WORLD TRADE ORGANIZATION

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PRELIMINARY COMMENTS AND QUESTIONS BY THE ARAB REPUBLIC OF EGYPT ON THE CONTRIBUTIONS SUBMITTED IN THE FRAMEWORK OF THE DOHA NEGOTIATIONS ON THE ANTI-DUMPING AGREEMENT AND ON THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

Submission from Egypt

The following communication, dated 20 March 2003, has been received from the Permanent Mission of Egypt.

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1. General submission from Canada (TN/RL/W/47)

Introduction

In its Proposal, Canada is seeking to find ways to strengthen the disciplines so as to achieve greater international convergence of methodologies, greater predictability in the application of the rules and to eliminate undue disruptions to international trade.

As a preliminary remark, Egypt would like to emphasize that the purpose of the ADA is to set a general framework which contains basic principles applicable to all WTO Members. Although a certain convergence may result from the application of the ADA by different investigating authorities, the convergence of the different domestic regulations should not be one of the aims of the ADA. The purpose of the ADA is not to foresee all the aspects of anti-dumping proceedings. It is important that a certain margin of appreciation should be left to investigating authorities.

Egypt would like to submit the following preliminary comments:

(a) Transparency and procedural fairness

Canada proposes to increase convergence among WTO Members in the application of rules concerning transparency and procedural fairness. In Egypt's view, it is essential that, when ensuring transparency and procedural fairness, a right balance is also maintained between the obligations imposed on interested parties and on investigating authorities.

Initiation standards

Canada suggests strengthening the requirements for the initiation of anti-dumping investigations. Egypt believes that such an amendment is not necessary. The object and purpose of the initiation requirements is to establish a balance between the competing interests of the domestic industry in the importing country in securing initiation and of the exporting country in avoiding the

potentially burdensome consequences of an investigation initiated on unmeritorious basis. This purpose is achieved through the current provisions of the ADA which clearly require that investigating authorities initiate an investigation only where substantiated evidence of dumping, material injury and causal link has been provided to them.

(i) Disclosure of information

It is suggested to improve the access of interested parties to information. According to Canada, this might include greater recourse to disclosure of information under protective order with appropriate penalties that discourage the misuse of such information.

Questions: - What is suggested by "*greater recourse to disclosure of information*"?

- How can it be practically ensured that interested parties to which sensitive information has been disclosed will not misuse this information?

(ii) Public hearings

Canada proposes to include within the ADA a public hearing requirement. During the public hearing, interested parties would be able to disclose evidence and present their positions and also given the opportunity to respond to the submissions of other parties. It is Egypt's view that the imposition of additional procedural requirements such as the holding of public hearings is not necessary. The contradictory aspect of the procedure is already achieved through the existing procedural requirements set forth in the ADA. Any further procedural requirements would be unduly burdensome for WTO Members, especially for new users of the Agreement which already have difficulties with the implementation of the current provisions.

(iii) Explanation of determinations and decisions

Canada suggests bolstering the information requirements of Article 12. Canada's suggestion could create difficulties for investigating authorities from developing countries to implement, considering the very short deadline within which findings must be reached under the ADA.

(b) Clarifications:

In addition to the changes mentioned above, Canada proposes to further clarify and simplify rules of the ADA. At the outset, we believe that proposals aimed at clarifying the ADA only achieve their intended goal if they do not create new unnecessary procedural requirements for investigating authorities, especially in developing countries.

(i) Ordinary course of trade

Canada proposes to define, in the light of the experiences of Members, the conditions for determining when sales are not made in the "*ordinary course of trade*" or do not permit a "proper comparison" to be established.

Egypt believes that each investigating authority should retain the possibility of determining on a case-by-case basis when sales are made in the ordinary course of trade or permit a proper comparison. For the reasons mentioned above, the definition of strict criteria would not serve the intended simplification purpose and would impose additional unnecessary obligations on investigating authorities.

(ii) Profitability test

According to Canada, it would be useful to explore the possibility of further expanding the conditions under which sales made at a loss would not be excluded for the purpose of determining the normal value, under Article 2.2.1.

Egypt believes that each investigating authority should retain the possibility of determining on a case-by-case basis when sales are profitable. For the reasons mentioned above, the definition of strict criteria would not serve the intended simplification purpose and would impose additional unnecessary obligations on investigating authorities

(iii) Cost Allocation

The clarification sought by Canada in this respect is aimed at providing an answer to the difficulties encountered by Canadian companies in anti-dumping proceedings concerning specific types of products. Egypt considers that the aim and purpose of the ADA is not to set forth strict rules governing the determination of cost allocation. Cost allocation is to be determined on a case-specific basis.

