Australian Government
Department of Industry, Innovation and Science
Anti-Dumping Commission

DUMPING AND SUBSIDY MANUAL
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VERSION HISTORY

Date	Summary of changes
December 2013	Start of version history
November 2015	Minor amendments to coincide with legislative reforms
April 2017	Targeted update
November 2018	Targeted update

ACRONYMS

Act	*Customs Act 1901*
ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AEP	Ascertained export price
ANV	Ascertained normal value
AUL	Average useful life
Commission	Anti-Dumping Commission
CTMS	Cost to make and sell
DCR	Dumping Commodity Register
Dumping Duty Act	*Customs Tariff (Anti-Dumping) Act 1975*
DXP	Export price
FOB	Free on board
GATT 1994	General Agreement on Tariffs and Trade 1994
LTAR	Less than adequate remuneration
Manual	Dumping and Subsidy Manual (this document)
NIP	Non-injurious price
PAD	Preliminary affirmative determination
Regulation	*Customs (International Obligations) Regulation 2015*
Review Panel	Anti-Dumping Review Panel
SCM Agreement	Agreement on subsidies and countervailing measures
SEF	Statement of essential facts
SG&A	Selling, general and administrative
SME	Small-to-medium enterprise
USP	Unsuppressed selling price
VAT	Value added tax
WACTMS	Weighted-average cost to make and sell
WTO	World Trade Organization

FOREWORD

The Dumping and Subsidy Manual sets out the legislative framework, principles, and practices followed by the Anti-Dumping Commission (Commission) as they normally apply to anti-dumping and countervailing investigations. The Manual does not intend to provide a mandatory set of instructions or constrain the decisions of the Commission officers.

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

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

(a) taking an irrelevant consideration into account in the exercise of a power;

(b) failing to take a relevant consideration into account in the exercise of a power;

(c) an exercise of a power for a purpose other than a purpose for which the power is conferred;

(d) an exercise of a discretionary power in bad faith;

(e) an exercise of a personal discretionary power at the direction or behest of another person;

(f) an exercise of a discretionary power in accordance with a rule of policy without regard to the merits of a particular case;

(g) an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power;

(h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

(i) any other exercise of a power in a way that constitutes abuse of the power.

1. APPLYING FOR ANTI-DUMPING OR COUNTERVAILING NOTICES

1.1 CONTEXT

Sections 269TB and 269TC of *Part XVB* of the *Customs Act 1901*[1] (the Act) set out the requirements for making an application for the publication of a dumping or countervailing duty notice. Section 269TAG also provides that the Minister may initiate an investigation into the need to take anti-dumping measures on his or her own initiative.

Subsection 269TC(1) sets out issues that the Commissioner must be satisfied of, having considered the matters contained in the application and any other information that the Commissioner considers relevant. These are:

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

Subsection 269TB(4) sets out that an application must:

- be in writing; and
- be in an approved form; and
- contain such information as the form requires; and
- be signed in the manner indicated in the form; and
- be supported by a sufficient part of the Australian industry; and
- be lodged in a manner approved under section 269SMS.

One of the support requirements is that those supporting the application must account for not less than 25 per cent of the total production or manufacture of like goods in Australia. The application form seeks data on value or volume of production in order to make determinations about industry support. The determination is usually based on volume data.

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

1.2 POLICY

A person, or a government of a third country, which believes there are, or may be, reasonable grounds for the publication of a dumping (or countervailing) duty notice

[1] All legislative references in this Manual are to the *Customs Act 1901*, unless otherwise stated.

in respect of goods imported into Australia, may apply for a dumping or countervailing duty notice.

The Commission has 20 days to examine the application to decide whether or not to reject the application and inform the applicant in writing of the decision. If, after an application has been lodged for assessment, an applicant provides unsolicited further information, the Commission will consider the information. The application will be taken to have been lodged and received when that further information was lodged and received, and will recommence the 20 day consideration period.

The Commission generally advises applicants that care needs to be taken to ensure the description of the goods[2] is sufficiently accurate. Once an investigation is initiated, it is generally not possible to alter the scope of the inquiry. Should an applicant decide to revise their goods description during the consideration period, this will be treated as new information and the 20 day consideration period will recommence.

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

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

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

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

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

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

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[2] Subsection 269TB(1)(a) outlines ‘the goods’ for which an application for a dumping duty or countervailing duty notice can be made.

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

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

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

1.3 PRACTICE

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

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

In order to determine whether there is, or may be established, an Australian industry producing like goods, the Commission will identify the imported goods (commonly referred to as the goods under consideration or the goods the subject of the application). It will also establish whether the goods produced by Australian industry are like goods to the imported goods. The like goods analysis is detailed in the "Like Goods" chapter of this Manual.

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

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

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

- whether there is opposition to the application.

The Commission may need to substantiate production figures by cross reference to other sources of information. Therefore, the applicant should provide the full details of all production of like goods in Australia in the application.

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

- a consignment of goods has been imported into Australia, or is likely to be imported, or like goods may be imported into Australia; and
- there is, or may be established, an Australian (or third country—see subsection 269TB(2)) industry producing like goods.

In identifying the imported goods for which measures are sought, the Commission will examine whether the applicant:

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

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

In describing the imported goods, the Commission will generally examine whether the applicant has provided:

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

The Commission may use other resources to crosscheck the information.

2. LIKE GOODS

2.1 CONTEXT

Like goods are defined in section 269T: *like goods, in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or, although not alike in all respects to the goods under consideration have characteristics closely resembling those goods under consideration*.

The determination of like goods[3] is used within the anti-dumping framework to define:

- the Australian industry producing like goods—subsection 269TB(1) refers. Establishing the Australian industry is critical to the examination and existence of injury
- the goods sold on the exporter's domestic market—subsection 269TAC(1) states "*the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export…or, if like goods are not so sold by the exporter, by other sellers of like goods*"
- the goods subject of the dumping duty or countervailing duty notice—subsections 269TG(1) and TG(2) provide for the Minister to declare that Section 8 of the *Customs Tariff (Anti-Dumping) Act 1975* (Dumping Duty Act) applies to like goods exported to Australia. Subsections 269TJ(1) and TJ(2) provide for the Minister to declare that Section 10 of the Dumping Duty Act applies to like goods exported to Australia.

2.2 POLICY

The Commission's policy is to interpret the legislation in a manner consistent with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement, ADA) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

Identical goods will be regarded as like goods should such goods exist; and goods closely resembling the goods under consideration will be regarded as like goods in the absence of identical goods.

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

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

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[3] The concept of like goods is also considered where adjustment to the price paid or payable for like goods is required in accordance with subsection 269TAC(8). This is described further under *Due Allowance*.

2.3 PRACTICE

Where two goods are identical they are like goods. In many applications differences may be identified between the locally produced goods and the imported goods. Where two goods are not alike in all respects, the Commission will assess whether they have characteristics closely resembling each other against the considerations below.

Physical likeness

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

Size	*Shape*	*Content*
Weight	*Appearance*	*Taste*
Grade	*Standards*	*Age*
Strength	*Purity*	*Chemical composition*

- Are the goods classified to a matching tariff classification?

Goods which are classed to the same tariff classification will often be physically like goods. However, in some instances the classification covers a very broad range of goods and other indicators of likeness are necessary to identify like goods. It may also be the case that like goods are classified by multiple tariff classifications.

Commercial likeness

Commercial likeness refers to attributes identifiable from market behaviour.

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

Functional likeness

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

- Do the goods have the same end use? To what extent are the two products functionally substitutable? e.g. both a shovel and an earthmoving machine can move earth.
- To what extent are the goods capable of performing the same or similar functions? e.g. an earthmoving machine is capable of moving earth more rapidly than a shovel.

- Do the goods have differential quality? Quality claims can be subjective. Objective evidence has higher probative value e.g. by standards, or the extent consumers are willing to use the goods to perform the required functions.
- Is consumer preference likely to change in the future? Consider consumer behaviour in other markets/ countries.

Production likeness

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

- To what extent are the goods constructed of the same or similar materials?
- Have the goods undergone a similar manufacturing process? If different, what is the impact of those differences?
- Are the costs of manufacture similar? A similarity in the cost of manufacture may be an indicator of likeness but is not determinative.
- Are there any patented processes or inputs involved?

Other considerations

How similar is the marketing of the goods?

In conducting its like goods analysis in terms of the factors set out above, the Commission will consider:

- matters raised by interested parties
- matters that the Commission identifies during the course of the investigation.

3. INVESTIGATION PERIOD

3.1 CONTEXT

Section 269T defines the investigation period as a period specified by the Commissioner in a notice under subsection 269TC(4) to be the investigation period.

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

- in determining whether material injury has been caused to an industry, the Minister may examine periods prior to the investigation period (subsection 269T(2AD));
- in the ordinary course of trade tests, which involve establishing whether sales have been made at a loss, and whether the seller of the goods is able to recover the costs of the loss making sales, the period in which this analysis occurs is the investigation period (subsection 269TAAD(3));
- in ascertaining whether dumping has occurred and the level of the dumping, export prices of goods exported during the investigation period are compared with corresponding normal values. The export prices and normal values relate to data over the investigation period (section 269TACB);
- in defining a new exporter to mean, in relation to goods the subject of an application for a dumping duty notice or countervailing notice or like goods, as an exporter who did not export such goods to Australia at any time during the investigation period in relation to the application;
- costs of production and administrative, selling and general costs are examined over the investigation period (sections 43 and 44 of the *Customs (International Obligations) Regulation 2015*, the Regulation).

3.2 POLICY

At the commencement of an investigation, the Commissioner will specify an investigation period in a notice under subsection 269TC(4). Following specification in the initiation notice, the investigation period cannot be varied (subsection 269TC(5A)).

The investigation period is generally the 12 months preceding the initiation date and ending on the most recently completed quarter or month.

The investigation period may cover a longer period than 12 months in certain circumstances to properly assess the causal link between dumping and claimed injury. The investigation period may cover a longer period:

- to ensure that a full financial accounting period is included;
- if there is long lead time between order and delivery, particularly when a tender process is involved;
- to ensure that the date of sale and the export of the goods occur within the investigation period.

The investigation period has a start and end date—events outside the investigation period are not taken into account when assessing dumping or benefit conferred.

If applicants for anti-dumping measures consider that the investigation period should be longer than 12 months, they must ensure that this issue has been addressed in their application for anti-dumping measures.

3.3 PRACTICE

Where a decision is made not to reject an application under subsections 269TB(1) or (2), the Commissioner issues a public notice of their decision to initiate an investigation. The notice identifies the investigation period.

4. INJURY TO AN AUSTRALIAN INDUSTRY

4.1 CONTEXT

Anti-dumping or countervailing measures can only be imposed where the Minister is satisfied that goods exported to Australia have been dumped or subsidised, and because of that dumping or subsidisation material injury to an Australian industry producing like goods has been or is being caused or threatened. Material injury is not defined in Australia's legislation or in the ADA or SCM Agreement.

Article 3.1 of the ADA requires that a determination of injury be based on positive evidence and involve an objective examination of the volume and price effects that constitute injury and the consequent impact on domestic industry. Article 3.4 of the ADA provides a non-exhaustive list of factors that *must* as a minimum be taken into account when assessing whether the domestic industry has experienced material injury. There are similar provisions in the SCM Agreement. The provisions are reflected in section 269TAE.

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

4.2 POLICY

In April 2012, a Ministerial Direction on Material Injury included these key issues:

- The identification of material injury be based on facts and not on assertions unsupported by facts;
- It must be shown that the industry is suffering injury and that the injury caused by dumping or subsidisation is material in degree;
- The injury must also be greater than that likely to occur in the normal ebb and flow of business;
- Subject to the law, material injury is that which is not immaterial, insubstantial or insignificant. No threshold amount has general application and identifying material injury will depend on the case circumstances;
- Dumping or subsidisation need not be the sole cause of injury. Injury caused by other factors must not be attributed to dumping or subsidisation;
- The law does not prevent judging the materiality of injury caused by a given degree of dumping or subsidisation differently, depending on the current economic circumstances of the industry. An industry which at one point in time is healthy and not adversely affected by dumping or subsidisation could, at another point in time, suffer a material injury from the same amount of dumping and subsidisation because it had become weakened by other events;
- Anti-dumping or countervailing action is possible in cases where an industry has been expanding its market share, and the dumped or subsidised imports have slowed the rate of growth—a decline in growth may be as relevant as the movement from growth to decline;
- As in all cases, a loss of market share alone cannot be decisive. Loss of market share should be considered with a range of relevant injury indicators before material injury may be established;

- In cases where dumped or subsidised imports hold a small market share, it may be difficult to demonstrate material injury. No minimum standard should be used to determine whether dumped or subsidised imports have a sufficient share of the market to cause material injury;
- An industry's vulnerability to dumped or subsidised imports may be confined to a specific region. Injury may be occurring in that region—it is still possible to take account of such regional injury and as appropriate to judge such injury to be material to the industry as a whole.

The Commission evaluates all of the factors in subsection 269TAE(3). Dumping may be causing a material injury even if the industry is adversely affected by a range of other (non-dumping) injury factors.

The injury arising from other factors will not be attributed to the dumping. Where it is established that the injury caused from dumping is *material,* that is sufficient to make a positive finding. The 'Causation' chapter explains in more detail the Commission's procedures in examining these other factors.

<u>Australian industry</u>

The Federal Court[4] has held that the Australian industry is the sum total of the industry in Australia (not any part, whether that part be defined by geography, market or any other criteria) and the material injury determination must be assessed against the Australian industry as a whole. This assessment is required regardless of the size of the applicant.

<u>Related party transactions</u>

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

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

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

In the context of section 269TAE which refers to terms such as "price", "paid", "sold" and "sales", the Commission considers these terms to be references to price and sales in a conventional sense. This has implications for the assessment of injury to the Australian industry producing like goods. In assessing volume and production related injury indicators, transactions between related parties are considered reliable and suitable. However, transaction values between related parties may be unreliable and inappropriate for assessing injury indicators

[4] See *Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Science, Customs and Small Business and the Anti-Dumping Authority [1989]* in judgement NG26 (Wilcox, J) and *Swan Portland Cement Limited and Cockburn Cement Limited v the Minister of Small Business and Customs and the Anti-Dumping Authority* [1991] in judgement G377 (Lockhart, J).

associated with price effects. (Costs may also be unreliable, for example where there are integrated production stages owned by related business divisions).

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

4.3 PRACTICE

The Commission bases its assessment of material injury on verified evidence that involves an objective examination of both:

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

When examining volume the Commission may consider, among other things:

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

When examining prices the Commission may take into account:

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

An examination of prices will show whether:

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

<u>Price suppression</u>: in terms of Article 3.2 of the ADA, is where price increases for the Australian industry's products, which otherwise would have occurred, have

been prevented to a significant degree. In determining whether price suppression has occurred the Commission may examine:

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

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

<u>Price comparisons:</u> The prices of the imported goods and those of the Australian industry are compared during the 12 month period that the sales transactions data have been provided for in the Australian industry's application. The price comparisons fall within the investigation period and are relevant in causation analysis.

The Commission normally examines the weighted average net realised prices, for example monthly, achieved by importers of the goods and Australian industry at equivalent levels of trade and any other necessary adjustments to ensure a meaningful comparison (see *Due Allowance* chapter). In some cases, where sales data for imports and local industry allows a more detailed analysis of prices to the same customer, the Commission can determine the amount of price undercutting per unit of quantity (this affords a more precise measure of the undercutting).

When comparing imported and local prices, the Commission adjusts the prices to account for differences between the imported and locally produced goods, for example differences in the terms and circumstances of their sales, or differences in physical characteristics.

<u>All relevant economic factors and indices</u>: The consequent impact of imports on Australian producers of like goods includes an evaluation of all relevant economic factors influencing the state of the industry and includes the factors in subsection 269TAE(3). Included in the relevant economic factors are the impact on jobs (the number of persons employed; the level of wages; and other factors relevant to effects on jobs in the domestic industry producing like goods such as terms and conditions of employment, hours worked and the effect on part time work). Also included are any effects on investment in the industry (including the level of return on investments; the ability to raise capital; and any other effects on investment in the domestic industry producing like goods).

The Commission conducts its investigations in accordance with the World Trade Organization (WTO) requirement which makes it mandatory to evaluate all of the factors listed in Article 3.4 of the ADA[5]. Section 269TAE(3) reflects that Article. In examining these factors the Commission will decide what weight ought to be given

[5] WTO Appellate Body: Thailand – Anti Dumping Duties on Angles, Shapes, and Sections, WT/DS122/AB/R March 2001

to any particular factor, based upon the case circumstances. Some factors may be significant while others may not—the Commission will explain its conclusions in this respect.

In considering this impact the Commission examines the Australian industry's export performance as well as its performance in the Australian market, if relevant. When the Australian industry's overall sales and production are considered (including goods sold overseas) the injury to the industry may not be material.

<u>Related party transactions</u>

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

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

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

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

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

<u>Other factors</u>

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

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

The list is illustrative of known factors. The Australian industry is asked in the application form to identify any such factors. Factors brought to the Commission's attention by interested parties, and any additional factors the Commission may become aware of in the course of the investigation, will be included in the analysis.

Subsection 269TAE(1) provides that the Minister in determining, inter-alia, whether the establishment of an Australian industry has been materially hindered, may have regard to a non-exhaustive list of matters set out in that section. As the list is non-exhaustive the Minister may have regard to other matters (such as the actual or potential production capability of an industry) when considering whether the establishment of an Australian industry has been materially hindered.

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

Market segment analysis

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

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

Section 269T defines industry in terms of production of like goods. This definition is from Article 4 of the ADA and Article 16 of the SCM Agreement. Both identify a domestic industry to be "domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products".

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

The WTO Agreements do not generally permit an injury finding to be made on less than the whole domestic industry (or at least 'those of them whose collective output of the like product constitutes a major proportion of the domestic production of the like product').

Even so, there is nothing to preclude the Commission from performing a sectoral analysis of an industry and/or market if it yields a better understanding of the effects of imports and a more thorough analysis and conclusion. Any conclusions drawn from a sectoral analysis must explicitly be related back to the industry as a whole.

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

- where a market sector has a particular susceptibility to dumped imports and resultant injury is focused and acute;

- where the market sector has special significance in the context of the overall industry; or
- where the market structure may be adversely affected by changes in competition in one sector.

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

The Commission might focus injury consideration principally on a market sector where:

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

In respect of separate market sectors, objective data might indicate:

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

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

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

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

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

Threat of material injury

Articles 3.4 and 3.7 of the ADA and Article 15 of the SCM Agreement set out the factors to be considered in a determination of threat of material injury.

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

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

The Commission will give consideration to these particular requirements of the Agreements.

The WTO Agreements provide that with respect to cases where injury is threatened by dumped or subsidised imports, the application of measures shall be considered and decided with special care. A determination of threat of material injury is thus subject to stringent tests. A totality of factors must lead to the conclusion that dumped or subsidised exports are imminent and that unless action is taken, material injury would occur.

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

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

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

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

5. ARMS LENGTH TRANSACTIONS

5.1 CONTEXT

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

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

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

5.2 POLICY

Whether transactions are at arms length is a matter of fact to be determined having regard to all the circumstances of the sales in question.

Section 269TAA sets out conditions where, if any one of them exists, a transaction will not be at arms length. The section is *not* taken to be *exhaustively* setting out criteria for determining whether a transaction is, or is not, arms length.

Even if none of the circumstances in section 269TAA exist, the Commission examines the relevant information in order to determine whether there has been genuine bargaining between buyer and seller.

In practical terms, the mere fact parties are associated—and in a legal sense not at arms length—is not taken to automatically mean that they cannot be engaged in arms length transactions. In assessing whether transactions between related parties are at arms length, the Commission looks beyond the legal or functional relationship. It will determine whether the parties deal with each other as arms length parties would, and whether outcomes are the result of real bargaining.

5.3 PRACTICE

<u>Any consideration payable other than price</u>

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

Price appears to be influenced by a commercial or other relationship

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

Reimbursement, compensation or other benefit in respect of the price

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

Factors to determine whether a transaction is the result of real bargaining

There is a range of identified factors that are relevant when assessing whether a transaction is the result of real bargaining, and these can vary between cases because of different circumstances. Relevant factors can include:

- whether or not negotiation has taken place between the buyer and seller
- the manner in which the prices were determined as a result of that negotiation
- whether those prices are comparable to those arrived at by parties that are at arms length
- whether the margins made by the parties to the transaction are comparable to those made by parties that are at arms length.

Where, for example, it is not possible to assess whether those prices are comparable to those set by parties that are at arms length because no benchmark exists at that level of trade and circumstances, the decision will be made having regard to all of the available evidence.

Rebates

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

Therefore, the mere fact that a rebate is paid is not in itself evidence that there is a compensatory arrangement under subsection 269TAA(1)(c).

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

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

If a party maintains that the price of goods is net of rebates, the Commission will verify the payment of rebates. If a party does not cooperate the Commission may ascertain the price having regard to all relevant information.

<u>Sales at a loss by the importer</u>

Under subsection 269TAA(2), the Minister for the purposes of subsection 269TAA(1)(c), may treat sales of the goods by an importer (or associate) in Australia at a loss as indicating that the importer (or associate) will, directly or indirectly, be reimbursed, compensated or otherwise receive a benefit in respect of the whole or a part of the price.

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

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

If goods have been sold at a loss, the Commission will examine the likelihood of recovery of costs. The price paid or payable for the goods by the importer is added to all other costs incurred in the importation and sale of the goods to arrive at a cost recovery price. Sales at a loss are treated as arms length if the costs can be recovered within a reasonable period of time. A “reasonable period of time” is generally taken to be 12 months. The Commission will also consider any other relevant matters when determining whether goods are sold by an importer at a loss.

6. DETERMINING AN EXPORT PRICE

6.1 CONTEXT

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

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

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

Section 269TAB(2) defines "prescribed deductions" to be:

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

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

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

6.2 POLICY

The Commission considers that goods are exported when they leave the country of export.

Generally, export price is assessed as the 'free on board (FOB) price' received by the exporter at the seaport in the country of export or, in the case of air transport, at the airport in the country of export. FOB is a generally known term and it is defined in *Incoterms*. In some circumstances export price may be assessed at another level. An ex-factory price received by the exporter may be used when calculating a dumping or subsidy margin, for example, in the situation where charges are all inclusive of local and international charges and it is impractical to segregate them.

Goods that are exported by sea from land-locked countries are transported across the country of export's border for a seaport destination. The point of export in this circumstance is generally taken to be the border of the country of export and any inland freight incurred from this point will not be included in the export price.

The Commission will generally identify the exporter as:

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

Where there is no principal in the country of export, the Commission will normally consider the exporter to be the person who gave up responsibility for the goods as described above.

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

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

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

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

Typically the manufacturer, as a principal, and who knowingly sent the goods for export to any destination, will be the exporter. The export price will be the price received by that producer/exporter i.e. the manufacturer. Where an intermediary is involved the export price, for the purposes of calculating a dumping or subsidy margin, will be the price received by that exporter when selling to the intermediary (even if the intermediary is in the same country as the exporter). In working out the dumping margin the export price received by the exporter for the goods will typically be the FOB price but an export price at another point may have to be used depending on the circumstances, for example, a free alongside price, or an export price expressed in some other terms.

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

6.3 PRACTICE

The export date usually reflects the valuation date used by the Australian Border Force, which is normally the Bill of Lading date. The Bill of Lading date is usually the date communicated to the Australian Border Force by customs brokers / importers as the date the goods left the place of export. If these dates should differ the specific case circumstances may be considered. If the Bill of Lading date is unavailable, the date of departure of the vessel provided by the shipping company may be used.

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

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

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

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

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

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

In establishing a reliable export price, the Commission may substitute an expense item if it finds that the expense in question has been affected by the association between exporter and importer. Costs incurred by an importer, but which may have been reimbursed by the related exporter, may still be deducted as they remain a real expense normally incurred.

Subsection 269TAB(2)(c) requires the profit to be '*the profit, if any, on the sale by the importer or, where the Minister so directs, an amount calculated with such rate as the Minister specifies in the direction…*'. Where an amount for profit to be deducted is not the actual profit of the importer, the Commission will recommend that the Minister make a direction concerning the amount of profit to be deducted.

In establishing a suitable rate of profit to be deducted, the Commission may have regard to (not in any order of priority) the:

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

Where the export price cannot be determined under subsections 269TAB(1)(a) or 269TAB(1)(b), and sufficient information is available, the export price will be determined under subsection 269TAB(1)(c), having regard to all the circumstances of the exportation. Those circumstances may include whether an export price is unaffected by any association or compensatory arrangement. In order to ensure the export price is representative of an arms length transaction, the Commission may adopt methodologies consistent with its approach under other parts of subsection 269TAB(1), including by assessing whether sales made by the importer are at a loss.

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

7. NORMAL VALUE BASED ON EXPORTER'S DOMESTIC SALES

7.1 CONTEXT

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

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

Section 269TAA (and chapter 5 '*Arms Length Transactions')* outlines the circumstances in which the price paid or payable shall not be treated as arms length.

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

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

7.2 POLICY

Section 269TAAD concerns sales at a loss not being in the ordinary course of trade. Articles 2.2.1 and 2.2.1.1 of the ADA concern sales which are not in the ordinary course of trade.[6]

Sales of goods at a loss occurring in substantial quantities and which do not provide for the recovery of costs within a reasonable period are regarded as being not in the ordinary course of trade.

One condition of section 269TAAD is that sales at a loss must have occurred in substantial quantities in order to be rejected from the normal value determination. The Commission will find that there have been substantial quantities of sales at a loss when the volume of domestic sales found to be sold at a loss within a reasonable period are 20 per cent or more of the total volume sold in the exporting country. The reasonable period of time is taken to be the investigation period.

[6] The Commission accepts there can be a number of factors which can be taken into account when deciding whether sales are in the ordinary course of trade – not only sales at a loss, which is the subject of section 269TAAD.

Article 2.2.1 of the ADA states that sales below cost of production may be treated as "…not being in the ordinary course of trade *by reason of price*…", recognising there are other situations that might require a finding that sales are not in the ordinary course of trade.

Depending on the circumstances, profitable sales may not be in the ordinary course of trade. These circumstances may include sample sales, promotional sales made at special prices, end of season sales, low quality sales, or sales in other unusual circumstances.

7.3 PRACTICE

For normal value to be ascertained under subsection 269TAC(1), the Commission first examines whether there are suitable sales of like goods for home consumption in the country of export by the exporter, made in the ordinary course of trade and at arms length over the investigation period. Model matching criteria will be followed in order to identify identical goods sold on the exporter's domestic market; or absent identical goods which goods most closely resemble the goods under consideration (see *Model Matching* chapter). The sales at a loss tests are applied separately for each grade or model.

<u>Ordinary course of trade</u>

One of the circumstances where sales may not be in the ordinary course of trade is when sales have been made at a loss. In order to test whether loss making sales are in the ordinary course of trade, all of the exporter's domestic sales of like models (transaction by transaction) and the unit cost to make and sell those domestic models are required. The cost of the goods in these calculations is the sum of the costs of production for the domestically sold goods and the administrative, selling and general expenses. (See also section 9.3 of the manual '*Normal value based on constructed method*').

The steps when examining sales at a loss are:

Step 1 – quantify the volume of sales at a loss over the investigation period – subsections 269TAAD(1)(a), (b) and (2).

- *Determine the domestic costs to make and sell (CTMS) for each model:* The CTMS for domestic sales are verified for each model. The CTMS is generally calculated for each quarter of the investigation period. In some circumstances a monthly, or an annual, domestic CTMS may be used. A monthly CTMS may be appropriate where an exporter has monthly costing records and: there are significant variations in raw material costs from month to month; or there is a highly inflationary or deflationary market.
- *Determine the volume of domestic sales made at a loss:* The sales price of each model for each transaction sold domestically is compared to the verified domestic CTMS for that grade/model. A determination is then made whether those loss making sales have occurred in '*substantial quantities during an extended period*'—this occurs if the volume of sales

of that model at a loss is equal to or greater than 20 per cent of the total volume of sales for that same model over the investigation period[7].

- The Commission has an administrative practice that the '*extended period*' referred to in the sections of the Act cited above is taken to be the investigation period.

Step 2 – Determine whether any of the sales at a loss provide for recovery of the CTMS within a reasonable period – subsections 269TAAD(1)(b) and (3).

If, under Step 1, it was found that the sales at a loss were in substantial quantities, another calculation is required. For those sales found to be sold at a loss and in substantial quantities, the selling price of each individual sale is compared to the weighted average cost to make and sell (WACTMS) calculated for that model during the investigation period.

If the loss making price is less than the WACTMS, that sales price is held to have failed to provide for cost recovery. The Commission has an administrative practice that '*a reasonable period*' referred to in the sections of the Act cited above is normally the investigation period.

