

ASSESSMENT OF SUBMISSIONS - EXPOSURE DRAFT DUMPING MANUAL

1. Ministry of Commerce of the People's Republic of China (MOFCOM)

Normal Value Based on Other Seller's Domestic Sales (Chapter 10)

The MOFCOM submission drew attention to the hierarchy of methods provided for in the *Customs Act 1901* (the Act) for determining normal values. MOFCOM stated that “an inability to disclose confidential details of an “other seller” price, or its circumstances, is not a factor which would permit Customs and Border Protection to move to the next method in that hierarchy”.

Customs and Border Protection agrees that the non-disclosure of confidential information by the other seller would not be sufficient grounds to depart from determining normal values under s. 269TAC(1). The draft text at lines 1261-1272 of the exposure draft was not intended to suggest that it was possible to disregard domestic sales of the other seller in the event that certain information could not be provided to the exporter for which the normal value was being established.

Customs and Border Protection was simply highlighting that refusal by the other seller to disclose certain details about its domestic sales to the exporter concerned may limit our ability to properly assess adjustment claims and, as a consequence, establish the necessary facts. In those circumstances, it may not be able to properly ensure a fair comparison between the normal value based on the other seller's domestic sales and the exporter's sales to Australia.

The paragraph has been amended to clarify the issue of non-disclosure of information by an other seller.

Due Allowance - Value Added Tax on Exports (Chapter 16)

MOFCOM submitted that the proposed approach to making due allowance for value added tax on exports was incorrect. It is claimed that the formula in the exposure draft used to calculate the amount of VAT payable on exports does not take into account VAT-exempt imported material as a deduction.

Customs and Border Protection agrees that VAT-exempt imports used in the production of the goods may impact on the calculation of the VAT liability. The exposure draft dumping manual makes clear that regard will be to relevant data and evidence submitted by exporters in examining their particular circumstances and the need for adjustment.

MOFCOM further submitted that the text in lines 2,020 TO 2,022 does not reflect Chinese law. It is claimed that the relevant Circular for VAT Refund explicitly uses the export FOB value as the basis for the refund calculation.

Customs and Border Protection will consider adjustments dealing with VAT after carefully examining the circumstances of each case. Further case experience should allow the matter to be revisited in the next revision of the manual.

Finally, MOFCOM considered that the calculation in the exposure draft appeared to involve a change to the FOB export price. It pointed out that this would not be in compliance with section 269TAC(8) of the Act, which required adjustments be made to the normal value.

Customs and Border Protection agrees that the legislation requires that adjustments are made to normal values. This is made clear in the exposure draft at lines 1864, 1880, 1932 and 2025-2026.

Reinvestigations (Chapter 27)

MOFCOM submitted that line 3387 of the exposure draft was incomplete as it incorrectly stated that the CEO must “affirm the finding or findings the subject of the reinvestigation”.

Customs and Border Protection agrees that this was an inadvertent error in drafting and has amended the text to more accurately reflect the legislation.

MOFCOM also submitted that “the views of the Trade Measures Review Officer will always be matters of relevance in a reinvestigation” and that Customs and Border Protection should consider “making specific reference to the relevance of the views of the TMRO in the conduct of a reinvestigation”.

As set out in this section of the exposure draft, the Act clearly requires that in conducting a reinvestigation, the CEO must only have regard to the information and conclusions to which the Review Officer was permitted to have regard. Section 269ZZK(6) defines ‘relevant information’ to which the Review Officer was permitted to have regard.

Customs and Border Protection considers that in conducting a reinvestigation, the views and findings of the TMRO are relevant in so far as they establish the scope of the matters to be reinvestigated. The commenter correctly points out that the views of the TMRO are always referenced in reports of reinvestigations undertaken by Customs and Border Protection. This is largely done to provide the reader with context to the matters subject of the reinvestigation.

Customs and Border Protection does not consider that amendment to the dumping manual is necessary.

MOFCOM also queried the practice set out at lines 3408-3410 of the exposure draft, in particular the reference to ‘Customs and Border Protection interpretation of the Act’.

MOFCOM submitted that the draft text could possibly be misinterpreted to suggest that Customs and Border Protection would not adjust its position in a reinvestigation from that based on its own interpretation of the Act and its policy and practice as outlined in the Dumping Manual. It requested that the dumping manual be amended to “recognise that existing policy and practice might not accord with law, and that Customs and Border Protection officers need to be careful so that inflexible rules of policy do not override Australian law as interpreted in light of the WTO Anti-Dumping Agreement.”

The purpose of the Customs and Border Protection dumping and countervailing manual is to provide guidance to operational staff in conducting investigations and also to inform interested parties of the policies and practices used in the administration of Australia’s anti-dumping and countervailing system. However, whilst the manual outlines the legislative framework, and the principles and practices followed by Customs and Border Protection in investigating anti-dumping and countervailing matters, it is made very clear in Chapter 1 that the manual “is not intended to provide a mandatory set of instructions or constrain the decisions of Customs and Border Protection officers.”

Nonetheless, Customs and Border Protection accepts that the proposed text could be interpreted as limiting the discretion of the decision maker in a reinvestigation and some clarifying amendments have been made.

2. Trade Remedies Task Force (TRTF)

Injury To An Australian Industry – Related Party Transactions (Chapter 6)

The TRTF agreed with Customs and Border Protection proposed approach to examining related party transactions by Australian industry and their impact on injury considerations. However it suggested that where Customs and Border Protection undertakes a line by line comparison of transactions between related and unrelated parties, minor variations between these sales should not be justification for rejecting all related party sales.

The proposed practice for examining related party transactions by the Australian industry is aimed at assessing the impact of related party transactions on the industry's price related injury claims, and therefore their suitability in determining the economic condition of the Australian industry. Where minor variations exist between an industry's related party transactions and its unrelated sales, it is open to Customs and Border Protection to find that these minor variations had little impact on the industry's weighted average selling price over the investigation period and therefore suitable for examining injury claims.

