



## INSTRUCTIONS AND GUIDELINES

### Dumping and Subsidy Manual

June 2009

**This Instruction and Guideline refers to Practice Statement: PS2009/25:  
Administration of Australia's Anti-Dumping and Countervailing System**

**Published date:** 16 July 2009

**Availability:** Internal and external

**Subject:** Dumping and Subsidy Manual (Manual)

**Purpose:** To set out the legislative framework, principles and practices followed by the Trade Measures Branch, as they normally apply to anti-dumping and countervailing investigations, and to promote a consistent approach to investigation findings and decisions.

**Owner:** National Director Trade Division

**Category:** Operational Procedures (OP)

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***The electronic version published on the intranet is the current Instruction and Guideline.***

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**Summary of main points**

This Instruction and Guideline outlines the context, policy and procedure followed by the Trade Measures Branch in administrating Australia's anti-dumping and countervailing system.

**This I&G applies to staff in:**

- Trade Measures Branch, Trade Division

**Introduction**

The Manual Volume 22 – Dumping and Subsidy (Dumping and Subsidy Manual August 2007), and the Dumping and Subsidy Manual – Exposure drafts for comment are replaced by this Instruction and Guideline, and the related Practice Statement *PS2009/25: Administration of Australia's Anti-Dumping and Countervailing System*.

This Instruction and Guideline and the related Practice Statement supersede these earlier versions of the Manual and should be read in conjunction with one another.

**Instructions and Guidelines**

The Manual contains chapters in relation to the following information:

Foreword;

1. Applying for anti-dumping or countervailing notices;
2. Like goods;
3. Investigation period;
4. Injury to Australian industry;
5. Arms length transactions;
6. Determining an export price;
7. Normal value based on exporter's domestic sales;
8. Normal value based on other seller's domestic sales;
9. Normal value based on constructed method;
10. Normal value based on exporter's third country sales;
11. Normal value in non-market economies;
12. Normal value in an economy in transition;
13. Normal value based on all relevant information;
14. Due allowance;
15. Identifying a subsidy – whether a financial contribution exists;
16. Identifying a subsidy – whether a benefit is conferred;
17. Specificity;
18. Upstream subsidies;
19. Imposition of concurrent dumping and countervailing measures;

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## INTERNAL AND EXTERNAL

20. Determination of dumping margins;
21. Causation;
22. Cumulation of injury;
23. Non-injurious price;
24. Termination of investigations;
25. Preliminary Affirmative Determination & provisional measures;
26. Statement of Essential Facts;
27. Interim Dumping Duties;
28. Third country dumping/countervailing duties;
29. Undertakings;
30. Reinvestigations;
31. Review of measures;
32. Accelerated reviews;
33. Continuation of measures;
34. Implementation of anti-dumping and countervailing measures;
35. Dumping or countervailing duty assessments;
36. Monitoring of measures.

### **Related Policies and References**

#### **Practice Statements:**

- PS2009/25: Administration of Australia's Anti-Dumping and Countervailing System.

#### **Legislation:**

- *Customs Act 1901*, particularly Part XVB, and associated regulations;
- *Customs Tariff (Anti Dumping) Act 1975*; and
- *Customs Administration Act 1985*.

### **Key Roles and Responsibilities**

- The National Manager, Trade Measures Branch, has responsibility for ensuring the implementation and maintenance of this Instruction and Guideline.
- This Instruction and Guideline applies to all staff in the Trade Measures Branch.

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## INTERNAL AND EXTERNAL

### **Consultation**

The following stakeholders have been consulted in the development of this Instruction and Guideline:

#### **Internal:**

- Relevant areas of Customs and Border Protection; and
- Relevant government agencies.

#### **External:**

- Relevant external stakeholders directly; and
- All other interested parties, by issuing Australian Customs Dumping Notices (ACDN) 2008/47 and ACDN 2009/04 advising of the availability of the draft papers for general comment, and placing a draft of certain Dumping and Subsidy parts of this Manual and a discussion paper on Market Situation on the Customs and Border Protection website.

### **Approval**

<b>Approved on</b>	26 JUNE 2009	
<b>By</b>	SUE PITMAN NATIONAL DIRECTOR TRADE DIVISION	
<b>Review Period</b>	Annually	

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**Australian Government**

**Australian Customs and  
Border Protection Service**

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**JUNE 2009**

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## FOREWARD

This Dumping & Subsidy Manual (Manual) sets out the legislative framework, principles, and practices followed by the Trade Measures Branch as they normally apply to anti-dumping and countervailing investigations. The manual does not intend to provide a mandatory set of instructions or constrain the decisions of Customs and Border Protection officers.

The Manual seeks to promote a consistent approach to investigation findings and decisions. It also provides interested members of the community with an explanation of the guidelines used by the Trade Measures Branch in conducting investigations. Decisions made by officers must be based on the facts of each individual case using the principles outlined in this manual.

Section 5(2) of the Administrative Decisions (Judicial Review) Act 1977 provides that the improper exercise of a power shall be construed as a reference to:

- (a) taking an irrelevant consideration into account in the exercise of a power;
- (b) failing to take a relevant consideration into account in the exercise of a power;
- (c) an exercise of a power for a purpose other than a purpose for which the power is conferred;
- (d) an exercise of a discretionary power in bad faith;
- (e) an exercise of a personal discretionary power at the direction or behest of another person;
- (f) an exercise of a discretionary power in accordance with a rule of policy without regard to the merits of a particular case;
- (g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;
- (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain;
- (i) any other exercise of a power in a way that constitutes abuse of the power.

# 1. APPLYING FOR ANTI-DUMPING OR COUNTERVAILING NOTICES

## 1.1 CONTEXT

Sections 269TB and 269TC of the Act set out the requirements for making an application for the publication of a dumping or countervailing duty notice. Section 269TAG of the Act also provides that the Minister may initiate an investigation into the need to take anti-dumping measures on his or her own initiative.

Section 269TC(1) of the Act sets out issues that the CEO must be satisfied of, having considered the matters contained in the application. These are:

- that the application complies with subsections. 269TB(4) of the Act; or
- that there is, or is likely to be established, an Australian industry in respect of like goods; or
- that there appear to be reasonable grounds for the publication of a dumping or countervailing duty notice.

Section 269TB(4) of the Act sets out that an application must:

- be in writing; and
- be in an approved form; and
- contain such information as the form requires; and
- be signed in the manner indicated on the form; and
- in the case of an application under s. 269TB(1) – be supported by a sufficient part of the Australian industry.

Article 5.4 of the Anti-Dumping Agreement (and Article 11.4 of the Agreement on Subsidies and Countervailing Measures) requires an application to have the support of a specified minimum (by volume) of the domestic producers of the goods (commonly referred to as standing). The articles are reflected in s. 269TB(6) of the Act. Standing refers to the representativeness of an industry member (or members) applying for an anti-dumping or countervailing duty notice by, or on behalf of, Australian industry

Section 269T(4) of the Act states that if there is a person or there are persons who produce like goods in Australia to the goods subject of the application, there is an Australian industry. Where like goods are close processed agricultural goods, ss 269T(4A), (4B) and (4C) of the Act extend the definition of industry to include producers of the raw agricultural goods from which the processed goods are derived. Raw agricultural goods are defined in s. 269T(1) of the Act as goods directly obtained by the undertaking of any agricultural operation or fishing operation.

## 1.2 POLICY

A person, or a government of a third country, which believes there are, or may be, reasonable grounds for the publication of a dumping (or countervailing) duty notice in respect of goods imported into Australia, may apply for a dumping duty notice.

Customs and Border Protection has 20 days to examine the application to decide whether or not to reject the application and inform the applicant in writing of the decision. If, after an application has been lodged for assessment an applicant provides unsolicited additional and/or new information, Customs and Border Protection will accept the information as if it were a new application and may recommence the 20-day consideration period.

In assessing whether there is an Australia industry producing like goods, s. 269T(2) of the Act requires that goods, other than unmanufactured raw products, are not to be taken to have been produced in Australia unless the goods were wholly or partly manufactured in Australia.

Section 269T(3) of the Act gives further guidance on what constitutes “partly manufactured”. For goods to be regarded as partly manufactured in Australia, at least one substantial process in the manufacture of the goods must be carried out in Australia. The concept of “substantial process” is not defined in the legislation but before it can be assessed, the process or processes undertaken in Australia must be identified.

To be substantial, that process must add some essential or vital quality or character to the finished product of like goods. The conversion of intermediate goods into final goods by virtue of a simple process such as dividing, sorting, simple assembly, packaging or labelling may not be regarded as substantial.

If locally produced goods are close processed agricultural goods, Australian industry includes producers of raw agricultural products (s. 269T(4A) of the Act refers). If all of the criteria set out in s. 269T(4B) of the Act are met, that expanded industry must be considered when assessing material injury.

There are no provisions in the Act to exclude an Australian producer/manufacturer that is related to an exporter, or that is itself an importer of allegedly dumped or subsidised goods from the definition of Australian industry.

Customs and Border Protection must determine industry support (or otherwise) for the application before assessing whether there are reasonable grounds for the publication of a notice. Industry is defined in terms of its production of like goods to the imported goods. If there is more than one Australian industry member, then the application must have the support of a specified minimum of the other members, calculated by reference to their size relative to the rest of the industry.

An application is supported by a sufficient part of the Australian industry if the CEO is satisfied that persons (including the applicant) who produce or manufacture like goods in Australia and who support the application:

- account for more than 50% of the total production or manufacture of like goods produced or manufactured by that portion of Australian industry that has expressed either support for, or opposition to, the application ; and
- account for not less than 25% of the total production or manufacture of like goods in Australia.

Applications may be withdrawn in whole or in part at any time before the Minister decides to publish a notice or to accept an undertaking.

### **1.3 PRACTICE**

In its consideration of an application, Customs and Border Protection examines the application and any other information that the CEO considers relevant to assess whether the requirements of s. 269TC(1) of the Act have been met. If not so satisfied, the application must be rejected.

The Australian industry producing like goods must be identified before initiation of an investigation. The decision is based on facts and not mere conjecture. A decision will be based on information contained in the application form and any other relevant information.

In order to determine whether there is, or may be established, an Australian industry producing like goods, Customs and Border Protection will identify the imported goods (commonly referred to as the goods under consideration or the goods the subject of the application). It will also

establish whether the goods produced by Australian industry are like goods to the imported goods. The like goods analysis is detailed in the “Like Goods” section of this manual.

Under s. 269TC(1) of the Act if the CEO is not satisfied that there is, or is likely to be established, an Australian industry in respect of like goods to the imported goods, the CEO must reject the application. The CEO must also be satisfied that there is support for the application by a sufficient part of Australian industry (including the applicant) who produce or manufacture like goods in Australia.

In determining whether the application has standing, Customs and Border Protection will assess information contained in the application to determine the composition of Australian industry and, the support of that industry, for an application. It also examine the following in reaching the level of satisfaction required:

- the total production (not sales) volume of Australian industry;
- the total production volume of the applicant and each of the other industry members;
- whether the production volumes of those members expressing support for the application account for more than 50% of the total production or manufacture of like goods produced or manufactured by that portion of the Australian industry which has expressed either support or opposition to the application;
- whether those supporting the application account for not less than 25% of the total production or manufacture of like goods in Australia; and
- whether there was opposition to the application.

Customs and Border Protection may need to substantiate production figures by cross reference to other sources of information. Therefore the applicant should provide the full details of all production of like goods in Australia in the application. Australian industry’s head office and/or manufacturing sites may also be visited to verify information contained in the application.

Before assessing whether an application demonstrates that there are or may be reasonable grounds for the publication of a dumping or countervailing duty notice, Customs and Border Protection must first determine that:

- a consignment of goods has been imported into Australia, or is likely to be imported, or like goods may be imported into Australia; and
- there is, or may be established, an Australian (or third country) industry producing like goods.

In identifying the imported goods for which measures are sought, Customs and Border Protection will examine whether the applicant:

- has sufficiently identified the allegedly dumped or subsidised goods; and
- provided evidence that they are being imported.

Customs and Border Protection may use its own resources to verify the volume and value of the imported goods, countries of export and tariff classifications.

In describing the imported goods, Customs and Border Protection will generally examine whether the applicant has provided:

- physical, technical and other properties;
- information for each make and model in the range;
- technical documentation;
- tariff classification and statistical code.

Customs and Border Protection may use other resources to crosscheck the information.

## 2. LIKE GOODS

### 2.1 CONTEXT

Like goods are defined in section 269T of the Act as goods that are identical in all respects to the goods under consideration or that although not alike in all respects to the goods under consideration have characteristics closely resembling those goods under consideration.

The determination of like goods is used within the anti-dumping framework to define:

- the Australian industry producing like goods— s. 269TB(1) of the Act refers. Establishing the Australian industry is critical to the examination and existence of injury;
- the goods sold on the exporter's domestic market – s. 269TAC(1) of the Act states “the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export...or, if like goods are not so sold by the exporter, by other sellers of like goods”, and
- the goods subject of the dumping duty notice – ss 269TG(1) and TG(2) of the Act provide for the Minister to declare that Section 8 of the Dumping Duty Act applies to like goods exported to Australia.

### 2.2 POLICY

Customs and Border Protection's policy is to interpret the legislation in a manner consistent with the Agreements. Therefore, identical goods will be regarded as like goods should such goods exist and to regard goods closely resembling the goods under consideration as like goods in the absence of identical goods.

In the context of like goods, identical goods are goods that are identical in physical characteristics, subject to variations in their presentation due to the need to adapt them to special conditions in the home or export market. If the goods are found to be identical, it is not necessary to further consider other factors such as channels of distribution, process of manufacturing etc. in determining the question of like goods.

If the goods are found not to be identical, it is necessary to determine whether the goods would still fall within the ambit of goods having characteristics closely resembling those of the goods under consideration. To determine whether the goods are goods having characteristics closely resembling those of the goods under consideration, the factors outlined below will be considered.

### 2.3 PRACTICE

Where two goods are identical they are like goods. In the majority of applications differences are identified between the locally produced goods and the imported goods. Where two goods are not alike in all respects, Customs and Border Protection will assess whether they have characteristics closely resembling each other against the following considerations.

#### Physical likeness

- Assess which physical characteristics are similar, and identify the extent of differences.  
Characteristics to consider:

<i>size</i>	<i>shape</i>	<i>content</i>
<i>weight</i>	<i>appearance</i>	<i>taste</i>
<i>grade</i>	<i>standards</i>	<i>age</i>
<i>strength</i>	<i>purity</i>	

- Are the goods classified to a matching tariff classification?

### Commercial likeness

Commercial likeness refers to attributes identifiable from market behaviour.

- Are the goods directly competitive in the market? e.g. do the goods compete in the same market sector? Within a market sector, are the goods similarly positioned?
- To what extent are participants in the supply chain willing to switch between sources of the goods and like goods? e.g. willingness of participants to switch between sources may suggest commercial interchangeability.
- How does price competition influence consumption? e.g. close price competition may indicate product differentiation is not recognised by the market.
- Are the distribution channels the same?
- How similar is the packaging used? Does different packaging reveal significant differences in the goods, or highlight different market sectors?

### Functional likeness

Functional likeness refers to end-use. End-use will not of itself establish like goods, but may provide support to the assessment of physical and commercial likeness.

- Do the goods have the same end use? To what extent are the two products functionally substitutable? e.g. both a shovel and an earthmoving machine can move earth.
- To what extent are the goods capable of performing the same, or similar functions? e.g. an earthmoving machine is capable of moving earth more rapidly than a shovel.
- Do the goods have differential quality? Quality claims can be subjective. Objective evidence has higher probative value e.g. by standards, or the extent consumers are willing to use the goods to perform the required functions.
- Is consumer preference likely to change in the future? Consider consumer behaviour in other markets/ countries?

### Production likeness

Different production processes may produce identical goods. However, different production processes may be used to create different product characteristics. A comparison of production process will not of itself establish like goods, but may highlight differences or provide support to the assessment of other considerations.

- To what extent are the goods constructed of the same or similar materials?
- Have the goods undergone a similar manufacturing process? If different, what is the impact of those differences?
- Are there any patented processes or inputs involved?

Other considerations

- Matters raised by interested parties,
- Matters that Customs and Border Protection identifies during the course of the investigation,
- How similar is the marketing of the goods?

### **3. INVESTIGATION PERIOD**

#### **3.1 CONTEXT**

Section 269T of the Act defines the investigation period as a period specified by the CEO in a notice under s. 269TC(4) of the Act.

The specified investigation period is relevant to other sections of the Act as follows:

- in determining whether material injury has been caused to an industry, the Minister may examine periods prior to the investigation period (s. 269T(2AD));
- in the ordinary course of trade tests, which involve establishing whether the seller of the goods is able to recover the costs within a reasonable period of time, costs are taken to be recoverable within a reasonable period if the selling price is above the weighted average cost of the goods over the investigation period (s. 269TAAD);
- in ascertaining whether dumping has occurred and to what level, export prices of goods exported during the investigation period are compared with corresponding normal values. If using weighted averages for the comparison, the weighted averages are to be of prices or values ascertained over the investigation period (s. 269TACB);
- in defining a new exporter as an exporter who did not export the goods during a period starting at the start of the investigation period and ending immediately before the statement of essential facts is placed on the public record (s. 269ZE(1));

#### **3.2 POLICY**

Customs and Border Protection will nominate an investigation period that is generally the 12 months preceding the initiation date and ending on the most recently completed quarter or month. However, the investigation period may cover a longer period to ensure that it includes a full financial accounting period. The investigation period has a start and end date and events happening outside the investigation period usually not being taken into account in assessing dumping and/or benefit conferred.

#### **3.3 PRACTICE**

Where decision is made not to reject an application under s. 269TB(1) or (2) of the Act, Customs and Border Protection will give public notice of its decision which will identify the investigation period.

## 4. INJURY TO AN AUSTRALIAN INDUSTRY

### 4.1 CONTEXT

Anti-dumping or countervailing measures can only be imposed where the Minister is satisfied that goods exported to Australia have been dumped or subsidised, and because of that dumping or subsidisation material injury to an Australian industry producing like goods has been or is being caused or threatened. Material injury is neither defined in Australia's legislation or the WTO Agreements.

Article 3.1 of the Anti-Dumping Agreement requires that a determination of injury be based on positive evidence and involve an objective examination of the volume and price effects that constitute injury and the consequent impact on domestic industry. Article 3.4 of the Anti-Dumping Agreement lists those factors to be taken into account when assessing whether the domestic industry has experienced material injury. There are similar provisions in the Agreement on Subsidies and Countervailing Measures. The provisions are reflected in section 269TAE of the Act.

Injury to the Australian industry caused by other factors must not be attributed to dumping or subsidisation. This is explained further in the Causation section of the manual.

### 4.2 POLICY

In September 1990, a Ministerial Direction was issued concerning material injury, which makes the following points:

- material injury is injury which is not immaterial, insubstantial or insignificant, and is greater than that likely to occur in the normal ebb and flow of business.
- material injury, or the threat thereof, will only rarely be taken as proven when the Australian industry producing like goods has not suffered, or is not threatened with, a "material" diminution of profits or when the dumped or subsidised imports do not hold (or threaten to hold) a sufficient share of the Australian market to cause or threaten "material injury".
- each case to be judged on its merits.

In December 1991, the Minister requested the following four specific aspects of injury be addressed when considering whether injury is material:

- the greater impact of injury during periods of economic downturn;
- regional dumping;
- reduced rates of growth as an element of injury;
- threat of material injury.

#### Related party transactions

Related party transactions are regarded as comprising either intra-company transactions between non-legal entities or transactions between related legal entities.

An examination is made of the Australian industry's sale prices and sale volumes of like goods in determining whether injury has occurred. Customs and Border Protection interprets the definition of a 'sale' as a contract for the transfer of property. To constitute a valid sale there must be at least two legal entities involved in the contract.

In a transaction where goods are transferred between business divisions within the one legal entity, the goods remain the property of the legal entity both before and after the transaction are completed. These transactions are not considered 'sales'.

In the context of s.269TAE which refers to terms such as “price”, “paid”, “sold”, “sales”, Customs and Border Protection considers these terms to be references to price and sales in a conventional sense. This has implications for the assessment of injury to the Australian industry producing like goods. In assessing volume and production related injury indicators, transactions between related parties are considered reliable and suitable. However, transaction values between related parties may be unreliable and inappropriate for assessing injury indicators associated with price effects. (Costs may also be unreliable for example where there are integrated production stages owned by related business divisions).

Therefore, it is policy is to examine the degree to which related party transactions involving the producing Australian industry are suitable for the material injury assessment. Customs and Border Protection will examine whether the association between the parties affects the transaction value. This is reflected in the practice outlined below. It establishes evidentiary benchmarks for examining related party transactions made by the Australian industry.

### 4.3 PRACTICE

Customs and Border Protection bases its assessment of material injury on verified evidence that involves an objective examination of both:

- the volume of the dumped or subsidised exports and the affect of those exports on prices in the Australian market for like goods;
- the consequent impact of those imports on Australian producers of like goods.

When examining volume Customs and Border Protection may consider, among other things:

- the quantity of goods that have been, or are likely to be, exported;
- any increase, or likely increase, in the quantity of goods exported;
- any change, or likely change, in the quantity of goods exported to Australia compared to the quantity of goods sold or consumed in Australia;
- any change, or likely change, in the quantity of goods produced in Australia compared to the total quantity of goods sold or consumed in Australia.

When examining prices Customs and Border Protection may take into account:

- the export price that has been or is likely to be paid by importers for the goods;
- the difference between the price paid or payable for the goods produced in Australia and the price paid or payable for the imported goods when sold in Australia;
- the difference between the price paid or payable for the goods produced in Australia and the landed duty paid into store cost of the imported goods at the same level of trade;
- the affect that the dumped or subsidised goods are having or are likely to have upon the price of the goods produced in Australia.

An examination of prices will show whether :

- the dumped or subsidised imports have undercut the local industry's selling prices (i.e. the imported goods are sold at a price below that of the locally made product);
- the dumped or subsidised imports may have caused price depression (i.e. when the local producer is forced to reduce prices in order to compete with the imported goods);
- ‘price suppression’ may have occurred .

‘Price suppression’, in terms of Article 3.2 of the ADA, is where price increases for the Australian industry’s products, which otherwise would have occurred, have been prevented to a significant degree. In determining whether price suppression has occurred Customs and Border Protection may examine:

- a comparison of prices with costs to assess whether over time (e.g. the injury analysis period) or within a specified period (e.g. the investigation period) - prices have not increased at the same rate as cost increases; and/or
- an assessment as to whether the prices for the Australian industry's product are lower than prices that may have been achieved in the absence of dumping (an unsuppressed selling price may be part of such analysis).

In either case the price suppression analysis is based on a counterfactual conclusion i.e. assessing what trend in, or level of, prices the Australian industry is likely to have achieved in the absence of dumping.

Customs and Border Protection normally examines the weighted average net realised prices achieved by importers of the goods and Australian industry at equivalent levels of trade. Adjustments are made as appropriate for differences between the imported and locally produced goods for differences in the terms and circumstances of their sales or for differences in physical characteristics.

The consequent impact of imports on Australian producers of like goods includes an evaluation of all relevant economic factors influencing the state of the industry and may include the factors in s. 269TAE(3) of the Act. In considering this impact Customs and Border Protection examines the Australian industry's export performance as well as its performance in the Australian market, if relevant.

When the Australian industry's overall sales and production are considered (including goods sold overseas) the injury to the industry may not be material. Also, poor export returns may be a significant contributing factor in the industry's declining profit. This decline in profits cannot be attributed to the goods exported to Australia.

### Related party transactions

The methods outlined below are used to assess the suitability of using the industry's related party transactions in support of their injury claims.

Where an applicant's domestic transactions involve a mix of unrelated and related parties, the preferred method is to benchmark the Australian industry's related party transactions against sales made to unrelated arms length customers. This would normally involve using the industry's detailed sales transactions line by line to compare prices between related and unrelated customers. Customs and Border Protection will also take into account the applicant's own accounting method for valuing those related party transactions.

Where discrepancies are found between related party sales and benchmark unrelated sales, Customs and Border Protection will take in to account the degree of any discrepancies in considering whether related party sales are suitable for examining the economic condition of the industry.

Where all of the applicant's domestic transactions are made to related parties, Customs and Border Protection will generally view the group of related parties as a single corporate entity for the purpose of assessing injury. For this reason, where the related party is a distributor which on sells the goods, the application should contain detailed domestic sales that reflect arms length transactions outside of the single corporate entity.

Where the Australian industry producing like goods sells to a related party and the imported goods compete at the level of the sales made by that related party, Customs and Border Protection will examine whether the downstream injury can be linked to the injury claims made in the application.

### Other factors

In accordance with s. 269TAE(2A) of the Act, any factor other than the exportation of dumped goods is causing or threatening to cause material injury must be considered, such as:

- the volume and prices of imported like goods that are not dumped; or
- the volume and prices of importations of like goods that are not subsidised; or
- contractions in demand or changes in patterns of consumption; or
- restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or
- developments in technology; or
- the export performance and productivity of the Australian industry

Section 269TAE(1) of the Act provides that the Minister in determining, inter-alia, whether the establishment of an Australian industry has been materially hindered, may have regard to a non-exhaustive list of matters set out in that section. As the list is non-exhaustive the Minister may have regard to other matters, such as the capability of an industry to produce in considering the issue of material hindrance in the establishment of an Australian industry.

Claims concerning hindrance to the establishment of an Australian industry may be found if positive evidence is presented showing that plans for the industry were at an advanced stage and financial commitments entered into by the prospective producers.

### Downstream injury

Injury analysis may need to focus on a particular sector of the Australian market. This could arise where an industry sells to two or more market sectors i.e. one sector is open to competition from imports and another sector is not. This may occur, but is not limited to, cases where there are:

- vertically integrated industries;
- long term supply contracts;
- products with more than one end-use;
- geographically separate markets.

The Act defines industry in terms of production of like goods. This definition is from Article 4 of the WTO Anti Dumping Agreement and Article 16 of the Agreement on Subsidies and Countervailing Measures. Both identify a domestic industry to be “domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products .....

As production, not sales, defines an industry, market sectors, differing end use, and downstream market structure are irrelevant determinants of an industry as a whole.

The WTO Agreements do not permit an injury finding to be made on less than the whole domestic industry (or at least 'those of them whose collective output of the like product constitutes a major proportion of the domestic production of the like product'). Even so, there is nothing to preclude Customs and Border Protection from performing a sectoral analysis of an industry and/or market if it yields a better understanding of the effects of imports and a more thorough analysis and conclusion. However to be consistent with the Agreements, any conclusions drawn from a sectoral analysis must explicitly be related back to the industry as a whole.

Whether a sectoral analysis is warranted in an investigation can only be determined by the circumstances of the case. Some examples could include:

- where a market sector has a particular susceptibility to dumped imports and resultant injury is focused and acute;
- where the market sector has special significance in the context of the overall industry; or
- that the market structure may be adversely affected by changes in competition in one sector.

An analysis of this type could result in a different weight being attributed to the injury in the sector competing with dumped imports.

Customs and Border Protection might focus injury consideration principally on a market sector where:

- an applicant requests it;
- issues of standing in respect of all production are satisfied;
- separate market sectors can be established by objective evidence;
- injury to the sector can be judged material to the industry as a whole; or
- sales volumes to each market sector are significant.

In respect of separate market sectors objective data might indicate:

- production destined for one market does not enter the other market;
- there are no imports or other external supply to the market unaffected by dumping;
- prices, and price movements, between the markets are dissimilar;
- different market structures exist between the market sectors (for example by different intermediate manufacturing processes, production technology, handling, packaging, distribution and sales methods);
- the imported and closed market production have different end uses, (however an application based on different end use alone would be inadequate as different end use does not of itself differentiate a market. If an application were decided on end use, it is not possible to apply measures on that basis); or
- that after intermediate processing the imported product is not sold onto the same market as output from the sector unaffected by dumping (ie where there are also downstream market sectors).

In respect of injury to a sector (or sectors) being judged as injury to industry as a whole, a conclusion that there is injury, or threat of injury, to a specific sector may be indicative of injury to the industry as a whole only where the sector in question is sufficiently representative of the industry concerned.

In respect of sales volume differences, a judgment that sales volumes to the sectors are significant is a matter of degree determined by the circumstances of the case. Without significant sales to the open market, it would be difficult to establish that injury to the industry as a whole is material. If there were significant sales to the closed market there would be no need to pursue an analysis of this type.

Production by an Australian industry for export is to a separate market. Accordingly, this is not a relevant consideration in relation to market sectors in a dumping analysis. In addition s. 269TAE(2A)(f) of the Act requires separate regard be had to exports in an injury assessment.

Section 269TAE(2A) of the Act lists factors other than dumping that the Minister must consider when determining injury. This includes consideration of the restrictive trade practices of, and competition between, foreign and Australian producers.

### Threat of material injury

Articles 3.4 and 3.7 of the Anti-Dumping Agreement and Article 15 of the Subsidies Agreement set out the factors to be considered in a determination of threat of material injury.

The Agreements give a non-exhaustive list of factors that should be considered in totality when making a determination of threat of material injury:

- a significant rate of increase of dumped/subsidised imports into the domestic market indicating the likelihood of substantially increased importation.
- sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped/subsidised exports to the market, taking into account the availability of any other export markets to absorb any additional exports.
- whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports.
- inventories of the product being investigated.
- in subsidy cases only, the nature of the subsidy or subsidies in question and the trade effects likely to arise there from.

Customs and Border Protection will give consideration to these particular requirements of the Agreement.

The WTO Agreements provide that with respect to cases where injury is threatened by dumped or subsidised imports, the application of measures shall be considered and decided with special care. A determination of threat of material injury is thus subject to stringent tests. A totality of factors must lead to the conclusion that because of the exportation of dumped or subsidised goods is imminent, a change in circumstances makes the threat of injury foreseeable and the injury threatened is material.

Customs and Border Protection examines the volume and price effects of the dumped imports on the Australian industry in accordance with s. 269TAE(1) of the Act. Under the terms of s. 269TAE(2B), consideration is also given to whether any changes in circumstance would make the threat of injury to the Australian industry imminent or foreseeable unless dumping or countervailing measures were imposed. Conclusions must be based on facts, not on conjecture.

Section 269TB of the Act allows for an application on the grounds that a consignment of goods "is likely to be imported into Australia; or may be imported into Australia". Provisional measures can be imposed where a Preliminary Affirmative Determination (PAD) has been made. In threat cases, a PAD can only be made where the CEO is satisfied that it appears there will be sufficient grounds for the publication of a notice subsequent to the importation into Australia of such goods. Accordingly, a decision could be made on the basis of a threat of injury arising from dumping or subsidisation. Securities may then be imposed upon importation and apply pending the final recommendation. While the investigation could commence before the goods have been exported, the Minister can only impose the final measures after exportation in accordance with the provisions of ss 269TG(2), 269TH(2), 269TJ(2) and 269TK(2) of the Act.

Consideration of the factors referred to in Article 3.4 of the Anti-Dumping Agreement is necessary in order to establish a background against which an evaluation of whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur unless dumping or countervailing measures were imposed.

That said, a dumping application based solely on threat is not required to contain information on all the factors and indices set out in Articles 3.2 and 3.4 of the Anti-Dumping Agreement. The factors and indices that are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations and the nature of the industry itself. Applicants need only to provide such information as is “reasonably available” to them with respect to the factors relevant to their claims.

## 5. ARMS LENGTH TRANSACTIONS

### 5.1 CONTEXT

In determining export prices under s. 269TAB(1)(a) and normal values under s. 269TAC(1), the Act requires that the relevant sales are arms length transactions.

Section 269TAA of the Act outlines the circumstances in which the price paid or payable shall not be treated as arms length. These are where:

- there is any consideration payable for in respect of the goods other than price;
- the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller;
- in the opinion of the Minister, the buyer, or an associate of the buyer, will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

### 5.2 POLICY

It is policy to test the nature of sales between the buyer and seller in order to demonstrate whether or not any of the situations set out in s. 269TAA of the Act exist.

### 5.3 PRACTICE

#### Any consideration payable other than price

This is a situation where apart from the price of the sale transaction there is some other consideration exchanged between the buyer and the seller. The consideration must be for or in respect of the goods (i.e. directly related and payable by the buyer to the seller of the goods). Customs and Border Protection does not consider that warranty and advertising payments are directly related to the price of the goods, as these are general business expenses and are therefore related to goods in general.

#### Price is influenced by a commercial or other relationship

In assessing the arms length nature of transactions, the commercial or other relationship between the principal parties is examined. There must be clear evidence that the price is influenced by the commercial or other relationship. To demonstrate this, Customs and Border Protection seeks to compare the price paid or payable for the goods where there is a relationship between a buyer and a seller with the price paid or payable for the goods between a buyer and a seller where there is no relationship.

#### Reimbursement, compensation or other benefit in respect of the price

Customs and Border Protection treats transactions as non-arms length where the buyers, or buyers' associates, are reimbursed or compensated by the sellers, or sellers' associates, either directly, or indirectly, in respect of the whole or any part of the price. Section 269TAA(4) of the Act defines whether or not two parties are associates. Each case is investigated in order to ascertain whether there is any association between the parties. Customs and Border Protection may rely on evidence such as the contract between the parties, the title of the goods subject to the transaction and the role of third parties such as selling agents.

## Rebates

Rebates are a reimbursement of part of the price paid. Section 269TAA(1A) of the Act allows transactions effected by reimbursements that are a normal business practice to be treated as being at arms length, after having regard to any agreement or established trading practice; or whether or not the reimbursement may be quantified. For example, parties may have an agreement (expressly or implicitly) that makes the terms certain at the commencement of the relevant period, and the reimbursement may be quantifiable. In these circumstances, the transactions may be taken as being at arms length.

Therefore, the mere fact that a rebate is paid is not in itself evidence that there is a compensatory arrangement under s. 269TAA(2)(c) of the Act.

Where a rebate is payable (e.g. volume rebates) Customs and Border Protection will consider that rebate is part of the process for determining the net price of the goods. A rebate may be considered part of price provided that the nature and manner of payment remain sufficiently connected with the sales transaction (e.g. volume rebate). Examples of rebates that have been considered not connected to price are:

- payment of advertising expenses;
- reimbursement of commissions paid by dealers to increase sale of goods;
- promotional expenses.

