

PROPOSAL ON MATERIAL RETARDATION

Communication from Egypt

The following communication, dated 12 May 2005, is being circulated at the request of the Delegation Egypt.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/76), also be circulated as a formal document.

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This proposal refers to the necessity of clarifying the concept of "*material retardation*", while taking into account the main problems that investigating authorities have faced, in particular in developing country Members, to implement this concept. This proposal is intended to further identify an issue previously examined (TN/RL/W/105). Egypt welcomes information on experiences of other Members with respect to "*material retardation*" and reserves its right to specify its proposal further to the discussions amongst participants on this matter.

Issue: Material retardation

Relevant Provision: Article 3 of the Anti-Dumping Agreement.

Description of problems:

Article VI of the General Agreement on Tariffs and Trade (GATT) provides that "*the contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.*"

Footnote 9 to Article 3 of the Anti-Dumping Agreement further provides that "*under this Agreement, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry*".

It is noted that, while determinations of both "*material injury*" and "*threat of material injury*" are specifically addressed in the Anti-Dumping Agreement, no provision defines nor governs "material retardation" determinations. The concept of "*material retardation*" is intimately connected to the definition of the concept of "*industry in the process of establishment*". It is generally accepted that material injury refers to actual injury and threat of material injury to clearly foreseen and imminent injury but material retardation remains to be precisely defined. There is currently no indication in the Anti-Dumping Agreement of how the terms "*material retardation of the*

establishment of the industry" should be interpreted. Also the Anti-Dumping Agreement fails to identify tests similar to those laid down in Article 3 of the Anti-Dumping Agreement concerning material injury and threat thereof with respect to material retardation. The criteria set forth under Articles 3.4 and 3.7 of the Anti-Dumping Agreement cannot be used to determine whether industries in the process of establishment suffer injury.

In order to ensure the effectiveness of the Anti-Dumping Agreement, Egypt considers that it is essential that the concept of "*material retardation*" be defined in terms similar to those defining the concepts of "*material injury*" and "*threat of material injury*". A common definition of the concept of "*material retardation*" will also serve to ensure a more consistent implementation of the Anti-Dumping Agreement by all Members. The interpretation of the concept of "*material retardation*" and the determination of specific criteria will no longer be left to the discretion of each Member. Furthermore, as detailed below, a definition of the concept of "*material retardation*" will ensure that Members and, in particular, developing countries, whose domestic industries are not very developed, can seek remedies against injurious dumping.

Illustrative example of situations unaddressed under Article 3 of the Anti-Dumping Agreement:

Egypt presents a summary of situations that are not properly addressed under the current version of the Anti-Dumping Agreement. These situations do not intend to describe all the difficulties resulting from the implementation of the concept of "*material retardation*". They only aim to present some of the difficulties that Egypt has faced since the entry into force of the Anti-Dumping Agreement. Egypt welcomes experiences of other participants in implementing or failing to implement the concept of "*material retardation*".

- New company in a developing domestic market

Developing countries, such as Egypt, are generally characterized by small domestic markets and small domestic industries. When domestic consumption is limited, it is common to have single-company domestic industries. With the development of domestic consumption, opportunities for new domestic investors are generally created. During the initial period of growth in the domestic market, the transition from a single-company domestic industry to a multiple-company domestic industry the domestic industry is delicate. The growth of the domestic market gives rise to fiercer competition as newcomers on the market are eager to rapidly conquer market shares. In such circumstances, exporting producers may be tempted to sell their products at dumped prices in order to make them more competitive on a new market.

During the transition period, until new domestic companies are established and have begun producing, the domestic industry, within the meaning of Article 4 of the Anti-Dumping Agreement, is composed of the company(ies) that were producing before the development of the domestic market. As a result, companies that have not begun production cannot request, by themselves, the initiation of an anti-dumping investigation even if their establishment is materially retarded. This situation can be particularly problematic when the company(ies) that were established before the development of the domestic market have decided not to develop themselves to meet increasing market demand and may not be suffering any material injury or threat thereof. In such circumstances, it is submitted that investors cannot protect their domestic investment against effects of injurious dumping under the current version of the Anti-Dumping Agreement.

