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Negotiating Group on Rules

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EGYPT'S PAPER CONTAINING COMMENTS ON THE CONTRIBUTIONS SUBMITTED IN THE FRAMEWORK OF THE DOHA NEGOTIATIONS ON THE ANTI-DUMPING AGREEMENT AND ON THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT

The following communication, dated 16 June 2003, has been received from the Permanent Mission of Egypt.

I. INTRODUCTION

In the current paper, Egypt is providing comments on the contributions submitted by the "Friends of AD Negotiations", the US, Argentina and Australian in May 2003 in the framework of the negotiations conducted by the Negotiating Group on Rules on the Anti-Dumping Agreement (referred to hereunder as the "ADA") and on the Agreement on Subsidies and Countervailing Measures (referred to hereunder as "ASCM".

As already mentioned in our comments on previous contributions, the scope of the negotiations to be carried out on the ADA and ASCM as a result of the Doha Declaration is limited to areas where "clarification and improvement" would be required. Also, as a recent anti-dumping user, Egypt believes that it is premature to expose developing countries to increased disciplines and, thus greater scrutiny under the ADA and ASCM.

II. SPECIFIC COMMENTS

Egypt presents below its comments on the following contributions submitted in the context of the negotiations on both the ADA and the ASCM: TN/RL/W/81, TN/RL/W/90, TN/RL/W/91, TN/RL/W/93, TN/RL/W/98 and TN/RL/W/104.

1. Communication by Argentina (TN/RL/W/81)

(a) Sales between related parties

Argentina notes that it would be preferable if criteria were established in order to determine what constitutes an "*association*" and how to establish the "*resale price*". Egypt considers that such a definition is not necessary since the terms identified by Argentina as unclear do not give rise to any interpretation issues. Moreover, it is considered that such criteria would lessen the flexibility for investigating authorities to determine the matter best to fit the particular circumstances of the case.

(b) Normal value

The Communication advocates that the sales relationship on the domestic market between the producer and the exporter ought to be assessed. It further mentions that criteria should be set out for such an assessment, as the Anti-Dumping Agreement currently only provides for this in the context of the link between exporters and importers.

Egypt welcomes the efforts made to clarify this situation, however, it does not consider that this type of relationships raises significant matters and must be addressed by the Negotiating Group on Rules.

(c) Construction of the export price

In this regard, Argentina notes that Articles 2.3 and 2.4 of the Anti-Dumping Agreement do not highlight the considerations that denote whether an export price ought to be considered unreliable. It proposes that such considerations be set out.

Egypt does not agree to such an addition being made in the Anti-Dumping Agreement itself, as it might make its application too rigid and less favourable to developing countries. Indeed, the most effective way of assessing reliability is on a case-by-case basis. It is submitted that investigating authorities are best placed to assess this matter.

(d) Like product

The Communication proposes that criteria be established for determining the "*like product*" in Article 2.6 of the Anti-Dumping Agreement.

Egypt believes that the definition of the term "*like product*" which is provided in Article 2.6 does not required to be clarified. Moreover Egypt is of the view that the definition of "like product" is sufficiently clarified by decisions of the Dispute Settlement Body such as *Japan – Alcoholic Beverages*. The Japan – Alcoholic Beverages panel recalled that previous panels had used different criteria to establish likeness such as the product's properties, nature and quality, and its end-uses; consumers' tastes and habits, which change from country to country and the product's classification in tariff nomenclatures (para 6.21 refers):

Egypt understands the concern of Argentina but would like Argentina to clarify the following: (i) wouldn't a codified non-exhaustive list lead to less flexibility in determining a matter on a case-by-case basis? (ii) What weight will investigating authorities give to the different criteria considering that different approaches could lead to opposing results?

(e) Cumulative imports

The Communication makes reference to Article 3.3 of the Anti-Dumping Agreement and to the fact that guidelines should be established to consider the conditions of competition that might be relevant for the purpose of determining whether a cumulative assessment of the effects of imports is appropriate.

Egypt point that Members should refer, with respect to this matter to the discussions conducted within the framework of the Committee on Anti-Dumping Practices.