The outcome of Step 1 and Step 2 is that where the sales at a loss are *equal to or greater than 20 per cent,* the only sales that may be included in the determination of normal value are those sales that are initially profitable *and* those loss making sales that provide for recovery of costs within a reasonable period. All other sales are excluded from the normal value determination.

Where sales at a loss are less than 20 per cent of total sales quantity of the model:

In a situation where the sales at a loss are less than 20 per cent of the total sales quantity for the model (meaning, of course, that 80 per cent or more of the domestic sales for the model in question were profitable), the remaining sales that were unprofitable are *not* taken to be outside the ordinary course of trade and must be included in the sales taken into account when determining the normal value. The exception would be if any of those unprofitable sales were disregarded for another reason as being not in the ordinary course of trade.

Suitability of sales

Subsection 269TAC(2) provides that certain domestic sales may be unsuitable for use in determining normal values because of a factor in the market.

Absence or low volume of sales

One such factor is where there is an absence, or low volume, of sales of like goods in the domestic market that would be relevant for the purposes of determining a normal value using prices (section 269TAC(1)). For example, there may be no comparable models on the domestic market and it may not be practicable to make the required specification adjustments for the purposes of comparing normal value to export price.

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[7] Article 2.2.1 and footnote 5 of the ADA shows two tests to determine 'substantial quantities'–the first compares the weighted average domestic sales price during the investigation period to the weighted average total cost to make and sell for the model during that same period; the second concerns the 20 per cent rule. Australia had intended to incorporate both tests as demonstrated in the explanatory memorandum at the time but only the 20 per cent test was enacted.

Low volume is defined in subsection 269TAC(14) as less than 5 per cent of the total volume of the goods under consideration that are exported to Australia by the exporter (unless the Minister is satisfied that the volume is still large enough to permit a proper comparison for the purposes of assessing a dumping margin). The quantity sold to the domestic and export markets is assessed over the investigation period.

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

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

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

<u>Example 1</u>

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

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

This example presents a circumstance where 5% of export sales to Australia may not be an appropriate measure of a sufficient quantity of relevant domestic sales (see market situation below). This is not to say however that the test of sufficient sales should only be applied as a ratio of total domestic sales.

<u>Example 2</u>

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

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

However, there may be instances where the Commission may be satisfied that a low volume of sales is still large enough to permit a proper comparison for the purposes of assessing a dumping margin under section 269TACB.

Market Situation

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

Certain domestic sales may be unsuitable for use in determining normal values because of '*the situation in the market of the country of export'*.

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

- whether the prices are artificially low; or
- whether there are other conditions in the market which render sales in that market not suitable for use in determining prices under subsection 269TAC(1).

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

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

One example of government influence distorting competitive conditions and leading to artificially low prices may be the presence of government owned enterprises in the domestic market. The presence of government owned enterprises, of itself, may not lead to the conclusion that sales are unsuitable. Rather, market conditions will no longer be said to prevail when the number of government owned enterprises, together with any unprofitable sales by those same enterprises, has caused a significant distortion to the prices received by private enterprises.

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

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

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

- Notify the government of the country and the exporters of the claims and of the evidence provided. Additional questions will be inserted into the exporter questionnaire titled “Market Situation”. A ‘Market Situation’ questionnaire will also be prepared for government.
- Both questionnaires will be based upon the evidence provided by the Australian industry that supported the decision to investigate. That is, the information supporting the claim that the domestic prices are materially influenced by the government of that country and are not substantially the same as they would be if they were determined in a competitive market. Any other relevant information in the possession of the Commission may also be taken into account when preparing the questionnaire. The government and the exporter will be asked to respond as specifically as possible to the questions. Accompanying letters will draw attention to these questions.
- If the government of the country or exporters fail to respond after being given a reasonable opportunity to do so, or do not provide probative evidence in response, all available evidence is weighed up, including the prima facie evidence of the application. One possible outcome is that the Commission will determine that a situation in the market has rendered domestic selling prices unsuitable for establishing normal values.

Other conditions in the market

Other conditions in the market which may render sales in that market not suitable for use in determining prices under subsection 269TAC(1) may include:

- differing patterns of demand in the exporter’s domestic market and the sales to Australia (including domestic sales significantly different in character or design features to the types exported; domestic sales through a single sales channel (including via a related party distributor); and unusual patterns of sales in the domestic market for the good). Implicit in such findings is the assumption that it is not possible to make reasonable adjustments to ensure comparability of the domestic sales prices;
- where only a single sale to one customer constitutes 5 per cent of the sales to Australia;
- significant barter trade; or
- non-commercial processing arrangements.

Where it is established that sales by the exporter do not meet the conditions of subsection 269TAC(1), the Commission then examines whether sales made by other sellers in the country of export are suitable and relevant for establishing normal values in accordance with subsection 269TAC(1). The treatment of other sellers is considered in chapter 8 of the Manual.

8. NORMAL VALUE BASED ON OTHER SELLERS DOMESTIC SALES

8.1 CONTEXT

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

8.2 POLICY

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

The Commission does not use information from other sellers where an exporter does not cooperate. In this situation it is not possible to make the required determinations as to whether the goods are 'sold' or 'not so sold' in arms length sales in the ordinary course of trade as required under subsection 269TAC(1). Similarly, if it is not known whether the exporter has made any domestic sales, other seller's information is not applicable for the purposes of subsection 269TAC(1).

In examining whether a normal value based on domestic sales by other sellers can be calculated, the Commission will examine whether those sales are '*suitable*' and '*relevant*' for the purposes of determining a price under subsection 269TAC(1)—'suitable' and 'relevant' being considerations within subsection 269TAC(2)(a).

Where a finding has been made that there is a situation in the market generally (see Chapter 7 of the Manual), sales by other sellers may also be unsuitable and not relevant. In this situation no further inquiry about other sellers' sales is necessary.

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

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

These constraints have the effect of limiting the use of other sellers' data.

8.3 PRACTICE

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

- The other seller's sales must be in the ordinary course of trade and be at arms length.
- In considering whether other seller's sales are suitable, the Commission will compare the other seller's prices to the CTMS of the exporter in question. The purpose is to ensure that the other seller's domestic sales prices, which are being considered for normal value purposes for the exporter in question, are not unprofitable and unrecoverable given the cost structure of the exporter in question. The other seller's prices should not be less than the CTMS of the exporter.
- If the other seller has not completed, or only partially completed, the exporter's questionnaire, that company's prices will not be used for determining a normal value.
- The ordinary course of trade requirement requires detailed information on the other seller's cost of production and the expenses incurred in selling etc., that is, a fully absorbed CTMS. A company that is not a producer, for example, a sales distribution company, can only provide selling expense information. The costs of production must be provided by the cooperating producer. As cost of production and selling expenses are required for the ordinary course of trade tests this requirement excludes a sales distribution company alone from being used as an 'other seller', where the producer of the goods in question fails to cooperate.
- The term "by the exporter or another seller" in subsection 269TAC(14) shows that where another seller's domestic sales are being considered as a basis for establishing normal value, the volume of domestic sales made by the other seller must be compared with the volume of export sales made by the exporter. However, even though the volume of domestic sales made by the other seller may be low compared to the volume of export sales, the sales by the other seller are not automatically precluded from use.
- The provisions of subsection 269TAC(2)(b) recognise that there are limitations to the use of the other sellers provision. The provision removes the obligation to use other sellers' information where it is not practicable to obtain that information in a reasonable time. For this reason it may not be possible to conduct additional inquiries or verification visits solely for the purpose of acquiring other seller information.
- Subsection 269TAC(2)(a) provides that where there is an absence or low volume of domestic sales that would be relevant for determining a price in the country of export, or sales are not suitable for use because of the situation in the market, normal value cannot be determined under subsection 269TAC(1). Sales of like goods by other sellers may not be relevant if a fair comparison cannot be achieved. The following examples illustrate situations where a fair comparison may not be possible:

  - there is a difference in the level of trade between the other seller's domestic sales and the exporter/producers' export sales, and there is no data available to allow for a meaningful level of trade adjustment, or
  - there are differences in characteristics (e.g. raw materials, specifications, production methods, performance and costs, etc.) between the other seller's domestic goods and the goods exported to Australia by the exporter, and it is not possible to reasonably work out the amount of any adjustment to account for those differences, or
  - there is a difference in the time of sale between the other seller's domestic sales and the exporter/producer's export sales, and there is no meaningful way of working out the adjustment.
- If other sellers declines to cooperate, or do not respond in a timely fashion, the other sellers provision would not be relevant.

In these circumstances normal value may be worked out using alternative methods (see Chapters 9, 10 and 13).

9. NORMAL VALUE BASED ON CONSTRUCTED METHOD

9.1 CONTEXT

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

The key elements in constructing a normal value are:

- the cost of production or manufacture of the exported good—the term 'cost to make' has been used throughout this chapter.
- the selling, general and administrative costs that would be incurred on the assumption that the exported good is sold on the domestic market; and
- an amount for profit.

The cost to make is worked out in accordance with section 43 of the Regulation (Regulation 43). The selling, general and administrative costs are worked out in accordance with section 44 of the Regulation (Regulation 44) and the profit is worked out in accordance with section 45 of the Regulation (Regulation 45). Subsections 269TAC(5A) and (5B) also refer.

9.2 POLICY

The purpose of the constructed normal value is to estimate as closely as possible, using costs and profit, the price of the like good sold in the ordinary course of trade in the exporter's domestic market.

The cost to make and the selling, general and administrative expenses will normally be based on the information in the exporter's records where they are kept in accordance with the generally accepted accounting principles in the country of export; reasonably reflect the *competitive* market costs of production; and reasonably reflect the selling, general and administrative expenses associated with the sale of the like goods.

The Commission will consider all of the available evidence on the proper allocation of costs including methods that have been historically used by the exporter. Where other information is available about an allocation method for any cost item, the Commission may take account of that information, or compare the methods, as part of being satisfied that the costs reasonably reflect the cost of the goods.

Subsection 269TAC(2)(c) requires the determination of the cost of production or manufacture of the goods (i.e. the goods exported to Australia) in the country of export. In circumstances involving homogenous products (e.g. chemicals), where the domestically sold goods and the exported goods are identical, the costs to make are usually the same.

As with the normal value determined under any of the provisions, adjustments may be required to ensure a proper comparison between the constructed price of the goods in the domestic market and the export price. For further information on adjustments to a constructed price refer to Chapter 15 *Due Allowance*.

9.3 PRACTICE

Regulation 43 provides that if an exporter keeps records relating to like goods and the records are in accordance with generally accepted accounting principles in the country of export, and reasonably reflect competitive market costs associated with the production or manufacture of like goods, the Minister must work out the cost of production or manufacture using information set out in the records.

The Commission includes the actual cost of materials, labour, and overheads incurred in the production of the goods in the cost to make calculation. The calculation assumes that the goods were sold within the domestic market of the country of export. The fully absorbed cost of the goods is the sum of the cost to make and the selling, general and administrative expenses.

Generally accepted accounting principles

Regulations 43 and 44 require that the records in relation to the cost to make and the selling, general and administrative expenses are in accordance with the generally accepted accounting principles in the county of export.

Usually this comes from the auditor's statements. Any qualifying remarks regarding the compliance of the exporter or producer with those principles is examined.

<u>Cost of production</u>

The cost to make includes all:

- material costs;
- labour costs; and
- fixed and variable manufacturing overhead costs (fixed costs refer to capital costs such as depreciation on buildings, machinery, and vehicles. Variable costs refer to costs such as rent, rates, insurance etc.).

If the exported goods differ from those sold on the domestic market (e.g. have different specifications) to the extent that this reflects a difference in the cost to make, care is taken to ensure that discrete costs to make are determined.

The exporter questionnaire asks for cost data for domestic sales and for export sales. This information is used in the following ways:

- the cost to make the domestically sold goods and the associated selling, general and administrative expenses related to domestic sales are used when determining the profitability of the domestic sales as part of applying the ordinary course of trade test to the domestic sales (the ordinary course of trade test is explained in chapter 7 of the Manual);
- this profit rate may also be relevant when working out a normal value under the constructed method; and
- if the cost to make the exported goods differs from the cost to make the domestically sold goods, that cost to make for the exported goods is used in the normal value construction under subsection 269TAC(2)(c).

The table below itemises those cost items that fall within the cost to make under Australian and International standards.

Australian accounting standards	International accounting standards
INCLUDED in cost of production	
Cost of purchase means the aggregate of: • **Purchase price** • Import duties and other taxes (other than those subsequently recoverable by the entity from the taxing authorities) • Inwards transport & handling • All directly attainable costs of acquisition (net of trade discounts and rebates) • Exchange rate differences from a foreign currency monetary item which relates to or can be attributed to an item of inventory that meets the definition of a qualifying asset Cost or gain on entering into a specific hedge for the purchase of goods before the date the goods are purchased.	**Cost of purchase means the aggregate of:** • **Purchase price** • Import duties and other taxes (other than those subsequently recoverable by the entity from the taxing authorities) • Transport and handling costs • Other directly attributable costs of acquisition (net of discounts and rebates) • Foreign exchange differences on the acquisition of inventories caused by severe devaluation or depreciation of a currency for which there is no practical means of hedging.
Costs of conversion • Costs of direct labour • Other production or preparation costs which contribute to the bringing of the inventories into their present location and condition.	**Costs of conversion** • Costs directly related to the units of production, such as direct labour.
Other costs • Other production costs limited to those which contribute to bringing inventories to their present location (including distribution to the point of sale) and condition • General administration costs that contribute to bring inventories to their present location and condition • Other costs to the extent that they are incurred in bringing the inventories to their present location and condition (e.g. Designing specific products for specific customers) • Borrowing costs (net of revenue made upon the investment of the borrowings) when the inventory being sold meets the definition of a qualifying asset (inventory that requires more than 12 months to bring them to a saleable condition).	**Other costs** • Other costs incurred in bringing the inventory into their current location • Borrowing costs (net of revenue earned upon the investment of the borrowings) when inventory being sold meets the definition of a qualifying asset (inventory that requires a substantial period of time to bring into a saleable condition).
Indirect Costs • Systematic allocation of production overheads that relate to bringing the asset to its present condition, such as indirect labour and materials, factory rent, normal spoilage costs, factory supervisor salaries, etc.	**Indirect Costs** • Systematic allocation of fixed production overheads such as depreciation and maintenance and factory management and administration, factory rent. • Systematic allocation of variable production overheads such as indirect material and labour, supervisor salaries and normal spoilage costs.
Items specifically EXCLUDED	
• Marketing costs • Selling costs • Distribution costs from the point of sale to customers • Costs arising from exceptional wastage • Inventories that are allocated to other asset accounts (e.g. items of inventory used as components of self-constructed property, plant & equipment. Inventories allocated to another asset in this way are recognised as an expense during the useful life of that asset) • Borrowing costs unless the inventory item is a qualifying asset • Exchange gains and loss from the purchase of inventories due to excessive depreciation and appreciation of the currency.	• Administrative overheads that do not contribute to bringing the inventories to their present location and condition such as marketing • Selling costs • Storage costs (unless necessary in the production process prior to completion of the good) • Abnormal amounts of wasted material, labour and other production costs • Inventories that are allocated to other asset accounts • Borrowing costs unless the inventory item is a qualifying asset.

Selling, general and administrative costs

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

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

Subsection 269TAC(2)(c) requires that the selling, general and administrative expenses so ascertained are those that would be incurred on sales in the ordinary course of trade on the domestic market. The exporter questionnaire seeks information on “costing information and constructed value” and the respondent is asked to identify the CTMS for sales on the domestic market as well as the CTMS for sales to Australia. Verification includes examination of the source data used by the exporter.

Where the selling, general and administrative expenses for domestic sales cannot be ascertained by the particular exporter concerned under Regulation 44(2), for example, where the exporter is unable to allocate those expenses to domestic sales of like goods for any reason, or if the allocations that are made are unsatisfactory or unverified, an amount for selling, general and administrative expenses can be calculated by:

- identifying the actual amounts incurred by the exporter or producer in the production and sale of the same general category of goods in the domestic market of the country of export—Regulation 44 (3)(a); or
- identifying the weighted average of the actual amounts incurred by other exporters or producers in the production and sale of like goods in the domestic market of the country of export—Regulation 44(3)(b); or
- using any other reasonable method and having regard to all relevant information as further explained below—Regulation 44(3)(c).

Any of these three remaining methods can be used as there is no hierarchy. In practice, the Commission will normally seek information on the first method where it is available from the exporter. This preference stems from the fact that this data relates to the same exporter that is the subject of the investigation.

While Regulation 44(3)(c) provides for any other reasonable method the Commission recognises that this is not without its limits. The purpose of constructing a normal value is to determine a notional domestic sales price. As such, under Regulation 44(3)(c), the Commission will prefer to look to expenses which are demonstrated to be relevant to the domestic market in question.

<u>Costs; Reasonably reflect competitive market costs; reasonably reflect selling, general and administrative costs</u>

Chapter 7 of the manual, at ‘*Market Situation’* addressed government influence on prices and suitability of sales. The government may also have an influence on the costs of inputs. The concept ‘*reasonably reflect competitive market costs’* may also refer to the situation where there is a government influence on the cost of inputs.

Regulation 43(2) requires the records relating to the costs of production or manufacture for the like goods to '*reasonably reflect competitive market costs'*; and Regulation 44(2) requires the records to '*reasonably reflect the administrative, general and selling expenses*" associated with the sale of the like goods. The Commission applies the same tests when constructing the normal value of the goods under subsection 269TAC(2)(c).

Concerning the term '*reasonably reflect competitive market costs'* for the cost to make used in Regulation 43(2), the Commission gives the term 'reasonably reflect' the following meanings:

- that the cost to make items are supported by the accounting records; and
- that the costs themselves are 'reasonable' i.e. the cost allocations methods used by the exporter in working out those costs are reasonable.

More generally, the Commission may examine whether the cost to make are those costs that would be incurred in a '*competitive*' market. The term 'competitive' in Regulation 43(2) is given its usual meaning and this can only be known according to the case circumstances.

For example, it may be relevant when examining whether the cost to make reasonably reflects *competitive* market costs to examine the production of other like goods in the country of export. A significant variation between the costs shown in the records of the exporter or producer concerned when compared with other producers of like goods may be an indication that the records do not reasonably reflect costs incurred. Or contracts entered into for long term supply can be relevant when deciding that the price under those contracts is a normal competitive market price.

Because the intention is to determine competitive market costs, depreciation of items based on taxation laws that do not reflect the actual costs of depreciation is not accepted.

The purchasing behaviour of the exporter may be examined to determine whether the input has been supplied at a competitive market price. For example, if the exporter buys "on-the-spot" from an external unrelated supplier in another country that will mean that it is a normal competitive market price.

The concept of a competitive market price is not taken to prevent an exporter buying inputs from arms length suppliers at the prevailing price even if that input had been sold at below cost or dumped. This is because a company should not be penalised for making commercial decisions to buy inputs at the best price, and a dumping authority would not be able to verify input costs from uncooperative and unrelated companies.[8]

An exception arises, however, where the company supplying the input is related to the exporter concerned. When considering competitive market costs, the Commission will examine inputs more carefully when the input supplier is a

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[8] This is because a company should not be penalised for making a sensible commercial decision to buy inputs at the best possible price; or a dumping authority would not be able to verify the cost of producing an input from a company not associated with the importer as such companies would not normally cooperate with a dumping inquiry; and finally there is recognition that dumping inquiries have to be conducted against a timetable that imposes limits on how much time can be spent on verification visits.

subsidiary of the exporting company or part of the same holding company that owns the exporter. In such cases it is reasonable for that company to cooperate with dumping inquiries.

Each of the following situations concern the question whether the cost to make reflect competitive market costs for the purposes of Regulation 43.

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

The Commission will accept the costs of these inputs as being reasonable if the cost of such an input reflects the normal market prices for these inputs. However, if an associate makes its records available then regard may be had to the information from that source and not the market in order to determine whether the records in relation to a major input are reasonable.

Where a major input is produced by a subsidiary company over which the exporter exercises control, or from an integrated processor.

In these circumstances the cost records relating to the input may be examined. The transfer price of the producer will be examined to determine whether it is reasonable given the known full cost of production for that input. For example, in relation to an integrated process, the Commission will examine the records of account of an exporter/producer to ascertain whether the transfer price of the producer is not unreasonable given the full cost of production for that input.

Where a major input is influenced by government

When examining whether the input is supplied at a normal competitive market price the Commission may enquire whether the government had influenced the price of any major cost inputs. Government influence can be the supply of inputs by government-owned enterprises, or may arise in other circumstances.

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

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

The Commission will first look to information in the country of export when calculating a price for the major cost input. In the context of a major input being supplied by government, and a decision has been taken that the supply does not reflect a *competitive* market price of that input, a substitute value for a major cost input may be ascertained using:

- the price constructed from any other relevant information including price lists, independent sources (including trade publications, trade statistics), earlier dumping investigations;
- the price of the major cost input supplied by a non-government-owned enterprise in the country of export to the exporter;

- the price of the major cost input supplied by a non-government owned enterprise in the country of export to other exporters in that country;
- the price of the major cost input supplied by a non-government owned enterprise in the country of export to an appropriate third country;
- the price of goods that are like the major cost input manufactured and sold for domestic consumption in a surrogate country;
- the price of goods that are like the major cost input manufactured and sold for export consumption in a surrogate country;
- the constructed price of a major cost input in any of the situations listed above;
- the price for goods that are like the major cost input, manufactured and sold in Australia.

If the use of domestic sales prices of another manufacturer/producer of like goods in the country of export, whose prices or major cost inputs are not influenced, is not possible (for reasons such as those given in Chapter 8 "Normal value based on Other Seller's Domestic Sales") then the options above set out an order of priority. Before deciding to use surrogate information it is important to examine all of the other information sources available and evaluate which is the most reasonable and appropriate in the circumstances.

Where the government influence is found to extend to all supplies of that major cost input in the market and thus there is no suitable market price in the country of export, the other country surrogate methods are possible.

Selling Expenses

Concerning the term '*reasonably reflect'* selling, general and administrative expenses associated with the sale of the like goods, used in Regulation 44(2), whether a cost is reasonable requires the Commission to consider all available evidence on the proper allocation of costs including methods that have been historically used by the exporter. Where other information is available about an allocation method for any cost item, the Commission may take account of that information, or compare the methods, as part of being satisfied that the costs reasonably reflect the cost of the like goods.

Treatment of non-operational income and expenses

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

Where applicable, the Commission will:

- allow netting of the relevant income/expense items but will not "cap" the amount. In other words, if the total of the relevant non-operating income items exceeds the total of the relevant non-operating expense items, the difference (being a negative cost amount) is added to the operating costs resulting in lower total operating and non-operating costs overall. If 'capping'

were followed this negative difference would not be added to the operating costs;
- allocate net interest and finance income/expenses to the goods on a reasonable basis;
- allocate the net transaction foreign exchange gains/losses to the goods on a reasonable basis;
- allocate the net translation foreign exchange gains/losses to the goods on a reasonable basis;
- allocate any other net non-operating income/expense items to the goods on a reasonable basis;
- generally not allocate any amount in respect of realised or unrealised foreign exchange income/expense items specific to accounts receivable as these usually relate to exports.

<u>Methods for working out an amount for profit</u>

In constructing a normal value, an amount for profit will usually be included subject to the rules set out in Regulation 45.

Profit is ascertained in each case so as to obtain the best estimate possible of a fair market price in the domestic market of the country of export.

The primary method the Commission must use is the profit achieved for sales of '*like goods'* sold by the exporter or producer 'in the ordinary course of trade*'*—Regulation 45(2) refers. The terms in this regulation are considered below.

Like goods: The Commission will decide on a case by case basis which '*like goods*' are to be used for the purpose of working out ordinary course of trade sales. When making this determination the Commission is not restricted to working out profit from a limited subset of the goods only, for example, identical models only. It may treat '*like goods*' for this determination to be a wider subset of the goods.

Ordinary course of trade: The profit so calculated under the primary method of Regulation 45(2) can pertain to sales of like goods that have occurred in low volumes. The only requirement is that they have been made in the ordinary course of trade. As explained in Chapter 7, the term ordinary course of trade can be understood when applying the tests concerning sales at a loss. Also, the term 'ordinary course of trade' may extend to circumstances where, although all sales were profitable, there may be situations that cause those sales to have not been made in the ordinary course of trade. Some of the reasons have been set out in the last paragraph of section 7.2 of the Manual.

Usually, where there are sales of like goods sold in the ordinary course of trade, those sales can be used for a normal value under subsection 269TAC(1). Regulation 45(2) envisages, however, that such sales can be used for the purposes of providing data for a constructed normal value under subsection 269TAC(2)(c)(ii).

This can occur in the following circumstances, for example:
- There is a low volume of domestic sales of the like goods such as a particular model in question. In this circumstance the normal value for that particular model can be constructed using the CTMS for that model and adding a profit. The amount of profit added when working out the normal value for the model in question may be calculated from sales of 'like goods'

which may also include sales of the low volume model. That is, there is no requirement to 'carve out' that part of the profit that is attributed to the low volume model. The only stipulation is that the sales used to work out the profit be for like goods in the ordinary course of trade and as noted above;
- Where the circumstances of the domestic sales are such that the Commission considers that the available information means it cannot reasonably calculate the necessary adjustment under subsection 269TAC(8) to the domestic sales prices of the like goods. This can occur, for example, in circumstances where the exporter has domestic sales for one model only and these sales occurred in only one part of the year, but its export sales were for a wide range of models, not only the model sold domestically, and these export sales had occurred throughout the whole of the investigation period. There can be a range of other circumstances such as those listed at section 8.3 '*Normal Value Based on Other Seller's Domestic Sales'* which can create a situation where the adjustments are unable to be reasonably calculated. In such circumstances a normal value may be constructed using the costs and a profit as required.
- There is a situation in the market of the country of export is such that sales in that market are not suitable for use in determining a normal value.

A profit may be unable to be determined under Regulation 45(2) because either all of the sales have been made at a loss; or those sales that are profitable are determined to not be in the ordinary course of trade for other reasons. In this situation, Regulation 45(3) sets out three other methods for profit determination. The alternatives are:
- identify the actual amounts realised by the exporter or producer from the sale of the same general category of goods in the domestic market of the country of export—Regulation 45(3)(a); or
- identify the weighted average of the actual amounts realised by other exporters or producers from the sale of like goods in the domestic market of the country of export—Regulation 45(3)(b); or
- subject to Regulation 45(4), use any other reasonable method and have regard to all relevant information—Regulation 45(3)(c).

Any of these three alternatives can be used as there is no hierarchy.

There is no requirement to test for ordinary course of trade in any of these three alternatives, nor will the Commission read any ordinary course of trade requirement into them.

Where no profit can be determined under Regulation 45(2) because all sales of the like goods have not been in the ordinary course of trade, and calculations under Regulations 45(3)(a) and (b) for example show no profit, it is possible under these rules for the constructed normal value to include a zero profit in certain circumstances.

Where it is not possible to calculate profit under any method in Regulation 45, generally, the Commission will not construct normal value under subsection

269TAC(2)(c) and alternate methods for calculating normal value will be considered.[9]

Same general category: This term in Regulation 45(3)(a) is not defined. The Commission will decide on a case by case basis what goods will be included in this category. For example, the Commission may decide that the best approximation of profit on a domestic sale for the like goods in question is a narrower, rather than a broader, category. A narrower category may be preferred if it is determined this most meets the policy intent for establishing normal value based on the constructed method (section 9.2 above). The Commission will issue supplementary information requests where it needs to collect data on a same general category of goods. Under this provision the Commission will not use the profit reported in an income statement where the income statement includes goods that are not in the same general category, or if the income statement includes export sales.

Weighted average: The Commission will apply this provision in Regulation 45(3)(b) only where there are two or more other exporters providing data in relation to domestic sales of the like goods. The Commission may determine the weighted average using volume or value.

Regulation 45(3)(c) provides for any other reasonable method. However, Regulation 45(4) caps the profit that may be added. The profit added must not exceed the profit normally realised by other exporters or producers on domestic sales of the same general category of goods. The Commission will not apply this provision if it is unable to determine the capped amount. The Commission will consider claims that a profit rate to be added may not be one that is ‘normally realised’ on the domestic market by the exporters in question.

Where there are no domestic sales at all in the domestic market, a profit may still be added.

[9] See *Steelforce Trading Pty Ltd v Parliamentary Secretary to the Minister for Industry, Innovation and Science* [2018] FCAFC 20, [97].

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

10.1 CONTEXT

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

10.2 POLICY

Where the conditions of subsection 269TAC(1) are not met, the Minister may determine a price by either a constructed value under subsection 269TAC(2)(c) or may direct that subsection 269TAC(2)(d) applies and use prices for like goods exported to a third country. The Minister is not required to consider third country sales before constructing the normal value of goods under subsection 269TAC(2)(c). The ADA places the constructed method, which is the normal value constructed from costs and a profit, and the third country export sales method, on an equal footing.

