

Australian Industries Group - Trade Remedies Task Force
Response to Draft Dumping and Subsidies Manuals
and Paper on “Particular Market Situation”

Dumping Manual

Related party transactions (pages 17, 18 and 19)

1. It accepts that the transactions between intra company transactions cannot be considered sales and that this does have implications for price effects in relation to material injury.
2. However as the methodology set out in the manual provides, it is possible to use the transactions between associated parties where it can be shown that these transactions in effect reflect transaction values between unrelated parties in an arms length transaction.
3. One way to do this is as the manual suggests, is to compare the sales of company made to unrelated and related parties. This would also apply to question of cost of inputs as well as sales of like goods.
4. Reference is made to making a line by line comparison of transaction between related and unrelated parties. It would be presumed that if there were small or insignificant variations in prices between related and unrelated parties that this minor variation would not result in the rejection of all the sales between related parties.
5. There should be some statement included in the manual to this effect.

Normal value particular market situation (page 30)

6. The Task Force will respond to the issue in more detail in relation to the paper that has been issued on this topic.
7. The Task Force agrees with the proposal in general that has been outlined in the draft manual. In respect of the question of notification of a country of a claim that a particular market situation exists, clarification is sought on the timing of the notification to the government in the country of export. Given that a particular market situation does not give rise to a claim of actionable subsidy then the consultation period referred to in the Agreement on Subsidies and Countervailing Measures does not apply. Is what being proposed in this draft along the lines of that agreement or will it be subsequent to initiation?

Normal value – other sellers provisions (page 32 and 33)

8. It is noted that the provision of section 269TAC (1) makes specific reference to “other sellers” and that the use of other seller provisions has not been the subject of adverse comment by either Australian industry or exporters.

Reliance on domestic selling prices has been seen as being more reliable than domestic selling prices determined on a cost of construction basis.

9. It is noted that the provision of section 269TAC (1) makes specific reference to “other sellers” and that the use of other seller provisions has not been the subject of adverse comment by either Australian industry or exporters. Reliance on domestic selling prices has been seen as being more reliable than domestic selling prices determined on a cost of construction basis.
10. The issue of confidentiality referred to is providing information to an exporter of the name of the other seller and in providing information of the type of product being sold on the domestic market and other sellers’ distribution methods which are relevant to a level of trade comparison.
11. The manual goes on to state that where sufficient information cannot be provided to the exporter without disclosing confidential information on such matters, Customs may be constrained in using other sellers’ sale prices and that it will consider other approaches.
12. The Task Force would question why would this information be per se confidential in the first place, why Customs would not be in a position to make all the necessary adjustments to ensure a fair comparison and why could there be adequate non confidential disclosure to the exporter to enable that exporter to defend its interests through the making of appropriate submissions.
13. This amendment appears to reflect the outcome of the Federal Court decision in Thai Pineapple Canning Industry Corp Ltd v Minister for Justice and Customs (2008) FCA 443. In that case the exporters consultant sought information on the “other seller” so appropriate submissions of the type referred to above could be made. Without going into all the details and findings of the case, it is evident that in this case Customs did not initially disclose to the exporter in question or its consultant that it was using other sellers provision, did not disclose who the “other seller” was in the Statement of Essential Facts and allowed the consultant to believe another party was the “other seller” and never corrected this misunderstanding.
14. Customs claimed that it was prevented from disclosing certain information, in regard to the “other seller” principally concerning adjustments to the applicant. The Federal Court found that:
 - the other seller had in fact not claimed confidentiality
 - that the issue of not being able to disclose confidential information to the exporter when using “other sales” did not for that reason alone prevent the use of the other seller provisions under section 269TAC(1)
 - that there was no basis for finding that a summary sufficient to allow a reasonable understanding of material could not have been made
15. In summary the proposal to overcome a long standing practice to use other sellers which in fact is mandated in section 269TAC(1) appears to go too far

and in fact in a properly conducted investigation should not give rise to the concerns that have been expressed in the Dumping Manual.

