

**IDENTIFICATION OF ISSUES UNDER THE ANTI-DUMPING AGREEMENT  
THAT NEED TO BE IMPROVED AND CLARIFIED WITHIN  
THE CURRENT NEGOTIATIONS ON WTO RULES**

Second Submission of the Arab Republic of Egypt

The following communication, dated 15 May 2003, has been received from the Permanent Mission of Egypt.

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This document aims at identifying issues under the Anti-Dumping Agreement that need to be improved and clarified within the current negotiations on WTO rules.

During the Doha Ministerial Conference, Members agreed to “*negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants*”. In order to facilitate the negotiations, Members also agreed that they would first identify “*the provisions, including disciplines on trade distorting practices that they seek to clarify and improve*”, before undertaking to reach an agreement on the necessary amendments to the Anti-Dumping and Subsidies and Countervailing Measures Agreements.

Egypt shares the view that the current negotiations aims at strengthening the current disciplines, preserving the effectiveness of the anti-dumping instrument and its objectives, simplifying and clarifying certain provisions and taking into account the needs of developing countries. Moreover, Egypt agrees with other Members that excessively complex rules are resource intensive for all WTO members, and notes that the Doha mandate calls for a clarification and improvement of the anti-dumping rules, rather than unnecessary changes to the substance and character of the Anti-Dumping Agreement through the introduction of excessively complex and stringent rules. The introduction of such rules will not permit all Members, notably developing country Members, to enforce their rights and obligations under the Anti-Dumping Agreement.

With a view to contributing to the initial phase of the negotiations, Egypt has identified some of the provisions of the Anti-Dumping Agreement that require to be clarified or improved in the context of the current negotiations in its previous submissions (TN/RL/W/55, TN/RL/W/56, TN/RL/W/57, TN/RL/W/79, TN/RL/W/101, TN/RL/W/102 and TN/RL/W/103). In the present submission, Egypt identifies supplementary issues which require to be clarified and improved. With this more comprehensive proposal, Egypt aims at assisting the Negotiating Group in the identification of common issues of interest. Egypt reserves its rights to identify further issues for clarification and improvement and to complement its position in the future.

## 1. Circumvention

During the Uruguay Round negotiations, Members failed to agree on the language of a specific provision concerning the problem of circumvention of anti-dumping measures, despite the general agreement that circumvention had to be addressed in the Anti-Dumping Agreement. In order to facilitate and promote the adoption of a multilaterally agreed set of rules concerning circumvention, Members adopted the Ministerial Decision on Anti-Circumvention, which constitutes an integral part of the Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations. This Decision identifies circumvention as an area that must be governed by uniform rules and refers this matter to the Committee on Anti-Dumping Practices.

The issue of circumvention must be addressed in the Anti-Dumping Agreement, because the circumvention of anti-dumping measures adopted in conformity with the provisions of the Anti-Dumping Agreement affects the effectiveness of the system as a whole. For example, exporters and producers subject to anti-dumping measures must be prevented from relocating the production of the product concerned for the sole purpose of evading the measures. Unless, a definition of circumvention and rules governing the adoption of anti-circumvention measures are adopted, the principles set forth in the Anti-Dumping Agreement will not be fully enforceable. In order to guarantee the basic concepts, principles and effectiveness of the Anti-Dumping Agreement, Egypt considers that it is essential that the issue of circumvention be addressed in the present negotiations and that the incomplete work undertaken during the Uruguay Round be concluded.

It is also essential that principles be adopted in order to set a common framework for the adoption of anti-circumvention measures. At present, most Members which are faced with circumvention of anti-dumping measures have inserted provisions governing the adoption of anti-circumvention measures in their anti-dumping regulations. The definition of circumvention as well as the conditions for the adoption of anti-circumvention measures varies from one Member to another. In the absence of a common framework, confronted to similar circumstances, different investigating authorities may adopt very different findings regarding the existence of circumvention. The absence of commonly agreed principles also makes it impossible for parties found to have been circumventing anti-dumping measures to challenge the decision of investigating authorities before the WTO. It is only by inserting provisions similar to those governing the review of anti-dumping measures that the rights of all interested parties in anti-circumvention proceedings will be guaranteed.

## 2. Lesser duty rule

The last sentence of Article 9.1 of the Anti-Dumping Agreement provides that *"It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry"*. Pursuant to this provision, Members remain free to decide whether or not investigating authorities must apply the lesser duty rule in the determination of the level of adequate anti-dumping measures.