The dumping manual has been amended to include reference to such situations.

Normal Value Based on Other Seller's Domestic Sales (Chapter 10)

The TRTF raised concerns with Customs and Border Protection proposal to using alternative methods to determining normal value when confidentiality constrains the use of other sellers domestic sales information. In its view, a "properly conducted investigation should not give rise to the concerns that have been expressed in the Dumping Manual".

As explained in response to similar concerns raised by MOFCOM, Customs and Border Protection was not proposing to simply disregard domestic sales of the other seller in the event that certain information could not be provided to the exporter for which the normal value was being established. This chapter of the manual has been amended to reflect that where Customs and Border Protection is unable to properly ensure fair comparison between the normal value based on the other seller's domestic sales and the exporter's sales to Australia, alternative approaches to determining normal value will be considered.

Due Allowance - Value Added Tax on Exports (Chapter 16)

The TRTF stated that it agreed with Customs and Border Protection proposed approach to calculating adjustments for VAT on exports. The comments we have made in response to the submission by MOFCOM should be read in this context.

Due Allowance – Date of Sale (Chapter 16)

The TRTF stated that it agreed with Customs and Border Protection proposed approach to establishing the date of sale.

Determination of dumping margins – Sampling (Chapter 17)

The TRTF welcomed the proposed formal procedures for sampling and was of the view that they were consistent with the anti-dumping agreement. However, it suggested that the manual should make clear, for non cooperating exporters, "Customs and Border Protection is not bound to limit finding of dumping margin to one that has been found for cooperating exporters."

The exposure draft highlights that for non-cooperating exporters, Customs and Border Protection will determine export price and normal value under the provisions s.269TAB(3) and

s.269TAC(6) respectively, having regard to all relevant information. This clearly shows that Customs and Border Protection is not limited to using dumping margins determined for cooperating exporters.

Interim Dumping Duties (Chapter 24)

The TRTF agreed with the proposed amendments in the exposure draft dumping manual.

Undertakings (Chapter 26)

The TRTF supported the proposed amendments in the exposure draft related to undertakings.

Reinvestigations (Chapter 27)

On the revised text relating to reinvestigations, the TRTF considered that the exposure draft did not clarify “whether the re-investigation is to be carried out by a different team to that which carried out the original investigation”. It held that this was matter of good practice and be “clearly notified to ensure the Minister receives professional and objective advice.”

It has been Customs and Border Protection practice to ensure that reinvestigations are undertaken by officers not intimately involved in the original investigation. Customs and Border Protection agrees with the commenter that this reflects good practice and removes any conflict of interest. The manual has been amended to reflect this practice.

The TRTF, like MOFCOM, queried the reference to ‘Customs and Border Protection interpretation of the Act’ and submitted that a reinvestigation should examine whether the original decision was made “consistent with the provisions of the Customs and Border Protection Act”.

As explained in the response to the same issue submitted by MOFCOM, Customs and Border Protection accepts that the proposed text could be interpreted as limiting the discretion of the decision maker in a reinvestigation and some clarifying amendments have been made.

Review of Measures (Chapter 28)

The TRTF queried the procedure “to notify the government of a country that has an application for review of measures” as there was no requirement in either the Act or the Anti-Dumping Agreement to do so.

Whilst not required by either the Act or the Anti-Dumping Agreement, Customs and Border Protection considers it good practice to notify the government of a country that is the subject of any review application. We will continue to support practices aimed at increasing transparency and accountability of Australia’s anti-dumping and countervailing system.

The TRTF also outlined their disagreement with the text in the exposure draft that outlined the proposal to consider both the change in variable factors and grounds for revocation in reviewing the anti-dumping measures. It considered that the review provisions provided “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 TRTF referred to the current application form which is supportive of this approach by requiring “that only one of these measures can be the subject of an application.”

The TRTF further added that “it is not open to Customs and Border Protection 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.” The TRTF also submitted that “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.”

Customs and Border Protection disagrees with the TRTF interpretation of the provisions governing the review of anti-dumping measures. Firstly, Customs and Border Protection considers that the inclusion of the option to revoke a notice in both ss.269ZDA(1)(a) and ss.269ZDB(1)(a) means that the CEO and the Minister must, in every review, consider whether the notice remain unaltered, revoked, or have effect as if different variable factors had been ascertained.

The basis upon which a review is commenced, for example a change in variable factors, does not determine the recommendations or the decision that may be made. There is no distinction in the Act between a variable factors review and a revocation review. The Act simply refers to a review of the measures. Once a ground for a review is established, the same process is followed, the same notice is published, the CEO makes a report with the same options for recommendations and the same decision making powers are granted to the Minister regardless of the basis (or bases) on which the review was initiated.

That said, Customs and Border Protection accepts that in preparing a Statement of Essential Facts and preparing a report in respect of a change in variable factors review, the CEO is required to have regard to "the application or request". Consequently, the proposed amendments in the exposure draft (Lines 3472-3) highlight that if an application or request that initiated a review drew attention only to the issue of possible changes in variable factors, and no comment or submissions during the investigation identify grounds for revocation, Customs and Border Protection will largely confine the subject matter of a review to examining the relevant variable factors in a particular period.

The TRTF also commented on the statement in the exposure draft that in undertaking a proper examination of revocation claims, Customs and Border Protection would require additional time to obtain and verify information from the Australian industry. The TRTF queried whether Customs and Border Protection was intending to provide industry with a form to be completed, and whether this was “consistent with the best practice of other dumping administrations.”