If a party maintains that the price of goods is net of rebates, Customs and Border Protection requires verification of the arrangements in relation to the payment of rebates. If a party does not cooperate, Customs may ascertain the price having regard to all relevant information.

## Sales at a loss by the Importer

Sales at a loss are an indicator only that the buyer may have been reimbursed, compensated or benefit otherwise. Sales that are at a loss do not compel a finding that the sales are not arms length. Customs and Border Protection may treat sales of the goods by an importer (or associate) in Australia at a loss as indicating that the importer (or associate) will, directly or indirectly, be reimbursed, compensated or otherwise receive a benefit in respect of the whole or a part of the price.

Section 269TAA(3) of the Act describes the information to which the Minister shall have regard when sales by the importer are at a loss. When examining export price, Customs and Border Protection examines the importer's Australian sales in order to ascertain if they are profitable. Customs and Border Protection will calculate the profitability of the importer's sales by comparing the sales revenue of the imported goods to the calculated fully absorbed cost to import and sell. The fully absorbed cost to import and sell will generally include the following items:

- cost of goods;
- overseas ocean freight and marine insurance;
- expenses associated with import clearance – eg import duty, port charges, broker's fees, fumigation and quarantine charges, terminal handling, etc
- other direct expenses – eg inland transport charges, repackaging expenses, warehousing, etc; and
- indirect selling, general and administration costs.

If sold at a loss, Customs and Border Protection will examine the likelihood of recovery of costs. The price paid or payable for the goods by the importer is added to all other costs incurred in the importation and sale of the goods to arrive at a cost recovery price. Sales at a loss are treated as arms length if the costs can be recovered within a reasonable period of time. A "reasonable

period of time” is generally taken to be 12 months. Customs and Border Protection will also consider any other relevant matters when determining whether goods are sold by an importer at a loss.

## 6. DETERMINING AN EXPORT PRICE

### 6.1 CONTEXT

Section 269TAB of the Act sets out the criteria for determining the export price for the goods exported to Australia. Section 269TAB(1)(a) of the Act provides that where a sale is between the importer and exporter, someone other than the importer has exported the goods and the sale is an arms length transaction, the export price is the price paid (or payable) to the exporter by the importer less any charges incurred after exportation.

Importer is defined in s. 269T(1) of the Act as the beneficial owner of the goods at the time of their arrival within the limits of the port or airport in Australia at which they have landed. The beneficial owner is considered to be the one who was entitled to all the benefits associated with ownership even though they may not be the legal owner of the goods.

Section 269TAB(1)(b) of the Act concerns the situation where the sale is between the importer and exporter and someone has exported the goods other than the importer, but the sale is not an arms length transaction. The legislation further provides that in this circumstance, if the goods are subsequently resold in Australia by the importer (in an unaltered condition) to an independent buyer, the export price is determined to be the selling price of those goods less the prescribed deductions.

Section 269TAB(2) of the Act defines “prescribed deductions” to be:

- any Customs duty or sales tax paid or payable; and
- any costs arising after exportation. For example, any costs incurred by the importer such as post export transportation, handling, storage and overheads; and
- the profit, if any, on the sale by the importer or a rate of profit on the sale by the importer, as directed by the Minister.

To apply the provisions of ss 269TAB(1)(a) or (b) of the Act, the sale must be between the importer and exporter and the goods must have been exported by someone other than the importer. Where either (or both) of these criteria are not met, s. 269TAB(1)(c) of the Act permits the export price to be determined having regard to all the circumstances of the exportation.

Where there is insufficient information to enable an export price to be determined, s. 269TAB(3) of the Act provides that the export price will be an amount determined by having regard to all relevant information.

### 6.2 POLICY

Customs and Border Protection considers that goods are exported when they leave the country of export. Generally, export price is assessed as the free on board price received by the exporter at the seaport in the country of export or, in the case of air transport, at the airport in the country of export. In some circumstances export price may be assessed at another level. An ex-factory price received by the exporter may be used for example in the situation where charges are all inclusive of local and international charges and it is impractical to segregate them. Goods that are exported by sea from land-locked countries are transported across the country of export's border for a seaport destination. The point of export in this circumstance is generally taken to be the border of the country of export and any inland freight incurred from this point will not be included in the export price.

The exporter will generally identify as:

- a principal in the transaction located in the country of export from where the goods were shipped who gave up responsibility by knowingly placing the goods in the hands of a carrier, courier, forwarding company, or their own vehicle for delivery to Australia; or
- a principal will be a person in the country of export who owns, or who has previously owned, the goods but need not be the owner at the time the goods were shipped.

Where there is no principal in the country of export Customs and Border Protection will normally consider the exporter to be the person who gave up responsibility for the good as described above.

Generally the exporter will be found in the country where the goods started their journey to Australia but situations may arise where goods pass in transit through another country. In this case Customs and Border Protection will normally consider the exporter to be located in the country of manufacture, being the person responsible for sending the goods to Australia.

It is common for traders or other intermediaries to play a role in the exportation of the goods. These parties will typically provide services such as arranging transportation (both land and ocean), arrange port services, arrange the loading, conduct price negotiations, arrange contracts with producer and customer alike, convey the customer's specifications to the producer including quality, marking, and packing requirements, etc.

In such case, in all of these functions when the roles are analysed the trader is typically acting as an intermediary who, although one of the principals, is essentially acting as a facilitator in the sale and shipment of the goods. That is to say, its essential role is a facilitator where, acting on behalf of another party, it facilitates the shipment of goods produced for export to Australia. For example, it may be acting as an agent on behalf of the customer/importer in Australia in some or all of the abovementioned functions.

Customs and Border Protection examines the parties in the transactions and identifies those parties whose essential role is just an intermediary in the transactions. Also identified are the principal parties such as the vendor, the exporter, and the importer. The exporter must have been the owner of the goods at one time but, as noted, ownership at the time the goods left for Australia is not treated as conclusive when identifying the exporter. The exporter and vendor are often different entities. When the goods are produced they may pass through several parties on their way to Australia, some of whom may be vendors in a third country. A vendor may arrange the sale; set prices; cover warranty; prepare Customs and other paperwork; make shipping arrangements; pay the freight; but still not be the exporter for determining normal value under these guidelines.

Typically the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter. The export price will be the price received by that producer/exporter and where an intermediary is involved the export price will be the price received by that exporter- which in this circumstance is the price to that intermediary. In working out the dumping margin the export price received by the exporter for the goods will typically be the free on board price but an export price at another point may have to be used depending on the circumstances, for example a free alongside price, or an export price expressed in some other terms.

Therefore, depending on the facts, Customs and Border Protection considers that only in rare circumstances would an intermediary be found to be the exporter. Typically this will only occur where the intermediary has purchased the goods from the manufacturer; the manufacturer has no knowledge at all that the goods are destined for export to any country; and the essential role of the intermediary is that of a distributor rather than a trader and because it is acting more like a distributor intermediary may usually have its own inventory for all export sales.

### 6.3 PRACTICE

In assessing whether the export price of the goods exported to Australia is the price paid, it must firstly be establish that:

- the goods have not been exported to Australia by the importer and have been purchased from the exporter by the importer (whether before or after exportation); and
- the purchase by the importer was an arms length transaction (for more information on rebates and free goods see the section on arms length);

Customs and Border Protection examines the role of the parties, their functions and responsibilities in the export transactions, and decides on who is the exporter and the importer or beneficial owner of the goods.

An export price will be determined under s. 269TAB(1)(a) of the Act where the goods have been exported otherwise than by the importer and purchased by the importer from the exporter in an arms length transaction. Therefore, where an intermediary is the vendor, directly dealing with the importer in Australia, export price cannot be assessed under this provisions as there has been no purchase by the importer from the exporter.

An export price will be determined under s. 269TAB(1)(b) of the Act where the goods have been exported otherwise than by the importer, and purchased by the importer from the exporter, in a transaction not at arms length. Further, the importer must sell the goods, in the condition in which they were imported, to a person who is not an associate of the importer.

In determining an export price under s. 269TAB(1)(b) of the Act, Customs and Border Protection endeavours to obtain a price that is representative of a reliable export price that is unaffected by any association or compensatory arrangement. An export price will be calculated by using a market price that is representative of an arms length sale, and deducting all associated expenses incurred between exportation and resale (including any profit).

In establishing a suitable rate of profit to be deducted, Customs and Border Protection will have regard to (not in any order of priority) the:

- historical profit achieved by the importer for the goods; or
- the historical profit achieved by the importer for the product group, profit centre or total company figures, taking account of the company's overall functions; or
- the profit achieved by other importers at the same level of trade for the goods during the investigation period.

Where the export price cannot be determined ss. 269TAB(1)(a) or 269TAB(1)(b) of the Act, and sufficient information is available, the export price will be determined under s. 269TAB(1)(c) of the Act, having regard to all the circumstances of the exportation.

Where sufficient information has not been furnished or is not available, the export price will be determined under s. 269TAB(3) of the Act, having regard to all relevant information.

## **7. NORMAL VALUE BASED ON EXPORTER'S DOMESTIC SALES**

### **7.1 CONTEXT**

Section 269TAC(1) of the Act provides that the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, or if like goods are not so sold by the exporter, by other sellers of like goods.

Section 269TAAD of the Act provides that if like goods are sold in the country of export in arms length transactions and in substantial quantities, and are sold at a price less than the cost of such goods and are unrecoverable within a reasonable period, they are taken not to have been paid in the ordinary course of trade.

Section 269TAA of the Act outlines the circumstances in which the price paid or payable shall not be treated as arms length. These are where:

- there is any consideration payable for or in respect of the goods other than price; or
- the price is influenced by a commercial or other relationship between the buyer, or an associate of the buyer, and the seller, or an associate of the seller; or
- in the opinion of the Minister, the buyer, or an associate of the buyer, will, directly or indirectly, be reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price.

Section 269TAC(2)(a) of the Act gives direction on whether sales of like goods sold for home consumption in the country of export are relevant and suitable for the purpose of determining a price under s. 269TAC(1) of the Act. Specifically, normal value cannot be ascertained under s. 269TAC(1) of the Act where:

- there are no sales, or an absence of relevant sales;
- there is a low volume of relevant sales;
- sales are unsuitable because of a situation in the market of the country of export.

### **7.2 POLICY**

Section 269TAAD of the Act is consistent with and gives effect to Articles 2.2.1 and 2.2.1.1 of the Anti-Dumping Agreement concerning sales at a loss. Therefore, sales of goods at a loss occurring in substantial quantities and which do not provide for the recovery of costs within a reasonable period, are regarded as being not in the ordinary course of trade.

One condition of s. 269TAAD of the Act is that sales at a loss must have occurred in substantial quantities in order to be rejected from the normal value determination. It is policy to find that there have been substantial quantities of sales at a loss when the volume of domestic sales found to be sold at a loss and unrecoverable within a reasonable period are greater than 20% of the total volume sold in the exporting country.

Article 2.2.1 of the Anti-Dumping Agreement states that sales below cost of production may be treated as "...not being in the ordinary course of trade by reason of price..", recognising there are other situations that might require a finding that sales are not in the ordinary course of trade. Therefore, in certain circumstances profitable sales may not be in the ordinary course of trade. These may include sample sales, promotional sales made at special prices, end of season sales, low quality sales, or sales in other unusual circumstances.

### 7.3 PRACTICE

For normal value to be ascertained under s. 269TAC(1) of the Act, Customs and Border Protection first examines whether there are suitable like good sales for home consumption in the country of export by the exporter, made in the ordinary course of trade and at arms length over the investigation period.

#### Ordinary course of trade

In order to test whether sales are in the ordinary course of trade, all of the exporter's domestic sales of like models (transaction by transaction) and the unit cost to make and sell those domestic models are required. For each grade or model sold domestically, selling prices for individual transactions are compared to the corresponding cost to make and sell for that grade or model. Whilst the period of comparison will generally be quarterly, there may be circumstances when a monthly or annual period is used. Examples of circumstances where it may be more appropriate to use monthly costs are where there are significant variations in raw material costs or where high levels of inflation exist.

For those sales found to be sold at a loss, the selling price of each individual sale is compared to the weighted average cost to make and sell for that grade or model over the whole of the investigation period to ascertain whether it is recoverable within a reasonable period. Where the volume of non-recoverable sales exceeds 20% of the total volume sold, those sales are rejected. The remaining profitable and recoverable sales are treated as sold in the ordinary course of trade.

Customs and Border Protection assesses the suitability of the ordinary course of trade sales for use in determining normal values.

#### Suitability of sales

Section 269TAC(2) of the Act provides that certain domestic sales may be unsuitable for use in determining normal values because of a factor in the market. One such factor is where there is an absence, or low volume, of sales of like goods in the domestic market.

Low volume is defined in s. 269TAC(14) of the Act as less than 5% of the total volume of the goods under consideration that are exported to Australia by the exporter. The quantity sold to the domestic and export markets is assessed over a reasonable period (e.g. twelve months in order to avoid distortions such as seasonal fluctuations).

In assessing whether there are sufficient sales made in the ordinary course, the following tests are performed:

- calculate whether the aggregate volume of all domestic ordinary course of trade sales of the like goods is 5% or more of the overall export sales volume to Australia from that country; and
- if the aggregate volume is greater than 5%, the test is applied individually for each model or type of like goods.

The two examples below highlight the treatment of significant differences between the volume of sales made by the exporter on the domestic market and the volume of sales to Australia.

Example 1

Volume of sales of product x by company y on the domestic market	10 000 tonnes
Volume of sales of product x by company y to Australia	1 000 tonnes
Volume of sales of product x by company y on the domestic market in the ordinary course of trade	60 tonnes
% Domestic sales as a proportion of export sales	1 000%
% ordinary course of trade sales as a proportion of sales to Australia	6%
% ordinary course of trade sales as a proportion of domestic sales	0.6%

In this example the volume of sales on the domestic market is much larger than the volume sold to Australia. On this basis, the sales may have been considered sufficient to enable a proper comparison with export sales. However, a volume consisting of 0.6% of domestic sales may not be considered representative of those domestic sales, or of domestic market prices in general.

This example presents a circumstance where 5% of export sales to Australia may not be an appropriate measure of a sufficient quantity of relevant domestic sales. This is not to say however that the test of sufficient sales should only be applied as a ratio of total domestic sales. Alternatively domestic sales may be significantly smaller in volume than sales to Australia. This is the case in example 2.

Example 2

Volume of sales of product x by company y on domestic market	10 tonnes
Volume of sales of product x by company y to Australia	1000 tonnes
Volume of sales of product x by company y on domestic market in the ordinary course of trade	10 tonnes
% Domestic sales as a proportion of export sales	1%
% ordinary course of trade sales as a proportion of sales to Australia	1%
% ordinary course of trade sales as a proportion of domestic sales	100%

In the second example the volume of sales to Australia is significantly higher than sales volume on the domestic market. Although 100% of sales on the domestic market are in the ordinary course of trade, those domestic sales may not be considered to be in sufficient quantities. This is because the sales on the domestic market consist of only 1% of the sales volume to Australia. Conceivably, the 10 tonnes sold on the domestic market may have been made solely with the intention of avoiding a positive dumping finding.

However, there may be instances where Customs and Border Protection may be satisfied that the low volume of sales is still large enough to permit a proper comparison for the purposes of assessing a normal value under s. 269TAC(1) of the Act.

Other situations in the market can arise making the sales not suitable for use in determining a normal value under s. 269TAC(1) of the Act. Sales that would otherwise be relevant for determination of normal value may be unsuitable because the price does not reflect a fair price in normal market conditions. The legislation does not define market situations that would render domestic sales as unsuitable. The investigation and analysis of each case must fully set out the reasons for the unsuitability of sales before determining normal value under succeeding provisions of section 269TAC of the Act.

In considering whether sales are not suitable for use in determining a normal value under s. 269TAC(1) of the Act because of the situation in the market of the country of export, Customs and Border Protection may have regard to factors such as:

- whether the prices are artificially low; or
- whether there is significant barter trade; or
- whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under s. 269TAC(1) of the Act.

Government influence on prices or costs could be one cause of “artificially low pricing”. Government influence means influence from any level of government.

In investigating whether a market situation exists due to government influence, Customs and Border Protection will seek to determine whether the impact of the government's involvement in the domestic market has materially distorted competitive conditions. A finding that competitive conditions have been materially distorted may give rise to a finding that domestic prices are artificially low or not substantially the same as they would be if they were determined in a competitive market.

One example of government influence distorting competitive conditions and leading to artificially low prices may be the presence of government owned enterprises in the domestic market. The presence of government owned enterprises might not, of itself, lead to a conclusion that the sales are unsuitable. Rather, the numbers of government owned enterprise and whether their trading unprofitably so as to significantly distort the prices in the market of private enterprises in and whether market conditions can no longer be said to prevail are looked at.

Prices may also be artificially low or lower than they would otherwise be in a competitive market due to government influence and distortion of the costs of inputs. Again the mere existence of any government influence on the costs of inputs would not be enough to make sales unsuitable. Rather, Customs and Border Protection looks at the effect of this influence on market conditions and the extent to which domestic prices can no longer be said to prevail in a normal competitive market. It should be noted government influence on costs can only disqualify the sales if those costs can be shown to be affecting the domestic prices.

Thus, a range of conditions concerning the sales themselves may have the effect of rendering those sales prices as being unsuitable for use in determining prices under s. 269TAC(1) of the Act.

When relevant and reasonably reliable evidence supporting the proposition that domestic selling prices are unsuitable for normal values is set out in the application, and an investigation is initiated, Customs and Border Protection will adopt the following procedures in order to ensure interested parties have an opportunity to consider the claims and present evidence:

- notify the government of the country and the exporters of the claims and of the evidence provided. Additional questions will be inserted into the exporter questionnaire titled "Market Situation". A 'Market Situation' questionnaire will also be prepared for government;
- both questionnaires will be based upon the evidence provided by the Australian industry and that supported the decision to investigate. That is, the information supporting the claim that the 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. Any other relevant information in the possession of Customs and Border Protection may also be taken into account when preparing the questionnaire. The government and the exporter will be asked to respond as specifically as possible to the questions. Accompanying letters will draw attention to these questions, and
- if the government of the country or exporters fail to respond after being given a reasonable opportunity to do so, or do not provide probative evidence in response, all available evidence is weighed up, including the prima facie evidence of the application. One possible outcome is that a situation in the market has rendered domestic selling prices unsuitable for establishing normal values.

Where it is established that sales by the exporter do not meet the conditions of s. 269TAC(1) of the Act, it then examines whether sales made by other sellers in the country of export are suitable and relevant for establishing normal values in accordance with s. 269TAC(1) of the Act.

## **8. NORMAL VALUE BASED ON OTHER SELLER'S DOMESTIC SALES**

### **8.1 CONTEXT**

Section 269TAC(1) of the Act provides that the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter, or if like goods are not so sold by the exporter, by other sellers of like goods.

### **8.2 POLICY**

The preference is to base normal value on the actual price paid, or payable, for like goods sold in the country of export by the exporter. However, where the exporter's domestic sales of like goods are confirmed to be not at arms length, or not in the ordinary course of trade, or where the exporter is known to have not made any domestic sales, already available domestic sales information from other sellers in the country of export will be considered before turning to the other methods for establishing normal value.

Customs and Border Protection will not look for information from other sellers where an exporter does not provide the required information, for example by non cooperation, because in this situation it is not possible to make the required determinations as to whether the goods are 'sold' or 'not so sold' in arms length sales in the ordinary course of trade as required under s. 269TAC(1) of the Act. Similarly, if it is not known whether the exporter has made any domestic sales, other seller's information is not applicable for the purposes of s269TAC(1).

In establishing normal values based on domestic sales by other sellers, Customs and Border Protection will look to assess whether those sales are 'suitable' and 'relevant' for the purposes of determining a price under s. 269TAC(1) of the Act ('suitable' and 'relevant' being considerations within s269TAC(2)(a)).

Where an other seller's prices are being considered for normal values, Customs and Border Protection will, subject to confidentiality, seek to provide the exporter with information about the other seller's sales so that the exporter in question might defend its interests. Generally this will involve identifying the other selling exporter, providing information on the type of products being sold on the domestic market and the other seller's domestic distribution methods which is relevant to level of trade comparisons.

Where sufficient information cannot be provided to the exporter without disclosing confidential information on such matters, Customs and Border Protection may be constrained in pursuing an examination of adjustment claims and as a result may be hindered in establishing the necessary facts to ensure fair comparison. As fair comparison is a fundamental principle in the determination of whether goods are dumped, it is considered that where fair comparison cannot be achieved, domestic sales of like goods by an other seller may not be suitable for determining a normal value.

### **8.3 PRACTICE**

In evaluating whether the other seller's prices are suitable for establishing normal values, undertakes certain tests, and has regard to a number of factors as set out below:

- other seller's sales must be in the ordinary course of trade and be at arms length.
- in considering whether other seller's sales are suitable Customs and Border Protection will compare the other seller's prices to the cost to make and sell of the exporter in

question. The purpose is to ensure that the other seller's domestic sales prices, which are being considered for normal value purposes for the exporter in question, are not unprofitable and unrecoverable given the cost structure of the exporter in question.

- If the other seller has not completed, or only partially completed, the exporter's questionnaire, that company's prices may not be use for determining a normal value.
- The ordinary course of trade requirement requires detailed information pertaining to the other seller's cost of production as well as the expenses incurred in selling etc. That is, a fully absorbed cost to make and sell. A company that is not a producer, for example a sales distribution company can only provide selling expense information. The costs of production must be provided by the cooperating producer. As cost of production and selling expenses are required for the ordinary course of trade requirement this requirement excludes a sales distribution company alone from being used as an 'other seller', where the producer of the goods in question fails to cooperate.
- The term "by the exporter or another seller" in s. 269TAC(14) of the Act show that where another seller's domestic sales are being considered as a basis for establishing normal value, the volume of domestic sales made by the other seller must be compared with the volume of export sales made by the exporter. However, even though the volume of domestic sales made by the other seller may be low volume when compared to the volume of export sales, the sales by the other seller are not automatically precluded from use.
- The provisions of s. 269TAC(2)(b) of the Act recognise that there are limitations to the use of the other sellers provision. The provision removes the obligation to use other seller's information where it is not practicable to obtain that information in a reasonable time. For this reason it may not be possible to conduct additional inquiries or verification visits solely for the purpose of acquiring other seller information.
- s. 269TAC(2)(a) of the Act provides that where there is an absence or low volume of domestic sales that would be relevant for determining a price in the country of export, or sales are not suitable for use because of the situation in the market, normal value cannot be determined under s. 269TAC(1) of the Act. Sales of like goods by other sellers may not be relevant if a fair comparison cannot be achieved. The following examples illustrate situations where a fair comparison may not be possible:
  - there is a difference in the level of trade between the other seller's domestic sales and the exporter/producers' export sales, and there is no meaningful way of making the level of trade adjustment, or
  - there are differences in characteristics (eg. raw materials, specifications, production methods, performance and costs, etc) between the other seller's domestic goods and the goods exported to Australia by the exporter, and it is not possible to reasonably work out the amount of any adjustment to account for those differences, or
  - there is a difference in the time of sale between the other seller's domestic sales and the exporter/producer's export sales, and there is no meaningful way of working out the adjustment.
- If the other seller declines to cooperate, or does not respond in a timely fashion, the other seller's provision would not be relevant.

In these circumstances normal value may be worked out using the costs for the exporter in question and adding an amount for profit, matters which are examined elsewhere in the manual.

## **9. NORMAL VALUE BASED ON CONSTRUCTED METHOD**

### **9.1 CONTEXT**

Section 269TAC(2)(c) of the Act provides that where the normal value of goods exported to Australia cannot be ascertained under s. 269TAC(1) of the Act, the normal value of the goods may be constructed.

The key elements in constructing a normal value are:

- the cost of production of the exported good;
- the administrative, selling and general costs are those that would be incurred on the assumption that the exported good is sold on the domestic market;
- the profit is that which would be earned on the assumption that the exported good is sold on the domestic market (s. 269TAC(13) of the Act refers) except where the relevant sales in the country of export have been made at a loss.

Sections 269TAC(5A) and (5B) of the Act should be read in conjunction with s. 269TAC(2)(c) of the Act. Section 269TAC(5A) of the Act requires the determination of cost of production and administrative, selling and general costs to take account of such factors as Regulations 180 and 181 of the Act provide. Section 269TAC(5B) of the Act requires the determination of profit taking account of factors provided in Regulation 181A of the Act.

The Minister may include an amount for profit under the provisions of s. 269TAC(2)(c)(ii) of the Act subject to s. 269TAC(13) of the Act. Section 269TAC(13) of the Act provides that where, because of the operation of section 269TAC(13) of the Act, the normal value is required to be determined under s. 269TAC(2), the Minister shall not include in his or her calculation of that normal value any profit component under s. 269TAC(2)(c)(ii) of the Act.

### **9.2 POLICY**

The costs used in any constructed normal value must be those incurred by the exporter, must reasonably reflect the costs of the goods, and be in accordance with generally accepted accounting principles in the country of export.

Section 269TAC(2)(c) of the Act requires the determination of the cost of production of the goods (i.e. the goods exported to Australia) in the country of export rather than like goods (i.e. those sold on the domestic market of the exporting country). In circumstances involving homogenous products (e.g. chemicals), where the domestically sold goods and the exported goods are identical, the cost of production is usually the same.

As with the normal value ascertained under any of the provisions of the section, adjustments may be required to ensure a proper comparison between the constructed price of goods in the domestic market and the export price. For further information on adjustments to the constructed price refer to the section on "Due Allowance".

### **9.3 PRACTICE**

Regulation 180 of the Act provides that if an exporter keeps records relating to like goods and the records are in accordance with generally accepted accounting principles in the country of export; and reasonably reflect the costs associated with the production or manufacture and the sale of like goods, the Minister must use the information set out in the records.

The amounts ascertained to be the cost of production or manufacture, administrative, selling and general costs, and profit must be calculated in the same manner as sales in the ordinary course of trade.

Customs and Border Protection includes the actual costs of materials, labour and overheads incurred in the production of the goods in the cost of production/manufacture. The calculation assumes that the goods were sold within the domestic market of the country of export and includes:

- all fixed costs such as rent, rates, insurance and depreciation which vary with production volumes;
- all variable costs such as raw materials and factory labour;
- other costs incurred in bringing the goods to sale.

Should the exported goods differ from those sold on the domestic market (e.g. have different specifications) to the extent that this reflects a difference in the cost of production, care is taken to ensure that discrete costs of production are ascertained. Customs and Border Protection requires one cost of production (that of the domestically sold good) for the purposes of establishing the ordinary course of trade of domestic sales, (i.e. the profitability) while the other (that of the exported good) is required under s. 269TAC(2)(c) of the Act.

#### Administrative, selling and general costs

Customs and Border Protection generally obtains administrative, selling and general costs from profit and loss statements for the most recent financial year covering the goods and preferably in relation to domestic sales only. This must include a fair allocation of other expenses incurred (e.g. research and development, head office, and regional sales offices). Such expenses must be included and allocations examined as to their reasonableness, otherwise there may be an understatement of the expenses.

Care is exercised when using the profit and loss statement because such statements usually incorporate a wide variety of goods (of which the like goods may be just a small part) and includes expenses incurred in both domestic and export sales. For example, selling costs in the statement could include a significant element of export freight costs, as well as other export related selling expenses. These types of expenses are irrelevant when establishing the administrative, selling and general expenses associated with domestic sales.

Therefore, it is required for the purposes of s. 269TAC(2)(c) of the Act that the costs so ascertained are incurred on sales on the domestic market. In section G of the exporter's questionnaire ("costing information and constructed value") the respondent is asked to identify the cost to make and sell for sales on the domestic market as well as the cost to make and sell for sales to Australia. Verification includes examination of the source data used by the exporter.

Where the administrative, selling and general expenses for domestic sales cannot be ascertained by the particular exporter concerned (e.g. if the exporter is unable to allocate those expenses to domestic sales of like goods for any reason, or if the allocations that are made are unsatisfactory or unverified), Regulation 181 of the Act directs that an amount be calculated by:

- identifying the actual amounts incurred and realised by the exporter in respect of the production and sale of the same general category of goods in the domestic market of the country of export; or
- identifying the weighted average of the actual amounts incurred and realised by other exporters or producers for the production and sales of like goods in the domestic market of the country of export; or
- by using any other reasonable method and having regard to all relevant information.

Any of these methods can be used depending upon what is most reasonable in the circumstances.

### Treatment of non-operational income and expenses

Customs and Border Protection will examine the extent to which each non-operating income/expense item is associated with the production, or manufacture, and sale of the goods, for the investigation period. Having established those income/expense items considered reasonably associated with the production, or manufacture, and sale of the goods, Customs and Border Protection will allocate an amount for such items when determining costs for the purpose of constructed normal values and ordinary course of trade tests.

Where applicable, Customs and Border Protection will:

- allow netting of the relevant income/expense items, but will not apply the practice of “capping”. In other words, if the total of the relevant non-operating income items exceed the total of the relevant non-operating expense items, the difference (being a negative cost amount) is added to the operating costs resulting in lower total operating and non-operating costs overall. If 'capping' were followed this negative difference would not be added to the operating costs;
- allocate net interest and finance income/expenses to the goods on a reasonable basis;
- allocate the net transaction foreign exchange gains/losses to the goods on a reasonable basis;
- generally allocate the net translation foreign exchange gains/losses to the goods on a reasonable basis;
- allocate any other net non-operating income/expense items to the goods on a reasonable basis;
- generally not allocate any amount in respect of realised or unrealised foreign exchange income/expense items specific to accounts receivable, as these will often relate only to exports.

### Profit

In constructing a normal value, an amount for profit may be included. Where all sales are made at a loss, no profit is added. Where sales in the ordinary course of trade are not in sufficient quantities, an amount for profit may be added in constructing the normal value. However in this scenario, the profit amount will not be based upon the low volume of domestic sales that were found to be unsuitable for determination of a normal value under s. 269TAC(1) of the Act.

The profit margin to be included will vary from case to case. Profit is ascertained in each case so as to obtain the best estimate possible of a fair market price in the domestic market of the country of export.

In accordance with Regulation 181A of the Act, where profit is unable to be determined on domestic sales of the goods by the exporter the regulation sets out other methods for profit determination. These are:

- by identifying the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market or the country of export; or
- by identifying the weighted average of the actual amount realised by other exporters or producer from the sale of like goods in the domestic market of the country of export; or
- subject to Regulation 181A(4) of the Act, by using any other reasonable method and having regard to all relevant information.

Customs and Border Protection may use any of the above methods depending upon what is most reasonable and appropriate in the circumstances.

Customs and Border Protection will not use the profit reported in an income statement in constructing the normal value where the income statement includes goods that are not in the same general category, or if the income statement includes export sales.

### Establishing costs

The primary purpose of the Regulation 180 of the Act is to prescribe how to establish costs in ss 269TAA and 269TAC(2)(c) of the Act. A key aspect of Regulation 180(2)(b)(ii) of the Act is the reference to records that reasonably reflect the costs associated with the production, or manufacture, and sale of like goods. Where non-recurring costs are identified but not included in the information presented by the exporter or other seller, the Minister must adjust those costs of production to reflect that non-recurring item of cost.

Regulation 180(5) of the Act identifies a circumstance that could result in costs being affected by start up operations and requires the Minister to adjust costs of production to take account of that circumstance.

In relation to these regulations and for the purposes of ordinary course of trade:

- associates are as defined in s. 269TAA(4) of the Act;
- integrated process means a process where the exporter/producer makes the goods using a major input made by the same exporter/producer, either on-site or at another site physically connected to the site where the final product is produced;
- major cost input will normally be an input representing 10% or more of the total cost of like goods made by the exporter;
- normal market costs refers to the cost available in the market and does not mean that an input has to be above the cost to make and sell or fully absorbed costs. Normal market place costs require case by case consideration;
- reasonable costs are those that reasonably reflect the costs incurred by the producer in the country of export.

Customs and Border Protection seeks to establish that the records of the exporter have been kept in accordance with the generally accepted accounting principles of the country of the exporter, usually from statements made by the auditor in the audited accounts. Particular attention will be paid to any qualifying remarks regarding the compliance of the exporter or producer with those principles.

Customs and Border Protection will consider the question of reasonably reflected costs in relation to the production of other like goods in the country of export. A significant variation between the costs shown in the records of the exporter or producer when compared with other producers of like goods may be an indication that the records do not reasonably reflect costs incurred.

Customs and Border Protection will also have regard to generally accepted accounting principles to assist it in determining whether the records reasonably reflect costs. Because the intention is to determine actual costs, depreciation of items based on taxation laws that do not reflect the actual costs of depreciation of that item will not be accepted. The table below gives a summary of the items that should and should not include in the cost of production or manufacture of inventories.