The freedom of choice which is left to Members on this issue is considered by many as necessary, even though certain Members have inserted mandatory lesser duty provisions in their anti-dumping regulations. The possibility for developing Members not to be required to apply a mandatory lesser duty rule is essential. Indeed, the application of the lesser duty rule entails additional obligations that investigating authorities from developing Members cannot meet. If mandatory lesser duty rules were inserted into the Anti-Dumping Agreement, the effectiveness of this Agreement for developing Members would be significantly affected. For developed Members, the issue of the application of the lesser duty rule is less problematical since investigating authorities have the necessary expertise and resources to implement the lesser duty rule. This is evidenced by the fact that a certain number of developed Members have inserted mandatory lesser duty provisions in their anti-dumping regulations.

Given the limited adjustment which would be required from developed Members for the mandatory application of the lesser duty rule and the necessity for developed Members to give special regard to the situation of developing Members, Egypt supports the mandatory application of the lesser duty rule by developed Members in anti-dumping proceedings concerning developing Members. Egypt considers that the mandatory application of the lesser duty rules by developed Members is one of the improvements which can be brought to the Anti-Dumping Agreement to render effective the provisions of Article 15. The application of the lesser duty rule in the determination of the level of anti-dumping measures imposed on imports from developing Members will guarantee these imports a special and differential treatment where the injury margin is lesser than the dumping margin.

### **3. Sunset reviews**

During the Uruguay Round, as a counterbalance to the general rule of Article 11.3 of the Anti-Dumping Agreement which provides for the termination of anti-dumping measures five years after their imposition, Members agreed to the insertion of a provision concerning sunset reviews. Pursuant to this provision, prior to the set date of expiry of anti-dumping measures, investigating authorities can initiate and conduct a review in order to determine whether the expiry of the measures would be likely to lead to continuation or recurrence of dumping and injury. The measures in force can be renewed if investigating authorities find that their termination could lead to a continuation of dumping and injury.

The balance between the limitation of anti-dumping measures, which are by nature temporary, and the need to prevent the continuation of injurious dumping is considered necessary. The difficulty does not lie with the principle but with the implementation of the rules set forth in Article 11.3. A number of Members which were unsatisfied with the almost automatic renewal of certain anti-dumping measures prior to the entry into force of the Anti-Dumping Agreement have noted that, despite the insertion of Article 11.3, most sunset reviews have resulted in a mechanical continuation of existing measures. The initiation of sunset reviews and the continued imposition of no longer warranted measures are particularly detrimental to the trade of developing Members which can only rely on a limited number of products. Consequently, it is necessary for the Negotiating Group to reconsider Article 11.3.

Egypt considers that, while it is indispensable to maintain the balance provided for in Article 11.3, Members should ensure that procedural requirements prevent the abuse of sunset review investigations. The absence of prescribed time limits for the completion of sunset review investigations and the continued imposition of measures previously in force during sunset review investigations does not encourage investigating authorities to complete their investigations within time limits similar to those applicable to other reviews. Egypt believes that the inherent trade distortion resulting from sunset reviews could be reduced if the 12-month time limit set forth in Article 11.4 would also apply to sunset reviews.

In addition, Egypt believes that, in the framework of the current negotiations, Members should modify the actions that may be taken as a result of sunset reviews. At present, under Article 11.3, Members only have the possibility of continuing or terminating anti-dumping measures imposed. The application of Article 11.3 can lead to absurd situations where the continuation or recurrence of injurious dumping is likely but where it has been shown that the adequate level to counter injurious dumping has changed. Egypt considers that the "adequate" character of anti-dumping measures stated in Article 9.1 can only be guaranteed under Article 11.3 if Members are authorised to amend the level of the measures imposed following sunset reviews which concluded that injurious dumping was likely to continue or recur.

#### 4. Newcomer reviews

Article 9.5 of the Anti-Dumping Agreement provides the possibility for exporters or producers in a country subject to anti-dumping measures, who have not exported the product concerned during the period of investigation and who are not related to producers and exporters subject to anti-dumping measures, to request the initiation of, so-called newcomer or new shipper reviews. Newcomer reviews are carried out on an accelerated basis by investigating authorities and are aimed at determining an individual anti-dumping margin and, thus, an individual measure for exporters and producers who were previously subject to “all other” dumping measures.

Even though Article 9.5 states that it is necessary that “*exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product*”, Egypt considers that Article 9.5 can be used by undertakings subject to measures to circumvent these measures. Exporters or producers can, indirectly establish a new entity to produce and export the product concerned at abnormally high prices, and then request the initiation of a newcomer review. As a result of the high prices, no dumping will be found by the investigating authorities and the producers and exporters subject to measures will redirect their production and exports through the newly established entity which is not subject to any anti-dumping measures.

