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

(DS538)

RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

February 28, 2020

TABLE OF REPORTS

Short Title	Full Case Title and Citation
Mexico – Anti-Dumping Measures on Rice (AB)	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005
US – Softwood Lumber VI (Panel)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2004

Question 1. Pakistan argues that when initiating the investigation in 2012, it selected the same period of investigation chosen for the investigation initiated in 2010 and subsequently interrupted, because this allowed it "to proceed on an accelerated basis by using the previously collected data that it had already begun to analyze". Under which conditions do you consider that the ability to expedite an investigation by using "previously collected data" would justify reliance on a period of investigation that precedes initiation by almost two years? Please explain.

1. As addressed in the third-party oral statement of the United States, the purpose of an anti-dumping measure is to "offset or prevent" dumping that is presently causing or threatening to cause material injury to a domestic industry in the importing country. Therefore, 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,[1] 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.

2. We recall that the panel in *Mexico – Rice* gave weight to the fact that:

> (i) the period of investigation chosen by [Mexico's authority] was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason – apart from the allegation that it is Mexico's general practice to accept the period of investigation submitted by the petition – why more recent information was not sought.[2]

That is, 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.

3. Similarly in this scenario, 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.

Question 2. The requirement for positive evidence in Article 3.1 has been held to constrain Members' ability to select a remote period of investigation for injury, account being taken of all relevant circumstances. Do you consider that Article VI of the GATT 1994, and/or the Anti-Dumping Agreement, impose similar constraints regarding the period of investigation for dumping? If so, what are the operative provisions imposing those constraints?

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

[2] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 167.

4. The Anti-Dumping Agreement does not set out a specific period of investigation for dumping investigations, nor does it set out the criteria for selecting the period of investigation for dumping. However, as addressed in the third-party oral statement of the United States, it is instructive that both dumping and injury are referred to in the present tense in Article VI of the GATT 1994[3] and the Anti-Dumping Agreement.

5. Numerous provisions in Article VI and the Anti-Dumping Agreement support this interpretation that the dumping seeking to be addressed is one that is currently or presently exists - or will exist in the imminent future. For example, Article VI of GATT 1994 defines both dumping and injury in the present tense, that dumping "is" causing or threatening to cause injury. Similarly, Article 2 of the Anti-Dumping Agreement, discusses imports "being" dumped and that an export price "is" lower than normal value.

6. 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,"[4] based on the circumstances of each case.

Question 3. Assume that a Member initiates an investigation, gathers data, and then abandons the investigation because of a domestic court order. Assume then that the same Member initiates an investigation with the same scope (same product, same countries, same period of investigation) as the first one, and relies substantially, in reaching its final determination, on data gathered in the first investigation. From when do you consider that the time-limit in Article 5.10 should run: the first or second initiation? What factors should a panel take into account in answering this question? Is the nature and extent of the information gathered following the first initiation but before the second initiation, and relied upon in the final determination, a factor? If so why?

7. As an initial matter, the above question does not define what is meant by "abandons the investigation." However, 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."[5] Therefore, as so defined, "initiation" does not mean continuation.

8. 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

[3] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

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

[5] *The New Shorter Oxford English Dictionary (4th Edition) (1993)*, p. 1370.

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.

9. Furthermore, assuming the scenario described above – that the first investigation is not ongoing and that the second initiation met the requirements of Article 5 – the "nature and extent" of information gathered after the first initiation would have no bearing on when the Article 5.10 timeframe starts running. However, if this data were used as a basis for the investigating authority's final determination (in the later investigation), it would still need to be part of a period of investigation data set that was "as close to the date of initiation as practicable,"[6] based on the circumstances of each case.

Question 6. Pakistan argues that a decision of a domestic court ordering the investigating authority to stay anti-dumping proceedings qualifies as an abnormal circumstance justifying a failure to comply with the 12-month time limit within which sunset reviews should "normally" be completed under Article 11.4. Do you agree? Please explain your views.

10. 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.

Question 7. To the extent the Panel finds in favour of the UAE, the UAE asks the Panel to make two suggestions for implementation under the second sentence of Article 19.1 of the DSU. One of the suggestions that the UAE asks for is that Pakistan "refund the anti-dumping duties collected". What are your views on such a request?

11. 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.

12. In general, panels have declined requests to make suggestions under Article 19.1 of the DSU, and for good reason. A Member generally has many options available to it to bring a measure into conformity with its WTO obligations. As the panel noted in *US – Softwood*

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

Lumber VI, 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."[7]

13. 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.

[7] *US – Softwood Lumber VI (Panel)*, para. 8.8.