

AUSTRALIAN CUSTOMS SERVICE
TRADE MEASURES BRANCH
CUSTOMS ACT 1901 - PART XV B

ORDINARY PORTLAND CEMENT

FROM

**INDONESIA, THE PEOPLE'S REPUBLIC OF CHINA,
MALAYSIA AND THAILAND**

Re-evaluation 20/1: Summary of Submissions

31 AUGUST 2001

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ABBREVIATIONS & ACRONYMS

ACDN	Australian Customs Dumping Notice
CEO	Chief Executive Officer of Customs
minister	Minister responsible for Customs
NIFOB	Non-injurious free-on-board price
SEF	statement of essential facts
the Act	The <i>Customs Act 1901</i>
the goods	The goods the subject of the application
USP	unsuppressed selling price
WTO	World Trade Organization
MOFTEC	Ministry of Foreign Trade and Economic Cooperation
SOE	state owned enterprise
NJC	Nanjing Jiangnan Cement Company Limited
JCF	Jiangnan Cement Factory
GML	Great Market Limited
NCA	Nanjing Cement Association
SABMI	State Administration of Building Materials Industry

1 OVERVIEW

On 11 September 2000 Customs reported to the former Minister about its findings from an investigation into the alleged dumping of ordinary portland cement exported from the People's Republic of China, Indonesia, Malaysia and Thailand. Customs found that exports of cement from Indonesia, Malaysia and Thailand had been dumped. It also found that exports from China had not been dumped. Customs did not consider that the Australian industry had suffered material injury from dumping, consequently, it did not recommend that anti-dumping measures be applied to imports of cement from any source.

In December 2000 the former Minister issued guidance to Customs about the determination of normal values in an 'economy in transition' (in this case China) and clarified the meaning of material injury. The documents issued by the former Minister had the potential to affect Customs' report, and she asked that it be re-evaluated.

To undertake the re-evaluation Customs released an issues paper and invited submissions from interested parties. This document provides a summary of the submissions made by interested parties.

A conclusion from the re-evaluation is that the findings made by Customs in its report of 11 September 2000 would have been no different had the Ministerial Guidelines of 28 June 2001 and the former Minister's affirmation of December 2000 been in existence at the time it made its report.

Prior to the preparation of Customs' supplementary report to the Minister, responses to this summary of submissions are sought by close of business 7 September 2001.

2 INTRODUCTION

This re-evaluation is in reference to Customs' report on its findings from an investigation into the alleged dumping of ordinary portland cement forwarded to the Minister on 11 September 2000. The report was not published. However the report was largely based on Customs Statement of Essential Facts number 20 (*Ordinary Portland Cement from Indonesia, Malaysia, the People's Republic of China and Thailand*) released on 26 July 2000 and submissions received in response to that Statement. All of the documents related to the re-evaluation should be read in conjunction with Customs Statement of Essential Facts number 20, and documents available from the public record.

This re-evaluation is limited. It covers two matters in Customs' report: price control situations in 'economies in transition'; and material injury caused by dumping.

2.1 CUSTOMS' INVESTIGATION

Customs' investigation into the alleged dumping of ordinary portland cement began on 9 December 1999 and examined exports to Australia of ordinary portland cement made between 1 January 1999 and 31 March 2000. Customs reported that during that period exports of ordinary portland cement from Indonesia, Malaysia and Thailand were dumped with margins ranging between 9% and 175%. Customs also reported that exports from China were not dumped.

To assess whether Australian cement producers had been materially injured by dumped imports, Customs analysed the economic performance of industry members during the period 1 January 1997 until 31 March 2000. From its inquiries Customs concluded that dumping had not caused, and did not threaten, material injury to Australian cement producers. Customs reported these findings to the former Minister on 11 September 2000.

2.2 EVENTS LEADING TO THIS RE-EVALUATION

In 1999 the *Customs Act 1901* was amended to provide a special approach for determining the normal value of allegedly dumped goods from countries in the process of transition to a market economy. The cement investigation was the first occasion where the provisions were considered. In this case, the provisions apply only to circumstances in China. The other nominated countries are unaffected.

In late December 2000 the former Minister for Justice and Customs:

- issued guidelines to assist Customs apply the new provisions. The guidance is not specific to the cement investigation and has general application. Until the guidelines were issued, the Minister had specified no particular factors that Customs must examine to decide whether a price control situation was extant; and
- affirmed a 1990 Ministerial Direction on material injury and causal link (causal link refers to the relationship between dumping and material injury). The affirmation clarified aspects of that Direction.

Customs reported its findings on the cement investigation to the Minister prior to the issue of the guidelines and the affirmation. When issued, the Minister had not made a decision in respect of the cement investigation and considered that both the guidelines and the affirmation had the potential to affect Customs' report. The former Minister requested that Customs advise about a suitable process for a '*re-evaluation of the alleged dumping of ordinary portland cement given my directions to Customs on matters material to this case*'. In January 2001 the Minister agreed to a procedure proposed by Customs.

Due to a ministerial change in late January 2001, Customs sought confirmation from the new Minister that the re-evaluation should proceed. On 20 February 2001 the Minister endorsed the approach proposed by Customs. On 28 February 2001 Customs publicly notified interested parties that aspects of the cement investigation would be re-evaluated.

Before the re-evaluation could properly commence Customs received legal advice that identified certain impediments to the implementation of the guidelines on price control. As the re-evaluation was dependent on the guidelines, the re-evaluation could not proceed until these impediments were addressed. The Minister issued revised guidelines on 28 June 2001. On the same day Customs released an 'issues paper' for the cement re-evaluation. To encourage maximum participation in the re-evaluation Customs wrote to all known interested parties and invited submissions by 20 July 2001.

A chronology of events is at [appendix A](#).

The guidelines applying to economies in transition are set out in Australian Customs Dumping Notice 2001/42 *Ministerial Guidelines – Section 268TAC(5E) Price Control Situation in Relation to an Economy in Transition*. The Minister's affirmation is contained in Australian Customs Dumping Notice 2001/13 *Section 269TAE Ministerial Guidance on Material Injury and Causal Link*.

ACDN 2001/42 is reproduced at [appendix B](#). ACDN 2001/13 is reproduced at [appendix C](#). Both ACDNs are also available from the internet at <http://www.customs.gov.au/notices/index.htm>.

3 CUSTOMS' RE-EVALUATION

3.1 SCOPE OF THE RE-EVALUATION

The instruction by the former Minister to undertake the re-evaluation, dated 22 December 2000, stated:

'I am returning to Customs the final report on the cement case unsigned with the expectation that a new analysis will be undertaken by Customs in light of the understandings now reached on the treatment of economies in transition and material injury'.

The report referred to was made to the Minister on 11 September 2000 and has not been publicly released.

The request was for 'a new analysis' and not a reinvestigation. The 'understandings now reached' was a reference to the matters as set out in ACDN 2001/42 *Ministerial Guidelines – Section 268TAC(5E) Price Control Situation in Relation to an Economy in Transition*; and ACDN 2001/13 *Section 269TAE Ministerial Guidance on Material Injury and Causal Link*.

