

WORLD TRADE ORGANIZATION

RESTRICTED

G/ADP/AHG/W/44

24 April 1998

(98-1668)

Committee on Anti-Dumping Practices Ad Hoc Group on Implementation

COMPILATION OF INFORMATION PROVIDED BY MEMBERS REGARDING CONFIDENTIAL INFORMATION

Note by the Secretariat

As requested by the Ad Hoc Group on Implementation at its October 1997 meeting, this document compiles information submitted by Members in response to WTO/AIR/643 regarding confidential information.

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Document G/ADP/AHG/W/8 (Hungary)

(B) A list of information believed to be confidential by nature.

We believe information is confidential if its disclosure would cause in the opinion of the party and the investigating authority as well a significant adverse effect on the supplier or the source of such information. A kind of information is confidential "by nature" if it is recognized as such in all cases. Probably information concerning the amount of the ex. works price and the elements of its calculation, and the amounts of the allowances made when calculating the export price may fall under this category.

Document G/ADP/AHG/W/10 (New Zealand)

(B) A description of information New Zealand believes is confidential by nature

Information is considered to be confidential if its disclosure would be likely:

- To be of significant competitive advantage to a competitor, e.g. production costs, distribution costs, business sales statistics, research/invention data, technical designs etc.
- 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 a 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. the names of the individual companies requesting the initiation of an investigation, who may be subject to commercial retaliation by customers who are also importers.
- To prejudice the security or defence of New Zealand or the international relations of the Government of New Zealand.
- To prejudice the entrusting of information to the Government of New Zealand.
- To prejudice the supply of similar information or information from the same source.
- To disclose a trade secret.
- To effect the maintenance of legal privilege.

Document G/ADP/AHG/W/12 (Venezuela)

2. List of information Members believe is confidential by nature

The question of the confidential treatment of information provided in proceedings is dealt with in Article 48 of the Venezuelan Anti-Dumping Law, which provides as follows:

"The Commission and the Technical Secretariat shall not disclose any information received during the course of an anti-dumping or subsidy investigation when the party providing such information requests that it should be treated as confidential. For this purpose, the party concerned shall indicate the grounds for treating the information as confidential and shall attach a non-confidential summary or an explanation of the reasons why such a summary cannot be made.

A request for confidential treatment shall be dealt with according to whether disclosure of the information would be of significant advantage to a competitor or would have any other adverse effect upon the person providing the information or upon a third party."

Access to the information provided by interested parties in an anti-dumping or subsidy proceeding is very important in that it ensures transparency and objectivity. In this connection, access to the information in the file ensures that the parties involved can fully exercise their right of defence, while the possibility of treating certain information confidentially encourages interested parties to furnish information which could be of vital importance for the proceeding but which would not be supplied if it did not receive confidential treatment. Hence, the question of the possibility of declaring certain information confidential or not must be handled very carefully.

The Technical Secretariat of the Anti-Dumping and Subsidies Commission is responsible for analysing and deciding whether the character or nature of the information for which confidential treatment has been requested justifies such treatment. The treatment of confidential information by the Technical Secretariat is not a matter of rigid criteria prejudging the nature of the information. In each particular case, a series of necessary factors must be analysed to determine whether the information requires such treatment. In the course of the various investigations conducted by the CASS in which confidential treatment of the information provided has been requested, the Technical Secretariat has developed some analytical criteria for determining whether in each particular case the information should be treated as confidential or not.

1. Full justification must be provided in support of the request for confidentiality, regardless of whether the information is confidential by nature or because the requesting party provides it as confidential. For this purpose, the requesting party must explain the grounds or reasons for which it considers that disclosure of the information provided would be of significant advantage to its competitors or have an adverse effect upon the person providing the information or upon a third party.
2. In order to determine the significant advantages or adverse effects which disclosure of the information provided could have for an enterprise or third party, the Technical Secretariat must analyse: (i) the type of information supplied in terms of its fundamental, secret or strategic character within the enterprise; (ii) the level of aggregation of the information supplied; and (iii) the possible consequences of public access to the information supplied.

These aspects are carefully analysed by the Technical Secretariat when taking a decision on confidential treatment, since information supplied as confidential by nature does not necessarily need to be treated as such without first being analysed in detail.

In any event, in practice there exists information which, depending on its nature, does not require further justification in order to conclude that it should be treated as confidential. An illustrative list of the information which the Technical Secretariat has considered confidential by nature according to the various confidentiality decisions it has taken includes: information on unit costs of a product, details of a company's past or future investments, a company's commercial strategies and expansion plans, percentages of components of a company's exclusive product, manufacturing formulas for the product concerned and market share percentages.

Document G/ADP/AHG/W/14 (Turkey)

(B) Confidential information

Article 6.5 of the A-D Agreement states that: "Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information) ... be treated as such by the authorities". In this respect, information relating to the following issues can be regarded as confidential:

- cost of production;
- market share;
- evidence relating to normal value and export prices;
- capacity;
- investment.

Document G/ADP/AHG/W/15 (Mexico)

I. INFORMATION WHICH IS CONSIDERED BY NATURE TO BE CONFIDENTIAL UNDER MEXICAN LAW

The Foreign Trade Act takes up the concept of confidential information as defined in Article 6.5 of the Anti-Dumping Agreement and carries it even further by establishing a much broader classification and introducing a system of access to various levels of that classification.¹ Thus, Articles 149, 150,

¹In view of the problem encountered by participants in an anti-dumping investigation in which other parties contribute information considered as confidential to which the former have no access for the purpose of defending their interests, Mexico, like other countries applying the system, has created a mechanism by which certain persons (particularly the legal representatives of the enterprises or their economic advisors) may have access to certain confidential information. Thus, the classification set forth below contains a clear indication as to whether or not the information may be made available to the representatives of the enterprises.

