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Committee on Anti-Dumping Practices
Committee on Subsidies and Countervailing Measures

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REPLIES TO QUESTIONS POSED BY THE OFFICE OF THE
UNITED STATES¹ TRADE REPRESENTATIVE CONCERNING
THE NOTIFICATION OF AUSTRALIAN LAWS AND REGULATIONS²

The following communication, dated 5 October 1995, has been received from the Permanent Mission of Australia.

Anti-Dumping:

Q.1 269TAB(1) of the 1901 Act identifies constructed export price ("CEP") cases as sales to Australia which are not at arms length. Prices below "arms length" are defined in 269TAA(1), inter alia, as any prices at which the merchandise is sold at a loss. How does Australia determine whether prices are at 'arms length'? How does this relate to the determination of whether CEP is used?

Answer 1

269TAA(1) defines sales that are not arms length. It sets out three criteria that, if applicable, require the Australian authorities to treat a transaction as non arms length. None of the criteria relates to sales at a loss.

269TAA(1)(a) provides that a purchase or sale shall not be treated as arms length if "there is any consideration payable ... other than their price". The type of consideration that may be covered by this provision would include offset arrangements in the price of other goods traded between the parties.

269TAA(1)(b) provides that a sale shall not be treated as arms length if "the price is influenced by a commercial or other relationship ...". It is not presumed that a relationship *per se* has an influence on the price. If there is no evidence of an influence on the price then the transaction must be considered to be at arms length even though there may be a commercial or other relationship.

269TAA(1)(c) provides that a sale shall not be treated as arms length if "in the opinion of the Minister 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".

¹G/ADP/W/14-G/SCM/W/21

²G/ADP/N/1/AUS/1-G/SCM/N/1/AUS/1.

269TAA(2) provides that the Minister may treat sales of goods by the importer at a loss "... as indicating that the importer ... will directly or indirectly be reimbursed ... for, in respect of, the whole or part of the price". In other words the Minister may treat sales by the importer at a loss as indicating that the condition in paragraph (1)(c) is satisfied, and thereby treat the sale from the exporter to the importer as non arms length.

A factual finding that sales by the importer are at a loss will not automatically require that such sales be treated as non arms length. 269TAA(1)(c) requires the Minister to formulate an opinion as to the existence of a reimbursement or compensation. In formulating this opinion the Minister would be bound by administrative law principles (e.g. to act reasonably and to have regard only to relevant considerations). Thus even if the Minister came to a finding of fact that sales by the importer were at a loss, that finding may not, in the absence of other relevant indicators, form a sufficient basis for the Minister to determine the sale between the exporter and importer was not at arms length.

269TAB(1)(b) relevantly provides that the export price is to be constructed if the purchase of goods by the importer was not arms length.

Q.2 What does Australia consider to be an "arms length" price? What is Australia's test for determining that a price is at "arms length"? Please explain how this relates to the determination of whether CEP is used, consistent with Article 2.3 of the AD Agreement.

Answer 2

269TAA sets out three conditions that, if applicable, require the Australian authorities to treat a transaction as non arms length. An arms length price is therefore one that does not satisfy the conditions of section 269TAA. (Refer to Answer 1.)

As indicated, 269TAB(1)(b) provides that the export price is to be constructed if the purchase of goods by the importer was determined to be not at arms length, including, if appropriate, where that determination is based on sales by the importer at a loss.

Article 2.3 permits reliance upon a CEP where one of two conditions is met. That is, where "... there is no export price ..." or "... where it appears to the investigating authorities ... that the export price is unreliable because of association or a compensatory arrangement".

A decision as to whether the first of these conditions has been met can be made based upon the acceptance of an established circumstance, ie. the absence of an export price.

A decision as to whether the latter condition applies cannot attract the same degree of certainty. Significantly Article 2.3 does not define the terms "association" or "a compensatory arrangement". It requires the application of judgement on the part of the investigating authorities. They must consider the information before them relating to any associations or compensatory arrangements, and evaluate whether any effect on the export price is such as to give rise to an appearance of unreliability.

