

ARTICLE 2.2: USE OF EXPORT PRICES TO THIRD COUNTRIES

Paper by New Zealand

The following communication, dated 15 April 2004, is being circulated at the request of the Delegation of New Zealand.

Introduction

At its meeting on 2 May 2003 the Working Group on Implementation agreed to discuss a number of new topics. The following paper sets out New Zealand's position on the use of Article 2.2 of the AD Agreement on the choice of using export prices to third countries or constructed normal values.

Legislative Framework

New Zealand's trade remedies investigations are conducted under the Dumping and Countervailing Duties Act 1988. Section 5 of the Act contains the provisions by which a normal value is calculated. Normally the basis for a normal value calculation is by way of section 5(1) of the Act – the price of like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by the exporter or, if like goods are not sold by the exporter, by other sellers of like goods, bearing in mind the need to make a fair comparison.

Section 5(2) of the Act deals with circumstances where the Chief Executive Officer (of the Ministry of Economic Development) is satisfied that the calculation of a normal value cannot be ascertained by way of sales in the ordinary course of trade. It contains the following provisions:

5. Normal value—

(1) Subject to this section, for the purposes of this Act, the normal value of any goods imported or intended to be imported into New Zealand shall be the price paid for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

(2) Where the Secretary is satisfied that the normal value of goods imported or intended to be imported into New Zealand cannot be determined under subsection (1) of this section because—

- (a) There is an absence of sales that would be relevant for the purpose of determining a price under that subsection; or

- (b) The situation in the relevant market is such that sales in that market that would otherwise be relevant for the purpose of determining a price under subsection (1) of this section are not suitable for use in determining such a price; or
- (c) Like goods are not sold in the ordinary course of trade for home consumption in the country of export in sales that are arm's length transactions by the exporter and it is not practicable to obtain within a reasonable time information in relation to sales by other sellers of like goods that would be relevant for the purpose of determining a price under subsection (1) of this section,—

the Secretary may determine that the normal value, for the purposes of this Act, shall be either—

- (d) The sum of—
 - (i) Such amount as is determined by the Secretary to be the cost of production or manufacture of the goods in the country of export; and
 - (ii) On the assumption that the goods, instead of being exported, had been sold for home consumption in the ordinary course of trade in the country of export,—
- (A) Such amounts as the Secretary determines would be reasonable amounts for administrative and selling costs, delivery charges, and other charges incurred in the sale; and
- (B) An amount calculated in accordance with such rate as the Secretary determines would be the rate of profit on that sale having regard to the rate of profit normally realised on sales of goods (where such sales exist) of the same general category in the domestic market of the country of export of the goods; or
- (e) The price that is representative of the price paid for similar quantities of like goods sold at arm's length in the ordinary course of trade in the country of export for export to a third country.

- (3) ...
- (4) ...
- (5) ...
- (6) ...