151 and 154 of the Regulations under the Foreign Trade Act establish that the information below is considered confidential by nature for the purposes of Article 6.5 of the Anti-Dumping Agreement:

Article 149 of the Regulations under the Foreign Trade Act:

- (i) Production processes for the product concerned (product under investigation);
- (ii) production costs and specification of components;
- (iii) distribution costs;
- (iv) terms and conditions of sale, except those offered to the public;
- (v) selling prices by transaction and by product, except components of prices such as dates of sales and distribution of the product, and transport if by public routes;
- (vi) description of the type of individual customers, distributors or suppliers;
- (vii) if applicable, the exact amount of the margin of price discrimination in individual sales;
- (viii) the amounts of adjustments for terms and conditions of sale, volume or quantities, variable costs and tax charges proposed by the interested party, and
- (ix) any other specific information about the enterprise concerned whose disclosure or dissemination to the public may cause injury to its competitive position.

This information is available to the legal representatives of the participating enterprises or their advisors, provided they meet certain requirements.²

On the other hand, the information referred to below, owing to its nature, can only be made available to the investigating authority; in other words, no party may have access to it.

Article 150 stipulates that restricted commercial information shall be deemed to be information whose disclosure may result in substantial and irreversible and financial damage or harm to the net worth of the owner of that information and which may include, among other things, secret formulas or processes which have a commercial value, are not patented and known exclusively to a small group of people who use them in the production of a commercial product.

Article 151, in its turn, states that the name of the natural or legal persons from whom the interested party obtained relevant information shall be known only to the Ministry.

And finally, Article 154 stipulates that confidential government information shall include information contained in government-to-government communications of a confidential nature (data, statistics and documents concerning national security and strategic activities for the scientific and

²In order to gain access to this information, they must meet the requirements set forth in Article 159 of the Regulations under the Foreign Trade Act, including the obligation to undertake and submit the commitment to confidentiality under the terms laid down by the Ministry.

technological development of the country), as well as information whose disclosure is prohibited by laws and other public legislation, and by international treaties or agreements to which Mexico is a party.

Document G/ADP/AHG/W/17 (Korea)

(B) A list of confidential information by nature

1. Cost of production.
2. Accounting materials which have not been made public.
3. Name, address and trade volume of the trade partners.
4. Matters concerning the provider of confidential information.
5. Materials deemed proper to be treated confidentially.

Document G/ADP/AHG/W/19 (Brazil)

2. Confidential information

Even though the creation of a list of information that is confidential by nature is still being discussed in Brazil, it is considered that such list must be as restricted as possible, and include only information of a party that, if disclosed, can affect conditions of competition, such as copies of receipts, list of clients and prices practised by clients.

Document G/ADP/AHG/W/21 (European Community)

Confidentiality: information which is "confidential by nature"

1. Background

As set out in the Community's note on the subject of confidentiality, our approach is based on the principle of ensuring that when information is classified as confidential, it is reproduced in summarized, non-confidential form. The use of indexed figures, or possibly ranges, is recommended for this purpose. Nevertheless, requests for confidential treatment should be justified and reasonable. A list of types of information considered "confidential by nature" should not imply removal of the requirement to justify confidential status, nor to provide accurate non-confidential summaries. Rather it should serve as guidance to authorities when assessing the claims of parties for confidential treatment.

2. Illustrative list of confidential information

As set out in Article 6(5) of the Agreement, the disclosure of information which is confidential by nature "would be of significant competitive advantage to a competitor or ... would have a significantly adverse effect upon a person supplying the information". Typically, this could include:

- Information on costs, including those of each stage of the production process;

- Information on prices, including both the prices paid by the producer to upstream suppliers, and the prices charged to downstream buyers - the names of these customers may also be treated as confidential;
- Information on performance, including profitability of operations, margins on individual products, as well as prospectives for investment and future strategy;
- Certain information supplied in the context of a public interest assessment (e.g. company performance forecasts).

3. Information from the above categories may not always be confidential (for instance, the prices paid to upstream suppliers may be uniform and transparent for a given industry). But since all of these types of data could be commercially sensitive, revealing elements of business strategy, sources of competitive advantage and so on, requests for confidential treatment in these areas should be granted. However, if non-confidential summaries of that information are not prepared the investigating authorities may reject such information.

4. This said, there remains a substantial amount of information which should not normally be considered as confidential. For instance, data and analysis provided by complainants as part of the injury claim will often be in the form of narrative assessment based on widely available statistics; company information such as annual reports and organizational charts is similarly public. Such information should only be granted confidential treatment in exceptional circumstances.

Document G/ADP/AHG/W/23 (Japan)

2. Treatment of Confidential Information

With regard to the treatment of confidential information, when any information provided comes under both of the following cases, Japan will treat it as confidential information in practice.