Following an application for review of measures, Customs and Border Protection’ current practice is to request the Australian industry’s full cost to make and sell for the goods sold during the review period. This information is necessary to calculate a contemporary unsuppressed selling price for the review period, which will then form the basis for updating and ascertaining the non-injurious price.

However, where an interested party applies for the revocation of measures on injury or causation grounds, Customs and Border Protection requires industry’s cost to make and sell information for several years prior to the review period, as well as other performance indicators such as sales, production etc, in order to undertake a proper assessment of the claims.

In the majority of these cases Customs and Border Protection may already have this information, either from the original investigation or from previous reviews.

Continuation of measures (Chapter 30)

The TRTF noted that the chapter dealing with continuation inquiries was not the subject of proposed amendment. It submitted that “given its importance and WTO jurisdiction on sunset reviews this part of the dumping manual ought to be expanded to make it more useful.”

Customs and Border Protection intends undertaking regular reviews of its existing guidelines and will consider whether amendments to the manual are required in the next round of revisions.

3. Casselle Commercial Services (CCS)

Due Allowance – Date of Sale (Chapter 16)

In response to proposed text on date of sale, CCS asserted that it is common for there to be longer lead times for export shipments resulting in orders being invoiced in the following month. Domestic consignments on the other hand are generally shipped and billed in the same month of order. CCS highlighted that in this situation, even though both domestic and export customers can negotiate identical pricing during a particular month, their respective invoice values may not be compared during the same period.

For this reason, CCS suggested that Customs and Border Protection amend its guidelines on date of sale so that “dates upon which firm purchase orders are actually received by exporters become the definitive dates for the purpose of comparing domestic and export invoice values.

Customs and Border Protection does not believe it necessary to amend its approach to establishing the appropriate date of sale given that the current guidelines allow for an alternative date to the invoice date. As set out in the guidelines, Customs and Border Protection may accept an order confirmation date or any other alternative date if satisfied that it better reflects the material terms of sale. Where a party claims that invoice date is not the most appropriate date for establishing the date of sale, the onus lies with that party to demonstrate that the material terms of sale are established by another date.

4. Orica Limited

Orica welcomed the proposal for “Customs and Border Protection to consult with the applicant industry in circumstances where the Minister may consider it appropriate for the exporter to provide an undertaking under s.269TG(3D).”

ASSESSMENT OF SUBMISSIONS - DISCUSSION PAPER ON 'PARTICULAR MARKET SITUATION' AND CLAIMS OF GOVERNMENT INFLUENCE

5. Ministry of Commerce of the People's Republic of China (MOFCOM)

MOFCOM generally supported the guidance provided by Customs and Border Protection in the Dumping Manual regarding particular market situation.

In response to the discussion paper, MOFCOM submitted that Article 2.2 of the Anti-Dumping Agreement focused on the comparison of normal value and export price. This allowed an authority to only disregard domestic sales as the basis for normal values where comparison is distorted due to conditions being different between the domestic and export sales. Therefore, any factor, such as government regulated low costs, which affect both domestic and exports sales no differently, cannot be the basis for a particular market situation.

However, MOFCOM accepted that the practices of some WTO members have tended to focus on the severity of impact of any particular factors. In their view, this approach still required an examination of the impact on competitive conditions in the market to determine whether competitive forces in the market have been prevented from setting prices. It considered that the severity of the situation must be found to exist and that it must impact on the comparison before domestic prices are deemed to be unsuitable.

Customs and Border Protection agrees that an examination of a particular market situation is focused on whether a factor exists in the country of export that has materially distorted domestic selling prices such that those prices cannot be considered to have been set under competitive conditions. However, it does not agree with the view that before determining that a particular market situation exists, it is required to further establish the extent to which that factor has also impacted on domestic and export sales differently to permit a proper comparison.

A finding that competitive conditions on a domestic market are distorted due to some form of government intervention is sufficient grounds to conclude that domestic sales are unsuitable for determining normal values. Those longer standing provisions concerning treatment of non-market economies embody a similar concept. So, in the example submitted by MOFCOM, where the government in the country of export sets or regulates costs, Customs and Border Protection will examine whether government involvement has materially impacted on competitive conditions and as a result distorted domestic prices. Customs and Border Protection will not in these circumstances further examine whether the government involvement has also materially impacted on export sales.

Whilst the focus of the discussion paper centred on particular market situation claims based on government intervention in the domestic market, there are other factors that may be the basis for finding that a particular market situations exists. Examples are a competitive domestic market having dissimilar characteristics; or a product type or types having dissimilar characteristics.

MOFCOM submitted that the reference in the discussion paper to "material price reduction" in lines 76-79 is insufficient as it does not reflect that requirement that there be a lack of competition in the market;

Customs and Border Protection agrees that the discussion paper should have included reference to competitive conditions.

MOFCOM submitted that the statements at lines 155-157, 159-160 and 164-169 of the discussion paper grossly understate the type and degree of effect of a factor on market conditions

Customs and Border Protection accepts that use of the word “generally” in this context may be construed as indicating that government influence that is immaterial or insignificant may render domestic sales unsuitable. It is Customs and Border Protection’ view that any government influence in the domestic market must be significant and have a material impact on competitive conditions before domestic sales can be found to be unsuitable for establishing normal values. This had been stated in other parts of the discussion paper.

MOFCOM queried whether the discussion paper at lines 205-208 was suggesting that facts adverse to the government of the country of export or its exporters could be used instead of other facts, for no reason other than their adverse nature.

Upon review, Customs and Border Protection considers that the proposed practice set out in the referred paragraph is not accurate. Reference to a particular market situation in s.269TAC(2)(a)(ii) is one of the exceptions to determining normal values under s.269TAC(1). It is clear then that a consideration of a particular market situation is relevant only where domestic sales are being considered for use in determining normal value under s.269TAC(1).

