

WORLD TRADE ORGANIZATION

RESTRICTED

G/ADP/AHG/W/4

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(97-1227)

**Committee on Anti-Dumping Practices
Ad Hoc Group on Implementation**

Original: Spanish

TOPICS 1, 4, 7 AND OTHERS*

Proposals by Venezuela

The following communication, dated 12 March 1997, has been received from the Permanent Mission of Venezuela.

1. Treatment of confidential information

With respect to the treatment of confidential information, we think that it is necessary to clarify the wording of Article 6.5 of the Anti-Dumping Agreement, since it lends itself to various interpretations. According to this Article, "Any information which is *by nature* confidential ... or which is ***provided on a confidential basis*** by ***parties to an investigation*** shall, upon good cause shown, be treated as such by the authorities". (Italics and bold added.)

As this partially quoted provision stands, the competent administrative authorities could be faced with two types of information for which confidentiality is requested: (i) information which is **by nature** confidential (e.g., many experts agree that information on costs is by nature confidential); and (ii) information which **is provided on a confidential basis by parties to an investigation**, i.e., information that is not confidential by nature but whose disclosure, for reasons of trade secrecy or strategy, could be of significant competitive advantage to the competitors of the party supplying the information or to a third party. A number of questions arise when the Agreement stipulates that the request for confidentiality should show good cause.

The need for the applicant to show good cause for confidential treatment under the said provision could be interpreted as arising only in the case of information which by nature, or *per se*, is not confidential. To that end, we propose that a clearer idea be given of what is considered to be information which is by nature confidential, by providing an illustrative, non-exhaustive list, to serve as a reference for the competent authorities, of the information that could be considered confidential **by nature**. In the case of requests for confidential treatment of information which is not confidential by nature, on the other hand, the applicant would have to show good cause as stipulated in the Agreement.

*See document G/ADP/W/401 for descriptions of the numbered topics. The additional topics are documentation of the application for initiation of an investigation; notice of and access to the information of an A-D investigation; and review for new exporters.

2. Initiation of investigations *ex officio* (special circumstances)

The term "special circumstances" used in Article 5.6 of the Anti-Dumping Agreement is rather vague and could lead to conflicts between Member countries when an *ex officio* investigation is initiated.

In our view, consideration could be given, in connection with the initiation of investigations without prior application, to circumstances in which the domestic industry affected is highly fragmented and its components are unable to join forces in order to submit an application or to participate as active complainants in an investigation, as well as to domestic producers with little or nothing in the way of economic resources.

Moreover, it should be made clear whether initiation of an investigation *ex officio* also applies to applications made by other government agencies to the competent authority, for example if the Ministry of Agriculture requests the initiation of an investigation on imports of agricultural products.

3. Informing the interested parties of the "essential facts" before the final determination

An examination of Article 6.9 of the Anti-Dumping Agreement, concerning the obligation to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures, reveals a need to clarify certain basic elements.

Firstly, the Article does not specify the nature of the information to be supplied to the interested parties, an omission which could result in the supply of incomplete information by the competent authority and could have an impact on the parties' defence. We think that the information or facts to be included in the notification in question should be specified in detail.

Secondly, we have observed that the time-limit within which the competent authorities must inform the interested parties of the essential facts under consideration for the decision is quite vague and unclear ("... in sufficient time ..."). Since the Agreement does not provide for any specific time-limit in this connection, the competent authorities are free to interpret the obligation as they see fit, which in many cases would limit the interested parties' possibility to defend themselves. It is therefore necessary to specify, on the one hand, the moment in the proceedings at which the authorities are required to inform the interested parties of the essential facts (for example, when the authorities arrive at an affirmative or negative final determination) and, on the other hand, the time-period available to the interested parties to defend their interests (for example, 30 days following the notification of the essential facts).

Finally, it is important to stress that the essential facts referred to in Article 6.9 must in no case prejudice the final decision about to be adopted by the competent authorities. Consequently, we think that it is essential that the reports of the results should be limited to a brief description of the procedure carried out and the methodology used by the competent authority without mentioning the determination the latter has reached.

4. Documentation of the application for initiation of an investigation

With respect to the documentation to be included in applications for the initiation of an investigation as laid down in Article 5.2 of the Anti-Dumping Agreement, a certain lack of precision is to be seen. The Article expressly stipulates that "Simple assertion, unsubstantiated by ***relevant evidence***, cannot be sufficient to meet the requirements of this paragraph. The application shall contain such information as is ***reasonably available*** to the applicant on the following ..." (Italics and bold added.) In other words, according to the Article the evidence presented by the interested party must be *relevant* and the information contained in the application *reasonably available to the applicant*.

Obviously, the sense and the meaning of this legal provision is far from clear. The expression "relevant evidence" which is "reasonably available to the applicant" is quite vague and could be interpreted in different ways by Member countries.

5. Notice of and access to information in an anti-dumping investigation

Article 6.1.3 of the Anti-Dumping Agreement stipulates that the competent administrative authorities shall *provide* the full text of the application to the exporters involved in the anti-dumping investigation in question and to the authorities of the exporting country.

In fact, this provision is not at all clear, since it is possible to interpret the term "shall provide" (i) in the sense of supplying the entire text of the application, i.e., all of the information, evidence, documents and annexes that the applicants have submitted to the competent authorities, which would slow down the investigation; and (ii) in the sense that the parties expressly mentioned in the said article would have full access to the text of the application submitted by the interested parties as soon as the anti-dumping investigation has been initiated.

In the interests of uniformity of criteria, we think that it would be wise to clarify the meaning and scope of the obligation in Article 6.1.3 of the Anti-Dumping Agreement, so as to avoid possible differences of interpretation.

6. Review for new exporters

Article 9.5 of the Anti-Dumping Agreement suggests that the administrative authorities must *promptly* carry out a review for exporters affected by an anti-dumping duty who do not have an individual rate because they did not carry out any exports during the period of the investigation (review for new exporters). This review is carried out on condition that the exporters in question can show that they are not related to any of the suppliers who are subject to definitive anti-dumping duties.

The above-mentioned provision also stipulates that review for new exporters shall be initiated and carried out on an *accelerated basis*, compared to normal duty assessment and review proceedings in the importing Member.

In addition, this Article of the Anti-Dumping Agreement is silent, in this particular area, as to the minimum time-period that the competent authorities should allow, once the anti-dumping investigation has been concluded, to receive and accept requests relating to reviews for new exporters.

The competent administrative authorities clearly have considerable leeway in applying the provisions of Article 9.5 of the Anti-Dumping Agreement. In other words, the Article is open to various conflicting interpretations, and "new exporters" wishing to enter a particular market would face a definite lack of legal safety, and so be deterred from carrying out their wish to sell their products on that market.

We think it appropriate to identify, define and clarify the above instances of lack of precision in the Agreement.