In practice, the Commission's preference is to use the costs based method in the first instance when the cost data is available from a cooperating exporter. Third country export sales data, on the other hand, would have to be examined in order to make determinations about an appropriate third country as well as conclusions about ordinary course of trade and arms length.

10.3 PRACTICE

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

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

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

11. NORMAL VALUE IN NON-MARKET ECONOMIES

11.1 CONTEXT

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

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

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

11.2 POLICY

The non-market economy provision has not been used for a considerable period. It no longer applies to major trading partners. That said, this chapter is retained in the manual for the time being.

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

11.3 PRACTICE

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

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

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

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

- the volume of trade from the surrogate country to the selected third country is similar to the volume of trade from the surrogate country to Australia;

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

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

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

Subsections 269TAC(5A) and (5B) require that the amounts to be determined in a constructed normal value must be worked out in accordance with the Regulations.

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

Where normal values are determined under subsection 269TAC(4), the Commission will ensure fair comparison in accordance with subsections 269TAC(8) or 269TAC(9).

<u>Selecting an appropriate “surrogate” country</u>

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

Administrative Expediency

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

Similarity of Products

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

Manufacturing Processes

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

Market Conditions

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

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

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

Volumes

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

Access to Raw Materials

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

Macroeconomic Indicators

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

12. NORMAL VALUE IN AN ECONOMY IN TRANSITION

12.1 CONTEXT

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

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

12.2 POLICY

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

12.3 PRACTICE

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

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

In assessing whether or not market conditions prevail in an economy in transition, the Commission will consider matters prescribed in Regulation 46. These include:

- whether the entity makes decisions about prices, costs, inputs, sales and investments:
  - in response to market signals; and
  - without significant interference by a government of the country of export;
- whether the entity keeps accounting records in accordance with generally accepted accounting standards in the country of export;
- whether the generally accepted accounting standards in the country of export are in line with international accounting standards developed by the International Accounting Standards Board;
- whether the accounting records mentioned in paragraph (b) are independently audited;
- whether the entity's production costs or financial situation are significantly affected by the influence that a government of the country of export had on the domestic price of goods in the country before the country's economy was an economy in transition;
- whether the country of export has laws relating to bankruptcy and property;
- whether the entity is subject to the bankruptcy and property laws (of the country of export);
- whether the entity is part of a market or sector in which the presence of an enterprise owned by a government of the country of export prevents market conditions from prevailing in that market or sector;
- whether utilities are supplied to the entity under contracts that reflect commercial terms and prices that are generally available throughout the economy of the country of export;
- if the land on which the entity's facilities are built is owned by a government of the country of export – whether the conditions of rent are comparable to those in a market economy;
- whether the entity has the right to hire and dismiss employees and to fix the salaries of employees.

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

- whether a genuinely private company or party holds the majority shareholding in the entity;
- if officials of a government of the country of export hold positions on the board of the entity – whether these officials are a minority of the members of the board;
- if officials of a government of the country of export hold significant management positions within the entity – whether these officials are a minority of the persons holding significant management positions;
- whether the entity's ability to carry on business activities in the country of export is affected by:
  - a restriction on selling in the domestic market; or
  - the potential for the right to do business being withdrawn other than under the contractual terms; or

  - if the entity is a joint-venture in which one of the parties is a foreign person, or is carried on in the form of such a joint-venture – the ability of the foreign person to export profits and repatriate capital invested;
- whether the entity's significant production inputs (including raw materials, labour, energy and technology) are supplied:
  - by enterprises that are owned or controlled by a government of the country of export; and
  - at prices that do not substantially reflect conditions found in a market economy.

13. NORMAL VALUE BASED ON ALL RELEVANT INFORMATION

13.1 CONTEXT

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

Article 6.8 of the ADA provides that preliminary and final determinations (affirmative or negative) may be made on the facts available if an interested party either:

- refuses access to necessary information;
- otherwise does not provide necessary information within a reasonable period; or
- significantly impedes an investigation.[10]

13.2 POLICY

The *Customs (Extensions of Time and Non-Cooperation) Direction 2015* provides direction on the matters which should be considered when determining whether a party is uncooperative.

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

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

There is an obligation to inform the relevant respondent that, if it fails to provide the required information, determinations may be made on the basis of the facts available.

13.3 PRACTICE

The Commission will consider all relevant evidence when working out a normal value under subsection 269TAC(6). As noted in Chapter 8 the Commission will not look for information from other sellers where an exporter has not cooperated. Adjustments to ascertain a normal value for the non-cooperating producer may be made (but the extent of any adjustments will necessarily be limited due to the non-cooperation).

[10] Article 6.8 is considered in *Argentina – definitive anti-dumping measures on imports of ceramic floor tiles from Italy* WT/DS189/R

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

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

14. MODEL MATCHING

14.1 POLICY

When determining normal value under subsection 269TAC(1) based on domestic sales of like goods in the exporter's domestic market, the Commission obtains information on all sales of these goods. In cases where different models of the goods exist, it is necessary to select the domestically sold models that are most directly comparable to the particular models exported to Australia. This allows for a proper comparison between the normal value and export price of the goods for the purposes of working out the dumping margin.

Appropriate model matching of the goods exported to Australia to like goods sold on the domestic market is therefore critical when ascertaining normal values under subsection 269TAC(1).

The Commission undertakes model matching using a Model Control Code (MCC) structure to identify key characteristics that will be used to match models of the goods exported to Australia and like goods sold domestically in the country of export. In determining the MCC structure, the Commission will have regard to differences in physical characteristics that give rise to distinguishable and material differences in price. Unit costs may also be taken into account in assessing differences in physical characteristics where the Commission is reasonably satisfied that those cost differences affect price comparability. An assessment such as this may be required, for example, where the models sold domestically and the models exported to Australia are different.

The Commission will also use the MCC structure to compare domestic selling prices of the like goods to the costs of such goods for the purposes of assessing whether the domestic sales are in the ordinary course of trade.

Sales and cost data submitted in the response to the exporter questionnaire are required to follow the MCC structure. At a minimum, the data must report sales and cost data separately for each of the mandatory MCC categories identified by the Commission. Modifications to the MCC structure may be considered based on the facts and evidence pertaining to a particular exporter. As sales data from importers may also be used to calculate a deductive export price, importers are also required to follow the MCC structure in submitting sales data in its response to the importer questionnaire.

Where there are no sales or insufficient sales of identical models of the goods exported to Australia that are sold in the ordinary course of trade on the domestic market, the Commission may use a surrogate model and make appropriate specification adjustments. In deciding the appropriate surrogate model and specification adjustments, the Commission will rely on the MCC structure and the hierarchy of categories or sub-categories. If comparing a constructed normal value under subsection 269TAC(2)(c) to export prices, the Commission will also use the MCC structure to identify the relevant costs of production.

The Commission may also have regard to the MCC structure in its assessment of material injury to the Australian industry, such as for an undercutting analysis.

There may be specific cases where the Commission considers that a MCC structure is not meaningful or cannot be established for the goods under consideration (for example power transformers where each sale is a unique model which is not comparable to any other sale). The Commission will make this determination on a case by case basis.

14.2 PRACTICE

The MCC structures provide a system of identifying fundamental characteristics of the goods subject to investigation (the goods) and assigns an alphanumeric code to define categories and sub-categories of the goods.

On initiation, the Commission will advise interested parties of the MCC structure that they will need to apply in their response to the questionnaires. The MCC structure will be based on information contained in the application and any other information that the Commission considers relevant.

The MCC structure comprises categories and sub-categories of the goods and like goods. Each of these categories and sub-categories will have mandatory or optional reporting requirements with respect to sales data and cost data. A category that is mandatory in the exporter's domestic sales spreadsheet may be optional in the corresponding cost spreadsheet, recognising the likelihood that sales data is often captured in accounting records on a more granular basis than cost data.

Importantly, the MCC structure will establish the model matching hierarchy. The categories in the MCC structure will be listed, in descending order, according to the significance of the category to the goods when model matching. This is to ensure that the most comparable surrogate models are chosen, for model matching purposes, when there are insufficient domestic sales of the identical model. The most comparable model is usually considered to be the surrogate model that has the closest physical characteristics (an indicator of this may be the model that has the smallest difference in cost of production per unit).

In addition, the MCC structure will identify certain key categories. For any key category (identified by a YES in the "Key category" column of the MCC structure), the approach will be that sub-categories within each key category should be compared directly and should not be used as surrogate models for other sub-categories within that key category. This would generally be because the physical characteristics are significantly different and making an adjustment for physical differences would not be meaningful in terms of estimating a price difference.

Below is an MCC structure which may apply in a case involving pens:

Category	Sub-category	Sales Data	Cost data	Key category
Material	P: Plastic NP: Non-plastic	Mandatory	Mandatory	Yes
Cover	N: None L: Lid C: Click T: Twist	Mandatory	Mandatory	No
Clip	WC: With Clip NC: No Clip	Mandatory	Optional	No

Based on the above MCC structure, a plastic pen with no cover or clip will have an MCC of: P-N-NC. Where there are insufficient domestic sales of that model, the next model to test for sufficiency of domestic sales will be a plastic pen with no cover but with a clip (i.e. MCC P-N-WC). Where there are still insufficient sales of that model, then the model matching hierarchy moves up to the next category. In this example, a plastic pen with a different cover will be used will be used as a surrogate to test for sufficiency. However, as "material" is a key category, a plastic pen cannot be matched with a non-plastic pen. If there are insufficient sales of models with the same key category, then the normal value may be constructed under 269TAC(2)(c) for that model.

While responses to questionnaires are required to follow the MCC structure, proposed modifications to the categories and/or sub-categories specific to an exporter may be considered on a case by case basis. Such modification may be considered, for example, where certain models sold by the exporter do not align within the proposed MCC structure, such as models specific to the exporter; unanticipated factors that the Commission did not have regard to in determining the MCC; or new information on the characteristics that is put before the Commission.

In the pens example above, there may be a new pen innovation with a cover that does not fit within the sub-category of a lid, click or twist, requiring the MCC structure to be modified to include this type of lid. Reasoning for such modifications will need to be demonstrated and supported with data and evidence.

Proposals to modify the MCC structure should be raised as soon as is practicable, but no later than the time the responses to the questionnaires are due and placed on the public record prior to any verification, otherwise the response may be deemed deficient. Interested parties are encouraged to make submissions on whether proposed modifications to the MCC structure should be accepted by the Commission. Any changes to the MCC structure will be considered by the Commission and reported in the Verification Reports or in the statement of essential facts.

The Commission will consider modifications to the MCC structure from the original investigation in subsequent reviews and continuations, where justified.

Where exporters do not provide cost and sales data for models that are consistent with the mandatory MCC categories, this may be regarded as a major deficiency in the response to the exporter questionnaire and therefore may result in the exporter being deemed uncooperative and/or the data being treated as unreliable.

15. DUE ALLOWANCE

15.1 CONTEXT

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

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

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

Under subsection 269TAC(8) where the domestic and export prices:

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

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

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

15.2 POLICY

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

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

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

The ADA sets out a non-exhaustive list of factors that may affect price comparability:

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

Adjustments will not be made for the following situations:

- differences in general sales and administration expenses that relate more to the general cost of doing business and are spread across all sales of the company (or expenses such as research and development as these too are spread across all sales of the firm). The Commission considers that general expenses of this nature do not fall within the scope of the term ‘differences in conditions and terms of sale’;
- where the goods sold in the domestic and export markets are essentially identical—notwithstanding that there are differences in costs because different raw materials are used. For example, the same models or types of a good, or fungible commodities where their nature is such that one part or quantity may readily be replaced with another equal part or quantity;
- where there is a two-tier pricing arrangement—which occurs when raw materials having different prices are used in production for export and production for domestic sale—adjustments are not made for the price differences of the raw materials under such arrangements which generally provide a cost advantage in the manufacture of goods for export;
- contract dates made in certain circumstances;
- where adjustment items overlap, particularly for level of trade, quantity, and discounts.

15.3 PRACTICE

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

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

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

Adjustments may be based upon actual costs incurred, or selling prices achieved, for the sales transactions under examination. Where based on costs, it is subject to the principle that adjustments will be made only where evidence indicates that price comparability has been affected.[11] An allocation of expenses is accepted by the Commission where actual expenses incurred cannot be obtained.

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

These guidelines focus upon adjustments to normal value under the provisions of subsection 269TAC(1) and subsection 269TAC(8). However, where adjustments

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

are made under subsection 269TAC(2)(c) and subsection 269TAC(9), based on costs, the principles set out below generally apply.

Adjustments

Sales at different times

When comparing export price and normal value, it is desirable that sales to which the prices relate occur as near as possible in time. Where transactions regularly occur in both markets, this adjustment does not normally arise as averaging periods are matched, for example month to month. The Commission will consider an adjustment for price movements where the sales being compared are not closely aligned and where inflation has had an effect on price comparability. The Commission will consider the available evidence in deciding whether such adjustment is possible under subsection 269TAC(8) or whether a constructed normal value is required.

Establishing the date of sale

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

Where a claim is made that a date other than the date of invoice better reflects the date of sale, the Commission will examine the evidence provided.

For such a claim to succeed it would first be necessary to demonstrate that the material terms of sale were, in fact, established by this other date. In doing so, the evidence would have to address whether price and quantity were subject to any continuing negotiation between the buyer and the seller after the claimed contract date.

This arises because there can be circumstances where an exporter and importer agree on price and quantity and make a sales agreement to that effect, but this may not establish the date on which terms were finally agreed upon because an element of informality continues, and conditions can be changed.

Any claim for an adjustment would need to substantively address:

- whether, why, and to what degree, the considerations in determining price differed between export and domestic sales;
- whether the materials cost differs at the time of subsequent invoicing of that export sale (compared to domestic sale invoices in the same invoice month of that export sale) having regard to factors such as the production schedules for domestic and export; and lead times for purchasing main input materials;
- whether contracts were entered into for the materials purchases, and materials inventory valuation.

Very long terms for future delivery: a producer/exporter may adjust its prices in the domestic market periodically according to market conditions but in the export market enter into a long term contractual arrangement, sometimes with an associate company, several years prior to the commencement of the investigation period. The Commission will use the invoice date in these circumstances because it ensures use of current data for normal value purposes.

Using the contract date for export sale is most likely to have application in situations where the production process takes a long time—for example, manufacturing items of heavy capital equipment causing delivery to occur well after the sale has taken place.

Physical characteristics and quality

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

Evidence should be provided of different selling prices for products with different physical characteristics or quality. In such cases, the size of the price difference may be used as the basis for any adjustment.

However, there may be situations where direct evidence of price differences cannot be provided (e.g. models sold domestically and exported to Australia are different). In these situations, adjustments for differences in physical characteristics or quality, where it reasonably affects price comparability, may be based on production cost differences plus the addition of the gross margin (i.e. the administrative, selling and general costs and profit) to the production cost difference. This is a means for calculating an adjustment that reflects the market value of the production cost difference.

Where neither of these methods may be utilised, the Commission may consider other reasonable methods to make adjustments for physical characteristics or quality.

Adjustments are not made for physical characteristics where:

- there are no differences in physical characteristics and only different raw materials have been used in manufacture of the exported goods and the domestically sold goods (see the related statement under 'Policy' above);
- if similar raw materials are being purchased from two different sources of supply, one source used for production destined for export, and the other source used for production for domestic consumption, and the final product has essentially the same characteristics, any difference in production costs due to the different materials prices does not merit any adjustment;
- although there may be some differences in physical characteristics, no demonstrable effect on the selling price of the goods has been observed or is likely because, for example, the customer remained unaware of any differences and no demonstrable price effect could be observed.

Differences in taxes

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

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

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

Value Added Tax on exports

Value added tax (VAT) liability can differ between domestic sales and export sales. Domestic sales prices are usually VAT free (because most companies separately capture the output VAT amount on each individual sale). Export sales, on the other hand, usually incur VAT liability.

The Commission treats this VAT liability in export sales as having influenced the export price. Accordingly, where the normal value is calculated from VAT exclusive domestic sales prices, an upward adjustment is made in order to compare those domestic sales prices to the VAT inclusive export sales prices.

The maximum amount of the upward adjustment will be the difference between the VAT rates for normal supply and the rate of VAT refund for export. For example, if the VAT rate is 17% and the VAT refund rate 5% (because domestic sales incur a VAT liability of 17% while export sales incur a VAT liability of 12%) in this circumstance the maximum upward adjustment to normal value is 12%.

Where the evidence shows that the maximum amount does not properly reflect the different VAT liability between domestic and export sales, a lesser adjustment will be made. For example, in China, it is known that raw materials used in the manufacture of the goods can be exempted from VAT. Or raw materials may be imported duty free. In these circumstances, because of the way in which the VAT scheme operates in China, the 'residual' VAT in the export sales may be lower than the maximum. However, a lesser upward adjustment is made only where the exporter provides evidence concerning the raw materials treatment. Otherwise, the full upward adjustment to the normal value will be made.

The Commission will calculate the residual export VAT liability for goods exported from China. Data, where it has been verified to the Commission's satisfaction, is used for the following variables to calculate the net VAT liability in the export sale:

VAT rate (%)
VAT refundable rate on export (%)
Raw materials purchases - domestic (RMB), exc VAT
Raw materials purchases - imported duty free (RMB)
Domestic sales value of finished goods (RMB), exc VAT
Export sales value of finished goods at FOB (RMB)
Deductible balance of VAT at the end of last period

Import duties ('duty drawback')

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

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

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

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

Example 1

The exporter manufactures identical goods for domestic and export sales (e.g. 600 tonnes for domestic market and 400 tonnes for the export market). A main raw material is used—sourced from local and overseas suppliers. The imported raw material amounts to 100 tonnes and all of it is used to produce the goods for export. The locally sourced raw material amounts to 150 tonnes and it is used to produce the domestically sold goods. Import duty of $5 per tonne was paid on the imported raw materials and the exporter has been refunded $500 in duty drawback.

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

Example 2

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

In this case, the duty drawback mechanism has provided a refund of the import duty paid to produce the export goods. The goods destined for export were not subject to any import duties but the domestic goods were. Accordingly, this causes a difference between the export and domestic prices due to the effects of the import duties. The Commission would allow an adjustment for duty drawback in this circumstance. The amount of the adjustment must relate to the import duty paid for the production of the goods for the domestic market (i.e. $750 or $1.25 per tonne when apportioned over the total domestic sales of 600 tonnes). In case

No. 2 apportioning the $500 drawback to the export volume (400 tonnes) yields the same result.

Example 3

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

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

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

<u>Substitution drawback</u>

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

<u>Level of trade</u>

Article 2.4 of the ADA requires that due allowance be made for differences which affect “price comparability” including differences in levels of trade.

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

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

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

Selling activities

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

Price differences

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

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

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

In quantifying a claim for differences in level of trade, two methods are used to estimate the amount of any trade level adjustment. The first is the costs arising from different functions method; the second is trade level discounts method. Priority is given to the first method.

Trade level issues can be complex due to different selling arrangements in each market. Parties are provided the opportunity to make submissions on these issues. The Commission expects exporter submissions about level of trade adjustment to be supported by evidence. Without relevant supporting evidence an adjustment will not be possible.

Costs arising from different functions method

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

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

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

Level discount method

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

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

Any other method

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

Related parties in the context of adjustments

The export or domestic sales may be between related entities. For example, the producer/exporter is related to a separate entity which undertakes the domestic sales functions on behalf of the corporate group. In this situation, the Commission may decide to treat the related producer and selling entities as a single exporter. This may affect the adjustment determinations and may result in different outcomes compared to the situation where the parties were not related.

One example is sales by the exporter/producer to an associated distributor who on-sells into the domestic market to customers who are at the same level category as the Australian customer of the exporter/producer. In this situation, the association between the producer and the distributor may have influenced the prices such that the domestic ‘sales’ between the related exporter and distributor are not arms length transactions. Rather, there is a ‘transfer price’ between the two.

The ‘downstream’ sales of the associated distributor can, however, be used for determining normal value where they meet the requirements of subsection 269TAC(1).

There is no trade level difference here per se as the sales in both markets are to the same types of customers. But there is a difference in that the sales being compared are not from the same entity—the domestic sales are from the associated distributor whereas in the export market the sales are from the producer/exporter itself.

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

Another example is where the associated domestic distributor may be at the same trade level as the Australian customer, buying directly from the exporter/producer (unlike the situation just described where it was the customers of the associated domestic distributor that were at the same level as the Australian customer).

A question arises as to what adjustment, if any, should be made in this situation where the ‘downstream’ sales by the associated distributor are used. In considering any adjustment, the Commission will not adjust those downstream prices by the related distributor for the amount of the related domestic distributor’s gross margin. To do so gives the same results as if normal value was determined from the non-arms length sales between the producer and the related distributor – but the related party sales had already been found to be unreliable and unsuitable for normal value. The Commission will, however, consider what adjustments are warranted based upon the relevant expenses incurred having regard to the principles above.

Trading houses/intermediaries

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

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

In this situation the Commission may, depending on the facts, add the margin of the trader to the domestic sales prices of the exporter in order to make the sales comparable.

Bad debt

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

Credit

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

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

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

Where no fixed credit period has been shown on the invoice or in a sales contract, where there is a variety of credit terms, or where the credit terms on the invoice are not adhered to; the Commission may calculate an average credit term for adjustment purposes. The steps are:

- Calculate an accounts receivable turnover ratio. This is a measure of how many times the average receivables balance is converted into cash during the year and is calculated by dividing total credit sales by the average accounts receivable (total net sales may be used as the numerator where total credit sales are not available).
    - The average accounts receivable (the denominator in the calculation described above) can be calculated using either of the following methods:
        - accounts receivable opening balance for the period + accounts receivable closing balance for the period, divided by 2; or
        - total monthly receivables balances divided by 12.
- The average credit term is then calculated by dividing 365 by the accounts receivable turnover ratio as calculated above.

The Commission will generally apply the same interest rate in calculating the domestic and export credit terms adjustments, unless the exporter can demonstrate that different interest rates apply to domestic and export sales.

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

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

domestic price/(1+(domestic interest rate * (domestic payment terms/365)))

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

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

The interest rate generally applied (in order of preference) is:

- the rate, or average of rates, applying on actual short term borrowings or an overdraft facility by the company
- the rate, or average of rates, applying to term deposits or other cash product (e.g. bonds) invested in by the company
- the prime interest rate prevailing for commercial loans in the country for credit terms that most closely approximate the credit terms on which the sales were made;
- such other rate considered appropriate in the circumstances.

Order of making credit terms adjustments

The domestic credit terms adjustment is made to the domestic sales price and this has the effect of discounting normal value to ‘cash equivalent’ terms. The export credit terms adjustment is made to this normal value (cash equivalent terms) after all of the other normal value adjustment items have been taken into account made to the ‘cash’ terms normal value.

This order, in making the export credit terms adjustment last, reflects the fact that credit terms are based on a price – as such, the ‘normal value’ (in cash equivalent terms) after all other adjustments, is at that point the most comparable price to the export sale on which the export credit terms had been extended.

Credit terms adjustment for an export oriented producer

Where the exporter has no domestic sales of any goods and the normal values must be calculated using the costs of production for the goods and the SG&A expenses associated with a domestic sale, credit costs associated with the sales are normally part of the finance expenses that have been included i.e. no separate credit terms are usually warranted in these circumstances.

Quantity discounts

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

Sales with a quantity discount

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

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

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

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

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

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

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

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

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

Any other method

A claim for a quantity adjustment using any other method must be substantiated by evidence of the effect on price.[12]

A claim by an exporter for a quantity adjustment must be supported by evidence. A claim presuming a price/volume relationship, lacking supporting information, is not

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

accepted. Likewise, the Commission itself will make a quantity adjustment only where it finds relevant data in support of an adjustment.

Where the Minister is satisfied that the low volume of sales is sufficient to permit a proper comparison (see subsection 269TAC(14)) a normal value so determined will only incorporate an adjustment for quantity where the evidence supports the adjustment.

The Commission will consider an adjustment for both differences in quantities and differences in level of trade – an adjustment for a difference in quantities will only be made in these circumstances where the evidence demonstrates that there is a separate effect on price comparability due to quantity and level of trade. Normally, these two adjustment items cannot be separately established.

Other discounts and rebates

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

Where exporters pay rebates to customers that have achieved designated target volumes in a given period, prices may be adjusted in respect of those rebates paid.

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

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

Delivery costs and ancillary charges

Domestic sales

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

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

Export sales

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

Packing

Adjustment for differences in packing costs is allowed where there is a distinct difference in packaging types. The price of like goods shall be adjusted downwards by the domestic packing costs and upwards by the export packing costs.

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

Commissions

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

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

After sales costs

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

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

Warehousing

Adjustment for warehousing is allowed where the costs associated with the warehousing function is evidenced and the connection to the respective sales established. Mere assertion of a difference is insufficient. For example, the price may be adjusted upwards if export sales are made from stock but production is made to order on the domestic market.

Royalty

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

Advertising and sales promotion

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

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

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

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

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

The domestic price may be adjusted downward to ensure proper comparison with the export price where, for example, there are local taxes that are part of that price and are not levied on the export sale. Where there are advantages, such as direct or indirect subsidies, which the exporter may have but are not present in the domestic sales prices, there is no requirement for the domestic sale price to be adjusted downwards.[13]

Inventory carrying costs

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

However, should the exporter be able to demonstrate the costs associated with holding goods for sale are different in so far as they relate to relevant domestic

[13] See *Mullins Wheels Pty Ltd v Minister for Customs & Consumer Affairs* [2000] FCA 357, [42].

sales and relevant export sales, an adjustment may be considered, if satisfied that the differences are reflected in price.

In calculating the opportunity cost of carrying inventory the common approach is to determine the average inventory turnover period, the appropriate short-term interest rate and the average unit cost of inventory.

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

- The beginning balance of finished goods inventory and the end balance are averaged; that average divided by the total cost of finished goods for the POI multiplied by 365 equals the average inventory period.
- The adjustment is calculated by dividing the annual interest rate by 365 (to give a daily rate) and multiplied by the average inventory period as calculated immediately above – resulting in the adjustment in percentage terms.

Or, to derive a unit amount for the opportunity cost of carrying inventory the turnover period is divided by 365 and multiplied by the interest rate – the rate is then multiplied by the unit cost.

The unit cost is generally used as the basis for the calculation rather than the market value. This is because inventory is normally valued at the lower of cost or market value. The unit cost used is generally a full absorption cost, i.e. including variable and fixed manufacturing costs.

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

Other

The Commission will consider an adjustment claim, supported by evidence, for any other differences shown to affect price comparability between domestic sales and export sales to Australia.

16. IDENTIFYING A SUBSIDY – WHETHER A FINANCIAL CONTRIBUTION EXISTS

16.1 CONTEXT

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

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

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

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

16.2 POLICY

The definition of a subsidy in section 269T refers to a '*government*' and to a '*public body'*. The term '*government*' is taken to include government at all different levels – national and sub-national. The definition also refers to a '*private body'* which the government or a public body entrust or directs to carry out a governmental function.

16.3 PRACTICE

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

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

Public Body

The term '*public body*' is not defined in the Act and the Commission has regard to the dictionary definition which refers to an institution or organisation acting on behalf of the community. The determination of whether an entity or company is a 'public body' will not focus on any one factor. Rather, there will be a careful evaluation of all available evidence of the entity's features and of its relationship with government including:

- The objectives and functions performed by the body—whether the entity in question is pursuing public policy objectives. In this regard relevant factors include:
  - statutes or other legal instruments;
  - the degree of separation and independence of the entity from a government including the appointment of directors;
  - the contribution that an entity makes to the pursuit of government policies or interests.
- The body's ownership and management structures.

This reflects the approach in the WTO Appellate Body in *United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China - DS379*. That Appellate Body report referred to three indicia: a 'public body' may possess, exercise or be vested with government authority, where:

- a statute or other legal instrument expressly vests government authority in the entity concerned;

- evidence exists that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority; and

- evidence exists that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.

The Commission treats these indicia as illustrations of circumstances which would point to an entity being a public body. Different types of evidence can be relevant depending on the circumstances when addressing the issues set out in first paragraph above under 'Public Body'. Concerning the first factor, the Commission does not read the word "authority" in the narrow sense as meaning a public body has to be an agent of the government.

The Commission utilises a government questionnaire concerning the nature and role of entities alleged to be public bodies (including state owned enterprises).

Ownership / Management

Ownership and management are examined as part of considering whether an entity is a public body - for example if the body is wholly owned by a government, or if the government has a majority ownership, and appoints the management.