(iv) Like product

Egypt believes that the definition of the term "*like product*" which is provided in Article 2.6 does not require to be clarified. In this respect, could Canada please explain how products alike in all respects or with closely resembling characteristics can be considered as not competing in the same market.

(v) Domestic industry

It is proposed to define the notion of "*major proportion*" and to strengthen the standing requirements of in the context of the initiation of investigations. The drafters of the ADA deliberately provided that an investigation can be initiated even if it is filed with the support of those domestic producers representing only a minority of the producers of the like product as long as they represent over 50 per cent of those producers expressing their support for or opposition to the petition. Egypt consider that the minimum standing requirement imposed under the ADA guarantees the standing of a complaint while limiting the discretion of investigating authorities. Also, we are of the opinion that a change in the minimum standing requirement would constitute a substantial change to the ADA and would go beyond the mandate of the Doha Declaration.

(vi) Lesser duty

It is proposed to consider appropriate methodologies for the calculation of a duty lesser than the full margin of dumping but adequate to remove the injury to the domestic industry.

The application of the lesser duty rule should be left to the discretion of each member. It should be borne in mind that an obligation to apply. The lesser duty rule would necessarily entail more detailed injury calculations since undercutting/underselling margins would need to be determined for each co-operating exporter. However, Egypt could consider the lesser duty rule under the S & D treatment to developing countries.

(vii) Sunset reviews

Sunset reviews were introduced in the ADA during the Uruguay Round Negotiations in exchange of an explicit limitation of the duration of anti-dumping orders to five years. It is true that

most sunset reviews result in a mechanical continuation of existing measures. The duration of sunset review investigations furthermore is often too long. The current system could be improved by providing, first, that the level of duties can be modified in the context of a sunset review in order to reflect the new dumping/injury determinations and, second, that sunset reviews must be completed by a prescribed time limit (e.g., 12 months). However, Egypt is reluctant to the insertion in the ADA a list of factors that authorities would have to consider in determining whether the expiry of duty is likely to lead to a continuation or recurrence of dumping and injury.

(viii) Reviews

Egypt agrees with Canada that the provisions of the ADA concerning reviews should be clarified in order to enable Members to know precisely which provisions relating to initial investigation also apply to review investigations.

(c) Improvement:

(i) Initiation standards

Egypt does not believe that authorizing swift dispute settlement procedures in the event that a Member considers that an investigation has been initiated in violation of the initiation requirements set forth in the ADA will ensure a better compliance with these requirements. Indeed, authorizing Members to initiate dispute settlement proceedings at an earlier stage will not guarantee stricter compliance with the initiation requirements. In addition, Egypt believes that such a procedure would generally be used as a procedural impediment in order to obstruct duly initiated investigations. Finally, Egypt considers that the Canadian proposal gives rise to the following questions.

Questions: - What does Canada envisage by a *"swift dispute settlement procedure*"? How would such procedures be practically conducted?

- What would be the status of the targeted investigation during the dispute settlement procedure? In terms of deadlines, how would compliance with the timing requirements of the ADA be ensured?

(ii) De minimis margin of dumping

Question: - With regard to *De minimis margin of dumping* , Egypt would like to ask Canada to clarify whether it considers that any change in the *de minimis* level should apply equally to both developed and developing countries?

(iii) Public interest and competition policies

This question is a matter of domestic policy. Egypt believes that the decision to initiate an investigation aimed at determining the national interests at stake should be left to the discretion of each Member who should also remain free to evaluate what weight to give to such domestic considerations in its determination.

(iv) Duty refunds

Egypt does not support Canada's proposal to require Members to refund anti-dumping duties imposed in violation of the ADA. Indeed, as stated by Canada in introduction, such proposal is in contradiction with the WTO Agreements.

(v) Duty imposition

Regardless of the system on the basis of which anti-dumping duties are determined, Egypt considers that the ADA provides clear and predictable rules. Also, contrary to what Canada appears to imply, we do not believe that the imposition of anti-dumping duties on a retrospective basis allows for a more rapid resumption of non-injurious trade. We consider that it is important that Members be allowed to choose their anti-dumping duties determination system since the retrospective system is more burdensome for developing Members to enforce.

2. Replies by the Dumping Friends to questions of contributions TN/RL/W/6 (TN/RL/W/45)

In its contribution TN/RL/W/45, the Dumping Friends reply to comments and questions raised by Australia, the EU and the US on their previous Paper TN/RL/W/6.

(i) Sales in the ordinary course of trade

It is proposed to further clarify Article 2.2.1. and to provide a definition of a "*reasonable period of time*" which would normally cover more than one year. Egypt is not convinced that it is in the interests of individual members to have more detailed rules on the cost-recovery test.