Australian accounting standards	International accounting standards
<b>INCLUDED in cost of production</b>	
<p><b>Cost of purchase means the aggregate of:</b></p> <ul style="list-style-type: none"> <li>• <b>Purchase price</b></li> <li>• Import duties and other taxes (other than those subsequently recoverable by the entity from the taxing authorities)</li> <li>• Inwards transport &amp; handling</li> <li>• All directly attainable costs of acquisition (net of trade discounts and rebates)</li> <li>• Exchange rate differences from a foreign currency monetary item which relates to or can be attributed to an item of inventory that meets the definition of a qualifying asset</li> </ul> <p>Cost or gain or entering into a specific hedge for the purchase of goods before the date the goods are purchased.</p>	<p><b>Cost of purchase means the aggregate of:</b></p> <ul style="list-style-type: none"> <li>• <b>Purchase price</b></li> <li>• Import duties and other taxes (other than those subsequently recoverable by the entity from the taxing authorities)</li> <li>• Transport and handling costs</li> <li>• Other directly attributable costs of acquisition (net of discounts and rebates)</li> <li>• Foreign exchange differences on the acquisition of inventories caused by severe devaluation or depreciation of a currency for which there is no practical means of hedging.</li> </ul>
<p><b>Costs of conversion</b></p> <ul style="list-style-type: none"> <li>• Costs of direct labour</li> <li>• Other production or preparation costs which contribute to the bringing of the inventories into their present location and condition.</li> </ul>	<p><b>Costs of conversion</b></p> <ul style="list-style-type: none"> <li>• Costs directly related to the units of production, such as direct labour.</li> </ul>
<p><b>Other costs</b></p> <ul style="list-style-type: none"> <li>• Other production costs limited to those which contribute to bringing inventories to their present location (including distribution to the point of sale) and condition</li> <li>• General administration costs that contribute to bring inventories to their present location and condition</li> <li>• Other costs to the extent that they are incurred in bringing the inventories to their present location and condition (e.g. Designing specific products for specific customers)</li> <li>• Borrowing costs (net of revenue made upon the investment of the borrowings) when the inventory being sold meets the definition of a qualifying asset (inventory that requires more than 12 months to bring them to a saleable condition).</li> </ul>	<p><b>Other costs</b></p> <ul style="list-style-type: none"> <li>• Other costs incurred in bringing the inventory into their current location</li> <li>• Borrowing costs (net of revenue earned upon the investment of the borrowings) when inventory being sold meets the definition of a qualifying asset (inventory that requires a substantial period of time to bring into a saleable condition).</li> </ul>
<p><b>Indirect Costs</b></p> <ul style="list-style-type: none"> <li>• Systematic allocation of production overheads that relate to bringing the asset to its present condition, such as indirect labour and materials, factory rent, normal spoilage costs, factory supervisor salaries, etc.</li> </ul>	<p><b>Indirect Costs</b></p> <ul style="list-style-type: none"> <li>• Systematic allocation of fixed production overheads such as depreciation and maintenance and factory management and administration, factory rent.</li> <li>• Systematic allocation of variable production overheads such as indirect material and labour, supervisor salaries and normal spoilage costs.</li> </ul>
<b>Items specifically EXCLUDED</b>	
<ul style="list-style-type: none"> <li>• Marketing costs</li> <li>• Selling costs</li> <li>• Distribution costs from the point of sale to customers</li> <li>• Costs arising from exceptional wastage</li> <li>• Inventories that are allocated to other asset accounts (e.g. items of inventory used as components of self-constructed property, plant &amp; equipment. Inventories allocated to another asset in this way are recognised as an expense during the useful life of that asset)</li> <li>• Borrowing costs unless the inventory item is a qualifying asset</li> <li>• Exchange gains and loss from the purchase of inventories due to excessive depreciation and appreciation of the currency.</li> </ul>	<ul style="list-style-type: none"> <li>• Administrative overheads that do not contribute to bringing the inventories to their present location and condition such as marketing</li> <li>• Selling costs</li> <li>• Storage costs (unless necessary in the production process prior to completion of the good)</li> <li>• Abnormal amounts of wasted material, labour and other production costs</li> <li>• Inventories that are allocated to other asset accounts</li> <li>• Borrowing costs unless the inventory item is a qualifying asset.</li> </ul>

Customs and Border Protection will ascertain normal market prices of an input by taking into account the size of the market and the purchasing behaviour of the exporter. For example if the exporter buys “on-the-spot” then usually that will be considered the normal market. Likewise if the exporter normally purchases major inputs under long-term supply contracts, the price under those contracts is the normal market price.

Under generally accepted WTO practice, an exporter is entitled to buy inputs, provided that they are at arms length and are at the prevailing market price, even if the input itself was sold below cost or dumped. This is because a company should not be penalised for making a sensible commercial decision to buy inputs at the best possible price; or a dumping authority would not be able to verify the cost of producing an input from a company not associated with the importer as such companies would not normally cooperate with a dumping inquiry; and finally there is

recognition that dumping inquiries have to be conducted against a timetable that imposes limits on how much time can be spent on verification visits.

An exception to that approach is where a company is a subsidiary of the exporting company. In such cases it is reasonable for that company to cooperate with dumping authorities inquiries. In the following circumstances:

*Where a major input is produced by an associate of the exporter*

In order to ensure that the cost of an input from an associate is reasonable, the normal market cost of such an input is taken into account, rather than seeking costing information. However if an associate makes its records available then regard may be had to the information from that source and not the market in order to determine whether the records in relation to a major input are reasonable.

*Where a major input is produced by an integrated processor of the like goods*

Customs and Border Protection will examine the records of account of an exporter/producer to ascertain whether the costs of producing the input have been reflected in the transfer price where the exporter/producer produces the goods under consideration as part of an integrated process.

Where major inputs are supplied from either an associated company or integrated processor, Customs and Border Protection will not accept the costs of these inputs as being reasonable unless in the case of inputs from an associate, the costs of such an input reflects the normal market price of such an input; and where an input is from an integrated processor, that the transfer price of the producer is not unreasonable given the full cost of production for that input.

Prevailing market price

As noted above under generally accepted WTO practice an exporter is entitled to buy inputs, provided that they are at arms length and are at the prevailing market price, even if the input itself was sold below cost or dumped. When examining whether the input is at normal price Customs and Border Protection may enquire whether the government has had an influence on the cost of major cost inputs. Government influence may be the supply of inputs by government-owned enterprises or may take other forms.

Where it is found that a major cost input is supplied by a government-owned enterprise, or there are other forms of government influence, the normal value should be calculated as the sum of:

- a determined (substitute) amount, having regard to all relevant information, for the value of the major cost input supplied by the government-owned enterprise (irrespective of the actual cost incurred by the exporter or producer for that input);
- the remaining production costs incurred by the exporter or producer; and
- administrative, selling and general costs associated with the sale and profit, had the goods been sold for home consumption in the country of export.

It is preferred, in the first instance, to calculate a price for the major cost input in the country of export. So, where a raw material is only partially supplied by a government-owned enterprise, it may be appropriate to use the cost for the major cost input supplied by a non government-owned enterprise. Where this price is not available, prices of major cost inputs supplied by non government-owned enterprises to other exporters in that country will be considered. A substitute value for a major cost input may be ascertained using:

- the price constructed from any other relevant information including price lists, independent sources (including trade publications, trade statistics), earlier dumping investigations;
- the price of the major cost input supplied by a non government-owned enterprise in the country of export to the exporter;
- the price of the major cost input supplied by a non government-owned enterprise in the country of export to other exporters in that country;
- the price of the major cost input supplied by a non government-owned enterprise in the country of export to an appropriate third country;
- the price of like goods to the major cost input manufactured and sold for domestic consumption in a surrogate country;
- the price of like goods to the major cost input manufactured and sold for export consumption in a surrogate country;
- the constructed price of a major cost input in any of the situations listed above;
- the price for like goods to the major cost input, manufactured and sold in Australia.

In some circumstances the 'surrogate country' method may be reasonable and appropriate to determine the cost of like goods for the major cost input. Customs and Border Protection is not limited to its use, and indeed, the preference is to use domestic prices from other sellers of like goods in the country of export (from a manufacturer/producer whose prices or major cost inputs are not influenced). Before deciding to use surrogate information it is important to examine all of the other information sources available and evaluate which is the most reasonable and appropriate in the circumstances.

Where the government influence is found to extend to all supplies of that major cost input in the market and thus there is no suitable market price in the country of export regard should be had to the countervailing provisions to determine whether they are appropriate.

## **10. NORMAL VALUE BASED ON EXPORTER'S THIRD COUNTRY SALES**

### **10.1 CONTEXT**

Section 269TAC(2)(d) of the Act provides that if the Minister so directs, the normal value is the price paid or payable for like goods sold in the ordinary course of trade in arms length transactions for exportation to an appropriate third country.

### **10.2 POLICY**

Where the conditions of s. 269TAC(1) of the Act are not met, the Minister may determine a price by either a constructed value under s. 269TAC(2)(c) of the Act or may direct that s. 269TAC(2)(d) of the Act applies and use prices for like goods exported to a third country. The WTO places the cost based method and third country export sales on an equal footing and Australia's legislation is treated as being consistent in this regard. However, the preference is to use the costs based method in the first instance, as cost data is always available from a cooperating exporter because costs must be verified before domestic sales prices may be used.

### **10.3 PRACTICE**

Exporter questionnaires requests summary data on exports sales to third countries and this data forms the basis for a more detailed examination in the event that normal values by either domestic prices or a constructed price are unable to be determined. A detailed examination of third country prices is not undertaken if there is sufficient information to establish normal value under the other methods.

Where circumstances are such that normal value is to be determined using third country sales, the third countries will be examined to determine an appropriate third country for comparison with exports to Australia. In determining whether a third country is an appropriate third country, regard will be had to whether:

- the volume of trade from the country of export to the selected third country is similar to the volume of trade from the country of export to Australia;
- the nature of the trade in like goods between the country of export and the selected third country is similar to the nature of trade between the country of export and Australia (in considering "nature of trade" such things as the level of trade in a third country may be relevant).

## 11. NORMAL VALUE IN NON-MARKET ECONOMIES

### 11.1 CONTEXT

Section 269TAC(4) of the Act provides alternative methods for ascertaining normal values, where the Government of the country of export has a monopoly, or substantial monopoly, of the trade of the country; and determines or substantially influences the domestic price of goods in that country. This situation is referred to as a 'non-market economy'.

Sections 269TAC(4)(c) to (f) of the Act provide that normal value may be determined for exports from a non-market economy based on:

- the price of like goods manufactured and sold for domestic consumption in a country determined by the Minister (a surrogate country);
- the price of like goods manufactured in a surrogate country and sold to an appropriate third country;
- the constructed price of like goods manufactured and sold in the surrogate country;
- the price payable for like goods manufactured and sold in Australia.

### 11.2 POLICY

There is no hierarchy for deciding the appropriate method in determining normal values for exports from non-market economies. Customs and Border Protection decides which method is used having regard to what is appropriate and reasonable in the circumstances of the case.

### 11.3 PRACTICE

Where an applicant alleges that the country of export is a non-market economy, or has a history of treatment as a non-market economy, Customs and Border Protection, in consultation with the DFAT, decides whether it is appropriate to ascertain normal values using these provisions.

Where normal values are to be determined under s. 269TAC(4)(c) of the Act using prices, like goods must be produced or manufactured in the surrogate country and sold for home consumption in the ordinary course of trade and in arms length transactions.

Where normal values are to be determined under s. 269TAC(4)(d) of the Act using prices to third countries, like goods must be produced or manufactured in the surrogate country and sold for export to an appropriate third country in the ordinary course of trade and in arms length transactions.

When deciding if a third country is an "appropriate" third country, regard may be had to whether:

- the volume of trade from the surrogate country to the selected third country is similar to the volume of trade from the surrogate country to Australia;
- the nature of the trade in like goods between the surrogate country and the selected third country is similar to the nature of trade between the surrogate country and Australia.

Where normal values are to be determined under s. 269TAC(4)(e) of the Act using costs, the calculation constructs a sales price in the ordinary course of trade by summing:

- the cost of production or manufacture of like goods in the surrogate country;
- the administrative, selling and general costs associated with the sale of like goods in the surrogate country; and
- the profit on the sale of like goods in the surrogate country.

Sections 269(5A) and (5B) of the Act require that the amounts to be determined in a constructed normal value must be worked out in accordance with, and take account of the factors set out in Regulation 181 of the Act.

Section 269TAC(4)(f) of the Act provides that the Minister may determine normal value as a value equal to the price payable for like goods produced/manufactured in Australia and sold for home consumption in the ordinary course of trade, in sales that are arms length transactions. This method would normally be used when all other avenues have been exhausted.

Where normal values are determined under s. 269TAC(4) of the Act, Customs and Border Protection will ensure fair comparison in accordance with ss 269TAC(8) or 269TAC(9) of the Act.

### Selecting an appropriate “surrogate” country

Customs and Border Protection requests the applicant to nominate a comparable market economy country if an application alleges dumping/subsidisation of goods exported from a non-market economy country. There are no set criteria that applies when selecting a comparable surrogate country. The following non-exhaustive indicators may be considered:

#### *Administrative Expediency*

It is usual practice to assess the suitability of any other market economy countries also nominated in an investigation involving a non-market economy. Where there are no other nominated countries, or those involved are not suitable as a surrogate, Customs and Border Protection may consider obtaining normal values from a country outside the investigation.

#### *Similarity of Products*

Producers in the surrogate country must manufacture a product that is like to that manufactured in the exporting non-market economy. This means making a comparison for like goods purposes between the sets of products. Comparability of quality may be a relevant factor. Minor differences between the products will not prevent them from being considered like, but may result in adjustments for fair comparison.

#### *Manufacturing Processes*

The similarities of the manufacturing process used in the non-market economy country and the surrogate country must be considered. This includes the technical and technological standards used and the scale of production.

#### *Market Conditions*

Prices in the surrogate country should be based on market considerations. There should be sufficient domestic competition to ensure that price levels are in a reasonable proportion to production costs. Prices should not be subject to distorting influences, such as price controls or other restrictions on imports (including high tariff barriers), inter-company relationships, or monopolistic practices. Government regulation of prices should be examined to determine whether or not such regulation reflects competitive conditions. Indicators of competition in the potential surrogate country may be:

- the existence of a substantial number of producers of the like product; and/or
- significant penetration of the domestic market by imports of the like product from other sources.

Should it be found that the surrogate’s domestic market is unsuitable, regard may be had to prices for exports to a third country from the potential surrogate country.

### *Volumes*

The domestic market in the surrogate country should be reasonably representative of that in the non-market economy country. An indicator that the surrogate country's domestic sales are representative is if they constitute at least 5% of the volume of sales from the non-market economy country to Australia. Failure of the surrogate country sales to constitute at least 5% of the volume of sales from the non-market economy country to Australia does not automatically preclude those sales from consideration.

### *Access to Raw Materials*

Any significant differences in the access to raw materials by the non-market economy country and the surrogate country should be examined to assess the impact on production costs.

### *Macroeconomic Indicators*

Similarities between the non-market economy country and the surrogate country, for example, in the level of development, gross national product, population, division of labour etc. may be considered. It is important to note however, that a sector specific approach (i.e. a focus on the industry producing the like product) is consistent with the fundamental nature of an anti-dumping investigation, which compares industries within different markets that produce like goods.

## 12. NORMAL VALUE IN AN ECONOMY IN TRANSITION

### 12.1 CONTEXT

In countries that are in the process of transition from a centrally planned to a market economy, s. 269TAC(5D) of the Act provides that the Minister may determine normal value having regard to all relevant information, where at least one of the following conditions apply:

- both of the following conditions exist:
  - the exporter of the exported goods sells like goods in the country of export;
  - market conditions do not prevail in that country in respect of the domestic selling price of those like goods;
- both of the following conditions exist:
  - the exporter of the exported goods does not sell like goods in the country of export but others do;
  - market conditions do not prevail in that country in respect of the domestic selling price of those like goods;
- the exporter of the exported goods does not answer questions in a questionnaire given to the exporter by the CEO under s. 269TC(8) of the Act within the period described in that section. or s. 269TC(9) of the Act for answering questions;
- the answers given within the period mentioned in s. 269TC(8) of the Act, or the further period mentioned in s. 269TC(9) of the Act, by the exporter of the exported goods to a questionnaire given to the exporter under s. 269TC(8) of the Act do not provide a reasonable basis for determining that paragraphs (a) and (b) of this section do not apply.

### 12.2 POLICY

Governments (of any level) may still influence the domestic price of certain goods in an economy in transition, making it inappropriate to ascertain normal values as if the country were a true market economy. The legislation permits a case-by-case approach in assessing the influence a government has over domestic selling prices and the method used for ascertaining normal values.

### 12.3 PRACTICE

When an application alleges dumping of goods exported from an economy in transition, the Australian industry may assert that market conditions do not prevail. This includes the situation where major raw material inputs to the like goods are supplied by a government-owned enterprise at prices that do not substantially reflect free market conditions. The applicant must supply sufficient prima facie evidence of such allegations before initiation.

In such cases, a "Supplementary Section – Questions for Exporter/Manufacturers in Transitional Economies" is included in the Exporter's Questionnaire. The exporter is required to complete these supplementary questions within 21 days from initiation. The responses will assist in deciding if normal value can be ascertained using information in the country of export, or if alternative methods should be employed.

In assessing whether or not market conditions prevail in an economy in transition, regard will be had to the matters prescribed in Regulation 183 of the Act. These include:

- whether the entity makes decisions about prices, costs, inputs, sales and investments;
  - in response to market signals; and
  - without significant interference by a government of the country of export;

- whether the entity keeps accounting records in accordance with generally accepted accounting standards in the country of export;
- whether the generally accepted accounting standards in the country of export are in line with international accounting standards developed by the International Accounting Standards Board;
- whether the accounting records mentioned in paragraph (b) are independently audited;
- whether the entity's production costs or financial situation are significantly affected by the influence that a government of the country of export had on the domestic price of goods in the country before the country's economy was an economy in transition;
- whether the country of export has laws relating to bankruptcy and property;
- whether the entity is subject to the bankruptcy and property laws of the country of export);
- whether the entity is part of a market or sector in which the presence of an enterprise owned by a government of the country of export prevents market conditions from prevailing in that market or sector;
- whether utilities are supplied to the entity under contracts that reflect commercial terms and prices that are generally available throughout the economy of the country of export;
- if the land on which the entity's facilities are built is owned by a government of the country of export – whether the conditions of rent are comparable to those in a market economy;
- whether the entity has the right to hire and dismiss employees and to fix the salaries of employees.

In assessing whether the entity makes decisions about prices, costs, inputs, sales and investments without significant interference by a government of the country of export, regard will be had to the following:

- whether a genuinely private company or party holds the majority shareholding in the entity;
- if officials of a government of the country of export hold positions on the board of the entity – whether these officials are a minority of the members of the board;
- if officials of a government of the country of export hold significant management positions within the entity – whether these officials are a minority of the persons holding significant management positions;
- whether the entity's ability to carry on business activities in the country of export is affected by:
  - a restriction on selling in the domestic market; or
  - the potential for the right to do business being withdrawn other than under the contractual terms; or
  - if the entity is a joint-venture in which one of the parties is a foreign person, or is carried on in the form of such a joint-venture – the ability of the foreign person to export profits and repatriate capital invested;
- whether the entity's significant production inputs (including raw materials, labour, energy and technology) are supplied:
  - by enterprises that are owned or controlled by a government of the country of export; and
  - at prices that do not substantially reflect conditions found in a market economy.

## **13. NORMAL VALUE BASED ON ALL RELEVANT INFORMATION**

### **13.1 CONTEXT**

Section 269TAC(6) of the Act provides that the Minister may determine normal value having regard to all relevant information, provided he/she is satisfied that sufficient information has not been furnished or is not available to enable the normal value of goods to be ascertained under preceding sections. Under s. 269TAC(7) of the Act, the Minister may disregard information considered unreliable.

Article 6.8 of the Anti-Dumping Agreement provides that preliminary and final determinations may be made on the facts available if a party either:

- refuses access to its premises;
- does not supply the information requested;
- significantly impedes an investigation;
- does not supply information within a reasonable period of time.

### **13.2 POLICY**

An interested party may be deemed as non-cooperative for:

- not providing the information requested in the exporter questionnaire; or
- not responding to the questionnaire in sufficient time; or
- not permitting verification of the information supplied in that questionnaire.

An interested party is not considered uncooperative if:

- information is not given in the requested electronic format because it would be too expensive or inconvenient to supply the information that way; or
- it does not supply all of the information requested but, nevertheless, has substantially complied with the requirements of the questionnaire; or
- it requests an extension of time to respond to a questionnaire and the extension is approved. Due consideration will be given to a request for extension of a reasonable period, particularly where English is not the normal language of the exporting country, or there is significant complexity in the information to be supplied, or there are staff availability issues.

Annex II of the Anti-Dumping Agreement concerns the best information available for the purpose of Article 6.8 of the Anti-Dumping Agreement. It provides that if an authority has to base its findings on information from secondary sources, this can include information supplied in the application but such information must only be used with due circumspection.

Annex II of the Anti-Dumping Agreement also states that authorities should have regard to information from other independent sources at their disposal such as published price lists, official import statistics, customs returns, and information obtained from other interested parties during the investigation. Also, it states that if a party does not cooperate this could lead to a less favourable result for that party.

### **13.3 PRACTICE**

Where there are several exporters in one country and one or more cooperate, whilst others do not, Customs and Border Protection considers the most directly relevant and therefore best information would be that obtained from those cooperating. Adjustments to ascertain a normal value for the non-cooperating producer may be made (but the extent of any adjustments will necessarily be limited due to the non-cooperation).

Where there is no cooperation at all from producers in a country, regard will be had to any of the following:

- price lists, provided there is supporting information from independent sources;
- information from other independent sources (e.g. trade publications, trade statistics);
- industry publications and industry consultancy reports;
- information set out in the application if such information is considered reliable;
- information gathered from other countries subject of the same investigation;
- earlier dumping investigations.

## 14. DUE ALLOWANCE

### 14.1 CONTEXT

The Anti-Dumping Agreement requires that, when determining dumping, a fair comparison be made between export price and normal value. The Anti-Dumping Agreement states that the comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time. It requires that due allowance be made in each case, on its merits, for differences which “affect price comparability”.

Australia’s anti-dumping legislation incorporates this obligation by requiring that:

- the prices of goods exported to Australia are compared with corresponding normal values (s. 269TACB of the Act); and
- any necessary adjustments are made to domestic prices (or constructed domestic prices) so that they can be fairly compared to export prices (s. 269TAC(8) and s. 269TAC(9) of the Act).

Under s. 269TAC(8) of the Act, where the domestic and export prices:

- relate to sales occurring at different times; or
- are not in respect of identical goods; or
- are modified in different ways by taxes or the terms or circumstances of the sales to which they relate;

the price paid or payable for like goods on the domestic market is a price adjusted to allow a fair comparison.

Section 269TAC(9) of the Act provides that, where the normal value is calculated using costs, the Minister must make adjustments, in determining the costs, to ensure the normal value so calculated is properly comparable to the export price.

### 14.2 POLICY

Adjustments will be made if there is evidence that a particular difference affects price comparability.

Adjustments are made to normal value established under s 269TAC(1) and/or 269TAC(2)(c) of the Act (and in rare cases, s. 269TAC(4)(e)) of the Act) in order to make a fair comparison with export prices.

The exporter questionnaire informs about adjustment claims and seeks evidence in support of adjustments. Further adjustments are made if data obtained in the course of an investigation demonstrates a particular difference affects price comparability.

The Anti-Dumping Agreement shows a non-exhaustive list of factors that may affect price comparability:

- conditions and terms of sale (which may include a range of factors related to the sale);
- taxation;
- levels of trade;
- quantities;
- physical characteristics.

Adjustments will not be made for the following situations:

- differences in general sales and administration expenses that relate more to the general cost of doing business and are spread across all sales of the company (or expenses such as research and development as these too are spread across all sales of the firm).

Customs and Border Protection considers that general expenses of this nature do not fall within the scope of the term 'differences in conditions and terms of sale';

- where the goods sold in the domestic and the export markets are essentially identical - notwithstanding that there are differences in costs because different raw materials are used. For example, the same models or types of a good, or fungible commodities where their nature is such that one part or quantity may readily be replaced with another equal part or quantity;
- where there is a two-tier pricing arrangement – which occurs when raw materials having different prices are used in production for export and production for domestic sale – adjustments are not made for the price differences of the raw materials under such arrangements which generally provide a cost advantage in the manufacture of goods for export;
- contract dates made in certain circumstances;
- where adjustment items overlap, particularly for level of trade, quantity, and discounts.

### 14.3 PRACTICE

Section 269TAC(8) places a responsibility on Customs and Border Protection, as part of its fact finding responsibility throughout an investigation or review, to make adjustments. Customs and Border Protection seeks relevant data and makes adjustments where evidence exists that a particular difference has affected price comparability.

Exporters making adjustment claims also have a responsibility to provide the evidence in support because this information is normally in their possession. Claims should be provided in a timely manner to enable an examination of the circumstances and to verify the supporting accounting information.

If an adjustment claim is made after the verification visit to the exporter, Customs and Border Protection will assess its appropriateness having regard to the reliability of the information provided and the remaining time available to complete the report.

Adjustments may be based upon actual costs incurred, or selling prices achieved, for the sales transactions under examination. Where based on costs it is subject to the principle that adjustments will be made only where evidence indicates that price comparability has been affected<sup>1</sup>. An allocation of expenses is accepted by Customs and Border Protection where actual expenses incurred cannot be obtained.

An adjustment item may be calculated as a weighted average of the relevant expense item over the investigation period, in which case the adjustment would be a constant amount per unit. Or, a known and varying amount for the item to be adjusted may be applied to the domestic sales prices line-by-line.

These guidelines focus upon adjustments to normal value under the provisions of s269TAC(1) and s269TAC(8). However, where adjustments are made under s269TAC(2)(c) and s269TAC(9) – based on costs – the principles set out below generally apply.

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<sup>1</sup> For example there may be differences in costs of producing goods on a modern production line for export and a old production line for domestic, both making essentially identical goods, but these production decisions (and costs that arise there from) are unlikely to affect price because of the role of buyers in the establishment of price.

## **Adjustments**

### **Sales at different times**

When comparing export price and normal value it is desirable that sales to which the prices relate occur as near as possible in time. Where transactions regularly occur in both markets this adjustment does not normally arise as averaging periods are matched, for example month to month. Customs and Border Protection will, however, consider an adjustment for price movements where the sales being compared are not closely aligned and where inflation has had an effect on price comparability.

### **Establishing the date of sale**

In establishing the date of sale, Customs and Border Protection will normally use the date of invoice as it best reflects the material terms of sale. For the goods exported, the date of invoice also usually approximates the shipment date.

Some other date will also be considered if satisfied that a different date better reflects the material terms of sale. For example, order confirmation date may be used if it is demonstrated to have more precisely established the material terms of the sale.

Where an exporter claims a date other than the date of invoice better reflects the date of sale, evidence must be provided to demonstrate that the material terms of sale were, in fact, established by this other date. In examining evidence provided by the exporter in support of the claimed date of sale, regard will be had to:

- whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed date through to the date the invoice being issued. While an exporter and importer may agree on price and quantity, and make an enforceable sales agreement to this effect, this may not have been the date on which terms were finally established; and
- the transaction date recorded in the exporter's financial accounts.

### **Physical characteristics and quality**

Adjustment is allowed for differences in physical characteristics where the differences can be quantified to ensure fair comparison. Differences here include quality, chemical composition, structure, or design.

Evidence may be provided of different selling prices for products with different physical characteristics or quality. In such cases, the size of the price difference may be used as the basis for any adjustment. However, in most cases adjustments for differences in physical characteristics, or for quality, are based on production cost differences. Additionally, in order that the adjustment calculation estimates the market value of the difference, the gross margin (i.e. the administrative, selling and general costs and profit) is added to the production cost difference.

Adjustments are not made for physical characteristics where:

- there are no differences in physical characteristics and only different raw materials have been used in manufacture of the exported goods and the domestically sold goods (see the related statement under 'Policy' above);
- If similar raw materials are being purchased from two different sources of supply, one source used for production destined for export, and the other source used for production for domestic consumption, and the final product has essentially the same characteristics

any difference in production costs due to the different materials prices does not merit any adjustment;

- although there may be some differences in physical characteristics, no demonstrable effect on the selling price of the goods has been observed or is likely because, for example, the customer remained unaware of any differences and no demonstrable price effect could be observed.

### Differences in taxes

Downward adjustments are made to domestic prices if any taxes or duties on those goods (including taxes or duties on materials or components incorporated in the goods) are not included in the price of the exported goods because of remissions, refunds or exemptions.

The remission, refund or exemption of indirect taxes or import duties refers to relief from those duties and taxes imposed on all inputs that are consumed in the production of the exported goods e.g. on energy (fuel, oil etc).

The following taxes and duties are categorised as indirect taxes on the goods or materials; sales, turnover, value added, franchise, stamp, transfer, border, and excise. Direct taxes such as corporate and income are not included as they do not apply exclusively to export sales.

### Value Added Tax on exports

The value added tax (VAT) liability may be different on domestic sales compared to export sales. In addition, the way in which a company captures VAT information on sale transactions is likely to be different on domestic sales compared to export sales. This may require adjustment to the normal value.

Export sales are not subject to output VAT liability, as domestic sales are, however they may be subject to a VAT liability equivalent to the FOB value x (VAT rate – VAT refund rate). In other words, although export sales are technically not subject to output VAT liability they effectively incur a VAT liability, which may be at a lesser rate than domestic sales.

For example, if the VAT rate is 17% and the VAT refund rate 5%, domestic sales incur output VAT liability of 17%, whereas export sales incur a VAT liability of 12%.

The main issue in relation to normal value determination is that the exporter usually provides domestic sale prices that are VAT- exclusive. This is because most companies separately capture the output VAT amount on each individual sale. Conversely, most companies do not separately capture the VAT liability associated with export sales because it is not strictly output VAT.

The assumption is that the company's VAT liability is built in to the export price. Accordingly the normal value, which is based on VAT-exclusive sale prices, needs to be adjusted upwards to be comparable to the VAT-inclusive export prices.

Where adjustment to the normal value is warranted due to evidence showing that a different VAT liability exists between domestic and export sales, Customs and Border Protection will carefully consider the information presented by exporters in calculating the amount of the adjustment.

### Import duties ('duty drawback')

Adjustment may be allowed for remission or drawback of import duties on inputs consumed in the production of the exported goods (i.e. inputs physically incorporated, as well as energy, fuels, oil and catalysts used) if the claimant produces evidence.

Section 269TAC(8) of the Act refers to sales being modified in different ways by taxes. Import charges are a form of taxation and the adjustment for drawback of customs duty implements the requirement for an adjustment where price comparability is affected due to differences in taxation.

Evidence that the products sold on the domestic market incorporate input products on which duty is paid and that export products incorporate inputs eligible for exemption does not have to be exhaustive (i.e. it is not necessary that an input be traced from importation through to exportation). It is sufficient that a reasonable link exists between the duties imposed and duties refunded.

Adjustment may be allowed if only a proportion of the imported raw material is used in export production, and the claimant can quantify that proportion. Customs and Border Protection does not adjust the normal value in every situation where duty drawback has been given. The following examples demonstrate the various approaches.

#### *Example 1*

The exporter manufactures identical goods for domestic and export sales (e.g. 600 tonnes for domestic market and 400 tonnes for the export market). Raw materials are sourced from local and overseas suppliers but the entire 100 tonnes of imported raw materials are used to produce the goods for export, and 150 tonnes of domestic raw materials are used to produce domestic goods. Import duty of \$5 per tonne was paid on the imported raw materials and the exporter has been refunded \$500 in duty drawback.

The duty drawback mechanism has provided a refund of import duty paid in production of the goods for export. Consequently, neither the goods for export nor the goods for the domestic market are subject to import duties. Accordingly, there are no differences in the export and domestic prices due to the effects of the import duties and no adjustment is made for duty drawback. This policy is followed regardless of the manner in which a company records the drawback and the import duty. Recorded differences do not, of themselves, constitute grounds for an adjustment for drawback as in this situation it is known there are no differences in import duties.

#### *Example 2*

The exporter manufactures identical goods for domestic market (600 tonnes) and goods for export (400 tonnes). All raw materials are imported - 150 tonnes are used in the production of the goods for the domestic market and 100 tonnes in the goods for export. Import duty of \$5 per tonne is paid on the imported raw materials. Out of the total \$1,250 import duty paid, the exporter has been refunded \$500 in duty drawback for the goods exported.

In this case the duty drawback mechanism has provided a refund of the import duty paid to produce the export goods. Thus the goods destined for export were not subject to import duties but the domestic goods were. Accordingly, there is a difference between the export and domestic prices due to the effects of the import duties. Customs and Border Protection would allow an adjustment for duty drawback. The amount of the adjustment must relate to the import duty paid for the production of the goods for the domestic market (i.e. \$750 or \$1.25 per tonne when apportioned over the total domestic sales of 600 tonnes. In case No. 2 apportioning the \$500 drawback to the export volume (400 tonnes) yields the same result.

### *Example 3*

The exporter manufactures identical goods for the domestic (600 tonnes) and export markets (400 tonnes). Imported and locally sourced materials are used in manufacture. Imported raw materials (100 tonnes) are used in the production of all the goods for export. Imported raw materials (50 tonnes) and locally sourced raw materials (100 tonnes) are used in the manufacture of goods made for the domestic market. Import duty of \$5 per tonne is paid on the imported raw materials. Of the total \$750 import duty paid, the exporter has been refunded \$500 in duty drawback for the export sales.

In this case the duty drawback mechanism has provided a refund of the import duty paid to produce the export goods. Consequently the export goods are not subject to import duties and some of the domestic goods are subject to import duties. Accordingly, there is a difference between the export and domestic prices due to the effects of the import duties. An adjustment for duty drawback is made. The amount of the adjustment must relate to the import duty paid for the production of the domestic goods (\$250 or \$0.42 per tonne when apportioned over the total domestic sales of 600 tonnes). Note that apportioning the \$500 drawback to the export tonnage in this case would provide an incorrect result.

The duties on raw materials (\$500) for the goods exported is relevant in so far as Customs and Border Protection will verify that this amount has effectively been refunded to the exporter before agreeing to the adjustment.

### Substitution drawback

Customs and Border Protection may make due allowance arising from a substitution drawback system. Under this scheme a quantity of domestic materials may be substituted for a similar quantity of like imported material when claiming drawback on exports of finished goods. If such a scheme operates in the country of export, Customs and Border Protection may allow the drawback payable on the substituted domestic materials if the like materials were imported within the previous two years and the total amount of the drawback does not exceed the total duty paid.

### Level of trade

Article 2.4 of the Anti-Dumping Agreement requires that due allowance be made for differences which affect "price comparability" including differences in levels of trade.

The evidence must demonstrate that the sales being compared were made at different levels of trade. An adjustment for trade level will only be made when these difference in levels of trade are shown to have affected price.

An example of a difference in the level of trade is where an exporter sells on its domestic market to levels A (a distributor) and B (a retailer). The export sales to Australia are at level A. In this circumstance Customs and Border Protection examines whether it is possible to determine a normal value using only comparable domestic sales to level A. This normal value would be based upon those sales that are at the same trade level as the export sales and not the total population of sales. A normal value using comparable domestic sales would not require an adjustment to take account of level of trade.