- (1) Such information which is not known publicly and which is protected by the person who provided the information.
- (2) Such information which falls within either of the following cases:
 - It is recognized that disclosure of any information would certainly provide a significant competitive advantage to competitors, or would certainly have a significant harmful effect upon the direct supplier of the information or the original supplier of the information.
 - When any information is provided as confidential information by any interested party, and the authority recognizes that there is enough reason for treating it as confidential information.

(Reference)

For example the following information is considered to be confidential.

- Cost of manufacturing
- Sales expenses
- Actual transaction prices

- Names of customers or suppliers
- Other business proprietary information

Document G/ADP/AHG/W/24 (Israel)

B. A List of Information the Authorities Believe to be Confidential by Nature

Section 8 of the Trade Levies Law - 1991 sets forth the general principle that information will be considered confidential if its disclosure would cause injury to the supplier of the information or to a third party.

It should be noted that since in numerous instances because of the small scale size of the Israeli economy, the complainant is the sole manufacturer of certain products, therefore disclosure of certain information would necessarily mean the divulging of secret business information.

Needless to say that confidentiality is determined on a case by case basis according to the particular circumstances involved.

In practice the authorities usually consider the following type of information by its nature, confidential:

- (i) Unpublished prices
- (ii) Costs
- (iii) Market shares of individual firms
- (iv) Internal structure (No. of employees)
- (v) Profit levels
- (vi) Other similar information deemed to relate to business secrets

The authorities require that the parties supply a non-confidential version of all material submitted, so that the text appears in full except in the place of the confidential information, appear empty brackets.

Document G/ADP/AHG/W/25 (Thailand)

1. Treatment of Confidential Information

Normally, information that will be treated as confidential in the investigation includes the cost of production, accounting information and balance sheet, invoices, domestic selling prices and export price of each consignment. However, information provided must notify the authority regarding the confidential status of each piece of information, according to Rule 9.1 of the Ministerial Notification.

Document G/ADP/AHG/W/26 (United States)

INFORMATION CONSIDERED "CONFIDENTIAL"

Under the US anti-dumping duty law, a petition alleging "dumping" must be filed with two separate agencies of the US Government on the same day: the US Department of Commerce (the Commerce Department or the Department) and the US International Trade Commission (the Commission). Each agency pursues its own, separate investigation. The Department investigates whether sales have been made at less than fair value and compares the prices of identical or similar merchandise

sold in the US market with that sold in the comparison market, while the Commission investigates whether a domestic industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is materially retarded by reason of imports sold at less than fair value. Each agency has its own definition of "confidential information". A description of the types of information which each agency considers to be "confidential" is provided below.

US Department of Commerce

The Commerce Department uses the term "business proprietary information" to describe information that is "confidential" within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Such information is not released to the public but, instead, only to representatives of parties to the proceedings which may be granted access to them under an administrative protective order (APO). The Department does not utilize the term "confidential" to describe such information but, instead, refers to such information as being "business proprietary". The reason for this is that, in US security classification parlance, the term "confidential" is used to refer to US Government information the dissemination of which is restricted in order to protect the national security of the United States.

As of this date, the Department is in the latter stages of revising its regulations simplifying its procedures protecting business proprietary information ("BPI"). The new regulations are expected to be implemented in the near future. Under these regulations, the Department recognizes four categories of information relevant to an anti-dumping proceeding: public, business proprietary, privileged (such as attorney-client privileged), and classified information (meaning information protected for purposes of national security). In general, public information is information which is made available to the public, whereas business proprietary information is submitted by private parties to the proceedings and may be disclosed (if at all) only to authorized applicants under a valid APO.⁵ Unlike business proprietary information, privileged and classified information cannot be released even under an APO.

Business Proprietary Information Releasable Under APO

The Department generally considers the following factual information to be business proprietary information, if it is so designated by the submitter: (1) business or trade secrets concerning the nature of a product or production process; (2) production costs (but not the identity of the production components, e.g., parts and equipment, unless a particular component is a trade secret); (3) distribution costs (but not channels of distribution); (4) terms of sale (but not terms of sale offered to the public); (5) prices of individual sales, likely sales, or other offers; (6) names of particular customers, distributors or suppliers⁶; (7) the dumping margin on individual sales; (8) the names of particular persons from whom business proprietary information was obtained; (9) the position of a domestic producer or workers regarding support for a petition; and (10) any other specific business information which, if released to the public, would cause substantial harm to the competitive position of the submitter.

Information Not Releasable Under APO

In contrast to information that may be released under APO, there are some categories of information which the Department considers privileged (again, information protected by the attorney-client

⁵The submitter of the proprietary information must also file a redacted or "public" version of the same document with the Department for public review.

⁶But not the destination of the sale or the designation of the type of customer, distributor, or supplier, unless the destination or designation would reveal the name of the customer.

privilege or information submitted by an informant) or classified (relating to military secrets) that may not be disclosed under an APO. Moreover, in some extraordinary circumstances, business proprietary information may also be withheld from disclosure under APO based on a determination by the Department that there is a clear and compelling need to withhold such information.

US International Trade Commission

Like the Commerce Department, the Commission uses the term "business proprietary information" to describe confidential or protected information. The Commission considers business proprietary information, by regulation, to be that "which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained".⁷ The Commission will release business proprietary information to specified representatives of interested parties who are parties to the proceeding and have applied for and received access to such information under an APO issued by the agency. The Commission will agree to release such information under protective order, unless the information is privileged, classified, or specific information of a type that must be withheld from disclosure based on a clear and compelling need.⁸

Document G/ADP/AHG/W/29 (Australia)

INFORMATION WHICH IS CONFIDENTIAL BY NATURE

Introduction

Article 6.5 of the WTO Anti-Dumping Agreement provides that any information which is by nature confidential, or which is provided on a confidential basis, upon good cause shown, be treated as such by the authorities.