In the event of non-cooperation by the government of the country and/or exporters, it is unlikely then that normal values will be established under s.269TAC(1) given that Customs and Border Protection will not have been provided with necessary domestic sales and cost information. Therefore, in these circumstances it is unnecessary to make a finding in relation to particular market situation given that s.269TAC(1) is not applicable.

In this case, Customs and Border Protection will be looking to determine normal values under s.269TAC(6) of the Act, having regard to all relevant information, which may include prima facie evidence contained in the application.

MOFCOM submitted that lines 325-331 needed qualification to show that only subsidies having a severe degree and effect on competitive conditions in the market for the product, will be capable of triggering a particular market situation exception;

Customs and Border Protection agrees that any factor, including subsidies examined as part of a countervailing investigation, must have a material impact on competitive conditions in the country of export in order to find that a particular market situation exists.

MOFCOM expressed concern with the use of the word “manipulation” in lines 378-391;

The term manipulation was intended to refer to the adjustment of the level of VAT payable on exports.

MOFCOM considered that the statement at lines 434-435 understated the compulsion to consider the “extent/materiality” of an alleged distortion;

Customs and Border Protection does not consider that the statement devalues the importance of considering the materiality of the alleged distortion.

6. The European Commission (EU)

The EU submitted that the reasoning for disregarding domestic sales, irrespective of a countervailing investigation, on the basis that ‘the assistance programs materially affected the domestic prices of like goods’, is unconvincing and clearly in breach of WTO rules.

The EU is of the view that countervailing investigations are the proper and only remedy for these alleged practices. It submitted that Article 32.1 of the Agreement on Subsidies and Countervailing Measures (SCM) states clearly that no specific action against a subsidy of another Member State can be taken except in accordance with the provisions of the SCM. The EU also considered that an examination of the extent and influence of a subsidy or government program is inappropriate in an anti-dumping investigation and ‘that the only solution possible is to have a joint anti-dumping and a countervailing investigation’.

Customs and Border Protection agrees that an examination of an alleged subsidy is to be undertaken within a countervailing investigation. However, we do not agree with the EU’s view that government activities, programs, or policies more generally, are only relevant in the countervailing context and may only be investigated by way of a countervailing investigation.

In determining whether a product is dumped, domestic sales of like goods are examined to ensure that they are both relevant and suitable for use in determining normal value. A factor that materially distorts the competitive conditions on the domestic home market may render domestic sales unsuitable for determining normal values as those sales may not permit proper comparison. As explained in the discussion paper, Australia’s law provides for this consideration under the ‘market situation’ provision. However, similar considerations of competitive conditions are captured by the ordinary course of trade provisions in the laws or regulations of other administering authorities.

Customs and Border Protection understands that the Commission of the European Communities (Commission) itself had regard to such matters in one past case. In its anti-dumping investigation into exports of cotton yarn originating in Brazil, Egypt and Turkey¹, it rejected domestic sales in Egypt due to government activity. The Commission found:

“that all cotton yarn spinning companies were directly or indirectly state owned. In establishing whether domestic prices were reliable it was found that domestic prices of cotton and cotton yarn were fixed by governmental authorities.

Furthermore, raw cotton was sold in the domestic market at a price considerably lower than the price of raw cotton exported from Egypt. This had a direct impact on the price of cotton yarn.

Under these conditions, the Commission came to the provisional conclusion that both domestic cotton yarn and raw cotton prices were influenced by non-market forces to such an extent that their artificiality prevented them from being considered as made in the ordinary course of trade. Consequently, the Commission considered it appropriate to determine the normal value of cotton yarn on the basis of constructed value.

The EU also raised concerns with text at lines 243-246 of the discussion paper and in particular that unsupported claims may be considered “relevant information” for the purpose of the investigation.

All information submitted to Customs and Border Protection that has a direct bearing on an investigation, will be considered relevant information. However, as explained at lines 255-258 in the discussion paper, in the absence of supporting evidence there may not be sufficient relevant and reliable information on which to reach the requisite level of satisfaction regarding a market situation. That is to say, that less credence will be given to unsubstantiated claims.

¹ Official Journal L 271, 27/09/1991 P. 0017 - 0029

7. The Trade Remedies Task Force (TRTF)

The TRTF provided its comments on the particular market situation discussion paper. In summary the TRTF submitted that:

- it agreed with the propositions put forward in the discussion paper that a claim of “particular market situation must meet the prima facie test that applies to all statement contained in an application. It also agreed with the general statements involving sufficiency of evidence and in particular that any supporting evidence did not need to be conclusive or irrefutable;
- it agreed with the examples of information sources outlined in the discussion paper and added that “regard could be had to international benchmarks and to other government publications and laws and practices of the country in question.”;
- it agreed that it will be rarely possible to precisely quantify the effect of government influence on prices and that any such effect “must be more than de minimis”. The TRTF also supported the use of a market situation questionnaire as supplementary to the exporter questionnaire;
- it agreed with the statements in relation to consideration of subsidies in Customs and Border Protection examination of a particular market situation.

The TRTF further submitted that an assessment of a particular market situation should involve a consideration of the evidence in totality and not “necessarily just relying on individual assessments of particular pieces of evidence”.

Customs and Border Protection agrees that a finding on particular market situation claims must be made after having regard to all relevant information. The standard of proof required to be “satisfied” of such matters is that of the balance of probabilities. In essence, Customs and Border Protection has to consider the information available to it, assess and investigate the claims made by parties, and decide whether on balance there is sufficient evidence to be satisfied that a situation in the market is such that domestic sales are unsuitable for the determination of normal values.

The TRTF considered that in the event of non-disclosure of information readily available to the government and/or exporters, “an adverse inference may and indeed should be drawn”.