Establishing a date of sale (page 51)

16. The Task Force agrees with the proposed amendment which is consistent with Customs present practice and reflects approaches taken by other dumping administrations.

Value Added Tax on exports (page 52)

17. The Task Force agrees with the proposed amendment on VAT on exports.

Sampling (pages 66-69)

18. The Task Force welcomes the establishment of a formal procedure that sets out the basis on which sampling will be conducted and notes that the basis of sampling is consistent with that specified in the anti dumping agreement.
19. In respect of the question of dumping margins, the Task Force agrees with the comments made as a whole. However in relation to non cooperating exporters there should be a statement to the effect that in imposing measures that unlike residual exporters Customs is not bound to limit finding of a dumping margin to one that has been found for cooperating exporters.

Interim Dumping Duties (page 86)

20. The Task Force agrees with the proposed amendments.

Third Country Dumping/ Countervailing Duties (page 88)

21. The Task Force has no comment to make on these amendments.

Undertakings (page 89 and 90)

22. The Task Force would agree with the statement that that only the exporter of the goods may offer an undertaking and that no undertaking can in fact be accepted by the Minister if offered by either a trader or intermediary.
23. The Task Force would also agree that even if the undertaking recognises the relationship between exporter and intermediary/ trader that any breach of the terms of the undertaking by either of these parties is a breach by the exporter.

24. The comments under “Practice” are supported as they clarify the differences in undertaking offered by the exporter and that proposed by the Minister.

Re-investigations (page 91 and 92)

25. The Task Force notes that the manual provides some clarity of its role in the re-investigation process.
26. However what is not clear is whether the re-investigation is to be carried out by a different team to that which carried out the original investigation or whether it will be carried out by a new team.
27. It is a matter of good practice not to have the same investigators to prepare advice on a report which may criticise the process/finding of those investigators. In the past Customs has recognised this unsatisfactory approach and directed officers not involved in the original investigation to prepare the report to the Minister. This practice should be clearly notified to ensure the Minister receives professional and objective advice.
28. Secondly under Practice, the statement is made that the examination of a finding should be consistent with Customs interpretation of the Act. However this introduces a subjective element of what is the correct interpretation of the Act which may in fact be a key issue. The reference to Custom Act should be that any decision will be made consistent with the provisions of the Customs Act.

Review of Measures (page 93 and 94)

29. There is no requirement under either the Anti Dumping Agreement or the Customs Act that Customs is required to notify the government of a country that it has an application for review of measures. The Task Force fails to see why such a step is being introduced into the process.
30. There are two clear grounds for seeking a review; one for a review of variable factors, the other a review of whether or not measures ought to be revoked. The application form requires that only one of these measures can be the subject of an application. This is logical in that if Customs is saying that measures should be varied you agree that measures should be in place. If Customs is stating that measures should be revoked then there is no need to consider the question of variable factors.
31. It is not open to Customs to also consider in one review the other ground of review and indeed the revised dumping manual states that an application for a review concerning variable factors should only consider that factor and make no comment about revocation.
32. However what the draft attempts to do is to address the issue of when Customs considers during the course of an inquiry into variable factors that there may

be grounds for considering revocation of measures. What is being proposed is that it will address this matter in the Statement of Essential Facts (SEF) and final report. The alternative is also put forward in considering revocation and on the assumption that those grounds are not found that Customs may consider that grounds exist for a change in variable factors.