269TAA(1) provides that export transactions will not be treated as arms length if one of the following three conditions is met:

- (a) where there is a consideration payable other than the price;
- (b) a commercial or other relationship influences the price; or

- (c) where, in the opinion of the Minister, a buyer will be reimbursed, compensated or will otherwise receive a benefit.

If the particular circumstances of the export transaction satisfy one or more of the conditions outlined, this would form a basis upon which Australian authorities could come to a finding of fact that an association or a compensatory arrangement existed.

269TAA(1)(c) is expanded by the provisions of 269TAA(2) because 269TAA(2)(b) is only a condition to be satisfied before the Minister may exercise the discretion conferred by 269TAA(2). The provisions of 269TAA(2) are not mandatory, the Minister is not directed to come to a finding that sales are non arms length in all cases where he is satisfied they have been made at a loss.

Conferring such a discretion is consistent with Article 2.3. As mentioned above, authorities are required to establish an appearance of unreliability only, and the phrase "association or a compensatory arrangement" is neither defined in Article 2.3 nor does its context suggest that it should be given a narrow meaning. It is therefore permissible to regard sales by the importer at a loss as a relevant indicator upon which to base a finding of an "association or a compensatory arrangement."

Q.3 How does Australia determine whether merchandise is sold at a loss under 269TAA(1)?

Answer 3

269TAA(1) does not mention sales at a loss.

269TAA(2) refers to sales by the importer at a loss, and 269TAA(3) includes matters the Minister must have regard to when determining whether goods are sold by an importer at a loss.

Under 269TAA(3), a cost recovery price is determined by adding the price paid or payable for the goods by the importer to identified costs incurred in the importation and sale of the goods. If the cost recovery price is greater than the importer's selling price the sales are, prima facie, at a loss. Consideration is then given to whether the costs are likely to be recovered within a reasonable period of time. If the assessment is that the importer would be unlikely to recover all of its costs within a reasonable period, the sale is treated as being at a loss.

Q.4 It appears that CEP can be used in cases where there is no association between the importer and the exporter. Please explain the circumstances in which Australia uses CEP. How is this consistent with Article 2.3 of the AD Agreement?

Answer 4

Refer to Answer 2.

Q.5 269TAC(1) appears to permit Australia to compare export sales by one company with home market sales by a different company. Under what circumstances would this provision be used? How is it consistent with Article 2.2 of the AD Agreement?

Answer 5

269TAC(1) permits comparison of export sales by an exporter with domestic sales by a different company in the exporter's domestic market.

Article 2.1 of the AD Agreement provides that the normal value is "the comparable price ... for the like product ... in the exporting country". It does not require that the goods be either produced or sold by the company selling on the export market.

Sales by other sellers of like goods in the exporting country would be used where sales by the exporter are not available, or are not considered as reliable. There might, for example, be a relationship which affects the exporter's price in the domestic market.

Article 2.2 provides for the normal value to be determined by reference to a comparable third country sales price or a constructed sales price only "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country" or when such sales do not permit a proper comparison.

Neither Article 2.1 nor Article 2.2, nor any other provision, restricts the consideration to the exporter's sales in the domestic market. Australia's legislation, which requires that if practicable these sales be considered before resort to Article 2.2, is therefore consistent with the Agreement.

Q.6 269TAC(1) appears to allow the use of constructed value or third country prices when the collection of home market prices is "impracticable". Under what conditions would collection of home market information be "impracticable"? How is this practice consistent with Article 2.2 of the AD Agreement?

Answer 6

The practice of using a constructed value or third country price when the collection of "home market prices" is "not practicable" comes under 269TAC(2)(b) rather than 269TAC(1).

269TAC(2)(b) provides for the use of constructed value or third country prices in determining normal value when "like goods are not sold in the ordinary course of trade for home consumption ... in sales that are arms length transactions by the exporter, that it is not practicable to obtain, within a reasonable time, information in relation to sales by other sellers of like goods ...".

The term "not practicable" therefore applies only to other sellers in the domestic market. This provision covers the situation when because of time constraints (answer 14 refers) it was not possible to contact other sellers after it was discovered that like goods are not sold in the ordinary course of trade in sales that are arms length transactions by the exporter in the country of export.