As explained in an earlier response to a point raised by MOFCOM, in the event of non-cooperation Customs and Border Protection will likely have to determine normal values under s.269TAC(6) of the Act, having regard to all relevant information, which may include prima facie evidence contained in the application.

The TRTF was of the view that information obtained from governments during the course of an investigation should be non-confidential, translated into English and should be placed on the public record in a timely manner.

A party that provides information to an investigation may claim confidentiality on the grounds that the publication of that information would adversely affect their business or commercial interests. However, the party must provide a summary containing sufficient detail to allow a reasonable understanding of the substance of the information. Therefore, Customs and Border Protection requires that any non-confidential submissions and attached documents be translated in English to be placed on the public record.

The TRTF also states in its submission that Customs and Border Protection’ statement of essential facts should outline the evidence relied upon in the making of a finding in relation to particular market situation and also clearly set out its reasoning for acceptance or rejection.

The purpose of Customs and Border Protection SEF report is to set out the facts established during the investigation and the preliminary findings drawn from those facts. Facts pertaining to a market situation will also be set out.

The TRTF stated that it welcomed the guidance aimed at 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. The TRTF considered that this was a more appropriate approach than the guidance given in the current Customs and Border Protection Dumping manual which focused on a reduction in selling prices. Accordingly the TRTF was of the view that the dumping manual required further clarification of this methodology.

The exposure draft dumping and countervailing manual has retained the two examples of government influence on domestic selling prices. These are the presence of government owned enterprises or control of the cost of inputs. In the two examples, the manual refers to the need for such factors to have artificially lowered domestic selling prices. These examples have been in the manual for several years. The purpose of the dumping manual is to provide guidance and it does not purport to provide an exhaustive list of factors that may be the basis for finding that a particular market situation exists.

Whilst Customs and Border Protection considers that an 'artificial lowering of domestic prices', and 'prices no being substantially the same' are inclusive enough to embrace the concept of not being substantially the same as they would be in a competitive market - the manual has been amended to reflect the wording captured in the discussion paper.

8. Orica Limited

Orica considered that the legislative requirement to be satisfied of a market situation was an objective test. Concerning the evidentiary standard it stated that "the necessary level of satisfaction far exceeds Australian industry's expectation of what constitutes reasonable information in this regard". Orica also submitted that a government influence does not necessarily result in a material reduction in domestic selling prices but can instead lead to prices being determined at levels that they would otherwise be but for the government influence.

Customs and Border Protection has addressed the evidentiary standard in response to other submissions. Customs and Border Protection agrees that a material reduction in selling prices is not the only possible impact of a government activity that would render domestic sales unsuitable.

Orica expressed concern with the prima facie test set out at Line 113-115 of the discussion paper given the lack of transparency by some governments and the difficulty this created for applicants in obtaining relevant information.

Orica also considered that the materiality remained subjective and that it was appropriate to benchmark domestic selling prices with domestic selling prices in a comparable market.

Orica supports the approach in examining whether domestic prices are not substantially the same as they would be if they were determined in a competitive market. It suggested amending the dumping manual by removing references to the effect of government-owned enterprises on the market beginning line 1198 of the exposure draft manual. Orica also proposed that the dumping manual should clarify the concepts of "ownership" and "control" in an examination of the impact of government-owned enterprises in the domestic market.

Orica submitted that the “manipulation of VAT and the discriminatory imposition of export taxes” impacted on domestic supply and selling prices such that they are lower than they otherwise would be in a competitive market.

9. Submissions from other parties

Customs and Border Protection received a number of confidential submissions responding to the market situation discussion paper. The relevant parties requested that they not be identified by Customs and Border Protection in its evaluation paper. However, the parties did agree that a summary of the key points raised in their submissions could be outlined.

One party raised a concern with the interpretation of the test required for determining that a particular market exists. In particular, they were concerned with the circumstance identified at lines 77-79 which referred to “material reduction in the domestic selling prices”. It was considered that this was “only one indication of a market situation”.

The party extracted from this that Customs and Border Protection would only contemplate a finding of a particular market situation where domestic selling prices have been reduced. In their view, the assessment should focus on whether a factor has impacted on “domestic selling prices materially to suppress prices at levels materially below what they would otherwise be.”

Firstly, Customs and Border Protection wishes to clarify that the statement referring to a material reduction was intended only as one example of an impact on domestic prices by factor(s) in the domestic market. This is supported by the corresponding footnote which states that this “is but one example of what might be covered by s.269TAC(2)(a)(ii)”.

Secondly, Customs and Border Protection considers that there is little conceptual difference between a material reduction in selling prices and a material suppression of prices at below what they would otherwise be. As explained at line 164-167, Customs and Border Protection does not aim to quantify the effect of government influence on domestic prices. The discussion paper goes on to say that judgements are required about the materiality of the government influence. That is, Customs and Border Protection investigation will examine whether domestic selling prices reasonably reflect competitive market prices by focusing on whether a government activity has materially impacted on the domestic market, such that the conditions of competition have been distorted.

Customs and Border Protection has amended the dumping manual to clarify this point.

The party also stated that it did not disagree with the principles contained in the sufficiency of evidence section of the discussion paper, however it considered that the evidence test was a “substantial hurdle for Australian industry to overcome – particularly more daunting for the small to medium enterprises”.

The evidentiary standard set out in the discussion paper is not unusual as it applies to all aspects of an application for dumping or countervailing duties. That is, evidence must be relevant and reasonably reliable but does not need to be conclusive. The evidentiary standard meets the requirements of Australia’s domestic legislation and also ensures Australia’s compliance with its international obligations under the WTO Anti-Dumping Agreement.

It is worth noting that stemming from the 2006 Joint Study into Australia’s Anti-Dumping System, Customs and Border Protection implemented several initiatives aimed at improving access to the anti-dumping system, particularly small to medium sized enterprises. These included:

- the development of simple application guidelines to assist potential applicants;
- introduction of a formalised pre-lodgement assessment service, and

- a SME liaison service to specifically deal with anti-dumping enquiries from SMEs.