In considering whether the sales are at different levels, two main issues are examined: the selling activities carried out at the different marketing stages, and the price differences between sales in the domestic market.

### *Selling activities*

In examining the selling activities (i.e. who is buying from whom and who they are selling to), while the titles attached to these functions (e.g. distributor or retailer) are considered, they are not regarded as conclusive. What need to be understood are the real sales functions of the customer. In making decisions about trade level Customs and Border Protection considers that the most important factor is likely to be the trade level of the customer.

### *Price differences*

Customs and Border Protection also considers the pricing structure at these marketing stages. For example, the exporter/producer may state that it sells to three levels of trade (A, B and C). There must be consistent and distinct differences in sale prices in order to establish a real difference in level of sales, again emphasising that it is price comparability that we are concerned with.

Customs and Border Protection will examine the pricing structure in order to determine whether all of the sales should remain in the normal value calculation. If there are no real differences in pricing between the nominated levels the domestic sales to all levels will be considered for normal value purposes.

Where a normal value using only comparable domestic sales cannot be established, as the exporter has no domestic sales at the same level as the export sales, Customs and Border Protection will examine the role of the parties and their place in the distribution chain (who's buying from whom or who's selling to whom). If evidence shows that the domestic sales and the export sales differ in level Customs will consider an adjustment (so as to avoid the potential for inequity in comparing a price to a retailer or end user to a price to a distributor).

In quantifying a claim for differences in level of trade, two methods that seek to quantify the amount of the adjustment are used. The first is the costs arising from different functions; and the second is the discounts that apply at certain levels of trade. Priority is given to the first method.

Trade level issues can become complex due to different selling arrangements in each market, and parties are provided the opportunity to make submissions on these issues. Customs and Border Protection expects exporter submissions about level of trade adjustment to be supported by evidence, and not be mere assertions.

### *Costs arising from different functions method*

The adjustment using this method is based upon the sum of the costs associated with each activity the exporter has performed in the domestic market but did not perform in its export market to Australia. An example is an exporter producer selling directly to retailers, or to the original equipment trade (OEM) trade. The export sales on the other hand are to distributors, who in turn sell to these types of customers. In making sales to the retail customers the producer carries out additional sales activities such as sales force expenses and salaries, additional promotion expenses, warehouse expenses, and technical assistance expenses. As the export sales to Australia are to a distributor, it is this distributor who carries these types of expenses. The price to retailer would not be directly comparable to the price to distributor because in the former situation the producer has to recover all of the additional costs in selling at that different trade level.

In this situation a downward adjustment, based upon the additional costs incurred because of the different functions performed, would need to be made to the domestic sale price of like goods used in determining normal values. The cost items must relate to the sales.

The quantification of costs arising from different functions might require estimates using allocations of expenses. In examining the activities of the exporter and the importer Customs will identify the particular activities that are trade level specific.

#### *Level discount method*

While the exporter might not have sales at the same level as sales to the importer in Australia there may be other sellers of like goods in the exporter's domestic market. If evidence exists on any discount granted to purchasers who are at the same level of trade as that of the importer (i.e. the other seller is selling to more than one level), and there is a clear pattern of pricing showing the level discount, then that discount may be used in making a level adjustment. This method may be subject to any confidentiality considerations. Alternatively, the exporter might have sales of the same general category of goods that establishes the grounds for a level discount.

Customs and Border Protection uses the level discount method where there is an absence of information pertaining to costs and expenses etc referred to in the first method. This order of priority is preferred because the first method uses the exporter's own cost and sales data for the like goods.

#### *Any other method*

Customs and Border Protection will consider other information concerning claims for level adjustments. Where a claim for level of trade adjustment is made using information from another country, Customs and Border Protection has not accepted such claims where the party has failed to demonstrate why such information is relevant to the situation of the exporter in the country of export that is the subject of the investigation, or failed to demonstrate why the exporter's own cost data, having regard to the functional differences, was unsuitable for working out the adjustment.

#### *Related parties ('collapsing')*

Increasingly, Customs and Border Protection is required to deal with export or domestic sales between related entities. For example, the producer/exporter is related to a separate entity which undertakes the domestic sales functions on behalf of the corporate group. In this situation, the related producer and selling entity may be treated as one. 'Collapsing' entities in this fashion will affect the adjustment determinations, and may result in different outcomes compared to the situation where the parties were not related.

One example are sales by the exporter/producer to an associated distributor who on-sells into the domestic market to customers who are at the same level category as the Australian customer of the exporter/producer. In this situation, the association between the producer and the distributor may have influenced the prices such that the domestic 'sales' between the related exporter and distributor are not arms length transactions. Rather, there is a 'transfer price' between the two. The 'downstream' sales of the associated distributor can be used for determining normal value where they meet the requirements of s269TAC(1) of the Act.

There is not a difference here in levels of trade per se as the sales in both markets are to the same types of customers. But, there is a difference in that the sales being compared are not

from the same entity – the domestic sales are from the associated distributor whereas in the export market the sales are from the producer/exporter itself.

In these situations Customs and Border Protection will carefully examine if the downstream sales contained additional price components which could affect the comparison. This will only be known from a consideration of the facts – the issue would be whether the associated distributor in the domestic market had incurred additional expenses arising from services it provided in those domestic sales, which had not been incurred by the exporter/producer in the export sales to Australia, and the likelihood that these differences affected price comparability. This is a matter requiring careful examination and also cooperation from the entities involved in providing the necessary accounting information.

As another example, the associated domestic distributor may be at the same trade level as the Australian customer buying directly from the exporter/producer (unlike the situation just described where it was the customers of the associated domestic distributor that were at the same level as the Australian customer). A question arises as to what adjustment, if any, should be made in this situation where the 'downstream' sales by the associated distributor are used. In considering any adjustment, Customs and Border Protection will not adjust those downstream prices by the related distributor for the amount of the related domestic distributor's gross margin. To do so gives the same results as if normal value was to be determined from the non-arms length sales between the producer and the related distributor. But, Customs and Border Protection had already determined that the related party sales were unreliable and unsuitable for normal value. Customs will, however, consider what adjustments are warranted based upon the relevant expenses incurred having regard to the principles above.

#### *Trading houses/intermediaries*

Trading houses or other intermediaries may exist in the export market. Intermediaries may also exist in a domestic market. Where sales by the exporter/producer are through an intermediary in both markets and this gives rise to different expenses incurred, the expenses in each market may be considered when making adjustments, for example in relation to level of trade.

It is rare to find a trader to be an exporter, but where this is the case an adjustment may be required to the domestic sales prices<sup>2</sup>.

#### Bad debt

Bad debt, like general administration expenses, generally relates to the general cost of business and does not, for that reason, normally represent grounds for adjustment. An exception arises where evidence demonstrates that credit risks between the two markets for a particular product were in fact different and that these differences affected price comparability.

#### Credit

An adjustment is warranted when credit terms for export sales differ from the credit terms for domestic sales.

Customs and Border Protection will generally use the credit period agreed at the time of sale and as shown on the sales invoice or the sales contract. The rationale is that it reasonable to presume that these known actual credit periods were taken into account when setting prices.

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<sup>2</sup> In this situation, and depending on the facts, the margin of the exporter/trader may have to be added to the domestic sales prices in determining normal value.

If some other credit period is claimed for adjustment purposes evidence would need to exist showing that prices were set having regard to that other period and not to the credit terms as shown on the invoice.

Where no fixed credit period has been shown on invoice or in a sales contract, Customs and Border Protection may calculate an average credit term for adjustment purposes, as follows:

- calculate an accounts receivable turnover ratio. This is a measure of how many times the average receivables balance is converted into cash during the year and is calculated by dividing total credit sales by the average accounts receivable. Net sales may be used as the numerator where total credit sales are not available. The average accounts receivable turnover ratio can be calculated as follows:
  - accounts receivable opening balance for the period + accounts receivable closing balance for the period, divided by 2; or
  - total monthly receivables balances divided by 12
- calculate the average credit period by dividing 365 by the accounts receivable turnover ratio as calculated immediately above.

Where the terms of the domestic sales are cash and the terms of the export sales are credit (e.g. 60 days), the domestic selling price is adjusted after having regard to the interest rate associated with export sales. The domestic rates are not used to adjust in this circumstance as to do so would include any peculiarities existing within that domestic market (e.g. inflation) that would be absent from the credit terms applicable to the export sale.

Where the terms for both domestic and export sales are credit (e.g. 60 days on domestic sales and 180 days on export sales), an adjustment is made having regard to the interest rates and terms applying in each markets as shown in the following example:

The credit inclusive domestic sales price is discounted to the equivalent of cash terms using the following calculation:

$\text{domestic price} / (1 + (\text{domestic interest rate} * (\text{domestic payment terms} / 365)))$

The domestic cash terms price is then adjusted to the same credit terms as the export sale [i.e.  $\text{domestic price cash terms} * (\text{export payment terms} / 365 * \text{export interest rate})$ ]. The amount so ascertained is added to the cash price as calculated above.

An adjustment is made for credit even if funds are not borrowed to finance the accounts receivable.

The interest rate applied to domestic sales (in order of preference) is:

- the rate, or average of rates, applying on actual short term borrowings by the company;
- the prime interest rate prevailing for commercial loans in the country for credit terms that most closely approximate the credit terms on which the sales were made;
- such other rate considered appropriate in the circumstances.

The interest rate applied to export sales is:

- where the exporter discounts a receivable, the bank discount rate;
- where the exporter waits for the receivable to mature and borrows to finance the export sale, the rate, or average of rates, applying on actual borrowings;
- the prime interest rate prevailing for commercial loans for that currency e.g. LIBOR + risk premium;
- such other rate considered appropriate in the circumstances.

### *Order of making credit terms adjustments*

The domestic credit terms adjustment is made to the domestic sales price and this has the effect of discounting normal value to 'cash equivalent' terms. The export credit terms adjustment is made to this normal value (cash equivalent terms) after all of the other normal value adjustment items have been taken into account made to the 'cash' terms normal value. This order, in making the export credit terms adjustment last, reflects the fact that credit terms are based on a price – as such, the 'normal value' (in cash equivalent terms) after all other adjustments, is at that point the most comparable price to the export sale on which the export credit terms had been extended.

### Quantity discounts, other discounts and rebates

Adjustment for a quantity discount is allowed where it is established that the quantity sold has an effect on price comparability. Evidence must be available substantiating that a price differential arises from a difference in quantities. The methods that may be used are:

#### *Sales with a quantity discount*

Where the export sales volume is greater than the quantities sold on the exporter's domestic market an exporter may consider an adjustment is required to permit a fair comparison between the domestic and the export prices. Normal value may be determined after having regard to:

- any quantity discount given to domestic sales of like goods with similar volumes as the export sales volume to Australia;
- any quantity discount given to the same general category of goods; or any other method that is supported by evidence.

Concerning any quantity discount given to domestic sales having similar volumes as the export sales to Australia, the adjustment may be achieved by: (a) applying the discount to that part of the total population of domestic sales not receiving the discount. This would mean that a weighted average normal value would reflect that discount across all sales; or (b) using only those domestic sales that did receive the discount when working out normal value i.e. normal value is based on a 'selective' number of sales like the situation discussed above in the second paragraph of "Level of Trade".

As part of deciding the relevant discount Customs and Border Protection will examine whether the discount is generally available for domestic sales having the same or similar volume as the export sales to Australia.

Customs and Border Protection will also compare the domestic sales that did receive the discount (for the same or similar volume as the export sales to Australia) to total domestic sales. If the discount is found to have been available for only a small proportion of domestic sales, a lesser adjustment made be allowed. (As a guide, Customs and Border Protection will examine whether the discount, for sales of a similar volume as export sales, is granted on 20% or more of the total domestic sales domestic sales of like goods).

The quantity adjustment may be equal to the discount generally granted on sales of substantially the same quantities as the quantities sold to Australia.

Conversely, if the export sales volume is less than the quantities sold on the exporter's domestic market, normal value may be based on the lesser (or no) discount granted on the domestic sales relating to that volume.

Evidence of the existence of a discount for quantity may be a price list, or an agreement showing the quantity discount scheme, and confirmation that sales occurred in accordance with that price list or agreement.

The exporter might have sales of the same general category of goods that establishes the grounds for a quantity discount along the same lines for like goods above.

*Any other method:*

A claim for a quantity adjustment using any other method must be substantiated by evidence of the effect on price<sup>3</sup>.

A claim by an exporter for a quantity adjustment must be supported by evidence. A claim presuming a price/volume relationship, lacking supporting information, is not accepted. Likewise, Customs and Border Protection itself will make a quantity adjustment only where it finds relevant data in support of an adjustment.

Where the Minister is satisfied that the low volume of sales is sufficient to permit a proper comparison (in terms of s268TAC(14) of the Act), a normal value so determined will only incorporate an adjustment for quantity where the evidence supports the adjustment.

Customs and Border Protection will consider an adjustment for both differences in quantities and differences in level of trade – an adjustment for a difference in quantities will only be made in these circumstances where the evidence demonstrates that there is a separate effect on price comparability due to quantity and level of trade. These two adjustment items are normally not able to be separately established.

### Other discounts and rebates

Differences in rebates and discounts are not required to be adjusted if already taken into account in determining net prices. Deferred discounts and rebates may be taken into account if paid in accordance with an agreement, or established trading practice, over a prior period.

Where exporters pay rebates to customers that have achieved designated target volumes in a given period prices may be adjusted in respect of those rebates paid. It may also adjust the selling prices where the amount of the rebate has not yet been paid, provided that sufficient evidence is available to demonstrate that the customer(s) have reached or exceeded the target volume for the period in question. Selling prices will not normally be adjusted if the exporter can only demonstrate that customer(s) have reached or exceeded the target volume on a pro-rata basis. This is because there is still some uncertainty as to whether the volume target and eligibility for rebate will be achieved. In considering such adjustments regard will be had to any agreement, established trading practice, the period the practice has been in place, and whether the amount can be quantified.

Where the amount of rebates or discounts is common to both domestic and export sales no adjustment is required.

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<sup>3</sup> 'Any other method' will reflect the circumstances of a case. For example, a claim based on the *cost differences* arising from different volumes of sales in the two markets being compared would have to establish a link between any additional costs incurred, or any costs saved, and price (if domestic sales were to have occurred in the same volume as the export sales).

## Delivery costs and ancillary charges

### *Domestic sales*

Selling price is adjusted down by the cost of delivery if domestic like goods are sold at a delivered price. Delivery costs include freight and other charges directly associated with movement of the goods to the purchaser.

Where like goods are sold on a common delivered basis (i.e. all delivered at the same price) the adjustment is an average of the costs incurred. If like goods are sold on an individually delivered basis the adjustment is the cost of that delivery. An average cost may be used if identifying the individual costs is not possible in the time available.

### *Export sales*

Selling prices of like goods may be adjusted upwards to account for costs of delivery to the point of export and ancillary costs. Ancillary costs include terminal handling; wharfage and other port charges; container taxes; document fees and customs brokers fees; clearance fees; bank charges, letter of credit fees etc; and other charges.

## Packing

Adjustment for differences in packing costs is allowed. The price of like goods shall be adjusted downwards by the domestic packing costs and upwards by the export packing costs.

Adjustments relate to the cost of packing materials (including pallets), and packing labour, and other costs. Indirect costs of packaging, such as overheads, are made where appropriate. If the costs adjustment to ascertain packing costs is allocated, the claimant must demonstrate that the allocation is reasonable.

## Commissions

For commissions paid in both markets included in the prices being compared, an adjustment to the domestic sales price for the difference in those commissions is allowed. The domestic sales commission is subtracted and the export sales commission added.

Where a commission is paid in only one of the markets under examination, an allowance is made for relevant selling expenses incurred in the market where the commission had not been paid. Relevant selling expenses include sales-staff salaries, associated overheads such as office, support staff, transport and communications incurred. For example, if a commission paid in the export market is included in the export price, the relevant domestic selling expenses from the domestic selling price are subtracted and the export sales commission is added.

## After sales costs

Adjustment is made for differences in after sale costs, including warranties, guarantees, technical assistance and services. A sales contract or other legal obligation normally contains these conditions. If the evidence relates to total warranty, guarantee or technical service costs, an allocation may be made to the goods.

Adjustment claims will not be allowed for technical services where the definition has been extended to include new product development.

## Warehousing

Adjustment for warehousing is allowed where the costs associated with the warehousing function is evidenced and the connection to the respective sales established. Mere assertion of

a difference is insufficient. The price may be adjusted upwards if export sales are made from stock but production is made to order on the domestic market.

### Royalty

Royalty expenses are incurred when selling goods produced under license. An adjustment is made for differences in royalty payments after considering the expenses incurred, the terms of the agreement and whether the expenses vary between the domestic and export markets.

### Advertising and sales promotion

As in the case of administration and bad debts, advertising expenses often relate more to the general cost of business and generally are not grounds for adjustment. However, where the connection to the sale is established and evidence is suitable, adjustment may be allowed in certain circumstances such as where:

- the exporter pays advertising costs on behalf of its customer;
- the exporter reimburses the importer for advertising costs;
- advertising and sales promotion expenses are exclusive to the goods in question.

### Two tier pricing; rebates received on materials used in export production; credits on export sales

“Two-tier” pricing occurs when a supplier in the country of export sells raw materials to a manufacturer who produces for both the domestic and export markets. The raw material destined for domestic production of the goods is sold at a higher price than that destined for the export production. This situation can arise, for example, when the domestic market is protected by tariffs thus enabling higher prices to be attained for the finished good. Those prices would not be competitive on the export market.

Adjustment is not made for differences in the two-tier pricing of the raw materials. There is a similar situation where rebates are received on materials used in export production, or when credits are received on the export sales.

The domestic price may be adjusted downward to ensure proper comparison with the export price where for example there are local taxes that are part of that price and are not levied on the export sale. Where there are advantages, such as direct or indirect subsidies, which the exporter may have but are not present in the domestic sales prices, there is no requirement for the domestic sale price to be adjusted downwards.

### Inventory carrying costs

Inventory carrying costs are the costs incurred when a business holds inventories of goods for sale. They often include the opportunity cost of the investment involved in inventory, and costs incurred in storage, warehousing activities and insurance. Exporters may claim that such costs differ in respect of sales made in the exporter’s domestic market and export sales. Such costs usually relate more to the general costs of doing business and might not directly relate to the sales under consideration.

However, should the exporter be able to demonstrate the costs associated with holding goods for sale are different in so far as they relate to relevant domestic sales and relevant export sales, an adjustment may be considered, if satisfied that the differences are reflected in price.

In calculating the opportunity cost of carrying inventory the approach is often one of determining the average inventory turnover period, the appropriate short-term interest rate and the average unit cost of inventory.

Customs and Border Protection will seek to verify these elements in order to support any claim for adjustment in respect of the opportunity cost of carrying inventory. In assessing whether an adjustment is warranted, regard will be had to information in respect of both domestic and export sales.

To derive a unit amount representing the opportunity cost of carrying inventory, the turnover period is divided by 365 and multiplied by the interest rate. The result is then multiplied by the unit cost. The unit cost is generally used as the basis for the calculation rather than the market value. This is because inventory is normally valued at the lower of cost or market value. The unit cost used is generally a full absorption cost, i.e. including variable and fixed manufacturing costs.

When considering whether to adjust for an inventory carrying cost, Customs and Border Protection will also examine the circumstances in relation to level of trade and warehousing adjustments to ensure there is no double counting.

### Other

Customs and Border Protection will consider an adjustment claim for any other differences shown to affect price comparability between domestic sales and export sales to Australia.

## 15. IDENTIFYING A SUBSIDY – WHETHER A FINANCIAL CONTRIBUTION EXISTS

### 15.1 CONTEXT

Article 1 of the SCM Agreement provides that a subsidy exists where two distinct elements are present: there must be a financial contribution by a government, or income or price support; and this must confer a benefit.

A financial contribution is a transaction through which something of economic value is transferred by the government – this may include for example money, goods, and services. The government's actions are the focus when examining whether there has been a financial contribution.

In establishing whether a financial contribution by a government exists, an important question is how broad is the concept of 'government'? It includes not only the 'government' per se, but also:

- any 'public body' within the country of export or origin of the goods; and
- any 'private body' entrusted or directed by the government to carry out a financial contribution as defined (.In defining a subsidy, section 269T of the Act seeks to incorporate the above provision.

### 15.2 POLICY

The definition of a subsidy in the Act refers to a 'government' and to a 'public body'. It also refers to a 'private body' which the government or a public body entrust or directs to carry out a governmental function. The term 'government' is taken to include government at all different levels – national, state or provincial governments.

### 15.3 PRACTICE

In examining whether there is a public body or there has been direction/entrustment provided to a private body the burden of proof is placed on Customs and Border Protection. It will seek to determine if positive evidence exists based on the totality of the evidence. For example, whether creditors acted on commercially reasonable basis or not in the financial transactions in question can be a relevant consideration. However, it may not be conclusive, as there could still be entrustment or direction by the government even where the financial contribution is made on commercially reasonable terms. It is only when taking into account the totality of the evidence may an informed decision be made about the issue.

The failure of a party to cooperate by providing the information required will be weighed up and examination may proceed on the basis of all relevant information available.

#### Public Body

As the term 'public body' is not defined in the Customs Act, Customs and Border Protection has regard to the dictionary definition which refers to an institution or organisation acting on behalf of the community. The determination of whether an entity or company is a 'public body' will be made by following a careful examination of:

- the body's ownership and management structures, and
- the objectives and functions performed by the body – whether the entity in question is pursuing public policy objectives.

### *Ownership / Management*

In some cases deciding on ownership and management will be relatively straightforward - for example if the body is wholly owned by a government, or if the government has a majority ownership, and appoints the management. The greater the ownership by government, the more likely a finding of a 'public body'.

Where the government is not a majority shareholder the evidentiary requirements placed on Customs and Border Protection to determine that it is a public body are significantly increased. In this situation, a decision whether a body is a public body can only be made after carefully examining all relevant facts concerning the management structure and the way in which it was appointed. A finding of a 'public body' may be seen through the government's ability to make appointments; the right of government to review results, determine the body's objectives, and its involvement in investment or business decisions.

### *Objectives / Functions*

Additional to ownership, Customs and Border Protection will consider whether the public body is authorised to act on behalf of the government (and not in the manner of a private entity that acts in the interests of its owners). Customs and Border Protection will examine whether the body in question carries out public policy objectives, taking into account national or regional economic interests and the promotion of social objectives. Private body

Where an entity is neither a government nor a public body Customs and Border Protection would treat it as a private body. In this case, government direction to provide a financial contribution must be established.

The level of government ownership may still be important in deciding whether the government has directed the private body.

Regarding the issue of government entrusting and directing a private body, our procedures will take into account WTO case law concerning the terms 'entrusts' and 'directs'. The Appellate Body (AB) found that interpreting 'entrusts' as being limited to acts of 'delegation'; and 'directs' as being limited to acts of 'command'; were too narrow. 'Delegation' was said to be too narrow because informal and other means by which governments may give responsibility to a private body to carry out functions. Likewise, 'directs' should not be limited to acts of 'command' because governments have other means at their disposal to exercise authority over a private body and some of these can be more subtle than 'command' or may not involve the same degree of compulsion.

The AB observed that paragraphs (i) (ii) and (iii) of Article 1.1(a)(1) identify the types of actions that when taken by private bodies that have been 'entrusted' or 'directed' by government fall within the scope of paragraph (iv), and any entrustment or direction to carry out a function outside the scope of paragraphs (i) through to (iii) falls outside the scope of financial contribution.

The AB stated that a finding of 'entrustment' or 'direction':

- requires that the government give responsibility to a private body – or exercise its authority over a private body – in order to effectuate a financial contribution. Thus not all government acts can be taken as amounting to entrustment or direction and mere policy pronouncements of themselves are not sufficient;
- entrustment or direction – through the giving of responsibility or exercise of authority over a private body – imply a more active role than mere acts of encouragement. The AB agrees with an earlier panel that entrustment and direction do not cover 'the

situation in which the government intervenes in the market in some way, which may or may not have a particular result, simply based on the given factual circumstances and the exercise of free choice by the actors in that market. Therefore the AB held that entrustment or direction ‘..cannot be inadvertent or a mere by-product of government regulation’;

- the AB summed up its findings: “.. ‘entrustment’ occurs where a government gives responsibility to a private body, and direction refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contribution listed in paragraphs (i) through (iii)’. In most cases it would involve ‘..some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case’.

In accordance with the above, Customs and Border Protection will determine entrustment as occurring when a government gives responsibility to a private body; and direction as referring to those situations where a government exercises its authority over a private body. The common element is that the government will have to be found as using a private body as proxy to give effect to types of financial contributions, and this also may involve some form of threat or inducement, which could serve as evidence of entrustment or direction.

Customs and Border Protection will not interpret the term "private body" as being limited to a single entity only – it may include a group of entities or persons.

#### Direct transfer of funds

The direct transfer of funds includes grants (such as investment allowances and equity infusion); and loans (such as preferential export credits, and tax deferrals) will be treated as a financial contribution. Also included are potential direct transfers of funds or liabilities such as loan guarantees.

If a budgetary amount has been set aside, for example in a budgetary allocation, or where a letter of commitment or some other assurance has been given, but no actual payment made, Customs will consider the totality of the evidence in deciding whether there has been a direct transfer of funds. While no payments may usually suggest that there has been no direct transfer of funds, the various possible funding arrangements would have to be examined.

#### Foregoing or non collection of revenue

Foregoing or not collecting revenue that is otherwise due such as granting tax credits or deductions from taxable income, or exemption from corporate income tax will be treated as a financial contribution. As governments could in theory tax all revenues this financial contribution arises where, using a benchmark, revenue actually raised and revenue that would ‘otherwise’ have been due can be compared.

Revenues due under the contested measure can be compared to revenues in some other situation. The benchmark will be the taxation rules of the country in question. In using such a benchmark Customs and Border Protection will ensure a comparison between taxpayers in comparable situations is being made. For example, if the measure at issue concerns income earned in sales transactions, it may not be the treatment of employment income; or if the measure at issue concerns tax rules of foreign sourced income in the hands of a domestic corporation, this may not be comparable with the tax treatment of income in the hands of a foreign corporation.

It usually refers to incentives such as tax credits, remissions of social security quotas. Also included are refunds of customs duties paid on imports of raw materials when it exports finished products incorporating those materials and the remission is in excess of those duties actually levied on the inputs.

Providing goods or services, or purchasing goods

Customs and Border Protection will examine whether a financial contribution may arise when a government provides goods or services or purchases goods. An example would be the supply by a government of energy at preferential prices to specific sectors. A private body may be entrusted with these functions. In doing so Customs will examine the evidence as to whether the contested measure relates to general infrastructure<sup>4</sup>.

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<sup>4</sup> Provision of public roads and transportation systems, fire protection and public health programs, fiscal policy measures or broad economic policies are general governmental policy measures that are regarded as not being a 'financial contribution'.

## 16. IDENTIFYING A SUBSIDY - WHETHER A BENEFIT IS CONFERRED

### 16.1 CONTEXT

Article 1 of the SCM Agreement provides that a subsidy exists where a financial contribution by a government or any public body confers a 'benefit'. This provision is reflected in s.269T of the Act. WTO case law has required that 'benefit' be determined in relation to the recipient of that benefit.

In examining benefit, the question Customs and Border Protection will be seeking to answer is whether the financial contribution has allowed the recipient to be better off than it otherwise would have been, absent that contribution, and it had to turn to the market to provide the financial contribution. The market provides an appropriate basis for comparison because the trade-distorting potential of a "financial contribution" can be identified by determining whether the recipient has received a "financial contribution" on terms more favourable than those available to the recipient in the market.

Such examination will demonstrate whether the recipient has received something of economic value from a government whether in terms of money, goods or services<sup>5</sup>. (Including the situation where a producer would have to pay more for the 'inputs' if there had been no financial contribution from a government to an upstream raw materials supplier). Article 14 of the SCM Agreement requires that the method used to calculate the "benefit to the recipient" be provided for in national legislation / regulations and that the methods be consistent with guidelines set out in that Article. This part of the manual meets that requirement.

### 16.2 POLICY

Where Customs and Border Protection finds that a financial contribution (or income or price support) by a government has been made, and a benefit conferred to the recipient i.e. the producer of the goods that are exported to Australia, the subsidy will be quantified at the point it is received by the producer of the final processed product exported to Australia, the subject of investigation.

In calculating the benefit to the recipient, regard will be had to all of the case circumstances, and Customs and Border Protection will ensure that the benefit calculations are fully outlined in its reports.

### 16.3 PRACTICE

#### **Methods to calculate the benefits to the recipient**

##### Objective of the calculation

The purpose is to determine the amount of subsidy per unit for each subsidy received by the exporter. The unit selected will vary according to the case circumstances. It may be the number of items in the case of consumer goods or per tonne, for example, in the case of goods like bulk chemicals.

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<sup>5</sup> Use of the present tense regarding the 'financial contribution' and the 'benefit' in the WTO provisions is taken to mean both must exist during the period of the investigation or review.

The calculation will be made during an investigation period which will usually be the most recent financial year of the beneficiary companies in the country concerned in order to allow verification to audited accounts.

In the case of a joint dumping and subsidy application Customs and Border Protection will set a common investigation period for both investigations. The investigation period will be worked out having regard to the requirements of the subsidy investigation and the desirability of avoiding a part period which overlaps another financial period (which may have been possible were there a dumping investigation only).

The simplest form is a subsidy granted per unit. Here the calculation would generally be a weighted average of the per unit amounts over the investigation period.

But most subsidies are not paid in such simple per unit terms and attribution, and allocations, are required in order to determine an amount per unit.

The amount of the subsidy will be calculated by:

- Attributing the amount of subsidy to the investigation period (and in that process take account of the time value of money);
- Calculating the amount of subsidy per unit sold during the investigation period;
- Converting the per unit subsidy into an ad valorem rate by expressing the per unit subsidy amount as a percentage of the average fob per unit export price;

#### Attribution of a subsidy to the investigation period

Payment of a subsidy can occur at a point in time. However, it will not always be appropriate to attribute every subsidy to a single year. It is recognised that some subsidies have the capacity to have an impact beyond the year in which the one-off payment may have been made.

The manner in which a subsidy will be attributed to the investigation period will vary according to the type of subsidy. For subsidies that continue to confer a benefit over a number of years the amount will be amortized in order to calculate the portion of the subsidy to be attributed to the investigation period.

Customs and Border Protection will investigate such subsidies over a prior period in order to determine the portion of such subsidy to be attributed to the investigation period.

On the other hand, some other types of subsidies may be attributed to the investigation period by expensing them within that period. For subsidies that cannot be linked to the acquisition of fixed assets the amount of the benefit received during the investigation period will be normally be attributed to that period.

The section 'Attribution – Expensed or Amortized' below provides more information. In this context the commonly used terms are: 'recurring' subsidies - those which do not have to be attributed over time but may be attributed entirely to a single year (i.e. expensed to that single year); 'non-recurring' subsidies - those which do have to be attributed (amortized) over time.

When a subsidy is being allocated over time the period is an approximation of the duration of the subsidy benefit. The methodology is intended to provide a reasonable and predictable approach to the estimation of the benefit.

#### Allocation to the goods

The amount of the subsidy, once attributed to the investigation period, may have to be allocated to the goods under consideration. For example, an enterprise may have multiple products and the total subsidy benefits within the investigation period, in relation to the enterprise's whole operations, must be allocated in order to estimate the amount of the subsidy on the goods.

Allocation to the goods may be made according to the most appropriate factor and depending on case circumstances:

- as a proportion of total production costs, or
- as a proportion of production or sales quantity.

#### Attribution – Expensed or Allocated

Not all subsidies should be allocated over time – some subsidies are more suited to being expensed. The decision whether to allocate over time or expense a subsidy depends for example on its type and purpose. A fundamental consideration in making these decisions is whether the subsidy is ‘recurring’ or ‘non-recurring’ as discussed above.

Recurring subsidies are those that are usually related to a firm’s ongoing production and sales activities and are usually on going in nature. An example is income tax exemptions which affect the yearly after tax profits. The type of subsidies used for operational expenses are usually expensed i.e. attributed entirely to a single year. Subsidies that are expensed in this manner, or those subsidies that are expensed under the 1% exception procedure described below, no subsidies provided before the investigation period should be taken into account.

On the other hand, non recurring subsidies are by their nature generally exceptional or infrequent, and linked to the longer term financial structure of the firm (i.e. its debt and equity) or its assets (e.g. plant and equipment). Because these types of subsidies have a continuing benefit to the enterprise beyond the year of receipt, they should be allocated (i.e. amortized) over a longer period and through this method a portion will be attributed to the investigation period. Subsidies used for acquisition of capital assets, for example, will be amortized over the expected useful life of the assets. Included in this are some subsidies which, although given on a recurring basis, are linked to fixed assets - the benefits accruing from previous years within the depreciation period are taken into account when working out the appropriate amount to attribute to the investigation period. An example is import duty exemptions on imported machinery.

Subsidies for other uses, or if the use of a subsidy is unknown, are generally amortized over the weighted average useful life of assets employed in the industry.

In summary, issues to be considered in deciding whether a benefit should be treated as recurring or non- recurring are whether:

- the subsidy is part of an ongoing scheme or was it exceptional in nature (i.e. the recipient held no expectation of receiving additional ongoing subsidies under the same scheme);
- receipt of the benefit is not automatic, for example each payment requiring express authorisation; and
- if it was linked to long term debt structure or capital assets of the enterprise.

Affirmative answers to one or more of the following suggest that a subsidy has to be amortized:

- whether the purpose of the subsidy was for the purchase of fixed assets
- whether non-recurring and/or large
- whether orientated toward future production
- whether consisting of equity
- whether carried forward in recipient’s accounting records.

In an investigation submission will be invited from interested parties in order to assist its determinations whether a particular subsidy should be expensed or amortized.

### Amortization period

Where the subsidies can be linked to the acquisition of fixed assets/long term debt structure of the enterprise the total value of the subsidy will be spread over a period which reflects the normal depreciation of the assets in the industry concerned. Therefore, a one-off grant used in this manner, for example, can be spread over the normal period used for the depreciation of assets. Such approach means that one-off subsidies paid in the past can remain countervailable provided that the benefit carried into the investigation period.

