

WORLD TRADE ORGANIZATION

RESTRICTED

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

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TOPIC 4*

Proposal by New Zealand

The following communication, dated 24 March 1997, has been received from the Permanent Mission of New Zealand.

“What might constitute “special circumstances” in Article 5.6 of the Agreement?”

Article 5.1 of the Agreement provides that “an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry” except as provided for in paragraph 6. Article 5.6 provides that if, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry, then they shall proceed only if they have sufficient evidence of dumping injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

Articles 5.2 to 5.5 of the Agreement set out the obligations of the investigating authority relating to the initiation of an investigation. Paragraph 2 outlines the evidence to be included in a written application with regard to dumping, injury and causal link; paragraph 3 requires an examination of the accuracy and adequacy of the evidence provided; paragraph 4 sets out the test for determining whether an application has been made by or on behalf of an industry; and paragraph 5 deals with publicizing of the application.

The intention of Article 5.6 appears to be that an authority can decide to initiate an investigation without having received a written application by or on behalf of a domestic industry. However the paragraph provides the caveat that there must be:

- special circumstances; and
- sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

Given that “special circumstances” is not further defined, the purpose of this paper is to provide a basis for discussion about the conditions which might apply to the use of this provision.

*See document G/ADP/W/401 for descriptions of the numbered topics.

Definition of “Special Circumstances”

In the absence of any definition in the Agreement, the plain meaning of the words according to a dictionary definition can be a useful starting point.

Special, as used in Article 5.6 can be defined in three ways according to the Concise Oxford Dictionary. It can be “of a particular kind, peculiar, not general; for a particular purpose; or especial, exceptional in amount, degree, intensity, etc”.

Circumstance is somewhat more straightforward being “time, place, manner, cause, occasion, etc., surroundings, of an act or event; external conditions affecting or that might affect action”.

A New Zealand Court has defined special circumstances as “facts peculiar to the case setting it apart from others. Special means something less than extraordinary or unique...”

What Conditions Could Lead to the Use of Article 5.6?

In considering the conditions which might permit the use of Article 5.6, it is necessary to analyse the meaning of the text. In effect, it means that authorities may initiate an investigation without having received a written application by or on behalf of an industry, but does require that initiation be based on the sufficiency of the evidence required by paragraph 2. The consequences would appear to be first, that an industry need not make a written application as such; and second, that the requirement that the application be made by or on behalf of a domestic industry is excused, and in particular that the determination required by paragraph 4 of Article 5 need not be made. In effect, therefore, the issue becomes one of deciding upon the exceptional circumstances which would justify the authorities waiving the requirement that a written application be made by or on behalf of an industry and that a minimum level of support by the industry be determined.

Exceptional or special circumstances relating to the lodging of a written application or to the determination that an application has been made by or behalf of an industry could arise in relation to:

- Difficulties in ascertaining the level of support for an application, e.g. because there are a large number of producers in an industry;
- Difficulties relating to the availability of information to an industry, e.g. the industry itself might not have access to information;
- Difficulties relating to the lodging of an application by an industry, e.g. because producers have concerns about the commercial consequences of making an application;

The situation where there is a fragmented industry involving a large number of producers is covered by Footnote 13, which provides for the determination of support by use of statistically valid sampling methods. This would suggest that a fragmented industry or a large number of producers cannot be regarded as a special circumstance because it has been envisaged and dealt with through the standard process provided for in Article 5.4. There may be other circumstances, such as difficulties in identifying or contacting producers, which make it difficult to ascertain levels of support, but the extent to which they could be regarded as being exceptional rather than, say, time-consuming, needs to be carefully considered. Another possible area of difficulty arises with the identification of a like product produced by a domestic industry, and whether, for example, Article 5.6 might be used where an affected industry’s product is processed into a like product (although it is not possible to take action consistent with the Agreement where dumping of a product is not causing injury to producers of like goods).

In some cases, an industry could argue that it does not have information “reasonably available” to it in terms of Article 5.2, which would meet the requirements for initiation under Article 5.1. However, information available to government agencies might be sufficient to meet those requirements. This turns on what might be regarded as “reasonably available”, and whether in the absence of information which is reasonably available to an applicant industry it is appropriate for the investigating authorities or some other agency to assemble and consider the information provided for in Article 5.2.

Concern about commercial consequences of an application can arise, for example in a small economy where importers are also significant customers of a domestic industry, and lodging an application could lead these importers to threaten not to purchase product from the industry. In such a circumstance, it may be appropriate to safeguard the position of the domestic industry by using Article 5.6. However, given that it is still necessary to base a decision to initiate an investigation on the information referred to in Article 5.2, which includes information relating to producers, it is unlikely that such an approach would effectively insulate the producers from any action by their customers. In any event, the investigating authorities should still ascertain that an application has the necessary degree of support in terms of Article 5.4, and the issue may be more one of maintaining confidentiality of information under Article 6.5 than applying the exception of Article 5.6.

Concerns about confidentiality of information between producers in an industry could mean that an administering authority may have to, in effect, act as the assembly point for information from a number of individual producers, which taken together makes up the application. Technically, this would mean that an application *per se* has not been made by or on behalf of an industry. However, for the reasons outlined above, this does not mean that the requirement to determine standing can be ignored.

There will be other possible scenarios for what might constitute “special circumstances” in terms of Article 5.6, and the question arises whether there might be some consistent approach to the consideration of such scenarios. One such approach could be to consider whether or not there are other provisions in the agreement which could deal with the situation, such as the specific footnote reference to fragmented industries, or the confidentiality provisions of Article 6 referred to above. The elaboration of possible guidelines in response to this question would be a useful area for discussion by the Ad Hoc Group.