The party further submitted that in the event of non-cooperation from exporters, Customs and Border Protection should consider having regard to information made available from an other seller on the domestic market, and who is not an exporter of the goods to Australia.

As explained at lines 265-267, the lack of cooperation by exporters or governments will likely lead to normal values being determined under s.269TAC(6) of the Act, having regard to all relevant information. The purpose of examining whether a particular market situation exists is to determine whether sales are suitable for determining a normal value s.269TAC(1) of the Act. Where domestic sales do not meet the requirements of this provision there is no need to further assess their suitability.

The party welcomed the comments at lines 212-214 of the discussion paper and suggested that the dumping manual explicitly mention that Customs and Border Protection may independently find that a market situation exists in the country of export.

Customs and Border Protection agrees and has amended the manual accordingly.

The party also submitted that in assessing particular market situation claims, Customs and Border Protection should have regard to benchmarking prices and costs in the country of export with information from a country of export nominated by the applicant industry as possessing characteristics which reflect a market situation. In their view, this information may assist in determining whether prices are artificially low or whether domestic prices are lower than they otherwise would be but for the government influence.

This proposal for Customs and Border Protection to benchmark prices and costs as part of its examination into whether a particular market exists would in essence be an application of surrogacy principles to determine whether domestic sales and costs are suitable. As stated in the discussion paper, there is no automatic assumption that domestic selling prices or costs are unsuitable in a market economy.

Customs and Border Protection is concerned that a simple comparison of prices and costs between countries of export will unreasonably penalise those market economies that possess a competitive cost advantage. For this reason, Customs and Border Protection considers that where an applicant wished to make an argument about market situation in this manner it should also face the responsibility of addressing the non-exhaustive indicators outlined in the dumping manual for the selection of a comparable market economy. These include:

- similarity of products and/or inputs – application of like goods framework to ensure products are similar. Adjustments due to physical difference should be considered to ensure fair comparison.
- manufacturing process – includes technical and technological standards used and the scale of production;
- market conditions – consideration of the level of competition having regard to the number of local producers of like goods and the penetration of imported like goods, price controls or other restrictions on imports, monopolistic practices;
- volumes – nominated market economy should be reasonably representative with volume of domestic sales being at least 5% of the volume of sales to Australia from the subject country of export;
- access to raw materials – differences in the access to raw materials and the impact on production costs;
- macroeconomic indicators – level of development, gross national product, population, division of labour, etc

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The party agrees that the identification of a subsidy in a countervailing investigation can impact on the suitability of domestic sales for dumping purposes. It also considered that other government policies such as adjustments to the level of VAT on exports and government control of electricity and gas prices can result in prices in the country of export being lower than they otherwise would be.

Customs and Border Protection agrees that other government policies may impact on the suitability of domestic selling prices however the application should contain sufficiently reliable and relevant information to demonstrate that the government policies have materially impact on competitive conditions in the market.

It also submitted that government cooperation should be encouraged in a time efficient manner where a market situation is claimed. It accepts that it is appropriate to provide reasonable extensions for the supply of information in such investigations, but the information must be provided in a timely and efficient manner to avoid prolonging the suffering of material injury by the Australian industry.

Customs and Border Protection agrees with the view put forward by the party. All parties involved in an investigation are encouraged to provide information to Customs and Border Protection in a timely manner. Importantly, the Act provides for the imposition of securities no earlier than 60 days after initiation if satisfied that:

- there appear to be sufficient ground for the publication of a dumping duty notice, and
- securities are necessary to prevent material injury to the industry occurring while the investigation continues.

Another party considered that the standard of evidence necessary to establish that a market situation exists has been set too high. It also considers that the evidentiary standard required of applications to satisfy Customs and Border Protection “appears clouded and requires close monitoring”.

As in the earlier response to a similar point, Customs and Border Protection considers that claims in an application must be supported by evidence that is relevant and reasonably reliable but does not need to be conclusive. This evidentiary standard meets the requirements of Australia’s domestic legislation and also ensures Australia’s compliance with its international obligations under the WTO Anti-Dumping Agreement.

The party also submitted that an “inter-country comparison” should occur in investigations involving multiple countries where one country’s selling prices are claimed to be unsuitable due to a market situation. However, the same party also put forward the view that “because the input costs and selling prices in one country are higher than the same input costs and selling prices in another market, it cannot be concluded that a market situation does not occur in the former market.”

Customs and Border Protection notes the obvious contradiction in these two statements and generally agrees with the latter. Variations in input costs and selling prices between market economies are to be expected and not automatically indicative of government influence in the domestic market with the lower input costs and lower selling prices.

As explained in an earlier response, Customs and Border Protection is concerned that any form of inter-company comparisons can readily lead to a surrogate normal value. Where applicants identify a suitable country of export for comparison purposes as part of making an argument about market situation, Customs and Border Protection considers that the application must also address each of the non-exhaustive indicators set out in the dumping manual relating to the selection of an appropriate surrogate country. Customs and Border Protection

considers that the evidentiary standard outlined in the discussion paper applies to any assessment against these indicators.

The party also submitted that the dumping and countervailing manual required clarification to distinguish the necessary information required for a subsidy application and a dumping application claiming where market situation is claimed.

As explained in ACDN 2008/47, Customs and Border Protection invited submissions from all stakeholders on the discussion paper with a view to revising the current guidelines to assist applicants to complete the dumping and countervailing approved form. These guidelines are a comprehensive and easy to understand reference tool to assist potential applicants in preparing an application by addressing the more commonly asked questions and incorporating examples.