Allocating a subsidy in this fashion is treating the allocation as being the equivalent of a series of annual grants.

### *Normal period for depreciation of assets*

At the outset of the investigation, exporters and the government are invited to provide information about the normal average useful life of assets (AUL) for the industry under investigation. It is preferred to use exporter/producer data concerning AULs<sup>6</sup>, but absent that will consider any other reliable information. For example, the government may be able to demonstrate that it has procedures in place which recognise the AUL of industries and which have been based upon reliable industry surveys. It will not be assumed that depreciation periods used for taxation purposes equate with the actual AUL of the industry.

Where the use of a subsidy is unknown for any reason, or is not linked to the acquisition of capital assets, estimates may have to be made of the AUL. In this instance, the weighted average of useful life of assets employed for other companies will be used, or if such information does not exist it may use the AUL based upon the Australian industry.

### *Exception*

In the case of long term loans at preferential rates, the AUL of assets will not be used. Instead, the actual term of the loan will be used to attribute the benefits over time.

### Addition of interest

Interest will be added whether the subsidy has been expensed or amortized. When expensed in the investigation period, the expensed amount will generally be increased by the annual commercial interest rate (to reflect the full estimate of benefit on the assumption that the beneficiary company would have had to borrow the money at the beginning of the period and repay at the end)<sup>7</sup>.

Addition of interest can become a significant addition to the benefit calculation if the rates are high. The rationale behind the addition of interest is that benefit to the recipient includes not only the amount conferred but also the interest related benefit of not having to borrow an equivalent amount of money. Adding interest in this manner means a distinction is being made

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<sup>6</sup> If generally recognised AUL's do not exist a company specific AUL may be estimated. One method of doing so is to cumulate the annual average book value of the depreciable fixed assets over an appropriate period divided by the sum of annual depreciation charges for that same period. (Excluded would be any fixed assets that are not depreciable and assets that have been already fully depreciated that are no longer in service. Assets fully depreciated and still in service may still be included). This method normally involves the collection of a longer period of historical data in order to make the calculation a reasonable one – generally this will require 10 years of historical data.

<sup>7</sup> Expressed as a face value all subsidies may conceptually be seen as being the equivalent of a grant. Non repayable grants are not available commercially, and in the absence of such a 'grant' the recipient would have to raise an equivalent sum from commercial sources and repay it with interest over a period of time. On this basis the amount of the benefit determined can be treated as having to include an amount for interest.

between the face value of a subsidy at the time it is transferred to the recipient or foregone by the government and the amount found to exist in the investigation period.

The determination of benefit may be made on a company-specific basis where the facts reveal the existence of different categories of producers who received different amounts of subsidization. Or it may make determinations at a more general level that is not company specific, again depending on the facts.

#### The appropriate denominator for allocation of a subsidy amount per unit

Once the subsidy amount attributed to the investigation period, and then allocated to the goods themselves, the resulting amount is used to determine the per unit subsidy, using the appropriate denominator.

For export subsidies, the appropriate denominator to be used when allocating to an amount per unit is the export volume during the investigation period. This is because the subsidy benefits only the export sales.

For non-export subsidies, for example a production subsidy, the total sales (domestic plus export) in the investigation period should normally be used as the denominator since such subsidies benefit both domestic and export sales.

If the benefit of a subsidy is limited to a particular product the denominator should reflect only sales of that product. If this is not the case, the denominator should be the recipient's total sales.

Production quantities may be relevant if the subsidy is linked to production.

#### Ad valorem

Having calculated the per unit subsidy as above, the ad valorem rate of that subsidy is then calculated, meaning it is expressed as a percentage of the export price. Generally, this calculation will be made in the manner illustrated by the following example:

- a subsidy of \$20m is given to purchase capital equipment and this has been attributed to the investigation period to an amount of \$2m;
- this amount is allocated to the goods under consideration based upon the ratio production costs of the goods bear to total production costs and equals, for example, \$0.5m;
- the total sales of the exporter in the investigation period was 10m units therefore subsidy per unit is \$0.05/unit;
- the FOB unit price for exports to Australia (a an average over the investigation period) is worked out to be \$0.30/unit;
- The ad valorem equivalent of the subsidy is 16.6%

The ad valorem equivalent of the subsidy is required under the terms of section 269TDA(16) of the Act in order to make determinations whether the subsidy is negligible.

#### Related Parties

If a subsidiary company is under investigation and certain subsidies have also been received by related parties for example the holding or parent company, some of that subsidy may be allocated to the subsidiary company where it relates to the goods. The chapter of the manual dealing with 'pass-through of a subsidy contains more information.

#### *Subsidies that are generally expensed*

Short term loans (operational); grants for operational expenses; tax credits, refunds, and exemptions; tax deferrals; excess relief of indirect taxes and import duties; provision by government of goods or services used for operations (and discounts on electricity, water and

other utilities); purchase of goods by government; price support; freight subsidies; export promotion assistance; wage subsidies; and upstream subsidies.

*Subsidies that are generally amortized*

Long term loans (non operational); loan guarantees (non operational); equity infusions and debt to equity swaps; grants for capital assets (non operational); provision of goods (capital assets) and infrastructure (non general); debt forgiveness; plant closure assistance.

These examples are illustrative only.

Attributing amortized benefits to each year including the investigation period

Where benefits have to be amortized over the AUL of assets, the formula to be used will be:

$$A_k = \frac{y/n + [y - (y/n)(k-1)]d}{1 + d}$$

Where:

- A<sub>k</sub> = the amount of the benefit allocated to year k,
- y = the face value of the subsidy,
- n = the AUL of assets in the industry being investigated,
- d = the discount rate, and
- k = the year of allocation where the year of receipt = 1 and 1 ≤ k ≤ n.

The formula calculates the annual benefit amount for each year using the variables: face value of the subsidy; AUL; and interest rate<sup>8</sup>. The numerator is can be seen to be like principal (subsidy) plus an interest component. The denominator brings the benefit back to day 1 dollars.

Year 1: in year 1 the numerator becomes y/n + (y)(d) (as k-1=0), and y/n is the ‘principal’ added to y(d) which is the ‘interest’ on that years allocated subsidy. On day one of the first year the subsidy part of the benefit is y/n and on day 364 of the first year the benefit is y /n + (y)(d). The denominator brings the benefit back to day 1 dollars. i.e., discounts the benefit at the end of the year 1 to day 1 of that year.

Year 2: in year 2 k equals 2 and (k-1) equals 1, and the numerator becomes y/n + [y – (y/n)]d; the numerator still consists of the interest component where y/n is the face value of the benefit allocated in year 2 added to the interest on the outstanding ‘principal’ in year 2. Because some of the subsidy (principal) has been attributed to year 1, there can be no interest component on that portion l year 2. Therefore the formula subtracts y/n from the face value of the grant before deriving the interest in year 2. On day 1 of year 2 the benefit is still y/n and at the end of year 2 the total benefit is y/n + [y – (y/n)]. As in year one the denominator brings the total benefit back to year 2, day 1 dollars. i.e., discounts the benefit at the end of the year 2 to day 1 of that year.

In following years while y/n stays the same, the interest component declines. The result is that benefit line slopes down over time because of the fact that the interest component decreases each year.

The interest, or discount, rate is based upon information relating to the year in which the subsidy was originally provided. The rate used will be in order of preference: the cost of long term fixed

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<sup>8</sup> y/n is the nominal annual benefit; [y – (y/ n)(k-1)]d is the interest on the declining balance of the face value of the subsidy; 1 + d is the factor that discounts the cash flow back to day one of the year of allocation; k is the year of allocation where year of receipt =1. (If the subsidy was given in 2000, and the AUL (n) was 5, the benefit would be attributed for the years from 2000 through to 2004).

rate loans paid by the company under examination; or the average of long term fixed rate loans in the country. This interest, or discount, rate is used to take into account in the benefit calculation the time value of money. Because the benefit from the subsidy is being allocated over a number of years the formula incorporates the interest rate in order to account for the time value of money. (\$1000 received today is worth more than \$1000 received one year later. This basic principle is incorporated in the calculations as it is considered to result in a more meaningful measurement of the benefit stream that is received by the recipient accruing from the face value of the subsidy).

## **Grants**

In the case of a grant, where none of the money is repaid, the benefit from this most basic type of subsidy is the amount of the grant. The benefit will normally have been regarded as having been received on the date the company first received the grant.

If the grant is expensed within the investigation period (i.e., it has been entirely allocated to production or sales during this period), the interest that would have accrued during the investigation period will be added.

However, if the grant has to be allocated over a longer period, the method of working out the amount that falls within the investigation period will be made in accordance with the procedures described above.

Any lump sum of revenue transferred or foregone (e.g. income tax or duty exemption, rebates, money saved from preferential provision of goods and services, or gained from excessive prices for the purchase of goods) will normally be treated as being equivalent to a grant. A decision would need to be made as to whether this amount is expensed or allocated.

### **Examples of grants (or equivalents to a grant)**

To work out the full amount of subsidy all of the amounts in the examples are increased by an amount for interest as described above. The total amount of subsidy also depends on whether the subsidy is apportioned over time or expensed.

#### *Direct transfer of funds*

This is the simplest case of a grant. The amount of subsidy is the amount received by the company concerned (a subsidy to cover operating losses would fall into this category).

#### *Tax exemption, tax reductions, and tax credits*

A common form of relief from direct taxes is special income tax exemptions, deductions, or credits. A benefit would be the extent to which the taxes paid by the enterprise are less than the taxes the enterprise would have paid had the program not existed. The benefit will generally be expensed to the year in which the benefit is received (benefit is normally received on the date on which the enterprise would otherwise have had to pay the taxes associated with the exemption etc – normally this will be the date it lodged the tax return). By this means the benefit can be expensed to the investigation period.

#### *Accelerated depreciation*

Accelerated depreciation of assets under a government agreed program would be considered the equivalent of a tax reduction. The amount of subsidy is the difference between the amount of tax that would have been paid during the investigation period under the normal depreciation schedule for the assets concerned and the amount actually paid under accelerated depreciation. There is a benefit to the extent that the accelerated depreciation results in a tax saving for the company concerned during the investigation period.

### *Interest rate subsidies*

In the case of an interest rate subsidy, the amount of subsidy is the amount of interest saved by the recipient company during the investigation period.

### *Debt forgiveness*

Government debt assumptions or forgiveness of debt, where a government may relieve a company of its repayment obligations, are treated as a grant. Grants may be either expensed or amortized depending on the circumstances. The illustrative table at the end of this chapter refers. Customs and Border Protection will examine whether the above criteria set out above apply – see ‘Subsidies that are generally amortized’.

(There may be some circumstances where an interest assumption is tied to a known loan and in this case the interest assumption may be treated like as a reduced interest loan and allocated according to the procedures that have been set out for loans).

All other exemptions or reductions of obligations, such as import duties, social security contributions, and redundancy payments, will also generally be treated as grant equivalents.

### **Loans**

In the case of a loan from the government (where repayment does take place) the subsidy is the difference between the amount of interest paid on the government loan and the interest normally payable on a comparable commercial loan during the investigation period.

A comparable commercial loan would normally be a loan of a similar amount with a similar repayment period. Emphasis is placed on similarities in the structure of the loans, for example fixed interest rate v variable interest rate; short v long term maturity; and the currency in which the loans are denominated. As part of seeking the most comparable commercial loan, Customs and Border Protection may also consider information that is available about ‘effective’ interest rates in preference to nominal rates – ‘effective’ interest rates being those which take into account the actual cost of the loan having regard to any fees, commissions, and other charges that may exist in addition to the nominal interest.

The commercial interest rate should preferably be established on the basis of the rate actually paid by the company concerned on comparable commercial loans. If this is not available, the interest paid on comparable private loans to companies in a similar financial situation in the same sector of the economy will be considered, or if such information is not available, to any comparable loan made to companies in a similar financial situation in any sector of the economy.

A loan from a government owned bank may be treated as a commercial loan. The evidence will be examined 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, and its purpose is to make loans to government approved or encouraged development programs. In such cases it is unlikely loans from such government owned banks could be used as the benchmark ‘comparable commercial loan’.

**No comparable commercial loans:** the SCM Agreement at Article 14(b) does not indicate how an investigating authority should establish the existence of benefit conferred by a loan in the event that there are no "comparable commercial loans which the firm could actually obtain on the market". As there is some considerable leeway, in adopting a reasonable methodology, Customs and Border Protection will take care in examining all available evidence. One method would be to gather available evidence of the terms that the market would have offered and

comparing those terms with those of the financial contribution at issue. This provides a market benchmark. Or, it may examine evidence of whether or not the financial contribution was provided on the basis of commercial considerations. This provides evidence that there has been reliance on non commercial considerations and indicates terms more favourable than those available from the market. Indicators of the economic situation prevailing at the time, such as the inflation rate, and the situation of the company concerned, can be considered in this context.

If all, or part of, a loan is forgiven or defaulted on the amount not repaid is treated as a grant depending on whether there was a guarantee.

In the case of loans the benefit will normally be taken as having been received in the year in which the enterprise would otherwise have had to make a payment on a comparable commercial loan.

### Attribution of the loan to a particular time period

#### *Short term loans*

For short term loans Customs and Border Protection will expense the benefit from that loan to the year in which the company is due to make the interest payments on the loan.

#### *Long term loans*

For long term loans having a concessionary fixed rate of interest the calculation involves determining a present value of the benefit that has occurred over time. The total interest differential over the life of the loan will be calculated and the present value of that total benefit stream will be calculated and treated like value y in the formula – this amount to be allocated over the life of the loan in line with the calculation methodology set out above under ‘Attributing amortized benefits to each year including the investigation period’.

This formula will be used in the case of:

- government provided loans and the loan to which it is compared – the benchmark loan – have different maturity periods or repayment schedules; or
- government provided loans where the only difference to the benchmark loan is the difference in repayment terms.

### Examples of loans

#### *Tax deferrals*

These will be treated as government provided loans. Deferrals of one year or less may be treated as short term loans and in this case a short term interest rate is used as the benchmark. For tax deferrals longer than one year the benefit will be calculated using a long term interest rate as the benchmark. For example, if the enterprise knows at the time the taxes are normally due that it would not be liable for taxes until 5 years later, the deferral can be treated like a 5 year loan and the benchmark would in that case be a 5 year loan.

#### *Reimbursable grants*

Reimbursable grants are treated like interest free loans until they are reimbursed. If not reimbursed, in whole or in part, they will be considered as grants rather than interest free loans from the date on which non-reimbursement is established. From this date, the normal grant methodology will apply. In particular, if the grant is to be allocated over time, this will commence from the establishment date of non-reimbursement. The amount of subsidy is the amount of the grant minus any repayments.

### *Contingent liability loans*

The same approach is followed as that for reimbursable grants. To the extent that such loans are given at a preferential rate of interest the subsidy would be calculated as the difference between the amounts of interest paid on the government loan and the interest normally payable on a comparable commercial loan during the investigation period. However, if it were to be determined that the loan would not be repaid, it is treated as a grant from the date on which non-repayment was established. The amount of subsidy is the amount of the loan, less any repayments.

### *Uncreditworthy loans*

Where a government makes loans to borrowers who are uncreditworthy - meaning that its financial position is so weak that it can be demonstrated from the evidence that it would not have obtained a commercial loan – Customs and Border Protection will consider whether the entire loan should be treated as the equivalent of a grant. Claims by Australian industry whether a company is uncreditworthy will need to be supported by information about the financial health of the company as shown by various financial indicators; its ability to meet its costs and financial obligations from cash flow; and evidence concerning the enterprise's future financial position using market studies, and project and loan appraisals. The presence of long term loans without any government guarantee may be indicative that an enterprise is not uncreditworthy.

### **Loan guarantees**

In general, a benefit exists from a loan guarantee to the extent that the total amount the firm pays for a loan with the government guarantee is less than what the enterprise would pay for a comparable commercial loan that the enterprise would actually obtain absent the guarantee.

### *Viable loan guarantees*

This category of guarantees is those where the borrower pays a fee to the authority running the program. Such fee allows the program to operate on a commercial basis. Determination of whether the guarantee has been financed on a commercial basis depends on whether the fee to access the guarantee program enables the program to cover its costs and to generate a reasonable profit margin. In such case there is no financial contribution from a government. In this situation the fact that loans are obtained at a lower interest rate than would otherwise be the case does not mean, of itself, that there is a subsidy – the fee is seen as covering the risk element involved in obtaining a lower interest rate. If the guarantee program is viable during the investigation period as a whole and the recipient has paid the appropriate fee, there is no benefit from the government and therefore no subsidy, even if the recipient involved were to default on its loans during the period.

### *Non-viable loan guarantees*

If the scheme is not viable, the benefit to the recipient will be the lower of the following two possibilities:

- the difference between the fees actually paid and the fees which should have been paid to make the program viable or;
- the difference between the amount the enterprise pays on the guaranteed loan and the amount that it would pay for a comparable commercial loan in the absence of the government guarantee.

If a guarantee is not part of a program, if fees paid are like those charged to other companies under a viable loan guarantee program, there will be no subsidy. If no fees are paid by the

recipient, the subsidy is the difference between the amount paid on the guaranteed loan and the amount it would pay for a comparable loan in the absence of the government guarantee.

Customs and Border Protection will examine whether the guarantee affects other terms of the loan such as the interest rate.

Where the government is the owner, and as owner provides a guarantee to the enterprise, that will not provide a benefit if evidence shows that it is normal commercial practice for shareholders to provide guarantees to their enterprises under similar circumstances.

For loan guarantees the benefit will normally be taken as having been received in the year in which the enterprise otherwise would have had to make a payment on the comparable commercial loan.

In attributing the benefit from a government provided guarantee to a particular time period Customs and Border Protection will generally use the method set out for loans.

### **Government provision of equity capital**

Government provision of equity capital is not considered to confer a benefit unless the investment decision can be regarded as being inconsistent with the usual investment practice (including the provision of risk capital) of private investors in the exporting country concerned.

Therefore, the provision of equity capital does not, of itself, confer a benefit. The criterion is whether a private investor would have put money into the company in the same situation in which the government provided equity.

If a government buys shares in a company and pays above the normal market price for these shares (taking into account of any other factors which may have influenced a private investor), the amount of subsidy is the difference between the two prices.

As a general rule, in cases where there is no market in freely traded shares, the government's realistic expectation of a return on the price paid for equity will be examined. The existence of an independent study demonstrating that it is a reasonable investment is the best evidence. If this evidence is not available, the exporting government should demonstrate the basis justifying its expectation of a reasonable return on investment.

If there is no market price and the equity injection is made as part of an ongoing program of such investments by the government, the analysis will take account of the enterprise in question as well as the overall record of the program over recent years. If the records show that the program has earned a reasonable rate of return for the government, there is a presumption that the government is acting according to the usual investment practice of private investors with regard to the case in question. If the program has not generated a reasonable return, the exporting government should demonstrate the grounds for its expectation of receiving a reasonable return on investment.

The existence of a subsidy is determined by the information available to the parties at the time the equity injection is made. Thus, if an investigation considers an equity injection that was made several years ago, the fact that the company has performed less well than expected does not mean that a subsidy exists, provided that the expectation of a reasonable return was justified in the light of the facts known at the time of the provision of the equity.

On the other hand, a subsidy might exist even if a reasonable return has been achieved; this is if at the time of the equity injection, the prospect of such a return was so uncertain that no private party would have made the investment.

In cases where there is no market price for the equity and there is a financial contribution and a benefit (i.e. the government has not acted according to the usual investment practice of private investors), all or part of the equity provided can be treated as a grant.

#### *Where an enterprise is unequityworthy*

If a project or enterprise is shown to be unequityworthy a benefit may exist to the amount of the equity. The comments above concerning uncreditworthiness provide information about the type of information requirements the Australian industry would have to produce to support a request for an investigation into the matter.

### **Provision of goods and services by the government**

The amount of subsidy where there has been a provision of goods or services by the government is the difference between the price paid by enterprises for the goods or service, and adequate remuneration for the product or service in relation to prevailing market conditions, if the price paid to the government is less than this amount.

Normally, adequate remuneration has to be determined in the light of prevailing market conditions on the domestic market of the exporting country, and the calculation of the subsidy amount must reflect only that part of the purchase of goods or services which are used directly in the production or sale of the like goods during the investigation period.

#### *Comparison with private suppliers*

As a first step where there has been a provision of goods/services by a government, it must be established whether the same goods or services involved are provided both by the government and by private operators. If so, the price charged by the government body would normally constitute a benefit to the extent that it is below the lowest price available from one of the private operators to the company involved for a comparable purchase. The amount of subsidy is the difference between these two prices.

If the company involved has not made comparable purchases from private operators, details are required of the price paid by comparable companies in the same sector of the economy. If such price is not available, a price will be obtained for comparable companies in the economy as a whole.

#### *Government monopoly suppliers*

If the government is a monopoly supplier of the goods or services involved, the goods or services are considered to be provided for less than adequate remuneration if certain enterprises or sectors benefit from preferential prices. The amount of subsidy is the difference between the preferential price and the normal price.

If the goods and services in question are widely used in the economy, a subsidy will only be specific if there is evidence of preferential pricing to a particular enterprise or sector.

The unit prices charged may vary according to neutral and objective criteria, for example large consumers pay less per unit than small ones in the provision of gas and electricity. In this situation, the fact that certain enterprises benefit from more favourable prices than others would not mean that the provision in this case was necessary made for less than adequate remuneration, provided that the pricing structure in question was generally applied throughout the whole economy, without any preferential prices being given to specific sectors or enterprises. The amount of subsidy is in principle the difference between the preferential price and the normal price charged to an equivalent company, according to the normal structure.

However, if the normal price is insufficient to cover the supplier's average total costs plus a reasonable profit margin (based on sector averages), the amount of subsidy is the difference between the preferential price and the price which would be required to cover these costs and profit.

If the government is the monopoly supplier of a good or service with a specific use the question of preferential pricing does not arise. The amount of subsidy is the difference between the price paid by the enterprise involved and the price required to cover the supplier's costs and profit margin.

### **Purchase of goods by government**

In a situation where private operators purchase the kind of goods in question as well as the government body, the amount of subsidy is the extent to which the price paid for the like goods by the government is made for more than adequate remuneration e.g. it may exceed the highest price offered for a comparable purchase of the same goods by the private sector.

If the company has not made comparable sales to private operators, details are required of the price paid by private operators to comparable companies in the same sector of the economy, or, if such data is not available, in the economy as a whole.

If the government has a monopoly for the purchase of the goods in question, the amount of subsidy as regards the purchase of goods by the government is the extent to which the price paid for the goods exceeds adequate remuneration. Adequate remuneration in this situation is the average costs incurred by the enterprise selling the product during the investigation period, plus a reasonable amount of profit, which will have to be determined on a case-by-case basis. The amount of subsidy is the difference between the price paid by the government and adequate remuneration as defined above.

### **Export subsidies**

A subsidy will generally be considered to be an export subsidy where it is contingent, in law or in fact, whether solely or as one of several other conditions, on export performance. Where a subsidy, without having been made legally contingent upon export performance, is in fact tied to the actual or anticipated exportation or export earnings. The mere fact that subsidy is granted to enterprises which export shall not, for that reason alone, be considered to be an export subsidy.

### **Price preference for inputs used in export production**

This reflects paragraph (d) of the Illustrative List of Export Subsidies (Annex I of the SCM Agreement). For an export subsidy to exist here it must be established that the government (or its agent):

- provided products or services for use in export production;
- on terms or conditions more favourable than those with which like or directly competitive products or services would have been provided for use in production for domestic consumption; and
- if products are being provided, the terms and conditions of provision are also more favourable than those commercially available on world markets to their exporters.

Commercially available means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

Regarding services, Customs and Border Protection will inquire whether the exporter has received services for production of the exported goods on terms more favourable than for the provision of like or directly competing services for domestic production.

Regarding products, Customs and Border Protection would also have to establish that the more favourable terms or conditions for use in export production *are also* more favourable than those commercially available on world markets to their exporters. In this case the amount of the benefit may be determined by comparing the price of products used in the production of exported goods to the commercially available world market price of such products, inclusive of delivery charges.

In determining whether the domestically sourced input is being provided on more favourable terms than are commercially available on world markets, adding delivery charges to the country in question to the world market price to yield a delivered price is a better measure of prices that are commercially available to exporters in that country.

The benefit will normally be taken to have been received as of the date on which the enterprise paid, or in the absence of payment was due to pay, for the product.

Attribution of benefit to a particular time period – normally the benefits will be expensed to the year in which the benefit is considered to have been received.

### **Exemption or remission upon export of indirect taxes**

These are based on paragraph (g) of the Illustrative List of Export Subsidies (Annex I of the SCM Agreement). This deals with indirect taxes on the production or distribution of the exported goods, such as value added tax, and provides that the remission or rebate of such taxes is an export subsidy if the amount of the remittance or rebate exceeds the amount of indirect taxes levied on like products sold for domestic consumption

For programs that provide for a full or partial exemption of an indirect tax or an import charge, a benefit can exist to the extent that the taxes or import charges paid by the enterprise as a result of the program are less than the taxes the enterprise would have paid in the absence of the program.

This is generally treated as having been received on the date the enterprise would otherwise have had to pay the taxes associated with the exemption or the remission – normally this will be the date the tax return was due to be lodged.

The subsidy will normally be expensed to the year in which it is considered to have been received.

### **Remission or drawback of import charges upon export**

These are provided for in paragraph (i) of the Guidelines on Consumption of Inputs in the Production Process, and the Guidelines in the Determination of Substitution Drawback Systems as Export Subsidies (Annex III to the SCM Agreement).

Governments may remit or drawback import charges paid on imported inputs consumed in production when the finished product is exported.

However, a benefit exists to the extent that the amount of the remission or drawback exceeds the amount of import charges on imported inputs that are consumed in the production of the exported product, making normal allowances for waste.

In the case of an exemption of import charges upon export, a benefit exists to the extent that the exemption extends to inputs that are not consumed in the production of the exported product, making normal allowances for waste, or if the exemption covers charges other than import charges that are imposed on the input.

In relation to "substitution drawback", under such a drawback system an enterprise may substitute domestic inputs for imported inputs without losing its eligibility for drawback. That is, it uses a quantity of home market inputs equal to, and having the same quality and characteristics

as, the imported inputs as a substitute for them. Substitution drawback does not necessarily result in the conferral of a benefit. However, a benefit exists if it is determined that:

- the import and the corresponding export operations both did not occur within a reasonable time period, not to exceed two years; or
- the amount drawn back exceeds the amount of the import charges levied initially on the imported inputs for which drawback is claimed.

The amount of the benefit arising from the remission or drawback of import charges, including substitution drawback, will generally be the difference between the amount of import charges remitted or drawn back and the amount paid on imported inputs consumed in production for which remission or drawback was claimed.

In the case of the exemption of import charges, the amount of the benefit will be the import charges that otherwise would have been paid on the inputs not consumed in the production of the exported product, making normal allowance for waste, and the amount of charges other than import charges covered by the exemption.

In the case of a deferral of import charges, the deferral will normally be treated like a government-provided loan equal to the amount of the import charges deferred on the inputs not consumed in the production of the exported product, making normal allowance for waste. The short-term interest rate may be used as the benchmark for deferrals of one year or less, and the long-term interest rate as the benchmark for deferrals of more than one year.

Based on Annex II to the SCM, Customs and Border Protection may consider the entire amount of an exemption, deferral, remission or drawback to be a benefit if the foreign government has not examined the inputs in order to confirm which inputs are consumed in the production of the exported goods, and in what amounts, and the taxes that are imposed on those inputs. If it's found that there is a system in place that confirms which inputs are consumed in the production of the exported goods, in what amounts, and the taxes that are imposed on the inputs consumed in production, Customs and Border Protection will examine that system to see if it is reasonable. Where such a system is not in operation, or where the one that exists is not reasonable or effective, the government in question may be able to carry out an examination of the actual inputs involved and show that the exemption, remission or deferral of indirect taxes reflects only those inputs which are consumed in the production of the exported goods, their quantity after allowing for waste, and only those indirect taxes imposed on the input product. If the linkages cannot be demonstrated by these means Customs and Border Protection may take the entire amount of the exemption etc as the benefit. i.e., it is treated like a grant.

The date of exportation will normally be taken to be the time of receipt of benefit in the case of the exemption, remission or drawback, including substitution drawback, of import charges.

In the case of a deferral of one year or less, the benefit will be taken to have been received on the date the import charges became due. In the case of longer deferral the benefit will be taken to have been received on the anniversary date(s) of the deferral.

The benefit will normally be expensed to the year in which the benefit is considered to have been received.

The table below provides further illustration of this issue. However, certain types of subsidy may be subject to a case-by-case analysis when deciding whether to expense or allocate.

### **Export credit guarantee or insurance programs**

This reflects paragraph (j) of the Illustrative List of Export Subsidies (Annex I of the SCM Agreement). Under this provision only export insurance programs provided at premium rates and that are inadequate to cover the long term operating costs and losses of the program are treated

as export subsidies. The focus is upon the inadequacy of the program. Customs and Border Protection will examine the financial performance of the services provided by the government; and assess the revenues from the premiums and the long term operating costs and losses. If satisfied that it will break even over the long term no subsidy will be found to exist.

**Deduction from an amount of subsidy**

The following may be deducted from the amount of subsidy:

- any application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy. It is up to the exporter in the country to provide the information to support any deduction.
- The only fees or costs that may normally be deducted are those paid directly to the government in the investigation period. It must be shown that such payment is compulsory in order to receive the subsidy. Thus payments to private parties, e.g. lawyers, accountants, incurred in applying for subsidies, are not deductible. Neither are voluntary contributions to governments, for example donations.
- the tax consequences of a subsidy are not included in determining the amount of any benefit. For example if in receiving a grant the enterprise pays more income tax, Customs and Border Protection does not reduce the benefit by the amount of higher taxes paid.
- export taxes, duties or other charges levied on the export of a product to Australia specifically intended to offset the subsidy.
- Such claims for deductions should only be accepted if the charges involved were levied during the investigation period, and it is established that they continue to be levied at the time when definitive measures are recommended.

**Illustrative table of subsidies to be expensed, or allocated over time**

<b>EXPENSED SUBSIDIES</b>	<b>SUBSIDIES ALLOCATED OVER TIME</b>
Grants: - Purpose is for other than purchase of fixed assets - Recurring and/or small	Grants: - Purpose is for purchase of fixed assets - Non-recurring and/or large - Recurring but granted in large, concentrated amounts
Tax Benefits/Indirect Tax Rebates/Import Duty Exemptions: - For operating expense - Benefits related to direct taxes	Tax Benefits/Indirect Tax Rebates/Import Duty Exemptions: - For purchase of/related to fixed assets (e.g. import duty/indirect tax exemption on machinery)
Provision of Goods and Services: - Provision of services/consumable inputs	Provision of Goods and Services: - Provision of fixed assets and non-general infrastructure
Research & Development: <sup>9</sup> - Expense only if allocation not appropriate	Research & Development: <sup>6</sup> - Presumption to allocate
Loss Coverage: - Recurring and/or small	Operating Costs: - Non-recurring and/or large - Benefit goods not yet produced
Interest Rate Subsidies: <sup>10</sup>	Interest Rate Subsidies: <sup>7</sup>

<sup>9</sup> This is based on the presumption that the R&D subsidies frequently benefit future productions.

<sup>10</sup> This is based on the presumption that the subsidy is non-recurring.

- Interest subsidy payments made as loan payments become due	- Subsidy is lump sum to offset past, present or future interest due or paid
Short-Term Loan Benefits	Equity Infusions
Export Rebates	Long-term Loan Benefits (benefits exist over life on loan)
Export Insurance	Forgiveness/Assumption of Long-term Debt (including principal and interest)
Export Promotion Assistance	
Redundancy Payments/Early Retirement/Workers Assistance	
Worker Training	
Wage Subsidies	
Price Support Payments	
Subsidies Below Minimum Threshold Size (if the total amount of the benefits is less than 1% ad valorem of the export sales value )	

## 17. SPECIFICITY

### 17.1 CONTEXT

A subsidy as defined in Article 1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) shall be countervailable only if it is specific in accordance with the provisions of Article 2 of the SCM Agreement. 'Specific' subsidies are those targeted at individual companies or certain sectors of the economy. This means even if a measure meets the definition of a subsidy, will not be countervailed by Customs and Border Protection unless it has been demonstrated to be a specific subsidy.

Article 2 of the SCM Agreement outlines principles to be applied in determining whether a subsidy is specific to 'certain enterprises'.

The aim of the specificity test is to avoid countervailing action being taken against subsidies that are generally available<sup>11</sup>. On these grounds a subsidy has to be specific to 'certain enterprises', as defined, in order to be countervailable.

Section 269TAAC of the Act seeks to implement the provisions of Article 2 of the SCM Agreement dealing with specificity.

### 17.2 POLICY

As prohibited subsidies i.e. those subsidies which are export or local content contingent, are deemed to be specific Customs and Border Protection will first examine whether the subsidy is a prohibited subsidy as defined. This matter is examined in some more detail below under 'Prohibited Subsidies'.

Customs and border Protection will next examine the legislation or regulation of the exporting country in order to determine whether the subsidy is limited by legislation to certain enterprises - sometimes referred to as de jure specificity.

When there is no explicit limitation in the legislation Customs and Border Protection may examine the factual circumstances in which subsidies are granted as the practices of the granting authority may show that, in fact, it primarily benefits certain enterprises - sometimes referred to as de facto specificity.

Customs and Border Protection will make its specificity determinations only after careful examination of the facts.

Customs and Border Protection has regard to Article 2.1 of the SCM Agreement which shows that the term 'certain enterprises' may include any of the following:

- a single firm
- an industry
- a group of firms
- a group of industries

### 17.3 PRACTICE

#### **Determination of specificity**

Determinations of specificity may examine four potential types:

- Prohibited subsidies

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<sup>11</sup> An example of a non specific subsidy may be a R&D tax concession meeting the requirements of Article 2.1(b) of the SCM Agreement.

- Enterprise specificity
- Industry specificity
- Regional specificity

### Prohibited subsidies

Customs and Border Protection first examines whether the subsidy is a prohibited subsidy before undertaking any specificity analysis. This is because a prohibited subsidy, even one that is generally available, is 'deemed to be specific' and no further specificity analysis is required.