The scope of the Minister's request refers only the determination of a normal value Chinese ordinary portland cement and to the consideration of material injury to the Australian industry producing like goods.

3.2 RE-EVALUATION PROCEDURE

The Minister approved the following procedural aspects for the re-evaluation:

- Customs would advise interested parties (by letter and public notice) that it would undertake a limited re-evaluation of its investigation, the reasons for the re-evaluation and the process to be followed in undertaking the re-evaluation;
- Customs would produce and disseminate an 'Issues Paper' seeking written submissions within 21 days;
- On completion of the re-evaluation Customs would forward a supplementary report detailing the result of its re-evaluation and any revised recommendations along with the original report to the Minister for consideration.

Customs notified that the re-evaluation would be done in ACDN 2000/16, by a notice placed in the *Australian Financial Review* of 28 February 2001, and by letters to interested parties dated 22 February 2001 and 28 June 2001. Interested parties were invited to make submissions to the re-evaluation to ensure that all views could be considered.

Within the terms of the Minister's instruction only written submissions to the re-evaluation were accepted.

Customs has maintained a public record during the re-evaluation. The public record meets the requirements of Australian legislation and Article 6 of the WTO Dumping Agreement¹ relating to evidence. The public record may be examined at:

Trade Measures Branch
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

To access the public record, please contact Trade Measures Office Management on telephone number +61 (02) 6275 6547.

Interested parties were also advised that a Probity Adviser was appointed to oversee the process of the re-evaluation.

3.3 HOW TO RESPOND TO THE SUMMARY OF SUBMISSIONS

Interested parties were advised that following receipt of submissions Customs would prepare and release a summary of the submissions received.

Interested parties have 5 working days to respond to this summary prior to the preparation of a report to the Minister. Responses are due by **7 September 2001** and should be addressed to:

The Director
Trade Measures, Operations 5
Australian Customs Service
Customs House
5 Constitution Avenue
CANBERRA ACT 2601

Alternatively, submissions may be sent by facsimile to +61 2 6275 6990 or by email to murray.edwards@customs.gov.au.

Interested parties are reminded that for the purpose of the public record, responses should be clearly marked 'confidential' and 'non-confidential' as appropriate. Non-confidential summaries of responses will be included on the public record and must be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

In some circumstances, it may not be possible to prepare a non-confidential summary in this way. The Dumping Agreement states this would be an 'exceptional circumstance'². If an interested party considers their circumstance to be exceptional, they must satisfy the Chief Executive Officer (CEO) of Customs that there is no way such a summary can be given to allow a reasonable understanding of the substance of

¹ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

² Sub paragraph 6.5.1

the information. Confidential responses made without a non-confidential version must include a statement of reasons to satisfy the CEO of this requirement.

Because of the limited time available to conduct its re-evaluation, responses must be received by the due date. Interested parties are advised that Customs may disregard responses that include information outside the scope of the re-evaluation, or are received after the due date, or do not include a non-confidential summary.

Interested parties are reminded that any responses to this summary are due by 7 September 2001.

3.4 SUBMISSIONS RECEIVED

Customs received twelve submissions in response to the issues paper released on 28 June 2001. Non-confidential summaries of the submissions are available from the public record. The submissions comprise those made by a foreign government, exporters, the Australian cement producing industry and the Australian cement importing industry. A list of submissions is at [appendix D](#).

The submissions raise four matters that will be addressed in Customs' supplementary report to the Minister. These are:

1. Whether a price control situation exists in respect of domestic sales made by the relevant Chinese exporter.
2. Whether the outcome of the price control consideration leads to a conclusion that the goods exported from China were, in fact, dumped.
3. In light of the affirmation issued by the Minister, if a conclusion can be made that the Australian industry has, in fact, been materially injured or is threatened with material injury from dumping.
4. Issues arising from the elapsed time since the investigation commenced.

Each of these matters is addressed in the following chapters. Customs' approach has primarily been to consider whether its recommendations would have been different had the guidelines on price control and the affirmation about material injury existed when it first reported to the Minister in September 2000.

4 PRICE CONTROL

Dumping, broadly defined, is the export sale of a good at a price less than its normal value. A normal value is usually established from the price charged in an exporter's domestic market or from the cost of production and sale. In the case of imports from a country where the government has a complete, or substantially complete, monopoly of its trade and where prices may be fixed by the state particular difficulties arise in the determination of a normal value³. Until 1999, Customs would usually determine a normal value in such a country by reference to a 'surrogate' price obtained from a suitable market economy.

In 1999 the *Customs Act 1901* was amended to provide a new approach to determine the normal value of allegedly dumped goods from a country with an economy in the process of adjustment from central management⁴ to a market economy. In an anti-dumping investigation this is usually referred to simply as an 'economy in transition'.

Because adjustment to a market economy may not be uniform, the legislative amendments made provision to establish whether an exporter's domestic selling price of particular goods is subject to government control. The legislation restored flexibility to the investigation of dumping from such countries recognising that a particular good may still be subject to price control, even though the economy as a whole is not. If a price control situation is extant the Minister may determine normal value having regard to all relevant information. This can include, but is not limited to, information obtained from countries other than the country of export.

In December 2000 the Minister for Justice and Customs issued guidelines to Customs to assist in the consideration about whether a price control situation exists in an economy in transition to a market economy. Because of certain legal issues, the guidelines were amended and re-issued on 28 June 2001⁵. The most recent guidelines are applicable to this re-evaluation.

The guidelines were issued in reference to a specific part of the *Customs Act 1901*⁶. The Act states:

- (5E) A price control situation applies in relation to the domestic selling price of like goods to the goods first referred to in subsection (5D):
- (a) if the exporter of the goods so referred to sells like goods in the country of export and the domestic selling price of those like goods is controlled, or substantially controlled, by a government (at whatever level) of that country; or.....

³ Footnote 2 to paragraph 1 of Article VI of the GATT 1995.

⁴ Customs legislation at ss266TAC(5D) refers to a situation where, in the past, 'the government of the country of export had a monopoly, or a substantial monopoly, of the trade of that country and determined, or substantially influenced, the domestic price of goods in that country'.

⁵ ACDN 2001/42 refers.

⁶ Sub section 269TAC(5E) defines price control. The definition is for application in sub section 269TAC(5D).

The legislation identifies the relevant consideration to be whether a government controls the domestic selling price for like goods sold by the particular exporter.

The Minister's guidelines refer to 'principal considerations' and 'other influencing considerations' relevant to the determination of a price control situation. Not all of the considerations make direct reference to selling prices. Some relate to inputs used in the producer/exporter's production, others relate to corporate governance matters, and the remainder refer to the domestic market in which the producer/exporter sells. In view of the construction of the legislation, the considerations identified by the guidelines require judgement about their relationship (and effect) on the domestic prices of the producer/exporter. That is, the guidelines are not in themselves determinative, but provide a framework for the examination of the issue.

