

PROPOSAL ON MATERIAL RETARDATION

Communication from Egypt

Revision

The following communication, dated 1 June 2006, is being circulated at the request of the Delegation of Egypt.

Egypt greatly benefited from the comments on its proposal (TN/RL/GEN/122) on material retardation that were made at the last meeting of the Negotiating Group on Rules. Egypt continues to consider that it is essential to define the concept of “*material retardation*” in terms similar to the concepts of “*material injury*” and “*threat of material injury*”, in particular, to ensure that developing country Members are in a position to protect their domestic industries against dumping practices that have not resulted in material injury or threat thereof, within the meaning of Article 3 of the Anti-Dumping Agreement.

Taking into account the remarks and suggestions by Members, Egypt has made the following additions/revisions to its earlier proposal on material retardation:

- The definition of the notion of “*establishment of a domestic industry*” is the key to the determination of the type injury suffered by a domestic industry. Egypt continues to consider that the concept of material retardation should not be limited to newly established industries but should also apply to embryonic industries, which have not previously been developed on a commercial scale or to industries that are facing a “new start”. Material retardation must serve to address forms of injury that cannot be properly addressed under the current version of Article 3. In order to strictly define the notion of “domestic industry in the process of establishment”, it is proposed to introduce a reference to the substantial commitment made by the domestic industry to achieve reasonable commercially viable production or sustainable business operations;
- In addition, in order to ensure that material retardation determinations are based on facts, the insertion of a provision similar to that of the first sentence of Article 3.7 is proposed. Investigating authorities shall ensure that a finding of material retardation is not based “*merely on allegation, conjecture or remote possibility*”. In reaching their conclusions, investigating authorities may consider, feasibility studies, investment plans and market studies;
- Finally, with respect to standing determinations in material retardation cases, Egypt proposes to require that existing production capacity be examined for companies which already have completed installing their production equipment and that projected production capacity be considered for companies which have not completed such installation. In line with the provisions of the proposed Article 3.9, projected production capacity could be determined on the basis of, amongst other elements, feasibility studies and investment plans.

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 has made a substantial commitment to achieve reasonable commercially viable production or sustainable business operations.

Proposed Changes in Article 3

It is proposed to add the following Article 3.9:

A determination of material retardation shall be based on facts and not merely on allegation, conjecture or remote possibility. In making a determination regarding the existence of material retardation, the authorities may consider feasibility studies, investment plans or market studies to examine, *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 expressed¹³ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.¹⁴ 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.¹⁵ 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.

¹³ 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.

¹⁴ 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.

¹⁵ If the existence of threat of material retardation is alleged, the level of support of domestic producers shall be determined on the basis of established or projected production capacity.