

1 **DISCUSSION PAPER**

2
3 **Market Situation – s. 269TAC(2)(a)(ii)**
4 **Guidance - Claims of Government Influence**

5
6 Background

7
8 The terms ‘particular market situation’ (used in the WTO), or ‘situation in the
9 market’ (used in the Customs Act), potentially cover a variety of situations.

10
11 One of these situations may be where the domestic selling prices in the country
12 of export have been materially affected by government influence rendering
13 those prices unsuitable for use in establishing normal values.

14
15 Government influence can occur in any market economy. Claims of a market
16 situation have most recently concerned China but the issues are the same for
17 any market economy.

18
19 The issue is that the government influence has acted to lower the selling prices
20 of the like goods in the domestic market of the exporting country. Or, put
21 another way, if the government influence had not existed, prices would have
22 been higher.

23
24 Purpose of guideline

25
26 This note provides guidance on preparing and examining applications for anti-
27 dumping duties that rely on claims that government influence in the market
28 renders domestic selling prices unsuitable for calculating normal values for the
29 purposes of s269TAC(2)(a)(ii).¹

30
31 It also includes:

- 32
- 33 • information why China is treated the same as other market economies
34 when calculating normal values, and
35 guidance on:
 - 36 ○ how Customs assesses claims that there is a market situation which
37 renders domestic selling prices unsuitable for calculating normal
38 values
 - 39 ○ the evidence that may be needed to establish that there is a market
40 situation because of government influence
 - 41 ○ examples of evidence that may support a claim of government
42 influence creating a market situation

¹ Section 269TAC(2)(a)(ii) of the *Customs Act 1901* (the Act) provides:

“... where the Minister is satisfied that ... because the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under subsection (1) ...”

- 43 ○ when the existence of government assistance in the market can be
44 used as a basis for finding that a “particular market situation” exists.
45

46 Legislation

47

48 The test for calculating normal values is set out in s.269TAC of the *Customs*
49 *Act 1901*. Under s.269TAC(1) there is a general test for determining the
50 normal value of goods. This general test must be used to establish normal
51 values unless one of the exceptions set out in s.269TAC(2) onwards is
52 applicable.

53

54 In broad terms, the general test is that the domestic selling price of goods is the
55 normal value of those goods subject to certain adjustments being made to
56 ensure there is a proper comparison.

57

58 One of the exceptions to this general test is set out in s. 269TAC(2)(a)(ii). In
59 broad terms, that exception provides that the general test will not be applicable
60 if the Minister is “satisfied” that a situation in the market has rendered domestic
61 selling prices unsuitable for establishing normal values.

62

63 In reaching a decision about whether he or she is satisfied that there is a market
64 situation under s.269TAC(2)(a)(ii), the Minister is required to follow the
65 principles of administrative law. That is, his or her decision must be based on
66 evidence, must only take into account relevant factors, must not take into
67 account irrelevant factors, and must be otherwise procedurally fair. If a
68 decision is not made according to administrative law requirements it may be
69 subject to challenge in a Court.

70

71 The test in s. 269TAC(2)(a)(ii):

72

- 73 - requires identification of the situation in the market that makes sales
74 in that market unsuitable for normal values² - in this case a
75 government activity that influences costs or prices; and
76 - a finding that the market situation has rendered domestic selling
77 prices unsuitable for normal values i.e. there has been a material
78 reduction in the domestic selling prices of the goods that is
79 attributable to the market situation.³

80

² La Doria Di Diodata Ferraioli S.P.A. v David Peter Beddall, Minister for Small Business, Construction and Customs; Anti-dumping Authority and Comptroller-General of Customs No. NG541 of 1992 Fed No. 391 Lee J at para 32.

³ Government influence that causes a material reduction in costs or prices is but one example of what might be covered by s269TAC(2)(a)(ii). Other market situation factors are examined in a separate guideline.