Australian Legislation

Sections 269ZI and 269ZJ of the *Customs Act 1901* (see pages 82-86 of G/ADP/N/1/AUS/1) set out the requirements for the provision of information to an investigation which is claimed to be confidential or information whose publication would adversely affect a person's business or commercial interests. Interested parties are required to provide a non-confidential summary which contains sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

Section 269ZJ(5) of the Customs Act provides that where the authorities disagree with a person's claim that information is confidential or whose publication would adversely affect a person's business or commercial interests, and despite the authorities opinion, the person making the claim will not prepare a non-confidential summary for inclusion in the public record, the authorities may disregard that information.

⁷See 19 C.F.R. 201.6(a)

⁸See 19 C.F.R. 207.7(g)(1)

Australian legislation *does not* provide a definition of information that can be considered to be confidential or information whose publication would adversely affect a person's business or commercial interests.

Australia does not provide for disclosure pursuant to a protective order.

Information that is Confidential by Nature

In order for the authorities to treat information as confidential by its nature, it must be "secret" i.e. the facts or knowledge must not be in the public domain. This is shown where the information or documents are not part of public knowledge or are not accessible to the public. Documents or information with this status must have some particular "value" which sets them apart from commonly available material. The latter can not be rendered confidential by the mere presence of a stamp of "secret" or "confidential".

It is accepted that any information which would give a commercial advantage to a competing party, or the disclosure or publication of which would cause an adverse affect to the competitive position of the person, will be considered confidential by nature. Such information generally relates to "trade secrets" including materials composition production processes and equipment specifications. Information also considered "confidential" will generally include commercial information such as costs, sales, purchases, client identification, inventories, profit, losses and expenditure.

Other Information

It should be noted that there is a second category of information, which, although not of itself confidential by nature, nevertheless is provided to the investigating authorities on the understanding that it will be treated as "confidential". Information in this second category is claimed as "confidential" by a desire to protect the interests of the source of the information. Although this type of information is not commonly submitted to an investigation, this circumstance generally arises in relation to information within the exporter's domestic market, but has included information on material injury claims. Where the investigating authorities are satisfied that disclosure of information may be harmful to the source of that information, it will be treated as "confidential".

List of Information Treated as Confidential by Nature

Typically, the following non-exhaustive list of information is gathered in the course of an investigation and is treated as confidential by its nature.

COMMON ELEMENTS1. Company Background

Information concerning public companies (e.g. "Proprietary Limited" or "Limited" companies) and other companies incorporated under Corporations Law is readily available via Government agencies. However, there is no requirement for publication of information relating to private companies (e.g. sole traders, family companies and trusts) thus this information may be considered confidential by nature. This background information includes:

- ownership
- organizational structure and functions of divisions
- audited profit and loss accounts
- administrative, selling & general costs
- non-operating income and expenses
- total sales revenue per annum

Company and market information (for all companies) which would normally be considered confidential by nature includes:

- accounting structure e.g. profit centres or central accounting
- charts of account and ledgers
- commercial relationships with suppliers
- agreements/contracts with suppliers
- levels of sales (e.g. distributor, retail)
- methods of sale (e.g. bulk, containers)
- projections and marketing strategies
- factors affecting sales and competition
- market share of company
- major competitors
- market price leaders/discounting practices
- major customers
- selling and distribution arrangements

2. Sales on the Domestic Market

- sales history
- inventories
- sales volumes
- net sales revenue
- purchase orders
- confirmation orders
- price lists
- sales invoices
- sales costs
 - packaging*
 - inland freight*
 - handling charges*
 - insurance*
- agreements/contracts with customers
- forward orders
- payment documentation e.g. T/Ts, Letters of Credit, Bills of Exchange
- bank statements
- payment terms
- sales tax payable
- sales incentives

COMPLAINANT

1. <u>Company Background</u> - as above
2. <u>Sales on the Domestic Market</u> - as above
3. <u>Manufacturing</u> <ul style="list-style-type: none"> - technical specification sheets - materials content data - production processes information - production equipment specifications - production capacity - production standards and variances - production volumes - no. production staff - costs of production <ul style="list-style-type: none"> <i>factory overheads</i> <i>labour costs</i> <i>raw materials cost</i> <i>research and development costs</i> <i>royalties/licence fees</i> <i>finance costs</i> - changes in stocks

EXPORTER

1. <u>Company Background</u> - as above
2. <u>Sales on the Domestic Market</u> - as above
3. <u>Manufacturing</u> - as above
4. <u>Exports</u> <ul style="list-style-type: none"> - volume and value of trade per country and importer - level of trade - models/types of goods exported - purchase orders - confirmation orders - contracts - price lists - invoices - packing - Bills of Lading or Air Waybills - place of export - level of sales e.g. f.o.b., c.i.f. - terms of sales e.g. sight, 60 days from Bill of Lading - forward orders - sales costs <ul style="list-style-type: none"> <i>packaging/packing</i> <i>inland freight</i> <i>container handling charges, port charges</i> <i>customs charges</i> <i>drawback</i> <i>overseas freight</i> <i>insurance</i> - payment documentation e.g. T/Ts, Letters of Credit, Bills of Exchange - any rebates/discounts not shown on invoice - any financial assistance, advertising materials, warranty etc. supplied to importers - currency and conversion rate