Whether the government has a majority share or not of the entity in question, the Commission will determine if it is a public body based upon a careful examination of all relevant facts, including the management structure and the way in which it was appointed. A finding of a 'public body' may be supported through the government's ability to make appointments; the right of government to review results and determine the body's objectives; and its involvement in investment or business decisions.

Objectives / Functions

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

<u>Private body</u>

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

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

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

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

The Appellate Body stated:

- A finding of 'entrustment' or 'direction' requires that the government give responsibility to a private body – or exercise its authority over a private body – in order to effect a financial contribution. Thus, not all government acts can be taken as amounting to entrustment or direction and mere policy pronouncements of themselves are not sufficient;
- Entrustment or direction – through the giving of responsibility or exercise of authority over a private body – implies a more active role than mere acts of encouragement. The Appellate Body agrees with an earlier panel that entrustment and direction do not cover 'the situation in which the government intervenes in the market in some way, which may or may

not have a particular result, simply based on the given factual circumstances and the exercise of free choice by the actors in that market. The Appellate Body held that entrustment or direction *'…cannot be inadvertent or a mere by-product of government regulation'*;

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

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

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

Direct transfer of funds

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

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

Foregoing or non-collection of revenue

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

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

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

Providing goods or services, or purchasing goods

The Commission will examine whether a financial contribution may arise when a government provides goods or services or purchases goods. An example would be the supply by a government of energy at preferential prices to specific sectors. A private body may be entrusted with these functions. In doing so the Commission will examine the evidence as to whether the contested measure relates to general infrastructure.[14]

[14] Provision of public roads and transportation systems, fire protection and public health programs, fiscal policy measures or broad economic policies are general governmental policy measures that are regarded as not being a ‘financial contribution’.

17. IDENTIFYING A SUBSIDY - WHETHER A BENEFIT IS CONFERRED

17.1 CONTEXT

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

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

Such examination will demonstrate whether the recipient has received something of economic value from a government whether in terms of money, goods or services.[15] This includes the situation where a producer would have to pay more for the 'inputs' if there had been no financial contribution from a government to an upstream raw materials supplier. Section 269TACC addresses whether a financial contribution or income or price support confers a benefit. This chapter describes the methods the Commission uses to calculate benefit to the recipient.

17.2 POLICY

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

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

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[15] Use of the present tense regarding the 'financial contribution' and the 'benefit' in the WTO provisions is taken to mean both must exist during the period of the investigation or review.

17.3 PRACTICE

<u>Methods to calculate the benefits to the recipient</u>

<u>Objective of the calculation</u>

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

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

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

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

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

The amount of the subsidy will be calculated by:

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

<u>Attribution of a subsidy to the investigation period</u>

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

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

The Commission will investigate such subsidies over a prior period in order to determine the portion of such subsidy to be attributed to the investigation period.

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

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

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

Allocation to the goods

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

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

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

Attribution – Expensed or Allocated

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

Recurring subsidies are those that are usually related to a firm’s on going production and sales activities and are ongoing in nature. An example is income tax exemptions which affect the yearly after tax profits. The type of subsidies used for operational expenses are usually expensed i.e. attributed entirely to a single year. Where a subsidy has been expensed in this manner, the Commission will not examine the subsidies provided before the investigation period.

On the other hand, non-recurring subsidies by their nature are generally exceptional or infrequent, and linked to the longer term financial structure of the firm (i.e. its debt and equity) or its assets (e.g. plant and equipment). Because these types of subsidies have a continuing benefit to the enterprise beyond the year of receipt, they should be allocated (i.e. amortized) over a longer period and through this method a portion will be attributed to the investigation period.

Subsidies used for acquisition of capital assets, for example, will be amortized over the expected useful life of the assets. Included in this are some subsidies which, although given on a recurring basis, are linked to fixed assets - the benefits accruing from previous years within the depreciation period are taken into account when working out the appropriate amount to attribute to the investigation period. An example is import duty exemptions on imported machinery.

Subsidies for other or unknown uses are generally amortized over the weighted average useful life of assets employed in the industry.

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

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

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

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

During an investigation, submissions will be invited from interested parties in order to decide whether a subsidy should be expensed or amortized.

Amortization period

Where the subsidies can be linked to the acquisition of fixed assets or to the long term debt structure of the enterprise, the total value of the subsidy will be spread over a period which reflects the normal depreciation of the assets in the industry concerned.

Therefore, a one-off grant used in this manner, for example, can be spread over the normal period used for the depreciation of assets. Such an approach means that one-off subsidies paid in the past can remain countervailable provided that the benefit carried into the investigation period.

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

Normal period for depreciation of assets

At the outset of the investigation, exporters and the government are invited to provide information about the normal average useful life of assets (AUL) for the industry under investigation. The Commission prefers to use exporter/producer data concerning AULs[16], but absent that will consider any other reliable information. For example, the government may be able to demonstrate that it has procedures in place which recognise the AUL of industries and which have been based upon reliable industry surveys. The Commission will not assume that depreciation periods used for taxation purposes equate with the actual AUL of the industry.

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

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

Exception

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

Addition of interest

Interest will be added whether the subsidy has been expensed or amortized. When expensed in the investigation period, the expensed amount will generally be increased by the annual commercial interest rate (to reflect the full estimate of benefit on the assumption that the beneficiary company would have had to borrow the money at the beginning of the period and repay at the end)[17].

Addition of interest can become a significant addition to the benefit calculation if the rates are high. The rationale behind the addition of interest is that the benefit to the recipient includes the amount conferred as well as the interest related benefit of not having to borrow an equivalent amount of money. Adding interest in this manner means a distinction is being made between the face value of a subsidy at the time it is transferred to the recipient or foregone by the government and the amount found to exist in the investigation period.

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

The appropriate denominator for allocation of a subsidy amount per unit

Once the subsidy amount attributed to the investigation period, and allocated to the goods, has been determined, the result is used to work out the subsidy per unit, using an appropriate denominator.

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

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

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

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

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

Ad valorem

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

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

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

Related Parties

If a subsidiary company is under investigation and certain subsidies have also been received by related parties, for example, the holding or parent company, some of that subsidy may be allocated to the subsidiary company where it relates to the goods. Chapter 19 *Upstream Subsidies* discusses with ‘pass-through’ of a subsidy.

Subsidies that are generally expensed

Short term loans (operational); grants for operational expenses; tax credits, refunds, and exemptions; tax deferrals; excess relief of indirect taxes and import duties; provision by government of goods or services used for operations (and discounts on electricity, water and other utilities); purchase of goods by government; price support; freight subsidies; export promotion assistance; wage subsidies; and upstream subsidies.

Subsidies that are generally amortized

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

These examples are illustrative only.

Attributing amortized benefits to each year including the investigation period

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

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

Where:
Ak = the amount of the benefit allocated to year k
y = the face value of the subsidy
n = the AUL of assets in the industry being investigated
d = the discount rate
k = the year of allocation where the year of receipt = 1 and $1 \leq k \leq n$.

The formula calculates the annual benefit amount for each year using the variables: face value of the subsidy; AUL; and the interest rate[18]. The numerator can be seen to be like principal (subsidy) plus an interest component. The denominator brings the benefit back to day 1 dollars.

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

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

Over the life of the subsidy, while y/n stays the same, the interest component declines each year. The result is that the benefit line slopes down over time.

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

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

Grants

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

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

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

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

Examples of grants (or equivalents to a grant)

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

Direct transfer of funds

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

Tax exemption, tax reductions, and tax credits

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

Accelerated depreciation

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

Interest rate subsidies

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

Debt forgiveness

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

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

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

Loans

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

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

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

A loan from a government owned bank may be treated as a commercial loan. The evidence will be examined when deciding whether the loan from that institution has been provided on non-commercial terms or has been made under any government direction. There is one qualification however—in some cases a government owned bank can be operating as a development bank, and its purpose is to make loans to government approved or encouraged development programs. In such cases it is unlikely loans from such government owned banks could be used as the benchmark 'comparable commercial loan'.

No comparable commercial loans: SCM Agreement Article 14(b) does not indicate how an investigating authority should establish the existence of benefit conferred by a loan in the event that there are no "comparable commercial loans which the firm could actually obtain on the market".

As there is some considerable leeway in adopting a reasonable methodology, the Commission will take care in examining all available evidence. One method would be to gather available evidence of the terms that the market would have offered and compare those terms with those of the financial contribution at issue. This provides a market benchmark. Or it may examine evidence of whether or not the financial contribution was provided on commercial considerations. This provides evidence that there has been reliance on non-commercial considerations and indicates terms more favourable than those available from the market. Indicators of the economic situation prevailing at the time, such as the inflation rate, and the situation of the company concerned, can be considered in this context.

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

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

<u>Attribution of the loan to a particular time period</u>

Short term loans

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

Long term loans

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

This formula will be used in the case of:

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

<u>Examples of loans</u>

Tax deferrals

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

Reimbursable grants

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

Contingent liability loans

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

Uncreditworthy loans

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

Loan guarantees

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

Viable loan guarantees

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

Non-viable loan guarantees

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

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

If a guarantee is not part of a program, if fees paid are like those charged to other companies under a viable loan guarantee program, there will be no subsidy. If no fees are paid by the recipient, the subsidy is the difference between the amount paid on the guaranteed loan and the amount it would pay for a comparable loan in the absence of the government guarantee.

The Commission will examine whether the guarantee affects other terms of the loan such as the interest rate.

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

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

In attributing the benefit from a government provided guarantee to a particular time period, the Commission will generally use the method set out for loans.

Government provision of equity capital

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

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

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

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

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

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

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

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

Where an enterprise is unequityworthy

If a private investor would not have put money into the company in the same situation in which the government provided equity, a project or enterprise may be found to be unequityworthy and a benefit will exist to the amount of the equity. The comments above concerning uncreditworthiness provide information about the type of information requirements the Australian industry would have to produce to support a request for an investigation into the matter.

Provision of goods and services by the government

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

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

Comparison with private suppliers

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

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

Government monopoly suppliers

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

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

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

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

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

Purchase of goods by government

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

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

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

Export subsidies

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

Price preference for inputs used in export production

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

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

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

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

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

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

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

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

Exemption or remission upon export of indirect taxes

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

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

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

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

Remission or drawback of import charges upon export

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

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

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

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

In relation to "substitution drawback", under such a drawback system an enterprise may substitute domestic inputs for imported inputs without losing its eligibility for drawback. That is, it uses a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them. Substitution drawback does not necessarily result in the conferral of a benefit. However, a benefit exists if it is determined that:

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

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

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

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

Based on Annex II to the SCM, the Commission may consider the entire amount of an exemption, deferral, remission or drawback to be a benefit if the foreign government has not examined the inputs in order to confirm which inputs are consumed in the production of the exported goods, and in what amounts, and the taxes that are imposed on those inputs. If it is found that there is a system in place that confirms which inputs are consumed in the production of the exported goods, in what amounts, and the taxes that are imposed on the inputs consumed in production, the Commission will examine that system to see if it is reasonable.

Where such a system is not in operation, or where the one that exists is not reasonable or effective, the government in question may be able to carry out an examination of the actual inputs involved and show that the exemption, remission or deferral of indirect taxes reflects only those inputs which are consumed in the production of the exported goods, their quantity after allowing for waste, and only those indirect taxes imposed on the input product. If the linkages cannot be demonstrated by these means, the Commission may take the entire amount of the exemption etc. as the benefit, i.e. it is treated like a grant.

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

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

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

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

Export credit guarantee or insurance programs

This reflects paragraph (j) of the Illustrative List of Export Subsidies (Annex I of the SCM Agreement). Under this provision only export insurance programs provided at premium rates and that are inadequate to cover the long term operating costs and losses of the program are treated as export subsidies. The focus is upon the inadequacy of the program. The Commission will examine the financial performance of the services provided by the government, and assess the revenues from the premiums and the long term operating costs and losses. If satisfied that it will break even over the long term, no subsidy will be found to exist.

Deduction from an amount of subsidy

The following may be deducted from the amount of subsidy:

- any application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy. It is up to the exporter in the country to provide the information to support any deduction.
    - The only fees or costs that may normally be deducted are those paid directly to the government in the investigation period. It must be shown that such payment is compulsory in order to receive the subsidy. Thus payments to private parties, e.g. lawyers, accountants, incurred in applying for subsidies, are not deductible. Neither are voluntary contributions to governments, for example donations.
- export taxes, duties or other charges levied on the export of a product to Australia specifically intended to offset the subsidy.

Claims for deductions should only be accepted if the charges involved were levied during the investigation period, and it is established that they continue to be levied at the time when definitive measures are recommended.

The tax consequences of a subsidy are not included in determining the amount of any benefit. For example, if in receiving a grant the enterprise pays more income tax, the Commission does not reduce the benefit by the amount of higher taxes paid.

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

EXPENSED SUBSIDIES	SUBSIDIES ALLOCATED OVER TIME
Grants: - Purpose is for other than purchase of fixed assets - Recurring and/or small	Grants: - Purpose is for purchase of fixed assets - Non-recurring and/or large - Recurring but granted in large, concentrated amounts

EXPENSED SUBSIDIES	SUBSIDIES ALLOCATED OVER TIME
Tax Benefits/Indirect Tax Rebates/Import Duty Exemptions: - For operating expense - Benefits related to direct taxes	Tax Benefits/Indirect Tax Rebates/Import Duty Exemptions: - For purchase of/related to fixed assets (e.g. import duty/indirect tax exemption on machinery)
Provision of Goods and Services: - Provision of services/consumable inputs	Provision of Goods and Services: - Provision of fixed assets and non-general infra-structure
Research and Development:[19] - Expense only if allocation not appropriate	Research and Development: - Presumption to allocate
Loss Coverage: - Recurring and/or small	Operating Costs: - Non-recurring and/or large - Benefit goods not yet produced
Interest Rate Subsidies:[20] - Interest subsidy payments made as loan payments become due	Interest Rate Subsidies: - Subsidy is lump sum to offset past, present or future interest due or paid
Short-Term Loan Benefits	Equity Infusions
Export Rebates	Long-term Loan Benefits (benefits exist over life on loan)
Export Insurance	Forgiveness/Assumption of Long-term Debt (including principal and interest)
Export Promotion Assistance	
Redundancy Payments/Early Retirement/Workers Assistance	
Worker Training	
Wage Subsidies	
Price Support Payments	
Subsidies Below Minimum Threshold Size (if the total amount of the benefits is less than 1% ad valorem of the export sales value)	

19 This is based on the presumption that the R&D subsidies frequently benefit future productions.

20 This is based on the presumption that the subsidy is non-recurring.

18. SPECIFICITY

18.1 CONTEXT

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

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

The aim of the specificity test is to avoid countervailing action being taken against subsidies that are generally available[21]. On these grounds a subsidy has to be specific to 'certain enterprises', as defined, in order to be countervailable.

Subsection 269TAAC implements the provisions of Article 2 of the SCM dealing with specificity. The Act permits action against all subsidies listed in paragraphs (a), (b) and (c) of that Article[22].

18.2 POLICY

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

The Commission will generally next examine the legislation or regulation of the exporting country in order to determine whether the subsidy is limited by legislation to certain enterprises—sometimes referred to as de jure specificity.

When there is no explicit limitation in the legislation the Commission may examine the factual circumstances in which subsidies are granted as the practices of the granting authority may show that, in fact, the subsidies primarily benefit certain enterprises—sometimes referred to as de facto specificity.

The Commission will make its specificity determinations only after careful examination of the facts.

The Commission has regard to Article 2.1 of the SCM Agreement which shows that the term 'certain enterprises' may include any of the following:

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

[21] An example of a non-specific subsidy may be a R&D tax concession meeting the requirements of Article 2.1(b) of the SCM Agreement.

[22] Subsidies, although specific, as described in paragraphs (a), (b) and (c) of *Article 8.2 of the SCM (Part IV Non Actionable Subsidies*) were not countervailable for an initial period of 5 years. That period ended in 1999 and changes in the *Customs Amendments (Anti Dumping Improvements) Bill 2011* have made them actionable. That same Bill also permitted all '*Green Box*' domestic support measures described in *Annex 2 of the Agreement on Agriculture* to become actionable under the Act (as the Agriculture Agreement's implementation period ended in 2004).

- a group of industries.

18.3 PRACTICE

Determination of specificity

Determinations of specificity may examine four potential types:

- Prohibited subsidies
- Enterprise specificity
- Industry specificity
- Regional specificity.

Prohibited subsidies

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

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

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

Whether a subsidy is contingent on export performance is a matter of fact to be determined in each case[23].

Enterprise specificity

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

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

The Commission has not defined what constitutes a sufficiently small number of enterprises or industries for it to properly be considered specific and such decisions can only be made in each case on the facts.

Industry specificity

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

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[23] In this regard the Illustrative List at Annex I to the SCM Agreement provide examples of export subsidies and practices not listed may be found to be a subsidy contingent on export performance.

Regional specificity

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

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

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

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

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

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

De Jure specificity

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

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

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

- objective criteria[24] or conditions govern the eligibility for and the amount of the subsidy;
- the objective criteria and conditions are strictly adhered to;
- eligibility is automatic if the objective criteria are met;
- the criteria and conditions are clearly set out by law, regulation or other official document so as to be capable of verification.

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

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

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

De Facto specificity

The Commission may examine the factual circumstances in which subsidies are granted, sometimes known as de facto specificity.

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

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

If supporting evidence was provided in an application for countervailing duties concerning de facto specificity, the exporter, and government questionnaires, would contain questions concerning the allegations that had been raised in the

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

application. The Commission would then seek information in relation to all de facto factors.

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

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

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

In applying these tests the Commission must consider:

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

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

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

For this reason, it is likely that an analysis of the level of benefit provided, i.e. whether recipients were dominant or disproportionate users under factors 2 or 3 respectively, will generally not be examined unless the subsidy was provided to numerous and diverse industries.

If this occurred the Commission will analyse the enterprises or industries that received benefits and seek to determine if one or a limited number of the recipient enterprises/industries were in fact dominant users (factor 2), or disproportionate users (factor 3) of the program.

In conducting this further analysis supplementary questionnaires may be issued as part of seeking the required information. In making decisions concerning the granting of disproportionately large amounts of subsidy to certain enterprises, the Commission will carefully consider what is the appropriate base line group on which it should make this assessment, having regard to the potential recipients of the alleged subsidy.

Again the de facto analysis will cease as soon as a determination is made that a single factor supports a finding of specificity[25]. The analysis under either factor 2 or

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[25] This means that where *de facto* specificity analysis has dropped down to Item 3 (receipt of *disproportionate* amounts), the Commission may treat this as positive evidence of specificity even if there are numerous users of the program and even if little discretion exists in awarding benefits. There is no certainty that it will always prove practical, or possible, to make

factor 3 will focus on the level of benefits provided, not the number of subsidies provided to different industries. Any analysis of whether the level of benefits received by a particular enterprise or industry, or group of enterprises or industries, were disproportionate in relation to the economy as a whole is likely to be an unusual situation.

Predominant use

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

Disproportionately large amounts

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

Discretion of granting authority

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

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

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

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determinations about the relative level of benefits under factors (2) or (3). (Information on each *de facto* factor will not always be available and because analyses can be complex the Commission will follow this sequential approach).

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

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

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

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

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

Other considerations

When evaluating de facto specificity, the Commission will consider:

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

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

Evidentiary requirements

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

Article 2.4 of the SCM requires that any determination of specificity be "clearly substantiated on the basis of positive evidence". When the exporter or the government refuses access to, or does not provide, the necessary information, the Commission will make determinations on the basis of all relevant information. If a party refuses to provide information requested in the questionnaires so that a specificity analysis cannot be conducted, the Commission may make findings based upon the all relevant information principle.

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

Time period for determining specificity

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

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

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

Determination of countervailable subsidy—non-cooperation by relevant entities

The determination concerning financial contribution, specificity and benefit in subsidy investigations may require the use of all available information where relevant entities have not cooperated with the investigation.

Section 269TAACA provides that where certain entities have not provided the requested information within a reasonable period of time or have significantly impeded the investigation, the determination may be made 'on the basis of all the facts available' and 'such assumptions as considered reasonable'. This standard of utilising all the facts available is applied consistent with the findings of the WTO Appellate Body, in *United States – Countervailing Duty Measures on Certain Products from China WT/DS437/AB/R,* which found that when using the available facts to make a determination (as provided in Article 12.7 of the SCM Agreement):

- The facts available have to reasonably replace the necessary information that is missing.

- The facts available are those in the possession of the investigating authority and on its written record—they cannot be made on the basis of non-factual assumptions or speculation. All substantiated facts on the record must be taken into account.
- The task of ascertaining which available facts reasonably replace the missing necessary information requires a process of reasoning and evaluation with a view to arriving at an accurate determination. Where several facts are available from which to choose, that process of reasoning involves a degree of comparison.
- This evaluation of the available facts and the form it takes depend on the factual circumstances, including the quality, nature, and amount of evidence on record.

19. UPSTREAM SUBSIDIES

19.1 CONTEXT

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

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

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

“Upstream” subsidy refers to a subsidy (non-export) paid to an input product such as raw material or a manufactured product used in the production of the goods in question, and countervailing action may be taken where the benefit received by the upstream recipient of the subsidy passed through, in whole or in part[26], to the downstream purchaser.

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

19.2 POLICY

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

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

- if there is a comparable and unsubsidised input product (either sourced in the country of export or imported), that actual price (subject to that price being reached under normal market conditions);
- average price data for an unsubsidised input product;
- surrogate information - pricing information may be available for a comparable industry where subsidies have not been paid on inputs and this

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

information may be used to assess the likelihood of a competitive benefit having been provided by the subsidised input in question;
- absent any information to enable a price to be established using the options above, the benchmark price shall be such amount having regard to all relevant information.

In comparing a benchmark price to a subsidised input price, appropriate adjustments will be made to the benchmark price to take account of differences that may affect its comparison with the subsidised input price. Such difference may include prices occurring at different times, physical characteristics, delivery terms and taxes.

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

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

19.3 PRACTICE

In considering whether there is “pass-through”, the Commission will examine the transactions that take place between the input product on which the subsidy is paid and the final exported product.

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

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

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

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

How far are upstream subsidies examined?

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

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

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

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

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

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

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

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

20. IMPOSITION OF CONCURRENT DUMPING AND COUNTERVAILING MEASURES

20.1 CONTEXT

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

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

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

Subsection 8(5BA) of the Dumping Duty Act requires that the sum of the ascertained export price of the good and of the amounts of interim dumping and countervailing duty to be imposed, must not exceed the non-injurious price of the particular goods. Where certain circumstances exist, the Minister is not required to have regard to the lesser duty rule (see Chapter 24). However, the finding of these circumstances does not prevent the Minister from considering and applying the lesser duty rule where the Minister considers it would be appropriate to do so.

20.2 POLICY

Where there is an export subsidy, the general approach followed when working out the amount of the countervailing and dumping duty in a joint application are:

- countervailing duty will be firstly imposed before deciding how much dumping duty should be imposed;
- the amount of any export subsidy will be deemed to have contributed to the dumping margin by the full amount of the export subsidy. As the export subsidy has been included in the amount of countervailing duty, the same amount of export subsidy has to be deducted from the amount of dumping duty to avoid double counting;
- any domestic subsidy, on the other hand, is not relevant to double counting and a domestic subsidy will be countervailed to the full amount of that subsidy - it will not affect quantification of dumping duty; and
- regard will be given to the lesser duty rule (unless certain circumstances apply—see Chapter 24 *The lesser duty rule and non-injurious price*).

Where there is a 'domestic' subsidy i.e. a general subsidy not specifically granted according to export performance, and normal value has been determined using information within the country of export, the domestic subsidy is assumed to have affected domestic and export costs/prices equally. In these circumstances, in joint dumping and countervailing cases, the Commission will countervail the full amount of the domestic subsidy and impose the full dumping margin.

Where there is a 'domestic' subsidy and the normal value has been determined using information from another 'surrogate' country, the Commission will avoid any double counting effect.

20.3 PRACTICE

The principles followed to avoid the double counting of dumping duty and countervailing duty are outlined below:

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

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

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

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

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

<u>Example</u>

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

- where the non-injurious price (NIP) is higher than the normal value
- where the NIP is the same as the normal value
- where the NIP is lower than the normal value.

Each of these scenarios is illustrated in the table below.

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

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

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

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

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

Section 8(5BA) of the Dumping Duty Act: this section requires that the total duty charged does not exceed the amount necessary to prevent injury, i.e. non-injurious price (unless certain circumstances apply).

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

Therefore, the Minister may impose duty up to the non-injurious price being made up of an interim countervailing duty of $20 and an interim dumping duty of $15.

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

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

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

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

As mentioned above, the Commission is required (except in certain circumstances) to ensure that the sum of the export price, interim dumping duty and interim countervailing duty does not exceed the non-injurious price. Given that the total duty possible plus export price will come to $120, this will exceed the NIP by $5. Therefore, dumping duty has to reduce by $5 to ensure that subsection 8(5BA) is not breached.

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

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

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

Unless the Minister determines that they will not have regard to the lesser duty rule, there is a lesser duty consideration in this example as the non-injurious price is lower than the normal value.

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

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

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

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

Therefore, interim duty will be imposed up to the NIP, being countervailing duty of $15 and no dumping duty.

<u>Avoidance of double counting where less than adequate remuneration is found</u>

The Commission may decide to construct normal value for the goods in question under subsection 269TAC(2)(c) in certain circumstances. In some of these circumstances, the cost of an input may not reasonably reflect competitive market costs and therefore an adjustment to that input cost is made in constructing normal value. Where that input was also the subject of a less than adequate remuneration subsidy finding, it is necessary to 'back out' the relevant subsidy from the dumping margin in order to avoid any double counting.

<u>Avoidance of double counting where normal value is derived from a 'surrogate' country</u>

A 'domestic subsidy' does not normally create a double counting problem when working out the dumping margin because, unlike export subsidies, the domestic subsidy is assumed to have affected domestic and export prices equally. Because both prices are affected equally by a domestic subsidy, any dumping margin will be the same with or without the domestic subsidy, neutralising its effect. Therefore, in joint cases where no surrogate value has been used for establishing normal value, and as noted above, the Commission will countervail the full amount of the domestic subsidy and impose the full dumping margin.

If normal value had been determined using information wholly from a ‘surrogate’ country, and given these assumptions, the export price will carry the domestic subsidy's price-decreasing effect but the normal value in the surrogate country will not. The margin between the export price and the surrogate normal value (the dumping margin) will hence be greater, proportional to the subsidy's effect on one price and not the other. In this or similar situations the Commission will ensure that there is no double counting and it will not impose the full margin of dumping (as the amount of the domestic subsidy will be assumed to have been carried into the dumping margin – unlike the situation immediately above).

21. DETERMINATION OF DUMPING MARGINS

21.1 CONTEXT

Dumping occurs when the export price is less than the normal value. The margin of dumping is the difference between the two, and when the dumping margin is worked out as a percentage the denominator is the export price.

Section 269TACB describes the methods by which dumping may be determined and reflects Articles 2.1, 2.4.2, 6.10 and 9.4 of the ADA.

The determination of dumping is relevant for the purposes of:

- deciding whether dumping is negligible and whether an investigation is to be terminated;
- assessing whether material injury has been (or is being, or will be) caused to an industry, and whether the imports from the various countries should be cumulated;
- publishing a notice to impose any interim measures; and
- ascertaining normal values and export prices for goods of residual exporters.

21.2 POLICY

A dumping margin is calculated for an exporter that exported the goods to Australia over the nominated investigation period.

While the Act describes various methods by which dumping may be determined, neither it, nor the ADA specifies the circumstances in which a particular method is to be preferred.

Methods for calculating dumping margins

Weighted average-to-weighted average method

In general, where there are many sales, the policy of the Commission is to determine dumping margins using the weighted average method over the investigation period. In applying the weighted average to weighted average method all relevant domestic sales over the period in which sales are being investigated are taken into account.

The weighted average-to-weighted average method of comparison used by the Commission is provided for in subsection 269TACB(2)(a). The provision at subsection 269TACB(2)(aa) extends subsection 269TACB(2)(a) to allow shorter period comparisons which may be required for fair comparison. Where shorter periods are used, the Commission aggregates these periods to determine the level of dumping for the whole of the investigation period. The resulting level of dumping for the whole of the investigation period is used to assess if the dumping is negligible and the level of the anti-dumping measure. The Commission does not apply zeroing practices[27] when using the weighted average-to-weighted average method.

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[27] In the weighted average-to-weighted average method, zeroing occurs when models with a negative dumping amount are excluded from the dumping margin calculation or the goods under consideration.

Transaction-to-transaction method

In some cases (e.g. where there are few transactions) the transaction-to-transaction method is used. This method is available under subsection 269TACB(2)(b).