81

82 Australia's treatment of China

83

84 The test for calculating normal values in an investigation involving China is the
85 same as for market economies generally⁴. That is, the general test under
86 s269TAC(1) that domestic selling prices will be used for normal values unless
87 one of the exceptions listed in s269TAC is established to the satisfaction of the
88 Minister.

89

90 There is no automatic assumption that domestic selling prices in China, as in
91 any other market economy, are unsuitable for use in calculating normal values.
92 Neither the Government of China nor the exporters in China have any
93 responsibility to demonstrate to Customs that domestic selling prices are
94 suitable for calculating normal values.

95

96 Australia's approach to investigations in China is, in that sense, the same as
97 investigations conducted in any other market economy.

98

99 Applications

100

101 Under s.269TC of the Customs Act 1901 an application for the initiation of a
102 dumping investigation must be rejected if the CEO of Customs is not satisfied,
103 having regard to the application and other available relevant information, that
104 there appears to be reasonable grounds for the publication of a dumping duty
105 notice.

106

107 An applicant for a dumping duty notice may seek to claim that domestic selling
108 prices are unsuitable for establishing normal values due to the effects of
109 government influence on domestic prices. In some cases an applicant may rely
110 on this claim to establish that a product is dumped. If such a claim is made the
111 applicant must provide some evidence of the claim.

112

113 To meet the *prima facie* test⁵ to initiate an inquiry, the CEO of Customs must
114 be satisfied that the claims made in the application have sufficient merit to
115 establish reasonable grounds for the publication of a dumping duty notice.

116

117 Unsupported allegations that merely identify government programs that may be
118 relevant, coupled with requests for Customs to investigate whether the
119 domestic selling prices of the goods might be significantly affected by the
120 government programs, will not be sufficient.

⁴ In April 2005 it was announced that Australia had agreed to recognise China as a market economy for anti-dumping purposes. Schedule 1B of the Customs Regulations 1926 was amended to include China, disapplying s269TAC(5D) of the Customs Act 1901.

⁵ The *prima facie* standard is defined to be: "(a) claim that meets the minimum threshold of evidence necessary to establish the facts alleged and shifts the burden to the other party to overcome that threshold"; "evidence that is sufficient to prove a factual matter at issue and justify a favourable judgement unless rebutted".

121
 122 The international Anti-Dumping Agreement states that “*simple assertions*⁶,
 123 *unsubstantiated by relevant evidence, cannot be considered sufficient to meet*
 124 *the requirements*” for a dumping application. These requirements are
 125 incorporated into Australian law.

126
 127 A mere assertion that there is a possibility of a government influence affecting
 128 prices does not satisfy these evidentiary requirements.

129

130 Sufficiency of evidence

131

132 Customs considers the evidence to support claims of a market situation:

133

- 134 - does not need to be conclusive or irrefutable; but
- 135 - must be relevant, and reasonably reliable, and unless rebutted, would be
- 136 reasonably supportive of a finding that domestic selling prices are
- 137 unsuitable for normal value.

138

139 Evidence is:

- 140 - ‘relevant’: where it has a direct bearing on the matter in hand and is
- 141 logically persuasive;
- 142 - ‘reasonably reliable’: where it has the tendency, as a matter of logic and
- 143 experience, to make the proposition for which it is advanced more likely
- 144 than the proposition would be if that evidence did not exist; and
- 145 - ‘supportive’: where it is found to be reasonably capable of supporting
- 146 the inferences necessary for a positive finding.

147

148 Evidence may come from a variety of sources including published information
 149 relating to the industry; specialist research that has been commissioned in order
 150 to examine the nature and effect of the alleged government influence in the
 151 industry concerned; and the finding’s and supporting evidence of other anti -
 152 dumping authorities that is relevant to the market situation for the goods in
 153 question.

154

155 Customs considers the effect of government influence on the market and the
 156 domestic selling prices will generally need to be material⁷ to make domestic
 157 selling prices unsuitable for use in establishing normal value.