Prohibited subsidies are defined at Article 2.3 of the SCM Agreement and are "deemed to be specific". They are identified at Article 3.1 to be subsidies contingent on:

- export performance, and
- the use of domestic goods over imported goods

Whether a subsidy is contingent on export performance is a matter of fact to be determined in each case<sup>12</sup>.

### Enterprise specificity

Enterprise specificity is where a government targets a particular company or companies for subsidisation (de jure or de facto specificity).

Concerning groups of industries, it isn't required that the members of the group share similar characteristics because the purpose of the specificity test is to ensure that subsidies that are distributed very widely throughout an economy are not countervailed. Therefore, while a particular enterprise may be the subject of the application it may not be the only commercial entity to which the subsidy is specifically provided.

Customs and Border Protection does not have a policy that defines what constitutes a sufficiently small number of enterprises or industries for it to properly be considered specific and such decisions can only be made in each case on the facts.

### Industry specificity

Industry specificity is where a government targets a particular sector or sectors for subsidisation (de jure or de facto specificity).

### Regional specificity

Regional specificity is where a government targets producers in specified parts of its territory for subsidisation (de jure specificity).

Such subsidies are treated as being de jure specific within the terms of Article 2.2 of the SCM Agreement, which provides that subsidies 'limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific'.

Section 269TAAC(2)(b) also refers providing a subsidy is specific if "...access is limited to particular enterprises carrying on business within a designated geographical region that is within the jurisdiction of the subsidising authority".

Depending on the design of the subsidy, a subsidy may be found to be regionally specific if:

- a central government grants a subsidy to a designated geographical region of that country regardless of the general availability within that geographical region;

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<sup>12</sup> In this regard the Illustrative List at Annex I to the SCM provide examples of export subsidies and practices not listed may be found to be a subsidy contingent on export performance.

- the subsidy is not generally available across the jurisdiction of the granting authority e.g. a central government makes subsidies generally available to all businesses in a state or province, and not to other states or provinces, they are specific;
- at the sub national level such as a state government, a subsidy that is limited to particular regions within that state shall be specific. Subsidies provided by the state or province shall not be treated as being specific if they are granted on a generally available basis (i.e. are not limited to certain enterprises) within that state or province.

That there may be more than one region, or that the one 'designated geographical region' may not be contiguous in nature, are not conclusive as to whether there is regional specificity.

### **De Jure Specificity**

If it is not found that a prohibited subsidy exists, Customs and Border Protection will next examine the legislation or regulation of the exporting country in order to determine whether the subsidy is explicitly limited, by legislation, to certain enterprises, sometimes known as de jure specificity.

De jure specificity is covered in Article 2.1 (a) and (b) of the SCM Agreement and in section 269TAAC of the Act. The conditions where a de jure specificity finding can be made occur where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises or industries (paragraph (a) of Article 2.1).

As a consequence of this definition, pursuant to paragraph (b) of Article 2.1 of the SCM Agreement and section 269TAAC(3) of the Act, a subsidy will not be considered as de jure specific if Customs and Border Protection is satisfied the following conditions apply:

- objective criteria<sup>13</sup> or conditions govern the eligibility for and the amount of the subsidy;
- the objective criteria and conditions are strictly adhered to;
- eligibility is automatic if the objective criteria are met;
- the criteria and conditions are clearly set out by law, regulation or other official document so as to be capable of verification.

An example, of the effect of paragraph (b) of Article 2.1 of the SCM Agreement and of section 269TAAC(3), is a subsidy provided to all small businesses across the jurisdiction of the granting authority. Even though restricted to these enterprises, provided it operated across the jurisdiction of the granting authority, and met the objective criteria and the eligibility requirement, it would not be treated as being specific.

It would be considered to be countervailable, on either de jure or de facto grounds, if the subsidy is found to be limited to certain small businesses. Another simple example of a de jure specific subsidy is where the industry assistance legislation provides grants to the textile industry or the tax legislation may limit the tax deductibility of investments to those made by the textile industry.

The de jure test will first be examined when assessing specificity because de jure specificity is generally recognised as involving less complex analyses than the de facto tests. Where a government expressly limits, in law or in regulations, access to a number of enterprises, industries, or groups of enterprises, and it has been established specificity exists on that basis, no further inquiry will be made about actual use under the de facto methods if such factors are

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<sup>13</sup> Footnote 2 of the SCM defines the term "objective criteria or conditions" to be: "...criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise".

being investigated. The circumstances about how a de facto analysis commences, and the sequential analysis followed in that situation, are discussed in more detail below.

### **De Facto specificity**

Secondly, Customs and Border Protection may examine the factual circumstances in which subsidies are granted, sometimes known as de facto specificity.

De facto analysis is not automatically included in every subsidy investigation. Due consideration is given to the provisions of Article 2.1(c) of the SCM Agreement which requires:

“If, notwithstanding any appearance of non specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered....”.

If supporting evidence was provided in an application for countervailing duties concerning de facto specificity, the exporter, and government questionnaires, would contain questions concerning the allegations that had been raised in the application. Customs and Border Protection would then seek information in relation to all de facto factors.

Information may be found in the course of an investigation which warrants examination of de facto specificity. In this situation, Customs and Border Protection will issue a supplementary questionnaire and seek information in relation to all de facto factors.

The factors to be considered when conducting a de facto analysis, and as provided for at section 269TAAC(4) and (5) of the Act, are:

- use of a subsidy program by a limited number of certain enterprises;
- predominant use by certain enterprises;
- the granting of disproportionately large amounts to certain enterprises; and
- the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.

In applying these tests Customs and Border Protection must consider:

- the extent of economic diversification of economic activities in the jurisdiction of the granting authority, and
- the length of time the subsidy program has been in operation

If there are grounds to examine the de facto factors, each factor in the order of its appearance in section 269TAAC(4) will be examined. Customs and Border Protection will cease conducting its specificity analysis as soon as it finds that a single factor is sufficient to show that there is specificity.

The starting point, therefore, when examining de facto specificity will be the number of users. Once it is found that there are a limited number of users of the program it will cease conducting further de facto analysis and the finding of specificity may be made on that single observation.

For this reason it is likely that an analysis of the level of benefit provided i.e. whether recipients were dominant or disproportionate users under factors (2) or (3) respectively, will generally not be examined unless the subsidy was provided to numerous and diverse industries. If this occurred Customs and Border Protection will analyse the enterprises or industries that received benefits and seek to determine if one or a limited number of the recipient enterprises/industries were in fact dominant users (factor 2), or disproportionate users (factor (3) of the program. In conducting this further analysis supplementary questionnaires may be issued as part of seeking the required information. In making decisions concerning the granting of disproportionately large amounts of subsidy to certain enterprises, Customs and Border Protection will carefully consider

what is the appropriate base line group on which it should make this assessment, having regard to the potential recipients of the alleged subsidy.

Again the de facto analysis will cease as soon as a determination is made that a single factor supports a finding of specificity<sup>14</sup>. The analysis under either factor (2) or factor (3) will focus on the level of benefits provided, not the number of subsidies provided to different industries. Any analysis of whether the level of benefits received by a particular enterprise or industry, or group of enterprises or industries, were disproportionate in relation to the economy as a whole is likely to be an unusual situation.

### **Predominant use**

In examining predominant use by certain enterprises, Customs and Border Protection generally compares the beneficiaries to others within the program in order to determine where they rank. For example, one of the beneficiaries may be found to have received 50% of the total subsidy amount.

### **Disproportionately large amounts**

In examining whether disproportionately large amounts have been used, Customs and Border Protection generally examines the relative proportions each beneficiary receives. For example, whether one beneficiary has received, say, 5% of the total subsidy amount whereas all others receive only 0.5% each. Or, if at industry level it may be the relative importance of recipient industries in terms of production value. Specificity on grounds of disproportionately large amounts being used may be found even though the program may have an objective of being open to all industries, again illustrating how the specificity findings are driven by the circumstances of each case.

### **Discretion of granting authority**

The 'manner' in which discretion has been exercised in the decision to grant a subsidy (as provided in Article 2.1(c) is another factor to be considered - as listed above under 'De facto specificity'. Customs and Border Protection exercises caution in applying this test because:

- administrative discretion will usually exist, in one form or the other, in most subsidy programs - discretion is usually being exercised when evaluating the facts or merits of an application for a subsidy, and
- without care it risks rendering other de facto factors rendered meaningless because every subsidy program may become specific were discretion given too broad a meaning.

An assessment of any discretion of the granting authority that shows favour toward some enterprise(s) or industry(ies) over others will inform the question of specificity. When examining this factor, information will be requested from the authority regarding the reasons for acceptance or rejection of the applications, so that it might examine the manner in which the authority exercised its discretion to either reject or grant subsidies. Having obtained such information, Customs and Border Protection will analyse the reasons for the rejection or acceptance to determine whether they disclose a systematic pattern of acceptance or rejection.

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<sup>14</sup> This means that where *de facto* specificity analysis has dropped down to Item 3 (receipt of *disproportionate* amounts), Customs and Border Protection may treat this as positive evidence of specificity even if there are numerous users of the program and even if little discretion exists in awarding benefits. There is no certainty that it will always prove practical, or possible, to make determinations about the relative level of benefits under factors (2) or (3). (Information on each *de facto* factor will not always be available and because analyses can be complex Customs and Border Protection follows this sequential approach).

Random, or purposeless discretion, cannot indicate specificity. Importantly, where the exercise of discretion has shown favouritism it would normally have manifested itself as one of the first three de facto factors, for example if the selected industries constituted a limited number, or if exercise of discretion lead to there being a predominant or disproportionate use.

Alternatively, if the selected industries (i.e. those selected by the granting authority) constituted more than a limited number of industries, or if there were no dominant users or disproportionate benefits to certain users, or if there were no other indication that one or a group of enterprises or industries was favoured over others, the program would not be specific.

This factor is therefore treated as the least significant factor, and for that reason it would be rare to make a specificity finding solely on the grounds that some measure of discretion was exercised. For the same reasons, an application claiming specificity on grounds of discretion alone would not generally be treated as establishing a prima facie case for an investigation.

Customs and Border Protection may give the discretion factor a greater weight where there is a new subsidy program and there have been few applicants and few recipients. In the case of a new program, the first three factors - limited number of users, dominant user, or disproportionately large user - may not provide useful information as to whether the program is de facto specific as this is necessarily fact related.

In this situation the manner in which authorities exercised discretion in the early days of a new program (e.g., by excluding certain applicants and limiting the benefit to a particular industry) can become a useful indicator of specificity. Or, the evidence relating to the first three factors may be inconclusive, and consideration of the discretion factor may help to inform whether there is specificity. In this situation, the factors to consider in analysing the relevance of discretion include the number of applicants turned down, the reasons they were turned down, and the reasons successful applicants were chosen.

### **Other considerations**

When evaluating de facto specificity Customs and Border Protection will consider:

- the length of time the subsidy program has been in operation, and
- the extent of diversification of economic activities within the economy in question

These additional criteria are seen as serving to inform the application of, rather than supersede, or substitute for, the four de facto specificity factors. That is, while they are not additional indicators of whether specificity exists they may inform when analysing the de facto factors. For example, with respect to economic diversification, in determining whether the number of industries using a subsidy is small or large account will be taken of the number of industries in the economy in question.

### **Evidentiary requirements**

From the information provided in the questionnaire responses, and verification, and any other information that may be collected, a specificity determination will be made on de jure or de facto grounds.

Article 2.4 of the SCM Agreement requires that any determination of specificity be “clearly substantiated on the basis of positive evidence”. This does not affect the right of Customs and Border Protection, however, to make determinations on the basis of the facts available, or all relevant information, when the exporter or the government refuses access to, or does not provide, the necessary information. If a party refuses to provide information requested in the questionnaires so that a specificity analysis cannot be conducted, Customs and Border Protection may make findings based upon the all relevant information principle.

If information is sought relevant to both de jure and the de facto tests (either at the outset of an investigation, or otherwise) and if, in the course of its investigation, becomes satisfied on de jure grounds the de facto examination may cease. Evidence is not required on both de jure and de facto grounds in order to make a finding of specificity. However the finding will have regard to the totality of the available evidence.

#### Time period for determining specificity

The time period for determining specificity does not have to coincide with the period of investigation. It may be appropriate to make it longer in some cases in order to fully appreciate the usage of a program. Therefore, questionnaires and correspondence may request information on specificity over a longer period.

Specificity of a subsidy may also have to be periodically reviewed as it may become non specific at some later point in time.

However, a subsidy that has been found to be specific that is non-recurring (i.e. one that has a benefit that can be amortised over time) will be treated as remaining specific for purposes of the amortised benefit stream, regardless of there having been any later changes to the program or its usage.

## 18. UPSTREAM SUBSIDIES

### 18.1 CONTEXT

Articles 10 and 32 of the SCM Agreement refer to Article VI of the GATT 1994, which provides:

“ no countervailing duty shall be levied on any product of the territory of a Member imported into the territory of another Member in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation..... The term “countervailing duty” shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export or any merchandise.”

Subsidies bestowed indirectly as used in Article VI of the GATT 1994 implies that financial contributions by the government to the production of inputs used in manufacturing products subject to an investigation are not excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the processed products.

“Upstream” subsidy refers to a subsidy (non-export) paid to an input product such as raw material or a manufactured product used in the production of the goods in question, and countervailing action may be taken where the benefit received by the upstream recipient of the subsidy passed through, in whole or in part<sup>15</sup>, to the downstream purchaser.

Where it is established that the price of the input product reflects the benefit of the subsidy, in whole or in part, received by the upstream supplier, then the downstream purchaser is taken to have had received a subsidy.

### 18.2 POLICY

Normally, the demonstration of the "pass-through" is undertaken by examining the price of the input product between the vendor and purchaser.

To determine whether the input has been purchased on terms that are more favourable than those available in the market Customs and Border Protection will, in order of priority, compare the purchase price of the subsidised input to the following benchmark prices:

- if there is a comparable and unsubsidised input product (either sourced in the country of export or imported), that actual price (subject to that price being reached under normal market conditions);
- average price data for an unsubsidised input product;
- surrogate information - pricing information may be available for a comparable industry where subsidies have not been paid on inputs and this information may be used to assess the likelihood of a competitive benefit having been provided by the subsidised input in question;
- absent any information to enable a price to be established using the options above, the benchmark price shall be such amount having regard to all relevant information.

In comparing a benchmark price to a subsidised input price, appropriate adjustments will be made to the benchmark price to take account of differences that may affect its comparison with

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<sup>15</sup> As it *cannot be assumed* that the whole of the benefit of the subsidy received by the input supplier always equates with the benefit that is received by the purchaser, being the producer of the *final goods* that are *the subject of the countervailing application*. (The exception being related party dealings as explained in this guideline).

the subsidised input price. Such difference may include prices occurring at different times, physical characteristics, delivery terms and taxes.

Specificity must be considered. A determination must be made whether the upstream subsidy was specific as defined. Specificity will be determined at the initial stage of disbursement of the subsidy by the government (or any private body that is entrusted or directed to carry out the functions on behalf of the government). For example, a subsidy that the government provides exclusively in law or in fact to steel producers will be considered as specific. This determination will not change even if the steel producers on-sell that subsidised steel to a wide range of downstream industries.

Where the input producers and the downstream processors operate at arms length the question of any benefit arising from the financial contribution received by the input producers will be examined in line with the practices below to establish whether any part of that benefit has passed through to producers of the final product subject of the investigation. Where the inputs are purchased from a related upstream supplier and consistent with practices elsewhere, Customs and Border Protection will infer that the whole of the input subsidy has been passed through to the related downstream purchasers.

### **18.3 PRACTICE**

In considering whether there is pass through Customs and Border Protection will examine the transactions that take place between the input product on which the subsidy is paid and the final exported product.

This examination might require sampling of those parties that are engaged in each step in the input process. Where necessary, Customs and Border Protection will consult with any relevant industrial organisation or other representative body in the country of export to agree on an appropriate sampling method.

Countervailing questionnaires will be dispatched for completion by the government of the country of export concerning the input scheme, and by companies involved in the production and exportation of the goods. In order to determine the nature of the transaction between the company producing the exported goods and the input supplier, a further questionnaire will be sent to the input supplier.

The purpose of the questionnaire is to determine whether the transactions between the input supplier and the producer are arms length transactions and whether the price paid was of fair market value. The information requested may include, for example, the contracts entered into between the relevant parties, whether there were any restrictions, and whether the parties could be considered to be related. In considering whether the parties are related, Customs and Border Protection will have regard to s.269TAA(4) of the Act concerning "associates".

Information obtained will be assessed in order to establish a benchmark market price. The benchmark could be an average price or a company specific price.

#### **How upstream is upstream?**

In most cases, upstream subsidies will be investigated up to one level immediately preceding the point of producing the exported goods. This practice rests upon two considerations:

- in moving up the chain beyond one level it becomes less likely that subsidies will have a significant effect on the cost of manufacturing the subject finished goods, and
- the knowledge that going beyond this point becomes unduly complex as multiple pass through tests may be required if the parties are not related.

However, there may be some few cases where it is appropriate to move up an additional stage. In the agricultural sector, subsidies are normally given to individual growers. These growers will then sell to distributors, wholesalers or co-operatives that consolidate the product and offer it for sale in both the domestic and export markets.

For example, a producer of good X may source its main raw material input from a producers' cooperative which in turn purchased the raw material input from various growers who received production subsidies from the government. In this case, it would be appropriate to pursue two levels immediately preceding the production of good X to determine if the production subsidies has passed through from the growers of the raw material input to the producer of good X.

Upstream subsidies can also be pursued throughout the production chain when all of the parties are related as in the case of a vertically integrated company. As mentioned above, input subsidy may be regarded as having passed through to the indirect downstream recipients when the parties are not operating at arms length (i.e. related parties). Hence, no pass through test would be required in such circumstances.

In other cases where an applicant requests an investigation in to an upstream subsidy more than one level removed from the goods under consideration it will face an onus to demonstrate the significance of those subsidies.

The following is an example of an upstream subsidy. A countervailing duty investigation is initiated in respect of wine exports from country X. The wine producers purchase grapes from grape growers. The grape growers receive production subsidies from the state and/or federal government - the wine producers do not receive any subsidies directly from any level of government.

The subsidies received by the grape producers are "upstream subsidies" provided they are passed-through, in whole or in part, to the wine producers in the price of the grapes. In these circumstances, the amount of the benefit that has flowed through to the producer of the exported product has to be established.

## 19. IMPOSITION OF CONCURRENT DUMPING AND COUNTERVAILING MEASURES

### 19.1 CONTEXT

Article VI of GATT 1994 requires: 'No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping and export subsidisation'.

Article 10 of the SCM requires that members of the WTO ensure that their imposition of countervailing measures is consistent with Article VI of the GATT 1994.

Section 269TJA of the Customs Act provides for the imposition of a combined dumping duty and countervailing duty which would arise from a joint application covering both dumping and subsidy. The practice set out below is designed to ensure that it acts in accordance with Article 10 of the SCM when imposing any dumping and countervailing duty in a joint investigation.

Section 8(5B) of the Customs Tariff (Anti Dumping) Act 1975 requires that the sum of the export price of the particular and the amounts of interim dumping and countervailing duty to be imposed, does not exceed the non-injurious price of the particular goods.

### 19.2 POLICY

The basic 'rules' followed when working out the amount of the countervailing and dumping duty in a joint application are:

- countervailing duty will be firstly imposed before deciding how much dumping duty should be imposed;
- the amount of any export subsidy will be deemed to have contributed to the dumping margin by the full amount of the export subsidy. As the export subsidy has been included in the amount of countervailing duty the same amount of export subsidy has to be deducted from the amount of dumping duty to avoid the double counting;
- any domestic subsidy, on the other hand, is not relevant to double counting and a domestic subsidy will be countervailed to the full amount of that subsidy - it will not affect quantification of dumping duty; and
- regard will be given to the lesser duty rule.

### 19.3 PRACTICE

The principles followed to avoid the double counting of dumping duty and countervailing duty is outlined in the following scenarios:

Joint AD/CVD application	AD margin	Export subsidy margin	Domestic subsidy margin	Proposed CVD duty	Proposed AD duty
<b>Scenario A</b>	20%	10%	-	10%	10%
<b>Scenario B</b>	20%	-	10%	10%	20%
<b>Scenario C</b>	30%	15%	10%	25%	15%

In scenario A there is a dumping margin of 20%. The export subsidy of 10% is deemed to have contributed to the dumping margin by that same amount. To avoid double counting the full amount of the countervailing margin is imposed first (10%), followed by the remainder of the dumping margin (10%).

In scenario B there is a dumping margin of 20%. There is no export subsidy but there is a domestic subsidy of 10%. In this situation the domestic subsidy is countervailed (i.e. 10%) and as there is no export subsidy the full amount of the dumping duty may be offset by a dumping duty (i.e. 20%).

In scenario C there is a dumping margin of 30%. The export subsidy of 15% is deemed to have contributed to the dumping margin by that same amount. To avoid double counting, and as the countervailing duty is taken first, a countervailing duty of 15% for the export subsidy and 10% for the domestic subsidy (i.e. a total CVD of 25%) is imposed. As 15% of the dumping margin is deemed to have been accounted for by the export subsidy the balance of 15% (i.e. 30%-15%) is accounted for by the dumping duty.

These scenarios provide useful principles when considering countervailing duties and dumping duties. The example below illustrates possible outcomes with factors shown in terms of unit values as used in Australia’s duty system.

Example

The relevant factors are shown in unit value terms. There are three possible scenarios:

- where the injury level is higher than the normal value
- where the injury level is the same as the normal value
- where the injury level is lower than the normal value

Each of these scenarios is illustrated in the table below.

	<b>Scenario 1</b>	<b>Scenario 2</b>	<b>Scenario 3</b>
<b>Export price</b>	\$80	\$80	\$80
<b>Normal value</b>	\$110	\$115	\$110
<b>Dumping margin</b>	\$30	\$35	\$30
<b>Non-injurious price</b>	\$115	\$115	\$95
<b>Export subsidy</b>	\$15	\$15	\$15
<b>Domestic subsidy</b>	\$5	\$5	\$5
<b>Potential CVD</b>	$\$15 + \$5 = \$20$	$\$15 + \$5 = \$20$	$\$15 + \$5 = \$20$
<b>Potential dumping duty</b>	$\$110 - \$80 - \$15 = \$15$	$\$115 - \$80 - \$15 = \$20$	$\$110 - \$80 - \$15 = \$15$
<b>Is action taken against all of the potential CVD?</b>	Yes	Yes	No. CVD will be \$15
<b>Is action taken against all of the potential dumping margin?</b>	Yes	No. Dumping duty will be \$15	No. Dumping duty will be zero

*Scenario 1: Where the non-injurious price is greater than the normal value*

There is no lesser duty consideration in this example as the non injurious price exceeds the normal value. The dumping margin is \$30 (NV less export price). There is an export subsidy of \$15 and this is deemed to have contributed to the dumping margin by the amount of the export subsidy.

Interim countervailing duty equals the sum of the export subsidy (\$15) and the domestic subsidy (\$5) giving a total countervailing duty of \$20.

The interim dumping duty is calculated by subtracting the export subsidy of \$15 from the dumping margin of \$30, meaning that there is a ‘potential interim dumping duty’ of \$15.

Section 8(5B) of the CTAD Act: this section requires that the total duty charged does not exceed the amount necessary to prevent injury, i.e. non-injurious price.

In this scenario, as the NIP is higher than the normal value, the dumping margin is calculated with regard to the normal value and not the non-injurious price. The sum of the duties and the export price is  $\$80 + \$20 + \$15 = \$115$  which results in an amount at the same level as non-injurious price.

Therefore, Customs and Border Protection will impose duty up to the non-injurious price being made up of an interim countervailing duty of \$20 and an interim dumping duty of \$15.

*Scenario 2: Where the non-injurious price is equal to normal value*

In this scenario the normal value and the NIP are both \$115. The dumping margin is \$35. The export subsidy of \$15 is deemed to have contributed to the dumping margin by the amount of the export subsidy.

Interim countervailing duty is the sum of the export subsidy (\$15) and the domestic subsidy (\$5) giving a total countervailing duty of \$20.

The interim dumping duty is calculated by subtracting the export subsidy which has contributed \$15 to the dumping margin of \$35, giving a 'potential interim dumping duty' of \$20.

As mentioned above, Customs and Border Protection is required to ensure that the total duty charged does not exceed the non-injurious price. Given that the total duty possible plus export price will come to \$120, this will exceed the NIP by \$5. Therefore, dumping duty has to reduce by \$5 to ensure that s.8(5) is not breached.

Therefore, duty will be imposed up to the normal value and the NIP:

- a countervailing duty of \$20
- a dumping duty of \$15.

*Scenario 3: Where the non-injurious price is lesser than the normal value*

There is a lesser duty consideration in this example as the non-injurious price is lower than the normal value.

The dumping margin is \$30. There is an export subsidy of \$15 and this is deemed to have contributed to the dumping margin by the amount of the export subsidy.

The interim countervailing duty is the sum of the export subsidy (\$15) and the domestic subsidy (\$5), giving a total countervailing duty of \$20.

The interim dumping duty is calculated by subtracting the export subsidy which contributed \$15 to the dumping margin of \$30, resulting in a 'potential dumping duty' of \$15.

In this example the NIP is lower than the normal value. The sum of the possible duties and the export price is  $\$80 + \$20 + \$15 = \$115$  which is higher than the non-injurious price (by an amount of \$20).

Therefore, interim duty will be imposed up to the NIP, being countervailing duty of \$15 and no dumping duty.

## 20. DETERMINATION OF DUMPING MARGINS

### 20.1 CONTEXT

Dumping occurs when the export price is less than the normal value, and the margin of dumping is the difference between them. Section 269TACB of the Act describes the methods by which dumping may be determined and reflects Articles 2.1, 2.4.2, 6.10 and 9.4 of the Anti-Dumping Agreement.

The determination of dumping is relevant for the purposes of:

- deciding whether dumping is negligible and whether an investigation is to be terminated.
- assessing whether material injury has been (or is being, or will be) caused to an industry, and whether the imports from the various countries should be cumulated;
- publishing a notice to impose any interim measures; and
- ascertaining normal values and export prices for goods of residual exporters.

### 20.2 POLICY

A dumping margin is calculated for an exporter that exported the goods to Australia over the nominated investigation period.

While the Act describes various methods by which dumping may be determined, neither it, nor the Anti-Dumping Agreement specifies the circumstances in which a particular method is to be preferred. However, the policy is to determine dumping margins using the weighted average method over the investigation period. In applying the weighted average method all relevant domestic sales over the period in which sales are being investigated are taken into account.

The existence of dumping and the size of a dumping margin are worked out for individual exporters. Thus, an investigation may be terminated on the grounds that a margin is less than 2% ("negligible" or "de minimis") in respect of one exporter but at the same time continue in respect of other exporters having margins of 2% or greater.

Customs and Border Protection may sample if the number of exporters from a particular country who supplied information is so large that it is not practicable to ascertain the existence of dumping and any dumping margins for each of them (refer s. 269TACB(8) of the Act). Any selection shall be made after consultation with exporters/producers concerned.

If an exporter not selected for an individual determination submits information, the investigation must be extended to that exporter unless to do so would prevent the timely completion of the investigation.

Generally speaking, dumping margins are determined for:

- exporters selected for an individual determination who cooperated with the investigation;
- exporters selected for an individual determination who did not cooperate with the investigation;
- exporters not sampled for an individual determination – referred to as 'residual exporters';
- exporters not sampled for an individual determination, but who provide sufficient information to warrant investigation and their own individual margin; and
- exporters who did not provide sufficient information to warrant investigation.

## 20.3 PRACTICE

### Weighted averaging

Section 269(TACB) outlines the following methods that may be used to calculate dumping margins:

- compare the weighted average of export prices over the investigation period with the weighted average of corresponding normal values over that period;
- apply the weighted average method to parts of the investigation period;
- compare the export prices determined in respect of individual transactions over the investigation period with corresponding normal values in the same period;
- combine the weighted average with the transaction to transaction method, or (in rare circumstances);
- compare the weighted average normal value with the individual transaction export prices.

Only in rare circumstances would Customs and Border Protection deviate from determining dumping margins using the weighted average approach. The concept of weighted averages is described in s. 269T(5A) of the Act.

A weighted average dumping margin is calculated by comparing the total normal value for the investigation period to the total export value for the investigation period. The total normal value for the investigation period is calculated either by summing the quarterly weighted average unit normal value multiplied by the corresponding quarterly export volume or summing the quarterly weighted average unit normal value multiplied by the export volume for each export transaction in the corresponding quarter.

Whilst weighted average unit normal values are typically calculated on a quarterly basis, there may be instances when months periods are preferred. Erratic movement in costs and/or prices over short periods within the investigation period may require calculating monthly unit normal values.

### Product margin

There may be different types/models/grades of a product. The product margin measures the margin of dumping by aggregating the margins of dumping for the discrete types or models.

Where there are different types or models, the fair comparison requirement leads to the determination of 'margins of dumping' for each type or model. Depending on the number of types or models it is possible that there could be many such type 'margins'. In assessing whether there is dumping at the product level requires that regard be given to the export volumes. The table below provides an example of working out the margin of dumping for the product after having regard to the data for model.

Model	Unit	Unit	Export	Dm	Total	Total	Product
	Export	Normal	quantity		dumping	Export	Dumping
	price	value	(tonnes)	(\$/tonne)	value	value	Margin
	(\$/tonne)	(\$/tonne)			\$	\$	%
			(3-2)	(4*5)	(4*2)	(6/7)	
<b>1</b>	<b>2</b>	<b>3</b>	<b>4</b>	<b>5</b>	<b>6</b>	<b>7</b>	<b>8</b>
A	15	26.25	200	11.25	2,250	3,000	
B	25	37	300	12	3,600	7,500	
C	30	42	120	12	1,440	3,600	
					7,290	14,100	<b>51.70%</b>

Therefore an additional calculation will be undertaken in determining the product margin. It is a method of aggregation across the various types in order to determine a single product margin for the exporter. The export volumes in this additional weighting exercise are used because it is the “normal value” of the goods being exported to Australia that is being established, and the unit normal value of the exported goods and the unit export price show the unit margin of dumping. In aggregating Customs and Border Protection does not zero any negative ‘margins’ for a particular model.

### **Currency Conversion**

Section 269TAF of the ACT outlines the treatment of currency conversion where a comparison of export prices with normal values is required.

The principles underlying the provisions of sections 269TAF(3) to 269TAF(6) of the Act is that an exporter faces a lag in responding to exchange rate changes and this should be recognised in anti-dumping investigations. Where there has been ‘sustained movement’ in exchange rates during the period of investigation a 60 day period is given to the exporter to respond to those currency changes and , if seeking not to be dumping, has the opportunity to set new export pricing levels.

The actual exchange rate movements in that 60 day period are disregarded so that dumping findings of a ‘technical’ nature might be avoided.

This typically arises where the sales to Australia take place during a period in which there has been a sustained movement in the rate of exchange, and reflected in an appreciation of the value of the foreign currency in which the domestic sales in the exporting country are denominated compared to the currency in which the exporter’s selling price to Australia is denominated.

Where it is established that there has been a ‘sustained movement’ in the exchange rate, the previously applicable rate of exchange may be applied for a period of 60 days.

A currency may show steady change, or some fluctuation, over time in the rate of exchange. The notion of a ‘sustained movement’ suggests something outside of a normal range of fluctuation. There must have been a ‘movement’, and this ‘movement’ must have been ‘sustained’ throughout subsequent periods.

Customs and Border Protection may, for example, and where the case circumstances warrant it, examine the rate of exchange throughout the investigation period – if the movements, up or down, were not significantly different from a moving average rate of exchange for the previous 60, or 90 days, it may be taken to support a view that no sustained movement had occurred.

### **Sampling**

Every known exporter is typically invited to take part in an investigation by sending a questionnaire to all known exporters/producers at initiation of the investigation inviting their participation<sup>16</sup>. However, an exception arises where there is a large number of exporters as provided in s269TACB(8) of the Customs Act<sup>17</sup>.

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<sup>16</sup> This means that initially all exporters have been selected to be a part of the investigation.

<sup>17</sup> Section 269TACB(8) states: “*If the number of exporters from a particular country of export who provide information in relation to an application for a dumping duty notice is so large that it is not practicable to determine the existence of dumping and to work out individual dumping margins for each of them, the Minister may, on the basis of information obtained from an investigation of a selected number of those exporters:*”

In this situation, if a large number of exporters/producers wish to complete the exporter questionnaire, Customs and Border Protection will consider whether sampling is required to limit the investigation to a smaller number of them so that the investigation is manageable.

### Preliminary Information Request

Every known supplier of the goods will be informed of their right to take part in the investigation. A supplier is a party identified as having supplied the goods and may either be the producer, an intermediary party or the importer.

A preliminary information request (PIR) is sent to all known suppliers at initiation of the investigation seeking information to assist in assessing whether sampling is required. The PIR inquires about: the functions undertaken, for example whether they are producers or traders; whether they are involved in the production or sale of the goods the subject of the investigation; volumes of trade; model or type information; upstream suppliers in the case of a subsidy; and relationships between the exporter and other companies.

Where suppliers/exporters do not respond to the PIR, or do not otherwise make themselves known within the investigation, Customs and Border Protection is precluded from further investigating their situation. In this case, the exporters are considered to have not cooperated with the investigation.

Following an evaluation of the responses Customs and Border Protection will consider whether the number of exporters is so large that it is unable to determine individual margins for each of them. If a large number of exporters are identified, Customs and Border Protection will then decide which exporters should be sampled for further investigation. Exporters not included in the sample for further investigation are considered to be residual exporters.

In identifying the sample of exporters to be investigated, Customs and Border Protection will take into account:

- the individual volume of each identified exporter; and
- the available resources to properly undertake the investigation.

In essence, the sample will be a manageable number of the largest volume exporters. Whilst traders will not be included in its sample, Customs and Border Protection will generally investigate some important traders that are associated with the sampled exporters.