33. The Task Force disagrees with the proposals contained in the draft. Clearly a choice has to be made by a party seeking a review and interested parties cannot in submissions go outside that review process to consider matters that in fact cannot be properly considered by that review or put forward to the Minister.
34. What has been proposed ignores this essential element in the conduct of a review by proposing that it will incorporate recommendations in both the SEF and in the Minister's report, even though they do not form part of the inquiry and cannot be addressed by the applicant when making its application.
35. There is a process in place where Customs if it so chooses can make a recommendation to the Minister for him to conduct a review to cover either the question of revocation or review of variable factors. Likewise it is open to an interested party to seek revocation of measures, and not as part of a review of variable factors make submission on why the measures should in fact be revoked and for the submission outside the actual review be incorporated into the Statement of Essential Facts and in the Final Report as recommendations for a new enquiry.
36. A review of revocation of measures is said to be like a continuation inquiry but of course it is not a continuation inquiry. It is also stated that Customs will need additional time to gather information. Is Customs proposing to provide a form that industry must fill out that is along the lines suggested? The Task Force would be interested to know what the practice in other jurisdictions on information gathering is and whether what is being proposed is consistent with the best practice of other dumping administrations.

Continuation of Measures

37. This part of the draft manual has not been the subject of any proposed amendments. The Task Force believes given its importance and WTO jurisdiction on sunset reviews that this part of the Dumping Manual ought to be expanded to make it more useful.

Paper on Particular Market Situation

38. China was recognised as having market economy status under Australia's anti-dumping legislation as a condition of it entering into Free Trade Negotiations with China.

39. It is noted that other major trading countries such as the USA and the EC have continued not to recognise China as a having “market economy status”. Canada’s position appears to be similar to Australia’s present position in considering whether domestic prices are substantially determined by a government and there is sufficient reason to believe that they are not substantially the same as they would be if they were determined in a competitive market. The EC has provisions which deal with what is a “particular market situation” in its regulations.
40. It is worth noting that in the latest review by the EC of the “Progress of the People’s Republic of China Towards Graduation to a Market Economy Status”, dated the 19 September 2009¹, found that China has not arrived at a point where it could be considered to have market economy status. Indeed as the paper noted:
- “... Distortions prevail despite Chinese efforts to reduce state interference in the management of the economy. These distortions directly or indirectly affect the domestic cost and price structures which are the primary considerations for the purpose of the TDI investigations.”
41. As part of its consideration of recognising China as having “market economy status” the Australian Government amended its Dumping Manual by elaborating what was meant by ‘situation in the market’ which made sales in that market unsuitable for normal values (section 269TAC (2) (a) (ii) and by agreeing to fund the establishment of a Customs office in Beijing specifically to deal with anti dumping issues.
42. Although the reference to having regard to “particular market situation” is not confined to just China the amendment to the Dumping manual to include guidelines on “particular market situation” and the funding of a Customs office in Beijing were to ensure that Australian Industry was not disadvantaged by the government’s recognition of China as a market economy. Attached is an extract from the Task Force Submission which discusses this question.

Evidence

43. In terms of lodging an application in which the issue of “particular market situation” is raised the Task Force agrees that this must meet the prima facie test that applies to all statements contained in an application and the Task Force has never argued to the contrary.
44. The Task Force agrees with the general comments made about “Sufficiency of Evidence” and in particular that evidence to support a claim of market

¹ **Similar findings in China : Description of Selected Government Practices and Policies Affecting Decision-Making in the Economy (USITC Investigation No. 332-492, Publication 3978, December 2007)**

situation does not need to be conclusive or irrefutable.

45. The Task Force also agrees with the statement that evidence may come from a variety of sources including published information relating to the industry, specialist research, findings and supporting evidence of other anti dumping authorities that is relevant to this question. The Task Force would also add that regard could be had to international benchmarks and to other government publications and laws and practices of the country in question.
46. In the case of a market situation the role of government may exist in many forms and at different levels and occur through agencies such as State owned enterprises. In some cases the evidence may be very specific; in other cases evidence is described in the guidelines as “reasonably reliable” and “supportive “enabling inferences to be drawn. This is especially true when it comes to establishing the question of impact on government activity on prices. In most, if not all, cases there will be no specific government pronouncement that the purpose of the government measures was to assist an industry by artificially impacting either domestic prices directly or indirectly through the provision of inputs.
47. An analogy with how the Appellate Body had regard to the question of establishing whether a government had entrusted or directed a private body to do something to assist an industry is considered helpful. In these cases, Customs may not necessarily find direct evidence that a government has in fact specifically entrusted or directed a private body, rather Customs may have regard to a range of facts which collectively enable a finding to be made.
48. In United States- Countervailing Duty Investigation on Dynamic Random Memory Access Memory Semi Conductors (DRAMS) from Korea the AB stated:

“We note, first, that the Panel's discussion of the *totality* of the evidence appears to be primarily a summation of errors that the Panel found in the course of its review of the individual pieces of evidence. Such errors undoubtedly would affect an examination of the *totality* of the evidence, as these pieces would constitute the evidence the Panel would consider as a whole in assessing the evidentiary support of the USDOC's finding of entrustment or direction. Nevertheless, what is absent from the Panel's "global" assessment, in our view, is a consideration of the *inferences* that might reasonably have been drawn by the USDOC on the basis of the *totality* of the evidence.

As we have already observed individual pieces of circumstantial evidence are unlikely to establish entrustment or direction; the significance of individual pieces of evidence may become clear only when viewed together with other evidence. In other words, a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference of entrustment or direction”.

49. The Task Force would consider that Customs should also consider the totality of evidence and come to a view without necessarily just relying on individual

assessments of particular pieces of evidence in coming to a view whether market situation exists and that it has materially affected prices.

Effect on prices

50. The Task Force notes that where the previous Dumping manual referred to the influence of government on prices as being “substantial” or “significant”. It is also noted that government influence can exist without making the market so distorted that the sale of goods in that market are unsuitable for establishing normal value, presumably the guidelines meant to say by using domestic sales.
51. The Task Force would agree that it will be rarely possible to precisely quantify the effect of government influence on prices. In considering what a material effect on prices is, the Task Force would agree that the effect must be more than *de minimis* and must not be unimportant and trivial and that several influences may combine to have a material effect. The Task Force believes that this clarification is helpful and supports the proposed wording.
52. The Task Force agrees with the process that Customs uses to obtain information i.e. the addition of a market situation questionnaire as part of the exporter questionnaire. The Task Force would also agree that if the government or exporter fails to cooperate after being given a reasonable opportunity to do so, or does not provide probative evidence, that Customs will weigh up the evidence including the *prima facie* evidence of the application and make a finding of market situation on that basis. Indeed the Task Force considers that as the government and exporter have this information but will not disclose it, that an adverse inference may and indeed should be drawn.
53. In relation to the specific examples given, the position is that clearly *prima facie* evidence but not conclusive evidence must be provided. Attention is drawn to the comments made in relation to evidence and that as the guidelines provide the question is the likely impact on prices of government interference in the market place.

Subsidies

54. The Task Force agrees with the comments made in relation to consideration of subsidies in making a decision on finding of “market situation”.

Public file

55. Reference ought to be made in the guidelines that information that is obtained as part of the investigation process will be available on the public file. Apart from commercial considerations that may arise when dealing with a company the information obtained from governments at all levels should be non

confidential and should be placed on the public file in a timely manner. It is also assumed that those documents would be in English.

Statement of Essential Fact and Report

56. It is important that the question of a finding or rejection of market situation be adequately addressed in the Statement of Essential Facts with evidence of the decision being set out and reasons given what a finding of market situation was accepted or rejected.
57. In the case of Sodium Hydrogen Carbonate (Sodium Bicarbonate) from the People's Republic of China, Report no.98 the applicant stated that Chinese sodium bicarbonate prices were artificially low when compared with other market economy prices as a result of the substantial level of state-owned enterprises (SOE) in the industry.
58. The response in the final report was:

“6.2.2 Customs’ assessment

During its verification visit to China, Customs examined whether domestic sales of sodium bicarbonate were unsuitable for establishing normal values because of a situation in the Chinese market. Customs considered a number of factors including whether the prices were artificially low and in doing so, had particular regard to whether any Government influence on prices or costs could have caused artificially low prices. Customs undertook a detailed examination of Ihju and Sunite’s costs and prices and had discussions with the China Soda Ash Industry Association (CSAIA) and the China Salt Association (CSA).