(ii) Constructed value

For the Dumping Friends the discretion left to investigating authorities in the determination of dumping is potentially abusive. As underlined in Australia's comments, Article 2.2.2. ensures a certain discretion to investigating authorities given the myriad of circumstances they may be faced with. Therefore, Egypt considers that the Rules pertaining to the constructed normal value are sufficiently clear and do not require any clarification or improvement.

(iii) Cyclical Markets

The ADA contains in Article 2.4 the requirement to make "*due allowance for any differences which are also demonstrated to affect price comparability*" and may be due to the fact that the high/low seasons in the domestic and export markets are following different cycles. Egypt considers that this provision provides sufficient guidance to address the issue of cyclical markets and that it is not necessary to elaborate a more specific requirement.

(iv) Cumulative assessment of injury

Although Egypt does not consider that it is in the interests of individual members to support the strengthening of the requirements provided for in Article 3.3. of the ADA, we can not agree with Australia that the work of the Negotiating Group on Rules should take as a starting point for the work of the Working Group on Implementation. Therefore, Egypt believes that this issue should be examined in the Ad-hoc group to avoid duplication of work.

(v) Causal relationship between dumping and injury

In view of the comments from Australia and the reply of the Dumping Friends to the question of the EC, Egypt considers that Article 3.5, as interpreted by panels and Appellate Body reports, does not require to be clarified or improved. It is not necessary to amend the ADA in order to insert the decisions of the Dispute Settlement Body concerning the ADA.

Egypt is concerned that the paper is basically proposing to go back to the pre-Tokyo Round situation when it had to be established that dumped imports were the principal cause of injury. It should be noted that this requirement was abandoned during the Tokyo Round negotiations. Egypt considers that the current legal discipline on causation is appropriate and that the above proposal represents an unnecessary change to the Anti-Dumping Agreement rather than a "clarification or improvement" as envisaged under paragraph 28 of the Doha Declaration.

Furthermore, Egypt considers that this new proposal places an extra, unreasonable burden on investigating authorities to measure the extent to which "other causes" of injury have contributed to the material injury suffered by the domestic industry.

(vi) Threat of material injury

The Dumping Friends propose to include a specific requirement for an assessment of all the factors required to the determination of threat of injury. Egypt thinks that further detail regarding factors to be taken into account in order to establish threat of injury is not necessary. As currently drafted, the Agreement includes sufficient guidance on threat of injury. The interpretation of the terms "*foreseen and imminent*" should not be defined but rather be left to the appreciation of investigating authorities on a case-by-case basis.

(vii) Facts available

The situation described in the paper is based on the DSB case USA-hot-rolled steel. The DSB found that the use of "adverse" facts available by the USA was not justified since the Japanese respondent had acted to the best of its ability… However, the use of "neutral" facts available was not condemned since the investigating authority missed essential information for its determinations. In Egypt's view, the current legal discipline is satisfactory and contains the right balance between the rights of respondents and the need for the investigating authority to reach meaningful determinations.

(viii) Lesser duty rule

The application of the lesser duty rule should be left to the discretion of each member. It should be borne in mind that an obligation to apply. The lesser duty rule would necessarily entail more detailed injury calculations since undercutting/underselling margins would need to be determined for each co-operating exporter. However, Egypt could consider the lesser duty rule under the S & D treatment to developing countries.

(ix) Sunset of anti-dumping orders

Sunset reviews were introduced in the WTO Anti-dumping Agreement during the Uruguay Round negotiations in exchange of an explicit limitation of the duration of anti-dumping to five years. It is true that the duration of sunset review investigations is often too long.

The current system could be improved by providing that sunset reviews must be completed by a prescribed time limit (eg. 12 months)

(x) Public interest

Egypt considers that the conduct of a public interest test should remain a matter of domestic policy left to the discretion of each Member. Indeed, the Government of Egypt does not consider that the WTO should oblige Members to conduct public interest investigations. Such investigations aim exclusively at protecting the interests of domestic users and consumers. Each Member must remain

free to decide whether or not the interests of domestic users and consumers should be taken into account in the decision to impose anti-dumping duties.

Furthermore, Egypt considers that the public interest issue in an AD investigation is well served by the provision of article 6.2 of the AD Agreement, which ensures that all interested parties are entitled to the full opportunity for the defense of their interests. This includes the opportunity for all interested parties to meet those parties with adverse interests so that opposing views may be presented and rebuttal arguments offered.

3. Brazil's replies to the questions made by the Australian delegation (TN/RL/W/64)

In this submission, Brazil is replying to the comments and questions raised by Australia (TN/Rl/W/37) on its paper on countervailing measures (TN/Rl/W/19).