The transaction-to-transaction method requires a single domestic transaction price to be compared to a single export transaction price. In doing so, all export sales must be taken into account i.e. all export sales of those sampled exporters, or all export sales where there has been no sampling of exporters. Thus, there are as many price to price comparisons as there are export transactions under consideration.

Where there are a large number of export transactions the transaction-to-transaction method becomes administratively impractical. Where there are a large number of domestic customers, this method becomes manageable if only one of possibly many customers was selected. These methods of sales selection introduce argument about the method to be followed. For example, should it be the price nearest to the average for the matching period? The Commission considers that the transaction-to-transaction method best suits those circumstances where there are not a large number of transactions. For example, capital equipment made to specific requirements where the normal value may vary from shipment to shipment with significant technical variation between each sale. This method produces a series of different 'margins' as there are export transactions—each of these must be amalgamated using a weighted average in order to calculate the single dumping margin over the investigation period for the product.

Consistent with the WTO Appellate Body decision in *Softwood Lumber, WT/DS264/AB/RW, August 2006*, if using the transaction-to-transaction method, the Commission will adopt the practice of aggregating the transaction-specific comparisons for all export prices and all corresponding normal values using a weighted average method in order to calculate the single product dumping margin over the investigation period. In aggregating, the Commission counts all the figures whether positive or negative. It does not 'zero' any of the negative figures when using the transaction-to-transaction method.

Combination of weighted average-to-weighted average method and transaction-to-transaction method

Section 269TACB(2)(c) provides for a method to be used which combines the weighted average method and transaction-to-transaction method described above.

Weighted average normal value-to-individual transaction export prices

The weighted average to transaction method of comparison provided for in subsection 269TACB(3) may only be used where the export prices vary significantly between purchasers, regions or over time. An amalgamation exercise is also required in this circumstance in order to work out a single margin of dumping for the product from the exporter concerned.

The existence of dumping and the size of a dumping margin are worked out for individual exporters. An investigation may be terminated on the grounds that a margin is less than 2% ("negligible" or "de minimis") in respect of one exporter but at the same time continue in respect of other exporters having margins of 2% or greater.

The Commission may sample if the number of exporters from a particular country is so large that it is not practicable to examine the exports of all of those exporters (refer sections 269TACAA and 269TACAB).

If an exporter not selected for an individual determination submits information, the Commission will extend the investigation to that exporter unless to do so would prevent the timely completion of the investigation.

21.3 PRACTICE

Weighted averaging

Section 269TACB outlines the following methods that may be used to calculate dumping margins:

- compare the weighted average of export prices over the investigation period with the weighted average of corresponding normal values over that period;
- apply the weighted average method to parts of the investigation period;
- compare the export prices determined in respect of individual transactions over the investigation period with corresponding normal values in the same period;
- combine the weighted average with the transaction to transaction method, or (in rare circumstances);
- compare the weighted average normal value with the individual transaction export prices.

Only in rare circumstances would the Commission deviate from determining dumping margins using the weighted average approach. In most cases involving commodities there is a large number of export transactions. The concept of weighted averages is described in subsection 269T(5A).

A weighted average dumping margin is calculated by comparing the total normal value for the investigation period to the total export value for the investigation period. The total normal value for the investigation period is calculated either by summing the quarterly weighted average unit normal value multiplied by the corresponding quarterly export volume, or summing the quarterly weighted average unit normal value multiplied by the export volume for each export transaction in the corresponding quarter.

Whilst weighted average unit normal values are typically calculated on a quarterly basis, the Commission may use monthly data where it determines that there are sufficient changes in costs and/or prices over short periods within the investigation period and the use of monthly unit normal values yields a more accurate dumping margin calculation.

Product margin

There may be different types/models/grades of a product. The product margin measures the margin of dumping by aggregating the margins of dumping for the discrete types or models.

Where there are different types or models, the fair comparison requirement leads to the determination of ‘margins of dumping’ for each type or model. Depending on the number of types or models it is possible that there could be many such type ‘margins’. Assessing whether there is dumping at the product level requires that regard be given to the export volumes. The table below provides an example of working out the margin of dumping for the product after having regard to the data for model.

Model	Unit export price ($/tonne)	Unit normal value ($/tonne)	Export quantity (tonnes)	Dumping margin ($/tonne)	Total dumping value ($)	Total export value ($)	Product dumping margin (%)
				[3-2]	[4*5]	[4*2]	[6/7]
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
A	15	26.25	200	11.25	2,250	3,000	
B	25	37	300	12	3,600	7,500	
C	30	42	120	12	1,440	3,600	
					7,290	**14,100**	**51.70%**

Therefore an additional calculation will be undertaken in determining the product margin. It is a method of aggregation across the various types in order to determine a single product margin for the exporter. The export volumes in this additional weighting exercise are used because it is the “normal value” of the goods being exported to Australia that is being established, and the unit normal value of the exported goods and the unit export price show the unit margin of dumping. In aggregating the Commission does not zero any negative ‘margins’ for a particular model.

Currency Conversion

Section 269TAF outlines the treatment of currency conversion where a comparison of export prices with normal values is required.

The principles underlying the provisions of subsections 269TAF(3) to 269TAF(6) are that an exporter faces a lag in responding to exchange rate changes and this should be recognised in anti-dumping investigations. Where there has been ‘sustained movement’ in exchange rates during the period of investigation, a 60 day period is given to the exporter to respond to those currency changes and, if seeking not to be dumping, has the opportunity to set new export pricing levels.

The actual exchange rate movements in that 60 day period are disregarded so that dumping findings of a ‘technical’ nature might be avoided. This typically arises where the sales to Australia take place during a period in which there has been a sustained movement in the rate of exchange, and reflected in an appreciation of the value of the foreign currency in which the domestic sales in the exporting country are denominated compared to the currency in which the exporter’s selling price to Australia is denominated.

Where it is established that there has been a ‘sustained movement’ in the exchange rate, the previously applicable rate of exchange may be applied for a period of 60 days.

A currency may show steady change, or some fluctuation, over time in the rate of exchange. The notion of a ‘sustained movement’ suggests something outside of a normal range of fluctuation. There must have been a ‘movement’, and this ‘movement’ must have been ‘sustained’ throughout subsequent periods.

The Commission may, for example, and where the circumstances warrant, examine the rate of exchange throughout the investigation period—if the movements, up or down, were not significantly different from a moving average rate of exchange for the previous 60, or 90 days, it may be taken to support a view that no sustained movement had occurred.

Sampling

The Commission typically invites all known exporters to take part in an investigation by sending them a questionnaire at initiation of the investigation and inviting their participation[28].

However, an exception arises where there is a large number of exporters as provided in subsection 269TACAA[29]. In this situation, the Commission will consider whether sampling is required to limit the investigation to a smaller number of them so that the investigation is manageable.

Preliminary Information Request

One way of implementing sampling is to use a preliminary information request (PIR). Another method may use known data concerning export volumes.

Every known supplier of the goods will be informed of their right to take part in the investigation. A supplier is a party identified as having supplied the goods and may either be the producer, an intermediary party or the importer.

If a PIR is used a brief questionnaire may be sent to all known suppliers at initiation of the investigation seeking information to assist in assessing whether sampling is required. The PIR may also be used in the selection of the sample. The PIR may inquire about: the functions undertaken, for example whether they are producers or traders; whether they are involved in the production or sale of the goods the subject of the investigation; volumes of trade; model or type information; upstream suppliers in the case of a subsidy; and relationships between the exporter and other companies.

Where suppliers/exporters do not respond to the PIR, or do not otherwise make themselves known within the investigation, the Commission is unable to further investigate their situation. In this case, the exporters are considered to have not cooperated with the investigation.

The Commission will consider whether the number of exporters is so large that it is not practicable to determine individual margins for each of them. If a large number of exporters are identified, the Commission will decide which exporters should be sampled for further investigation.

In identifying the sample of exporters to be investigated, the Commission will take into account:

- the individual volume of each identified exporter; and

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[28] This means that initially all exporters have been selected to be a part of the investigation.

[29] Section 269TACAA states in part: " (*If*).. *the number of exporters from a particular country of export in relation to the investigation, review or inquiry is so large that it is not practicable to examine the exports of all of those exporters; then the investigation ….may be carried out, and findings may be made, on the basis of information obtained from an examination of a selected number of those exporters, who constitute a statistically valid sample of those exporters; or who are responsible for the largest volume of exportations to Australia that can reasonably be examined"*

- the available resources to properly undertake the investigation.

In essence, the sample will be a manageable number of the largest volume exporters. Whilst traders will not be included in its sample, the Commission may decide to investigate some important traders that are associated with the sampled exporters.

How is the selection made when sampling?

The Commission includes exporters in its sample having regard to export volumes (the method provided for in subsection 269TACAA(1)(d)). Export volumes may be known from information available to the Commission or from the information provided in response to the PIRs, or from importers. The Commission will be mindful of the desirability of consultation in Article 6.10.1 of the ADA. Usually it will be the largest volume exporters included in the sample to make the case manageable.

What dumping margin outcomes are possible when there has been sampling?

In a sampling situation the dumping margins may be worked out in the manner as prescribed at sections 269TACAA and 269TACAB:

- individual rates of duty for all cooperative exporters and any uncooperative exporters for whom an individual export price and normal value were calculated. These exporters will be named in the notice
- a single rate of duty for all residual exporters. These are the cooperative exporters which were not examined and this is only applicable where sampling is undertaken; and
- a single rate of duty for all other exporters not named in the notice. This will include uncooperative exporters which are not covered by an individual rate, and new exporters. This is termed the ‘uncooperative and all others rate’.

Requests for individual treatment

If an exporter who is not sampled requests its own individual treatment and completes the exporter questionnaire, the Commission will examine that information only if there is time available and having regard to any resource constraints. The Commission can make determinations without an on-site verification visit. The Commission may satisfy itself that the information is accurate via other means such as benchmarking. New exporters who become subject to the single rate of duty for all other exporters not named in the notice may apply for an accelerated review if they qualify (see Chapter 34 of the Manual).

22. CAUSATION OF INJURY

22.1 CONTEXT

Before any action can be taken against dumped and/or subsidised imports, it must be demonstrated that the Australian industry producing like goods is injured and that injury is caused by the dumped (and/or subsidised) imports.

Australia's legislation reflects Article 3 of the ADA and Article 15 of the SCM Agreement.

22.2 POLICY

All available evidence will be examined in establishing whether a causal link between the dumped/subsidised imports and the injury to the Australian industry exists. This includes the effect of the injury factors set out in section 269TAE. The *Ministerial Direction on Material Injury* (see Chapter 4 of the Manual) makes clear that injury caused by other factors must not be attributed to dumping or subsidisation. The dumping or the subsidisation need not be the sole cause of the injury.

Causation may be examined using what is termed a 'coincidence' analysis; or comparing the industry to a point in time prior to the injury having commenced; or using a 'but for' analytical method.

Causation is most commonly examined by using a 'coincidence' analysis—where the volume and prices of the dumped imports and the injury factors are examined in order to assess whether a linkage exists between these events. To complete the causation analysis the Commission examines other factors that cannot be attributed to dumped or subsidised imports and excludes their effects when determining causation.

What weight will be given to the various causal factors is a matter for the Commission to decide having regard to all of the available information. Injury factors are examined over the injury analysis period that was identified in the initiation notice. Any dumping is measured in the named investigation period, which is generally the 12 months preceding the initiation date and ending on the most recently completed quarter or month as described at Chapter 3.

In understanding causation there will be a focus on injury indicators in the dumping investigation period. It is the Commission's view that subsection 269T(2AD) allows the examination of material injury indicators before the investigation period, but it cannot support an inference or presumption that material injury identified as occurring before the investigation period can be attributed to dumped imports.

A causal link between dumped imports and material injury may be established only in circumstances where indicators of material injury are identified as being present during an investigation period in which dumped goods are found have been exported to Australia. There can be no presumption that goods exported to Australia before the commencement of the investigation period are dumped goods.

Consideration of material injury data in periods prior to the investigation period may be useful in assessing whether publication of a dumping duty notice is justified. For example, it may reveal injury factors unrelated to the exportation of goods that have occurred before the investigation period but continue to impact on the industry's performance after the commencement of that period.

The injury examination period provided by subsection 269T(2AD) also enables the Commission to examine alleged indicators of injury over a period of time so that benchmarks/trends may be established to assess the materiality of any injury occurring in the dumping investigation period.

Consideration of the factors set out in subsection 269TAE(2A) (and any other factor having a bearing on the examination of injury and causation) is mandatory only to the extent that they are known and assessable.

Where multiple countries are involved in the investigation, the Commission will consider cumulation—in which case dumped imports from several countries will be treated as a single cause and injury will not be apportioned between countries.

22.3 PRACTICE

Information obtained from participants in the Australian market, e.g. Australian industry, importers and end-users, is used to evaluate the causal effect of the dumped and/or subsidised imports on Australian industry.

As injury caused by other factors cannot be attributed to dumped or subsidised imports, the Commission considers the influence of other factors when assessing whether there is a causal link between the injury to the Australian industry and the presence of dumped and/or subsidised imports in the market.

Such other factors may include, but are not limited to:

- the volume and prices of imports that are not dumped or subsidised;
- contraction in demand or changes in the patterns of consumption;
- trade restrictive practices of, and competition between, foreign and domestic producers;
- developments in technology;
- the export performance and productivity of the domestic industry.

The Commission will also consider the implications of undumped/unsubsidised goods sold at lower prices than the dumped/subsidised goods in the marketplace. In considering the effect of the undumped/unsubsidised goods in the market, the Commission may have regard to:

- customer preferences (i.e. factors other than price such as quality considerations);
- the market share of the goods;
- whether prices have been lowered to compete with the dumped/subsidised product;
- like goods sourced from a country with low costs/prices which the dumped/ subsidised source cannot match, but which compete on some other basis.

A determination of causation will be based on positive evidence and involve an objective examination of both:

- the volume of the dumped and/or subsidised goods and the effect of those imports on prices in the domestic market for like goods; and
- the consequent impact of these imports on domestic producers of such goods.

The Commission will undertake a price undercutting analysis that focuses on data that covers transactions made during the investigation period. This analysis compares the price of the imported goods with the sales price of the locally produced goods, ensuring that the transactions are made under the same conditions (e.g. timing, volume, discounts, delivery, credit, same customer etc.).

<u>Causation</u>

Causation is treated as a discrete element in injury determination. The Commission conducts its causation assessment in accordance with the requirements of Article 3.5 of the ADA and Article 15.5 of the SCM Agreement which require that:

- it be ‘*demonstrated*’ that the dumped or subsidised imports are causing injury to the domestic industry
- causation ‘*be based on an examination of all relevant evidence*’
- known factors other than the dumping or subsidisation must be examined.

Section 269TAE incorporates causation and also requires factors other than dumping or subsidy to be considered.

Where there are no other causes at all which can be identified in the investigation, and only the dumping exists, the Commission will consider that in these circumstances it is reasonable to conclude that a causal link exists between the dumping or the subsidy and the injury.

The Commission will examine the causal link in relation to those suppliers who make up the Australian industry seeking a remedy against dumped imports. Causation will not be investigated in relation to suppliers who have not supported the application.

<u>Causation methodology</u>

The injury factors are listed in section 269TAE. Injury will be assessed by comparing the current state of the industry to a prior period. Typically, this means that causation is assessed by examining the trends or movements in the volumes and prices of dumped and/or subsidised imports over time, and also the volume and price movements in the injury factors.

Where there is a coincidence in timing between the two, this may be taken to mean there is a causal connection. An increase in the volume of dumped and/or subsidised imports may coincide with the decline in the industry’s sales in Australia. Or the prices of the dumped or subsidised imports can be compared to the movements in the Australian industry’s sales prices.

Prices: In examining causation the effect of the dumped imports on the Australian industry’s prices will be considered. The Commission assesses whether there has been any significant price undercutting by the dumped imports, or whether there has been price depression, or price suppression. Chapter 4 provides more information on price suppression and price depression.

Causation may be established in volume or price effects. In some circumstances there may be no increase in the volumes of the dumped or subsidised goods but a positive causation finding may be possible where the requisite price effects exist.

In the coincidence analysis data is examined over the nominated injury analysis period. As the dumping is usually measured in the most recent year, in understanding causation the Commission will also focus on injury indicators in the dumping investigation period.

In some cases dumped imports may be known to have commenced at a particular point in time. In this situation, when examining causation, the current state of the industry may be compared to the state the industry was in during a period immediately prior to that event.

In some cases evidence may show that imported goods at dumped or subsidised prices won contracts because of their price advantages. This evidence may establish a direct link to the injury experienced by the Australian industry that had also contested those same contracts.

The Commission may utilise 'soft' information when examining causation. For example, users of the imported and locally made goods may provide responses to user questionnaires on issues such as substitutability of the goods; conditions of competition; and price responsiveness; which are designed to better understand the effects of these 'other factors'.

Alternate analytical methods: Where no coincidence has been found, or a 'coincidence analysis' has not been possible, the Commission may accept an alternate analytical method—such as a '*but for'* analysis—when examining causation. Any alternate method will be required to be evidence based. The Commission will conduct such investigations in accordance with the WTO jurisprudence which requires that any other method, other than the coincidence analysis described above, will require a '*compelling explanation'* as to why causation exists notwithstanding the absence of any coincidence.

Under a '*but for*' analytical method it may be possible to compare the current state of the industry to the state the industry would likely have been in if there had been no dumping. Such analysis also inquires about the likely effects of the dumping or subsidisation alone. Parties submitting information to demonstrate injury based on '*but for'* grounds must provide, and explain, the evidence on which this claim rests. For example, how they estimated the effects of the dumping by using suitable accounting methods and counterfactual analysis. It is not sufficient to simply assert such an effect as this will not meet the evidentiary requirement.

<u>Other factors</u>

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

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

The list is illustrative of any known factors. In its causation analysis the Commission will not attribute to dumped imports the injury caused by other non-dumping factors, as this is a requirement of Article 3.5 of the ADA (in the third and fourth sentences)—injury caused by other factors "*which at the same time are injuring the domestic industry ... must not be attributed*" to the dumped or subsidised imports. Subsection 269TAE(2A) reflects that requirement of the ADA.

The Commission will:

- only examine those factors *known* to be operating. The applicant industry is asked to identify any such factors; factors may be brought to the Commission's attention by other interested parties; and any additional factors the Commission may become aware of in the course of the investigation, will be included in the analysis;
- **not** assess the effects of other factors where they have not been operating at the same time as the dumped imports.

The coincidence in movements in dumped imports (import volumes, market share, and prices) and the movements in relevant injury factors may not, of itself, prove causation as the Commission will carefully examine all of the available evidence, including the effects of other factors, when reaching a reasoned conclusion.

The methodology the Commission follows in seeking to meet the non-attribution requirement will be based upon the evidence. Like the causation analysis the Commission will consider whether the particular factor in question exhibited a trend that could not have resulted in injury; or, if the factor in question did show a trend that could have caused injury, whether there was a coincidence in time between those trends and the injury indicators.

Concerning the first factor in the illustrative list—the volume and prices of imported like goods that are not dumped—the Commission must consider the effects of imports from other countries that are not the subject to the investigation where this is known to be an factor impacting on injury[30]. Such imports are taken to not be dumped. Likewise, in a subsidy investigation, the Commission must consider as part of its examination of other factors, the imports from countries not the subject of the investigation.

In determining the volume of dumped imports, the Commission will take care to ensure imports from any producers found to be not dumping are excluded. [31]

Concerning demand, competition, and technology factors in the illustrative list—the injury can be caused by a declining demand for a particular product driven by, for example, changes in consumer preferences for a substitute product that incorporates new technologies; non-price factors such as inferior quality, performance and service; or general economic conditions causing a decline in

[30] This is consistent with WTO Panels *Egypt – Rebar; and EC – Pipe Fittings*

[31] The WTO Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India - Recourse to Article 21.5* determined that injury caused by "volume and prices of imports not sold at dumping prices" must be separated and distinguished from injury caused by the "dumped imports". It also held that it is impermissible to presume that imports attributable to non-examined producers are in all circumstances dumped for purposes of injury analysis solely because they are subject to the imposition of anti-dumping duties under Article 9.4 of the ADA.

demand for the product in question. These will be taken into account where relevant.

Concerning export performance and productivity of the Australian industry, poor export returns may be a significant contributing factor in the industry's declining profit. This decline in profits cannot be attributed to the goods exported to Australia.

In examining the effects of the other factors, the Commission accepts that the purpose is to 'disentangle' their effects from those of the dumping or subsidisation. A judgement must be made as to whether these factors have not acted in such a way to 'break the causal link' that may have seemed apparent between the dumped or subsidised imports and the material injury.

23. CUMULATION OF INJURY

23.1 CONTEXT

Subsection 269TAE(2C) sets out the requirements for assessing the cumulative effects of exports of goods to Australia from different countries. Where exports from more than one country are simultaneously the subject of anti-dumping investigations, the Minister may cumulatively assess the effects of such imports if:

- the investigations of those exports resulted from applications under section 269TB lodged with the Commissioner on the same day, or they resulted from applications under section 269TB lodged with the Commissioner on different days but the investigation periods for all the investigations overlap significantly; and
- the margin of dumping or the amount of countervailable subsidy is not negligible; and
- the volume of imports from each country is not negligible; and
- cumulative assessment is appropriate in light of: the conditions of competition between the imported goods; and the conditions of competition between the imported goods and the like domestic goods.

Only then can cumulation of injury be considered. Article 3.3 of the ADA and Article 15.3 of the SCM Agreement address this matter.

23.2 POLICY

If separate applications are lodged against different countries on different days, cumulation will be considered if the separate investigation periods significantly overlap (this is generally taken to be a period of not less than 6 months).

In determining whether the dumping margins, amount of countervailable subsidy and volumes are negligible, the Commission refers to the termination provisions in section 269TDA.

The negligible margin of dumping is defined as less than 2 per cent of the export price. A countervailable subsidy received is negligible if the country of export is not a developing country and the subsidy is less than 1 per cent of the export price of the goods.

Dumped or subsidised exports of the goods from a particular country are taken to be a negligible volume if they account for less than 3 per cent of the total Australian import volume (or less than 4 per cent for subsidised exports from a developing country). This is unless the dumped goods from that country, and dumped goods from other countries that individually account for less than 3 per cent of the total Australian import volume collectively account for more than 7 per cent of imports.

23.3 PRACTICE

Data relevant to cumulation is collected and verified during the course of an investigation.

The conditions of competition are assessed between the goods imported from all countries and the conditions of competition between the exported goods and like goods that are locally produced by the Australian industry. Such assessment might be, but is not confined to:

- Physical characteristics and uses of the domestic like product and imports from each of the countries whose imports may be cumulated, as well as the degree of interchangeability, fungibility, or substitutability. Considerations of customer perception, specific customer requirements and tariff classification may be relevant in this regard;
- For the purpose of analysing threat of material injury, the levels and trends in the volume of imports from each of the countries whose imports may otherwise be cumulated, either in absolute terms or relative to production or consumption in the importing country.
- The existence of sales of the domestic like product and imports from each of the countries whose imports may otherwise be cumulated. Examples of this are:
    - through common or similar channels of distribution;
    - during the period of investigation;
    - the trends of prices for the domestic like product and imports from each of the countries whose imports may be cumulated;
    - the levels and trends of price undercutting by imports from each of the countries whose imports may otherwise be cumulated during the period of the dumping investigation.

The Commission will not have regard to data collected outside the injury analysis period in assessing the conditions of competition.

24. THE LESSER DUTY RULE AND NON-INJURIOUS PRICE

24.1 CONTEXT

The Dumping Duty Act requires the Minister to have regard to the desirability of specifying a lesser amount of duty than the full dumping or subsidy margin where the imposition of that lesser amount is adequate to remove injury.[32] This is commonly known as the 'lesser duty rule'. The 'lesser duty rule' is contained in sections 8, 9, 10 and 11 of the Dumping Duty Act.

A lesser dumping duty may be imposed where the NIP of the goods is less than the normal value of the goods as ascertained by the Minister. When the lesser duty rule applies, subsection 8(5B) of the Dumping Duty Act requires that the sum of the export price and the interim dumping duty payable does not exceed the NIP.

Similar principles apply in the case of a countervailing duty—subsection 10(3C); or when a dumping duty notice and countervailing duty notice are published at the same time—subsections 8(5BA) and 10(3D).

Section 269TACA concerns the NIP of the goods exported to Australia and states inter alia that it is "...the minimum price necessary…to prevent the injury, or a recurrence of the injury…" which arises from dumping or subsidisation. These provisions incorporate the principle in Article 9.1 of the ADA and Article 19.2 of the SCM Agreement, which concern the desirability of imposing a lesser duty where it is adequate to remove the injury.

Where the investigation concerns goods from multiple countries, the Minister must apply the duties in a non-discriminatory manner in accordance with the obligation established by Article 9.2 of the ADA and Article 19.3 of the SCM Agreement.

The Minister is not required to give consideration to the lesser duty rule where (as relevant to the type of notice) the Minister is satisfied that one or more of the following circumstances exist:

- in the case of a dumping duty notice, normal value was not able to be ascertained under s.269TAC(1) because of the operation of s.269TAC(2)(a)(ii) (see Chapter 7, 'market situation')
- the Australian industry consists of at least 2 small-medium enterprises (SMEs)
- in the case of a countervailing duty notice, the country concerned had not complied with Article 25 of the SCM Agreement for the compliance period.

Where any of the three circumstances above are present, the Minister is not required to, but may still, consider the application of the lesser duty rule. The discretion of the Minister to consider a lesser duty in these circumstances also applies to the Minister's consideration of undertakings.

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[32] The requirement to consider material injury caused to the Australian industry is explained in chapter 4 *Injury to an Australian Industry.*

Small-medium enterprises

'Small-medium enterprise' has been prescribed by the *Customs (Definition of "small-medium enterprise") Determination 2013* for the purposes of subsection 269T(1) to mean, a producer or manufacturer with 200 or less full-time staff, which is independently operated and which is not a related body corporate for the purposes of the *Corporations Act 2001*.

Compliance period

'Compliance period' has been prescribed by the *Customs (Definition of "compliance period") Determination 2013* for the purposes of subsection 269T(1) as, the two most recent biennial periods, ending prior to the date of initiation of a countervailing investigation, in which a WTO Member is obliged to make new and full notifications of subsidies to the WTO in accordance with the procedures adopted by the WTO Committee on Subsidies and Countervailing Measures.

24.2 POLICY

Non-injurious price

The Commission will generally derive the NIP from an unsuppressed selling price (USP). The USP is a selling price that the Australian industry could reasonably achieve in the market in the absence of dumped or subsidised imports. The USP does not redress the effects of other causes of injury including fair import competition or competition from other domestic producers.

In calculating the USP, the Australian industry's selling prices at a time unaffected by dumping or subsidisation will normally be used. If there are sound reasons for not using this approach, a price may be constructed based on the industry's cost to make and sell, plus a profit.

If either of these methods is not appropriate, the selling prices of undumped and unsubsidised imports in the Australian market will be used. The Commission will also examine USP/NIP issues in the statement of essential facts for the purpose of assessment of material injury and causal link.

When establishing the USP/NIP in reviews under Division 5 of Part XVB of the Act, the Commission will generally not depart from the approach taken in the original investigation or a previous review, unless there has been a change in circumstances that either makes the earlier USP approach unreasonable, or less preferred amongst the other available options.

Similarly, when establishing the USP/NIP in accelerated reviews under Division 6 of Part XVB of the Act, the Commission will not depart from the approach taken in the original investigation or a previous review.

Exceptions to the mandatory consideration of the lesser duty rule

On 1 January 2014, the Act was amended to no longer require the Minister to give mandatory consideration to imposing a lesser duty in certain circumstances as described above. Prior to this, the Minister was required to consider the desirability of applying a lesser duty in all situations.

Accordingly, the Commissioner will advise the Minister that mandatory consideration of the lesser duty rule is *not* required where the specified circumstances exist, and

- the dumping or countervailing notice is published after 1 January 2014; or
- in the case of a continuation of measures under Division 6A—where the dumping duty or countervailing duty notice was published before 1 January 2014 and, on or after 1 January 2014, the Minister publishes a notice under subsection 269ZHG(1) of the Act declaring the continuation of the anti-dumping measures concerned.

In general, in relation to other processes conducted pursuant to Part XVB of the Act (including duty assessments conducted under Division 4, reviews conducted under Division 5 (not simultaneous with continuation inquiries) and accelerated reviews conducted under Division 6) the Commissioner's recommendation regarding consideration of the lesser duty rule will be consistent with the requirement that applied when the measures were imposed or last continued unless circumstances have changed.

24.3 PRACTICE

Non-injurious price

<u>Method for calculating non-injurious price</u>

The method of calculating a NIP is not prescribed in the legislation. In practice, the Commission usually uses the Australian industry's USP as the basis for the NIP.