Customs confirmed that Ihju and Sunite are subsidiaries of a State Owned Enterprise (SOE) and that SOEs dominate the production of sodium bicarbonate in China. However, Customs remains of the view that there is no evidence to indicate that the domestic selling prices of sodium bicarbonate in China were artificially low and therefore not suitable for use in determining a price under s. 269TAC(1).”

59. This of course does not give any indication of the facts that were relied upon in coming to that view. Indeed the inquiries carried out by Customs did indicate that the companies in question were State Owned Enterprises (SOE) and that SOE’s dominated production of sodium bicarbonate but then said Custom remains of the view there was no evidence to indicate whether the prices were artificially low.
60. Clearly this response should be considered unsatisfactory as it simply does not provide any meaningful evidence upon which the findings were based or analysis of evidence to enable an applicant to form a view that this question has been addressed in any meaningful way.
61. The Discussion Paper highlights Customs’ intent in the Exporter Questionnaire to establish the impact of ‘Government Influence’. The Task Force welcomes the guideline which requests information demonstrating

whether “domestic prices are materially influenced by the government of that country and are not substantially the same as they would be if they were determined in a competitive market.” This approach reflects the CBSA methodology of Canada.

62. The Task Force recommends the above test as to what constitutes government influence is a more realistic and appropriate approach than guidelines contained in the current wording of the Dumping manual which reflect the impact of SOEs trading at a loss “so as to significantly lower costs”. The Task Force considers that the impact may not be a reduction in selling prices but, rather, the suppression of selling prices at levels below what they would otherwise be in a competitive market. Or to put it another way, the Task Force considers that the impact may not only be a reduction in selling prices but, rather, the suppression of selling prices at levels below what they would be in the absence of the factors identified as affecting domestic prices.
63. The Dumping Manual requires further clarification of the “prices are lower than they otherwise would be” methodology.

Assistance to Australian Industry

64. One issue that is not referred to in the proposed guidelines is that of the assistance that should be made available to Australian industry through being able to have contact with the Beijing office.
65. There is a common recognition that China because of its size, its complexity, history of major government control in the economy, the difference economically between various regions, the influence of local government, not to mention language, presents unique problems to an Australian Industry in gathering information to lodge an application and for Customs in carrying out an investigation.
66. As previously mentioned the Beijing office was created to assist Customs and indirectly industry in the carrying out of dumping investigations in China. In the Joint Study report Customs stated that:

“The Beijing office is a resource to assist the Trade Measures Branch’s understanding of the business environment and markets in China and to assist with the logistics of verification visits.”
67. The Task Force would consider that the officers in the Beijing office should do more than provide logistical assistance to a verification visit but to be actively engaged in assisting any investigation team. There seems little justification in maintaining such an office if its purpose is confined to assisting in logistical support.
68. On the broader question of “market situation” the Task Force considers that it would be of great assistance if Industry could seek the assistance of officers from the Beijing office in coming to a better understanding of the level of

government involvement in an industry and prior to the initiation of an investigation. The nature of inquiries would depend on each case but would not be used as a “fishing expedition”. The assistance could range from making a potential applicant aware of particular programmes, of areas within the government in which contact could be made or of articles or publications on an industry. This would not mean of course that the office would be proactively involved in assisting in the preparation of a case.

