

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

(DS538)

**THIRD-PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA**

FEBRUARY 6, 2020

Madame Chairperson, members of the Panel:

1. The United States welcomes this opportunity to present its views to the Panel. Our statement will focus on the requirements for selecting a viable period of investigation under Article 3.1 of the Anti-Dumping Agreement and the effect of judicial review under Article 13 of the Anti-Dumping Agreement on that selection.¹

2. The following comments concern the proper legal interpretation of the relevant provisions of the Anti-Dumping Agreement and the GATT 1994.²

3. Under Article VI of the GATT 1994, the purpose of an anti-dumping measure is to "offset or prevent" dumping that is causing or threatening to cause material injury to a domestic industry in the importing country.³ Numerous provisions in Article VI and the Anti-Dumping Agreement support this interpretation that the injury an investigation seeks to address is one that is alleged to presently exist – or that will exist in the imminent future. For example, Article VI of GATT 1994 defines dumping and injury in the present tense, that dumping “causes or threatens” material injury or "is" such as to cause or threaten to cause injury.⁴ Similarly, Article 2 of the Anti-Dumping Agreement discusses imports "being" dumped and that export price "is" lower than normal value. Furthermore, the examination pursuant to Article 3.4 of the Anti-Dumping Agreement is in relation to the "state" of the domestic industry, not its previous condition during some specified prior time period.⁵

¹ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“Anti-Dumping Agreement”).

² *General Agreement on Tariffs and Trade 1994* (“GATT 1994”).

³ GATT 1994 Art. VI:2.

⁴ GATT 1994 Arts. VI:1, VI:6.

⁵ Oxford University Press, *lexico.com*: “state” (first definition): “the particular condition that someone or something is in at a specific time”.

4. In addition to this temporal requirement, Article 3.1 of the Anti-Dumping Agreement requires that this determination of current injury “be based on positive evidence and involve an objective examination.”

5. Hence, the purpose of a dumping investigation is not to test whether foreign exporters may have dumped and caused injury at some point in the past, but whether there is injurious dumping occurring at the time of the filing of the petition and the initiation of the investigation. However, as recognized by the panel in *Mexico – Steel Pipes and Tubes*, while there must be “an inherent real-time link between the investigation leading to the imposition of measures and the data on which the investigation is based,” the period of investigation will, necessarily, be from a “past period.”⁶

6. The WTO Committee on Anti-Dumping Practices recommended that the period of investigation for dumping investigations should end as “close to the date of initiation as is practicable.”⁷ While each case must be determined on its own facts, such a time period with recent information would be most likely to provide positive evidence to an investigating authority of the injurious dumping alleged. Data from the period starting after the filing of a petition and initiation of an investigation may suffer from post-petition effects that skew the data.⁸

7. The UAE acknowledges this when it states that the “optimal scenario” is when the “period of investigation ends the day before the date of initiation.”⁹ However, the UAE goes on

⁶ *Mexico – Steel Pipes and Tubes*, paras. 7.227-7.228 (citing *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 7.56 -7.61 and *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 165).

⁷ Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, GI ADP/6, 16 May 2000.

⁸ *Mexico – Steel Pipes and Tubes*, para. 7.230.

⁹ UAE’s First Written Submission, para. 105 (citing *Mexico – Steel Pipes and Tubes*, para. 7.230).

to suggest that even in situations where an investigating authority selects a period of investigation as close to the date of initiation as practicable, a measure may breach Article 3.1 if the period of investigation is not sufficiently close in time to the date of imposition of the duty itself.¹⁰ Under the UAE’s logic, if a determination were subject to judicial review and remand procedures, the investigating authority could need to undertake a new investigation with a more recent period of investigation for any measure imposed as a result of that remand, in order for the antidumping duty to be consistent with Article 3.1.

8. The UAE’s position is contrary to the terms of the Anti-Dumping Agreement and attempts to establish new requirements not set out in that agreement that would lead to unworkable outcomes in practice.

9. First, this position would effectively place limits on the timing of judicial reviews and remands that are found nowhere in the text of the Anti-Dumping Agreement. As explained in Section II of the United States’ Third Party Submission, Article 13 does not contain obligations concerning the nature of judicial review proceedings, nor does it place a specific time limit on any domestic judicial review. The UAE’s position, however, would have the practical effect of placing a severe time limit on domestic judicial review if a Member wanted to avoid the major administrative burden of performing new data collection for a new period of investigation upon any remand.

10. Furthermore, Article 13 does not cross-reference the deadlines set out in Article 5.10. Therefore, the EU’s suggestion to use the deadlines found in Article 5.10 as “context” for a “reasonable” period for remand proceedings also lacks a textual basis in the Anti-Dumping

¹⁰ UAE’s First Written Submission, para. 136.

Agreement and should be rejected.¹¹ The time limits set out in Article 5.10 apply to investigations, and are not applicable to the timeframes that might be required for judicial review. Article 5.10 also would not apply to any remand proceedings implementing the instructions of a reviewing court, which are part and parcel of judicial review.

11. Second, the UAE's position fundamentally misconceives the role of remands by domestic judicial authorities. A remand proceeding is not a new investigation, requiring the collection of updated data. Rather, a remand is a proceeding to augment or re-perform an analysis on data as to an existing period of investigation, in line with instructions from a reviewing court or tribunal. A requirement to select a new period of investigation for a remand proceeding, however, would effectively require the investigating authority to redo the entire investigation. This is because, to ensure compliance with other requirements under the Anti-Dumping Agreement, the investigating authority would need to collect data for that new period of investigation, permit interested parties to comment on those new data, then provide an analysis and come to a new determination. This would substantially increase the number of requests for judicial review, not because of actual legal errors, but because interested parties would be incentivized to seek remands which could render the original period of investigation stale and require a new investigation. Thus, the UAE's position would place a significant burden on investigating authorities, not to mention the mechanisms for judicial review in domestic systems, and effectively prevent the timely completion of investigations or the correction of even minor legal errors in remand situations.

12. Similarly, such a rule would deter a petitioning party from seeking judicial review of negative determinations, even where it has a valid basis to do so, out of concern for the time and

¹¹ EU's Third Party Submission, paras. 8-9.

expense a second investigation would entail. In this way, a petitioner who has the right to receive relief from unfair trade practices may never receive it because the time and expense of obtaining it could prove prohibitive.

13. Finally, not only would an investigating authority have to select a new period of investigation, but the authority would likely have to select a new period of investigation that included data predominantly or entirely post-dating the initiation. This would require the authority to rely on data that may reflect the effects of the initiation and investigation. Use of such data has the potential to be subject to reliability issues.¹²

14. This concludes the U.S. oral statement. We thank the Panel for its consideration of our views and look forward to answering any questions the Panel may have.

¹² See *Mexico – Steel Pipes and Tubes*, para. 7.230.