

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

**SUMMARY REPORT OF THE MEETING OF THE
AD HOC GROUP ON IMPLEMENTATION
OF THE COMMITTEE ON ANTI-DUMPING PRACTICES
27-28 APRIL 1998**

Note by the Secretariat

1. The Ad Hoc Group on Implementation ("the Group") held its third substantive discussions concerning the topics referred to it by the Committee on Anti-Dumping Practices ("the Committee")¹. The proposed agenda for the meeting, which had been circulated in document WTO/AIR/828, dated 17 April 1998, was adopted.
2. The Chairman (Mr. K. Sukhum, Thailand) reminded the Group that the discussions would follow the order in which papers were received, as set forth in the agenda. Members who had submitted papers on a topic would be asked to briefly present their views, and the floor would then be opened for general discussion. The Chairman also noted that the Secretariat had prepared a list of participants at the last meeting of the Group, in October 1997, and requested that delegates, in filling out the attendance forms, indicate their e-mail or other contact address, in order that a list of participants at this meeting could be prepared and circulated, including that information.
3. The first topic on the agenda was topic number 1, Article 6.5, "Treatment of Confidential Information". Members discussed the proposed illustrative list of information deemed confidential, and described their individual practices in deciding whether information should be treated as confidential and handling confidential information. It was noted that while an illustrative list would be useful, it could not be determinative. Information treated as confidential in one instance might appropriately not be deemed as such in another, for instance if the justification for confidential treatment were inadequate, or the level of aggregation of the information were different.
4. Some Members observed that some information is simply confidential by nature, and therefore no justification is required for confidential treatment. Different conceptual bases for justifying confidential treatment were discussed, including (a) the concept of substantial harm to the competitive position of the supplier if the information were to be released, (b) whether release of the information would adversely affect business or commercial interests of the supplier. It was observed that there was substantial subjectivity in these concepts. The fundamental concern should be to balance interests of confidentiality and access.
5. Questions were raised about Members' practice in a case where information is deemed confidential and susceptible of being summarized in non-confidential form, but the supplier of the information simply refuses to provide a confidential summary. It was noted that the Agreement does not provide a clear mechanism for dealing with this situation. One Member's practice in such a case is

¹The list of topics referred to the Ad Hoc Group was circulated to Members in document G/ADP/W/401.

to disregard the information, or if it is determined to be correct, use the information. Another Member in such a case would, if it rejected information because a request for confidential treatment was deemed insufficient, or for lack of a non-confidential summary, use other information available in the case file. It was noted that this was an area of some concern in light of the provisions of Article 6.5.2. For instance, assume an authority granted confidential treatment, but no non-confidential summary was provided, and the authority was aware from other sources that the information was correct – would it be obligated to consider that information? Some Members observed that in such a case, the information would nonetheless be disregarded, unless and until a non-confidential summary was provided. Other Members suggested that, in view of the language of the provision, if the condition (the correctness of the information in question) was satisfied, the discretion to reject it disappeared. It was also noted that to reject and not consider information known to be correct could cause problems in the context of domestic judicial review. However, it was observed that if the information was rejected, it would not be subject to verification. Therefore it was unlikely that the authorities could ever be satisfied that the information was nonetheless correct, and the issue simply did not arise. One Member observed that the investigating authorities themselves could disclose a non-confidential summary of the information if it was relied upon in making a decision.

6. Following the discussions, the Group agreed to ask Members to submit, if they have not already done so, a list of information considered confidential by nature. The Group also agreed to ask Members to consider, and submit their views on, the following procedural questions posed by the Chairman, including information on their own practice: (a) How should confidential information be submitted to the investigating authorities? (b) How should the non-confidential version of confidential information be submitted? (c) What are the criteria applied by the investigation authorities in deciding whether to accept or reject a request for confidential treatment? (d) How is confidential information handled by the authority? (e) In the event that a Member provides access to confidential information, how should the confidential information be accessed?

7. The Group then turned to the next topic on the agenda, topic number 2, the period of data collection. A number of Members expressed broad agreement with Secretariat's Draft Recommendation. Members noted that a minimum rule was needed, but that any agreement by the Group should not affect existing legislation that differed. Several Members reported on the specific time periods that are applicable under their own domestic practice. In general, Members stressed the need for transparency in determining and explaining the period of investigation in any case. The Chairman proposed a revision of paragraph 4 of the Draft Recommendation (document G/ADP/AHG/W/22).