IMPORTER

1. <u>Company Background</u> - as above
2. <u>Sales on the Domestic Market</u> - as above
3. <u>Imports</u> <ul style="list-style-type: none"> - import volumes - price lists - forward orders - purchase orders - confirmation orders - sales invoices - customs entries - packing lists - Air Waybills/ Bills of Lading - level of sales e.g. f.o.b., c.i.f., - terms of sales e.g. sight, 60 days from Bill of Lading - payment documentation e.g. T/Ts, Letters of Credit, Bills of Exchange - finance costs - forward exchange contracts - import costs <ul style="list-style-type: none"> <i>freight charges</i> <i>insurance</i> <i>container handling charges, port charges</i> <i>customs duty/sales tax</i> <i>customs brokers fees</i> <i>inland freight</i> <i>warehousing</i>

Document G/ADP/AHG/W/31 (Canada)

B. LIST OF INFORMATION BELIEVED TO BE CONFIDENTIAL

There is no exact definition as to what constitutes confidential information. In Article 6.5 of the Anti-Dumping Agreement. However, Article 6.5 does provide general guidance insofar as information may be considered confidential because:

its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information.

Product-specific information that could have such effect includes:

- costing data;
- domestic and export sales invoices;
- technical information and production processes;
- non-published price lists;
- non-public financial statements, etc.

While parties may designate information as confidential, such a designation must be warranted given the nature of the information and the purpose for which it is being submitted. Information that is already in the public domain does not warrant confidential treatment. In effect, *the determination* of whether or not specific information is confidential is made on a case-by-case basis.

Document G/ADP/AHG/W/34 (Colombia)

(b) List of information considered confidential by nature

Statements of production costs and income statements by production line for the product investigated

Article 41 of Law 222/95 refers to the dissemination of financial statements in the following terms: "Within a month following the date of their approval, copies of the general financial statements, together with comments and the corresponding recommendation, if appropriate, shall be deposited with the Chamber of Commerce in the place of the registered office. The Chamber shall send copies of these documents to persons requesting them, who pay the costs incurred."

Hence the financial statements which must legally be disseminated and can be consulted in accordance with Article 41 (Law 222/95) are general financial statements and not other statements.

Like statements of output by production line, statements of production and selling costs, (both for the enterprise and the production line) and the financial statements covering intermediate periods (both for the enterprise and the line) are not general financial statements: they are not public by nature unless the applicant expressly so decides.

Lists of customers and commercial invoices

In accordance with accounting practices, these are assimilated to auxiliary books under the provisions of Article 125, paragraph 4(a) of D.R. 2649/93, pursuant to Article 49 of the Code of Commerce.

Article 61 of the Code of Commerce specifically states that "Traders' books and papers may not be examined by persons other than their owners or persons authorized to do so, unless it is for the purposes indicated in the Constitution and pursuant to an order by the competent authority." In accordance with this Article, an auxiliary book is not deemed to be of a public nature.

Input-output table

The input-output table is not a supporting accounts document in accordance with Article 123 of D.R. 2649/93.

An analysis of the information contained in the table shows that it corresponds to consumption of raw materials, and this information shown in Colombian currency constitutes an element of the production cost - raw materials - in the statement of production costs. As mentioned above, disclosure of the statement of production costs is not compulsory and by extension this also applies to its constituent elements.

The information contained in the input-output table therefore cannot be considered as being public by nature.

Industrial secrets and know-how

In accordance with Article 72 of Decision 344 of 1993 of the Commission of the Cartagena Agreement and Article 75.3 of the Code of Commerce.

Document G/ADP/AHG/W/35 (Turkey)

Topic 1 - Treatment of Confidential Information

As already stated in our previous paper (G/ADP/AHG/W/14),

"the information on

- cost of production,
- market share,
- evidence relating to normal value and export prices,
- capacity,
- investment

is treated as confidential."

In addition to the above, the following type of information is considered as confidential by its nature:

- product specification,
- technological process,
- customer names,
- price of individual sales,
- sales cost,
- profit levels,
- other similar information deemed to be business secrets.

Turkey does not have a system of disclosing confidential information in anti-dumping investigations.

Document G/ADP/AHG/W/38 (Venezuela)

Topic 1* - Article 6.5: Treatment of Confidential Information

The possibility for interested parties in an anti-dumping procedure to fully exercise their right of defence depends to a greater or lesser degree on their access to the information submitted by the opposing parties or obtained by the competent authority. At the same time, the Anti-Dumping Agreement allows that certain information to be declared confidential, thus limiting access thereto. Consequently, we consider that confidentiality should be understood as an exception to the rule of access to information, and as such should be clearly defined in order to ensure that the right to confidentiality is not used as a means of blocking access to information, thereby impeding the full exercise of the right of defence by the interested party in question.

Although on the one hand, an illustrative list (of information that is confidential by nature) could clarify matters for the competent authorities when issuing their rulings, it could also give rise to different interpretations and limitations with respect to the scope of confidentiality.

For example, what grounds and justification would be required in order to declare confidential a given item of information covered by the illustrative list? Does the mere fact that the information for which confidentiality has been requested is covered by the illustrative list mean that it warrants confidential treatment? What would happen if in spite of the fact that information for which confidentiality is sought is covered by the illustrative list, the level of aggregation of the data contained therein is such as to prevent the disclosure of confidential information?