The price control guidelines will be used by Customs to analyse the situation in China and to formulate recommendations about matters on which Customs considers the Minister ought to be satisfied⁷.

4.1 VIEWS OF INTERESTED PARTIES

The investigation identified one company that had exported cement to Australia from China during the investigation period. Customs visited that company, Nanjing Jiangnan Cement Company Limited (NJC), in April 2000. A report about the visit is available from the public record. At that time, Customs concluded that a price control situation did not exist in relation to domestic sales of cement by the Chinese exporter. The normal value assessed for NJC was constructed using the company's costs to make and sell cement in China. Chinese market prices were not used in the construction.

The re-evaluation assesses whether or not the same conclusion would be reached had the Minister's guidelines been in existence and applied at the time Customs made its recommendations to the Minister.

Four submissions referred to the issue of price control. Two made no specific reference to the guidelines issued by the Minister⁸ but considered the methodology applied by Customs in making its initial recommendation was correct.

A submission from Freehills, made on behalf of Chinese interests, stated that the information reported by Customs about the Chinese producer's corporate status, suppliers and the industry was largely correct. The submission concluded that the facts do not suggest the Chinese Government controls the price of cement sold by NJC. It states '*[n]ot only is NJC free to determine the price at which it sells cement (and this is the relevant legal consideration),*

⁷ Section 269TC. At the conclusion of an investigation and before a dumping duty notice can be published Customs' is required to furnish a report to the Minister that recommends, among other things, whether '*the minister ought to be satisfied as to the matters in respect of which the minister is required to be satisfied*'.

⁸ Submissions from PT Semen Cibinong Tbk and Pt Semen Kupang (Persero).

there is no evidence that the government controls the price of cement sold by what are referred to as “SOEs” [state owned enterprises].

The submission from Freehills is in contrast to a submission from the Cement Industry Federation (and also in a late submission from lawyers on the Federation’s behalf). Each presented Customs with different opinions about the meaning of ‘control’ as expressed in the legislation. Freehills (representing exporter interests) takes a narrow view of the meaning of control. The Cement Industry Federation (representing Australian producer interests) takes a wider view.

Customs’ view of the meaning of control is, for the most part, influenced by the Minister’s guidelines. In making a recommendation about price control its approach has been to analyse the facts against each of the considerations set out in the guidance. This accords with Customs’ understanding of the Minister’s request that a new analysis be done.

4.2 THE MINISTER’S PRINCIPAL CONSIDERATIONS

The guidelines state that in determining whether or not a price control situation applies, regard may be had to four principal considerations. In the guidelines these principal considerations are labelled (A) to (D).

4.2.1 Exporter’s decisions about price, cost, inputs, sales and investments

Principal consideration (A) is whether decisions of the relevant producers or exporters relating to prices, costs, inputs, sales, and investments are made in response to market signals and without significant state interference. This consideration is expanded into four sub paragraphs.

Sub paragraph (i) addresses whether genuinely private companies or parties hold the majority shareholding of the relevant producer. The following facts are relevant to this consideration:

- The exporter, NJC, is a legal entity.
- NJC is a joint venture company, the two partners being Jiangnan Cement Factory (JCF) and Great Market Limited (GML).
- GML holds 60% of the issued capital and JCF holds 40%.
- The minority shareholder, JCF, is a wholly state owned enterprise (SOE).
- The majority shareholder, GML, is a wholly owned subsidiary of Shui On Building Materials Ltd that, in turn, is a subsidiary of Shui On Construction and Materials Ltd.
- Shui On Construction and Materials Ltd is a public company listed on the Hong Kong stock exchange.

The Cement Industry Federation suggests that Customs’ conclusion about private ownership is not supported by information in the 1999/2000 Annual Report of Shui On Construction and Materials where in respect of NJC it is said that *‘the Group is under a contractual arrangement to jointly control [NJC] with a PRC partner. Accordingly the Directors consider it a jointly controlled entity’*. The Cement Industry Federation suggests that the term ‘joint control’ is

inconsistent with a finding that a private company has a majority shareholding. The annual report defines jointly controlled entities to be 'joint venture arrangements which involve the establishment of a separate entity in which each venturer has an interest'⁹. Therefore, the comment in the annual report does not, of itself, provide evidence to alter a conclusion that a genuinely private company holds the majority shareholding of NJC.

Sub paragraph (ii) considers whether state or provincial officials appearing on the board or in key management positions are in a clear minority. In respect of this consideration Customs found the following:

- The joint venture agreement provides for GML to have a majority of members on the board.
- The board chairman is a JCF appointee and a Nanjing municipal government official.
- The joint venture agreement states that each member of the board has one vote.
- No state or provincial official holds any of the following management positions at NJC: General Manager, Deputy General Manager, Financial Controller, Technical Director.

The Cement Industry Federation considers this information is inconsistent with the statement about joint control in the Shui On Construction and Materials annual report referred to above. What can be interpreted from the statement has already been addressed. The Cement Industry Federation requests that Customs recognise the influence and role of the Chairman, a municipal government official, in an environment where 'state controls are still pervasive'. However, it is not apparent that state controls are, in fact, pervasive. What is evident from documents obtained by Customs is that the Chairman has a single vote, like other board members.

Sub paragraph (iii) considers whether the relevant producer or exporter has guaranteed freedom to carry on business activities as evidenced by (a) no restriction on selling on the domestic market (b) the right to do business cannot be withdrawn outside proper contractual terms, and (c) in the case of joint venture companies, profits can be exported and capital invested can be repatriated. In respect of this consideration Customs found the following:

- NJC sells cement to customers located along the eastern seaboard of China as well as inland.
- NJC requires a business licence to operate. The Chinese authorities have withdrawn business licences for certain cement operations as part of an initiative to restructure the cement industry.
- NJC is a joint venture company. The joint venture agreement states that, after paying relevant taxes, profit and loans due to GML can be taken outside China. NJC made no profits in 1998 and 1999.

The Cement Industry Federation suggest that local governments will generally only purchase from the local cement company (or other entity) in which they have an interest. Regarding NJC, the Cement Industry Federation propose that because most of its sales are to the eastern seaboard this is indicative of sales to local governments.

⁹ Shui On Construction and Materials annual report, statement of significant accounting policies.

Customs' found that the geographic distribution of sales is limited by the logistics and cost of transporting cement.

In respect of NJC's sales to inland customers, the Cement Industry Federation state these are to a related company and do not indicate a general absence of restrictions on domestic sales. The Cement Industry Federation's information has been compared with Customs' verified information and is inaccurate. NJC's inland sales include customers other than related parties.

The Cement Industry Federation also state that their information shows that while profits from a joint venture can be paid as dividends to shareholders, there is no provision in Chinese company law to allow for the reduction in capital that has been contributed by a foreign entity to a joint venture. Customs has been advised that repatriation of capital is not precluded.