(f) Ex officio initiation of an anti-dumping investigation

In this regard, Argentina would like to seek clarification in the form of guidelines as to what could be denoted "*special*" for the purposes of Article 5.6 of the Anti-Dumping Agreement when justifying the *ex officio* initiation of an investigation. Egypt believes that the *ex officio* initiation of anti-dumping investigations is so infrequent that the Negotiating Group should not address this issue.

Egypt understands the concerns of Argentina in this respect but that the Doha mandate does not provide for a systematic analysis and review of the provisions of the Anti-Dumping Agreement.

(g) Confidential information

With regard to Article 6.5 of the Anti-Dumping agreement, Argentina seeks clarification as to the nature and treatment on confidential information. It also seeks to address domestic legislation of countries on the different types of information and conditions for the preparation of non-confidential summaries.

Egypt supports clarity on this issue as it is of seminal importance to companies subject to anti-dumping investigations. However, the fact must remain that Members' themselves are best placed to treat the question of confidentiality and that uniform guidelines may prove difficult to implement for all investigating authorities.

(h) Price undertakings

It is proposed that an outline be provided of the procedure to be followed in cases under Article 8 of the Anti-Dumping Agreement where only some exporters submit price undertakings, and of the treatment applicable to others.

Egypt is the opinion that since price undertakings constitute an alternative to the imposition of duties, investigating authorities should have some discretion in determining whether or not to accept a price undertaking and the conditions for such acceptance.

(i) Reviews

This section deals with a number of points in relation to Articles 9.5, 11.2 and 11.3 of the Anti-Dumping Agreement.

The Communication states that the procedures applicable to reviews are not set out in any detail in the Agreement.

It proposes that an assessment should take place of minimum standards of information for the initiation of reviews and in relation to the elements of recurrence of dumping or injury. Also noted is that consideration ought to be taken of the differences between Articles 11.2 and 11.3.

In relation to Article 11.3 concern is voiced that the rule enounced therein could lead the anti-dumping measure to be imposed for an excessively long period.

Reference is also made to new exporter reviews. Here, Argentina submits that more detailed guidelines should be established on procedural aspects especially in situations were the export price is not known.

Egypt supports further discussion on the above issues, to the extent that clarity is achieved on a fuller understanding of the respective roles of Articles 11.2 and 11.3. Egypt considers that the

provisions of the Anti-Dumping Agreement concerning reviews should be clarified in order to enable Members to know precisely which provisions relating to initial investigation also apply to review investigations. Although it is correct that there is little information on the procedural aspects for new exporter reviews, it is considered premature to issue such guidelines prior to Members having a fuller understanding of the procedure itself as a result of the clarifications required by the Doha Declaration.

(j) Best information available

It is proposed that objective criteria should be set forth for deciding when the investigating authorities consider that the best information available should be used under Annex II to the Anti-Dumping Agreement.

Egypt considers that the fact of the matter is that such objective criteria would be an impediment to case-by-case basis on which such an action should be assessed. The situation described in the paper is based on the US – Hot-rolled steel dispute settlement case. In this case, it was found that the use of "adverse" facts available by the US 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.

Egypt understands the concerns of Argentina but would like to know which criteria would be needed to address the variety of circumstances under which the best facts available would need to be considered?

2. Article 9.4 of the WTO Anti-Dumping Agreement: Dumping margins for each sampled exporter based on facts available - Submission by Australia (TN/RL/W/90)

The submission by Australia concerns Article 9.4 of the WTO Anti-Dumping Agreement which governs the determination of dumping margins in situations were sampling was necessary. The submission is a follow up to previous ones with regard to the issue of the "*all others*" rate.

The background to Australia's claim is that Article 9.4 prohibits use of certain margins in calculating the "*all others*" rate. Article 9.4 applies to known exporters and producers - cooperating parties only, i.e., those that submitted sufficient and appropriate information but which were excluded from the sample. As previously noted by Egypt, the Australian submission points out that the Anti-Dumping Agreement makes no provision for the lacuna of Article 9.4. It is pointed out that the Appellate Body in the *US Hot-Rolled Steel* case, the Appellate Body recognized such a lacuna, but did not prescribe any method to resolve the issue.

