

**FACTS AVAILABLE**

Communication from Egypt

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

The present proposal aims at providing guidance for investigating authorities that see themselves obliged to base their determinations on facts available because the use of information submitted by interested parties would be unduly difficult.

Several Members have suggested the introduction of new provisions to clarify the concept of facts available as established under Article 6.8 and Annex II of the Anti-Dumping Agreement<sup>1</sup>. The main objective of these proposals was to define in clearer terms the circumstances under which investigating authorities may resort to facts available. While some of the Members appear to be in favour of significant modifications to the present rules in order to restrict the circumstances in which use of facts available may be made, Egypt feels that some of these proposed modifications would undoubtedly jeopardize the functioning of the provisions of Article 6.8 and Annex II. These are essential to the preservation of the effectiveness of the Anti-Dumping Agreement. Indeed, if investigating authorities were not any longer empowered to take decisions on the basis of facts available in situations where insufficient information has been provided, investigating authorities may no longer be in a position to reach fair and accurate findings. In the light of the foregoing, Egypt believes that any modification of the wording of Article 6.8 and/or Annex II should be undertaken with special circumspection.

**Clarification of the terms “*undue difficulties*”**

Egypt is not in favour of any drastic amendments to the rules set forth in Article 6.8 and Annex II but agrees that the clarification of certain specific issues could be beneficial. In particular, Egypt believes that the terms “*undue difficulties*” in paragraph 3 of Annex II, i.e., where investigating authorities have “*undue difficulties*” to use information that was submitted by interested parties, should be clarified. Egypt is of the opinion that further guidance should be provided to investigating authorities in such cases. In this regard, Egypt welcomed the recent proposal (TN/RL/GEN/105) on facts available that was presented by the United States which suggested the introduction of provisions that would clarify the concept of “*undue difficulties*”. Basically, the US proposal provides for two modifications to the current rules: first of all, it is proposed to introduce a new footnote in paragraph 3 of Annex II that declares that the existence of “*undue difficulties*” would be a “*highly fact-specific issue*”. The US moreover proposes to amend paragraph 3 of Annex II so that it makes clear that, in essence, “*undue difficulties*” may also exist where an interested party provides certain information necessary for the determination, while failing to provide other information, also deemed necessary for the determination.

<sup>1</sup> See submissions TN/RL/W/6-26-81-86-93-153 and TN/RL/GEN/20-64-105

Egypt also considers that the determination of the existence of “*undue difficulties*” is a fact-specific issue and that it should be analysed by investigating authorities on a case-by-case basis. The insertion of such a requirement would prevent investigating authorities from invoking the existence of “*undue difficulties*” as a standard justification for disregarding information without providing further explanation on their specific reasons. Building on the proposal by the United States, Egypt would like to add examples of what may be regarded as an undue difficulty. Therefore, Egypt proposes to introduce a second sentence in the proposed footnote 25, which would, in a matter that is consistent with Members’ current understandings and practice, provide situations where the review of information can be regarded as unduly difficult.

### **Proposed changes to Annex II**

In view of the foregoing, it is proposed to amend paragraph 3 of Annex II as follows:

“All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties<sup>25</sup>, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.”.

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<sup>25</sup> Undue difficulties may, for instance, exist where an interested party submits information that must be complemented with other information in order to be used by authorities or is not directly pertinent. It is understood that the question of whether information submitted can be used in the investigation without undue difficulties is a highly fact-specific issue.