158

159 The mere existence of some government influence in the market will generally
 160 not be sufficient of itself to make the sales unsuitable. A degree of government
 161 influence can, and often does, exist without rendering the situation in the
 162 market so distorted that sales of the goods in that market are unsuitable for
 163 establishing normal value.

⁶ As in Article 5.2 of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Agreement).

⁷ Like the previous provisions in relation to China which used the term “*substantial*” or “*significant*”.

164 In an investigation concerning market situation it will rarely be possible to
165 precisely quantify the effect of a government influence on the price.
166 Judgements will have to be made whether the effect of the government
167 influence has been “*material*”. Generally, this means that the government’s
168 effect on the price of the goods must be more than a *de minimis* effect⁸, and
169 must not be unimportant or trivial. It is possible that several influences
170 combined may have a material effect⁹.

171 If the CEO of Customs, or a duly authorised delegate, forms the view that an
172 application contains only unsupported allegations that a market situation has
173 rendered domestic selling prices unsuitable for normal values it will advise the
174 applicant at the earliest opportunity either in consideration of a draft application
175 or an application formally lodged.

176

177 Alternatively, if an investigation is initiated on grounds other than the claimed
178 market situation, the applicant will be advised of this fact.

179

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

185

- 186 o notify the government of the country and the exporters of the claims
187 and of the evidence provided. Additional questions will be inserted
188 into the exporter questionnaire titled “Market Situation”. A ‘Market
189 Situation’ questionnaire will also be prepared for government;
- 190 o both questionnaires will be based upon the evidence provided by the
191 Australian industry and that supported the decision to investigate.
192 That is, the information supporting the claim that the domestic prices
193 are materially influenced by the government of that country and are
194 not substantially the same as they would be if they were determined
195 in a competitive market. Any other relevant information in Customs
196 possession may also be taken into account when preparing the
197 questionnaire such as any advice regarding the type of questions to
198 be asked for the industry in question. The government and the
199 exporter will be asked to respond as specifically as possible to the

⁸ This should not to be read as having the same meaning as *de minimis* dumping which is defined to be less than 2% of the export price.

⁹ The emphasis on an observable price effect is apparent in Canadian procedures – the preliminary determination into carbon steel welded pipe of May 2007 stated: ‘The mere existence of substantial price determination by the government would be insufficient to apply section 20 of SIMA. The CBSA is also required to examine the price effect resulting from substantial government determination of domestic prices and whether there is sufficient information on the record for the President to have a reason to believe that the resulting domestic prices are not substantially the same as they would be in a competitive market’.

200 questions. Accompanying letters will draw attention to these
 201 questions, and
 202 o if the government of the country or exporters fail to respond after
 203 being given a reasonable opportunity to do so, or do not provide
 204 probative evidence in response, Customs will weigh up the evidence
 205 including the *prima facie* evidence of the application. One possible
 206 outcome is that Customs could find that a situation in the market has
 207 rendered domestic selling prices unsuitable for establishing normal
 208 values.

209

210 What about information obtained in the course of an investigation?

211

212 After an investigation has been initiated Customs may find, quite independently
 213 of any allegations made (or not made) in an application, that there is a market
 214 situation. In these circumstances, Customs will follow similar procedures to
 215 those outlined above for applications. That is, Customs will:

- 216 o notify the government of the country and the exporters of the
 217 evidence, and, as necessary, ask additional questions; and
- 218 o ensure interested parties have an opportunity to consider the claims
 219 and present further evidence in accordance with the Customs Act
 220 1901.

221

222 In practice, however, Customs experience has been that this type of information
 223 is usually not found independently by Customs within the constraints of the
 224 investigation timetable. This means that if an applicant has evidence of a
 225 market situation this should be provided at the earliest opportunity, preferably
 226 in the application.