The submission invites a need to resolve this issue. It suggests that the uncertainty could be removed by using a provision similar to the one in Article 2(2)(iii) of the Anti-Dumping Agreement, namely that dumping margins should be determined by "*any other reasonable method*" when determining "*all other*" rate. It also provides that the ceiling in Article 9.4 be removed due to the fact that is based on the fact that some of the sampled exporters would have cooperated. The submission notes that such removal would not prejudice the rights of new exporters as they have the right to an accelerated review.

Egypt shares the concerns of Australia with regard to this issue. As explained in the Australian submission, Article 9.4 fails to take into account all the situations which may arise and is therefore incomplete.

3. "Like product" within the meaning of the WTO Anti-Dumping Agreement - Submission by Australia (TN/RL/W/91)

This submission raises a number of questions in relation to the clarification of the term "*like product*". Each of the questions raised at the end of the submission involve some form of change to the Anti-Dumping Agreement, whether by setting out non-exhaustive criteria, replacing the word "*identical*", or providing separate criteria to make a distinction for the purposes of Article 3 of the Anti-Dumping Agreement relating to the determination of dumping and the determination of injury.

Egypt considers that the product under investigation must be clearly and precisely defined at the beginning of an investigation. Also, Egypt is of the opinion that there is a close link between definition of the product under investigation and the determination of the domestic industry. However, Egypt does not believe that s definition of the concept of "product under investigation" will enable investigating authorities to more precisely determine the scope of an investigation is specific to catch case and requires the exercise of a certain discretion from the investigating authorities.

4. Proposal of facts available – Paper from the Friends of Anti-Dumping Negotiations (TN/RL/W/93)

This proposal relates to the issues of "*facts available*". It addresses, in particular, the problem of the arbitrary use of facts available in anti-dumping proceedings. It notes that the basic objective of the facts available is a limited one, namely to balance the requirement to complete the appropriate calculation of the margins of dumping and the requirement to complete an anti-dumping proceeding within the time limit prescribed.

It notes that Article 6.8 and Annex II of the Anti-Dumping Agreement provide inadequate guidance for preventing abuse of "facts available" in anti-dumping investigations.

The proposal suggests provisions with regard to the purpose of using facts available, the situation in which facts available can be applied, and the method of applying facts available.

The proposal notes that "facts available" should only be used as a substitute for missing or rejected information. Accordingly, it is proposed to mention this explicitly in Article 6.8. Also, it is proposed to question the ambiguous concept of "*significant impediment*" and to add the concept of "*refusal of verification*" whereby in such circumstances the facts available doctrine can be applied.

As concerns both application and methodology, changes are envisaged to Annexes II.1, II.3, II.6 and II.7. In the annex II.1, it is proposed to insert a requirement for investigating authorities to make all reasonable efforts to obtain the necessary information from respondents. In Annex II.3, under the proposed amendment, investigating authorities would be required to use all submitted information that is verifiable, germane to the investigation and not proven to be accurate. Under the proposed Annex II.7 investigating authorities would be required to select "facts available" information from a secondary source that appropriately represents the situation of the prevailing state of the industry or relevant market. Furthermore, the Friends of Anti-Dumping Negotiations propose to clarify the concept of cooperative party. In annex II.6, the proposed change would constrain implementing authorities to provide a sufficient explanation of the reasons why the submitted information has been totally or partially rejected and specifically identify the information that the authorities intend to substitute for the rejected information.

Egypt considers that the proposals made with respect to facts available go beyond the scope of Doha Round negotiations. As previously mentioned by Egypt in its paper TN/RL/W/79, the question of "facts available" is one which is best considered on a case-by-case basis by the investigating authorities, which are best placed to examine whether the information provided is

supported by evidence and/or complete. It is also worth reiterating that the DSB has provided some guidance on the legal discipline involved in such guidelines in decisions such as US *Hot-Rolled Steel* In cases of abuse, it is submitted that recourse can always be had to the Dispute Settlement procedure.

5. Identification of additional issues under the Anti-Dumping and Subsidies Agreements – Paper submitted by the United States (TN/RL/W/98)

(a) Interpretation of Domestic Production

The United States submits that Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the Agreement on Subsidies and Countervailing Measures should be amended/clarified in order that Members do not refer to the proportion of the domestic industry which supported the application, and then limit the injury analysis to such firms.

Egypt considers that the definitions provided by the Article 4.1 and 16.1 are adequate to deemed the above practice contrary to WTO law and that it is thus, unnecessary to amend these articles.