Customs and Border Protection proposes to revise the guidelines and will include the evidentiary standard principles outlined in the discussion paper. The guidelines to the application form also provide assistance to applicants about the necessary information required in relation to seeking countervailing action against government subsidies.

The party further stated that it should be recognised that government influence of input costs and government “manipulation of VAT and taxation measures” can suppress the cost of key inputs and selling prices in the domestic market.

As explained in the discussion paper, assertions of a general nature suggesting that a government activity can impact on costs and prices would not support a finding that domestic prices are unsuitable for determining normal values. The applicant must provide relevant information demonstrating how the government activity has materially distorted competitive conditions on the domestic market such that sales are unsuitable.

ASSESSMENT OF SUBMISSIONS – EXPOSURE DRAFT SUBSIDY MANUAL

10. Ministry of Commerce of the People’s Republic of China (MOFCOM)

In relation to lines 52-73 concerning private bodies and the notions of entrustment or direction, MOFCOM referred to other salient findings by the WTO Appellate Body. Customs and Border Protection has decided that the manual would be improved by carrying in additional information in relation to the Appellate Body’s findings on entrustment and direction.

As part of its comments concerning the draft manual’s explanations on ‘public body’, MOFCOM drew attention to line 79 of the draft manual which read “The provision of grants, loans or loan guarantees by State banks will also be taken by Customs and Border Protection to be a form of financial contribution”. It said the meaning was not clear. Customs and Border Protection agrees that the sentence is not useful given its context. Whether a bank is operating on commercial terms, or as a public body, is a matter of fact to be determined given the case circumstances. The sentence has been deleted.

Concerning a grant or tax incentive, at lines 162 and 163, MOFCOM submitted that it cannot be assumed that a grant or tax exemption always confers a benefit and all cases must be considered on their merits. For example, the grant might be in compensation for an equivalent ‘benefit’ provided to the government by the enterprise concerned in another transaction. Customs and Border Protection agrees that all case circumstances must be considered. However the notion that a grant can be compensation for some offsetting benefit given to the government by the firm is considered to have no sound basis. Further, it is not clear to Customs and Border Protection how far this notion of an equivalent and offsetting ‘benefit’ is intended to apply in MOFCOM’s view. Customs and Border Protection has made clear at lines 732 to 750 of the exposure draft that any such tax consequences are not offset against the benefit. Customs and Border Protection does say that certain deductions can be made such as application fees and costs incurred to qualify for the subsidy. Customs and Border Protection has decided not to make any changes to this section of the manual.

In commenting on lines 303 to 311 of the exposure draft MOFCOM disagrees with that part of the proposed manual and expressed the view that smaller benefits that are ordinarily amortized should not be expensed. It considers they should still be amortized. Customs and Border Protection has considered the views of MOFCOM and others and has redrafted this part of the manual.

Regarding the question of amortizing particular types of subsidies, examined at lines 318-332 of the exposure draft, MOFCOM submitted that debt forgiveness should be expensed, not generally amortized, as proposed by Customs and Border Protection. It was submitted that cessation of debt is carried into the accounts of an enterprise and has an immediate effect on the financial position. It was likened to a grant for operational purposes which the draft manual indicated are generally expensed (see line 313). Customs and Border Protection has considered these comments and made some changes to achieve clarity. However, Customs and Border Protection considers that it cannot be assumed that all debt forgiveness must be expensed and decisions will depend on the case circumstances. Customs and Border Protection has left debt forgiveness in the sub-heading ‘Subsidies that are generally amortized’

as it is sufficiently qualified to make clear that there may be different methods used depending on the case circumstances.

Like debt forgiveness, MOFCOM submitted that plant closure assistance should also be expensed and not amortized because such benefits were said to be taken up in the year of closure. Customs and Border Protection view is that whether a benefit is 'taken up' in a particular year or not is not always decisive. For example, in the case of a grant it may have been paid on a one-off basis in some prior period and 'taken up' in the firm's financial records in the year of receipt. However, this does not mean that it must be expensed in the year of receipt. The illustrative table at the end of this chapter shows that grants may be expensed or amortized over time. Therefore, the date the grant is recorded in the financial records cannot be determinative. Customs and Border Protection has decided to leave debt forgiveness as an example of subsidies that may usually be amortized (i.e. non- recurring).

Customs and Border Protection has made some amendments to the section starting at line 285 ('Attribution – Expensed or Amortized') in order to clarify factors to be considered when deciding whether a subsidy should be treated as a recurring (expensed) or non-recurring (amortized). Part of the commentary at lines 322-332 of the exposure draft which dealt with the same issue have been carried up into the 'Attribution – Expensed or Amortized' section in order to achieve greater clarity.

In relation to 'Loans', MOFCOM pointed out that at lines 426-428 the draft states: 'A comparable commercial loan would normally be a loan of a similar amount with a similar repayment period obtainable by the recipient from a representative private bank operating on the domestic market'. MOFCOM considered that reference to "private bank" is confusing in light of Article 14(b) of the SCM Agreement which does not use that term. That article provides:

"A loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market".

The reference to a comparable commercial loan in Article 14(b) does not stipulate a particular type of bank which can be considered, to the exclusion of other types. MOFOM pointed out that the dual requirements are commerciality and the market.

Customs and Border Protection agrees that an amendment is required in so far that the words 'representative private bank' are not preferred. Some amendments have been made to remove reference to 'representative private banks' and 'comparable commercial loan' has been used instead.

The underlined words identified below have been added:

"Customs and Border Protection may treat a loan from a government owned bank as a commercial loan. Customs and Border Protection will examine the evidence when deciding whether the loan from that institution has been provided on non-commercial terms or has been made under any government direction. There is one qualification however – in some cases a government owned bank can be operating as a development bank. That is to say, its purpose is to make loans for government development programs. In such cases it is unlikely such a

government owned bank could be found to be a suitable benchmark 'comparable commercial loan'."

