

**TREATMENT OF CONFIDENTIAL AND NON-CONFIDENTIAL INFORMATION
UNDER ARTICLE 6.5 OF THE WTO ANTI-DUMPING AGREEMENT**

Submission by Australia

As Australia noted in its comments paper in response to the United States' paper (document TN/RL/W/35) on topics for further consideration relating to investigatory procedures in anti-dumping and countervailing duty investigations, Australia considers that the issue of the treatment of confidential and non-confidential information merits examination by the Negotiating Group on Rules. While references throughout this paper refer to the WTO Anti-Dumping Agreement, comments made are equally applicable to the corresponding provisions in the WTO Agreement on Subsidies and Countervailing Measures.

At present Article 6.5 of the WTO Anti-Dumping Agreement (ADA) provides that information which is of itself confidential or which is provided on a confidential basis be treated as such. In relation to the latter, the question of whether the investigating authorities should treat the information as confidential is dependent on good cause being shown. Australia notes the *Guatemala – Cement II* Panel (WT/DS156/R, 24 October 2000) found that the requirement to show "good cause" applied to both (1) "information which is by nature confidential" and (2) information "which is provided on a confidential basis". The Panel considered that this "good cause" requirement is imposed on the interested party submitting the confidential information at issue. At footnote 856 of its Report, the Panel noted that it had made no findings as to how "good cause" may be shown in respect of information which is "by nature" confidential.

Under ADA Article 6.5.1 interested parties providing confidential information are required to furnish a non-confidential summary. These summaries are to permit a reasonable understanding of the substance of the information submitted in confidence. ADA Article 6.5.2 provides that if a request for confidentiality is not warranted and the supplier of the information is unwilling to make the information public or authorize its disclosure in summary form, authorities may disregard such information unless it can be demonstrated to its satisfaction that the information is correct.

Australian experience

In relation to the lodgement of a dumping application, the Australian Customs Service (ACS) requires that information concerning material injury be set out by reference to indexing in the non-confidential version to assist interested parties.

ACS' experience is that, once an investigation has been initiated, interested parties often make claims of confidentiality for information which would not ordinarily be considered to be confidential. This situation could arise because of a genuine misunderstanding or to frustrate the access to non-confidential information by making unfounded claims for confidentiality. One possible reason for confusion is that there are two bases for claiming confidential information under the ADA: information is confidential by nature or information where confidentiality is claimed. In the latter situation, parties may feel that it is up to them to simply claim information is confidential and feel

compelled to make such claims, even though the information is not in fact confidential. Although such a claim should only be made upon “good cause” being shown, there is no meaning given as to what constitutes “good cause” or how good cause may be shown.

The other issue is how promptly a non-confidential summary should be placed on the public file. Ideally a non-confidential summary should be placed on the public file at the same time as the investigating authorities receive the confidential version. At present the ADA is silent on this question. This is compounded by the fact that it is the responsibility of the party providing the information to supply the non-confidential summary. If that party wants to delay a non-confidential summary on the public file, then little can be done at present.

If a non-confidential summary is not provided, the investigating authorities “may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct” (Article 6.5.2). Information from “appropriate” sources is not defined. One example could be where a verification visit to one exporter validates some of the information from the other exporter who has incorrectly claimed confidentiality.

Background

The question of non-confidential information was raised in the Ad Hoc Group on Implementation in the Committee on Anti-Dumping Practices. A synthesis of the discussion is set out at G/ADP/AHG/W/65.

It would be useful to have a definition of what constitutes “confidential” information. Although there are two tests for what is confidential, i.e. information that is by its nature confidential and information, which is provided on a confidential basis, there seems to be some acknowledgement that there may not be a need for a distinction between the two. It has been suggested within the Ad Hoc Group on Implementation that an illustrative list be prepared setting out what information could be considered confidential.¹ Information could be considered to be confidential if it is not in the public domain and if its disclosure would be likely *inter alia*:

- To be of significant competitive advantage to a competitor, e.g. production costs distribution costs, upstream and downstream pricing data, profit or loss margins, certain conditions of sale, business sales statistics, research/invention data, technical designs, business or trade secrets concerning the nature of a product or production process, specification of components, capacity data, investment data, inventory data, performance/ profitability data, details of margins of dumping and adjustments calculated by investigating authorities;
- To have a significant adverse effect upon the party who submitted the information, or the party from whom the information was acquired by the party who submitted the information, e.g. customer and supplier lists;
- To have significant adverse effect upon any party to whom the information relates, e.g. statistical/ market share information;
- To prejudice the commercial position of a person who supplied or who is the subject of the information, e.g. names of individual companies requesting the initiation of an investigation, who may be subject to commercial retaliation by customers who are also importers;

¹ The list provided is drawn from G/ADP/AHG/W/65. However, we suggest that “certain conditions of sale” (first dot point) would not relate to those commonly available.

- To prejudice the security or defence of a Member, or the international relations of a Member;
- To prejudice the entrusting of information to the authorities of a Member;
- To prejudice the supply of similar information or information from the same source;
- To disclose a trade secret or
- To effect the maintenance of legal privilege.

It also seems to be generally accepted that information that is in the public domain or, in the case of material injury, is in narrative form or is based on widely available company information, should be presumed non-confidential and therefore could not, except in exceptional cases, be considered as confidential.

In other words, an alternative approach may therefore be to identify matters, a definition, or type of information, which would constitute, or be considered to be, “non-confidential” information.

No guidance is given in the ADA as to what is an acceptable means for providing a non-confidential summary. In most instances, it may be too difficult to give meaningful guidance. However in relation to the question of material injury, it may be useful to specify that such information can be expressed in a non-confidential form through the use of numerical indices or the use of ranges. For example, in Australia’s anti-dumping applications, the investigating authorities request that non-confidential summaries be provided on claims for material injury using indexation.

Questions for consideration

1. Should the distinction be made in ADA Article 6.5 between information which is considered to be by nature confidential and information which is provided on a confidential basis, or should the claim be for information which is confidential?
2. Could the above illustrative list be used to assist in giving guidance to authorities on what is confidential information?
3. Should there be a statement in ADA Article 6.5 that information that is in the public domain cannot be considered to be confidential?
4. What is meant by the term “upon good cause being shown”?
5. Should a time limit be specified for a party to supply a non-confidential summary?
6. What is meant by “demonstrated to their satisfaction from appropriate sources that the information is correct” in ADA Article 6.5.2?
7. Should specific consideration be given in the case of claims of material injury for the use of indices or ranges as being the appropriate/ preferred method of providing a non-confidential summary of such information?
8. Should this be an option for all numeric data, for example responses provided in exporter questionnaires? In this regard it would be acknowledged that it would be too burdensome for an exporter to provide a non-confidential questionnaire in relation to all costing information.

However it may be possible for this information to be provided at a more general level e.g. labour, overheads, and raw materials.