In calculating the USP, the Australian industry's weighted average selling price is calculated for a period unaffected by dumping. A minimum of one year of selling prices is preferred, and seasonal fluctuations or longer cyclical trends are taken into account, if applicable.

If there is an appropriate period unaffected by dumping or subsidisation, selling prices will generally be used provided that those prices are no older than five years (this includes data sought in the application form covering at least four years, plus the 155 day investigation timeframe). However, this does not preclude the applicant from supplying data from previous periods. Where it can be demonstrated that the information from the previous periods is relevant to the USP (e.g. it relates to a period unaffected by dumping), and if that data is verified, the Commission will normally consider using those selling prices from the previous periods as a basis for the USP.

Where the USP is older than five years, the Commission will also consider the updating of old prices by indexing or other means where reasonable.

The Commission may not use the approach of updating old prices if, for example:

- the market, and in particular the Australian industry's selling prices, were affected by dumping over the entire injury analysis 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 (e.g. had been based on obsolete manufacturing processes).

The existence of any one or more of the above circumstances should not normally be taken as a reason for automatic exclusion of the price or market approach in establishing an USP. The appropriate approach will be considered on a case-by-case basis.

Where it is not reasonable to use the price or market approach in establishing USP, the reasons for that position will be outlined in relevant reports. A weighted average of the most recent verified industry cost to make and sell (CTMS) from the current application will generally be used, with a preference for a one year minimum. This allows for fluctuations for seasonal or longer cyclical trends to be taken into account.

In addition to verifying data contained in the application, industry data (including CTMS) will be gathered and verified for a period subsequent to that provided in the application. The Commission may consider including this data for the purpose of establishing a constructed USP.

Options for determining a reasonable amount for profit are:

- weighted average profit rate (% mark-up) achieved by the industry in the most recent period unaffected by dumping, with a preference for a one year minimum; or
- profit rate (% mark-up) from the Australian industry's similar category of goods (where the data for similar category of goods is verified).

Where it is unreasonable to use either of the two options above for determining profit, the Commission may consider the use of a profit rate (% mark-up) calculated:

- with regard to return on investment—where the resultant price is considered reasonable; or
- from appropriate profit surveys.

In the latter two approaches, the Commission will also consider whether it is appropriate to obtain an independent assessment of an appropriate amount for profit.

Reasons for not using a constructed price method include:

- a reasonable rate for historical profit could not be established;
- the industry CTMS data was unsuitable for a construction approach;
- the result is an unreasonable level of USP (for example, the resultant USP may be unreasonable when contrasted with the price obtained historically) .

Where it is not reasonable to use the constructed price method, the reasons for this position will be outlined in relevant reports.

In assessing whether the prices of undumped imports in Australia are suitable for using as an USP, the following factors will be considered:

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

This approach would normally be adopted where exports from a particular exporter, exporters, country or countries subject of the investigation were found not to be dumped; and they were present in the Australian market in sufficient volume to influence price; and the price in Australia of such exported goods was not affected by dumping.

If information is available relating to Australian selling price data for goods from countries other than those under investigation, particular care must be taken in regard to whether:

- such imports were in sufficient volume to influence the market price; and
- the prices have been affected by dumping.

In cases of multiple Australian producers or one producer with multiple plants, the Commission generally seeks to establish one USP for each product or, where appropriate, each model/type/grade of the product.

In establishing a single industry USP for multiple Australian producers, the Commission will generally use a weighted average figure established in accordance with the options above. However, the following may be used:

- data in relation to a selected representative group of sales (for example, a large and/or representative contract); or
- data from the most efficient manufacturer or plant.

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

When implementing anti-dumping measures, a single NIP is worked out for each exporter of the goods under consideration. Where there are a number of models or types of the good, that single NIP may be worked out as a weighted average. For example, a weighted average of the individual NIPs of each model/type, or of each main model/type.

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, the Commission generally uses information obtained from the most efficient representative importer/exporter from each country. That is, usually the importer at the relevant level of trade, in sufficient sales volumes and with the lowest on-costs.

In cases where no verified data is available from exporters/importers from a particular country, it may be that verified post-exportation costs are unavailable for that country. In this case, the Commission would normally rely on post-exportation costs that are available from other sources, for example, data from another country, data from the application or data from other relevant inquiries.

A NIP is calculated for the purpose of measures even though it may be clearly above the normal value. While the NIP may not be the operative measure when anti-dumping measures are first applied, subsequent reviews can provide for significantly revised variable factors. It is possible the operative measure may be the normal value after one review and the NIP after another.

The Commission aims to examine the USP and NIP as early as the consideration of the application.

Estimates of the USP and the NIP can assist in assessing whether dumping has caused material injury and the level of remedy that industry could expect from anti-dumping measures. This is a useful test during the consideration of an application. As the investigation advances, the same issues can be further considered, while progressively referring to data that has been verified.

As the investigation progresses, the NIP will be compared to export prices to assess causal link and the likelihood of an injury margin. Where export prices are found to be above the NIP, the Commission may consider the likelihood that material injury was not caused by dumping.

The NIP will usually be calculated using the proprietary information of the Australian industry and other interested parties. As it is possible in some instances for this information to be mathematically revealed if the NIP is made public, calculations of the NIP are kept confidential.

The table below provides an example of a calculation of the NIP derived from a USP.

USP		**$1.20**
Less Profit	0.150	
Less AS&G expenses	0.175	
Less packaging costs	0.089①	
Less into store costs	0.005	
Less o/s freight & insurance	0.064	
Duty inclusive price		**$0.717**
Less duty @ 10%	0.065 ②	
NIP		**$0.652**
NIP per dozen = $7.824		

① Where importer engages in a value added activity, in this case packaging.
② Duty may be calculated as follows:
if X = the duty inclusive price (0.717)
Y = the duty rate expressed as a decimal (0.10)
N = NIP

N+(YxN)= X , then $\frac{X}{1+Y} = \frac{0.717}{1.10} = 0.652$ So, duty \$ = (X-N)
= 0.717-0.652
= 0.065

OR, $N = \frac{X}{1+Y}$, therefore duty amount = $Y \times \frac{X}{1+Y} = 0.10 \times \frac{0.717}{1.10} = 0.065$

Alternatively, if the duty rate were to be expressed as a percentage then the

duty amount = $\frac{Y}{100+Y} \times X$, (i.e. $\frac{10}{110} \times 0.717 = 0.065$)

❖*Note:* *Costs of importation are usually the actual costs incurred by the importer, although in some cases costs may be calculated (e.g. profit or administration, selling and general expenses could be based on a percentage of the USP; or into store costs, overseas freight and insurance and duty based upon a percentage of the NIP). NIPs are always calculated in Australian dollars.*

Assessment of the non-injurious price for injury purposes

While the Minister may not be required to have regard to the lesser duty rule in an investigation, as discussed under 'method for calculating a non-injurious price', the

NIP may be utilised by the Commission to assess the materiality of injury caused by dumping. Accordingly, in each case, the Commission will continue to seek information and invite submissions on the proposed USP and the NIP that is derived from that amount, to be used in the examination of material injury.

Exceptions to the mandatory consideration of the lesser duty rule

Market Situation

This circumstance is relevant to the application of dumping duties pursuant to subsection 269TG of the Act. An investigation may consider claims and evidence that a particular market situation exists in the market of the exporter of those goods which makes the domestic selling prices unsuitable for determining normal value. What might constitute a market situation is explained in chapter 7.

In some cases, an applicant may claim a market situation exists in which case the Commission may advise at an early stage that, should the Minister be satisfied that a particular market situation exists, this would remove the obligation for the Minister to consider applying the lesser duty rule. In other cases, a market situation may not be known and investigated until a later stage, in which case the Commission may advise these details at the earliest opportunity, such as the Statement of Essential Facts.

SMEs

In practice, two or more members of the industry claiming injury would be expected to identify themselves as an SME, and provide evidence, for the Minister to not be required to consider the desirability of a lesser duty.

This identification process may be by way of statements in an application for measures, submissions to the investigation, or from industry verification. If an industry member does not claim SME status, and the Commission has no other information to suggest an entity fits within this definition of SME, the industry member will not be treated as such.

Where the Commission considers the industry comprises two or more SMEs, this will be detailed in the Statement of Essential Facts and in the final report to the Minister.

Country concerned has not complied with Article 25 of the SCM Agreement for the compliance period

This circumstance is relevant to countervailing investigations only (i.e. notices published under section 269TJ). It does not apply to countries that are not Members of the WTO.

The Minister is not required to consider the desirability of applying a lesser duty if a countervailable subsidy has been received in respect of the goods and the country in relation to which the subsidy has been provided has not complied with Article 25 of the SCM Agreement for the compliance period.

Article 25.1 of the SCM Agreement requires WTO Members to provide notifications of subsidies no later than 30 June of each year (in respect of the previous calendar year). The WTO Committee on Subsidies and Countervailing Measures agreed, in 2005, to extend for an indefinite period its prior (2001 and 2003) decisions that 'new and full notifications' should be submitted every two years. As a consequence, the annual updating notifications have been de-emphasised. For example, notifications for 2013 were due on 30 June 2013 and this relates to subsidies maintained during the 2011 and 2012 calendar years.

Annual Report of the Committee on Subsidies and Countervailing Measures[33]*:* This report is adopted at the October session of the Committee. Annexures to the report show the status of notifications by Members for relevant reporting periods on a biennial basis (reflecting, as noted above, that new and full notifications should be submitted every two years). In the annexes, three notations are used: "*None*" if the country did not submit the notification; "*X*" if the country notified subsidies; "*N*" where the country stated that it maintains no notifiable subsidies.

<u>Example 1:</u> Assume a countervailing investigation is initiated in February 2014. If the annexes to the Annual Reports of the Committee on Subsidies and Countervailing Measures show that a country that is the subject of a countervailing investigation has "*None*" – i.e. no notifications were submitted for the most recent two reporting periods (being 2013 and 2011), that country would be considered as having <u>failed to notify subsidies</u> for the compliance period, thereby satisfying one of the circumstances where the <u>Minister is not required to have mandatory consideration of the lesser duty rule</u> in applying countervailing measures.

<u>Example 2:</u> Assuming the same timeframe for an application as provided in Example 1, but instead the country subject to the countervailing investigation is shown as having "*None*" in respect of 2013, but an "*X*" or an "*N*" in respect of 2011, then that country would <u>***not*** be considered to have failed to notify subsidies</u> for the compliance period. In these circumstances, assuming that no other trigger was satisfied (i.e. there was no finding of a particular market situation in a contemporaneous dumping investigation, or the industry was not comprised of two or more SMEs), <u>the Minister would be required to consider the lesser duty rule</u>.

Submission of further notifications since publication of the WTO Subsidies Committee Annual Report: The annual report of the Committee is the primary source for notification information. However, it is possible that a country may have notified subsidies for the same period after publication of the WTO Subsidies Committee Annual Report. As this later notification refers to the compliance period, the Commission will look at the annual report as well as any later notification when determining whether a country has provided notification. This information may be obtained from the WTO website and the Commission may also seek advice from the Department of Foreign Affairs and Trade.

The Commission will also consider any information provided by interested parties, including the government of the subject country, as to whether there have been

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[33] The Annual Report of the WTO Committee on Subsidies and Countervailing Measures may be viewed at https://www.wto.org/english/tratop_e/scm_e/scm_e.htm.

any new or further notifications of subsidies to the WTO after the annual report was published.

The Commission will not assess the adequacy or completeness of any notifications on the WTO website. If a notification had shown “N” or “X” in the relevant annexure of the Committee’s Annual Report, the Commission will accept that evidence at face value.

Findings in relation to whether the subsidy notification requirements have been met, and the Commission’s proposed recommendations as to the rate of duty, will be detailed in the Statement of Essential Facts, and in the final report to the Minister. In making its findings, the Commission will simply state the factual in relation to this matter, e.g. “subsidy notifications have not been submitted during the compliance period”.

25. TERMINATION OF INVESTIGATIONS

25.1 CONTEXT

The Commissioner is required to terminate investigations in respect of individual exporters or by country, where certain conditions are evident. The provisions of section 269TDA set out the following requirements for termination of investigations (in whole or in part);

- all dumping margins are negligible;
- countervailable subsidisation is negligible;
- negligible volumes of dumping are found;
- negligible volumes of countervailable subsidisation are found;
- dumping causes negligible injury; and/or
- subsidisation causes negligible injury.

This largely reflects Articles 5.8 of the ADA and 11.9 of the SCM Agreement. The Agreements require that investigations shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping (or subsidisation) or of injury so as to proceed with the investigation.

There shall be immediate termination in cases where the authorities determine that the margin of dumping (or subsidy) is de minimis (i.e. less than 2 per cent dumping margin), or that the volume of dumped (or subsidised) imports, actual or potential, or the injury is negligible.

Under the Act, where the investigation relates to two or more countries, in determining whether to terminate for negligible injury caused by exports from a particular country or countries, the Commissioner must, if satisfied that the conditions in subsection 269TDA(14B) are met, consider the cumulative effect of exportations of goods to Australia (subsections 269TDA(13A), 269TDA(14A) and 269TDA (14B)).

25.2 POLICY

In general terms, if the Commissioner is satisfied that one or more of the termination conditions set out in section 269TDA are met, then the Commissioner must terminate the investigation promptly, and must not continue the investigation (unless the termination is only in respect of one of multiple exporters, or in relation to one of multiple countries).

The Commissioner will terminate an investigation in relation to an individual exporter if satisfied that the dumping margin of the exporter is negligible (de minimis). Dumping margins are negligible if the margin is less than 2% when expressed as a percentage of the export price or weighted average of export prices.

The Commissioner will terminate a subsidy investigation in relation to an individual exporter if satisfied that the exporter concerned has received no countervailable subsidy, or the level of the subsidy is negligible. A countervailable subsidy is negligible as defined in subsection 269TDA(16).

The Commissioner must terminate the investigation in so far as it relates to a country if satisfied that negligible volumes of dumping are found. Negligible volumes of dumped goods is defined in subsection 269TDA(4).

Section 269TDA(5) provides that imports of dumped goods will be "aggregated". Import volumes of dumped goods from countries that individually constitute less than 3 per cent of the total Australian import volume over a "reasonable examination period" ("reasonable examination period" is defined in subsection 269TDA(17)) are not considered negligible if, cumulatively, they account for more than 7 per cent of the total Australian import volume over a reasonable examination period. The legislation requires an assessment of negligible volumes of dumped imports, including those with margins of less than 2 per cent.

The Commissioner must terminate the investigation so far as it relates to a country if the Commissioner is satisfied that negligible volumes of countervailable subsidisation are found. A negligible volume of countervailable subsidisation is defined in subsection 269TDA(8).

Sections 269TDA(9) and (10) provide that imports of subsidised goods will be "aggregated". Different rules apply for developing countries and other countries. Sections 269TDA(10) and (9) respectively refer.

Sections 269TDA(13) and (14) require the Commissioner to terminate the investigation if satisfied that Australian industry has not been injured or injury caused (or hindrance to the establishment of an Australian industry) is negligible. However, these are subject to cumulative effect provisions in subsections 269TDA(13A), 269TDA(14) and 269TDA(14B).

In interpreting subsection 269TDA(13), the Commissioner has regard to the wording of Article 5.8 of the ADA which provides "immediate termination in cases where the authorities determine that the margin of dumping is de minimis,…or the injury, is negligible". Therefore, where in the first instance the Commissioner is satisfied that injury to the Australian industry is negligible, a finding on dumping is not required in order to terminate under this provision.

Subsection 269TDA(14B) sets out the circumstances in which the Commissioner must conduct a cumulative assessment of injury or hindrance for the purposes of determining whether injury or hindrance caused by exports from two or more countries is negligible, for the purposes of subsections 269TDA(13A) and (14A). These conditions are consistent with those set out in subsection 269TAE(2C) which relate to the cumulative assessment of injury for the purpose of determining whether injury, threat of injury or hindrance caused by exports from two or more countries is material (see Chapter 23).

Subsection 269TDA(13) is subject to subsection 269TDA(13A), which provides that if the Commissioner performs a cumulative assessment of injury or hindrance in relation to exportations from two or more countries, and is not satisfied that the cumulative injury caused by those exports is negligible, then the investigation in relation to those countries continues and is not required to be terminated.

On the other hand, if after having performed a cumulative assessment of injury, the Commissioner is satisfied the injury caused by exports from those countries is negligible, the investigation must be terminated in relation to those countries. Similar provisions apply in relation to a countervailing investigation—subsections 269TDA(14) and (14A) refer.

25.3 PRACTICE

The example below shows dumping margins, volumes of imports for each exporter and for each country. Volumes are expressed as a percentage of the total Australian import volume for the goods. Dumping margins are expressed as a percentage of the export price.

		Dumping Margin	Volume of Imports	Volume of Dumped Imports
Country 1	Company A	23.00%	31.20%	31.20%
	B	8.00%	5.40%	5.40%
	C	12.00%	5.00%	5.00%
			41.60%	41.60%
Country 2	Company D	0.00%	12.60%	
	E	0.00%	5.80%	
	F	1.80%	1.60%	1.60%
	G	11.40%	1.30%	1.30%
			21.30%	2.90%
Country 3	Company H	2.00%	2.80%	2.80%
Country 4	Company I	10.00%	2.10%	2.10%
	J	0.00%	1.80%	
	Residual (K)	10.00%	1.00%	1.00%
			4.90%	3.10%
Country 5	Company L	13.00%	1.50%	1.50%
Country 6	Company M	1.50%	0.30%	0.30%
Country 7	Company N	0.00%	7.30%	
Country 8	Company O	10.00%	0.10%	0.10%
Volume of imports from countries under reference:			79.80%	
Volume of imports from countries NOT under reference:			20.20%	
			100.00%	

The table demonstrates how termination is considered against individual exporters or countries (in relation to dumping margins and volumes).

Individual exporter termination due to negligible dumping margins: Six exporters - D,E,F,J,M and N - have dumping margins of less than 2 per cent and termination is required by subsection 269TDA(1).

Country termination due to negligible volumes of dumping: Five countries - 2,3,5,6, 8 – each have a volume of dumped imports of less than 3 per cent of total imports (subsections 269TDA(3) and (4) refer). However, termination does not occur against these countries because of the condition in subsection 269TDA(5) which concerns ‘aggregation of volumes of dumped imports’. The total aggregated volume of dumped imports from these five countries is 7.6 per cent of the total import volume. Because this is above 7 per cent a country termination does not occur. If country 2 had a volume of dumped imports of 2.3 per cent, rather than the 2.9 per cent, the aggregated volume of dumped imports from these countries becomes 7 per cent, and in that event termination against all five countries would have been necessary.

NOTE: (i) Exporter F has a dumping margin of 1.8 per cent and exporter M has a dumping margin of 1.5 per cent. The volumes of both of these exporters are included when calculating the volume of dumped imports from an individual country and when considering aggregation – due to the operation of subsection 269TDA(6) which includes dumping margins of less than 2 per cent.

(ii) The denominator in the volume thresholds is total imports of the goods from all sources not only named countries under investigation (relevant parts of section 269TDA use the expression "the total Australian import volume").

Where the Commissioner decides to terminate an investigation (whether in whole or in part), public notice of the decision will be given. The applicant has 30 days from publication of the termination notice to lodge an application with the Anti-Dumping Review Panel (Review Panel).

26. PRELIMINARY AFFIRMATIVE DETERMINATION & PROVISIONAL MEASURES

26.1 CONTEXT

When considering an application for the publication of a dumping or countervailing duty notice, under section 269TD the Commissioner may, at any time not earlier than 60 days from the date of initiation of an investigation, make a preliminary affirmative determination (PAD) that there appears to be, or it appears there will be, sufficient grounds for the publication of a notice.

The provisions reflect the intent of Article 7.1 of the ADA which provides that provisional measures may only be applied after a PAD has been made of dumping and consequent injury to a domestic industry, and the authorities concerned judge such measures are necessary to prevent further injury being caused during the investigation. Similar conditions are contained in Article 17.1 of the SCM Agreement.

The *Customs (Preliminary Affirmative Determinations) Direction 2015* directs the Commissioner to make a PAD 60 days after the date of initiation of an investigation or publish a Status Report providing reasons why a PAD was not made. If the Commissioner has published a Status Report, the Commissioner must reconsider whether or not to make a PAD at least once prior to the publication of the SEF.

26.2 POLICY

A PAD may be made at any time not earlier than 60 days after the date of initiation of an investigation when there are sufficient grounds for the publication of a dumping duty notice (or countervailing duty notice) in respect of goods the subject of the application.

In making a PAD, the Commission must have regard to the application, any submissions that are received within 37 days after the date of initiation of the investigation and may have regard to any other matters considered relevant.

Securities may be imposed after having regard to unverified information provided by exporters and importers.

There is no obligation to have regard to any submissions received after day 37 if to do so would, in the Commissioner's opinion, prevent the timely consideration of the question of whether or not to make a PAD. Nevertheless, the Commission will not disregard relevant available determinative information prior to any decision the Commissioner may take in respect of making a PAD even if it was so received after day 37 of the investigation.

The Commonwealth cannot require and take securities under section 42 of the Act in respect of any interim dumping duty (or countervailing duty) that may become payable on the goods under consideration unless the Commissioner has made a PAD and is satisfied that it is necessary to do so to prevent material injury to an Australian industry occurring while the investigation continues.

26.3 PRACTICE

Preliminary Affirmative Determination

A PAD must be made before provisional measures can be imposed or a price undertaking considered by the Minister. In some circumstances, a PAD may be made without provisional measures being imposed (e.g. in order to consider an undertaking that the exporter has indicated they wish to offer). If a PAD is made, public notification of this decision must be given.

Where the Commissioner is satisfied that there appear to be sufficient grounds for the publication of a notice (i.e. a dumping or countervailing duty notice), a PAD report will contain the following detail:

- the applicant and other domestic producers;
- importers and exporters;
- procedural background on the investigation process;
- full description of the imported goods, including classification and origin;
- full description of the locally produced goods (including types, models etc. where appropriate);
- domestic market;
- period of investigation for both dumping and injury;
- the estimated dumping margins including the calculation of normal value and export price;
- outline of injury analysis;
- causal link;
- reasons for imposing any provisional measures;
- any other relevant detail such as the expected date of statement of essential facts.

The Commissioner can make a PAD at any time from day 60 in the investigation.

Visits to the Australian industry are undertaken soon after initiation to verify the information contained in the application. Therefore, by day 60, the Commissioner should be in a position to evaluate the reliability of the industry's cost to make and sell information for the purposes of assessing the unsuppressed selling price and injury claims. If the Australian industry comprises numerous members, it may not be possible to have completed that evaluation by day 60.

In relation to whether dumping is occurring, the due date for exporter submissions is day 37. However, exporter information is generally not verified before day 60. Therefore at day 60, whilst information in submissions is unlikely to have been verified, the available information from the cooperating exporters may provide more reliable information than the normal value and export price information submitted in the industry's application.

In respect of causal link, it is likely that most of the information needed to undertake the assessment would have been gathered upon completion of importer verification visits and visit reports. The Commission seeks to obtain importer sales information that would be sufficient for price comparisons and market share analysis. The claims made by the industry in its application concerning causal link are assessed against information gathered during these importer verification visits. For example, using sales information provided by importers may allow for a preliminary price undercutting analysis that supports allegations made by the industry. Verified information from importers also allows for a better assessment as to whether any claimed decline in market share has been taken up by imports from the nominated country.

If a PAD is not made on day 60 of an investigation the Commissioner will publish a Status Report on the Commission's website outlining the reasons why a PAD was not made. If a Status Report is published, the Commissioner will reconsider whether to make a PAD during the course of the investigation. A PAD can be made prior to or at the same time as the publication of the SEF.

Provisional measures

The Commonwealth may require and take securities in respect of interim duty that may become payable if the Commissioner is satisfied that it is necessary to do so to prevent material injury to the Australian industry while the investigation continues. The Commonwealth may require and take provisional measures in the form of securities under sections 42 to 45 of the Act in respect of any interim duty that may become payable on the goods. The amount of security is worked out using the same methods used to calculate interim dumping and countervailing duty and with consideration to the *Guidelines on the application of forms of dumping duty*.

A security may be given (section 43 of the Act refers) in the manner and form approved by a Collector, usually this means either a cash or documentary security with surety. A general security as specified in section 44 of the Act covering all transactions in a specified period is not usually appropriate as the overarching intention of the provisional measure is to affect the prices on the Australian domestic market for the product concerned and an actual cash deposit or bank guaranteed security is the best vehicle to achieve that objective.

An Officer of Customs may refuse to deliver the goods pending receipt of the required security. Dumping securities may be taken at the time of entry of the goods and can be held for a period of up to 4 months (or up to 6 months if the exporter requests). Countervailing securities can be held for a period of up to 4 months. Where the non-injurious price is less than the normal value of the goods (as last ascertained for the purpose of the investigation), the dumping securities taken can be held for a period of 6 months, or up to 9 months if the exporter requests.

Securities are collected on an individual shipment basis. Where securities have been imposed to protect the Australian industry during the remainder of an investigation, they will be collected until the Minister has made a decision in relation to the application.

The public notice of the PAD states whether securities will be collected on future shipments and sets out the date from which they will apply. This date is generally the date of the PAD. Details of the amount of the security to be collected are made available on request to bona fide importers.

27. STATEMENT OF ESSENTIAL FACTS

27.1 CONTEXT

In accordance with subsection 269TDAA(1) the Commissioner must issue a statement of essential facts (SEF) within 110 days of the initiation of an investigation (unless the date that the statement of essential facts was to be placed on the public record has been extended). This requirement reflects Article 6.9 of the ADA and Article 12.8 of the SCM Agreement which provide that authorities shall inform all interested parties of the essential facts under consideration before a final determination is made.

27.2 POLICY

A SEF is issued at day 110 in all investigations except for an accelerated review. The Minister can extend the time to make an SEF under section 269ZHI.

The SEF is a provisional document placed on the public record so that interested parties are provided the opportunity to address issues. It sets out the essential facts on which the Commissioner proposes to base recommendations to the Minister. It shows the main conclusions and recommendations as they are known at that point.

In preparing the SEF, the Commissioner must have regard to matters set out in the application for anti-dumping measures; submissions received within 37 days after the initiation of the investigation; and any other relevant matters. The Commissioner is not obliged to have regard to late submissions if to do so would prevent the timely placement of the SEF on the public record.

Parties have 20 days after publication of the SEF to comment on the SEF. The Commissioner must have regard to submissions made within 20 days in deciding on the recommendations to be made to the Minister.

27.3 PRACTICE

A SEF is issued in respect of investigations for new measures, reviews of existing measures, inquiries into whether measures should continue and anti-circumvention inquiries (except inquiries relating to avoidance of the intended effect of duty). The SEF documents findings relevant to the type of investigation undertaken and addresses issues raised by interested parties during investigations.

The SEF sets out the Commissioner's recommendations and findings and provides particulars of the material evidence relied on. The Commission is not bound to investigate each and every avenue suggested by an interested party—it will conduct the investigation having regard to the evidence that is material so that the investigation can be concluded within the time available.

A SEF contains proposed recommendations in relation to matters such as export price, normal value and adjustments affecting the normal value. The SEF is about reporting the facts, analysis and findings rather than detailing proposed recommendations in relation to issues such as causation and the imposition (or otherwise) of measures.

SEF in respect of investigations for new measures

The SEF first describes the goods the subject of the application, including technical specifications, production processes, main uses and the relevant tariff classification or classifications. The SEF then describes the like goods produced by Australian industry in terms of the like goods framework and then presents the findings of the investigation.

If the nature of the goods and like goods was an issue during the investigation, the SEF sets out the claims and counter claims of interested parties and the findings of the Commission.

The SEF includes a description of the domestic producers and their market share, and findings in respect of manufacturing processes, capacity of the Australian industry to produce, distribution channels and other participants in the Australian market. The Commissioner must consider whether there is an Australian industry producing like goods according to the terms of subsections 269T(2), (3) and (4).

The SEF describes the Australian market. Factors considered include market size, individual market sectors, factors affecting demand/sales of goods, the sources of the supply and trends in the imported and domestically produced goods, distribution channels for the goods, differences in marketing methods, recent changes, end users, seasonal fluctuations, packaging, contracts, etc.

An assessment of the size of the market will generally involve verified sales data obtained from Australian industry members and importers. The SEF will not disclose commercially confidential information about the market.

The SEF will only outline the methods used to determine export price and normal value in accordance with the relevant provisions. Exporter verification reports and importer verification reports contain findings, analysis, evidence relied upon, and reasoning on key verification outcomes.

The SEF contains a summary of the dumping margins established for each exporter in each of the countries nominated.

The SEF addresses each of the injury factors including trends in pricing, sales volumes, market share, profits and profitability. It also addresses any relevant claims made during the course of the investigation, if supported by evidence. The SEF draws a preliminary conclusion about whether the claims are substantiated.