Sub paragraph (iv) considers whether the major production inputs of the relevant producer or exporter are or are not supplied by state owned or controlled enterprises at prices which do not substantially reflect free market conditions. Inputs include, *inter alia*, raw materials, labour, energy and technology costs. In respect of this consideration Customs found the following:

- The major production inputs for cement are limestone, coal, electricity and labour.
- A Limestone Supply Agreement is an attachment to the NJC joint venture agreement. The Limestone Supply Agreement:
 - ◀ requires that JCF supply the joint venture with limestone;
 - ◀ places a cap on the price of limestone payable by the joint venture for a period following the establishment of the joint venture;
 - ◀ provides for limestone prices to be adjusted infrequently following the initial price cap period.
- JCF sources limestone for supply to the joint venture from a quarry operated by a joint venture company, Jiangnan-Onada Cement Company.
- JCF is a minority partner in Jiangnan-Onada Cement Company. The major partner is Taiheiyo Cement Corporation, a Japanese cement manufacturer.
- NJC provided quotes for the supply of limestone from two alternative sources. Both quotes were lower than the price paid by NJC. NJC could not state that the suppliers or the quarries were not wholly or partly state owned.
- Customs compared the price paid by NJC for limestone with the costs incurred by cement producers in Indonesia and Malaysia and found the limestone cost in Indonesia and Malaysia was significantly lower than the price paid by NJC.
- NJC sources coal from a number of suppliers. NJC 'suspects' that the suppliers may be SOEs.
- NJC is not party to a contract for the supply of electricity. NJC has made a payment to an electricity authority to guarantee supply over an extended period.
- Staff for the joint venture were re-employed from JCF.

The Cement Industry Federation considers the major inputs relevant to this consideration to be coal, electricity, gypsum, limestone and labour. Although labour was initially brought into the joint venture from JCF, a state owned enterprise, NJC is now the employer. Labour is not supplied by a state owned or controlled enterprise. Limestone is extracted and first sold by a joint venture company, but it is purchased

by NJC through its joint venture partner, JCF. On the evidence, coal and electricity are probably supplied by SOEs. Although Customs is aware of the name of the Chinese supplier of gypsum, it is not evident whether this is a state owned enterprise.

Some inputs are supplied by state owned or controlled enterprises. Where the production inputs are supplied by state owned or controlled enterprises the Minister expects that Customs will examine whether prices substantially reflect free market conditions. In its first report Customs benchmarked the price of limestone (as the only raw material representing more than 10% of production cost) against known market prices in Indonesia and Malaysia. The comparison revealed limestone prices in these other countries to be significantly less than the actual cost incurred by NJC in China. Customs has now similarly benchmarked other major input costs for NJC. This extended comparison reveals NJC receives no cost advantage (relative to the accepted market economies of Malaysia and Indonesia) by sourcing some of its inputs from state enterprises.

4.2.2 The exporter's accounting records

Principal consideration (B) is whether one clear set of basic accounting records is kept by the relevant producer or exporter, and is independently audited and maintained in accordance with either generally accepted accounting principles in the country of export and in line with international accounting standards.

A Chinese accounting rule, said by the Cement Industry Federation to be different from internationally accepted standards, is that the provision for bad debts 'shall be 0.5% of the outstanding balance at the end of the accounting period'. According to independent advice received by Customs, the information submitted by the Cement Industry Federation is not correct. The percentage referred to is in relation to a tax regulation applicable to claims for deductions. An examination of NJC's accounts also shows an allocation that substantially exceeds 0.5%.

The Cement Industry Federation also submitted that Deloitte Touche Tohmatsu does not audit NJC's accounts. This is correct: As previously reported by Customs KPMG Hong Kong is the independent auditor of NJC's accounts. Customs also reported NJC prepares its financial accounts in accordance with the Statements of Standard Accounting Practice issued by the Hong Kong Society of Accountants and accounting principles generally accepted in Hong Kong.

4.2.3 Whether production costs are distorted

Principal consideration (C) assesses whether the production costs and financial situation of the relevant producer or exporter are or are not subject to any significant distortions carried over from the non-market economy system.

In response to this consideration the Cement Industry Federation put forward several views on the structure of the cement industry in China. The relevance of this to the consideration, and others, is addressed later in this summary.

The Cement Industry Federation also refer to an ‘admission’ by MOFTEC that it controls export prices. Customs’ report of what MOFTEC said is repeated below¹⁰.

‘MOFTEC sought to explain that there was some government control [over export prices] in cases where exporters were found to be dumping following an investigation by foreign governments, MOFTEC would ensure that a minimum price was complied with.

MOFTEC was then asked about government controls over export rights and foreign exchange. MOFTEC responded by claiming that the old licensing arrangements were extensively reformed and that licensing now was a matter of registration with the government or using agents that were registered. MOFTEC stated that the government did maintain some controls over certain products, but that cement was not included.’

From these statements it is not apparent that the production cost and financial situation of NJC is subject to distortion carried over from the non-market economy system.

4.2.4 Bankruptcy laws

Principal consideration (D) assesses whether the relevant producer or exporter is subject to bankruptcy and property laws, which guarantee legal certainty and stability.

In respect of this consideration the Cement Industry Federation stated it was not in a position to comment, but noted the producer does not own land as it is owned by the state. Customs has established that although NJC does not own land, it has purchased the rights to the use of land. Regarding bankruptcy laws, Customs’ report¹¹ about the situation in respect of Chinese SOEs states:

‘The investigation team inquired [with MOFTEC and the State Administration of Building Materials Industry] as to what measures were in place to ensure that SOE’s do not continue to sell at a loss. It was stated that SOE’s now face bankruptcy proceedings.’

Customs has been advised that China’s bankruptcy laws were introduced in 1987, apply equally to all entities and are not modified at the provincial government level. Twenty-eight large and medium-sized state owned enterprises declared bankruptcy in Jiangsu Province in 1999¹².

It is evident that bankruptcy laws are in operation in the Jiangsu province where NJC operates, and that SOEs are subject to those laws.

¹⁰ Non confidential version of Customs report of its on site visit to NJC and discussions with Chinese officials pg 26, available from the public record.

¹¹ idem at pg 27

¹² Pg 71 Statistical Communiqué of the People’s Republic of China on the 1999 National Economic Development, Foreign Language Press, China Statistical Information Service Centre, Beijing.

4.3 OTHER INFLUENCING CONSIDERATIONS

The ministerial guidance identifies other influencing considerations (labelled 1 to 4) to which regard may also be had in determining whether a price control situation exists.

4.3.1 The broader market

An influencing consideration is whether the relevant producer or exporter of the goods under consideration forms part of a broader market or sector in which the presence of a state owned enterprise or enterprises has influenced prices. Customs found that a significant proportion of cement production and sales in the Nanjing area (and throughout China) is supplied by SOEs. It also found that all of the cement SOE's in the Nanjing area made losses in 1999.

