# WORLD TRADE ORGANIZATION

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## THREAT OF MATERIAL INJURY

Communication from Egypt

The following communication, dated 20 April 2006, is being circulated at the request of the Delegation of Egypt.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(06)/104), also be circulated as a formal document.

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This proposal refers to the necessity of clarifying the concept of "*threat of material injury*" and develops earlier submissions by Egypt and other Members[1]. Indeed, in the framework of these negotiations, several Members have expressed their concerns about the fact that Article 3.7 does not provide for sufficiently clear factors to determine whether or not there is a threat of material injury. Egypt shares these concerns and, by means of the present proposal, intends to further specify the concept of threat of material injury in order to provide investigating authorities and interested parties with additional guidance for its assessment.

The concept of threat of material injury is particularly important for developing country Members since the generally small size of their domestic markets and the limited development of their domestic industries render the latter particularly vulnerable to dumped imports. Because industries of developing countries can rapidly cease to exist, it is indispensable that the mechanism allowing Members to protect their industries as soon as a threat of material injury becomes apparent be as efficient and practical as possible. The present proposal, thus aims at clarifying the factors that may be considered in threat of material injury cases.

**Introduction of an explicit reference to the factors listed in Article 3.4**

Egypt is of the opinion that the existing list of factors in Article 3.7 does not sufficiently assist investigating authorities in their assessment of whether there is a threat of injury. Their formulation together with the inexperience of a number of investigating authorities in implementing Article 3.7 may make the assessment of threat of injury particularly cumbersome. Egypt believes that investigating authorities should be encouraged to consider additional and more practical factors when assessing whether or not there is a threat of material injury.

Therefore, Egypt proposes to enlarge the list of factors considered under Article 3.7 by adding a subparagraph (v) with a reference to the factors listed in Article 3.4. Indeed, the factors listed in Article 3.4 may provide useful guidance for the determination of threat of material injury. Also, Egypt is convinced that, since, at present, investigating authorities are by far more familiar with the assessment of material injury, the analysis of these factors in threat of injury cases will not be problematic.

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[1] See the relevant sections in TN/RL/W/110, TN/RL/W/6 and TN/RL/W/66.

It should also be pointed out that the proposed reference to the factors of Article 3.4 in Article 3.7 is consistent with the interpretation of the latter as confirmed in *Mexico – HFCS*[2]. In this case, the Panel explained that Article 3.7 sets out additional factors that must be considered in a threat of injury 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. Therefore, a cross-reference to Article 3.4 would clarify the present legal situation and provide Members wishing to investigate a threat case with more legal certainty.

**Clarification of the meaning of subheading (ii) of Article 3.7**

Egypt believes that subheading (ii) of Article 3.7 should be clarified in order to further endorse the practical applicability of Article 3.7. In particular, Egypt is concerned with the identification of "*other export markets*" and the availability of data concerning these markets.

Subheading (ii) does not specify whether an assessment "*of the availability of other markets to absorb any additional exports*" needs to be carried out by the investigating authorities even if the exporters/producers have not made any respective claims. Likewise, Article 3.7 does not specify the scope of such assessment: are investigating authorities required to assess all potential export markets, i.e. on a worldwide basis, in order to comply with subheading (ii), or can they limit their assessment to export markets that have a particular volume? Finally, Article 3.7 does not state what kind of information may be used for the assessment of "*other export markets*". This opens the door to arbitrary allegations by exporters/producers that may be difficult to rebut because adequate information sources on third countries' export markets are limited. In view of the foregoing, Egypt considers that the elements listed under subheading (ii) are, in their present form, not sufficiently clear to allow investigating authorities to conduct a meaningful analysis.

It is therefore proposed to clarify the circumstances under which an investigation into the "*availability of other export markets to absorb additional exports*" should be carried out. In this regard, Egypt wishes to propose to modify the present text twofold: firstly, authorities should only have to investigate the absorbability of those export markets that have been identified by exporters/producers. Secondly, exporters/producers may only base their respective claims on information coming from sources of recognized authority. In other words, the burden of proof should explicitly be put on the shoulders of the exporters/producers and their allegations should be based on reliable and accessible information. Egypt is convinced that the proposed clarification of subheading (ii) would contribute to render the application of Article 3.7 more practicable.

**Proposed Changes in Article 3.7**

In view of the above, it is proposed to amend Article 3.7 of the Anti-Dumping Agreement as follows:

> A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.[3] In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

[2] *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, paras. 7.111-142.

[3] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices.

(i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

(ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market~~, taking into account the availability of other export markets to absorb any additional exports;~~ . If evidence on the availability of other export markets to absorb any additional exports is provided, the investigating authorities shall take it into account if it is based on sources of recognized authority.

(iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; ~~and~~

(iv) inventories of the product being investigated~~.~~ ; and

(v) the list of relevant factors in Article 3.4.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.