8. Questions were raised concerning the possibility of modifying the period of investigation after initiation: how would or could this be done, and what effect would it have on the course of an investigation – for instance with respect to time limits for responses? Some Members expressed the view that it would be more appropriate to establish the period of investigation at the outset, perhaps after considering the views of the domestic industry or other interested parties, and then make no changes.

9. Following the discussion, the Group agreed to ask the Secretariat to circulate a revised draft recommendation on this topic, taking into account the discussion and points made during the meeting, including the Chairman's suggested revision of paragraph 4 of document G/ADP/W/AHG/22.

10. The Group then turned to the next topic on the agenda, topic number 3, Article 6.10 sampling method. Members addressed some of the issues concerning sampling methods that had arisen in their own practice. Particular questions included (a) Whether or not it was appropriate to include information provided by producers not part of the original sample? (b) When a sample is selected? (c) What circumstances, if any, justify modification of the sample? and (d) Whether, if modifications are to be made, new consultations are needed on the proposed new sample? One Member also raised

questions about which companies are included in an "all others" duty rate – all those for which there is not a specifically determined margin, whether or not they were included in the sample set? Another question concerned distinguishing between obtaining information from the largest number of producers, and defining a "statistically valid" sample. It was noted that the choice of method can have a significant effect on the results, i.e. in an industry composed of a few large and many small companies. The Chairman raised a question concerning the Article 6.10.2 of the Agreement, noting that the last sentence of that Article provides the "Voluntary responses shall not be discouraged", and asked how Members implemented this provision in their domestic practice.

11. Following the discussion, the Group agreed to request Members to respond to the questions posed by Brazil in paragraph 2.1 of its paper, document G/ADP/AHG/W/46. The Group also agreed to ask Members to respond to the question posed by the delegation of India, concerning the criteria applied by investigating authorities in determining, in a particular investigation, whether to base their investigation on a statistically valid sample, or the largest percentage of the volume of exports from the country in question which can reasonably be investigated. Finally, the Group requested Members to consider the question posed by the Chairman concerning the application and implementation of the last sentence of Article 6.10.2 of the Agreement.

12. The Group then turned to the next topic on the agenda, topic number 4, Article 5.6, "special circumstances". Much of the discussion addressed whether, in a self-initiated investigation, the investigating authorities are required to verify the level of support for the investigation. The consensus that emerged was that, while the cooperation of a major proportion of the domestic industry was clearly necessary for an investigation to be properly carried out, and thus the "support" of the industry was needed in a sense, the obligation of Article 5.4 to determine the level of support did not apply in a case of self-initiation under Article 5.6, since there was no application regarding which support or opposition could be expressed. However, the evidentiary requirements of Article 5.2 are applicable, as they are specifically referenced in Article 5.6 itself.

13. Several Members expressed themselves in favour of a restrictive interpretation of the "special circumstances" sufficient to justify self-initiation under Article 5.6, noting that, for instance, a domestic industry's fear of commercial consequences upon filing an application should not justify self-initiation. The question of self-initiation in the case of fragmented industries was also discussed, with several Members suggesting that such circumstances could be sufficient to justify self-initiation.

14. Members also discussed the provision of assistance by authorities to applicants. Among the issues discussed was the difference between "general and limited" assistance, concerning, for example procedures for investigations and applications, requirements for applications, etc., and more specific assistance to individual applicants.

15. Following the discussion, the Group agreed to ask Members to submit further examples, if they had not already done so, of circumstances which they would consider insufficient to constitute "special circumstances" in the context of Article 5.6. The Group also agreed to request Members to supply information concerning the number, if any, of investigations that have been self-initiated in their practice, and the circumstances in each case which were considered sufficient to constitute "special circumstances" within the meaning of Article 5.6. Finally, the Group agreed to ask the Secretariat to prepare, based on the discussion at the meeting and the papers submitted, a draft recommendation concerning the Article 5.4 requirement to verify support for an application in the context of self-initiation pursuant to Article 5.6,

16. The Group then turned to the next topic on the agenda, topic number 5, Article 5.5, notification to the exporting Member. The discussion indicated that Members generally agreed that the first and second sentences of Article 5.5 did not conflict. However, the specific mechanics of notification under the second sentence of Article 5.5 were the subject of some differences.