The Cement Industry Federation, in response to this consideration, suggests that because SOEs are predominant in the cement industry prices are 'hence set'. It comments that NJC is 'part of the broader building and construction industry which is primarily government owned and which plays the dominant role in determining demand for cement and price'.

Regarding other market influences the Cement Industry Federation has provided various viewpoints, including that infrastructure spending by the Chinese Government is a driver of demand (and hence prices), and that efforts to restructure the industry is evidence of government involvement such that a conclusion of price control must be drawn.

In its submission Freehills states '*the designation of any company as an SOE does not mean that the prices at which it sells products is controlled by the government*'. The Minister's guidelines do not conflict with this view¹³. When evaluating submissions, Customs has taken into account that the Minister's guidelines require that it assess both the presence of state owned enterprises as well as any influence on price.

Customs considered this aspect during its normal value inquiries. Customs' report stated¹⁴:

'It would seem logical to conclude that the presence of SOE's is an influence in the Nanjing cement market and therefore a factor contributing to the problems the market is currently experiencing. However, the material provided by the NCA [Nanjing Cement Association] indicates that other market forces are also in play in the Nanjing market. An extract from the previously quoted December 99 report is reproduced again below.

It is anticipated that supply will continue to exceed demand in Nanjing over a long period of time. Thus cement price will continue to hover at a low level.

¹³ For example, consideration (A)(iv) examines whether prices from a state enterprise reflect free market conditions. That is, mere supply by an SOE does not automatically lead to a conclusion of price control - the Minister expects that an assessment be done about whether the prices from an SOE reflect those determined by a market.

¹⁴ Non confidential version of Customs report of its on site visit to NJC and discussions with Chinese officials pg 28, available from the public record.

Another reason for the low level of price is because of the surplus supply, the large and medium size cement enterprises, which supply 80% of Nanjing market have not jointly worked together to uphold cement prices. They lower their price to compete fiercely for market share.'

The extract from the Nanjing Cement Association reports 'fierce' competition for market share between cement producers (including SOE cement producers). There are other references to strong competition having a downward effect on prices¹⁵. In its report Customs concluded that although SOE's may have contributed to depressed prices this could not be interpreted as a form of price control exercised by the government without further evidence to support such a conclusion.

The World Bank¹⁶ when describing progress with price reforms in China said:

'China's price reforms began in late 1978, implementing a dual-track system in which the share of production subject to state procurement continuously declined, and more and more prices were subjected to varying degrees of market guidance. The reforms began in agriculture and spread slowly, first to consumer goods and later to intermediate goods industries. In each case a free market developed in parallel with the controlled market, where state supply was kept unchanged at the (lower) plan price. Supply in the free market grew rapidly, so its share in total output rose steadily. Meanwhile the planned price was raised incrementally until it approached the market price. By the end of 1994 this dual track system had led to the decontrol of more than 90 percent of retail prices and between 80 and 90 percent of agricultural and intermediate product prices, all of which are now market determined. Only a few prices remain fixed or negotiable within a band set by the state.'

In 1997 the Department of Foreign Affairs and Trade¹⁷ emphasised the progress with price reform by reference to supporting studies by the World Bank and the International Monetary Fund. Customs has obtained an updated list of the products and services subject to price controls in China¹⁸. Cement is not included in the listing.

The reports of 'strong' and 'fierce' price competition in the Chinese cement industry, in conjunction with other information about price reform in China, point to prices in the cement market being able to move unfettered by government control. That is, the broader market or sector in which NJC participates has the characteristics of a market economy.

In its submission the Cement Industry Federation provides information about industry restructuring underway in the Chinese cement industry. Generally, it refers to a Chinese Government intention to encourage closures of inefficient plant and the

¹⁵ Shui On Construction and Materials Ltd Announcement of results for year ended 31 March 2001, attachment 14 Cement Industry Federation submission, and Cement Industry Federation submission pg 13, both available from the public record.

¹⁶ 1996 World Bank *World Development Report 1996 From Plan to Market*, International Oxford University Press, Oxford, pg 24.

¹⁷ 1997 Department of Foreign Affairs and Trade, *China Embraces the Market*, Commonwealth of Australia, Pg 77.

¹⁸ Restricted WTO document.

implementation of standards to increase the production of higher quality cement. Customs was advised about this intention by SABMI, the State Administration of Building Materials Industry. Customs reported¹⁹:

'By the end of year 2000 SABMI expects that low quality production will be reduced by 100 million tonnes. This will be done to reduce pollution and wastage of resources. This is consistent with the government's strategy to improve production capacity of high quality cement by attracting foreign investment to either upgrade or replace existing factories.'

As Customs understands it, the intention of the Chinese Government's plans for structural reform include encouraging scale economies of production (by the closure of smaller plants), developing efficiency in production (by the adoption of newer technology), promoting the production of higher quality cements (through investment in new plants and implementation of product standards) and reducing the polluting effects of inefficient production. In the context of the Minister's guidance Customs considers government activities that may affect price, and those activities that in effect control price, should be distinguished. Industry structural reforms may be intended to ultimately attain more efficient pricing, but under ordinary concepts could not necessarily be construed as a control over prices.

The Cement Industry Federation refer to reports about infrastructure spending in China and state *'the demand for cement is principally a function of government infrastructure expenditure which has been directed to promote the use of high grade cement in the local region serviced by the exporter'* and *'the government infrastructure program is a key driver of demand, and almost all cement is sold to a state controlled entity'*. Customs discussed infrastructure spending with MOFTEC and SABMI. Examples of infrastructure projects included highways of 1,045,000 kilometres (1.15 times more than the current level), expressways of 20,000 to 25,000 kilometres (or around 2.7 to 4.2 times current levels) and the provision within the next decade of 3 billion sqm of accommodation in city areas and 800 million sqm in country areas. However, macroeconomic policies, such as an expansionary fiscal policy that may stimulate aggregate demand, are arguably remote from the price control provisions of Australian anti-dumping legislation that focus on the domestic selling prices of a particular exporter ²⁰.

4.3.2 Utility supply

¹⁹ Non confidential version of Customs report of its on site visit to NJC and discussions with Chinese officials pg 25, available from the public record.

²⁰ Even the United States, which continues to treat China as a non-market economy, makes a similar distinction. For example when considering whether to determine separate export prices in a dumping investigation the Department of Commerce stated *'the Department's separate rate test to determine whether the exporters are independent from government control is not concerned, in general, with macroeconomic/border type control eg export licences, quotas, and minimum export prices, particularly if these controls are imposed to prevent dumping. The test focuses, rather, on controls over the investment, pricing, and output decision making process at the individual firm level'*. Preliminary Determination, Foundry Coke from China, FR 13885 pg 9.

The second consideration is whether the supply of utilities is guaranteed on the basis of contracts that reflect normal commercial terms and at prices that are generally available throughout the economy. Customs found the principal utility used by NJC is electricity. NJC does not have a supply contract with its electricity supplier but it has paid an amount to guarantee supply for a period. The supply price of electricity was examined as part of Customs' assessment of principal consideration (A).