Article 2.2 of the AD Agreement does not stand on its own. It must be considered in the context of the whole Agreement. Article 6.14, which relates to the collection of evidence, states that "the procedures ... (described in Article 6) ... are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to ... reaching preliminary or final determinations ... in accordance with relevant provisions of this Agreement". 269TAC(2)(b) enables the Australian authorities to carry out investigations and make preliminary and final determinations within legislative timeframes consistent with Article 6.14.

Q.7 269TAC(8) provides for adjustment to normal value where there is a difference in times of sale, types of goods, or circumstances of sale, as directed by the Minister. When will adjustments be made under 269TAC(8) and what adjustments will be made? For example, are packing and freight included? See Article 2.4 of the AD Agreement.

Answer 7

Under 269TAC(8) the domestic sales price of like goods must be adjusted to account for all differences in the terms and circumstances of domestic and export sales. The adjustments are made to ensure that any differences will not affect the comparison between normal value and export price. Australian legislation is cast in broad terms and therefore does not contain a definitive list. Export charges such as packing and freight are considered by the Australian authorities when making adjustments under 269TAC(8).

Q.8 Australia does not appear to require that export price and normal value be compared at the same level of trade. Will level of trade adjustments be permitted and, if so, under what circumstances?

Answer 8

As indicated in Answer 7, 269TAC(8) is cast in broad terms but does ensure that the domestic sales price of like goods is adjusted to account for all differences in the terms and circumstances of domestic and export sales. This includes differences in level of trade.

Q.9 Under 269TAF, what criteria will the Minister apply to determine whether there has been a "sustained movement in exchange rates", and how will the Minister select the effective date of an adjustment for a sustained movement in exchange rates? See Article 2.4.1 of the AD Agreement.

Answer 9

269TAF does not specify a basis upon which a determination of a sustained movement in exchange rates is made. Such a determination would be a matter of observation, from authoritative sources, over time.

269TAF(4), (5) and (6) provide a basis upon which a date, or any number of dates, can be notified and the exchange rate applicable on that day, or those days, may then be applied for 60 days thereafter. This procedure was seen as an appropriate mechanism to implement the requirement of Article 2.4.1 that exporters be allowed 60 days to adjust export prices to reflect sustained movement in exchange rates, given that

- the sustained movement may be a "one off" event; or
- there may be continuing movement in rates, and the direction and amount of that movement may change over time; and
- there may be movements which are not sustained, and therefore a procedure for exporters to adjust export prices is inappropriate.

Q.10 Explain how profit will be accounted for in constructed value. See Article 2.2.2 of the AD Agreement.

Answer 10

Article 2.2.2 of the AD Agreement requires profits to be based on actual data pertaining to sales of the like product or if profit cannot be determined on this basis, it may be determined on a number of other bases.

269TAC(2)(c) provides for a constructed normal value. A constructed normal value includes the profit determined by the Minister to apply to domestic sales in the ordinary course of trade in the country of export.

269TAC(5B) provides that the profit so included is to be determined in accordance with Regulation 181. Regulation 181 states matters the Minister must take account of in determining an amount to be the profit on the sale of goods for the purpose of constructing a normal value. This regulation requires the Minister to calculate an amount representing the profit using data relating to the sale of like goods in the ordinary course of trade or if profit cannot be determined on this basis, the regulation provides a number of other bases which are consistent with Article 2.2.2.

Where domestic sales are at a loss and are therefore determined to be not in the ordinary course of trade, a profit component is not included in a constructed normal value because of the operation of 269TAC(13) and 269TAAD.

Subsidies and Countervailing Measures:

Q.11 269TACC(4)(a) does not mention the concept of "risk capital", as referred to by Article 14(a) of the SCM Agreement. In the absence of a specific provision, how would Australia ensure the conformity of its practice with the Agreement?

Answer 11

The phrase "normal investment practice" was considered to encompass "the provision of risk capital" and it was therefore not necessary to include a specific reference to risk capital in the paragraph.

Q.12 Explain the phrase in 269TAAC(2) "without limiting the generality of the circumstances in which a subsidy is specific." See Article 2 of the SCM Agreement.