17. Several Members expressed concern that any minimum period for the notification to the exporting Member might be unworkable in the context of some Members' domestic practice. It was mentioned by several Members that the purpose of the notification was not entirely clear, and perhaps a better understanding of the reason for the notification might help in deciding when it must be made. In this regard, several Members suggested that the purpose of the notification is to give the exporting Member time to prepare for a possible investigation, identify interested exporting companies, etc. There seemed to be an emerging consensus that notification under the second sentence of Article 5.5 should be made as soon as possible after receipt of a properly documented application, and as early as possible before initiation, but that a greater degree of specificity, *i.e.*, specifying minimum time periods, might not be practicable in view of the differences in Members' time-tables at this stage of the proceedings.

18. There was also discussion of the contents of the notification – generally, Members seemed to agree that the notification could contain less information than that called for in the notification of initiation under Article 12.1. It was suggested that simply identifying the date of receipt of the application, the product concerned, the applicant, and the identified exporters, might be sufficient.

19. The "how" of the Article 5.5 notification was also discussed, including such questions as whether an oral notification, or a *note verbale*, would be adequate, and who should receive the notification. In this regard, it was noted that the lack of diplomatic or other representation in some Members' capitals might explain why such notifications were not always received. Several Members suggested that a list of contact points for this purpose would be useful. It was emphasized by some Members that any such list could only be indicative, and could not impose an obligation as to the specific form of notification or a required recipient.

20. Following the discussion, the Group agreed to ask the Secretariat to circulate a draft recommendation addressing the timing of the notification under Article 5.5, taking into account the discussions and points made at the meeting and the papers submitted by Members. The Group also agreed to ask the Secretariat to circulate a request to Members, asking them to submit the identity and address of contact points for the Article 5.5 notification, and then the Secretariat would compile the responses and circulate them as an indicative list. In addition, the Group agreed to ask Members to comment on the question of the appropriate contents of the Article 5.5 notification, including the question of whether the names of exporters or producers who might be the object of an investigation, should one be initiated, be included.

21. The Group then turned to the next item on the Agenda, topic number 6, Article 6.2 hearings. Several Members reported on their own practice in the conduct of hearings, including their practice concerning handling of confidential information, whether hearings were held once or more than once, and whether hearings were required in all cases or only upon request. Other matters discussed concerned who presided over hearings, with some Members noting that since there was no single decision-maker in their system, hearings could be presided over by staff, investigators, or other senior officials.

22. During the discussion which followed the presentation of papers, Members generally agreed that it was useful to hold hearings, as it provided an opportunity for decision makers and staff to hear the arguments of parties, and for parties to hear and respond to each others' views. One Member noted that while hearings may in general be useful, in its own practice, no hearing including opposing parties had ever been requested. Guidelines on such matters as transparency, neutrality, who may be present, timing and frequency, would be useful, but the Group should avoid setting guidelines on when hearings should or may be requested, or how often hearings are held.

23. The Chairman noted that several questions concerning how Members conducted hearings had been addressed in the papers submitted and in the oral presentations, including when requests were

made for hearings, whether there was a cut off date for requesting a hearing, and if so, how late or early in the process, how hearings were structured, how oral presentations were handled with reference to the provisions of Article 6.3, how the authorities handled new information presented in a hearing, etc.

24. Following the discussions, the Group agreed to ask Members, if they had not already done so, to provide information on their procedures and practices concerning hearings. The Group also agreed to ask the Secretariat to circulate a compilation of information received from Members concerning their hearing processes, and circulate a checklist of elements regarding hearings, identified by Members, that might be considered by the Group at future meetings in assessing the degree to which there are common points of practice and procedure among Members. The Group agreed that the Secretariat would be asked to circulate a request to Members to provide information about their own practice regarding those common elements, if they have not already done so.

25. The Group then turned to the next item on its agenda, topic number 7, Article 6.9, disclosure of essential facts. Members described their different practices concerning disclosure of essential facts. Practices included disclosure of all information, or disclosure of all public information, with confidential information disclosed to the party submitting it, disclosure before hearings, before final decisions, and after final decisions.

26. Much of the discussion centered on the difficulties of determining what facts were essential, and therefore required to be disclosed, before a final decision was taken. In addition, several Members commented on the problem posed by confidential information, which might be considered essential facts, but could only be disclosed to the party submitting the information. Thus, there might be a need to prepare separate disclosure for each party, which would pose a significant administrative burden. One Member noted that in its practice everything was disclosed, either publicly, or confidentially to the parties' representatives. In this Member's view, everything was essential to the decision and parties needed all the information to defend their interests, as well as to enable the correction of clerical errors, and in order for judicial review to be meaningful and independent. Other Members suggested that a selected disclosure of those facts the investigating authorities considered essential on the elements of dumping, injury, and causation, would be more useful than disclosure of all facts without regard to whether they were "essential" to the final decision to be made.