4.3.3 Supply of land

The third consideration is whether the land on which the facilities of the company are built is rented from the state at conditions comparable to those in a market economy country (eg. proper contractual leases). The Cement Industry Federation submit there is no indication that the contract is at market rates, terms or tenure. Whether the lease is or is not at market rates is difficult to establish²¹. The consideration focuses on the conditions under which the rental takes place, and an example is given about lease conditions being 'proper'. Customs found that NJC purchased from JCF the rights to the land on which it operates. The evidence shows that the rights to land use are subject to the conditions of the joint venture agreement; the lease is finite but renewable, there is consideration paid and payable, the payments are not nominal and the amounts are properly reflected in NJC's accounting records. These are all conditions comparable to a market economy country.

4.3.4 Supply of labour

The fourth consideration is whether the company has the right to hire and dismiss employees and the right to fix salaries. Customs found the following relevant to this consideration:

- The joint venture agreement states that the responsibilities of the General Manager include appointing and dismissing staff.
- The joint venture agreement states that decisions relating to wages and benefit payments to workers can be made with the agreement of two thirds of the directors.
- Customs obtained a copy of a 1998 staff management proposal aimed at reducing staff numbers agreed to by NJC's Board of Directors.
- Customs obtained a copy of a document approved by NJC's Board of Directors setting out the method of implementing wage increases for 2000.

No substantive submissions from any party were received by Customs in response to this consideration.

4.3.5 Other information

²¹ The value of land, and by consequence its lease value, is determined by variable factors (including but not limited to parcel size, location, access to resources, services, and proximity to infrastructure). In combination these create a unique value. Because of this the land value and lease rate cannot easily be benchmarked to a like situation in another economy.

The Minister's guidance states that he will have regard to any other information that is relevant to the consideration of the existence or otherwise of a price control situation.

Other information supplied by the Cement Industry Federation, not already addressed elsewhere in this summary, includes that NJC has not been profitable since it commenced operations in 1998. Sales at a loss, and particularly for start up operations, occur in market economies. It is sufficiently common that anti-dumping legislation makes specific provision for loss making sales. Customs points out that all of the other cement companies exporting to Australia made losses during the investigation period. Sales at a loss by NJC is not indicative of a price control situation.

The Cement Industry Federation in its submission, and in other correspondence to Customs, refer to the operations of Hebei Provincial Jidong Cement Plant (Jidong). Jidong did not export any cement to Australia during Customs' investigation period. Jidong has no known association with NJC, the exporter investigated by Customs, whose sales are being assessed for price control. Domestic sales by Jidong are irrelevant to the determination of a normal value for NJC.

4.4 CONCLUSION REGARDING PRICE CONTROL

The considerations identified by the Minister's guidelines require a judgement to be made about their relationship (and effect) on the domestic prices of the producer/exporter. In respect of NJC, none of the considerations provide evidence of the existence of a price control situation.

4.5 DUMPING MARGIN - CHINA

Customs first recommended to the Minister that a normal value applicable to NJC's domestic sales be determined according to section 269TAC5(G) of the Act. Had the Minister's guidelines existed at the time Customs reported to the Minister, its recommendation about the way to determine normal value would be unchanged²².

The conclusion that ordinary portland cement exported from China was not dumped during the investigation period is unaltered by the Minister's guidelines²³.

²² Customs does not usually prepare alternative normal values for the Minister's consideration. In this case, Customs was faced with the prospect that as a result of the application of the Minister's guidelines its recommendation would change. In anticipation of that, Customs worked out other 'normal values' according to two other methodologies such that it would be in a position to promptly advise the Minister. Neither reveals an actionable dumping margin. This result is provided for the information of interested parties and will not form part of Customs' recommendation to the Minister.

²³ At consideration A(iv) the guidelines assess whether substantially free market conditions apply to major production inputs. This is a principal consideration for the determination of price control. The consideration shows the importance the Minister places on input prices that reflect market conditions. Customs found that a particular raw material, limestone, was supplied by a state owned enterprise at a value higher than in Indonesia and Malaysia. In making its recommendation to the Minister Customs will continue to calculate a normal value according to section 269TAC5(G) of the Act, but will consider the substitution of limestone prices reflecting Indonesian and Malaysian market values.

5 MATERIAL INJURY

Before anti-dumping measures can be applied three things must be established (i) that imported goods have been dumped, (ii) that an Australian industry producing like goods has been injured, and (iii) injury that can be attributed to dumping is ‘material’ (this latter point is usually referred to as ‘causal link’).

In March 1989 the Anti-Dumping Authority completed an inquiry into the meaning of material injury²⁴. The Authority’s conclusions formed the basis of a Ministerial Direction issued in 1990. The Direction stated:

‘The Comptroller shall make a preliminary finding that sufficient grounds exist for the publication of a dumping duty notice or a countervailing duty notice only when dumping or subsidisation has caused, or is threatening, "material" injury to the Australian industry producing like goods - that is, injury which is not immaterial, insubstantial or insignificant; injury which is greater than that likely to occur in the normal ebb and flow of business.

The Government expects that 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, in the sense in which "material" is defined above. Nevertheless, the Government acknowledges that (rare) cases may occur in which material injury may indeed be caused or threatened even though the Australian industry's profits have not been "materially" reduced and even though the dumped or subsidised imports hold only a small share of the Australian market.

The Comptroller shall take the above comments to apply, adjusted as necessary to the circumstances of the case, when considering whether dumping or subsidisation has "materially" hindered the establishment of an Australian industry.’

In December 2000 the former Minister affirmed this Direction. Like the Minister’s guidance on ‘economies in transition’, the former Minister’s affirmation is not specific to the cement investigation. However, unlike the Ministerial guidance, the affirmation referred to a document in existence at the time Customs completed its report. In effect, the affirmation clarified aspects of the Ministerial Direction – it did not create any new considerations.

Both the Direction and affirmation confirm a requirement to assess profits and the volume of imports when considering of material injury. The former Minister’s affirmation states that these two matters are not to be read cumulatively. That is, material injury from dumping can be established where there is a ‘material’ diminution of profits but it is not also necessary that dumped imports hold a significant market share (but imports must nevertheless be sufficient to cause or threaten the material injury).

The affirmation also confirms that, in the former Minister’s view, in only rare cases will material injury be proven where there has not been a material diminution of profit or where dumped imports hold only a small share of the Australian market.

²⁴ Anti-Dumping Authority 1989, *Inquiry into Material Injury, Profit in Normal Values and Extended Period of Time*, AGPS, Canberra

5.1 CONSIDERATION OF SUBMISSIONS

To assist interested parties prepare submissions to the re-evaluation Customs identified in its issues paper several matters raised by the former Minister's affirmation.

The issues paper identified certain issues that would have arisen had cement from China been found to be dumped. Because Customs has concluded that its finding in relation to price control is not altered by the guidelines these issues do not arise.