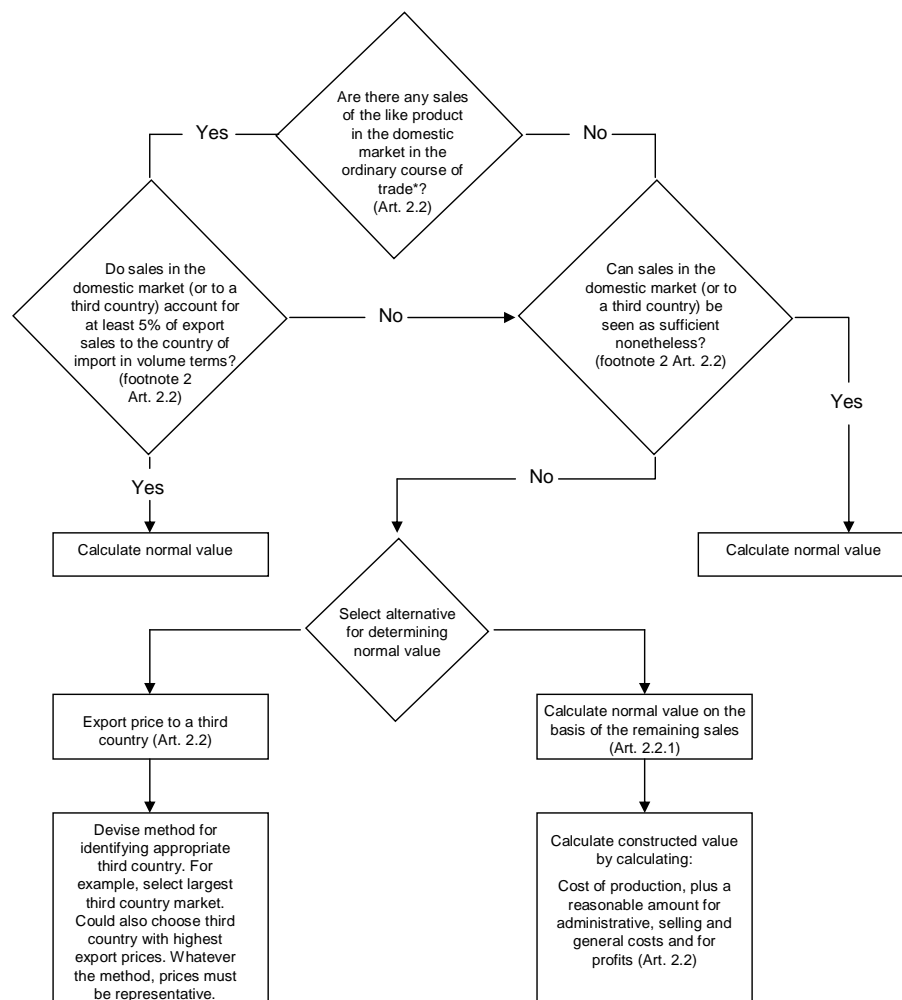
Use of Provisions

New Zealand has not had to use the provisions of Section 5(2)(e) of the Act to establish a normal value in any of the cases it has undertaken since it introduced the Dumping and Countervailing Duties Act in 1988. The preferred choice of practice would be to use sales in the ordinary course of trade as per section 5(1). Where such a situation was not available, then a normal value based on a cost of production calculation or a sale to a third country could be used as per sections 5(2)(d) and (e) of the Act. These two choices are alternatives and do not represent an hierarchical choice.

The provisions of Articles 2.2 of the AD Agreement lay out the basic rules to be applied when an investigating authority is faced with no sales of like product in the ordinary course of trade. It gives examples of such sales (a particular market situation or a low volume of sales that do not permit a proper comparison) and gives the options available to the investigating authority – calculated normal value or sales to a third country.

Negotiating History

Article 2.2 of the current AD Agreement is basically the same as Article 2.4 of the Tokyo Round text although the last sentence of the latter incorporating the general rule on profit has been omitted and Footnote 2 has been added to Article 2.4. During the Uruguay Round negotiations several delegations sought clarification in the area of "ordinary course of trade" and Footnote 2 to Article 2.2 and Article 2.2.1 of the Agreement are the result of this negotiation. Footnote 2 deals with the volume of sales of like product that shall normally be considered a sufficient quantity for the determination of normal value. Article 2.2.1 expands on the basic premise by outlining when authorities can treat sales as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value. It also describes a process for authorities to follow in order to determine this fact. The following decision tree illustrates this process:



In order to ensure that sales are in the ordinary course of trade (the first decision) an authority would have to calculate a value using the guidelines of Article 2.2.1 in order to determine if the sales made within an extended period of time, in substantial quantities, and are at prices which cover all the costs incurred in production over a reasonable period of time. Once this fact has been established the investigating authority has, in effect, completed one of the options it has at its disposal for establishing a normal value for sales not in the ordinary course of trade. Given that it has a figure that it can use to easily establish normal value in these circumstances, an administration would possibly opt to use the calculation option, rather than use the prices of a sale to a third country which may or may not be at a dumped price.

It would be of use to Members of the Working Group on Implementation if those investigating authorities that have used the provision allowing the use of sales to a third country could explain why they opted to use that price rather than a cost of production figure. If no Member has used the provision, or there is general agreement that this methodology will not be used to establish normal value, the question is whether or not such a methodology is necessary.

Another issue that is worthy of discussion is the situation faced by many small countries whose economies are based on export industries. Such industries will normally not be able to meet the sufficiency test of Footnote 2 to Article 2.2 as the product is either not normally consumed on the domestic market or because the domestic market is not large enough, domestic sales cannot meet the necessary level. Although the footnote states that a lower ratio of sales can be acceptable if considered of sufficient magnitude to provide for a proper comparison, administering authorities generally still use a constructed value calculation. Is this procedure then appropriate given that the difference between markets is completely out of the control of the exporting country?

Summary

It is unlikely that New Zealand would rely on the provisions of Article 2.2 and section 5(2)(e) of the Dumping and Countervailing Duties Act which deal with the calculation of normal value using sales of like product when exported to an appropriate third country. New Zealand has so far not needed to use sales to a third country as a basis for normal value, and it is unlikely that this methodology would be used if, because of the market situation or the low volume of sales, such sales did not permit a proper comparison.

As information is generally available on sales in the ordinary course of trade or for calculating a normal value these methodologies are preferred.