### How is the further selection made?

Customs and Border Protection makes the further selection and includes exporters in its sample having regard to export volumes (the method provided for in s.269TACB(8)(b) of the Act). Using information available to Customs and Border Protection, information provided in the responses to the PIRs, and any other relevant information such as information provided by importers, the export volume is estimated for each exporter of the goods to Australia during the investigation period. Then a manageable number of the largest volume exporters are included in the sample.

### What dumping margin outcomes are possible when there has been sampling?

In summary, in a sampling situation, a consequence of these procedures is that dumping margins may be worked out in the following manner:

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*who constitute a statistically valid sample of those exporters; or who are responsible for the largest volume of exportations to Australia that can reasonably be investigated; decide whether dumping exists, and, if it does, fix dumping margins for such selected exporters and for exporters who are not so selected". (Reflecting the second sentence of Article 6.10 of the ADA).*

*Exporters sampled for further investigation - selected exporters:*

- Cooperating: the exporters selected for further investigation because of their large volumes of trade, who submitted the required information, and permitted verification. These exporters have their individual dumping margins assessed on their own information;
- Non cooperating: for any non-cooperating exporters in the sample export prices and normal values will be determined having regard to all relevant information in accordance with the provisions of s269TAB(3) and s269TAC(6).

*Exporters not sampled for further investigation – residual exporters:*

- includes those exporters that responded to the PIR but were not sampled due to the lower export volumes compared to other exporters;
- the calculation method for residual exporters ensures that a dumping margin is determined which is no greater than the weighted average for the exporters selected for an individual determination and who cooperated with the investigation. This ensures that these exporters are not worse off than the average of the cooperating sampled exporters.

*Non-cooperating exporters – selected exporters*

- parties that did not respond to the PIR, or did not make themselves known, thereby precluding their situation from being further investigated;
- export prices and normal values will be determined having regard to all relevant information in accordance with the provisions of s269TAB(3) and s269TAC(6).

Requests for individual treatment

If an exporter who is not sampled requests its own individual treatment and completes the exporter questionnaire, Customs and Border Protection will investigate and determine individual dumping margins for them only if the time is available and having regard to the resource constraints.

Customs and Border Protection may have regard to the information submitted unless the information provided is unreliable.

## **21. CAUSATION**

### **21.1 CONTEXT**

Before any remedial action can be taken against dumped and/or subsidised imports, it must be demonstrated that the Australian industry producing like goods is injured, and that that injury is caused by the dumped (and/or subsidised) imports.

Australia's legislation generally reflects Article 3 of the Anti-Dumping Agreement and Article 15 of the Agreement on Subsidies and Countervailing Measures.

### **21.2 POLICY**

In assessing causation, Customs and Border Protection examines if there is a direct and discernible link between the material injury (or threatened material injury) and the dumping and/or subsidy that is causing it.

Generally, Customs and Border Protection will examine causation factors coinciding with the injury analysis period. All available evidence will be examined in establishing whether a causal link between the dumped/subsidised imports and the injury to the Australian industry exists. This includes the effect of injury factors set out in the relevant articles in the Agreements (and generally reflected in s. 269TAE of the Act).

Consideration of the factors set out in s. 269TAE(2A) of the Act (and any other factor having a bearing on the examination of injury and causation) is mandatory only to the extent that they are known and assessable.

Customs and Border Protection examines the factors that cannot be attributed to dumped or subsidised imports and does not take the effect of those factors into consideration in determining causal link.

Where multiple countries are involved in the investigation, Customs and Border Protection will consider whether cumulation is appropriate.

### **21.3 PRACTICE**

Information obtained from participants in the Australian market, e.g. Australian industry, importers and end-users is used to evaluate the causal effect of the dumped (and/or subsidised) imports on Australian industry.

As injury caused by other factors cannot be attributed to dumped or subsidised imports, Customs and Border Protection considers the influence of other factors when assessing whether there is a causal link between the injury to the Australian industry and the presence of dumped and/or subsidised imports in the market.

Such other factors may include, but are not limited to:

- the volume and prices of imports that are not dumped or subsidised;
- contraction in demand or changes in the patterns of consumption;
- trade restrictive practices of, and competition between, foreign and domestic producers;
- developments in technology;
- the export performance and productivity of the domestic industry.

Customs and Border Protection will also consider the implications of undumped/unsubsidised goods sold at lower prices than the dumped/subsidised goods in the marketplace. In considering the effect of the undumped/unsubsidised goods in the market, Customs and Border Protection may have regard to:

- customer preference (i.e. factors other than price such as quality considerations);
- the market share of the goods;
- whether prices have been lowered to compete with the dumped/subsidised product;
- like goods sourced from a country with low costs/prices which the dumped/ subsidised source cannot match, but which compete on some other basis.

A determination of causation will be based on positive evidence and involve an objective examination of both:

- the volume of the dumped (and/or subsidised) goods and the effect of those imports on prices in the domestic market for like goods; and
- the consequent impact of these imports on domestic producers of such goods.

Customs and Border Protection will undertake a price undercutting analysis that focuses on data that covers transactions made during the investigation period. This analysis compares the price of the imported goods with the sales price of the locally produced goods, ensuring that the transactions are made under the same conditions (e.g. timing, volume, discounts, delivery, credit, same customer etc).

## 22. CUMULATION OF INJURY

### 22.1 CONTEXT

Section 269TAE(2C) of the Act sets out the requirements for assessing the cumulative effects of exports of goods to Australia from different countries. Where exports from more than one country are simultaneously the subject of anti-dumping investigations, the Minister may cumulatively assess the effects of such imports if:

- the margin of dumping established for each country is not negligible; and
- the volume of imports from each country is not negligible; and
- cumulative assessment is appropriate in light of the conditions of competition between the imported goods and the like domestic goods.

Only then can the decision to cumulate be considered. Article 3.3 of the Anti-Dumping Agreement and Article 15.3 of the Agreement on Subsidies and Countervailing Measures address this matter.

### 22.2 POLICY

If separate applications are lodged against different countries, cumulation will be considered if the separate investigation periods substantially overlap (this is taken to be a period of not more than 6 months).

In determining the dumping margins and volumes, Customs and Border Protection refers to the termination provisions in section 269TDA of the Act. The negligible margin of dumping is defined as less than 2% of the export price. Negligible volume is defined as less than 3% of the imports of the like products in the importing member which individually account for less than 3%, unless they collectively account for more than 7% of imports.

### 22.3 PRACTICE

Data is collected and verified during the course of an investigation that is relevant to the question of cumulation.

In assessing dumping margins, the margin of dumping will be established for each exporter and for each country in accordance with Article 3.3 of the Anti-Dumping Agreement. Where a country dumping margin is negligible, the country will not be included in the cumulation of injury.

The conditions of competition is assessed between the goods imported from all countries and the conditions of competition between the exported goods and like goods that are locally produced by the Australian industry. Such assessment might be, but is not confined to:

- Physical characteristics and uses of the domestic like product and imports from each of the countries whose imports may be cumulated, as well as the degree of interchangeability, fungibility, or substitutability. Considerations of customer perception and specific customer requirements; tariff classification may be relevant in this regard;
- For the purpose of analysing threat of material injury, the levels and trends in the volume of imports from each of the countries whose imports may otherwise be cumulated, either in absolute terms or relative to production or consumption in the importing country.
- The existence of sales of the domestic like product and imports from each of the countries whose imports may otherwise be cumulated. Examples of this are:
  - through common or similar channels of distribution;
  - during the period of investigation;
  - the trends of prices for the domestic like product and imports from each of the countries whose import may be cumulated;

- the levels and trends of prices undercutting by imports from each of the countries whose imports may otherwise be cumulated during the period of the dumping investigation;

Customs and Border Protection will not have regard to data collected outside the injury period in assessing the conditions of competition.

## **23. NON-INJURIOUS PRICE**

### **23.1 CONTEXT**

Section 269TACA of the Act and ss 8, 9, 10, 11 of the Dumping Duty Act reflect Article 9.1 of the Anti-Dumping Agreement and Article 19.2 of the Agreement on Subsidies and Countervailing Measures. Under the Dumping Duty Act, the Minister must have regard to the desirability of ensuring that the amount of dumping duty is not greater than is necessary to prevent injury or a recurrence of the injury.

Section 269TACA of the Act identifies the non-injurious price (NIP) of the goods exported to Australia as the minimum price necessary to remove the injury caused by the dumping and/or subsidisation.

### **23.2 POLICY**

Customs and Border Protection will generally derive the NIP from an unsuppressed selling price (USP). The USP is a selling price that the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports. The USP does not redress the effects of other causes of injury including fair import competition or competition from other domestic producers.

In calculating the USP, the Australian industry's selling prices will normally be used at a time unaffected by dumping. If there are sound reasons for not using this approach, a price may be constructed based on the industry's cost to make and sell, plus a profit. If either of these methods is not appropriate, the selling prices of undumped imports in the Australian market will be used.

The NIP will be considered before making a preliminary affirmative determination and imposing securities. Customs and Border Protection will also examine USP/NIP issues in the statement of essential facts for the purpose of assessment of material injury and causal link.

When establishing the USP/NIP in reviews under Division 5 of Part XVB of the Act, Customs and Border Protection will generally not depart from the approach taken in the original investigation or a previous review, unless there has been a change in circumstances that either makes the earlier USP approach:

- unreasonable; and/or
- less preferred amongst options now available.

Similarly, when establishing the USP/NIP in accelerated reviews under Division 6 of Part XVB of the Act, Customs and Border Protection will not depart from the approach taken in the original investigation or a previous review.

### **23.3 PRACTICE**

The method of calculating a NIP is not prescribed in the legislation but it is usually based on Australian industry's unsuppressed selling price (USP).

In calculating the USP, the Australian industry's weighted average selling price is calculated for a period unaffected by dumping, with a preference for a 1 -year minimum period. Seasonal fluctuations or longer cyclical trends are taken into account, if applicable.

Selling prices no older than 5 years are generally used (this includes data covering three completed financial years sought in the application form and the current financial year, plus the 155 day investigation timeframe). However, this does not preclude the applicant from supplying

data from previous periods. Where it can be demonstrated that the information from the previous periods is relevant to the establishment of the USP and if that data is verified, Customs and Border Protection will normally consider using those selling prices from the previous periods as a basis for the USP. Customs will also consider the updating of old prices by indexing or other means where reasonable.

Customs and Border Protection may not use the approach of updating old prices if, for example:

- the market, and in particular the Australian industry's selling prices, were affected by dumping over the entire injury period;
- the industry or market structure changed significantly and it is reasonable to expect the Australian industry's selling prices would have been affected as a result. It is also recognised that industry or market structure change may, in some circumstances, not materially impact prices;
- the price may be unreasonably dated.

The existence of any one or more of the above circumstances should not normally be taken as a reason for automatic exclusion of the price or market approach in establishing an USP. The appropriate approach will be considered on a case-by-case basis.

Where it's considered that it is not reasonable to use the price or market approach in establishing USP, the reasons for that position will be outlined in relevant reports. A weighted average of the most recent verified industry cost to make and sell (CTMS) from the current application will generally be used, with a preference for a 1 year minimum. This allows for fluctuations for seasonal or longer cyclical trends to be taken into account.

In addition to verifying data contained in the application, industry data (including CTMS) will be gathered and verified for a period subsequent to that provided in the application. Customs and Border Protection may consider including this data for the purpose of establishing a constructed USP.

Options for determining a reasonable amount for profit are:

- weighted average profit rate (% mark-up) achieved by the industry in the most recent period unaffected by dumping, with a preference for a 1-year minimum; or
- profit rate (% mark-up) from the Australian industry's similar category of goods (where the data for similar category of goods is verified).

Where it is unreasonable to use either of the two options above for determining profit, Customs and Border Protection may consider the use a profit rate (% mark-up) calculated:

- with regard to return on investment – where the resultant price is considered reasonable; or
- from appropriate profit surveys.

In the latter two approaches, Customs and Border Protection will also consider whether it is appropriate to obtain an independent assessment of an appropriate amount for profit.

Reasons for not using a constructed price method include:

- a reasonable rate for historical profit could not be established.
- the industry CTMS data was unsuitable for a construction approach.
- the result is an unreasonable level of USP (For example, the resultant USP may be unreasonable when contrasted with the price obtained historically.)

Where it is not reasonable to use the constructed price method, the reasons for this position will be outlined in relevant reports.

In assessing whether the prices of undumped imports in Australia are suitable for using as an USP, the following factors will be considered:

- whether such imports were in sufficient volume to influence the market price; and
- whether the prices have been affected by dumping; and
- whether Customs and Border Protection can be confident these goods are undumped.

This approach would normally be adopted where exports from a particular exporter, exporters, country or countries subject of the investigation were found not to be dumped; and they were present in the Australian market in sufficient volume to influence price; and the price in Australia of such exported goods was not affected by dumping.

If information is available relating to Australian selling price data for goods from countries other than those under investigation, particular care must be taken in regard to whether:

- such imports were in sufficient volume to influence the market price; and
- the prices have been affected by dumping.

In cases of multiple Australian producers or one producer with multiple plants, Customs and Border Protection generally seeks to establish one USP for each product or, where appropriate, each model/type/grade of the product.

In establishing a single industry USP for multiple Australian producers, Customs and Border Protection will generally use a weighted average figure established in accordance with the options above. However, the following may be used:

- data in relation to a selected representative group of sales (for example, a large and/or representative contract); or
- data from the most efficient manufacturer or plant.

Where it is not reasonable to use the weighted average approach the reasons for this will be outlined in relevant reports.

In cases of multiple importers, multiple exporters and multiple countries, Customs and Border Protection generally calculates one USP for each product, or each model/type/grade of product. Deductions from this figure are made for post-exportation costs separately for each country. Therefore, one NIP is calculated for each country and product combination, or each country and model/type/grade combination.

Data gathered from importers and exporters includes the post exportation costs, which form the basis of deductions from the USP to calculate the NIP. In the case of multiple importers/exporters, Customs and Border Protection generally uses information obtained from the most efficient representative importer/exporter from each country. That is, usually the importer at the relevant level of trade, in sufficient sales volumes and with the lowest on-costs.

In cases where no verified data is available from exporters/importers from a particular country, it may be that verified post-exportation costs are unavailable for that country. In this case Customs and Border Protection would normally rely on post-exportation costs that are available from other sources, for example, data from another country or data from the application.

A NIP is calculated for the purpose of measures even though it may be clearly above the normal value. While the NIP may not be the operative measure when anti-dumping measures are first applied, it could be the case that subsequent reviews provide for significantly revised variable factors. It is possible the operative measure may be the normal value after one review and the NIP after another.

Customs and Border Protection aims to examine the USP and NIP as early as the consideration of the application.

Estimates of the USP and the NIP can assist in assessing whether dumping has caused material injury and the level of remedy that industry could expect from anti-dumping measures. This is a useful test during the consideration of an application. As the investigation advances the same issues can be further considered, while progressively referring to data that has been verified.

As the investigation progresses, the NIP will be compared to export prices to assess causal link and the likelihood of an injury margin. Where export prices are found to be above the NIP, Customs and Border Protection may consider the likelihood that material injury was not caused by dumping.

The NIP will usually be calculated using the proprietary information of the Australian industry and other interested parties. As it is possible in some instances for this information to be mathematically revealed if the NIP is made public, calculations of the NIP are kept confidential.

The table below provides an example of a calculation of the NIP derived from a USP.

	<b>USP</b>	<b>\$1.20</b>
Less Profit	0.150	
Less AS&G expenses	0.175	
Less packaging costs	0.089 <sup>①</sup>	
Less into store costs	0.005	
Less o/s freight & insurance	0.064	
	<b>Duty inclusive price</b>	<b>\$0.717</b>
Less duty @ 10%	0.065 <sup>②</sup>	
	<b>NIP</b>	<b>\$0.652</b>
NIP per dozen = \$7.824		

① Where importer engages in a value added activity, in this case packaging.  
 ② Duty may be calculated as follows:  
 if X = the duty inclusive price (0.717)  
 Y = the duty rate expressed as a decimal (0.10)  
 N = NIP

$N + (Y \times N) = X$ , then  $\frac{X}{1 + Y} = \frac{0.717}{1.10} = 0.652$       So, duty \$ = (X - N)  
 = 0.717 - 0.652  
 = 0.065

OR,  $N = \frac{X}{1 + Y}$ , therefore duty amount =  $Y \times \frac{X}{1 + Y} = 0.10 \times \frac{0.717}{1.10} = 0.065$

*Alternatively, if the duty rate were to be expressed as a percentage then the*

duty amount =  $\frac{Y}{100 + Y} \times X$ , (i.e.  $\frac{10}{110} \times 0.717 = 0.065$ )

*❖Note: Costs of importation are usually the actual costs incurred by the importer, although in some cases costs may be calculated (e.g. profit or administration, selling and general expenses could be based on a percentage of the USP; or into store costs, overseas freight and insurance and duty based upon a percentage of the NIP). NIPs are always calculated in Australian dollars.*

## 24. TERMINATION OF INVESTIGATIONS

### 24.1 CONTEXT

The CEO is required to terminate investigations in respect of individual exporters, exporters generally, or by country, where certain conditions are evident. The provisions of s. 269TDA of the Act set out the following requirements for termination of investigations;

- all dumping margins are negligible; or
- countervailable subsidisation is negligible; or
- negligible volumes of dumping are found; or
- negligible volumes of countervailable subsidisation are found;
- dumping causes negligible injury;
- subsidisation causes negligible injury

This largely reflects Articles 5.8 of the Anti-Dumping Agreement and 11.9 of the Agreement on Subsidies and Countervailing Measures. The Agreements require that investigations shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping (or subsidisation), or of injury so as to proceed with the investigation. There shall be immediate termination in cases where the authorities determine that the margin of dumping (or subsidy) is de minimis (i.e. less than 2 per cent), or that the volume of dumped (or subsidised) imports, actual or potential, or the injury is negligible.

### 24.2 POLICY

In general terms, if the CEO is satisfied that one of the termination conditions set out in s. 269TDA of the Act are met, then the CEO must terminate the investigation promptly, and must not continue the investigation (unless the termination is only in respect of one of multiple exporters, or in relation to one of multiple countries).

The CEO will terminate an investigation in relation to an individual exporter where the dumping margin of the exporter is negligible (de minimis). Dumping margins are negligible if the margin is less than 2% when expressed as a percentage of the export price or weighted average of export prices.

The CEO will terminate a subsidy investigation in relation to an individual exporter if satisfied that the exporter concerned has received no countervailable subsidy, or the level of the subsidy is negligible. A countervailable subsidy is negligible as defined in s. 269TDA(16) of the Act.

The CEO must terminate the investigation so far as it relates to a country if satisfied that negligible volumes of dumping are found. Negligible volumes of dumped goods is defined in s. 269TDA(4) of the Act.

Section 269TDA(5) of the Act provides that imports of dumped goods will be "aggregated". Import volumes of dumped goods from countries that individually constitute less than 3% of the total Australian import volume over a "reasonable examination period" are not considered negligible if, cumulatively, they account for more than 7% of the total Australian import volume over a reasonable examination period. The legislation requires an assessment of negligible volumes of dumped imports, including those with margins of less than 2%.

The CEO must terminate the investigation so far as it relates to a country if the CEO is satisfied that negligible volumes of countervailable subsidisation are found. A negligible volume of countervailable subsidisation is defined in s. 269TDA(8) of the Act.

Sections 269TDA(9) and (10) of the Act provide that imports of subsidised goods will be "aggregated". Different rules apply for developing and other countries. Sections 269TDA(10) and (9) of the Act respectively refer.

Sections 269TDA(13) and (14) of the Act require the CEO to terminate the investigation if the CEO is satisfied that Australian industry has not been injured or injury caused (or the establishment of, or hindrance) is negligible.

In interpreting s. 269TDA(13) of the Act, the CEO has regard to the wording of Article 5.8 of the Anti-Dumping Agreement which provides "immediate termination in cases where the authorities determine that the margin of dumping is de minimis, ..., or the injury, is negligible". Therefore, where in the first instance the CEO is satisfied that injury to the Australian industry is negligible, a finding on dumping is not required in order to terminate under this provision.

**24.3 PRACTICE**

The example below showing dumping margins, volumes of imports for each exporter and for each country. Volumes are expressed as a percentage of the total Australian import volume for the goods. Dumping margins are expressed as a percentage of the export price.

		Dumping Margin	Volume of Imports	Volume of Dumped Imports
Country 1	Company A	23.00%	31.20%	31.20%
	B	8.00%	5.40%	5.40%
	C	12.00%	5.00%	5.00%
			41.60%	41.60%
Country 2	Company D	0.00%	12.60%	
	E	0.00%	5.80%	
	F	1.80%	1.60%	1.60%
	G	11.40%	1.30%	1.30%
			21.30%	2.90%
Country 3	Company H	2.00%	2.80%	2.80%
Country 4	Company I	10.00%	2.10%	2.10%
	J	0.00%	1.80%	
	Residual (K)	10.00%	1.00%	1.00%
			4.90%	3.10%
Country 5	Company L	13.00%	1.50%	1.50%
Country 6	Company M	1.50%	0.30%	0.30%
Country 7	Company N	0.00%	7.30%	
Country 8	Company O	10.00%	0.10%	0.10%
Volume of imports from countries under reference:			79.80%	
Volume of imports from countries NOT under reference:			20.20%	
			100.00%	

Where the CEO decides to terminate an investigation, public notice of the decision will be given.

## **25. PRELIMINARY AFFIRMATIVE DETERMINATION & PROVISIONAL MEASURES**

### **25.1 CONTEXT**

When considering an application for the publication of a dumping or countervailing duty notice under s. 269TD of the Act, the CEO may, at any time not earlier than 60 days from the date of initiation of an investigation, make a preliminary affirmative determination (PAD) that there appears to be, or it appears there will be, sufficient grounds for the publication of a notice.

The provisions reflect the intent of Article 7.1 of the Anti-Dumping Agreement which provides that provisional measures may only be applied after a PAD has been made of dumping and consequent injury to a domestic industry, and the authorities concerned judge such measures are necessary to prevent further injury being caused during the investigation. Similar conditions are contained in Article 17.1 of the Agreement on Subsidies and Countervailing Measures.

### **25.2 POLICY**

A PAD may be made at any time not earlier than 60 days after the date of initiation of an investigation as to whether there are sufficient grounds for the publication of a dumping duty notice (or countervailing duty notice) in respect of goods the subject of the application.

In making a PAD, Customs and Border Protection must have regard to the application, any submissions that are received within 40 days after the date of initiation of the investigation and, may have regard to any other matters considered relevant.

There is not obligation to have regard to any submissions received after day 40 if to do so would, in the CEO's opinion, prevent the timely consideration of the question whether or not to make a PAD. Nevertheless Customs and Border Protection will not disregard relevant available determinative information prior to any decision the CEO may take in respect of making a PAD even if it was so received after day 40 of the investigation.

Customs and Border Protection cannot require and take securities under s. 42 of the Customs Act in respect of any interim dumping duty (or countervailing duty) that may be payable on the goods under consideration unless the CEO has made a PAD and is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues.

### **25.3 PRACTICE**

#### Preliminary Affirmative Determination

A PAD must be made before provisional measures can be imposed or a price undertaking considered by the Minister. In some circumstances, a PAD may be made without provisional measures being imposed (e.g. in order to consider an undertaking that the exporter has indicated they wish to offer). If a PAD is made public notification of this decision must be given.

Where the CEO is satisfied that there appear to be sufficient grounds for the publication of a notice (i.e. a dumping or countervailing duty notice), a PAD report will contain the following detail:

- the applicant and other domestic producers;
- importers and exporters;
- procedural background on the investigation process;
- full description of the imported goods, including classification and origin;

- full description of the locally produced goods (including types, models etc where appropriate);
- domestic market;
- period of investigation for both dumping and injury;
- the estimated dumping margins including the calculation of normal value and export price;
- outline of injury analysis;
- causal link;
- reasons for imposing any provisional measures;
- any other relevant detail such as the expected date of statement of essential facts.

The CEO can make a PAD at any time after day 60 in the investigation and before the report and recommendation is made to the Minister (at day 155 unless an extension has been granted).

Visits to the Australian industry are undertaken soon after initiation to verify the information contained in the application. Therefore, by day 60, the CEO should be in a position to evaluate the reliability of the industry's cost to make and sell information for the purposes of assessing the unsuppressed selling price and injury claims. If the Australian industry comprises numerous members it may not be possible to have completed that evaluation by day 60.

In relation to whether dumping is occurring, the due date for exporter submissions is day 40. However, exporter's information is generally not verified before day 60. Therefore at day 60, whilst information in submissions is unlikely to have been verified, the available information from the cooperating exporters may provide more reliable information than the normal value and export price information submitted in the industry's application.

In respect of causal link, it is likely that most of the information needed to undertake the assessment would have been gathered upon completion of importer verification visits and visit reports, typically completed by day 80. Customs and Border Protection seeks to obtain importer sales information that would be sufficient for price comparisons and market share analysis. The claims made by the industry in its application concerning causal link are assessed against information gathered during these importer verification visits. For example, using sales information provided by importers may allow for a preliminary price undercutting analysis that supports allegations made by the industry. Verified information from importers also allows for a better assess as to whether any claimed decline in market share has been taken up by imports from the nominated country.

### Provisional measures

The CEO may apply provisional measures in order to prevent further injury, or threat of injury, to the Australian industry while the investigation is proceeding to finalisation. Customs and Border Protection may require and take provisional measures in the form of securities under ss 42 to 45 of the Dumping Duty Act in respect of any interim duty that may become payable on the goods.

A security may be given (s. 43 of the Dumping Duty Act refers) in the manner and form approved by the relevant Regional Director, usually this means either a cash or documentary security with surety. A general security as specified in s. 44 of the Dumping Duty Act covering all transactions in a specified period is not usually appropriate as the overarching intention of the provisional measure is to affect the prices on the Australian domestic market for the product concerned and an actual cash deposit or bank guaranteed security is the best vehicle to achieve that objective.

The Regional Director may refuse to deliver the goods pending receipt of the required security. Dumping securities may be taken at the time of entry of the goods and can be held for a period of up to 6 months (or up to 9 months if the exporter requests). Countervailing securities can be held for a period of up to 4 months. Securities are collected on an individual shipment basis. Where securities have been imposed to protect the Australian industry during the remainder of an investigation they will be collected until the Minister has made a decision in relation to the application.

The public notice of the PAD states whether securities will be collected on future shipments and sets out the date from which they will apply. This date is generally the date of the PAD. Details of the amount of the security to be collected are made available by Regional Dumping Liaison officers, on request, to bone fide importers.

## **26. STATEMENT OF ESSENTIAL FACTS**

### **26.1 CONTEXT**

In accordance with s. 269TDAA(1) of the Act, the CEO must issue a statement of essential facts (SEF) within 110 days of the initiation of an investigation (unless the date that the statement of essential facts was to be placed on the public record has been extended). This requirement reflects Article 6.9 of the Anti-dumping Agreement and Article 12.8 of the Agreement on Subsidies and Countervailing Measures which provide that authorities shall inform all interested parties of the essential facts under consideration before a final determination is made.

### **26.2 POLICY**

A SEF is issued at day 110 in all investigations except for an accelerated review. The Minister can extend the time to make an SEF under s. 269ZHI of the Act. The SEF sets out the essential facts on which the CEO proposes to base recommendations to the Minister.

In preparing the SEF, the CEO must have regard to matters set out in the application for anti-dumping measures and to submissions received within 40 days after the initiation of the investigation. The CEO may also have regard to any other relevant matters.

Parties have 20 days after publication of the SEF to comment on the SEF. The CEO must have regard to submissions made within 20 days in deciding on the recommendations to be made to the Minister. The CEO is not obliged to have regard to late submissions if to do so would prevent the timely placement of the SEF on the public record.

### **26.3 PRACTICE**

A SEF is issued in respect of investigations for new measures, reviews of existing measures, and inquiries into whether measures should continue. The SEF documents findings relevant to the type of investigation undertaken and addresses issues raised by interested parties during investigations.

A SEF does not contain proposed recommendations in relation to matters such as export price, normal value and adjustments effecting the normal value however, the SEF is about reporting the facts, analysis and findings rather than detailing proposed recommendations in relation to issues such as causation and the imposition (or otherwise) of measures.

#### SEF in respect of investigations for new measures

The SEF first describes the goods the subject of the application, including technical specifications, production processes, main uses and the relevant tariff classification or classifications. The SEF then describes the like goods produced by Australian industry in terms of the like goods framework and then presents the findings of the investigation.

If the nature of the goods and like goods was an issue during the investigation, the SEF sets out the claims and counter claims of interested parties and the findings of Customs and Border Protection.

The SEF includes a description of the domestic producers, their market share, findings in respect of manufacturing processes and capacity of the Australian industry to produce and the distribution channels and other participants in the Australian market. The CEO must consider whether there is an Australian industry producing like goods according to the terms of ss.269T(2), (3) and (4) of the Act.

The SEF describes the Australian market. Factors considered include market size, individual market sectors, factors affecting demand/sales of goods, the sources of the supply and trends in the imported and domestically produced goods, distribution channels for the goods, differences in marketing methods, recent changes, end users, seasonal fluctuations, packaging, contracts, etc.

An assessment of the size of the market will generally involve verified sales data obtained from Australian industry members and importers. The SEF will not disclose commercially confidential information about the market.

The SEF will only outline the methods used to determine export price and normal value in accordance with the relevant provisions. Exporters visit reports (concerning normal value and export price) and importer visit reports (concerning export price and market factors relating to injury) generally contain a detailed examination of the exporter's domestic sales and an examination of sales of the imported goods made in Australia.

The SEF contains a summary of the dumping margins established for each exporter in each of the countries nominated.

The SEF addresses each of the injury factors including trends in pricing, sales volumes, market share, profits and profitability. It also addresses any relevant claims made during the course of the investigation, if supported by evidence. The SEF draws a preliminary conclusion about whether the claims are substantiated.

In considering causal link, the SEF analyses the price and volume effects of dumped goods on the Australian market over the injury investigation period. The SEF sets out the facts in relation to other possible causes of injury to Australian industry.

The SEF draws a preliminary conclusion about whether the dumped goods caused injury to Australian industry and whether that injury was material.

Where multiple countries are subject to investigation in respect of the same goods, cumulation may be considered as part of the causal link analysis.

The SEF addresses the issue of non-injurious price and may contain an analysis of the factors relevant to determining the non-injurious price and the method used, as well as interested parties' comments.

#### SEF in respect of reviews of existing measures

A SEF in respect of an inquiry into whether the measures should continue will:

- identify the applicant and scope of the review;
- describe the measures applying to the goods the subject of review;
- set out the methods of determining normal value and export price;
- determine whether the variable factors relevant to the taking of anti-dumping measures and affecting the NIP have changed, and if so, their movement.

#### SEF in respect of the inquiry into whether the measures should continue

A SEF report in respect of a review of existing measures will:

- identify the applicant and the goods subject to measures;
- outline the history of reviews of the measures since they were first imposed;
- document the current state of the Australian market and changes in the market place since measures have been in place;
- set out the pattern of exports since the measures were imposed, and whether there is current dumping of the goods;

- contain an analysis of the economic condition of Australian industry, changes in the industry since measures were imposed, and whether there is still an industry producing like goods to the imported goods; and
- discuss the likelihood of continuing or recurring dumping and continuing or recurring injury.

## 27. INTERIM DUMPING DUTIES

### 27.1 CONTEXT

Under s. 269TG of the Act, if the Minister is satisfied that certain conditions have been met, he or she may declare in a public notice that duties have been imposed. The notice remains in force for five years unless revoked earlier.

The relevant provisions as set out in Division 3 of the Act and s. 8 of the Dumping Duty Act give effect to Articles 9.1, 9.2, 9.3 and 9.4 of the Anti-Dumping Agreement and Article 19 of the Agreement on Subsidies and Countervailing Measures.

### 27.2 POLICY

The Minister must be satisfied that goods have been dumped, and because of that material injury to an Australian industry producing like goods has been caused or threatened, or in a case where securities were taken as a result of a preliminary affirmative determination, that material injury would or might have been caused to an Australian industry producing like goods if the security had not been taken.

The Minister has the power to impose duties under section 8 of the Dumping Duty Act.

Section 8(3) of the Dumping Duty Act refers to an interim duty on goods the subject of a dumping duty notice pending final assessment of the dumping duty payable. The amount of interim duty payable is ascertained under ss 8(4), 8(5) and 8(5A) of the Dumping Duty Act.

Under s. 8(4) of the Dumping Duty Act the interim dumping duty payable is an amount equal to the sum of the difference between the ascertained export price (AEP) and the ascertained normal value (ANV), and any duty, payable when the actual export price of imported goods is less than the AEP.

Section 8(5) of the Dumping Duty Act describes how the difference between ANV and AEP for interim dumping duty is ascertained;

- as a proportion of the export price of the particular goods or of the ascertained export price, whichever is greater; (e.g. 13.5% of the export price (DXP), or 13.5% of the AEP, whichever is greater). This is an "ad valorem" rate; or
- by reference to a unit of quantity (e.g. \$A13.50 per kilogram); or
- a combination of ad valorem and unit of quantity (e.g. 7.5% of the DXP or the AEP of goods of that kind, whichever is greater plus AUD7.00 per kilogram).

Section 8(5A) of the Dumping Duty Act specifies that in imposing interim dumping duty, the Minister must have regard to the desirability of fixing a lesser amount of duty where the non-injurious price (NIP) is less than the normal value. This is the "lesser duty" rule. Where the Minister decides to impose dumping duty at a level lower than the maximum allowed in s. 8(4) of the Dumping Duty Act, the NIP applies to the calculation of the ANV and subsequently to the final assessment of dumping duty. The NIP is defined at s. 269TACA of the Act.

Section 8(5B) of the Dumping Duty Act provides that where simultaneous dumping and countervailing measures are to be imposed, the export price of the goods (DXP), plus the difference between ANV and AEP for interim dumping duty, plus the interim countervailing duty, will not exceed the NIP. Where simultaneous dumping and countervailing measures apply the interim countervailing duty calculation is automatically triggered on the Customs declaration, as well as the interim dumping duty up to the level of the NIP. The two amounts are then added.

Where the export price of the particular goods is less than the AEP, the difference is collected, regardless of the NIP.