Four submissions were received about whether blended cements and clinker could be included along with ordinary portland cement as like goods²⁵. Neither the Ministerial Direction nor the former Minister's affirmation alter the interpretation of the definition of like goods. The Ministerial Direction and the former Minister's affirmation refer only to injury to an industry producing like goods, that is, apparently exclusive of clinker and blended cements. However, Customs' injury assessment included consideration of blended cements and clinker. The submissions create no reason why Customs should exclude blended cements and clinker from its consideration of injury.

Other issues relate to the volume of dumped imports and their impact on the Australian market. During the investigation period, the volume of dumped imports was small in comparison to the size of the Australian market (less than 1%). Although identified as a rare case, neither the Ministerial Direction (that applied at the time of Customs' report to the Minister) nor the former Minister's affirmation preclude that a small market share may be sufficient to cause material injury. For the most part, the Australian industry producing cement does not submit that its injury has been in the form of lost sales volume or lost market share. It has stated that injury is essentially quarantined to price effects '*as local prices have had to be reduced in order to avoid lost sales and increased import penetration through dumped imports undercutting local producers' selling prices*'. From its consideration of submissions, Customs' findings about the extent of injury attributable to the quantity of imports do not appear to be substantially at issue.

The remaining issue concerns cement prices and the profits of Australian cement producers. In its submission to Customs, the Cement Industry Federation reiterates how dumping has allegedly caused injury. In summary, it is stated that because of the industry structure and the homogenous nature of cement, the industry has no option other than to import parity price. In this situation, if it is shown to exist, the rare circumstance described in the Ministerial direction is feasible: the price outcome from a small volume of imports (that establishes a credible threat from imports) could, in theory, cause an adverse price effect and a material diminution of profits.

In its assessment of material injury, at no time did Customs conclude the volume of imports to be too small to cause material injury.

²⁵ S. 269T defines like goods to be '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 of the goods under consideration'.

When considering whether injury could still be proven by a material diminution of profit, Customs found that the Australian industry's profits in 1998 and 1999 (the years where dumped imports were present in the Australian market) were higher than in 1997 (when there were no imports).

The Cement Industry Federation submit that although profits do not appear to have been reduced other factors are relevant. It states '*[p]rices declined when volumes increased to record levels; profitability stayed flat when it should have risen from the combination of observable cost reductions, observable volume increases and expected price increases during peak demand*' and '*[t]he very substantial investment by the Australian industry to reduce costs should also have produced additional profits in line with the cost reductions achieved*'²⁶. Although there has not been a material fall in profits, the Cement Industry Federation submits that but for the presence of imports the industry's prices (and hence profits) would have been higher.

Customs did consider, as required by the Ministerial Direction, whether a relationship could be established between dumped import prices and domestic prices. The evidence observed by Customs does not support the position made by the Cement Industry Federation²⁷. Imports were present in the Queensland market for about twelve months prior to any price change of significance, in Victoria price changes preceded imports, and price changes in New South Wales and Western Australia occurred in the complete absence of imports. Because price changes could be associated with factors other than imports, Customs concluded that a causal link between dumped imports and injury to the Australian industry could not be made.

5.2 CONCLUSION ON MATERIAL INJURY

Customs' conclusions on material injury would have been no different had the former Minister's affirmation been made prior to Customs' report to the Minister.

²⁶ CIF Submission dated 20 July 2001, public record version, pg 26.

²⁷ With the exception of the Northern Territory.

6 CURRENT INFORMATION

Several submissions refer to the time taken for the investigation to reach this point. The reasons for this are explained elsewhere in this summary.

The submissions identify two issues. The first, raised by the Cement Industry Federation, is that Customs and the Minister must have regard to reasonably current information in reaching conclusions and making decisions for this investigation. The second, raised by the Indonesian Government and Indonesian exporters, is that a decision consistent with WTO anti-dumping requirements cannot now be made.

6.1 RECENT INFORMATION

The Cement Industry Federation refer to (their) legal advice that the provisions of the Act require the Minister's decision be made using up to date information on normal values, export prices and material injury.

The Cement Industry Federation has supplied what it asserts to be updated information about the economic performance of the cement industry. As for all investigations, Customs' practice is to accept this type of information only after verifying its accuracy and completeness. Industry economic data must also be considered in the context of contemporary export prices and normal values to establish the existence (or otherwise) of dumping. Without revisiting all the relevant exporters and importers, this information is, therefore, unavailable. A substantial process of re-investigation, including ensuring all interested parties have the opportunity to present information, would be required. The former Minister's request for re-evaluation did not contemplate that Customs do this.

6.2 WTO PROVISIONS

Article 5.10 of the Anti Dumping Agreement²⁸ states:

'Investigations shall, except in special circumstances, be concluded within one year and in no case more than 18 months, after their initiation.'

A submission from the Indonesian Government refers to the article:

'Bearing in mind that the investigation concerned was initiated on 9 December 1999 and the eighteen month period laid down in article 5.10 of the Agreement on Implementation of article VI of GATT 1994 (agreement) has already passed, the Indonesian Authorities understands that the issue paper and summary of facts represents an internal procedure with no legal standing in the context of the Agreement' (sic).

Customs reported its results to the Minister on 11 September 2000, well within the period specified by the Agreement. However the Agreement does not define when an investigation is concluded, nor is the Agreement explicit about

²⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

what action is available or intended where the stipulated time frames are exceeded. A view, which can be implied from the Indonesian Government's submission, is that an investigation is not concluded until a final determination is made. Also implied is that where a determination is not made within the time period the expectation is that the relevant investigation be terminated.

7 CONCLUSIONS

The conclusions that can be made from the re-evaluation are that:

- the findings in Customs report of 11 September 2000 would have been the same had the Ministerial Guidelines of 28 June 2001 and the former Minister's affirmation of December 2000 existed at the time the report was made; and
- the results of Customs' investigation and re-evaluation do not support a recommendation that the Minister be satisfied that ordinary portland cement exported and dumped during the investigation period from Indonesia, Thailand, Malaysia caused or threaten to cause material injury to the Australian industry.

8 APPENDICES

- Appendix A Chronology
- Appendix B *Australian Customs Dumping Notice 2001/42 Ministerial Guidelines – Section 268TAC(5E) Price Control Situation in Relation to an Economy in Transition*
- Appendix C *Australian Customs Dumping Notice 2001/13 Section 269TAE Ministerial Guidance on Material Injury and Causal Link.*
- Appendix D Submissions made to the re-evaluation.