Answer 12

The need for the expression "Without limiting the generality of the circumstances in which a subsidy is specific" in 269TAAC(2) arises from the legislative drafting of Section 269TAAC, in particular the need for the Minister to make a determination under subsection (4) taking account of subsection (5). The particular criteria for specificity and non-specificity are set out in 269TAAC and are the same as in Article 2 of the SCM Agreement. Although there are slight differences, these are due to Australian legislative drafting requirements. The expression does not imply that the Australian authorities could apply the conditions in respect of specificity in a manner different from Australia's WTO rights and obligations.

Q.13 How does Australia interpret the term "particular enterprises", as it is used in 269TAAC?

Answer 13

The phrase, "particular enterprises" has the same meaning as "certain enterprises" in Article 2 of the SCM Agreement.

Procedures:

Q.14 While it appears from the timetable that investigations will be completed within one year, there is no explicit statement of such a requirement. In the absence of an explicit provision, how does Australia

ensure conformity of its practice with Article 5.10 of the AD Agreement and Article 11.11 of the SCM Agreement, which requires completion of investigations in one year, and in no instance longer than 18 months?

Answer 14

Timeframes for the various elements of an inquiry are as follows:

- 269TC(4)(c) refers to publication of the period for making a preliminary finding which is 120 days or another period as prescribed by regulations. Customs Regulation 183AB states that the period for making a preliminary finding is the period ending 100 days after the initiation of the investigation or 120 days if a longer period is necessary.
- 269TD(2) requires the Comptroller to refer a positive preliminary finding to the Anti-Dumping Authority within 7 days of publication of the preliminary finding notice.
- Subsection 7(1) of the Anti-Dumping Authority Act provides that, from the date the preliminary finding is referred to the Anti-Dumping Authority by Customs, the Authority has a period of 120 days, or another period if prescribed by the regulations (no other period is prescribed), to report to the Minister recommending whether definitive measures should be imposed.

The Australian legislation therefore places a maximum time limit of 247 days on the Australian authorities to report to the Minister. Given these constraints, specific provisions to reflect Article 5.10 of the AD Agreement and Article 11.11 of the SCM Agreement were not considered necessary.

Q.15 Australia's law does not appear to require the Minister, before disregarding information considered "unreliable", to consider the reasonable ability of interested parties to respond. In the absence of an explicit provision, how will Australia ensure the conformity of its practice with Article 6.8 and Annex II of the AD Agreement?

Answer 15

The Administrative Decisions (Judicial Review) Act requires the Australian administration to adhere to laws of natural justice and procedural fairness. A decision-maker must provide all interested parties with an opportunity to represent their interests and address the information from and claims of others, must take into account only relevant factors and must act reasonably. A failure to so act will cause the Federal Court to set aside the decision and to refer the matter back to the decision-maker to be remade.

This legal framework in which Australian administrators operate ensures procedures and practices are at least to the standards of procedural fairness required by Article 6.8 and Annex II to the AD Agreement. Given this legal framework, specific statutory provisions to address these procedural fairness issues are not required within the anti-dumping legislation.

Australia's procedural requirements would require the Minister, before disregarding information considered "unreliable", to ensure that interested parties had been given a reasonable opportunity to address the claimed reasons for disregarding information provided.

Q.16 Australia's law does not appear to require the Minister not to disregard information submitted by a party where that party has acted to the best of its ability. In the absence of an explicit provision,

how would Australia ensure the conformity of its practice with Article 6.8 and Annex II, paragraph 5 of the AD Agreement?

Answer 16

Refer to Answer 15.

The Minister is required to base decisions on all relevant information available, thus information submitted by a party which has acted to the best of its ability would not be disregarded unless it was considered not relevant.

Q.17 Australia's law does not appear to require the Minister to use adverse information only where a party has not been cooperative by not acting to the best of its ability. Explain the circumstances under which adverse information will be used. See Article 6.8 and Annex II, paragraph 6 of the AD Agreement.

Answer 17

Refer to Answer 15.

