Ombudsman
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Case note

Request for access to an application for an anti-dumping investigation

Legislation	Official Information Act 1982, s 6(a)
Agency	Ministry of Commerce
Ombudsman	Sir Brian Elwood
Case number(s)	W41825
Date	March 1999

Request for application for the initiation of an anti-dumping investigation—request refused in reliance upon s 6(a)—consideration of New Zealand's obligations as a member of the WTO—Article 5.5 of the WTO Anti-Dumping Agreement—Dumping and Countervailing Duties Act 1998—prejudice to New Zealand's international relations would be likely to occur

Legal advisers to two pharmaceutical companies made a request for access to an application, made by a third pharmaceutical company, to the Ministry of Commerce for the initiation of an anti-dumping investigation involving those two companies. *'Dumping'* is defined in the Dumping and Countervailing Duties Act 1988 as meaning, in relation to goods, *'a situation where the export price of goods imported into New Zealand or intended to be imported into New Zealand is less than the normal value of the goods as determined in accordance with the provisions of this Act…'*. The Ministry declined to make the information available in reliance upon section 6(a) of the OIA. The legal advisers sought a review of that decision.

In assessing whether the requirements of section 6(a) were met in this case, the issue on which a view had to be formed was whether release of the information at issue *'would be likely'* to prejudice the *'international relations of the Government of New Zealand'.*

In reporting on its decision, the Ministry explained that it is responsible for the administration of the Dumping and Countervailing Duties Act 1988. In respect of the dumping of goods, this Act reflects the provisions of the World Trade Organisation ('WTO') Anti-Dumping Agreement. The WTO agreement provides the legal basis for investigating whether goods imported into New Zealand are being dumped and whether dumped goods are causing or threatening

material injury to a New Zealand industry. Applications for dumping investigations may be made by or on behalf of the New Zealand industry or, in the case of third country dumping, by a Government of a third country on behalf of its domestic industry. A dumping investigation is initiated only if the Secretary of Commerce is satisfied that a properly documented application contains sufficient evidence that imported goods are being dumped and, as a consequence, material injury to an industry has been or is being caused, or is threatened, or the establishment of an industry has been or is being materially retarded.

As a member of the WTO, New Zealand is bound by the provisions of the WTO Anti-Dumping Agreement. Article 5.5 of the WTO Anti-Dumping Agreement states:

> *The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicising of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.*

The Ministry is required by Article 5.5 to avoid publicising an application for the initiation of an investigation under that Agreement unless a decision has been made to initiate an investigation. It submitted that to make available the details of an application would be in contravention of this obligation, and such a breach of a WTO obligation would adversely affect New Zealand's international reputation as an adherent to WTO rules and would adversely affect New Zealand's credibility as an advocate promoting adherence to WTO rules.

The Ministry of Foreign Affairs and Trade was consulted and it advised that it is the New Zealand Government's policy to act in accordance with all its international undertakings. Doing otherwise would prejudice our international relations by:

- undermining New Zealand's reputation as a country which adheres carefully to all the undertakings it has made. This reputation gives New Zealand standing as a reliable and responsible negotiator and contributes significantly to its ability to negotiate good outcomes; and
- raising questions about New Zealand's approach to dumping investigations more generally. WTO Members, such as the European Communities, monitor very closely adherence with procedural and substantive requirements for dumping and other investigations (as does New Zealand in respect of other countries). The Ministry said that any breaches are seized upon, including through WTO dispute settlement action.

The requesters submitted that disclosure of the information at issue to themselves (as legal counsel for the two companies that were the subject of the application) would not be in breach of Article 5.5 of the WTO Anti-Dumping Agreement, because such disclosure would not amount to 'publicising' the application within the meaning of that word in both the Concise Oxford Dictionary and the new Oxford Dictionary. They also argued that, to the extent that the company which had made the application had itself issued a press release to the effect that it was going to make the application, the purpose of the obligation in Article 5.5 had been defeated.

Whilst disclosure to requesters as legal counsel might not fall within the dictionary definitions of the word 'publicise', the question was not whether disclosure would publicise the application, but rather whether disclosure would breach the New Zealand Government's obligation to *'avoid…any publicising'* of the application. It is the perception of the parties to the Agreement as to whether the Government of New Zealand has honoured its obligations under the Agreement, rather than dictionary definitions of the word *'publicise'*, that is in issue.

The Ministry's practice has been not to release the text of applications before a decision has been made on initiation of an investigation, *'thereby avoiding publicising an application'*. Although some governments may have different approaches to that taken by New Zealand, practices similar to that followed by New Zealand have been adopted by others. The Ministry's view was that release of the application on a 'confidential-to-counsel' basis could still be regarded by some WTO members as publicising the application and contravening New Zealand's obligations under the WTO Anti-Dumping Agreement.

Concerns were also expressed that if the information were to be made available in this case, any other interested party (or their legal counsel) could make a similar request, which would then be required to be granted on the same grounds that disclosure to that party was not in breach of the Agreement against 'publicising'. Against that background, disclosure to legal counsel, even on a 'confidential-to-counsel' basis, could provide grounds for other parties to complain that the New Zealand Government was not taking all reasonable steps to 'avoid' publicising the application. The issue was not one of whether, on an objective basis, those parties should have cause for complaint, but rather, whether, on a subjective basis, they would be likely to consider that they have cause for complaint. In this context, the views of the Ministry of Foreign Affairs and Trade, as Government's 'expert' policy advisers on international relations, were persuasive.

On the matter of the 'publicising' of the application by the company which made the application, such publicising by a party other than a relevant government agency is not the subject matter of the Agreement.

After assessing the respective merits of the arguments advanced by both the requesters and the Ministry of Commerce, the view was formed that disclosure of the application *'would be likely'* to prejudice *'the international relations of the Government of New Zealand'* and that section 6(a) therefore provided good reason to withhold the information at issue.

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