(b) Fragmented Industries

The essence of this proposal is that, in certain circumstances, the collection of data for the domestic industry may involve as many as several thousand producers. Accordingly, the United States proposes that Articles 4.1 and 16.1 be clarified to provide for this situation. An example would be reliance by investigating authorities on information on industry groups or governmental statistical authorities.

Egypt supports the proposal of the United States in this respect. Indeed the industries of developing and least-developed Members are generally fragmented and the limited resources available to their investigating authorities do not permit an individual analysis of the situations of the domestic producers concerned.

(c) Causation

Here, the United States suggests that consideration should be afforded as to whether Article 3.5 of the Anti-Dumping Agreement needs to be clarified in order to provide authorities practical guidance in implementing the negative obligation of non-attribution and on how this obligation should relate to the examination of the effect of dumped imports, while ensuring that any affirmative obligations are clearly set out in the Agreement and are workable for authorities to implement.

A previously stated on document number TN/RL/W/70, Egypt considers that Article 3.5 as interpreted by panels and the Appellate Body is sufficiently clear and does not require to be clarified or improved.

(d) Cumulation

The submission makes the point whether Articles 3.3 of the Anti-Dumping Agreement and Article 15.3 of the Anti-Subsidy and Countervailing Measures Agreement should be clarified to expressly provide for the cumulation of imports with subsidized imports so as to assess the effects of the unfair imports on the domestic industry.

Egypt believes that it is not necessary to address this issue in the Anti-Dumping and Subsidies and Countervailing Measures Agreements in order not to affect the balance of both Agreements, as

anti-dumping and countervailing investigations should, when necessary, be conducted in parallel, but not affect one another.

(e) Favoured Exporter Treatment

The comment by the United States is in relation to Article 6.10 of the Anti-Dumping Agreement. The United States wishes to avoid the practice of certain favoured exporters being excluded by name from any investigation and from the coverage of the anti-dumping measure. The submission makes a note that changes might be made to the Anti-Dumping and Anti-Subsidy agreement to reflect this situation.

Egypt would like to express its concerns for cases were exporters are excluded *ab initio* from a proceeding but request the United States to specify what it considers to be favoured exporters.

(f) Exclusion of companies

The proposal of the United States envisages whether Article 9.2 of the ADA and 19.3 of the ASCM should be clarified in relation to ensuring that any examined exporter or producer found not to be dumping, or found not to have received a countervailable subsidy, during an investigation may not be covered by any measure which results from that investigation.

Egypt is of the opinion that under Article 9.2 and 19.3 of the Anti-Dumping and Subsidies and Countervailing Measures Agreements respectively, Members are not entitled to impose measures on producers or exporters which have not been found to be dumping or receiving countervailable subsidies. Members confronted with situations similar to the ones described by the United States in its paper should refer this issue to the Dispute Settlement Body if no mutually acceptable solution can be reached through consultations.

(g) Disclosure of Essential Facts

This proposal here stems from Article 6.9 of the ADA and 12.8 of the ASCM in that after the disclosure of essential facts there is no definition in the agreements as to what constitutes "*sufficient time for the parties to defend their interests*", nor of the "ess*ential facts under consideration which form the basis of the decision whether to apply definitive measures*". The question is posed as to whether the Agreement needs to be amended to clarify such terms.

In this regard, Egypt considers that the flexibility provided for in the Anti-Dumping and Subsidies and Countervailing Measures Agreements must be maintained. Members must remain free to determine in their domestic regulations what constitutes "sufficient time" and the nature of the information disclosed to support their findings. The purpose of Articles 6.9 and 12.8 is not to directly govern the operations of investigating authorities but to guarantee that Members comply with basic procedural requirements. We consider that imposing strict and detailed procedural requirements will affect the character of the Anti-Dumping and Subsidies and Countervailing Measures Agreements and limit the possibility for developing Members to combat injurious dumping and subsidization.

(h) Accrual of interest

The point is made that in Articles 9.3.1 and 9.3.2 of the ADA, no provision is made for repayment of interest on any excess monies collected and held by the importing Member. The United States poses the questions whether the ADA and the ASCM ought to be amended in order to avoid Members obtaining "interest free loans". As stated in the document TN/RL/W/103 that "it would be appropriate to insert a provision guaranteeing the payment of interest on refunded anti-dumping duties in Article 9.3".

