

# TRADE MEASURES POLICY ADVICE

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Topic: Establishing USPs and NIPs

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## Issue

Under s 8(5A) of the *Customs Tariff (Anti Dumping) Act 1975*, the Minister must have regard to the desirability of fixing a lesser amount of duty such that the sum of the export price and the lesser amount of duty does not exceed the non-injurious price (NIP).

Section 269TACA of the *Customs Act 1901* defines the non-injurious price as the minimum price necessary to remove the injury (or hindrance) caused by dumping and/or subsidy. However, the legislation is silent on the method of calculating a NIP.

This advice sets out Customs approach to establishing the NIP.

## Advice

The NIP is derived from the unsuppressed selling price (USP). The USP is a price the industry may 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.

Customs approach to establishing USPs observes the following hierarchy.

1. Industry selling prices at a time unaffected by dumping
2. Constructed industry prices – industry cost to make and sell plus profit
3. Selling prices of undumped imports

Having calculated the USP, Customs then calculates a NIP by deducting the costs incurred in getting the goods from the export FOB point (or another point if appropriate) to the relevant level of trade in Australia. The deductions normally include all into store costs, duties and an amount for importer's profit. The deductions are usually obtained from the most efficient representative importer. That is, usually the importer at the relevant level of trade, in sufficient sales volumes and with the lowest on-costs.

An example of a calculation of a NIP derived from an USP is at appendix 12 of the Dumping Manual (Volume 22 of the Australian Customs Manual).

Customs will examine USP/NIP issues at a very early stage of an investigation. Where possible and appropriate, preliminary examinations will be made during the screening period for the purposes of prima facie assessments of material injury and causal link. To enable this examination to occur, the applicant must provide costing and sales data to model/type/grade level within the application.

Customs expectation is that industry will include an assessment of the approach to USP in the application and will support that position with appropriate data at the industry verification visit. As a result it would be expected that the issue of USP will be discussed in confidential and non-confidential reports of the industry visit, marking an early commencement to transparent and comprehensive discussion of USP/NIP issues.

The NIP will be considered before the making of a PAD and the imposition of securities. It is also expected that USP/NIP issues will be examined in the statement of essential facts for the purpose of assessment of material injury and causal link.

NIPs should be calculated in all cases where measures are recommended. Customs cannot be confident of the significance of the NIP in relation to the normal value until it is calculated. Further, the significance of the NIP may change in subsequent reviews of variable factors.

## **Discussion**

### **Approaches to establishing the USP**

1. Industry selling prices at a time unaffected by dumping
2. Constructed industry prices – industry cost to make and sell plus profit
3. Selling prices of undumped imports

#### **1. Industry selling prices at a time unaffected by dumping**

Customs will generally calculate a weighted average of verified selling prices from a period unaffected by dumping, with a preference for a 1-year minimum period. Seasonal fluctuations or longer cyclical trends will be taken into account.

The application seeks data for 3 completed financial years and the current financial year. The investigation has a 155 day timeframe. This means Customs would generally use selling prices no older than 5 years.

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 will 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.

***Reasons for not using this approach include:***

- 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 be taken as a reason for automatic exclusion of the market approach in establishing an USP (using industry selling prices). The reasonableness of using this market approach should be considered on a case-by-case basis.

Where Customs considers it is not reasonable to use the market approach involving Australian industry's selling prices at a time unaffected by dumping, the reasons for that position will be outlined in relevant reports.

<b>2. Constructed industry prices– recent industry CTMS data plus a reasonable amount for profit</b>
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Customs will generally use a weighted average of the most recent verified industry cost to make and sell (CTMS) from the current application, 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 the verification of data contained in the application, Customs generally gathers and verifies industry data (including CTMS) for a period subsequent to that provided in the application. Customs may consider including this data for the purpose of establishing a constructed USP.

The options for determining a reasonable amount for profit are:

- weighted average profit rate (% mark-up) achieved by 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 Customs considers it unreasonable to use either of the two options above for determining profit, Customs may consider the use of:

- profit rate (% mark-up) calculated with regard to return on investment – where the resultant price is considered reasonable; or
- profit rate (% mark-up) from appropriate profit surveys.