Egypt believes that it is necessary to improve Article 9.5 in order to prevent its use by exporters and producers subject to anti-dumping measures as a circumventing instrument. As stated above, as a developing Member, Egypt is particularly concerned with the negative consequences of circumvention of anti-dumping measures on its industries. Egypt considers that the provisions of Article 9.5 can be amended to ensure that investigating authorities in developing Members are not faced with abusive uses of Article 9.5 and that the basic principles of the Anti-Dumping Agreement are effectively guaranteed. Egypt is of the opinion that, by examining, among others elements, the circumstances in which the initiation of newcomer reviews can be requested, the newcomer review procedure and duration and the measures applicable to new exporters or producers while newcomer reviews are carried out, the Negotiating Group could improve Article 9.5. In this regard, it is important to bear in mind that circumvention negatively affects both injured domestic industries and exporters and producers subject to anti-dumping measures.

#### 5. Threat of material injury

Footnote 9 to the Anti-Dumping Agreement states that “*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 such an industry*”. The three different aspects of injury have been resorted to differently by investigating authorities. While material injury is almost always invoked in anti-dumping proceedings, threat of material injury is rarely made use of and material retardation hardly ever referred to. Egypt considers that this is significant of the use of the anti-dumping instrument by traditional users which are, to a great extent, developed Members. While developing Members are also concerned by dumping causing material injury to their domestic industries, the limited level of development of these industries calls for more attention from these Members. Incipient and small industries with minor domestic markets are more rapidly and severely affected by dumped imports than well established industries with large domestic markets. If temporary protective measures are not adopted promptly, industries of developing Members can quickly disappear.

Egypt, which has addressed the issue of material retardation in its previous submission, wishes to draw the attention of all Members on the necessity of specifying in further detail the conditions for determining the existence of a threat of material injury. Article 3.7 lists some of the elements investigating authorities should consider in determining the existence of a threat of material injury. Egypt is of the view that subheading (ii) needs to be clarified. This subheading states that

investigating authorities should consider “*sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports*”. Egypt is concerned with the identification of other export markets and the availability of data concerning these markets. Egypt considers that the elements listed under subheading (ii) are not sufficiently clear to allow investigating authorities to conduct a meaningful analysis. Also, Egypt is concerned with the wording of subheading (iv) which refers “*inventories of the product being investigated*”. In the absence of a precise definition for the term inventory, Egypt is of the opinion that it is difficult for investigating authorities to reach a conclusion on the basis of the level of inventory. Moreover, producers and exporters of a product can have production facilities and stocks located worldwide.

Egypt considers that Article 3.7 is insufficient to assist investigating authorities, particularly of developing Members, in determining the existence of a threat of material injury. We believe that in order to clarify the Anti-Dumping Agreement, the Negotiating Group should aim at detailing the factors that must be considered when determining whether or not protective actions are necessary to prevent material injury from occurring. In particular, Egypt is of the opinion that it is essential to identify the potential impact of further dumped imports on the domestic industry concerned in a manner similar to Article 3.4.

## **6. Refund**

The refund of anti-dumping duties collected in excess of the anti-dumping duties determined under Article 9.2 of the Anti-Dumping Agreement is governed by Article 9.3. Article 9.3 provides for the reimbursement of anti-dumping duties collected where it can be shown that the margin or assessment on the basis of which the duties were paid, has been eliminated or reduced to a level which is below the level of the applied duties. The refund amounts to the difference between the duties paid and the final margin or assessment of dumping.

Public refund procedures are common and usually concern the repayment of fees or duties collected in excess of what should normally have been due. As compensation to parties which have incurred undue costs, public authorities generally refund the fees or duties collected in excess as well as pay an interest on these. In order to preserve the interests of exporters and producers which have paid excessive anti-dumping duties, Egypt considers that it would be appropriate to insert a provision guaranteeing the payment of interest on refunded anti-dumping duties in Article 9.3.

## **7. All Other Rates**

Egypt believes that Article 9.4 of the Anti-Dumping Agreements needs to be improved in order to ensure that the “all-other” rate can be calculated using an appropriate and reasonable method in circumstances where exporters and producers investigated have been found to cooperate insufficiently. Egypt supports the view that, in certain circumstances, it would be appropriate to take into account dumping margins that are based on constructed normal values for the determination of the “all-others” rate. Experience has shown that this may reveal necessary in situations where a limited amount of facts available was used during the investigation in the anti-dumping margin determination.

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