In reaching its most recent decisions on confidentiality, the competent authority of Venezuela has applied more general criteria, avoiding the limitations that might be associated with an illustrative list or with past practice in declaring information confidential by nature. It has considered confidential by nature information whose disclosure could reveal elements of a company's trade strategy or constitute a source of competitive advantage, or expose trade or business secrets of the industry in question, and information supplied by third parties if the level of disaggregation of such information disclosed reveals or makes it possible to infer fundamental data or secrets or the identity of the person supplying the information, according to the case.

System of disclosing confidential information

Venezuela does not have a system of disclosing information declared confidential to counsel or representatives of the interested parties. Once the information is declared confidential, it is placed in a separate file to which only the officials of the competent authority have access.

Document G/ADP/AHG/W/39 (Colombia)

Topic I

1. Article 6.5

What is confidential information?

1.1 Legal provisions

1.1.1. WTO

Articles 6.5, 6.5.1 and 6.5.2 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

1.1.2 Colombian legislation

The legislation specifically relating to anti-dumping investigations is Decree 299 of 10 February 1995, Article 43 of which relates to confidentiality:

ARTICLE 43. - CONFIDENTIALITY OF DOCUMENTS. When initiating the investigation, INCOMEX shall open a separate file, in which shall be placed the documents which the authorities, the complainant or the interested parties provide on a confidential basis. Such documents shall be treated as confidential in accordance with the provisions of the Political Constitution and may be inspected only by the authorities.

Persons who provide confidential documents shall supply non-confidential summaries. If INCOMEX considers that the documents designated as confidential are not confidential by nature, it shall request the persons providing them to inform INCOMEX in writing that they waive such confidentiality or to state the reasons why they are unwilling to do so.

The confidential nature of a document cannot be adduced as grounds for refusing to provide it to the authorities requesting it in the proper exercise of their functions. The authorities are responsible for ensuring the confidentiality of such documents as they receive in the course of the proceedings mentioned in this Decree.

Paragraph: When, pursuant to this Article, documents are designated as confidential and non-confidential summaries are not supplied, or confidentiality is not waived when INCOMEX so requests, or the reasons for refraining from so doing are not stated, or when the reasons are not duly justified, the documentation designated as confidential may be disregarded in the investigation.

In addition, Law 170 of 15 December 1994 approves the Agreement Establishing the World Trade Organization, including the complete text of the Agreement on Implementation of Article VI of the General Agreement on Tariffs on Trade 1994.

1.2 Colombian practice

List of information considered confidential by nature.

1.2.1 Statements of production costs and income statements by production line for the product investigated

Article 41 of Law 222-95 amending Book II of the Commercial Code, establishing a new tender system and making other provisions, in the part relating to the dissemination of financial statements, provides that: "within the month following the date of their approval, copies of the general financial statements, together with comments and the corresponding recommendation, where appropriate, shall be deposited with the Chamber of Commerce in the place of the registered office. The Chamber shall send copies of these documents to persons requesting them, who pay the costs incurred."

Hence the financial statements which must legally be disseminated and can be consulted in accordance with Article 41 (Law 222-95) are general financial statements and not other statements.

Like statements of output by production line, statements of production and selling costs (both for the enterprise and the production line) and financial statements covering intermediate periods (both for the enterprise and the line) are not general financial statements, and in accordance with the provisions of the Law are not public, so that if the applicant requests that the statements be considered confidential, they should be treated as such.

1.2.2 Lists of customers and commercial invoices

In accordance with accounting practices, these are assimilated to auxiliary books under the provisions of Article 125, paragraph 4(a) of Regulatory Decree 2649/93, pursuant to Article 49 of the Commercial Code.

Article 61 of the Commercial Code specifically states that "traders' books and papers may not be examined by persons other than their owners or persons authorized to do so, unless it be for the purposes indicated in the Constitution and pursuant to an order by the competent authority." In accordance with this Article, an auxiliary book is not deemed to be of a public nature. Therefore, if the applicant requests that it be considered confidential, it should be treated as such.

1.2.3 Input-output table

The input-output table is not a supporting accounts document in accordance with Article 123 of Regulatory Decree 2649/93.

An analysis of the information contained in the table shows that it corresponds to consumption of raw materials, and this information shown in Colombian currency constitutes an element of the production cost - raw materials - in the statement of production costs. As mentioned above, disclosure of the statement of production costs is not compulsory and by extension this also applies to its constituent parts.

Therefore, INCOMEX considers that the information contained in the input-output table is not public by nature, but if the applicant requests that the table be kept confidential, it should be treated as such.

1.2.4 Industrial secrets and know-how

This is confidential information in accordance with Article 72 of Decision 344 (1993) of the Commission of the Cartagena Agreement and Article 75.3 of the Commercial Code.

2. Is there any system for allowing access to confidential information? If so, how does that system operate?

2.1 Legal provisions

2.1.1 WTO

Articles 6.5, 6.5.1 and 6.5.2 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

2.1.2 Colombian legislation

The above-mentioned Article 43 of Decree 299 of 10 February 1995 and Article 44 of the same Decree which states: "ACCESS TO THE RECORD. Any person may have access to the non-confidential documents referred to in this Decree and may request the issue of photocopies, as provided for in the Administrative Litigation Code."