In the event that either of the latter two approaches to profit is being considered, Customs will also consider whether it is appropriate to obtain an independent assessment of an appropriate amount for profit.

***Reasons for not using this approach include the following.***

- 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 Customs considers it is not reasonable to use the constructed industry price, the reasons for this position will be outlined in relevant reports.

### **3. Selling price of undumped imports**

This is an option that has been rarely adopted by Customs. In assessing whether the prices of undumped imports in Australia are suitable for using as an USP, regard is had to the following factors:

- whether such imports were in sufficient volume to influence the market price; and
- whether the prices have been affected by dumping; and
- whether Customs can be confident these goods are undumped.

Therefore, it is envisaged that this approach may 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 Customs has access 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
- whether the prices have been affected by dumping.

### **4. Other issues**

#### ***Cases of multiple Australian producers or one producer with multiple plants***

Customs generally seeks to establish one USP for each product or, where appropriate, each model/type/grade of the product. This is because it is not practical to implement and monitor anti-dumping measures that would vary, for example, in accordance with region, level of trade, or end-use.

In establishing a single industry USP for multiple Australian producers, Customs will generally use a weighted average figure established in accordance with the options above.

However, Customs may use, where it is considered appropriate:

- 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 Customs considers it is not reasonable to use the weighted average approach, the reasons for this will be outlined in relevant reports.

### ***Cases of multiple importers, multiple exporters and multiple countries***

Customs 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, Customs arrives at one NIP 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 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, with the lowest on-costs.

### ***Cases where no verified data is available from exporters/importers from a particular country***

It may occur that verified post-exportation costs are unavailable for a particular country. In this case Customs may rely on post exportation costs that are available from other sources, for example, data from another country or the application.

### ***Cases where the NIP is clearly above the normal value***

It is necessary to calculate a NIP for the purpose of measures even when the NIP is clearly above the normal value. Customs cannot be confident of the significance of the NIP until it is calculated.

Whilst the NIP may not be the operative measure when anti-dumping measures are first applied, it could be that subsequent reviews provide for significantly revised variable factors. It is possible the operative measure may alternate between normal value and NIP from one review to the next.

### ***Timing and purpose of the consideration of USP and NIP***

Customs aims to examine the USP and NIP as early as the screening 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 screening process. As the investigation advances Customs can consider the same issues, whilst progressively referring to data that has been verified.

The USP can be used in the analysis of price underselling (an approach taken by the EC). This is a tool that can be used as an adjunct to analysis of price undercutting, price depression and price suppression by providing a benchmark for injury and causal link. These approaches have not been common practice to this point, but Customs intends to establish procedures in this regard.

NIP estimates that unfold as the investigation progresses can be compared to export prices to assess causal link and the likelihood of an injury margin. For example, in a simple case of one product with one model/type/grade from one country, a finding that the export prices are above the NIPs, would make it difficult to find that material injury was caused by dumping.

The early consideration of the USP and the NIP is another reason for emphasising the importance of the application requirements for cost and price information to be provided separately in respect of each model/type/grade of the goods.

### ***Reviews and accelerated reviews***

When establishing the USP/NIP in reviews (in terms of Division 5 of Part XVB of the *Customs Act 1901*), Customs will generally not depart from the prior approach in the original investigation or a previous review.

Customs might depart from the prior approach where there has been a change in circumstances that would, for example:

- (a) make the earlier USP approach unreasonable; and/or
- (b) makes the earlier USP approach less preferred amongst options now available.

It is possible that the NIP will change, even though the approach to establishing the USP has not because the actual amount of the USP and/or the post-exportation deductions used to derive the NIP may still change.

Similarly, when establishing the USP/NIP in conducting accelerated reviews (in terms of Division 6 of Part XVB of the *Customs Act 1901*), Customs will generally not depart from the prior approach taken in the original investigation or a previous review. In addition, Customs will generally not change the quantum of the USP in an accelerated review.