69. We would welcome your comments on this suggestion.

Draft Subsidy Manual

70. The comments on the Draft Subsidy Manual will be brief. The Task Force welcomes the publication of a Customs Subsidy Manual for first time. It considers that its general description of what is a subsidy, what is a financial contribution; the question of specificity; upstream subsidy and the methodology that will be employed to calculate a subsidy are consistent with the subsidies agreement and Australian legislation.
71. The only comment that would be made is that at page 29 of the manual in considering the question of upstream subsidy, Customs states that it will only investigate up to one level immediately preceding the point of production of the exported goods.
72. The argument is simply based on inconvenience of having to go beyond that point on the basis that the impact of a subsidy is less likely and that going beyond this point is unduly complex and that multiple pass through tests may be required if the parties are not related.
73. There is no legal basis for Customs to so restrict its investigation in this manner under either the anti dumping agreement or Australian legislation and to do so based on inconvenience is simply unacceptable.
74. The statement that if a party requests an investigation beyond this stage, that it has an onus to demonstrate its significance, is inconsistent with the test that an applicant is required only to provide *prima facie* evidence in an application.

Attachment A

TRADE REMEDIES TASK FORCE SUBMISSION TO THE JOINT STUDY OF THE ADMINISTRATION OF AUSTRALIA'S ANTI DUMPING SYSTEM dated 7 April 2006.

5 (b) Verification in China and role of Customs Beijing Office

"Because of China's size, language differences and business culture it provides a major challenge for Australian industry in obtaining in-country information, and in Customs ability to conduct on the spot verification.

The TRTF commends the Australian Government for providing Customs officers in Beijing to assist in anti-dumping investigations. Although the functions of these officers may be wider than anti-dumping investigations, it is important that the primary role of these positions is specifically dedicated to such investigations. It is important to clarify whether these officers would be available to assist an applicant in obtaining information on the domestic market in China, and in particular whether these officers would assist and participate in the in-country verification process being undertaken by Customs officers from Australia. It would be helpful for Australian industry to know the specific roles the Beijing-based officers will be expected to perform in relation to anti-dumping.

The TRTF would expect that these officers will have received detailed training in Australia's anti-dumping law and practice, in particular on the verification of information. The opportunity should be made available for these officers to return to Australia to participate in briefings on individual cases and to speak to applicants. If necessary, these officers should also be available for briefings that applicants and Customs may need to hold in Beijing.

5 (c) Government Influence on Costs and Prices

The TRTF and Australian manufacturers generally, fought hard last year to ensure that with granting China market economy status, Australia's anti-dumping system was not compromised. The particular concern related to the criteria used to assess normal value where the criteria might not reflect true market conditions or where input costs are influenced by Government behaviour. At that time manufacturing industry congratulated the Government in responding to these concerns by amending the Customs Manual (see Attachment D). The TRTF would expect that the guidance given in the Manual would be applied in all relevant investigations. The TRTF will be keeping a close watching brief on the applications of the standards set out in the Customs Dumping Manual."

Joint Study Report to Minister at page 29

"Several submissions raise the issue of assessing whether costs are artificially low. The issue of artificially low costs is often raised in the context of China and the possible influence of SOEs on the market or cost of production inputs. Since

May 2005, Australia has recognised China as a market economy under its anti-dumping legislation.

Customs now has representatives in Beijing, recognising the increasing importance of China in trade with Australia. The Beijing office is a resource to assist the Trade Measures Branch's understanding of the business environment and markets in China and to assist with the logistics of verification visits. As the legislation stands, it would not be possible to impose an onus of proof on exporters in regard to artificially low pricing as suggested in some submissions. Australia's legislation and the WTO Anti-Dumping Agreement require that normal values are based on selling prices in the country of export except where the Minister is satisfied that certain conditions exist. One such condition relates to the situation in the market of the country of export rendering sales in that market unsuitable for determining normal values.

It would not be open to the Minister to satisfy himself that the market is unsuitable based on a failure of an exporter to prove that the market situation is suitable. The onus must rest on Customs to make thorough inquiries, seeking the assistance of exporters and other parties that might hold relevant information. The failure of an exporter to provide information in response to Customs' inquiries.