Paragraph 7 of Annex II places an obligation on an administration that information from "a secondary source" should be used with "special circumspection". The paragraph recognises that a situation where an interested party does not cooperate could lead to a result which is less favourable to the party than if the party did cooperate.

Australia is uncertain as to what the US is referring when it uses the term "adverse information". If this is meant to convey the selection of information under "best information available" that is the most adverse, then, the Australian authorities do not adopt such a practice and indeed are precluded from so doing by well accepted principles of administrative law, in particular those relating to natural justice. In addition Australia does not consider that such an approach would be consistent with the obligations under the Agreements.

Relevant provisions contained in the Customs Act are 269TAB(3) and 269TAC(6). These provisions enable the Minister to determine export price and normal value having regard to all relevant information when the Minister is satisfied that sufficient information has not been furnished or is not available. The Australian authorities use these provisions when the exporter or importer refuses to supply, or only supplies in part, the information requested. In such situations a judgement is made as to which information held is the most reliable. This may be from the complainant, an independent third party or any other source. However any information used under these provisions must be reliable.

Q.18 Does Australia's law give respondents with an opportunity to correct deficient submissions, or to give reasons for rejecting information, as required by Annex II, paragraph 6 of the A-D Agreement?

Answer 18

Yes. Refer to Answer 15.

Q.19 Under what circumstances, when employing secondary information, will Australia check the information against independent sources? See Annex II, paragraph 7 of the AD Agreement.

Answer 19

Refer to Answer 15.

As explained in Answer 17 the Australian authorities, when using best information available, are required by administrative law principles to consider all reasonably available and relevant information and to use that information considered to be the most reliable. The process of determining the reliability of information will include checking that information against independent sources.

Q.20 Does Australia's law require the Minister to take into account all information which is verifiable, which is appropriately submitted so that it can be used without undue difficulties, and which is supplied in a timely fashion? See Annex II, paragraph 3 of the AD Agreement.

Answer 20

Refer to Answer 15.

Information which is verifiable (indeed all relevant information) must be considered. As noted in the previous reply, Australian authorities including the Minister are by law required to consider all reasonably available and relevant information and to base decisions on that information considered to be the most reliable.

Q21. 269TAA(3)(b) of the Act calls for the Minister, in determining whether goods are sold at a loss (for the purposes of treating such sales as an indication that a related importer will be reimbursed or otherwise receive a benefit from the exporter and that thus the sale is not at arms length) to have regard to "such other amounts as the Minister determines to be costs necessarily incurred in the importation and sale of goods." 269TAB(1)(b) and (c) calls for the export price for sales not at arms length to be reduced by "duties of Customs" and by "any costs, charges or expenses arising in relation to the goods after exportation." Do these provisions permit Australia to deduct anti-dumping duties from the related party's resale price in Australia as costs? How is this consistent with the AD Agreement?

Answer 21

Australian authorities do not deduct anti-dumping duties from the importer's resale price in Australia as costs.

Dumping duty is defined in 8(2) of the Customs Tariff Anti-Dumping Act as a "special duty of Customs" and it is not therefore a "... duty of Customs ..." as mentioned in 269TAB(2)(a). As a result, dumping (and countervailing) duties are not "prescribed deductions" under 269TAB(2)(a).

Q.22 269ZG(2) of the Act requires that new shippers reviews be completed within 100 days after applications are lodged (ie. filed with the Minister). May new shippers file their requests for accelerated reviews at any time following the final determination?

Answer 22

269T(1) includes new exporters in the definition of residual exporters. 269ZE(1) of the Customs Act allows residual exporters to lodge an application for an accelerated review if a dumping or countervailing duty notice has been published ie. a positive final finding has been made. Thus an

application for an accelerated review can be made at any time following the publication of a final determination.

Q.23 Does Australia have an anti-circumvention provision?

Answer 23

Australia understands that anti-dumping and countervailing measures can only apply to particular goods, generally referred to among practitioners as "like goods". We further understand that before such measures can be applied, inquiries must establish that the like goods have been dumped and / or subsidised, and caused or threatened material injury to the industry producing like goods.