(i) Article 11.4 – Standing requirements

Brazil considers that the threshold of domestic support, which is necessary to initiate an investigation, should be increased.

In its initial paper, Brazil suggested that an application should be supported by at least more than 50 per cent of the total domestic production.

In response to the question of Australia concerning the necessity of adjusting the threshold of the domestic industry expressing either support for or opposition to a petition, Brazil replies that its proposal is aimed at addressing situations where an application is supported by a small portion of the domestic industry without a clear manifestation of support of the rest of the domestic industry.

We agree with Australia that the standing requirements for both countervailing duty and dumping investigations should be in harmony. We note that under the AD and SCM Agreements, the minimum threshold are identical and guarantee the standing of the applicant while, at the same time, providing the opportunity for a portion of the domestic to oppose the initiation of an investigation.

We consider that the silence of a portion of the domestic industry in favour or against an application should not be interpreted as an opposition to the initiation of an investigation. Consequently, we believe that Article 11.4 of the SCM should remain unchanged in order to enable a portion of a domestic industry to express either support for or opposition to an application or not take any position.

(ii) Articles 11.9 and 19 – De minimis amount

Despite the findings of the Panel in the DRAMs case, Brazil considers that Articles 11.9 and 19 of the SCM Agreement should be interpreted together and that, as a result, no duties should be collected when the amount of subsidies is *de minimis.*

We agree with Brazil in considering that the SCM Agreement, as well as the AD Agreement, should be interpreted and applied as a whole. Investigating authorities cannot be required to reject an application or terminate an investigation under Article 11.9 and authorised to impose and collect countervailing duties under Article 19.4 where the amount of subsidy is *de minimis.*

(iii) Article 16 – Product under investigation

Australia and Brazil agree that it is important to define the "product under investigation" at the initial stage of an investigation and that this concept is directly linked to the notion of "domestic industry".

We share the opinion of Australia and Brazil in this respect. We consider that the product under investigation must be clearly and precisely defined at the beginning of an investigation. Also, we consider that there is a close link between definition of the product under investigation and the determination of the domestic industry. However, we do not believe that a definition of the concept of "product under investigation" will enable investigating authorities to more precisely determine the scope of an investigation since the definition of the product under investigation is specific to each case and requires the exercise of a certain discretion from the investigating authorities.

(iv) Article 12.7 – Facts available

Brazil notes that the SCM Agreement does not sufficiently elaborate on the notion of "facts available" in Article 12.7, contrary to the AD Agreement.

Again, we agree with Australia and Brazil that the rules pertaining to the use of facts available should be similar, if not identical, in both the AD and SCM Agreement. Also we consider that investigating authorities should exercise great attention when the data provided to them by the parties concerned cannot be used as a basis for a positive determination or in the absence of any information. However, we doubt that the rules of the AD and SCM Agreements regulating this issue can further be clarified to the benefit of interested parties. The decision to consider that "facts available" should be used will always depend directly from the investigating authorities, which will consider, on a case-by-case basis, whether the information provided to them is supported by evidence and/or complete.

4. Submission by Australia concerning the treatment of confidential and non-confidential information under Article 6.5 of ADA (TN/RL/W/44)

Egypt considers that the question of what constitutes confidential and non-confidential information can best be addressed at a domestic level. Indeed, Egypt believes that investigating authorities should retain the authority to determine on a case-by-case basis what information is to be treated on a confidential basis. A definition of what is to be considered as confidential information will not facilitate the difficulties faced by interested parties since investigating authorities will, eventually, have to determine whether the information submitted to them is confidential or not. Also, imposing additional rules on the treatment of confidential treatment will certainly result in imposing further constraints on investigating authorities.

5. Communication of Venezuela and Cuba on non-actionable subsidies (TN/RL/W/41)

This proposal is formulated in the light of paragraph 10-2 of the Doha decision on implementation –related issues and concerns which takes note of the proposal to treat measures implemented by developing countries with a view of achieving legitimate developing goals such as regional growth technology research, development funding production diversification, development and implementation of environmentally sound methods of production as non actionable subsidies.

Having this in mind, Egypt would like to raise the following questions:

1. How is the development dimension of subsidies to be evaluated? Could it be considered that any subsidies with a view of promoting research and development regional growth disadvantage regions and environmental restructuring are aimed at promoting the development?

2. The use of non –actionable subsidies proved in the past to be relatively limited given the stringent criteria laid down in article 8 of the SCM Agreement… Which criteria could be adopted to allow the effective use of the category of non –actionable subsidies?

Conclusion

Egypt Reserves its full right to submit any further comments or questions during the course of the negotiations in the Negotiating Group on Rules.