6. Agreements on Anti-Dumping Practices and Subsidies and Countervailing Measures: illustrative common issues - Paper by the Friends of Anti-Dumping Negotiations (TN/RL/W/104)

(a) Definition of domestic industry

The communication makes a number of comments in relation to aspects of Article 4.1 of the ADA and Article 16.1 of the ASCM.

The first point that is made is that of a clearer definition of the criteria of the term "major proportion" in the ASCM as proposed for the ADA. For the reasons mentioned with respect to the ADA, we believe that such amendment is not appropriate.

The second point whereby the Friends of Anti-Dumping Negotiations are of the view that the domestic industry shall be taken as a major proportion of total domestic production only where it is not possible for the investigating authorities to obtain information regarding the "*domestic producers as a whole of the like products*" is related to the first point insofar as it envisages a change in the Agreement itself. Moreover, the clarification is unnecessary given the general understanding of what the drafters intended for the Article as set in Egypt's previous papers TN/RL/W/56 and TN/RL/W/79.

The Friends of Anti-Dumping Negotiations raise an interesting point with regard to the discrepancy between the ADA and the ASCM in that Article 16.1 of the latter permits the exclusion of domestic producers who are themselves importers of a like product from other countries. Whilst Egypt should welcome discussion as to the full understanding of such differences, it believes that such a provision should not be inserted in the Anti-Dumping Agreement even though it may be necessary to consider how companies which both import and domestically produce the product concerned should be classified in the framework of an anti-dumping proceeding.

(b) Interested parties

The communication makes a salient point that industrial users and consumer organizations should have an opportunity to have their views taken into consideration in an investigation. It is proposed that such organizations be taken account in the definition of interested parties in Article 6.1 of the ADA and Article 12.9 of the ASCM. It is further noted that this would be with a view to securing such users and organizations the opportunity to fully participate in AD and CVD investigations.

The proposals of the Friends of Anti-Dumping Negotiations could result in a substantial amendment of the Anti-Dumping and Subsidies and Countervailing Measures Agreements. By promoting the increased participation of domestic parties which benefit from dumped imports, the Friends of Anti-Dumping Negotiations indirectly introduce the question of "*national interest*". Egypt does not agree to the extension of the definition of interested parties to domestic users of dumped imports because it considers that the interested parties as defined by the current provisions is sufficient. Moreover, another issue is closely related to the issue of interested party definition, that is assessment of public interest. As stated previously in TN/RL/W/79, Egypt considers that the conduct of public interest test should remain a matter of domestic policy left to the discretion of each member.

(c) Provisional measures

The communication notes that although Articles 7 of the ADA and Article 17 of the ASCM deal with provisional measures, they have differences with regard to the form of the measure and its

duration. The question is posed as to whether there ought to be a uniformity of provisions in relation to the issue of provisional measures.

Egypt welcomes that a fuller understanding be reached on both provisions and the respective distinctions between them.

(d) Refund or reimbursement of the duty paid in excess

In addressing the differences between the ADA and ASCM, the Friends of Anti-Dumping Negotiations notes an important difference with respect to the issue of refund or reimbursement. The ADA provides for a refund of the anti-dumping duties paid in excess while the ASCM only provides that no countervailing duty shall be levied in excess of the amount of subsidy found to exist. Since the level of subsidization is dependent on Members and not on individual undertakings, Egypt believes that the issue of the refund or reimbursement of duties paid in excess is less pertinent in countervailing than in anti-dumping proceedings. The termination or the modification of a subsidy scheme would warrant the initiation of a review. However, Egypt welcomes negotiations aimed at addressing the question of the reimbursement or refund of countervailing duties collected in excess. Furthermore, Egypt supports the insertion of provisions concerning the payment of interests on duties collected in excess.

(e) Retroactivity

The communication makes reference to the fact that there is not greater symmetry between Article 10 of the ADA and Article 20 of the ASCM. It is, in particular, mentioned that the ASCM should be more detailed on the issue of retroactivity, in line with the ADA. Egypt welcomes the opportunity for Members to clarify its understanding of provisions relating to this important subject. This is without prejudice to agreeing to substantive changes subsequently.

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