Australia recalls that most of the discussion on anti-circumvention in the Uruguay Round related to the automatic extension of measures to goods other than the like goods, such as parts for those goods. If the question is "does Australia have such provisions?", the answer is no and, in any case, Australia does not see how they would be consistent with the AD and SCM Agreements.

Q.24 How does Australia determine whether a product is within the scope of an investigation?

Answer 24

The applicant is required to describe the goods in respect of which measures are sought, and when the application is initiated that description serves to set the scope of the investigation.

Injury:

Q.25 269TAE (1) of the Act states that material injury to an Australian industry "has been or is being caused" or "is threatened or would or might have been caused" "because of any circumstances in relation to the exportation of goods to Australia from the country of export." Explain how this language is consistent with:

- (a) the definition of material injury as a present condition contained in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement;*
- (b) the definition of threat of material injury as "based on facts and not merely on allegation, conjecture or remote possibility" contained in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement; and*
- (c) the requirement of a causal relationship between the dumped or subsidised imports and the injury to the domestic industry contained in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement.*

Answer 25

- (a) The phrase "would or might have been caused" was included in 269TAE(1) to enable retrospective definitive measures to be imposed, under 269TG(1), for the period for which provisional measures have been applied.*

269TG(1)(ii) provides for the imposition of definitive measures when because of dumping "material injury to an Australian industry producing like goods would or might have been caused

if this security (provisional measure) had not been taken". This provision is consistent with Article 10.2 of the AD Agreement.

- (b) 269TAE(1), which embraces all possibilities for consideration of injury to an Australian industry, makes provision for the possibilities recognised by Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement. 269TAE(1) must be read in conjunction with 269TAE(2B) which limits the Minister's consideration of threat to circumstances "as would make that injury foreseeable and imminent unless ... (definitive) ... measures were imposed".
- (c) 269TG, 269TJ and 269TJA require that the Minister be satisfied that dumped and/ or subsidised goods has caused, is causing or is threatening to cause material injury to the Australian industry before measures can be imposed. 269TAE simply lists factors the Minister may have regard to in determining, for the purposes of 269TG or 269TJ, whether material injury to an Australian industry has been or is being caused or is threatened.

Q.26 269TAE(1) of the Act states that "the Minister may ... have regard to" the following criteria in order to determine whether an Australian industry has been materially injured, threatened, or the establishment of an industry materially hindered. How is the apparently discretionary language "may ... have regard to" consistent with the "shall consider" requirement of Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement?

Answer 26

269TAE includes an indicative, but not exhaustive, listing of those factors to which the Minister may have regard when determining whether material injury has been caused, or threatened, to an Australian industry.

In opening remarks at the Joint Committee Meeting on 20 July 1995, Australia provided a general statement relating to issues of procedural fairness and the rights of all interested parties to represent their interests. Those comments address the issue raised in this question.

As indicated in that statement, all decisions by administrators must have regard to relevant considerations, and not have regard to irrelevant considerations. The inclusion of an indicative and non exhaustive list of considerations in legislation has the effect of establishing that each is relevant - and must be addressed - unless it is clearly irrelevant given the circumstances of a particular case.

Q.27 Article 3.2 of the AD Agreement and Article 15.2 of the SCM Agreement provide that price undercutting is "significant" or that dumped or subsidised imports depress prices to a "significant degree" or prevent price increases to a "significant degree". How is 269TAE(1)(d)-(f) of the Act consistent with these requirements that price effects be significant?

Answer 27

Australia's legislation requires that price undercutting and depression and the prevention of price increases will be considered. Where price effects are considered to be insignificant they could not form the basis for a finding that injury was material.

269TAE ensures that price effects will be addressed consistent with Articles 3.2 of the AD Agreement and 15.2 of the SCM Agreement.

Q.28 269TAE(3) of the Act provides a list of the relevant economic factors to be considered. Is this list exhaustive or are other factors also considered, such as inventories, factors affecting domestic prices, and other relevant economic factors as provided for in Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement?

Answer 28

269 TAE(3) is drafted as an exhaustive list of 'relevant economic factors' but it serves only to define a term used in 269TAE(1). 269TAE(1) is a non exhaustive list, and in that respect reflects the non exhaustive lists of considerations in Articles 3.4 of the AD Agreement and 15.4 of the SCM Agreement.

