

**MATERIAL RETARDATION**

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)/105), also be circulated as a formal document.

The present proposal is based on the need of defining the concept of "*material retardation*" and develops earlier submissions by Egypt on the same subject.<sup>11</sup> Egypt deplores the fact that the current definition of material retardation remains impractical and vague although it could constitute an important tool for developing country Members to protect their domestic industries against unfair trade practices that do have not resulted in material injury or threat thereof, within the meaning of Article 3 of the Anti-Dumping Agreement.

It is reiterated that, while determinations of both "*material injury*" and "*threat of material injury*" are specifically addressed in the Anti-Dumping Agreement, no provision defines the concept of material retardation. In addition, the Anti-Dumping Agreement does not establish any criteria similar to those laid down in Article 3.4 and 3.7 for investigating authorities to assess material retardation.

In order to ensure the effectiveness of the Anti-Dumping Agreement, Egypt considers that it is essential that the concept of material retardation be clarified. First of all, a clear definition of the "*establishment of a domestic industry*" should be introduced. This definition should cover situations that are not considered as constitutive of material injury or threat thereof. Secondly, factors for the assessment of material retardation should be defined

**Introduction of a definition of "*establishment of a domestic industry*"**

At present, the terms "*material retardation*" and "*establishment of a domestic industry*" are only briefly referred to under footnote 9 to Article 3: "*Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean (...) material retardation of the establishment of (a domestic) industry (...).*"

The concept of material retardation is closely connected to the definition of the establishment of an industry. Egypt considers that the concept of material retardation should not only apply to new industries but should also concern domestic industries that are facing a "new start" after being reorganised or have never been developed on a commercial scale. In view of the foregoing, Egypt

<sup>11</sup> See TN/RL/W/105 and TN/RL/GEN/40.

proposes to define a domestic industry in the process of establishment as undertaking efforts to achieve reasonable commercial production. The period during which an industry is undertaking efforts to achieve a reasonable commercial production would, for example, include the period during which it is unable to cover its start-up costs.

### **Introduction of factors for the determination of “material retardation”**

As already mentioned above, Egypt regrets the fact that, while Article 3 establishes requirements on the determination of material injury or threat of material injury, it does not do so with respect to the determination of material retardation. Egypt considers that it is important to set forth factors to assist investigating authorities in determining whether there is material retardation.

Egypt believes that the proposed list of factors that investigating authorities may consider should include: (i) capacity utilisation; (ii) delays in the start of reasonable commercial production; and (iii) the amount of domestic production as compared to the size of the domestic market substantial delays in the start of mass production. Egypt is convinced that the examination of the above-mentioned factors provide useful signal to investigating authorities in determining whether the establishment of a domestic industry is materially retarded.

### **Standing requirement in “material retardation” cases**

Under Article 5.4, “*an application shall be considered to have been made ‘by or on behalf of the domestic industry’ if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry*”. The determining factor to assess whether or not domestic producers are sufficiently representative is, thus, their actual volume of production.

For producers in the process of establishment, the volume of production is often meaningless. Indeed, there may have been no production or the existing volume of production may be very small in relation to the planned volume of commercial production or the installed production capacity. Consequently, Egypt proposes to insert a footnote in Article 5.4 to indicate that where the existence of material retardation is alleged, the representativity of the domestic industry shall be assessed using production capacity instead of production as a reference.<sup>12</sup>

### **Proposed Changes in footnote 9**

In view of the foregoing, it is proposed to amend footnote 9 of the Anti-Dumping Agreement as follows:

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 and shall be interpreted in accordance with the provisions of this Article. A domestic industry shall be considered in establishment when it is undertaking efforts to achieve reasonable commercial production.

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<sup>12</sup> Since the issue identified in relation to Article 5.4 is also pertinent to the application of Article 4.1, Egypt considers that the latter will have to be amended in similar terms.

### Proposed Changes in Article 3

It is proposed to add the following Article 3.9:

In making a determination regarding the existence of material retardation, the authorities should consider, *inter alia*, such factors as:

- (i) capacity utilisation;
- (ii) delays in the start of reasonable commercial production; and
- (iii) the amount of domestic production as compared to the size of the domestic market.

### Proposed Changes in Article 5.4

For the reasons mentioned above, it is proposed to amend Article 5.4 as follows:

An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed<sup>13</sup> by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.<sup>14</sup> The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application.<sup>15</sup> However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

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<sup>13</sup> In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

<sup>14</sup> Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

<sup>15</sup> If the existence of threat of material retardation is alleged, the level of support of domestic producers shall be determined on the basis of production capacity.