27. Several Members noted that the disclosure of essential facts was to take place before the final decision, and therefore must not prejudice the final decision. Thus, such disclosure should relate to bare facts without analysis on weight or judgement. One Member noted the relation between this topic, and the question of treatment of confidential information, and suggested that the Agreement should be read consistently across these two requirements. Another Member noted that different methods of disclosure could all be acceptable under the Agreement.

28. Following the discussions, the Group agreed to ask Members, if they had not already done so, to provide information concerning the minimum facts they believe must be disclosed as "essential facts". The Group also agreed to ask the Secretariat to circulate a list of such "essential facts" identified by Members, that could form the basis for discussions of a general "minimum list" of essential facts to be disclosed.

29. The Group then turned to the next item on its agenda, topic number 10, Article 9, duty assessments. Members described their individual mechanisms for duty assessments, including their procedures for refunds and, in the case of one Member, reviews for assessment purposes. Several Members reported that, while they had legislative provisions dealing with this matter, they had no practical experience, as no requests for refunds or reviews had ever been received. Questions raised included whether, in the case of refund investigations, the level of duty should be changed prospectively, whether the methodology for calculating dumping margins in refund or review

investigations should be the same as in the original investigation, and differences between refund or assessment reviews, and reviews conducted for other reasons. In this latter context, it was observed that refund procedures and reviews for duty assessment purposes concerned only normal value and export price, while other reviews could address other issues, such as whether the domestic industry continued to be injured, or whether its condition had improved or worsened, changes in behaviour or the circumstances of exporters and domestic producers, etc. Questions were also raised concerning how Members calculated refunds in cases where a lesser duty was applied. One Member noted that in such cases, there was no re-examination of the injury level, but that the refund, if any, was premised on a finding that the actual dumping was less than the amount of the duty paid. Another question concerned how refunds should be calculated in the case of a duty rate based on a sample, where the information for the refund proceeding concerned an individual company. Questions were also raised concerning how refunds were requested, how importers could know and/or demonstrate that excess duty had been paid, and the extent of the refund review – *i.e.*, whether new questionnaires were sent out.

30. Following the discussion, the Group agreed to ask Members who apply the lesser duty rule, if they had not already done so, to provide information concerning their application of the lesser duty rule. The Group also agreed to ask Members, if they had not already done so, to provide information on how they handle duty assessments, how they handle refund procedures, and their views concerning the intersection between refund procedures and judicial review. The Group agreed to revert to this topic at a later date.

31. The Group then turned to the next item on its agenda, topic number 8, Article 12, public notices. It was noted that there appeared to be a substantial overlap between the requirements of Article 12 regarding public notices of determinations and Article 6.9 disclosure of essential facts, as well as a relation between Article 12 and the Article 16.4 requirement of notification of preliminary and final actions.

32. Questions were raised as to what constitutes "public" notice – *i.e.*, publication in the official Gazette of the Government, publication in a newspaper, posting on the internet, etc. Members also discussed what specifically was included in the various public notices required to be issued under Article 12.

33. Following the discussions, the Group agreed to ask Members, if their domestic investigating and/or decision-making authorities maintain a web-site on the internet, to submit the relevant internet address(es) (URL) to the Secretariat, which would circulate a list of such home-page addresses to Members. The Group also agreed to request Members to submit information concerning their practice regarding Article 12 public notices, with specific reference to how public notices are issued (in what official document or newspaper, or other form), and what are the contents of the various public notices issued at different points of the investigation process.

34. The Group did not reach the last item on the agenda, topic number 9, contents of preliminary affirmative determinations, during the course of the meeting, and agreed therefore that it would be taken up as the first item on the agenda of the next meeting. The Group noted that Members were encouraged to submit papers on this topic.

35. The Group agreed that its next meeting would be scheduled in conjunction with the October regular meeting of the Committee, on Monday and Tuesday, 26-27 October 1998.

36. The Group agreed that papers and other submissions for the Group's next meeting should be transmitted to the Secretariat no later than 14 September 1998.