In addition, Law 170 of 15 December 1994 approves the Agreement Establishing the World Trade Organization, including the complete text of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

2.2 Colombian practice

The Colombian legislation has no provision for a system for allowing access to information designated confidential. However, access is allowed to the non-confidential summary furnished by the applicant, which describes the main features of the confidential information in general terms.

Moreover, the technical studies carried out by INCOMEX represent the behaviour of the variables subject to analysis in terms of percentage variations, which enables appropriate conclusions to be drawn.

Document G/ADP/AHG/W/40 (Argentina)

B. Confidential Information

During investigations of injury to domestic industry conducted before the CNCE in connection with applications for the introduction of anti-dumping and countervailing duties and safeguard measures, any party submitting information whose disclosure they consider could be harmful or could provide a competitor with a significant advantage may request confidential treatment.

B.1 Legal framework

The laws governing confidential treatment at the international and national levels are:

- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994;
Articles 6.5, 6.5.1 and 6.5.2;
- Agreement on Subsidies and Countervailing Measures
Articles 12.4, 12.4.1 and 12.4.2;
- Agreement on Safeguards
Articles 3.2
- Decree 2121/94
Articles 45 and 46
- Decree 1059/96
Articles 3, 4, 5 and 6

B.2 Requirements

Under the provisions in force, the application for confidential treatment must include:

- (a) Clear identification of the information for which confidentiality is requested by indicating "CONFIDENTIAL" in the upper right-hand corner of each page;
- (b) justification of the need for such treatment;
- (c) non-confidential summary permitting a reasonable understanding of the content of the information supplied as confidential, for inclusion in the file.

If the information for which confidentiality has been requested cannot be summarized, the law requires that the applicant should so indicate, explaining the reasons why this cannot be done.

B.3 Procedure

The CNCE has five working days from the day following the receipt of the request for confidentiality to decide whether or not to grant such treatment, for which purpose it must determine whether the mentioned requirements have been met. Until confidential treatment has been granted,

the information in question is removed from the file and kept in a sealed envelope to which only the technical personnel assigned to the investigation have access.

Should confidential treatment not be granted, the party that supplied the information may withdraw it at any time, in which case the said information cannot be taken into account in the investigation. If, on the other hand, the applicant withdraws the request, the information may be included in the file.

Requests for confidentiality are made upon submission of the information.

B.4 Confidential information in the technical reports and determinations of the CNCE

Argentine legislation does not provide for a system of access to confidential information for the legal counsel of the parties. Such information is available only to the party by which it was furnished and to the implementing authority.

This is why the non-confidential summaries must provide a sufficiently clear description of the documentation which is inaccessible for reasons of confidentiality.

These non-confidential summaries are included in the file. Thus, in files in which confidential information has been supplied and used, there are two versions of the technical report and of the official records containing the determinations: one that is confidential and is not included in the file, circulated only within the CNCE, and the other that is included in the public file, in which the confidential information is replaced by asterisks.

B.5 Confidential information and hearings

The CNCE is responsible, in accordance with all of the confidentiality provisions, for safeguarding confidential information during the hearings conducted under its auspices. Article 13 of Resolution 02/96 stipulates that: "The hearings, whatever their nature, shall be conducted in strict compliance with the rules concerning confidential information contained in the file of the investigation concerned. Thus, the CNCE may only consult summaries of the confidential information provided by the parties".

B.6 Information for which the CNCE generally grants confidential treatment if such treatment is requested by the parties

- Cost structure;
- list of customers;
- discounts and conditions of payment;
- determination of the price at the point of sale;
- stocks;
- monthly sales;
- production processes.

Document G/ADP/AHG/W/41 (United States)

Topic 1, Article 6.5 - "Treatment of Confidential Information"

The United States has previously submitted two papers on this topic: G/ADP/AHG/W/3 (21 March 1997) and G/ADP/AHG/W/ 26 (13 October 1997). Following discussions held at the last meeting of the Ad Hoc Group in October 1997, it was decided that the Secretariat would compile a list of types of information Members have identified as being "confidential by nature" in response to the request for information in WTO/AIR/643. The United States submits the following regarding what it considers to be "confidential by nature".

As described in its earlier submissions, under the US anti-dumping duty law, a petition alleging "dumping" must be filed on the same day with both the US Department of Commerce (the Commerce Department or the Department) and the US International Trade Commission (the Commission). The Commerce Department determines dumping while the Commission determines whether a domestic industry in the United States is materially injured, threatened with material injury, or the establishment of an industry is materially retarded by reason of imports sold at less than fair value. Each agency has its own definition of "confidential information". A description of the types of information which each agency considers to be "confidential" is provided below.

US Department of Commerce

The Commerce Department uses the term "business proprietary information" to describe information that is "confidential" within the meaning of Article 6.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). Under its regulations, the Department recognizes four categories of information which can be relevant in an anti-dumping proceeding: public, business proprietary, privileged (such as internal agency documents covered by the attorney-client privilege), and classified information (meaning information protected for purposes of national security).¹ In general, public information is information which is made available to the public, whereas business proprietary information is submitted by private parties to an anti-dumping proceeding and may be disclosed (if at all) only to authorized applicants under a valid administrative protective order (APO).² Unlike business proprietary information, privileged and classified information cannot be released even under an APO.