Q.29 269TAE(2B) of the Act provides that determinations regarding threat of material injury "must take account only of such changes in circumstances ... as would make that injury foreseeable and imminent unless dumping or countervailing measures were imposed." How will the criteria for threat determinations articulated in Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement be implemented or at least considered in the threat determination?

Answer 29

269TAE does employ the words "foreseeable and imminent". However the words in Article 3.7 of the AD Agreement " ... the authorities should consider, inter alia, such factors as: ..." is clearly an illustrative and non-exhaustive list of factors. The phrase in 269TAE(2B) "as determined by the Minister" covers the factors included in Article 3.7 and other factors considered on a case by case basis.

Q.30 269TAE(2B) provides guidance on how subsections (1) and (2) are to be considered for the threat determination. Is similar separate guidance provided regarding consideration of those subsections for material injury determinations and for material hindrance determinations?

Answer 30

269TAE(2B) was added to the material injury provisions as, in Australia's view, Articles 3.7 of the AD Agreement and 15.7 of the SCM Agreement demanded it. There is no comparable provision relating to material injury, or material hindrance to the establishment of an industry.

Q.31 269TAE(2C) of the Act permits consideration of the cumulative effects of imports from more than one country "if having regard to" the conditions of competition between imported goods and between imported goods and the domestic like good, "the Minister is satisfied that it is appropriate to do so." How will the other requirements of Article 3.3 of the AD Agreement and Article 15.3 of the SCM Agreement be considered, which provide that the cumulative effect may be considered "only if" a determination is made that the dumping margin or amount of subsidisation is more than de minimis (pursuant to Article 5.8 or Article 11.9, respectively) and that the volume of imports from each country is not negligible?

Answer 31.

269TDA provides that anti-dumping investigations must be terminated where the dumping margin is *de minimis* or the volume of imports negligible. As preliminary findings and final findings are made only in relation to goods under inquiry, imports from sources in relation to which an inquiry has been

terminated would not be taken into account in assessing the affects of dumped imports, and the requirement of Article 3.3(a) of the AD Agreement is satisfied.

269TAE(2C) contains only the part of the test required by Article 3.3(b) of the AD Agreement. Given the effect of the termination provisions, specific reference to the other provisions of Article 3.3 was not considered necessary.

Q.32 The term "Australian industry" is used in several sections of the Act and is briefly defined in 269T(4) as consisting of a person or "persons who produce like goods in Australia". How does Australia's application or construction of the term "Australian industry" conform with the requirements of the Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement, specifically regarding:

- (a) the requirement that domestic producers constitute a "major proportion of the total domestic production;"*
- (b) the definition of producers "related to exporters or importers;" and*
- (c) the restrictions regarding dividing production "into two or more competitive markets," (ie. regional industries)?*

Answer 32

Article 4.1 defines the term "domestic industry" as "the domestic producers as a whole" or "a major proportion" of them. 269TAE(1) refers to "material injury to an Australian industry". 269T(4) defines an Australian industry as "a person or ... persons [i.e. all such persons] who produce like goods in Australia". The Australian legislation does not have a provision relating to "a major proportion". The Australian authorities consider material injury to the whole domestic industry.

Article 4.1(i) of the AD Agreement provides for producers who are "related to the exporters or importers or who are importers themselves" to be excluded from the definition of domestic industry. This provision is discretionary. The Australian legislation does not contain this provision.

Article 4.1(ii) allows Members to consider divided competitive markets "in exceptional circumstances". Australian legislation does not contain this provision.

Q.33 Is there a requirement consistent with Article 3.6 of the AD Agreement and Article 15.6 of the SCM Agreement regarding examination of production data on the basis of like product or the narrowest group or range of products?

Answer 33

The requirement of Article 3.6 of the AD Agreement and 15.6 of the SCM Agreement is implemented by the "Application for Anti-dumping and Countervailing Duties" Form. Section L of that form requires certain information relating to Profit/Loss be provided. This section specifically requests the following information be provided.