### 27.3 PRACTICE

Any securities taken after making a preliminary affirmative determination are transferred to revenue as interim anti-dumping duty on publication of a notice under s. 269TG(1) of the Act.

The Minister may also publish a notice in relation to goods that had no security imposed where Customs and Border Protection had the right to require and take securities. If a notice is not published the Minister has discretionary powers to cancel any securities that have been collected.

A notice under s. 269TG(1) of the Act is subject to the conditions of s. 269TN of the Act concerning retrospective notices.

The Minister may publish a notice under s. 269TG(2) of the Act in order to impose duties on goods that may be exported in the future at dumped prices. The Minister must be satisfied that the export price of the goods that have already been exported to Australia is less than the normal value of the goods and that the export price of any future exports to Australia may be less than the normal value of those goods. The Minister must also be satisfied that because the goods are being, or may be, exported to Australia at a dumped price, a causal link to the injury exists. A notice under this section applies to goods exported after the date of its publication, or a later date as specified in the notice.

The Minister may publish a notice under this section independent of a notice published under s. 269TG(1) of the Act. If goods were exported to Australia before the publication of a notice under s. 269TG(2) of the Act, and no s. 269TG(1) of the Act notice had been published, that particular shipment of goods is not subject to interim dumping duty.

Notices under this section must include the respective amounts of the ascertained normal value, the ascertained export price, and the ascertained non-injurious price, unless, upon written request, the Minister decides that the publication of that information would be detrimental to the commercial interests of any party (s. 269TG(3) of the Act refers). In practice, the ascertained amounts are shown as a confidential attachment in a table attached to the notifications made under ss 269TG and 269TJ of the Act.

The ascertained amounts will generally be expressed in the following currencies:

- AEP - denominated in the currency in which the export sales are usually made;
- ANV - denominated in the currency in which the domestic sales are usually made;
- NIP - denominated in the Australian dollars

The Minister must cause notices under s. 8(5) of the Dumping Duty Act to be published in the Gazette, except where it would adversely affect the business or commercial interests of any party. The usual practice is to publish the name of the exporter, a description of the goods, and the amount of the interim dumping duty payable. The public notice imposing measures is not published if publication would adversely affect business or commercial interests.

Section 8(5D) of the Dumping Duty Act specifies when a notice under s. 8(5) of the Dumping Duty Act may have effect. The date of effect can be a date prior to publication, the date of publication, or a date after publication but not a day on which an earlier notice applied to the goods. A notice taking effect prior to publication is used in conjunction with notices made under s. 269TG(1) of the Act. The date of effect of a notice applies to goods entered for home consumption from the specified date.

Sections 8(3), 8(4), 8(5) and 8(5A) to (5D) of the Dumping Duty Act complete the taxing code for imposing interim dumping duties. Division 4 of Part XVB of the Act provides for importers to apply for an assessment of the actual duty liability, and repayment of excess interim duty. The Minister determines the actual normal value and export price of each consignment within a particular period in assessing the exact liability. Section 8(6) of the Dumping Duty Act specifies the amount of dumping duty payable.

Section 8(7) of the Dumping Duty Act provides that the Minister may exempt goods from interim dumping duty and dumping duty if:

- like or directly competitive goods are not offered for sale in Australia on equal terms under like conditions to all purchasers;
- a Tariff Concession Order (TCO) applies to the goods;
- a Customs by-law applies to the goods and suitably equivalent goods produced or manufactured in Australia are not reasonably available;
- either the duty payable on the goods is zero, or the rate payable is equivalent to a special concessional rate applicable to the goods and suitably equivalent goods produced or manufactured in Australia are not reasonably available; or
- the goods are samples for the purposes of promotion.

The Minister is not obliged to exempt goods if they meet the criteria. If an exemption is sought and granted by the Minister, the exemption notice must be published in the Gazette.

## **28. THIRD COUNTRY DUMPING / COUNTERVAILING DUTIES**

### **28.1 CONTEXT**

Sections 269TH and 269TK of the Act are similar to s.269TG and s.269TJ respectively but relate to anti-dumping and countervailing measures imposed on third countries where the Minister is satisfied that certain conditions have been met. Under s.269TH(1) and s.269TK(1), the Minister may impose measures on goods produced or manufactured in a particular country that have been exported to Australia when satisfied that those goods are dumped or a countervailable subsidy has been received in respect of those goods, and because of that, material injury to an industry in a third country engaged in the production of like goods has been or is being caused or is threatened. Notices under these sections are subject to the conditions of s.269TN.

Notices under s.269TH(1) and (2) declare that s. 9 of the Dumping Duty Act apply and notices under s.269TK(1) and (2) declare that s.11 of the Dumping Duty Act.

Like dumping duties under s. 8 of the Dumping Duty Act, third country dumping duties imposed under s.9 of the Dumping Duty Act do not apply to goods exported to Australia from New Zealand.

### **28.2 POLICY**

Following a decision by the CEO to not reject an application by the Government of a third country for the imposition of anti-dumping measures, an investigation will examine whether material injury to a domestic industry in a third country has been caused by dumped exports to Australia from a particular country.

### **28.3 PRACTICE**

The investigation will establish export prices and normal values for goods exported to Australia from a particular country and determine whether those goods have been exported at dumped prices during the investigation period. Customs and Border Protection will also undertake an assessment of the economic condition of the industry as a whole in the third country. The injury analysis will not only be confined to that third country industry's exports to Australia.

## **29. UNDERTAKINGS**

### **29.1 CONTEXT**

An undertaking is an agreement between the Minister and the exporter that the exporter will conduct future export trade in a manner that will avoid causing or threatening material injury to the Australian industry, or materially hindering the establishment of the industry.

The acceptance of the undertaking by the Minister is an alternative to him, or her, publishing a dumping notice under s. 269TG(2) of the Act.

### **29.2 POLICY**

Only the exporter of the goods may offer undertakings. Offers of undertakings by a trader/intermediary alone will not be the subject of recommendations to the Minister. However, the terms of an undertaking by an exporter may have regard to its trading relationships by including the name of the trader or intermediary, and relevant pricing information. The CEO will consider whether, having regard to all the circumstances, an undertaking in such terms is adequate to remove the injury, or threat of injury, to which the application for a dumping duty notice/countervailing duty notice was addressed.

In all circumstances, including where an intermediary/trader is named in an undertaking, it will be the exporter who is subject to the obligations established by the terms of the undertaking and it is the exporter who is responsible for ensuring all terms of the undertaking are complied with. Accordingly, a failure by the trader/intermediary to comply with the pricing established in the undertaking can result in a breach of the terms of the undertaking by the exporter. Such a breach of the terms of the undertaking may result in the resumption of the investigation into the need to publish a dumping duty notice and/or countervailing duty notice.

The undertakings following consideration of anti-dumping matters by the Minister are exporter based given the terms of s. 269TG(4) - undertakings by each exporter may be all at the same export price.

Section 269TG(5) of the Act requires the Minister to have regard to the desirability that the undertaking relate to a non-injurious price (NIP) for the goods. That is to say, any price increase to which the undertaking relates should be at a level that is sufficient to remove the material injury.

Similar provisions exist in respect of countervailing investigations under s269TJ of the Act.

Customs and Border Protection is not precluded from taking securities under section 42 of the Act in respect of interim dumping duties before acceptance of an undertaking by the Minister.

### **29.3 PRACTICE**

The typical process leading to the acceptance of an undertaking is where the exporter, following the making of a preliminary affirmative determination by the CEO, writes to the CEO offering an undertaking in certain terms. The exporter's offer is then considered by the CEO and forms the basis of recommendations to the Minister under s. 269TEB of the Act regarding undertakings offered.

Those recommendations may be made during the course of the investigation, but are often part of the report to the Minister in relation to the investigation. If, following recommendation by the CEO, the Minister accepts the undertaking offered by the exporter, s. 269TEB(6) has the effect of suspending the investigation as far as it relates to that exporter.

Alternatively, under s. 269TG(3D) of the Act, the Minister may give notice to an exporter that the Minister is of the opinion that it would be appropriate for the exporter to give an undertaking, and indicating the terms of the undertaking that the Minister considers would be satisfactory. When considering whether to give a notice under s. 269TG(3), the Minister may authorize Customs and Border Protection under s. 269U to convening a meeting with the Australian industry. These circumstances may arise after the Minister has received the report from the CEO.

Under s. 269TG(4) of the Act, whether or not a notice has been given to the exporter by the Minister, the Minister may accept undertakings offered by an exporter, thereby deferring the decision to publish (or not to publish) a dumping duty notice in respect of that exporter.

If a notice has already been made under s. 269TG(2) of the Act, it is not possible to revoke that notice and then accept an undertaking.

The Minister must give public notice of any undertaking accepted under s269TEB following recommendation from the CEO, or following a notice to the exporter by the Minister under s269TG(3D).

In accepting an undertaking the Minister may make it subject to conditions such as the provision of information relevant to the fulfilment of the undertaking on an agreed basis, and appropriate access to such information.

Breach of the terms of the undertaking may result in the resumption of the investigation into the need to publish a dumping duty notice and/or countervailing duty notice. In such circumstances, where an investigation is resumed, Customs and Border Protection may impose a security under s.42 of the Customs Act in respect of any interim dumping or countervailing duty that may become payable. Duties may also be imposed retrospectively. A breach may include breaches by the trader/intermediary named in the undertaking; breaches by the exporter itself; either in relation to the export price level or any other conditions such as the provision of information.

## 30. REINVESTIGATIONS

### 30.1 CONTEXT

Division 9 of the *Customs Act 1901* (the Act) sets out procedures for review by the Review Officer of certain decisions by the Minister or the CEO.

Subdivision B sets out the mechanism for review of certain Ministerial decisions (“reviewable decisions”) including: a decision to publish a dumping duty notice, or a countervailing duty notice, or a decision not to publish such a notice.

Interested parties are entitled to apply to the Review Officer for a review of a reviewable decision within 30 days after a public notice of the reviewable decision was first published in a newspaper.

Section 269ZZK(1) requires that if the application is not rejected, the Review Officer must recommend in a report to the Minister that he/she either:

- affirm the reviewable decision; or
- direct the CEO to reinvestigate a finding or findings that formed the basis of the reviewable decision, being the findings or any of the findings specified in the application.

In making the recommendation, the Review Officer must not have regard to any information other than the relevant information. For reviewable decisions made pursuant to an application under section 269TB of the Act, relevant information is defined in this section as information to which the CEO had had regard or was required to have regard under subsection 269TEA(3)(a) of the Act.

Section 269TEA(3)(a) of the Act requires that the CEO must have regard to:

- the application; and
- any submissions concerning the publication of that notice to which the CEO had regard for the purpose of formulating the statement of essential facts;
- the statement of essential facts; and
- any submission made in response to that statement.

If the Minister accepts a recommendation by the Review Officer and requires the CEO to reinvestigate a finding or findings, the Minister must in writing require the CEO to make further investigation of the finding/s and report the result of the further investigation to the Minister within a specified period.

The CEO must conduct the reinvestigation in accordance with the Minister’s requirements, and only have regard to the information and conclusions to which the Review Officer was permitted to have regard.

In the report to the Minister, the CEO must:

- if the CEO is of the view that the finding or any of the findings subject of the reinvestigation should be affirmed - affirm the finding or findings; and
- set out any new finding or findings made as a result of the reinvestigation; and
- set out the evidence or other material on which the new finding or findings are based; and
- set out the reasons for the decision.

### 30.2 POLICY

In conducting a reinvestigation, the following principles set out in the Act will be observed, namely the reinvestigation must:

- be conducted accordance with the Minister’s requirements; and

- only have regard to the information to which the Review Officer was permitted to have regard.

As the CEO is only permitted to have regard to the information and conclusions to which the Review Officer was permitted to have regard, Customs and Border Protection will not publish a “statement of essential facts” or equivalent report to solicit comments from interested parties prior to making a report to the Minister.

### **30.3 PRACTICE**

Where a finding or findings is required to be reinvestigated, Customs and Border Protection will ensure that the decision-maker is a person other than the original decision-maker.

In determining whether the findings from the original investigation should be affirmed, or revoked and substituted with new findings, the reinvestigation will reconsider the facts, law and policy aspects of the original decision, and determine what the correct and preferable decision is.

This examination should consider whether the original decision was:

- correct – in the sense that they are made according to law; and
- preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

Therefore any recommendation following a reinvestigation (whether it is affirmation of findings or substitution of new findings) must:

- be consistent with the legislative requirements in s.269ZZL of the Act;
- based on objective considerations; and
- supported by analysis and reasoning as detailed in the reinvestigation report.

## 31. REVIEW OF MEASURES

### 31.1 CONTEXT

An affected party can seek a review of the measures as they affect a particular exporter or exporters generally because:

- one or more of the variable factors have changed; or
- if those measures had not been taken, the Minister would not be entitled to take any such measures.

After conducting a review, a report by Customs and Border Protection must recommend (in the case of a dumping or countervailing duty notice):

- that the notice remain unaltered; or
- that the notice be revoked in its application to a particular exporter or to a particular kind of goods or revoked generally; or
- that the notice have effect in relation to a particular exporter or to exporters generally, as if different variable factors had been ascertained.

Similar provisions exist in relation to undertakings.

### 31.2 POLICY

Division 5 sets out the review provisions in relation to applications, reports and the Minister's final decisions. The purpose is to bring about changes to the measures applying to exporters or revocation of the measures where appropriate.

The procedure for reviewing the level of measures varies according to when the measures were first imposed. In the case of measures imposed after 1 January 1993 reviews are carried out in accordance with Division 5 of the Customs Act 1901. Measures imposed before 1 January 1993 ('old measures') are reviewed using the provisions of s. 269TAD of the Act which were repealed in 1992 but remain in force under transitional arrangements.

In a review of undertakings and consistent with the provisions of s. 269TG(5) of the Act it is desirable that the minimum export price requirement specified by an undertaking is not more than the non-injurious price of the goods.

### 31.3 PRACTICE

An application for review by an affected party must be in an approved form, be in writing, be signed, and contain such information as the form requires – including a description of the goods to which the measures relate and a description of the measure.

For the 'old measures' no application form requirements exist within the legislation - in these cases Customs and Border Protection requires a letter to the CEO containing the same type of information as the Division 5 application requirements. There are no legislative timeframes for the completion of reviews under section 269TAD of the Act however the practice is to follow the same manner and time frame as reviews of the post 1 January 1993 measures.

If the application is based on a change in the variable factors it must contain:

- a statement of the variable factor(s) that may have changed;
- a statement of the amount by which each factor has changed;
- information to support any claimed change.

If the application seeks revocation of the measure (in terms of s269ZA(1)(b)(ii): 'if those measures had not been taken - the Minister would not be entitled to take any such measures'), the applicant should provide a statement of those circumstances.

Within twenty days after lodgement of an application for review the application must be examined to establish whether there are reasonable grounds for either asserting that the variable factors have changed or that a dumping or countervailing duty notice should be revoked.

In line with its procedures for applications for measures Customs and Border Protection will notify, within 5 days of having received a properly documented review application, the governments of the countries concerned and the Department of Foreign Affairs and Trade.

If the review application is accepted Customs and Border Protection must publish a notice in a nationally circulating newspaper. Reviews must be completed within 155 days of the publication of the notice and the CEO's report to the Minister must set out reasons for the recommendation. Customs and Border Protection must place a statement of essential facts on the public record at or before day 110 setting out the facts and the basis on which the CEO proposes to base a recommendation. Section 269ZH1 permits the Minister to consider requests to extend the period beyond 110 days.

An application for a review may concern variable factors only and make no comment about revocation. In this case Customs and Border Protection will focus upon the variable factors. If, in the course of the review, Customs and Border Protection finds grounds to recommend revocation the SEF and the final report will address that matter. If no grounds for revocation are found Customs and Border Protection will report accordingly and the report will largely be confined to the variable factors.

An application for review may concern revocation. The basis for the claim may be that there is no longer any dumping (or subsidy) of some or all of those goods, or that the Australian industry is no longer suffering injury from the goods subject to measures. In such cases Customs and Border Protection will consider whether it should extend a review to include the variable factors as provided for in s269ZC(4).

In assessing revocation claims concerning dumping Customs and Border Protection will include in its examination whether the continued imposition of the anti-dumping measure is required in the future to offset any dumping. That is, it will not merely assess whether there is present dumping, but also the likely recurrence of dumping.

In assessing revocation claims concerning injury or causation Customs and Border Protection will examine the current economic conditions of the industry as well as whether the injury would be likely to recur following any revocation of the anti-dumping measures. Doing so necessarily involves an examination about the likely recurrence of the dumping as above.

Examining revocation claims concerning injury entails the collection of detailed cost and price data from the industry, normally for several years, like a continuation inquiry. Customs and Border Protection would therefore require the necessary time to obtain and verify additional information from the Australian industry.

A review may have commenced based on an applicant's claims about the changed variable factors. Where, in the course of that review, an interested party other than the applicant makes claims concerning revocation, Customs and Border Protection will consider these. The ability for Customs and Border Protection to consider and report on such revocation claims will depend on the time available and the nature of the information provided concerning revocation which can be investigated.

Once a measure has been reviewed and the result notified a further application for review cannot be made for another 12 months from the date of public notification. However, the Minister can request the CEO to conduct a review at any time.

#### Reviews as a remedy to duty absorption

After dumping duties have been imposed removal of the injury may not occur if the price in the Australian market of the imported goods has not risen as a result of the duty. There may be a number of explanations as to why prices in the market have not increased subsequent to the imposition of the dumping duty. For example the normal value may have decreased (and a consequence being there is little or no final duty liability), or the importer may have absorbed the duty by making a lower profit. These situations are permissible under the dumping legislation as no compensatory behaviours have occurred between the exporter and the importer.

However, there are other circumstances where the parties may have avoided the price effects of the duty by entering into compensatory arrangements and a review could provide a remedy. If, after imposing the dumping duty, prices in Australia have not increased and in absorbing the duty the importer has moved into a loss making situation, a review of measures could find that export sales are not at arms length. In this situation Customs and Border Protection may construct the export price which, because of the loss making resale price, will be lower than the original ascertained export price. The effect is to increase the duty.

If the exporter had reimbursed the importer's costs of paying the dumping duty, a review may find that the payment of duty by the exporter made export sales non arms length. A deductive export price where the deductions include the dumping duty payable, as provided in s. 269TAB(2)(a), will lower than the original ascertained export price. Again, the effect is to increase the duty.

## **32. ACCELERATED REVIEWS**

### **32.1 CONTEXT**

Division 6 of the Act allows a new exporter (as defined) to apply for an accelerated review of a dumping or countervailing duty notice in so far as it affects that exporter. The relevant provisions give effect to Article 9.5 of the Anti-Dumping Agreement.

The Act defines new exporter as an exporter who did not export goods the subject of a dumping or countervailing duty notice to Australia at any time during the period:

- starting at the start of the investigation period in relation to the application; and
- ending immediately before the day the CEO places on the public record the statement of essential facts in relation to the investigation of the application

### **32.2 POLICY**

The CEO must complete a report as soon as practicable but no later than 100 days after the lodgement of the application. The report to the Minister must recommend either:

- that the dumping or countervailing duty notice remain unaltered, or
- that the dumping or countervailing duty notice be altered so as not to apply to the applicant or so as to apply as if different variable factors had been fixed.

Normal value and export price for the new exporter will be established under the relevant provisions of ss 269TAC and 269TAB of the Act.

Customs and Border Protection will not collect interim dumping duties on consignments of goods exported by that new exporter and entered for home consumption in Australia until the review is completed. However the CEO may require and take securities in respect of the new exporter's consignments of goods entered for home consumption during that period.

### **32.3 PRACTICE**

Lodged applications for an accelerated review should contain:

- a description of the goods to which the dumping or countervailing duty notice relates; and
- a statement of the basis on which the exporter considers that the particular notice is inappropriate so far as the exporter is concerned.

The statement referred to above should explain why the variable factors (normal value, export price) pertinent to the dumping margin that is relevant to the notice are not appropriate in this case. Applicants should provide evidence in support of their claim.

Section 269ZE(2) of the Act provides that the CEO may reject an application from an exporter for an accelerated review if satisfied that the exporter:

- was not investigated in the investigation relating to publication of the notice because that exporter refused to cooperate;
- is related to an exporter who was a selected exporter (as defined in s. 269T of the Act) for the investigation relating to publication of the notice.

Where the CEO is satisfied that the applicant for accelerated review is refusing to cooperate with any aspect of the review or is related to an exporter who was a selected exporter during the investigation relating to publication of the notice, the CEO may terminate the accelerated review.

Upon commencement of an accelerated review, Customs and Border Protection will forward an exporter's questionnaire to the exporter concerned. Information submitted in a questionnaire response will usually be verified.

A public file for accelerated reviews is not maintained, nor is a statement of essential facts issued. There are no review rights to the Trade Measures Review Officer in respect of an accelerated review.

## **33. CONTINUATION OF MEASURES**

### **33.1 CONTEXT**

Sections 269TM(1) and (2) specify that, unless they are earlier revoked, anti-dumping measures expire after 5 years.

Division 6A provides for the person, or persons representing the whole or a portion of the Australian industry producing like goods to the goods covered by those measures, whose application resulted in those measures, to apply for a continuation of the measures. Customs and Border Protection must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping (and/or subsidisation) and the material injury that the anti-dumping measure is intended to prevent.

### **33.2 POLICY**

Sections 269ZHB through to 269ZHG of the Act set out the procedures to be followed in conducting a continuation inquiry. There are twenty days to examine the application and decide whether reasonable grounds exist for an inquiry to be undertaken.

An application must be in writing, be in an approved form, contain such information as the form requires, and be signed. The application must demonstrate that there appear to be reasonable grounds for asserting that the expiration of the measures might lead to a continuation of, or a recurrence of, material injury that the measures were intended to prevent.

### **33.3 PRACTICE**

A notice is published in a nationally circulating newspaper not later than 9 months before a measure is due to expire, inviting interested parties to apply, within 60 days, for the continuation of the measure. If no application is received the measures expire. If a valid application is received and Customs and Border Protection does not reject the application an investigation commences and a report on whether the measures should continue is given to the Minister.

If an application is rejected, the applicant is advised of the reasons in writing, and advised of their appeal rights.

The decision to accept the application is publicly notified in a nationally circulating newspaper. At or before day 155, Customs and Border Protection must report to the Minister on whether the measures should continue. The report must have regard to the application, submissions received, the statement of essential facts and any submission in response to the statement lodged within the specified time limit. Late submissions may be disregarded. The report must clearly set out the material findings of fact on which the recommendation to the Minister is based, as well as a statement of evidence relied upon to support those findings.

The Minister must decide whether to accept the recommendations contained in the report and declare by notice in the *Gazette* and a nationally circulating newspaper whether or not steps have been taken to continue the measures. If the Minister decides that the measures are to expire, the expiry date must be publicly notified.

If the Minister decides to continue the anti-dumping measures, the measures extend for a further five years from the date the measures were to have expired, unless the measures are subsequently terminated or varied, or an exporter is released from an undertaking.

In assessing the likelihood of continuing or recurring dumping, the inquiry may gather facts as relevant on (the list is non-exhaustive):

- pattern of exports since the measures were imposed
- volumes and values of the imported goods
- effectiveness of the measures
- whether exports are likely to continue or resume (such as volume of exports before and after measures were imposed, exporters' production capacity, exporters' supply chains, exporters' other markets, third country sales, and world market for the goods)
- whether dumping will resume (such as exporters' margins, volume of exports before and after the measures were imposed, effect of the measures, the level of dumping compared with the level of measures ie. NIP, any changes in the level of the measures as a result of review)
- exchange rate fluctuations
- changes in technology
- exporters' historic margins
- exporters' historic volume and value of exports
- duty absorption by the exporters (or other means of circumventing measures)
- exporters' volumes and values to third countries
- normal values in the exporting country
- export trends after the measures were imposed
- changes in distribution channels
- changes in transport costs
- demand in exporters' home markets
- evidence of sales below costs
- high dumping margins
- high tariffs in the exporting country
- exporters' dependence on export markets
- world capacity
- other possible sources of supply by importers
- end user preferences
- exporters' domestic profit on sales of like goods
- availability of other markets

In assessing the likelihood of continuing or recurring injury, the inquiry may gather facts as relevant on (the list is non-exhaustive):

- state of the Australian industry
- production capacity
- other causes of injury
- market size, share and shape
- demand for the goods
- any changes in the structure and operation since the measures were imposed
- price of exports compared with NIP and USP
- measures relevance to selling prices
- the impact of imports of the goods not dumped from other sources
- changes in technology, product types, consumer preferences, demand and supply.

## **34. IMPLEMENTATION OF ANTI-DUMPING AND COUNTERVAILING MEASURES**

### **34.1 CONTEXT**

Customs and Border Protection is responsible for implementation of anti-dumping measures following an investigation.

Provisional measures in the form of securities are taken to prevent further material injury, or threat of material injury, to the Australian industry while the investigation is continuing. If the Minister then accepts Customs and Border Protection's recommendations to impose anti-dumping measures, these securities are converted to interim dumping duty.

Section 269TG(2) of the Act provides that the Minister declares that section 8 of the Dumping Duty Act applies. This declaration is made by public notice in a national newspaper and the Commonwealth Gazette. Measures are applicable to like goods after the date of publication of the notice.

### **34.2 POLICY**

The Act provides for the imposition of anti-dumping measures in the form of interim dumping and or countervailing duty, or an undertaking by an exporter. In accordance with Article 9.1 of the Anti-Dumping Agreement the maximum amount of duty payable may be less than the total dumping margin. A lesser duty or undertaking level may be applicable if sufficient to remove the injury to the Australian industry. Anti-dumping measures are imposed for a period of five years, unless revoked prior to the expiration date.

Following an investigation, once the Minister accepts the recommendations and findings, Customs and Border Protection implements the measures.

### **34.3 PRACTICE**

For anti-dumping measures to be imposed, whether in the form of securities, interim dumping duty, price undertaking or countervailing duty, Customs and Border Protection creates a Dumping Duty Record (DDR). The DDRs detail the actual measures that are being imposed. The notices signed by the Minister provide the level of measures. The Integrated Cargo System (ICS) creates these new measures by entering information such as tariff classification, statistical code, country code, Customs Client Identifiers (CCIDs) and the actual rates. When a shipment is entered using a tariff number that has dumping duty applicable, the record is flagged as possibly having dumping duty payable.

All implementation tasks, such as updating computer systems and publishing administrative documents will be completed. In all cases commercial in confidence and/or confidential material will not be disclosed to unauthorised parties.

Confidential Instructions (CI) and Dumping Commodities Register (DCR) pages are created. The CI pages contain all aspects of the measures to allow brokers to enter the shipment details and determine how much duty, if any, is payable. The CI pages are only released to bona fide importers for the goods they are entering. The DCR pages contain no confidential information and are available to the public. The DCR pages contain practical information on how to lodge a declaration and make the associated calculations once IDD has been imposed. Regional dumping liaison and securities officers are provided with both the CI and DCR versions of the measures.

## **35. DUMPING OR COUNTERVAILING DUTY ASSESSMENTS**

### **35.1 CONTEXT**

The provisions in Division 4 of the Act provide for an importer, who has paid interim dumping duty (IDD) on particular imports to apply, within specified time limits, for an assessment of final anti-dumping duty payable on those goods. The IDD paid is based on variable factors established during the original dumping investigation or in any subsequent reviews. After examining the application, Customs and Border Protection must make a recommendation that ensures the final anti-dumping duty collected does not exceed the actual dumping margin for those shipments imported within specified importation periods (IP).

Recommendations by Customs and Border Protection may result in either the applicant receiving a full repayment of any IDD paid, a part repayment of any IDD paid or where the total duty payable exceeds the amount of IDD paid, that excess amount is waived.

Prior to any recommendation there are provisions for the rejection and/or termination of an application.

The relevant provisions as set out in Division 4 of the Act give effect to Article 9.3 of the Anti-Dumping Agreement.

### **35.2 POLICY**

Sections 269V and 269W of the Act respectively detail the circumstances and manner of making and lodging an application for assessment of final duty payable on the particular imports in the nominated IP. An importation period is defined at s. 269T of the Act.

After meeting the requirements for lodgement, the CEO must, as soon as practicable but not more than 155 days after lodgement, examine the application and decide what recommendation to make to the Minister.

Section 269X(2) of the Act provides that in considering the application the CEO may seek further information from the applicant and also from a person other than the applicant, who, it is considered may be able to provide information relevant to the assessment. Where information is received (other than from the applicant) and the CEO proposes to take such information into account, the CEO must give the applicant a copy of that information. However, only information considered to be non-confidential may be supplied to the applicant.

Section 269X(5) of the Act requires that on the basis of any information received or evidence provided in the application or any other information considered relevant, the CEO must provisionally ascertain in relation to each consignment entered for home consumption in the IP, each variable factor relevant to the determination of the duty payable. Using the provisionally ascertained variable factors the CEO must calculate the amount of duty payable.

Section 269X(6) of the Act provides that on the basis of the calculation of the amount of final duty payable the CEO must decide whether to recommend to the Minister:

- where the total interim duty paid on the goods exceeds the total duty payable, a repayment of the amount of interim duty overpaid (a positive preliminary decision); or
- where total interim duty paid on the goods exceeds the total duty payable, but not to the extent contended in the application, a repayment of the amount of interim duty overpaid (a negative preliminary decision); or

- where the total amount of duty payable on the goods is equal to or exceeds the total of interim duty that was paid on the goods, that any duty in excess of the interim duty paid on those goods be waived (a negative preliminary decision).

After making a provisional decision the CEO must notify the applicant. If a negative preliminary decision is made under s. 269X(7) of the Act the applicant is informed of those reasons and of the right to apply for a review of the CEO decision to the Trade Measures Review Officer. Such application must be made within 30 days of receipt of the notification from the CEO. Where a positive preliminary decision is made, under the provisions of s. 269X(8) of the Act the CEO must, within seven days of making the decision, recommend that the Minister give effect to that decision.

Where no review is sought following a negative preliminary decision, the CEO must, within seven days of the expiry of the period for seeking a review, recommend that the Minister give effect to that decision.

In accordance with s. 269Y of the Act, the Minister will, by notice in writing, ascertain the variable factors for each consignment and order that the total interim duty overpaid be repaid or that the total unpaid duty in excess of the interim duty already paid be waived. The applicant is supplied with a copy of the Minister's notice as soon as practicable after issuing the notice and advised of repayment arrangements, where applicable.

Provision also exists for the rejection or termination of a duty assessment application. Rejection would occur where either the application does not contain everything it must contain or a commitment to provide such information within a certain period is not met. Termination may occur where the CEO is satisfied that there is not enough information to provisionally ascertain the variable factors in relation to each consignment of goods to which the application relates. Section 269YA provides for the rejection and termination provisions.

### **35.3 PRACTICE**

Because of legislative timeframes potential applicants are encouraged to submit applications well before the end of the six month period available for lodgement. This provides sufficient opportunity to identify possible errors or omissions in the information provided. Applications made after the end of the period available for lodgement cannot be accepted for lodgement.

In establishing the provisionally ascertained variable factors for each consignment Customs and Border Protection will generally not depart from the approach taken in the original investigation or most recent review. Where the non-injurious price (NIP) is the operative measure, Customs and Border Protection uses the most recent information from the Australian industry in order to establish the NIP.

Applicants must provide sufficient evidence in support of their opinion of the export price and normal value. Customs and Border Protection will then verify the evidence through visits to the applicant and, where appropriate to the manufacturer/exporter.

After verification, a weighted average normal value, export price and NIP, will be calculated if applicable. In calculating the normal value, adjustments are made to ensure that the normal value is properly comparable with the export price.

## 36. MONITORING OF MEASURES

### 36.1 CONTEXT

If a notice is published, that notice creates a liability under the Dumping Duty Act, in relation to any goods to which the notice extends, to pay a special duty of customs on their importation into Australia and, pending assessment of that special duty, to pay interim dumping or countervailing duty.

When a special duty of Customs is imposed by virtue of a dumping duty notice or a countervailing duty notice, that special duty of Customs must be collected and paid. A dumping duty notice means a notice published by the Minister under ss 269TG(1), (2), 269TH(1) or (2) of the Act. A countervailing duty notice means a notice published by the Minister under ss 269TJ(1), (2), 269TK(1) or (2) of the Act.

A special duty of Customs is defined as:

- dumping duty (s. 8(2) of the Dumping Duty Act);
- third country dumping duty (s. 9(2) of the Dumping Duty Act);
- countervailing duty (s. 10(1) of the Dumping Duty Act);
- third country countervailing duty (s. 11(1) of the Dumping Duty Act).

### 36.2 POLICY

Monitoring is the process undertaken whereby Customs and Border Protection ensures that the relevant amount of dumping and/or countervailing duty has been collected and paid.

Monitoring is limited to the identification of cases of circumvention and non-compliance by importers and exporters with the imposed measures. It does not cover the monitoring of the remedial effectiveness (in economic terms) of the measures for the Australian industry.

Monitoring of a commodity will normally be initiated from the results of a risk assessment process. Monitoring may also result from:

- specific complaints alleging that an importer or exporter is not complying with the measures; or
- inconsistencies identified from an analysis of import data during investigations into the review or continuation of measures.

### 36.3 PRACTICE

Commodities covered by measures, in the form of securities, are monitored for possible non-compliance during the period between the imposition of the securities and the imposition of the final measures.

Commodities covered by measures other than securities are monitored within the first 12 months after the imposition of the dumping and/or countervailing duty. Additional monitoring of the commodity occurs at least once more during the life of the measures, subject to additional monitoring identified by commodity risk profiles and the risk management processes.

Monitoring may range from a simple “desk top” audit to a visit to the premises of importers (and sometimes exporters) to verify compliance. Importers are required to lodge amending import declarations to correct errors found and, where necessary, pay outstanding securities and/or dumping and/or countervailing duty.

Where it is found that there has been an overpayment of securities or dumping and/or countervailing duty, the importer will be informed so that it may apply for a refund under the relevant section of the Act.

*Instructions and Guidelines – Dumping and Subsidy Manual*  
Trade Measures Branch, Trade and Compliance Division  
Customs and Border Protection  
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