227

228 If, in some cases, the requisite standard of evidence concerning the market
 229 situation is submitted to Customs after initiation, Customs may have regard to
 230 that evidence provided it is practicable to do so. That evidence *must* be
 231 provided in a timely manner so that it remains possible for Customs to
 232 investigate the evidence provided (including through the use of questionnaires
 233 to exporters and to the government) within the timeframe of the investigation,
 234 and at the same time ensures that the requirements of procedural fairness in
 235 investigations can be met.

236

237 If received late in the investigative process, Customs will assess the
 238 information to determine whether questions can be put to relevant parties; if
 239 parties have sufficient time to consider that evidence and prepare their defence;
 240 and whether Customs is able to investigate the matter at the on-the-spot
 241 verification visits in the exporting country.

242

243 If a market situation is claimed during the investigative process but the claim
 244 lacks supporting evidence, such a claim may be considered “relevant

245 information” for the purpose of the investigation and relevant submissions
 246 should be placed on the public record to be accessed by interested parties.

247

248 As such a claim lacks supporting evidence, although Customs had decided that
 249 preparation of a questionnaire to government and/or exporters and further
 250 investigation was not supported by the claim, Customs should provide the
 251 government and/or exporters who are visited an opportunity to respond to the
 252 submission.

253

254 Ultimately a decision as to the existence of a market situation will be made
 255 having regard to all relevant information. In the absence of supporting
 256 evidence Customs would not have sufficient relevant and reliable information
 257 on which to reach the requisite level of satisfaction regarding a market
 258 situation.

259

260 This approach suggests that claims alleging a market situation should be made
 261 early in the investigation (preferably in the application) and should be
 262 supported by relevant evidence which can be tested during Customs’
 263 investigative processes.

264

265 Customs will not examine market situation claims where there is no
 266 cooperation from the exporters and, as a consequence, no prospect of prices or
 267 costs being used under either s269TAC(1) or (2)(c) of the Act¹⁰.

268

269 Can the existence of subsidies in the market be used as the basis for a finding
 270 of “market situation”?

271

272 In one anti-dumping investigation a party submitted that Customs was
 273 precluded from having regard to domestic subsidies under the market
 274 situation provision. It submitted that subsidies could only be considered in a
 275 countervailing investigation.

276

277 However, a domestic subsidy (i.e. other than an export subsidy) may affect
 278 the suitability of domestic sales prices and as a result can be a relevant
 279 consideration under s. 269TAC(2)(a)(ii).

280

281 This issue was considered in the Federal Court and on appeal in *Minister for*
 282 *Small Business, Construction and Customs v La Doria di Diodata Ferraioli*
 283 *SPA* (1994) 33 ALD 35. The court supported the Anti Dumping Authority’s

¹⁰ If sales are found unsuitable for normal value purposes under s269TAC(1) because they are not arms length, or not in the ordinary course of trade, Customs will not further examine claims that a market situation has made those prices unsuitable. Customs will examine properly substantiated claims that a market situation has arisen by reason of the effect of government influences on costs, and hence prices, when making determinations under s269TAC(2)(c).

284 finding that the provision of a production aid made domestic sales of those
285 goods unsuitable for establishing normal values under s. 269TAC(2)(a)(ii).

286

287 The Court held in that case that the Anti-Dumping Authority, and ultimately
288 the Minister, had to make a practical factual judgement based on evidence,
289 about the true nature and consequence of the production aid payments on the
290 domestic selling prices of canned tomatoes in Italy. The Court held that it was
291 a matter for the Authority to determine whether the payment of the production
292 aid distorted domestic selling prices to the extent that canned tomatoes were
293 being consistently sold at prices below the production and selling costs of the
294 canners. The Authority came to the conclusion that it was, and that therefore
295 the domestic sales in Italy were not suitable for use in assessing normal value
296 as provided for in s 269TAC(2)(a)(ii). The Court held that this was the correct
297 procedure to follow.