MOFCOM submitted that the commentary in the draft at lines 532-533 concerning credit guarantees was unclear. The words used: '...the same calculation would apply' may infer that credit guarantees cannot operate at break even and no subsidy be found to exist. Customs and Border Protection has considered the submission and decided that the manual would be improved by inserting a separate subheading 'Export Credit guarantee or insurance programs'. Customs and Border Protection has also redrafted the Loan Guarantee section in order to more clearly distinguish between viable and non-viable schemes.

Regarding the draft manual's commentary at line 651 (Price preference for inputs used in export production), the manual was seeking to clarify the provision at paragraph (d) of the Illustrative List of Export Subsidies (Annex I of the SCM Agreement). In MOFCOM's view, this paragraph must mean that an export credit guarantee which operates at no net cost to the government is not an export subsidy. MOFCOM considered that there is no need for it to be demonstrated that the government program concerned earns a reasonable profit margin in cases of alleged export subsidies. MOFCOM therefore suggests that the same calculation principles as Customs and Border Protection intends to apply to loan guarantees cannot in this respect be transposed to the case of export credit guarantee programs and requests that the exposure draft be clarified accordingly.

In this part of the draft, concerning price preference for inputs used in export production, Customs and Border Protection was intending to explain that in the case of products it must be established that:

- terms and conditions were more favourable than the terms and conditions for like or directly competitive products provided for use in domestic production; and
- they were also more favourable than terms commercially available on world markets to their exporters;

before a benefit could be found to exist. Customs and Border Protection has redrafted the section in order to achieve greater clarity.

The section in the draft dealing with 'Exemption or remission upon export of indirect taxes' has been removed and replaced with the schemes that discuss export subsidies.

MOFOM also made a submission on evidentiary/initiation standards of a countervailing duty application. It expressed concern that Australian industry had been copying the results of other administrations when making their applications. Applications relying on the findings of other administrations could be deficient, it said, in the following ways: out of date evidence as laws and practices no longer exist; programs being reformed; product types differ from case to case; and different practices followed by other administrations.

Customs and Border Protection agrees such matters can be relevant and would expect that the applicant would have made reasonable attempts to demonstrate their relevancy. For example, information from another authority may have made findings concerning specificity, however if that finding was in relation to a different product, enterprise or industry (or group of enterprises, or group of industries), the applicant would need to address why the specificity finding is relevant to the industry the subject of the application. If the other authority had made preliminary findings concerning specificity, Customs and Border Protection will weigh up the available evidence in deciding whether grounds exist for initiation of an investigation.

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11. Trade Remedies Task Force

The TRTF welcomed the publication of the subsidy manual and considered that the critical elements to determining a countervailable subsidy are consistent with the subsidies agreement and Australian legislation.

The TRTF did however raise concerns with the proposed approach of only examining upstream subsidies one level immediately preceding the point of producing the exported goods. It submitted that there is no legal basis for restricting an investigation in such a way.

An application requesting the publication of a countervailing duty notice must contain prima facie evidence demonstrating that a subsidy exists and that the subsidy is specific to certain enterprises in order to be countervailable. This prima facie evidence is required whether the subsidy is paid directly to the producer of the exported goods or indirectly via upstream input suppliers.

The reference in the exposure draft to applicant's facing an onus to demonstrate the significance of those subsidies relates to the need for a pass-through analysis in order to demonstrate that the alleged countervailing subsidy has conferred a benefit to the exported goods. As explained, the further up the production chain that subsidies are paid, the greater the possibility that the benefit conferred has been diluted. The upstream subsidies chapter provides guidance to potential applicants in conducting a pass-through assessment using possible benchmark prices for the upstream input.

12. Bureau of Trade Interests and Remedies (BTIR), Department of Foreign Trade (Thailand)

BTIR commented on the investigation period used in countervailing investigations – mentioned at lines 171-173 of the exposure draft. It stated that using a most recent financial year should not result in more recent data being overlooked. Where a non recurring subsidy has been paid sometime in the past, although an 'investigation period' has been nominated at initiation, the investigation of that alleged subsidy necessarily involves collection of information over a prior in order to have the necessary information to work out the amount of any benefit that may be attributed to the 'investigation period' itself. In this situation the initiation of an investigation sometime after the 'investigation period' is unlikely to pose any significant problems because estimates are being made of any subsidy in the most recent relevant period. The same may be true for recurring benefits which are allocated (i.e. expensed) in the year received. In Customs and Border Protection view, linking the 'investigation period' to the most recent financial period in subsidy investigations can be a very important consideration to aid calculation and verification.

That said, and especially in joint dumping and countervailing investigations, Customs and Border Protection agrees that there may be circumstances where it could be undesirable for an initiation to lag the end of the most recent financial year may by too long a period. This will be taken into account when making decisions about the 'investigation period'. Customs and Border Protection has decided to leave that part of the manual unchanged.

Concerning the addition of interest, referred to at lines 236-251 of the draft, BTIR expresses a view that only half the amount of interest should be added. If this correctly reflects the views of BTIR, Customs and Border Protection respectfully does not agree that only half the interest amount should be added in each and every benefit calculation. However, there may be cases in Customs and Border Protection view where the date of receipt of a benefit can affect the interest calculation. For example, if a benefit is found to have been received mid way through a year, the interest component added would be for 6 months, not 12 months. Or, where the benefit relates to a period shorter than 12 months, then the interest component added would be for that lesser period.

In relation to specificity, and lines 903-909 in particular, BTIR suggests that specificity should not be limited to just one factor. Customs and Border Protection will seek information on both specificity grounds, and will consider all of the available information. However, depending on the case circumstances, it could be possible for a finding to be made on de jure grounds alone.