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

(DS538)

THIRD PARTY INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

March 6, 2020

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS REGARDING JUDICIAL REVIEW AND ARTICLE 5.10

1. Article 5.10 requires that "[i]nvestigations shall, except in special circumstances, be concluded in one year, and in no case more than 18 months, after their initiation." The time frame in Article 5.10 applies to "investigations" only, and not to the judicial review of an investigation or an administering authority's subsequent response to that judicial review.

2. In claiming that Pakistan's investigating authority exceeded the 18-month limitation in Article 5.10, the UAE implies that the 18 months includes the time taken to complete any and all of the following procedural steps: (1) all investigatory activities and determinations made in the normal course by the investigating authorities; (2) the time it takes for a domestic court (or courts) to hear and decide any requests for review of the investigating authorities' determinations; and (3) the investigating authorities' re-examination and re-determination on remand, if necessary. The UAE's interpretation might also extend to (4) any judicial review of the redetermination, (5) any further re-examination or redetermination following a second judicial remand, or even (6) any repetitions of the foregoing steps. Nothing in Article 5.10 would support such an interpretation.

3. Article 13 of the Anti-Dumping Agreement explicitly contemplates the possibility of such additional proceedings after the investigating authorities issue their final determinations in the first instance. Whereas Article 5 of the Anti-Dumping Agreement governs the conduct of "investigations," an entirely separate Article, Article 13, addresses judicial review proceedings. With respect to timing, Article 13 requires only that judicial review proceedings be "prompt." Article 13 does not contain any specific durational requirements for domestic judicial review, nor does it cross-reference the 12-month/18-month deadlines set out in Article 5.10 for completion of investigations.

4. The UAE's interpretation of Article 5.10 thus seeks to impose requirements nowhere stated in the text and indeed appears to be inconsistent with Article 13 of the Anti-Dumping Agreement. The UAE's interpretation thus does not provide a basis for a claim under Article 5.10.

II. CLAIMS REGARDING PROFITABILITY UNDER ARTICLE 3.4

5. A negative material injury determination is not compelled merely because a domestic industry has remained profitable during the period of investigation. As Article 3.4 of the Anti-Dumping Agreement states, "the list [of injury factors] is not exhaustive, *nor can one or several of these factors necessarily give decisive guidance* (emphasis added)." Furthermore, Article 3.4 does not direct an investigating authority to determine if the domestic industry has fallen from profitability to loss. Instead, Article 3.4 requires the authority to evaluate, among other things, the "actual and potential decline in… profits".

6. Therefore, a Member would not breach Article 3.4 based on the sole fact that the domestic industry had remained profitable. Rather, an investigating authority may find that dumped imports have caused material injury to a domestic industry based on factors identified in

Article 3.4, including that industry remaining profitable, depending on the specific facts and circumstances of a given case.

III. CLAIMS REGARDING LIKELIHOOD OF INJURY DETERMINATIONS UNDER ARTICLE 11.3

7. While Article 11.3 directs an investigating authority to consider whether "expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury," it is important to recall that Article 11.3 of the Anti-Dumping Agreement does not prescribe what data an investigating authority must consider in conducting such an examination. And nothing in that Article precludes authorities from analysing both current and historical – including pre-order – data in conducting their analyses. Nor does Article 11.3 indicates that the current condition of the industry must be given specific weight, let alone dispositive weight, in the likelihood of injury analysis. Indeed, through the term "recurrence of … injury", Article 11.3 contemplates a situation in which the domestic industry had ceased to experience injury.

8. Consequently, the Agreement does not support a conclusion that a domestic industry's current market share would compel a negative likelihood-of-injury determination. Rather, the investigating authority may evaluate a variety of available data in determining whether "the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury."

EXECUTIVE SUMMARY OF U.S. THIRD PARTY ORAL STATEMENT

9. 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."

10. 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." 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.

11. 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." However, the UAE goes on 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. 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.

12. 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.

13. 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. Second, the UAE's position fundamentally misconceives the role of remands by domestic judicial authorities. 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. 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 expense a second investigation would entail. 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.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

14. In order to impose an anti-dumping measure, the investigating authority must examine, as part of its initial investigation pursuant to Article 5 of the Anti-Dumping Agreement, a period of time that is as close to the date of initiation as practicable. The United States does not see any exception to this obligation where using older data would simply be more expedient or would otherwise allow the investigating authorities to proceed on an accelerated basis. The panel in *Mexico – Rice* considered that the pertinent inquiry was whether it was necessary, not whether it was expedient, for the authority to rely on older data. Without establishing other facts, an authority's decision to select a period of investigation based on expediency alone does not justify the use of a stale period of investigation.

15. Numerous provisions in Article VI and the Anti-Dumping Agreement support the interpretation that the dumping seeking to be addressed is one that is currently or presently exists - or will exist in the imminent future. Hence, the purpose of a dumping investigation is not to test whether foreign exporters may have dumped at some point in the past, but whether there is injurious dumping occurring at the time of the initiation of the investigation. Therefore, the period of investigation selected as part of an investigating authority's initial investigation for calculating dumping should, as it is for injury, be "as close to the date of initiation as practicable," based on the circumstances of each case.

16. Article 5.10 of the Anti-Dumping Agreement provides that "investigations shall, except in special circumstances, be concluded in one year, and in no case more than 18 months, after their initiation (emphasis added)." The ordinary meaning of the word "initiation" is defined as "[t]he action of beginning or originating something; the fact of being begun; commencement, origination." Therefore, as so defined, "initiation" does not mean continuation. Based on this ordinary meaning, an investigation into a specific import or set of imports could only be initiated for a second time if any prior investigation was either already terminated or never existed in the first place. Thus, assuming that the first investigation was not ongoing – due to either termination or absence of a valid prior initiation – and that the second initiation met the

requirements of Article 5, the investigating authority would need to conclude that investigation within one year (or 18 months) of that later, separate initiation.

17. Article 11.4 states that sunset reviews "shall normally be concluded within 12 months of the date of the initiation of the review." By its terms, the 12 month time limit found in Article 11.4 is not a strict deadline that is applicable in all cases. Rather, Article 11.4 is drafted to permit a review to go beyond this "normal" deadline when circumstances warrant. While such circumstances are not defined in the Anti-Dumping Agreement, the United States submits that a decision of a domestic court ordering the investigating authority to stay anti-dumping proceedings while a judicial review proceeding governed by Article 13 took place is an unusual and infrequent occurrence in a sunset review. Therefore, depending on the particular facts, such an occurrence may permit an investigating authority to complete its review after the 12-month "normal" deadline found in Article 11.4.

18. If the Panel finds in the UAE's favor on any claim, the Panel should provide the recommendation set forth in DSU Article 19.l, that Pakistan bring its measure into conformity with its obligations under the relevant agreements. In general, panels have declined requests to make suggestions under Article 19.1 of the DSU, and for good reason. Article 21.3 of the DSU makes clear that "the choice of means of implementation is decided, in the first instance, by the Member concerned." Here, the UAE is advocating for a specific, retroactive remedy of the sort panels reviewing anti-dumping and countervailing duty measures have avoided. Panels are not experts in national law, and should refrain from attempting to identify ways in which Members can best bring offending measures into conformity with their obligations.