In considering causal link, the SEF analyses the price and volume effects of dumped goods on the Australian market over the injury investigation period. The SEF sets out the facts in relation to other possible causes of injury to Australian industry.

The SEF draws a preliminary conclusion about whether the dumped goods caused injury to Australian industry and whether that injury was material.

Where multiple countries are subject to investigation in respect of the same goods, cumulation may be considered as part of the causal link analysis.

The SEF addresses the issue of non-injurious price and may contain an analysis of the factors relevant to determining the non-injurious price and the method used, as well as interested parties' comments.

SEF in respect of reviews of existing measures

A SEF report in respect of a review of existing measures will:

- identify the applicant and scope of the review;
- describe the measures applying to the goods the subject of review;
- set out the methods of determining normal value and export price;
- determine whether the variable factors relevant to the taking of anti-dumping measures and affecting the NIP have changed, and if so, their movement.

SEF in respect of the inquiry into whether the measures should continue

A SEF in respect of an inquiry into whether the measures should continue will:

- identify the applicant and the goods subject to measures;
- outline the history of reviews of the measures since they were first imposed;
- document the current state of the Australian market and changes in the market place since measures have been in place;
- set out the pattern of exports since the measures were imposed, and whether there is current dumping of the goods;
- contain an analysis of the economic condition of Australian industry, changes in the industry since measures were imposed, and whether there is still an industry producing like goods to the imported goods;
- discuss the likelihood of continuing or recurring dumping and continuing or recurring injury; and
- where required, determine whether the variable factors relevant to the taking of anti-dumping measures have changed.

28. INTERIM DUMPING DUTIES

28.1 CONTEXT

Under section 269TG, if the Minister is satisfied that certain conditions have been met, he or she may declare in a public notice that duties have been imposed. The notice remains in force for five years unless revoked earlier.

The relevant provisions as set out in Division 3 of the Act, and section 8 of the Dumping Duty Act, give effect to Articles 9.1, 9.2, 9.3 and 9.4 of the ADA. The *Customs Tariff (Anti-Dumping) Regulations 2013* specify the form of anti-dumping duty.

28.2 POLICY

The Minister must be satisfied that goods have been dumped, and because of that, material injury to an Australian industry producing like goods has been caused or threatened, or the establishment of an Australian industry producing like goods has been or may be materially hindered, or in a case where securities were taken as a result of a preliminary affirmative determination, that material injury would or might have been caused to an Australian industry producing like goods if the security had not been taken.

The Minister has the power to impose duties under section 8 of the Dumping Duty Act. The amount of the interim dumping duty is worked out in accordance with a method specified in the notice required by subsection 8(5) of the Dumping Duty Act.

The methods for working out the interim dumping duty are set out in the *Customs Tariff (Anti-Dumping) Regulation 2013*. It describes four forms of dumping duty:

- combination of fixed and variable duty method[34] ('combination' duty);
- fixed duty method;
- floor price duty method;
- *ad valorem* duty method;

The *Guidelines on the application of forms of dumping duty* sets out issues that are likely to be relevant when determining the form of the duty to be imposed. The Commission will consider submissions from interested parties including industries using the imported goods subject to the dumping duty when deciding on the appropriate form of duty.

Coverage of a Notice: In *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth 2013* the Federal Court held that variable factors determined in a Notice published under subsection 269TG(3) of the dumping legislation should reflect the dumping determination itself for the goods and the Minister may not vary the notices by putting into effect different variable factors by model or finish

[34] The combination of fixed and variable duty method began to operate in late 1992. It replaced a floor price duty method that had operated previously. For countervailing duties the various forms of duty always existed.

type. This has relevance to the form of duty that may be selected. The Guideline explains this issue and its relevance to the form of duty.

Subsection 8(5B) of the Dumping Duty Act specifies that in imposing interim dumping duty, the Minister must have regard to the desirability of fixing a lesser amount of duty where the NIP is less than the normal value. This is the “lesser duty” rule. If certain circumstances exist, the Minister is not required to have regard to the lesser duty rule. However, the finding of these circumstances does not prevent the Minister from considering and applying the lesser duty rule where the Minister considers it would be appropriate to do so.

Where the Minister decides to impose dumping duty at the NIP level, it operates in the duty collection process whenever it is lower than the ANV. The NIP is defined at section 269TACA.

Subsection 8(5BA) of the Dumping Duty Act provides that where simultaneous dumping and countervailing measures are to be imposed, the export price of the goods as so ascertained or last so ascertained, plus the interim dumping duty payable, plus the interim countervailing duty payable, will not exceed the NIP. For each good subject to interim dumping duty or interim countervailing duty, the Commission publishes a Dumping Commodity Register (DCR). The DCR provides information on the amount of duty applicable and how to calculate the interim dumping duty and countervailing duty liability.

28.3 PRACTICE

Any securities taken after making a preliminary affirmative determination, which have not been cancelled (see Chapter 26), are transferred to revenue as interim anti-dumping duty on publication of a notice under subsection 269TG(1).

The Minister may also publish a notice in relation to goods that had no security imposed where the Commonwealth had the right to require and take securities. If a notice under subsection 269TG(1) is not published any securities taken will be cancelled.

A notice under subsection 269TG(1) is subject to the conditions of section 269TN concerning retrospective notices.

The Minister may publish a notice under subsection 269TG(2) in order to impose duties on goods that may be exported in the future at dumped prices. The Minister must be satisfied that the export price of the goods that have already been exported to Australia is less than the normal value of the goods and that the export price of any future exports to Australia may be less than the normal value of those goods. The Minister must also be satisfied that because the goods are being, or may be, exported to Australia at a dumped price, a causal link to the injury exists. A notice under this section applies to goods exported after the date of its publication, or a later date as specified in the notice.

The Minister may publish a notice under this section independent of a notice published under subsection 269TG(1). If goods were exported to Australia before the publication of a notice under subsection 269TG(2), and no subsection 269TG(1) notice had been published, that particular shipment of goods is not subject to interim dumping duty.

Notices under this section must include the respective amounts of the ascertained normal value, the ascertained export price, and the ascertained non-injurious price, unless, upon written request, the Minister decides that the publication of that information would be detrimental to the commercial interests of any party (subsections 269TG(3) and 269TG(3A) refer). In practice, the ascertained amounts are shown as a confidential attachment in a table attached to the notifications made under sections 269TG and 269TJ.

The ascertained amounts will be expressed in the following currencies:

- AEP - denominated in the currency in which the export sales are made
- ANV - denominated in the currency in which the domestic sales are made
- NIP - denominated in Australian dollars.

Where the export sales are in more than one currency, for example some sales are in AUD and others in USD, the AEP will be expressed in the currency which on a weighted average, using trade volume, represents the majority of the total sales to Australia.

The Minister must cause notices under subsection 8(5) of the Dumping Duty Act to be published on the Commission's website except where it would adversely affect the business or commercial interests of any party. The usual practice is to publish the name of the exporter, a description of the goods, and the amount of the interim dumping duty payable. The public notice imposing measures is not published if publication would adversely affect business or commercial interests.

Subsection 8(5D) of the Dumping Duty Act specifies when a notice under subsection 8(5) may have effect. The date of effect can be a date prior to publication, the date of publication, or a date after publication but not a day on which an earlier notice applied to the goods. A notice taking effect prior to publication is used in conjunction with notices made under subsection 269TG(1). The date of effect of a notice applies to goods entered for home consumption from the specified date.

Subsections 8(3), 8(5) and 8(5A) to (5D) of the Dumping Duty Act, read in conjunction with the Regulations, complete the taxing code for imposing interim dumping duties. Division 4 of Part XVB of the Act provides for importers to apply for an assessment of the actual duty liability, and repayment of excess interim duty. The Minister determines the actual normal value and export price of each consignment within a particular period in assessing the exact liability. Subsection 8(6) of the Dumping Duty Act specifies the amount of dumping duty payable.

Treatment of traders when imposing measures

When setting a measure the notice will not normally name intermediaries such as traders in their own right. This is because intermediaries do not manufacture the goods. If a dumping margin was set for an intermediary in its own right, there is the risk that the measures can be 'diluted', for example, where an intermediary was made the subject of a low duty compared to the producer exporters.

Therefore, the Commission will generally make intermediaries subject to the 'all other exporters' rate'. There can be exceptions, for example, where the Commission finds certain producer and trader relationships exist in an investigation or review, and in these cases it will describe the producer-trader linkages in the measure. On rare occasions, the Commission may name an intermediary in its own right to give effect to measures.

The Commission may allow an importer to obtain a change in the rate of duty applied to their imports if they are able to demonstrate that: they are importing goods through a trader which were manufactured by an exporter/producer who is individually named or is in the residual category; or they are importing through a trader, goods that have been manufactured by an exporter/producer who is not subject to measures.

The ‘all other exporters' rate’

Chapter 21 describes the dumping duty outcomes when there has been sampling.

Where the Commission has not undertaken a sampling exercise, the Commission will determine separate rates for the individual exporters and an ‘all other exporters’ rate. The ‘all other exporters’ rate applies to any exporters not known, or which did not exist, at the time of the investigation, and applies to any new exporters. In practice the Commission generally calculates one rate for uncooperative and all other exporters known as the ‘the uncooperative and all other exporters’ rate’. New exporters may be eligible to apply for an accelerated review in order to receive individualised variable factors (see Chapter 34).

Exemption from duty

Subsection 8(7) of the Dumping Duty Act provides that the Minister may exempt goods from interim dumping duty and dumping duty if:

- like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions to all purchasers;
- a Tariff Concession Order (TCO) applies to the goods;
- a Customs by-law applies to the goods and suitably equivalent goods produced or manufactured in Australia are not reasonably available;
- either the duty payable on the goods is zero, or the rate payable is equivalent to a special concessional rate applicable to the goods and suitably equivalent goods produced or manufactured in Australia are not reasonably available; or
- the goods are samples for the purposes of promotion.

The exemption power could be exercised when the Minister makes a decision to impose a duty following an investigation. However, usually an exemption application is examined subsequent to the imposition of the duty.

The provision imparts quite broad discretions to the Minister. The Minister is not obliged to exempt goods if they meet the criteria.

A party seeking exemption from the dumping or countervailing duty may write to the Commission setting out its reasons. As part of considering the request, the Commission will send out a questionnaire to the Australian industry asking whether, in their opinion, substitutable goods are offered or available for sale. The information provided may be verified. The Commission will then undertake a comparative analysis between the local and the imported goods in question in order to determine whether like, or directly competitive goods, are offered for sale by the local industry. The Commission may also examine whether the terms and conditions attached to any offer to supply are in keeping with its normal business practices.

Where goods are exempted from dumping duty following an application for exemption, the date of effect of the exemption must not be earlier than the day the application is made.

29. THIRD COUNTRY DUMPING / COUNTERVAILING DUTIES

29.1 CONTEXT

Sections 269TH and 269TK are similar to section 269TG and section 269TJ respectively but relate to anti-dumping and countervailing measures imposed on third countries where the Minister is satisfied that certain conditions have been met.

Under subsection 269TH(1) and subsection 269TK(1), the Minister may impose measures on goods produced or manufactured in a particular country that have been exported to Australia when satisfied that those goods are dumped or a countervailable subsidy has been received in respect of those goods, and because of that, material injury to an industry in a third country engaged in the production of like goods has been or is being caused or is threatened. Notices under these sections are subject to the conditions of section269TN.

Notices under subsections 269TH(1) and (2) declare that section 9 of the Dumping Duty Act apply and notices under subsections 269TK(1) and (2) declare that section 11 of the Dumping Duty Act applies.

Like dumping duties under section 8 of the Dumping Duty Act, third country dumping duties imposed under section 9 do not apply to goods exported to Australia from New Zealand.

29.2 POLICY

Following a decision by the Commissioner to not reject an application by the Government of a third country for the imposition of anti-dumping measures, an investigation will examine whether material injury to a domestic industry in a third country has been caused by dumped exports to Australia from a particular country.

29.3 PRACTICE

The investigation will establish export prices and normal values for goods exported to Australia from a particular country and determine whether those goods have been exported at dumped prices during the investigation period. The Commission will also undertake an assessment of the economic condition of the industry as a whole in the third country. The injury analysis will not only be confined to that third country industry's exports to Australia.

30. UNDERTAKINGS

30.1 CONTEXT

In relation to a dumping investigation, an undertaking is an agreement between the Minister and the exporter that the exporter will conduct future export trade in a manner that will avoid causing or threatening material injury to the Australian industry, or materially hindering the establishment of the industry.

The acceptance of the undertaking by the Minister is an alternative to publishing a dumping notice under subsection 269TG(1) and 269TG(2).

This chapter focuses on undertakings in relation to a dumping investigation. However, undertakings can also be given in relation to a subsidy investigation. In relation to a subsidy investigation, an undertaking can be offered by the government of the country of export or an exporter (subsection 269TEB). In subsidy investigations, an undertaking from an exporter cannot be accepted by the Minister unless the government of the country consents to the giving of the undertaking (subsection 269TJ(3C)(d)).

30.2 POLICY

Only the exporter of the goods may offer undertakings. Offers of undertakings by a trader/intermediary alone will not be the subject of recommendations to the Minister. However, the terms of an undertaking by an exporter may have regard to its trading relationships by including the name of the trader or intermediary, and relevant pricing information. The Commissioner will consider whether, having regard to all the circumstances, an undertaking in such terms is adequate to remove the injury, threat of injury, or hindrance to the establishment of an Australian industry to which the application for a dumping duty notice was addressed.

In all circumstances, including where an intermediary/trader is named in an undertaking, it will be the exporter who is subject to the obligations established by the terms of the undertaking and it is the exporter who is responsible for ensuring all terms of the undertaking are complied with.

Accordingly, a failure by the trader/intermediary to comply with the pricing established in the undertaking can result in a breach of the terms of the undertaking by the exporter. Such a breach of the terms of the undertaking may result in the resumption of the investigation into the need to publish a dumping duty notice and/or countervailing duty notice.

The undertakings following consideration of anti-dumping matters by the Minister are exporter based given the terms of subsection 269TG(4)—undertakings by each exporter may be all at the same export price.

Subsection 269TG(5) requires the Minister to have regard to the desirability that the price increase to which the undertaking relates is limited to the NIP for the goods. That is to say, any price increase to which the undertaking relates should be at a level that is sufficient to remove the material injury. If certain circumstances exist, the Minister is not required to have regard to limiting the undertaking to the amount of the NIP (subsection 269TG(5A). However, the finding of these circumstances does not prevent the Minister from considering and applying the lesser duty rule where the Minister considers it would be appropriate to do so.

Similar provisions exist in respect of countervailing investigations under section 269TJ.

The Commonwealth is not precluded from taking securities under section 42 of the Act in respect of interim dumping duties that may become payable before acceptance of an undertaking by the Minister.

30.3 PRACTICE

The typical process leading to the acceptance of an undertaking is where the exporter, following the making of a preliminary affirmative determination, writes to the Commissioner offering an undertaking in certain terms. The exporter's offer is then considered by the Commissioner and forms the basis of recommendations to the Minister under section 269TEB regarding undertakings offered.

Those recommendations may be made during the course of the investigation, but are often part of the report to the Minister in relation to the investigation. If, following recommendation by the Commissioner, the Minister accepts the undertaking offered by the exporter, subsection 269TEB(6) has the effect of suspending the investigation as far as it relates to that exporter.

Alternatively, under subsection 269TG(3D), the Minister may give notice to an exporter that the Minister is of the opinion that it would be appropriate for the exporter to give an undertaking, and indicating the terms of the undertaking that the Minister considers would be satisfactory. When considering whether to give a notice under subsection 269TG(3), the Commissioner may authorise a Commission staff member under section 269U to convene a meeting with the Australian industry in relation to the terms of the undertaking. These circumstances may arise after the Minister has received the report from the Commissioner.

Under subsection 269TG(4), whether or not a notice has been given to the exporter by the Minister, the Minister may accept undertakings offered by an exporter, thereby deferring the decision to publish (or not to publish) a dumping duty notice in respect of that exporter.

If a notice has already been made under subsection 269TG(2), it is not possible to revoke that notice and then accept an undertaking.

The Minister must give public notice of any undertaking accepted under section 269TEB following recommendation from the Commissioner, or following a notice to the exporter by the Minister under subsection 269TG(3D).

In accepting an undertaking, the Minister may make it subject to conditions such as the provision of information relevant to the fulfilment of the undertaking on an agreed basis and appropriate access to such information.

Breach of the terms of the undertaking may result in the resumption of the investigation into the need to publish a dumping duty notice and/or countervailing duty notice. In such circumstances, where an investigation is resumed, the Commonwealth may require and take a security under section 42 of the Act in respect of any interim dumping or countervailing duty that may become payable. Duties may also be imposed retrospectively. A breach may include breaches by the trader/intermediary named in the undertaking, or breaches by the exporter itself, either in relation to the export price level or any other conditions such as the provision of information.

31. REINVESTIGATIONS

31.1 CONTEXT

Division 9 of the Act sets out procedures for review by the Review Panel of certain decisions by the Minister or the Commissioner.

Subdivision B sets out the mechanism for review of certain Ministerial decisions (“reviewable decisions”). These include:

- a decision to publish a dumping duty notice, or a countervailing duty notice, or a decision not to publish such a notice
- decisions under subsection 269ZDB(1) in relation to reviews of anti-dumping measures
- decisions in relation to anti-circumvention inquiries
- decisions in relation to the continuation of anti-dumping measures.

Interested parties are entitled to apply to the Review Panel for a review of a reviewable decision within 30 days after a notice of the reviewable decision was first published on the Commission’s website.

Subsection 269ZZK(1) requires that if the application is not rejected, the Review Panel must recommend to the Minister that:

- the reviewable decision be affirmed; or
- the reviewable decision be revoked and a specified new decision substituted.

In making the recommendation, the Review Panel may have regard only to ‘*relevant information*’ as defined in subsection 269ZZK(6).

In the case of an application under section 269TB ‘*relevant information*’ is the information which the Commissioner had regard to under subsection 269TEA(3)(a).

The Review Panel may require the Commissioner to reinvestigate a specific finding that formed the basis of the reviewable decisions and report the result of the reinvestigation to the Review Panel. The reinvestigation report by the Commission must be completed within the specified period set by the Review Panel, and that reinvestigation must be conducted in accordance with the Review Panel’s requirements.

In the report to the Review Panel the Commissioner must:

- if the Commissioner is of the view that the finding or any of the findings subject of the reinvestigation should be affirmed—affirm the finding or findings; and
- set out any new finding or findings made as a result of the reinvestigation; and
- set out the evidence or other material on which the new finding or findings are based; and
- set out the reasons for the Commissioner’s decision.

31.2 POLICY

In each reinvestigation, a reinvestigation report will be provided to the Review Panel. The report examines the issues identified by the Review Panel and provides the results of the reinvestigation.

31.3 PRACTICE

In determining whether the findings from the original investigation should be affirmed, the reinvestigation will reconsider the facts, legal and policy aspects of the original decision.

This examination should consider whether the original decision was:

- correct – in the sense that it was made according to law; and
- preferable – in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

Any findings from a reinvestigation must be:

- consistent with the legislative requirements in section 269ZZL;
- based on objective considerations; and
- supported by analysis and reasoning as detailed in the reinvestigation report.

32. REVIEW OF MEASURES

32.1 CONTEXT

An affected party can seek a review of a dumping duty notice, a countervailing duty notice, or an undertaking.

A review may concern the 'variable factors'—the normal value, export price, non-injurious price, or the amount of the subsidy. A review may also concern a claim that anti-dumping measures are no longer warranted (revocations). Reviews may be in relation to a particular exporter or exporters generally.

The Minister may, after a review has been initiated, extend the review to cover additional matters, either on advice from the Commissioner or on the Minister's own initiative.

After conducting a review, a report by the Commissioner must recommend (in the case of a dumping or countervailing duty notice):

- that the notice remain unaltered; or
- that the notice be revoked in its application to a particular exporter or to a particular kind of goods or revoked generally; or
- that the notice have effect using different variable factors either for a particular exporter or exporters generally.

Similar provisions exist in relation to undertakings.

Where the export price of goods exported to Australia is being ascertained for the purposes of a review under Division 5, subsection 269TAB(2B) provides methods to determine appropriate export prices where there are no exports, or a low volume of exports, during the period examined.

A review application may not be lodged earlier than 12 months after publication of the notice implementing the original measure or the notice declaring the outcome of the last review (whether that last review was undertaken at the applicant's request or not). The Minister may request that the Commissioner initiate a review at any time.

32.2 POLICY

Division 5 sets out the review provisions in relation to applications, reports and the Minister's final decisions. The purpose is to bring about changes to the measures applying to exporters or revocation of the measures where appropriate.

In a review of undertakings, and consistent with the provisions of subsections 269TG(5), 269TG(5A), 269TJ(3B) and 269TJ(3BA), unless certain circumstances exist, it is desirable that the minimum export price requirement specified by an undertaking is not more than the non-injurious price of the goods.

32.3 PRACTICE

An application for review by an affected party must be in an approved form, be in writing, be signed, be lodged in the manner approved under section 269SMS and contain such information as the form requires—including a description of the goods to which the measures relate and a description of the measure.

If the review application is based on a change in the variable factors it must contain:

- a statement of the variable factor(s) that may have changed;
- a statement of the amount by which each factor has changed;
- information to support any claimed change.

If the application seeks revocation of the measure (in terms of subsection 269ZA(1)(b)(ii): ‘that the anti-dumping measures are no longer warranted’), the applicant is required to provide evidence of those circumstances.

Within twenty days after lodgement of an application for review, the application must be examined to establish whether there are reasonable grounds for either asserting that the variable factors have changed or that the anti-dumping measures are no longer warranted.

The Commission will notify the governments of the countries concerned and the Department of Foreign Affairs and Trade after initiating a review.

If the review application is accepted, the Commission publishes a notice on its website. Reviews must be completed within 155 days of the publication of the notice and the Commissioner’s report to the Minister must set out reasons for the recommendation. The Commission must place a statement of essential facts on the public record at or before day 110 setting out the facts and the basis on which the Commissioner proposes to base a recommendation. Section 269ZHI permits the Minister to consider requests to extend the period beyond 110 days.

An application for a review may concern changed variable factors, or revocation, or both. If the Commissioner is not satisfied that there appear to be reasonable grounds for the assertions that are made, the application must be rejected. The supporting evidence should point to the changed circumstances since the time the notice was published or an undertaking accepted to support the review request.

An application for changed variable factors must provide evidence of changed normal values, export prices or non-injurious prices.

If a changed factors review has been commenced, an affected party has an opportunity to apply, using an approved form, for an extension of the review to include revocation. That extension application will need to provide evidence of the circumstances that in the applicant’s view indicate that measures are no longer warranted.

A recommendation to revoke a measure can only be made where a revocation review notice has been published. Revocation review notices are published where: a party has successfully applied for a revocation review in its original application; where a review has been commenced concerning variable factors and a party has successfully applied for extension to include revocation; or where the Minister has requested a revocation review or an extension of an existing review to also examine revocation.

A revocation application may provide evidence that: there is no longer any current dumping or subsidisation; or any current dumping or subsidisation is not causing injury; or the measures are having no effect and there is no current injury. It must also address why a recurrence or continuation of the dumping and subsidisation, and of the injury, is unlikely were the measures to be revoked. While there may be no current dumping or subsidisation this does not, of itself, mean that the measure must be revoked.

When examining a revocation claim, the Commission conducts a prospective examination—the issue will be whether, if the anti-dumping measures were to be revoked, dumping or subsidisation causing injury to the industry would be *likely* to continue or recur. In examining the likelihood of injury as a result of any future dumping or subsidy, the Commission takes guidance from WTO jurisprudence[35] where '*likely*' has been taken to mean 'probable' and the evidence relied upon will be appropriate to circumstances of practical reasoning intrinsic to a review process.

A revocation review includes an examination of the current economic conditions of the industry as part of assessing whether the injury would be likely to recur following any revocation of the anti-dumping measure. The likely recurrence of dumping or subsidisation is also examined.

Examining revocation claims concerning injury entails the collection of detailed cost and price data from the industry, normally for several years, similar to a continuation inquiry.

Reviews as a remedy to non arm's length transactions following imposition of the duty

After dumping duties have been imposed, removal of the injury may not occur if the price in the Australian market of the imported goods has not risen as a result of the duty. There may be a number of reasons for this. For example, the normal value may have decreased leading to there being little or no final duty liability. This situation is permissible under the dumping legislation as no compensatory behaviours have occurred between the exporter and the importer.

However, there are other circumstances where the parties may have avoided the price effects of the duty by entering into compensatory arrangements. In this situation a review could provide a remedy. If, after imposing the dumping duty, prices in Australia have not increased and in absorbing the duty the importer has moved into a loss making situation, a review of measures could find that export sales are not at arms length—see subsection 269TAA(2). In this situation, if the Commission determines that there has been some reimbursement between exporter and importer, it may construct the export price which, because of the loss making resale price, will be lower than the actual or ascertained export price. The effect is to increase the duty.

If the exporter had reimbursed the importer's costs of paying the dumping duty, a review may find that the payment of duty by the exporter made export sales non-arms length. A deductive export price where the deductions include the dumping duty payable, as provided in subsection 269TAB(2)(a), will be lower than the original ascertained export price. Again, the effect is to increase the duty.

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[35] *US Drams* - WT/DS99/R 1999

33. ANTI-CIRCUMVENTION

33.1 CONTEXT

These provisions provide a mechanism for the Australian industry to apply for an inquiry into practices which are designed to avoid the payment of dumping or countervailing duties. A notice must have been published under subsection 269TG(2) or subsection 269TJ(2) and an alleged circumvention activity identified.

The Minister has a power to request the Commission to conduct an anti-circumvention inquiry even though an application had not been lodged.

33.2 POLICY

Circumvention is a strategy used by the exporters and importers of products subject to a dumping duty notice to avoid the full payment of those duties.

If circumvention is found to have occurred, the Minister can amend the original notice imposing the dumping or countervailing duty. The Minister may extend that notice so that it applies to different goods, exporters and countries which were not specified in the original notice.

Division 5A of the Act sets out the application process, the inquiry process, and the Minister's powers after considering a report by the Commission regarding the alleged circumvention activity.

The legislation defines the types of circumvention activities that are intended to avoid the dumping or countervailing duty to be:

- Assembly of exported parts in Australia
- Assembly of parts in a third country
- Export of goods through one or more third countries
- Arrangements between exporters
- Avoidance of intended effect of duty
- Slight modification of goods

Division 5A provides that other types of circumvention activities can be defined in the Regulations.

33.3 PRACTICE

An application for a Division 5A inquiry by Australian industry must be in an approved form, be in writing, be signed, and contain such information as the form requires. Included is a description of each of the following: the goods concerned; the original notice; the alleged circumvention activity; and the alteration being sought to the original dumping or countervailing duty notice.

Within twenty days after lodgement of an application for the inquiry, the application must be examined to establish whether there are reasonable grounds for asserting that circumvention has occurred.

The Commission will notify the governments of the countries concerned and other relevant government agencies after initiating an inquiry.

If the application is accepted, the Commission will publish a notice on the Commission’s website. The inquiry must be completed within 155 days of the publication of the notice. The Commission’s report to the Minister must recommend whether the original notice remain unaltered or be amended.

The Commission will verify the information in an application or submission through a desktop review, questions to the submitter or an on-site visit.

The Commission must place a SEF on the public record at or before day 110 setting out the facts on which the Commissioner proposes to base its recommendations to the Minister. Section 269ZHI permits the Minister to consider requests to extend the period beyond 110 days.

If the Minister decides to alter the original notice after receiving a report from the Commissioner, the changes can include the specification of:

- different goods that are to be the subject of the original notice;
- different foreign countries that are to be the subject of the original notice;
- different exporters that are to be the subject of the original notice.

The Minister may specify different variable factors for: an existing exporter subject to the original notice; and for an exporter that is to become subject to the original notice.

The first two types of circumvention activity listed above concern parts assembled in Australia or in a third country.

The third circumvention activity as shown at subsection 269ZDBB(4), concerns finished goods and provides:

‘*export of goods through one or more third countries*’:

> *a) goods (the circumvention goods) are exported to Australia from a foreign country in respect of which the notice does not apply;*
> *b) before that export, there were one or more other exports of the goods from a foreign country to another foreign country;*
> *c) the first of those other exports was from a foreign country in respect of which the notice applies;*
> *d) the circumvention goods would be the subject of the notice if they were exported to Australia by an exporter in respect of which the notice applies;*
> *e) section 8 or 10 of the Dumping Duty Act, as the case requires, does not apply to the export of the circumvention goods to Australia.*

This provision is taken to apply where the goods would have been subject to the notice had they been exported directly from the originating country that is subject to a notice. If the goods have been exported through one or more third countries that are not subject to the notice, thus not attracting the dumping or countervailing duties, this may be a form of circumvention under this provision.