298

299 In that case, the Authority was able to rely on evidence that the payment of
300 production aid had distorted domestic selling prices in Italy to the extent that
301 canned tomatoes had been consistently sold at prices which were less than the
302 production costs of the Italian canners.

303

304 La Doria involved a joint subsidy and dumping situation. In the case of an
305 anti-dumping investigation only, a question arises about government practices
306 that are considered to have affected domestic sales prices. Had those
307 practices been the subject of a countervailing investigation one outcome may
308 have been that some, or all, of those same practices could have been subjected
309 to a countervailing duty. It may be considered, therefore, that the remedy is
310 more properly found in the imposition of a countervailing duty, not anti-
311 dumping duty.

312

313 In order to be countervailable these practices must meet the requirements of
314 the legislation concerning a subsidy - government contribution, specificity,
315 and benefit.

316

317 In an anti-dumping investigation that does not also involve a subsidy
318 allegation, Customs considers that the assistance practices of a government
319 can be examined in the context of a market situation. Here the question will
320 not be whether they are countervailable subsidies that meet the relevant
321 criteria, but whether the assistance programs have materially affected the
322 domestic sales prices of the like goods. Any such price effect is not examined
323 in a subsidy investigation.

324

325 Customs approach therefore will be that it is not precluded from having
326 regard to the existence of government assistance programs in the context of
327 deciding whether domestic sales are suitable for normal value purposes in a
328 dumping investigation alone. That said, in an anti-dumping investigation,
329 Customs ability to examine the extent and influence of a government

330 program, in the absence of an early and appropriately evidenced claim about
 331 the effect of the program on selling prices, would be quite limited.

332

333 Consideration of some past claims by applicants

334

335 Some examples of claims that have been put forward in other investigations are
 336 set out and discussed below. These examples are not intended to be exhaustive
 337 or universally applicable and are for guidance only. Each case turns on its own
 338 facts.

339

340 ***State owned enterprises (SOE):***

341

342 Some applicants have provided general information about State owned
 343 enterprises (SOEs) and claimed that the level of SOEs in the industry or in the
 344 industry supplying the raw materials for the goods has resulted in a situation in
 345 the market that renders domestic sales unsuitable for normal values.

346

347 Information about the level of SOEs in an economy is a relevant consideration
 348 in deciding when making decisions about an economy-in-transition. However,
 349 now that China is no longer an economy in transition such a general allegation
 350 will not, of itself, be evidence that domestic selling prices are unsuitable under
 351 s269TAC for China or any other market economy.

352

353 The applicant should provide information that is relevant, and which links the
 354 *likely impact of the existence and operations of the SOEs to an effect on the*
 355 *prices of the goods themselves.* That is, there should be information that the
 356 likely impact of the SOEs on the market creates a situation in the market such
 357 that domestic selling prices are unsuitable for establishing normal values. The
 358 prima facie evidence would show that the preponderance of SOEs *and* their
 359 likely impact on the market was significant enough to support a finding that
 360 domestic selling prices were unsuitable for establishing normal values.

361

362 Issues that might be useful to consider are:

363

- 364 - what factors make it reasonable to assume that the SOEs are subject to
 365 government influence and not market forces? Are there any regulatory
 366 controls on their prices?
- 367 - are there one or more significantly sized privately owned companies in
 368 the market? If so, why shouldn't these privately owned companies be
 369 setting the domestic market prices rather than the SOE?
- 370 - are SOEs operating unprofitably? If so, is this because of state
 371 ownership and assistance, or because of normal competitive pressures in
 372 the domestic market?
- 373 - if there had been an impact on the market in question has it been
 374 significant enough to support the finding that domestic selling prices are
 375 unsuitable?

376

377

378 ***Value Added Tax (VAT) manipulation***

379

380 Similar to the situation concerning SOEs, applicants have claimed that the
381 manipulation of VAT by the government has discouraged exports, affecting the
382 domestic market and making domestic sales unsuitable for normal value.