CHRONOLOGY – CEMENT INVESTIGATION

19 November 1999	Industry makes properly documented application.
9 December 1999	Customs initiates investigation.
28 March 2000	Minister agrees to 120 day extension for Customs to prepare its Statement Of Essential Facts.
26 July 2000	Statement of Essential Facts issued in accordance with extension.
11 September 2000	Customs reports its findings to Minister.
7 December 2000	Price control guidelines issued.
December 2000	Minister affirms direction on material injury.
16 January 2001	Minister agrees to process of re-evaluation.
30 January 2001	Ministerial change to portfolio.
20 February 2001	Incoming Minister confirms re-evaluation should proceed.
28 June 2001	New guidelines on price control issued. Customs invites submissions to re-evaluation.
20 July 2001	Closing date for submissions.
31 August 2001	Summary of submissions released.



Australian Customs Dumping Notice
No.2001/42

CUSTOMS ACT 1901

MINISTERIAL GUIDELINES - SECTION 269TAC(5E)

**PRICE CONTROL SITUATION IN RELATION TO AN
ECONOMY IN TRANSITION**

The Minister for Justice and Customs has issued the following guidelines in relation to a price control situation in an economy in transition.

“Procedure

Relevant producers or exporters in an economy in transition are to be advised they have the opportunity to submit information to show that a price control situation does not apply to the goods under consideration. Such information is to be provided in the context of answers to questions contained within the exporter's questionnaire. This information should deal with each of the considerations referred to below.

Adverse inferences may be drawn where there is failure by the producer or exporter to materially and substantially respond to the questions in the exporter's questionnaire.

Principal Considerations

In determining whether or not a price control situation applies, regard may be had to the following particular considerations:

(A) Whether decisions of the relevant producers or exporters relating to prices, costs, inputs, sales, and investments are made in response to market signals and without significant state interference.

To assist in assessing this consideration, information should be provided as to whether:

- (i) genuinely private companies or parties hold the majority shareholding of the relevant producer or exporter;

- (ii) state or provincial officials appearing on the board or in key management positions are in a clear minority;

(iii) the relevant producer or exporter has the guaranteed freedom to carry on business activities. In this regard, information is sought as to whether:

- (a) there is no restriction on selling on the domestic market;
- (b) the right to do business cannot be withdrawn outside proper contractual terms; and
- (c) in the case of joint venture companies, profits can be exported and capital invested can be repatriated.
- (iv) major production inputs of the relevant producer or exporter are or are not supplied by state owned or controlled enterprises at prices which do not substantially reflect free market conditions. Inputs include, inter alia, raw materials, labour, energy and technology costs.

(B) Whether one clear set of basic accounting records is kept by the relevant producer or exporter and is independently audited and is maintained in accordance with generally accepted accounting principles in the country of export and in line with international accounting standards.

(C) Whether the production costs and financial situation of the relevant producer or exporter are or are not subject to any significant distortions carried over from the non-market economy system.

(D) Whether the relevant producer or exporter is subject to bankruptcy and property laws, which guarantee legal certainty and stability of performance.

Other Influencing Considerations

In considering whether a price control situation exists, regard may also be had to the following further considerations:

- (1) Whether the relevant producer or exporter of the goods under consideration forms part of a broader market or sector in which the presence of a State owned enterprise or enterprises has influenced prices.
- (2) Whether the supply of utilities are guaranteed on the basis of contracts that reflect normal commercial terms and prices which are generally available throughout the economy.

- (3) Whether the land on which the facilities of the company are built are rented from the State at conditions comparable to those in a market economy country (eg. proper contractual leases).
- (4) Whether the company has the right to hire and dismiss employees and the right to fix salaries.

I shall also have regard to any other information received which is relevant to my consideration of the existence or otherwise of a price control situation.

The relative importance I give to any one or more of the above considerations will depend upon the facts as they emerge in the course of the particular anti-dumping inquiry.”

This ACDN replaces ACDN No. 2000/60.

SUE PITMAN
National Manager
Trade Measures Branch
CANBERRA ACT
28 June 2001



Australian Customs Dumping Notice
No.2001/13

CUSTOMS ACT 1901 - PART XVB
Section 269TAE

MINISTERIAL GUIDANCE ON
MATERIAL INJURY AND CAUSAL LINK

In December 2000, the former Minister for Justice and Customs (Senator Vanstone) affirmed the Ministerial Direction of 1990 on material injury, and on causal link.

“I should firstly like to state that the reference in the 1990 Ministerial Direction to the volume of dumped imports and a diminution of profit are not to be read cumulatively. This is consistent with the wording of the direction (which refers to one or the other) and the anti-dumping agreement.

I would draw attention to the fact that the 1990 Direction does not use the word ‘significant’ in determining if an indicator is ‘material’. This Direction defines ‘material’ to be ‘not immaterial insubstantial or insignificant’. This is a minimum test.

I do not consider that any minimum standard can be used to determine whether dumped goods have a sufficient share of the Australian market to cause or threaten material injury. This question can only be determined on a case by case basis.

Likewise, where an industry has suffered a diminution of profits through price depression or suppression which is ‘material’, there is not an additional requirement imposed by the Ministerial Direction that there must also be a finding that dumped goods have a significant market share.

In determining the question of the profit of an industry in an expanding market, I would endorse the comments made by the Minister for Industry Technology and Commerce in his letter of 16 December 1991

‘...the Customs Service considering an industry which has been expanding its market rapidly, might decide that no action be taken against dumping which has merely slowed the rate of industry’s growth without causing it to contract. Should such a case arise I expect you to bear in mind that a substantial diminution in an industry’s rate of growth can be just as serious to the Australian economy as the movement of the industry from growth to decline. In this matter as in all others of course, your

judgement should be guided by observable facts and not by unsupported assertions that an industry would have been far more prosperous if dumping had not occurred'

Also I would endorse the comment in the letter *viz.*

'an industry which at one point in time is healthy and could shrug off the effects of the presence of dumped products in its market could at another time, weakened by other events, suffer material injury from the same amount and degree of dumping.'

Some uncertainty has arisen over the requirements for establishing that material injury has been caused by dumping, when other factors may also be contributing to the injury suffered by an industry. I consider in such circumstance that if the injury caused to an industry from dumped sources is material then that is sufficient. This is consistent with the anti-dumping agreement.

In considering what is material injury, I would expect Customs to have regard to all indicators of material injury, and where a particular indicator is not relied upon, a reason must be given for that decision."

Any enquiries regarding this notice may be directed to Michael Mulgrew, Director Policy, Trade Measures Branch telephone 02 6275 6195.

Sue Pitman
National Manager
Trade Measures Branch

8 February 2001

Submissions received

Participant	Date received
Adelaide Brighton Limited	20 July 01
BGC (Australia) Pty Ltd	20 July 01
Freehills	20 July 01
Departemen Perindustrian Dan Perdagangan	19 July 01
Industry and Trade Consultants Australia	20 July 01
International Quality Cement Brokers Pty Ltd	5 July 01
Malayan Cement Berhad	20 July 01
Pt Semen Cibinong Tbk	19 July 01
Pt Semen Kupang	18 July 01
Pt Indocement Tunggal Prakarsa Tbk	18 July 01
SA Cement Supply Pty Ltd	20 July 01
Siam Cement Industry Co Ltd	23 July 01