The fourth type of circumvention activity concerns arrangements between exporters in the country subject to the notice that result in the intended amount of dumping duty not being paid.

The Minister's decision to alter or not alter the original notice is reviewable by the Review Panel. An interested party can apply for a review within 30 days from the publication of the Minister's decision.

34. ACCELERATED REVIEWS

34.1 CONTEXT

Division 6 of the Act allows a new exporter (as defined) to apply for an accelerated review of a dumping or countervailing duty notice in so far as it affects that exporter. The relevant provisions give effect to Article 9.5 of the ADA.

Section 269T defines '*new exporter*' to mean, in relation to goods the subject of an application for a dumping duty notice or countervailing notice or like goods, an exporter who did not export such goods to Australia at any time during the investigation period in relation to the application.

34.2 POLICY

The Commissioner must complete a report as soon as practicable but no later than 100 days after the lodgement of the application. The report to the Minister must recommend either:

- that the dumping or countervailing duty notice remain unaltered, or
- that the dumping or countervailing duty notice be altered so as to apply to the applicant as if different variable factors had been fixed.[36]

The Commission does not require an applicant for an accelerated review to have already exported some minimum quantity of the goods to Australia. Article 9.5 of the ADA contains two conditions: that the exporter did not export the goods during the investigation period; and that it is not related to an exporter already subject to the duty. In the circumstances where there have been no exportations, any accelerated review will assess the normal value for the goods. If there have been exportations by the applicant exporter, or contracts entered into, those details will also be examined.

Normal value and export price for the new exporter will be established under the relevant provisions of section 269TAC and section 269TAB.

The Commonwealth will not collect interim dumping duties on consignments of goods exported by that new exporter and entered for home consumption in Australia after the application is lodged, and until the review is completed. However, the Commonwealth may require and take securities in respect of the new exporter's consignments of goods entered for home consumption during that period.

34.3 PRACTICE

Lodged applications for an accelerated review should contain:

- a description of the goods to which the dumping or countervailing duty notice relates; and
- a statement of the basis on which the exporter considers that the particular notice is inappropriate so far as the exporter is concerned.

[36] The form of duty is applied in accordance with the *Customs Tariff (Anti-Dumping) Act 1975* (countervailing duty) and the *Customs Tariff (Anti-Dumping) Regulation 2013* (dumping duty).

The statement referred to above should explain why the variable factors (normal value, export price, NIP and/or the amount of countervailable subsidy) pertinent to the anti-dumping measures that is relevant to the notice are not appropriate in this case. Applicants should provide evidence in support of their claim.

Subsection 269ZE(2) provides that the Commissioner may reject an application from an exporter for an accelerated review if satisfied that the exporter:

- was not investigated in the investigation relating to publication of the notice because that exporter refused to cooperate;
- is related to an exporter whose exports were examined in relation to the application for publication of the notice.

Where the applicant does not meet the requirements set out in section 269T (see 34.1 above) no accelerated review can commence.

In considering whether to initiate an accelerated review, the Commission will decide whether the applicant meets its requirements concerning an exporter.

The information provided at section 6.2 of this Manual concerning the identification of an exporter is also relevant. Accelerated reviews may require normal values to be ascertained which means all relevant cost and price information is required from the producer/exporter. Any application for an accelerated review will need to provide this information.

Where the Commissioner is satisfied that the applicant for accelerated review is refusing to cooperate with any aspect of the review, or is related to an exporter who was examined during the investigation relating to publication of the notice, the accelerated review will be terminated.

Upon commencement of an accelerated review, the Commission will send an exporter's questionnaire to the exporter concerned. Information submitted in a questionnaire response will usually be verified.

A public file for accelerated reviews is not required in Division 6 of the Act. However, the Commission has an administrative practice that, in the interest of transparency, a public file will be kept for an accelerated review. This record will include a copy of the non-confidential version of the application; the consideration report of that application; all submissions and letters from interested parties; and the verification report of the exporter's information. There are no review rights to the Review Panel regarding accelerated reviews.

35. CONTINUATION OF MEASURES

35.1 CONTEXT

Subsections 269TM(1) and (2) specify that, unless they are earlier revoked, anti-dumping measures expire after 5 years.

Division 6A sets out what occurs if an application for a continuation of measures has been received. After conducting the inquiry, the Commission is required to provide a report to the Minister. The report may recommend that the measures be amended if the Minister decides to continue them.

Under section 269ZHF(2), the Commissioner must not recommend that the Minister take steps to secure the continuation of the anti-dumping measures unless satisfied that the expiration of the measures would lead, or would be likely to lead, to a continuation of, or a recurrence of, the dumping (and/or subsidisation) and the material injury that the anti-dumping measures are intended to prevent.

If the Minister decides to continue the anti-dumping measures, the Minister may determine that:

- the notice continues in force after the specified expiry day; or
- the notice continues in force after the specified expiry date but that, after that day, the notice ceases to apply in relation to a particular exporter or to a particular kind of goods; or
- the notice continues in force after the specified day but that, after that day, the notice has effect, in relation to a particular exporter or to exporters generally, as if the Minister had fixed different specified variable factors in relation to an exporter or to exporters generally.

A measure (regardless of its form) cannot persist for longer than five years without being subject to a continuation inquiry. For example, if in a review the Minister decides to change the form of a measure from an undertaking to a dumping duty notice prior to the expiry of that undertaking, the notice will expire five years after the implementation of the original undertaking (unless continued).

35.2 POLICY

Sections 269ZHB to 269ZHG set out the procedures to be followed in conducting a continuation inquiry.

An application to continue measures must be made by the original applicant for the measures, or by persons representing the whole or a portion of the Australian industry producing like goods to the goods covered by those measures. In a continuation inquiry the Commission does not revisit the industry support requirements that are set out in section 269TB.

After conducting an inquiry the Commissioner must give a report to the Minister recommending any change to the notice; and in recommending continuation the Commissioner must be satisfied of the requirement in subsection 269ZHF(2).

35.3 PRACTICE

A notice is published on the Commission's website not later than 9 months before measures are due to expire, inviting interested parties to apply, within 60 days, for the continuation of the measures. If no application is received the measures expire.

An application must be in writing, be in an approved form, contain such information as the form requires, be signed and be lodged in the manner approved under section 269SMS. The application must demonstrate that there appear to be reasonable grounds for asserting that the expiration of the measures might lead to a continuation of, or a recurrence of, material injury that the measures were intended to prevent.

If an application is received there are 20 days, after the 60 day period referred to above, to examine the application and decide whether reasonable grounds exist for an inquiry to be undertaken. If an application is rejected, the applicant is advised of the reasons in writing, and advised of their appeal rights.

The decision to accept the application is publicly notified on the Commission's website. At or before day 155, the Commissioner must report to the Minister. That report may recommend that a dumping duty notice or countervailing duty notice:

- remain unaltered;
- no longer apply to an exporter or to particular goods;
- have effect in relation to a particular exporter or exporters generally, as if different variable factors had been ascertained; or
- expire on the specified expiry day.

The report must have regard to the application, submissions received, the statement of essential facts and any submissions in response to the statement lodged within the specified time limit. Late submissions may be disregarded. The report must clearly set out the material findings of fact on which the recommendation to the Minister is based, as well as a statement of evidence relied upon to support those findings.

The Minister must decide whether to accept the recommendations contained in the report and declare by notice on the Commission's website whether or not steps have been taken to continue the measures. If the Minister decides that the measures are to expire, the expiry date must be publicly notified.

If a notice applies to certain goods exported from two or more countries, the Minister may decide, where warranted, to continue the measures in relation to exporters from some countries but not others.

If the Minister decides to continue the anti-dumping measures, the measures extend for a further five years from the date the measures were to have expired, unless the measures are subsequently terminated or varied, or an exporter is released from an undertaking.

In assessing the likelihood of continuing or recurring dumping, the inquiry may gather facts as relevant on (the list is non-exhaustive):

- pattern of exports since the measures were imposed
- volumes and values of the imported goods
- effectiveness of the measures

- whether exports are likely to continue or resume (such as volume of exports before and after measures were imposed, exporters' production capacity, exporters' supply chains, exporters' other markets, third country sales, and the world market for the goods)
- whether dumping will resume (such as exporters' margins, volume of exports before and after the measures were imposed, effect of the measures, the level of dumping compared with the level of measures i.e. NIP, any changes in the level of the measures as a result of review)
- exchange rate fluctuations
- changes in technology
- exporters' historic margins
- exporters' historic volume and value of exports
- duty absorption by the exporters (or other means of circumventing measures)
- exporters' volumes and values to third countries
- normal values in the exporting country
- export trends after the measures were imposed
- changes in distribution channels
- changes in transport costs
- demand in exporters' home markets
- evidence of sales below costs
- high dumping margins
- high tariffs in the exporting country
- exporters' dependence on export markets
- world capacity
- other possible sources of supply by importers
- end user preferences
- exporters' domestic profit on sales of like goods
- availability of other markets.

In assessing the likelihood of continuing or recurring injury, the inquiry may gather facts as relevant on (the list is non-exhaustive):

- state of the Australian industry
- production capacity
- other causes of injury
- market size and share
- demand for the goods
- any changes in the structure and operation since the measures were imposed
- price of exports compared with NIP and USP
- measures relevance to selling prices
- the impact of imports of the goods not dumped from other sources
- changes in technology, product types, consumer preferences, demand and supply.

36. IMPLEMENTATION OF ANTI-DUMPING AND COUNTERVAILING MEASURES

36.1 CONTEXT

The Commission is responsible for implementation of anti-dumping measures following an investigation.

The Commonwealth may require and take provisional measures in the form of dumping and/or countervailing securities under section 42, where the Commissioner is satisfied that it is necessary to do so in order to prevent material injury to an Australian industry occurring while an anti-dumping and/or countervailing investigation continues.

Securities may be taken on the date of, or at any time after, the Commissioner makes a PAD under section 269TD in relation to that investigation. A PAD may be made at any time not earlier than 60 days after the initiation of an investigation, where the Commissioner (or his or her Delegate) is satisfied that there is, or it appears there will be, sufficient grounds for the publication of a dumping duty notice and/or a countervailing duty notice.

Subsections 269TG(1) and (2) provide that the Minister may declare that section 8 of the Dumping Duty Act applies. Subsections 269TJ(1) and (2) provide that the Minister may declare that section 10 of the Dumping Duty Act applies. This declaration is made by public notice on the Commission's website. Measures are applicable to like goods after the date of publication of the notice.

36.2 POLICY

The Act provides for the imposition of anti-dumping measures in the form of interim dumping and or countervailing duty, or an undertaking by an exporter. In accordance with Article 9.1 of the ADA and Article 19.2 of the SCM Agreement, the maximum amount of duty payable may be less than the total dumping and/ or subsidy margin. A lesser duty or undertaking level may be applicable if sufficient to remove the injury to the Australian industry. Anti-dumping measures are imposed for a period of five years, unless revoked prior to the expiration date.

Following an investigation, once the Minister accepts the recommendations and findings, the Commission implements the measures.

36.3 PRACTICE

When securities are imposed, the Commonwealth takes securities for all subject goods entered for home consumption on or after the date securities are commenced. Goods are considered to be entered for home consumption in accordance with section 71A.

<u>Conversion of securities</u>

If, at the conclusion of an investigation, the Minister decides to publish a dumping duty notice and/or a countervailing duty notice, securities taken during the investigation, which have not been cancelled, may be converted to interim dumping and/or countervailing duty.

Securities are converted at the rate of duty applicable to the Minister's dumping duty notice and/or countervailing duty notice up to the amount of the security (where the security taken is greater than the rate of interim duty, the security will only be converted up to the rate of interim duty applicable). The amount converted to interim dumping and/or countervailing duties cannot exceed the amount of the security taken.

When securities are converted to interim duty, securities are converted only for goods the subject of the dumping duty notice and/or countervailing duty notice that were exported to Australia on or after the date that the Commissioner made a PAD. Securities taken for goods that were entered for home consumption on or after the date of imposition of the securities, but exported before the date of the PAD, will not be converted to interim duty and will be cancelled.

Integrated Cargo System Procedure

For anti-dumping measures to be imposed, whether in the form of securities, interim dumping duty, price undertaking or countervailing duty, the Commission creates a Dumping Duty Record (DDR).

The DDRs detail the actual measures that are being imposed. The notices signed by the Minister provide the level of measures. The new measures are created in the Integrated Cargo System (ICS) by entering information such as tariff classification, statistical code, country code, Customs Client Identifiers (CCIDs) and the actual rates. When a shipment is entered using a tariff number that has dumping duty applicable, the record is flagged as possibly having dumping and/or countervailing duty payable.

All implementation tasks, such as updating computer systems and publishing administrative documents, will be completed. Commercial in confidence and/or confidential material will not be disclosed to unauthorised parties.

Confidential Instructions (CI) and Dumping Commodities Register (DCR) pages are created.

The CI pages contain all aspects of the measures to allow brokers to determine how much duty, if any, is payable. The CI pages are only released to bona fide importers for the goods they are entering. The DCR pages contain no confidential information and are available to the public. The DCR pages contain practical information on how to lodge a declaration and make the associated calculations once interim duty has been imposed.

37. DUMPING OR COUNTERVAILING DUTY ASSESSMENTS

37.1 CONTEXT

Australia operates a '*prospective*' duty system. Under prospective systems a duty, not a cash deposit/security, is imposed at the conclusion of the investigation.

The ADA requires that when the amount of anti-dumping duty is assessed on a prospective basis provisions shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. The provisions set out in Division 4 of Part XVB of the Act give effect to Article 9.3.2 of the ADA.

A refund is required where duty paid exceeds the actual margin of dumping for the shipments in question. The duty paid is based on the dumping margins established in the original investigation (or last review)—but the current actual dumping margins may be different due to the changed circumstances.

The current data may show no dumping or a lesser margin of dumping than previously established and which set the duty imposed—giving rise to a refund entitlement.

Division 4 of Part XVB the Act incorporates the refund obligation. It provides for an importer, who has paid interim duty on particular imports, to apply within specified time limits for an assessment of final duty payable.

Dumping duty payable and countervailing duty payable is calculated in accordance with subsections 8(6) and 10(3E) of the Dumping Duty Act respectively.

37.2 POLICY

The WTO ADA requires refund 'of any duty paid in excess of the actual margin of dumping'.

Section 269W provides that the application must present sufficient evidence that the applicant's opinion is correct. Alternatively, the application must provide the evidence the applicant has to establish their opinion and a commitment for someone else, generally the exporter, to give further evidence. Exporter cooperation is necessary for the purposes of a duty assessment in order to ascertain the variable factors relevant to the determination of duty payable for each consignment in the importation period.

Exporter cooperation: If the exporter does not cooperate by providing the necessary price and cost information required in the exporter questionnaire, the Commission will not establish normal values under subsection 269TAC(1) using information from another cooperating exporter/domestic producer. The reason for this has been set out at 8.2 of the manual.

Further, where the normal value cannot be established using verified information under subsections 269TAC(1) or (2), the Commission will not seek to estimate a dumping margin using unverified information under subsection 269TAC(6):

- The assessment provisions clearly require exporter co-operation. This provision would have no effect if normal values in a duty assessment could be established using the all relevant information provision of subsection 269TAC(6). Where an exporter cooperates, normal values are established under subsections 269TAC(1) or (2) using cost and price information

- Unverified/piecemeal information and data are not suitable for determining an actual dumping margin for working out a refund entitlement—the Commission sees the rejection and termination provisions (see subsections 269YA(3) and (4)) as supporting its requirement concerning the standard of the information required to work out the final duty liability.

Rejection: The Commissioner must reject an application under subsection 269YA(2), if the Commissioner is satisfied within 20 days after it is lodged that it does not contain everything it must contain under subsections 269W(1) and (1A).

The Commissioner must reject an application under subsection 269YA(3), where the application contained a commitment described under subsection 269W(1A)(b) that someone else will give the Commissioner further evidence, and the Commissioner is satisfied that this further information was not provided in the time allowed.

Termination: If following the 20 day 'screening' period/s, the Commissioner is satisfied that he or she does not have the information required to provisionally ascertain the variable factors as required by subsection 269X(5)(a), the Commissioner may terminate the duty assessment under subsection 269YA(4).

Rejection and termination decisions are reviewable by the Review Panel.

Where both interim dumping duty and countervailing duty are imposed: Where both a dumping duty and a countervailing duty have been imposed on the goods, the Commission will not process a refund claim based on the dumping or countervailing duty alone. This is because, under the terms of the legislation, the refund assessment must be based on the total duty payable. Therefore, if the applicant considers it has an entitlement for a refund because no countervailable subsidy was alleged to have been paid, it must also provide information relevant to the dumping duty.

Where the interim dumping duty rate has been assessed as zero, the Commission still requires the applicant in a duty assessment to provide information on normal value.

All Consignments (all exporters): A duty assessment application must include all consignments (from all exporters) entered for home consumption during the relevant importation period by the importer. For example, if two exporters supplied the importer during the importation period and the duty assessment is in relation to only one of them, it will be treated as being incomplete because it has not been made in relation to all consignments imported during the importation period.

The outcome of a duty assessment does not impact the rate of interim duty applied to future consignments of the goods.

37.3 PRACTICE

Applicants are encouraged to submit applications well before the end of the six month period available for lodgement (at least one month before, but preferably longer). This provides an opportunity to resubmit an application, within the legislated timeframe, should any deficiencies be identified and the initial application rejected. There is an application form available on the Commission's website to assist applicants with submitting a duty assessment application.

Applicants must provide sufficient evidence in support of their opinion of the export price , normal value and amount of countervailable subsidy received, as applicable. Where there is a commitment that someone else will provide further information, it is still expected that the applicant will have some evidence to establish that their opinion is correct. It is expected that this information will be provided as part of the application.

The Commission will examine the information provided by the exporter/producer and decide whether a verification visit is warranted. If a large refund has been claimed, an onsite visit at the exporter's premises may be required.

As a part of the duty assessment process, all full import declarations (FID) related to the duty assessment will be locked. This will prevent any amendments to the FIDs related to the duty assessment. If any FIDs require amendment, the applicant will need to contact the Commission and provide the reason for the amendment. If the amendment is deemed necessary, the relevant FIDs will be unlocked for the amending action to be carried out. The FIDs will again be locked once the amendment has been made.

After verification, a weighted average normal value, export price and and amount of countervailable subsidy received will be calculated if applicable. In calculating the normal value, adjustments are made to ensure that the normal value is properly comparable with the export price. In establishing the provisionally ascertained variable factors for each consignment, the Commission will usually adopt the same methodology as the original investigation or most recent review.

Like original investigations the Commission does not practice zeroing when working out the weighted average dumping margin in the duty assessment.

Where the Commission decides that the information is suitable to work out a refund entitlement, subsection 269X(5) requires, on the basis of the information that is considered relevant, the Commissioner to provisionally ascertain in relation to each consignment entered for home consumption in the importation period each variable factor relevant. Using the provisionally ascertained variable factors, the Commissioner must calculate the amount of duty payable.

Subsection 269X(6) requires that the Commissioner decide to recommend to the Minister:

- where the total interim duty paid on the goods exceeds the total duty payable, a repayment of the amount of interim duty overpaid (a positive preliminary decision); or
- where total interim duty paid on the goods exceeds the total duty payable, but not to the extent contended in the application, a repayment of the amount of interim duty overpaid (a negative preliminary decision); or

- where the total amount of duty payable on the goods is equal to or exceeds the total of interim duty that was paid on the goods, any duty in excess of the interim duty paid on those goods will be waived (a negative preliminary decision).

After making a provisional decision the Commissioner will notify the applicant. If a negative preliminary decision is made under subsection 269X(7), the applicant is informed of the reasons and of the right to apply for a review of the Commissioner's decision to the Review Panel. Such application must be made within 30 days of receipt of the notification from the Commissioner.

Where no review is sought following a negative preliminary decision, the Commissioner must, within seven days of the expiry of the period for seeking a review, recommend that the Minister give effect to that decision.

Where a positive preliminary decision is made, under the provisions of subsection 269X(8), the Commissioner must, within seven days of making the decision, recommend that the Minister give effect to that decision.

In accordance with section 269Y, the Minister will, by notice in writing, ascertain the variable factors for each consignment and order that the total interim duty overpaid be repaid or that the total unpaid duty in excess of the interim duty already paid be waived. The applicant is supplied with a copy of the Minister's notice as soon as practicable after issuing the notice and advised of repayment arrangements, where applicable. Once the duty assessment has been finalised, the related interim duty becomes final duty.

38. MONITORING OF MEASURES

38.1 CONTEXT

If a notice is published, that notice creates a liability under the Dumping Duty Act, in relation to any goods to which the notice extends, to pay a special duty of customs on their importation into Australia and, pending assessment of that special duty, to pay interim dumping or countervailing duty.

When a special duty of Customs is imposed by virtue of a dumping duty notice or a countervailing duty notice, that special duty of Customs must be collected and paid. A dumping duty notice means a notice published by the Minister under subsections 269TG(1), (2), 269TH(1) or (2). A countervailing duty notice means a notice published by the Minister under subsections 269TJ(1), (2), 269TK(1) or (2).

A special duty of Customs is defined as:

- dumping duty (subsection 8(2) of the Dumping Duty Act);
- third country dumping duty (subsection 9(2) of the Dumping Duty Act);
- countervailing duty (subsection 10(1) of the Dumping Duty Act);
- third country countervailing duty (subsection 11(1) of the Dumping Duty Act).

38.2 POLICY

Monitoring is the process undertaken whereby the Australian Border Force ensures that the relevant amount of dumping and/or countervailing duty has been collected and paid.

The Commission works closely with the Australian Border Force to assist in the monitoring of measures including referring suspected non-compliance activity. Any suspicious activities or suspected non-compliance can be reported to the Australian Border Force via Border Watch.

39. RETROSPECTIVE NOTICES

39.1 CONTEXT

Article 10.6 of the ADA and Article 20.6 of the SCM Agreement allow duties to be levied on products which were entered for home consumption not more than 90 days prior to the date of application of provisional measures, in limited circumstances.

When considering the publication of a dumping or countervailing duty notice under subsections 269TG(1) or 269TJ(1) of the Act, the Minister may, pursuant to section 269TN of the Act, issue a retrospective notice. The potential effect of this provision is to address situations where importers may stockpile large quantities of the goods in the expectation that they may avoid payment of any dumping or countervailing duties.

Under section 269TN, duties can be imposed retrospectively on goods which have been entered for home consumption between the day of initiation of an investigation (day 0) to the day securities could be taken or were taken, up to a limit of 90 days prior to the date securities could have been or were taken. Retrospective duties can also be imposed where provisional measures (securities) have been applied. This is discussed further in Chapter 26 *Provisional affirmative determination and provisional measures*.

In considering whether a retrospective notice should be published in relation to *dumping duties*, the Minister must have regard to whether:

- goods have been imported into Australia by an importer who the Minister considers knew, or ought to have known, that the goods were dumped, and that material injury would be caused to Australian industry (subsection 269TN(4)(a)); or
- the goods are of a kind the exportation of which to Australia on a number of occasions has caused material injury to Australian industry, or would have caused material injury but for the publication of a notice under section 269TG because they were dumped (i.e. the goods are of a kind which have previously been found to be dumped in Australia) (subsection 269TN(4)(b));

  <u>and</u>

- within 90 days after the entry of the goods for home consumption, security has been taken under section 42 of the Act (or the Commonwealth had a right to require and take securities) (subsection 269TN(3)(a)); and
- material injury, arising from dumping, has been caused to Australian industry by the importation during a short period of large quantities of goods of the same kind (subsection 269TN(3)(b)); and
- publication of a retrospective notice is necessary to prevent the serious undermining of the remedial effect of the dumping duty that will become payable upon publication of the notice (subsection 269TN(3)(b)).

In considering whether a retrospective notice should be published in relation to *countervailing duties*, the Minister must have regard to whether:

- within 90 days after the entry of the goods for home consumption, security has been taken under section 42 of the Act (or the Commonwealth had a right to require and take securities) (subsection 269TN(5)(a)); and
- material injury which is difficult to repair has been caused to Australian industry by the importation during a short period of large quantities of goods because a countervailable subsidy has been received (subsection 269TN(5)(b)); and
- publication of a retrospective notice is necessary to prevent the recurrence of the injury (s. 269TN(5)(b)).

A retrospective notice may be published if the respective criteria above are satisfied, and the Minister has informed the particular importer of the goods, allowed a reasonable opportunity for the importer to comment, and given consideration to the importer's comments (subsections 269TN(4A) and 269TN(6)).

The Minister cannot apply retrospective dumping duties in respect of goods that have entered for home consumption prior to the investigation being initiated (subsection 269TN(4C)).

39.2 PRACTICE

The Commission will generally only investigate whether retrospective duties should apply if an applicant for the implementation of dumping or countervailing duties makes such a claim and provides reasonable evidence to support the claim.

<u>Retrospective notices in relation to dumping duties</u>

Once an investigation is initiated by the Commissioner, when considering whether retrospective duties should apply, the Commission will consider all imports to Australia of the goods, looking at a period prior to the day of initiation up until the day that any securities are taken (following a preliminary affirmative determination that there appears to be sufficient grounds for the publication of a dumping duty notice).

The purpose is to determine if there has been an importation of a *large quantity* of the goods the subject of the investigation during a *short period*. These terms are not defined within the legislation, however, as a matter of policy, when applying these expressions to factual scenarios the Commission would begin its analysis in the following ways.

- A 'large quantity' would be a quantity that is significantly greater than that seen in previous patterns of importations.
- A 'short period' would be a period of time that is not an extended period of time, and would include the period of time between the date of initiation of the investigation and the date securities are taken (or the right to take securities). However, consistent with the WTO Panel finding in *US – Hot*

Rolled Steel[37], this period can also include a period of time where it had become public knowledge that an investigation was imminent i.e. that period prior to the initiation of an investigation.

If a large quantity of the goods is imported during a short period, the Commission must make a further assessment, including a determination of the impact of these importations on the Australian industry producing like goods.

Further, the Commission must also establish whether the importer knew, or ought to have known, that the goods were dumped and would cause material injury. This assessment will consider the importer's history of trade in the goods, its relationship with the exporter, current/recent exposure to the anti-dumping system and its activity in the Australian market. The Commission will examine whether the goods are of a kind which have previously been found to be dumped in Australia. Also relevant are anti-dumping findings of other authorities in relation to the same goods, and as reported in the semi-annual reports to the WTO Committee on Anti-Dumping Practices.

The Commission must also consider whether the publication of a retrospective notice is necessary to prevent the serious undermining of the remedial effect of a dumping duty. This assessment will examine the impact of the importations in the context of the Australian market. The Commission will consider whether duties imposed from the date that a preliminary affirmative determination was made can, of themselves, adequately remedy the injury caused by dumping or whether retrospective duties are necessary to prevent the serious undermining of the remedial effect of a dumping duty.

If the Commissioner recommends to the Minister that a retrospective notice be published, and the Minister agrees to this recommendation, a notice under subsection 269TG(1) of the Act must reflect this, and in accordance with subsection 269TN(4C) duties can apply retrospectively to the goods entered for home consumption on or after the date of initiation of the investigation.

<u>Retrospective notices in relation to countervailing duties</u>

Consistent with the approach in a dumping investigation, when considering whether retrospective duties should apply in a countervailing investigation, the Commission will consider all imports to Australia of the goods during the period prior to the day of initiation up until the day that any securities are taken (following a preliminary affirmative determination that there appears to be sufficient grounds for the publication of a countervailing duty notice).

The purpose is to determine if there has been an importation of a *large quantity* of the goods the subject of the investigation during a *short period***.** These concepts are discussed in the section above relating to retrospective dumping duties.

The Commission must determine if the importation during a short period of a large quantity of the goods has caused material injury to Australian industry which is "*difficult to repair*". The Commission considers that material injury which is difficult

[37] *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* February 2001 WT/DS184/R

to repair is injury that is unlikely to be remedied in the short to medium term through the imposition of purely prospective measures.

The Commission must also be satisfied that imposing retrospective countervailing duties is necessary to prevent the recurrence of the injury caused by the importations of those goods.

Article 20.6 of the SCM Agreement provides that countervailing duties may be applied retroactively only in “critical circumstances” and where it is deemed necessary to do so in order to preclude the recurrence of injury. The Commission will examine the circumstances in which the subsidised products have entered the Australian market and their impact on the domestic industry producing like goods to determine whether such critical circumstances exist.

Consistent with the approach taken in respect of dumping duties, the Commission will only recommend that duties apply retrospectively to the goods entered for home consumption on or after the date of initiation of the investigation.