383

384 An allegation of such a general nature would not generally support a finding
385 that domestic prices are unsuitable for calculating normal values under
386 s269TAC(1).

387

388 The applicant should provide relevant information about how the VAT
389 manipulation has affected the market and *the likely impact on the prices of the*
390 *goods themselves*. If there has been an impact on the market in what ways is it
391 material to support the finding that domestic selling prices are unsuitable?

392

393 ***Government influence on input costs***

394

395 Applicants have provided information about the claimed government control of
396 a key input and have alleged that this control leads to domestic selling prices
397 being unsuitable for calculating normal values.

398

399 Information about the control of a key input price is a relevant consideration in
400 making assessments about economies in transition¹¹. The terms of
401 s269TAC(5D)(c) and (d)¹², place an onus on the exporter in an EIT to provide
402 information, and Customs could make inferences about the market for the
403 goods in question. However, the EIT provisions no longer apply to China.

404

405 The applicant should provide information that links the government control of
406 inputs to distortions in the domestic *prices of the goods themselves*. Issues
407 applicants should consider are:

¹¹ Reg 183 provides, amongst other things:

“(2) For subsection 269TAC(5E) of the Act, the following matters are prescribed:

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

“(3) In assessing whether there is significant interference for subparagraph (2)(a)(ii), the Minister must have regard to the following:

(a) .. (b) .. (c) .. (d) ..

(e) whether the entity’s significant production inputs (including raw materials, labour, energy, and technology) are supplied:

- (i) by enterprises that are owned or controlled by a government of the country of export;
- (ii) at prices that do not substantially reflect conditions found in a market economy”

¹² S269TAC(5D)(c) : ‘the exporter of the goods does not answer questions ...within the period prescribed ..’; and (d) ‘the answers given ...do not provide a reasonable basis for determining that paragraphs (a) and (b) of this subsection do not apply’ (paragraphs (a) and (b) concern market conditions not prevailing).

- 408 - why has the alleged influence or control on the input prices affected
 409 prices of the final goods?
 410 - has the influence had any impact on the domestic selling prices given
 411 the nature of the particular market for the goods in question?
 412 - if there has been an impact on the domestic prices of the goods in
 413 question has it been material enough to support a finding that domestic
 414 prices are no longer being set in a normal competitive market?
 415

416 ***Electricity and rail transportation costs***
 417

418 Applicants have claimed that government control over electricity and rail
 419 freight prices in China make domestic price unsuitable for normal value.

420 A general claim of this nature without supporting information will usually be
 421 insufficient. The applicant should provide information demonstrating the likely
 422 impact of government involvement in rail and electricity costs and prices
 423 compared to the situation that would likely exist *absent* the alleged
 424 intervention. Applicants should consider why it is reasonable to assume that
 425 the affected costs of electricity and rail have flowed through to the domestic
 426 selling prices of the goods and how they have distorted the market in some
 427 material way.

428 In the examples reference to government is taken to mean national or
 429 provincial government.

430 **Summary:**

- 431 - Applicants who claim that domestic selling prices are not suitable for
 432 establishing normal values should demonstrate how and why those
 433 domestic selling prices are not suitable for calculating normal values.
 434 “How” includes the need for some consideration of the
 435 extent/materiality of the alleged distortion.
 436 - If this information is provided by an applicant after the initiation of
 437 an investigation it should be provided early, in a timeframe that
 438 allows for appropriate, fair, and rigorous investigation.
 439 - Customs will notify applicants through a deficiency list, rejection
 440 report, consideration report, or by correspondence during the
 441 investigation, if allegations that have been made are considered
 442 insufficient to warrant further investigation.
 443 - Ultimately, the Minister makes a practical decision that must be
 444 based on evidence about whether a market situation has made the
 445 domestic selling prices of the goods unsuitable for calculating
 446 normal value.
 447