Business Proprietary Information Releasable Under APO

The Department generally considers the following factual information to be business proprietary information, if it is so designated by the submitter: (1) business or trade secrets concerning the nature of a product or production process; (2) production costs (but not the identity of the production components, e.g. parts and equipment, unless a particular component is a trade secret); (3) distribution costs (but not channels of distribution); (4) terms of sale (but not terms of sale offered to the public); (5) prices of individual sales, likely sales, or other offers; (6) names of particular customers, distributors

¹See 19 C.F.R.351.105.

²The submitter of the proprietary information must also file a redacted or "public" version of the same document with the Department.

or suppliers³; (7) the dumping margin on individual sales; (8) the names of particular persons from whom business proprietary information was obtained; (9) the position of a domestic producer or workers regarding support for a petition; and (10) any other specific business information which, if released to the public, would cause substantial harm to the competitive position of the submitter.⁴

US International Trade Commission

Like the Commerce Department, the Commission uses the term "business proprietary information" to describe confidential or protected information. The Commission considers business proprietary information, by regulation, to be that "which concerns or relates to the trade secrets, processes, operations, style of works, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or other organization, or other information of commercial value, the disclosure of which is likely to have the effect of either impairing the Commission's ability to obtain such information as is necessary to perform its statutory functions, or causing substantial harm to the competitive position of the person, firm, partnership, corporation, or other organization from which the information was obtained".⁵ The Commission will release business proprietary information to specified representatives of interested parties who are parties to the proceeding and have applied for and received access to such information under an APO issued by the agency. The Commission will agree to release such information under protective order, unless the information is privileged, classified, or specific information of a type that must be withheld from disclosure based on a clear and compelling need.⁶

Document G/ADP/AHG/W/42 (Japan)

1. Treatment of Confidential Information¹ (Topic 1, Article 6.5)

Japanese law protects information which is, Japan believes, by nature confidential, as explained in the Government of Japan's submission to Ad hoc group of to the Committee of 30 September 1997.² Illustrative examples of confidential information set forth in Japan's paper include the following:

- Cost of manufacturing
- Sales expenses
- Actual transaction prices
- Names of customers or suppliers

³But not the destination of the sale or the designation of the type of customer, distributor, or supplier, unless the destination or designation would reveal the name of the customer.

⁴See 19 C.F.R. 351.105(c).

⁵See 19 C.F.R. 201.6(a)(1)

⁶See 19 C.F.R. 207.7(g)(2)

¹See document G/ADP/W/401 for descriptions of the numbered topics and document WTO/AIR/750 for a description of supplemental topics.

²See document G/ADP/AHG/W/23.

- Other business proprietary information

The information on the items listed below should also be treated as confidential because its disclosure would likely result in significant competitive advantage to a competitor, or because its disclosure would have a significantly adverse effect on the company to which the information relates or on the person supplying the information.

- Production capacity and operating ratio
- Volume of production and sales for each company
- Non-public financial statements

From the practical point of views, in Japan, it is only the precise numbers and specific names of traders, and not general descriptions of the categories of information listed above or other categories of information, that warrant confidential treatment. Confidential treatment should be accorded only to the information that has been treated as confidential by those who providing the information, and that is not publicly available. On the other hand, even though confidential treatment is warranted it is necessary to provide non-confidential information such as index so that the interested parties can understand the reasons for determinations made in an investigation.

Regarding the disclosure of confidential information in anti-dumping investigations, Japanese law does not permit the disclosure of confidential information to an interested party or its representatives. Although certain Members may be permitted to disclose the confidential information to the representatives of interested parties pursuant to protective orders, there is no system of protective orders, or any other basis under Japanese law for the disclosure of confidential information to interested parties or their representatives.

In our view, non-disclosure of confidential information to interested parties or their representatives does neither deprive them of the ability to participate in a meaningful manner in an investigation nor result in the denial of critical information to defend their interests. Interested parties and their representatives have access to non-confidential information, summaries of confidential information, and essential facts underlying final determinations. In this connection, we carefully examine the requests for confidential treatment, for example, if we receive the extravagant requests and find they are not warranted, the requests shall be rejected. In our view, investigating authorities should indicate the basic methodologies used in an investigation and the results for interested parties to understand, but it is not necessary to disclose every detail of concrete figures of calculation.

Japanese law provides that a person submitting the information that is determined to be confidential shall furnish a non-confidential summary of such information in writing. If confidential information cannot be summarized, a document stating why it cannot be summarized shall be submitted to the Minister of Finance.

The confidential information may be disregarded if the person fails to furnish a non-confidential summary or to submit a document explaining the reasons why the confidential information cannot be summarized, or if those documents does not sufficiently explain the reasons.

If a request for confidentiality is not warranted, the person submitting the information shall be promptly informed of why such treatment was determined to be unwarranted. The information may not be examined unless the request for confidentiality of the information is withdrawn or an appropriate summary of the information is submitted in writing.

If the information that has been submitted is disregarded for any of the reasons set forth above, the person who submitted the information shall be informed in writing of why the information was disregarded.

If an investigation is initiated, interested parties shall, upon request in writing, be provided the opportunity to examine the information that has been submitted except the information which is confidential, the information submitted by interested parties confidentiality is claimed, and the documents recording the information orally presented as confidential by interested parties. [Cf. the Cabinet Order Relating to Anti-Dumping Duty (hereinafter referred to as "the Cabinet Order"), Articles 7.6-7.10 and 11.]