- Upgrade of production facilities

Domestic industries in developing countries are also generally characterized by their limited level of technological development. With the development of domestic consumption, companies in developing countries, however, invest to upgrade their production facilities and to better satisfy

market demand. The introduction of new products, can even lead existing domestic companies to make significant investments to meet domestic market demand for these new products. If the new products for which investments are being made, but which are not yet produced, are not considered like or directly competing with the products that these companies normally produce, they will not be in a position to claim that they are materially injured or suffer a threat of material injury as a result of dumped imports of the new products that they intend to produce.

Some Members may argue that these companies could claim that their establishment is materially retarded under the current wording of the Anti-Dumping Agreement. However, other Members may consider that since these companies are part of established domestic industries that are not suffering material injury or threat thereof for their current production, they cannot claim that their establishment is materially retarded.

- Privatization

In an important number of developing country Members such as Egypt, the privatization of important sectors of the economy that were previously controlled by the state constitutes one of the essential features of the economic reforms undertaken in recent years. Privatization is encouraged by international organizations, such as the World Bank and the International Monetary Fund, as well as by developed countries and participates to the liberalization of international trade.

The privatization of state-owned companies may give rise to specific situations that are not addressed under the current version of the Anti-Dumping Agreement. Privatization is often linked with market liberalization. State-owned monopolies are privatized at the same time the domestic market is open to domestic and foreign competition. The transformation of former state-owned companies which were not previously led by market considerations, such as profit and consumer demand, into commercial companies in a highly competitive environment can be very problematic if the market is disrupted by dumped imports. It is submitted that the concepts of "*material injury*" and "*threat of material injury*", as defined in the current version of the Anti-Dumping Agreement, do not always ensure that former state-owned companies can initiate investigations to remedy the negative effects of dumped imports. For example, shortly after privatization and market liberalization, it is difficult for investigating authorities to assess the causal link between dumped imports and the material injury or threat thereof that may have been established since a comparison between a non-market and a market situation has to be made. In summary, investigating authorities must establish whether a newly privatized company must be considered as a newly established company or as a successor of the state-owned company.

Elements of a Solution

- Definition of the concept of material retardation

In order to address the above-described situations and situations that may be specific to developing countries, that do not fall within the definition of the concepts of "*material injury*" and "*threat of material injury*", it is proposed to clarify the current text of footnote 9 to Article 3 to clarify that the concept of "*material retardation*" is not limited to industries which are established from zero, but should apply to all domestic industries which are characterized by a limited level of development and/or a new organization.

- Material retardation test

In addition, in order to ensure that the concept of material retardation is uniformly applied, it is proposed to clarify Article 3 of the Anti-Dumping Agreement to specify criteria determining in which circumstances material retardation occurs.

Egypt welcomes proposals of other participants to reach a common definition of the concept of "*material retardation*" and to set forth criteria to determine when material retardation is occurring.

Explanation

- Definition of the concept of material retardation

This proposal intends to clarify in which cases investigating authorities should examine whether material retardation occurs. Egypt considers that it is crucial not to limit the "*material retardation*" test to industries which are newly established. Egypt is particularly concerned with the embryonic, restructuring and newly privatized industries which should also be regarded as industries in the process of establishment. This matter is of specific concern to developing country Members since their domestic industries are rarely developed.

- Material retardation test

While Article 3 of the Anti-Dumping Agreement clearly identifies the factors and elements which must be considered in order to determine whether material injury or threat of material injury is established, it does not indicate which factors are relevant for the determination of whether the domestic industry suffers from material retardation. Egypt considers that it is essential to identify tests which will help the investigating authorities to determine whether there is material retardation, thereby avoiding uncertainty.

Footnote 9 to Article 3 specifies that injury which shall also mean material retardation shall be interpreted in accordance with the provisions of Article 3 of the Agreement. Therefore, Egypt understands that investigating authorities should consider and evaluate the factors listed in Article 3.4 also in case of material retardation. This seems supported by the Panel's findings in *Mexico – HFCS*. In that case, the Panel explained that Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4. In other words, according to the Panel, investigating authorities should consider both the factors listed in Article 3.7 as well as the factors listed in Article 3.4 in a threat case. The Panel explained that this conclusion is mandated by the text of Article 3 which, as a whole deals with the determination of injury which is defined as material injury, threat of material injury, or material retardation of the establishment of a domestic industry.

Even if investigating authorities are required to consider the factors listed in Article 3.4 in the framework of a material retardation case, the Agreement does not include any indication as to *when* there is material retardation. The purpose of a new paragraph in Article 3 would be to list factors on the basis of which investigating authorities can establish that there is material retardation.
