Article 6.7 of the AD Agreement provides, in relevant part:

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

36. As an initial matter, the use of the word “may” in the first sentence of Article 6.7 of the AD Agreement, which is also contained in the first sentence of Article 12.6 of the SCM Agreement, “makes clear that on-the-spot verifications in the territory of other Members are permitted, but not required.”<sup>51</sup>

37. The last sentence of Article 6.7 of the AD Agreement requires investigating authorities “to inform the investigated exporters of the verification results,”<sup>52</sup> *i.e.*, the results of the verification visit. The panel in *Korea – Certain Paper* observed:

the purpose of the disclosure requirement under Article 6.7 is to make sure that exporters, and to a certain extent other interested parties, are informed of the verification results and can therefore structure their cases for the rest of the investigation in light of those results. It is therefore important that such disclosure contain adequate information regarding all aspects of verification, including a description of the information which was not verified as well as of information that was verified successfully. This is because, in our view, information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties’ cases.<sup>53</sup>

38. The United States agrees with Pakistan that disclosure of the results of a verification visit are important both in enabling exporters and WTO Members to seek judicial review of the investigating authority’s determination under Article 23 of the SCM Agreement,<sup>54</sup> and to protect exporters’ rights to prepare and present their cases under Article 12.3 of the SCM Agreement.<sup>55</sup>

39. The United States also agrees with Pakistan that the meaning of the term “results”<sup>56</sup> in the last sentence of Article 12.6 of the SCM Agreement informs the extent of what the investigating authority must provide to “the firms to which they pertain.” The ordinary meaning of “result” is

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<sup>51</sup> *Egypt – Steel Rebar (Panel)*, paras. 7.326-7.327; *see also Argentina – Ceramic Tiles (Panel)*, para. 6.57 n.65; *EC – Salmon (Norway) (Panel)*, para. 7.358.

<sup>52</sup> *Korea – Certain Paper (Panel)*, para. 7.184.

<sup>53</sup> *Korea – Certain Paper (Panel)*, para. 7.192.

<sup>54</sup> Pakistan First Written Submission, paras. 8.39-8.44.

<sup>55</sup> Pakistan First Written Submission, paras. 8.45-8.47.

<sup>56</sup> *See* Pakistan First Written Submission, para. 8.21.

“an effect, issue, or outcome *from* some action, process or design.”<sup>57</sup> Similarly, the United States agrees that the “results” envisaged by Article 12.6 of the SCM Agreement are the “outcome” of the verification visit, which under Annex VI(7) is an on-the-spot investigation “to verify information provided or to obtain further details.”<sup>58</sup>

40. Article 12.6 of the SCM Agreement (as does Article 6.7 of the AD Agreement) provides two alternative mechanisms for disclosing the verification visit results: to make the results available to the firm to which the results pertain or to disclose the results as part of the essential facts which form the basis for a decision to impose definitive measures.<sup>59</sup> Thus, the United States agrees that one such option is to “‘make available’ a separate report containing the results of the verification visits.”<sup>60</sup>

41. Regarding this second form of disclosure, Article 12.6 references the requirements of Article 12.8. Article 12.8 provides:

The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measure. Such disclosure should take place in sufficient time for the parties to defend their interests.<sup>61</sup>

42. Article 12.8 of the SCM Agreement requires disclosure of the essential facts under consideration which form the basis for the decision whether to apply definitive measures in sufficient time for the parties to defend their interests.<sup>62</sup> The “essential facts” are those that “‘provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.’”<sup>63</sup> In *China – Broiler Products*, the panel found that China acted inconsistently with Article 6.9 of the AD Agreement because the investigating authority’s disclosure was “essentially reduced to a conclusory statement, instead of providing the essential facts underlying the authority’s decision.”<sup>64</sup>

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

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<sup>57</sup> *US – Steel Safeguards (AB)*, para. 315. The European Union proffers a similar definition from *The Shorter Oxford Dictionary*: “the effect, consequence, issue, or outcome of some action, process or design”). EU First Written Submission, para. 239.

<sup>58</sup> See Pakistan First Written Submission, para. 8.22.

<sup>59</sup> *Korea – Certain Paper (Panel)*, para. 7.184 (interpreting Article 6.7 of the AD Agreement).

<sup>60</sup> Pakistan First Written Submission, para. 8.20.

<sup>61</sup> Article 12.8 of the SCM Agreement contains the additional obligation to inform “interested Members,” which is not contained in Article 6.9 of the AD Agreement.

<sup>62</sup> *China – Broiler Products (Panel)*, paras. 7.315-7.317 (interpreting Article 6.9 of the AD Agreement); *China – X-Ray Equipment (Panel)*, para. 7.400.

<sup>63</sup> *China – Broiler Products (Panel)*, para. 7.88 (quoting *EC – Salmon (Norway) (Panel)*, para. 7.805).

<sup>64</sup> *China – Broiler Products (Panel)*, paras. 7.318-7.319.

**V. CONCLUSION**

44. The United States thanks the Panel for its consideration of these comments.