- "1. Provide copies of trading and profit and loss statements for the like goods or for the narrowest group or range of products which includes the like goods, for the period commencing from the financial year prior to the start of injury through to the current financial period."

Q.34 Section 269TB(4)(b) of the Act requires that applications for anti-dumping or countervailing duty actions "be in an approved form" and "contain such information as the form requires." Is the information required on the approved form consistent with the requirements of Article 5.2 of the AD Agreement and Article 11.2 of the SCM Agreement?

Answer 34

The application requires answers be given to a number of questions asked under the following headings:

- A. Applicants Details (including identity of the applicant)
- B. The Australian Industry (including volume and value of domestic production of all known domestic producers)
- C. The Goods (including description of the product)
- D. Source of Imports (including names of countries of export and exporters and names of importers)
- E. Export Price (including information on export prices)
- F. Normal Value (including information on domestic prices in the country of export)
- G. Price Comparison
- H. Dumping Margin
- I. Subsidisation
- J. Material Injury (including information on volume of allegedly dumped imports, effect on prices and consequent impact on the domestic industry)
- K. Causal Link
- L. Profit/Loss

As can be seen from the above list, the form includes all the information required in Articles 5.2 of the AD Agreement and 11.2 of the SCM Agreement.³

Q.35 269TC(4)(e) of the Act specifies that interested parties will have a period of "not more than 40 days after the date of initiation of the investigation" to lodge "submissions concerning the publication of the notice sought by the application." How is this consistent with Article 6.2 of the AD Agreement and Article 12.3 of the SCM Agreement?

Answer 35

Article 6.2 of the AD Agreement requires authorities to provide interested parties with a "full opportunity for the defence of their interests" throughout the investigation.

269TC relates to the preliminary investigation. 269TC(4) requires the Comptroller to publicly notify the decision to initiate an investigation and include certain matters in the notice. One of those matters, specified in 269TC(4)(e), is an invitation to interested parties to lodge submissions within 40 days of initiation of the investigation. (This requirement is considered necessary because of the legislative timeframes in which the Australian authorities operate.) However this requirement is subject to:

- 269TC(6), which provides for an extension of time for making a submission; and

³Interested persons are requested to contact the Secretariat, Office 1023, Tel. 739 51 09.

- 269TD(1), which requires the Comptroller, when making a preliminary finding, to take into account the application, submissions received and any other matters considered relevant. "Other matters" may include submissions received after the 40 day deadline.

The legal requirements governing the conduct of final inquiries are included in Part IV of the Anti-Dumping Authority Act. Subsection 23(2) lists the matters which must be included in a public notice of the commencement of an inquiry. 23(2)(g) requires the notice to "invite interested parties to lodge with the Authority, within a specified period of not less than 40 days after the date of the public notice of the inquiry, submissions concerning the subject matter of the inquiry".

Subsection 7(6) of the Anti-Dumping Authority Act requires the Authority to have regard to all submissions received within the period specified in the notice of inquiry under section 23. Subsection 7(7) requires the Authority to have regard to submissions that relate to the statement of essential facts placed on the public record and received within 7 days after the statement is placed on the public record.

As previously explained in Answer 15, under Australian administrative law a decision-maker must provide all interested parties with an opportunity to represent their interests and address the information from and claims of others.

Q.36 Are there any requirements concerning how information is to be sought from interested parties in an investigation consistent with Article 6.1 of the AD Agreement and Article 12.1 of the SCM Agreement?

Answer 36

269TC(4)(e) requires the Comptroller to include in a public notice of the initiation of a preliminary investigation an invitation to interested parties to lodge submissions. Questionnaires are sent to all identified importers and exporters on the day the initiation notice is published. The questionnaires describe all the information that is required to be provided in submissions.

The Anti-Dumping Authority publicly notifies the commencement of a final inquiry in accordance with section 23 of the Anti-Dumping Authority Act. 23(2)(g) requires the Authority to invite interested parties to lodge submissions "concerning the subject matter of the inquiry". Importers and exporters identified during the preliminary investigation, and others found to exist, are advised of the information required to be included in a submission.

REPLIES BY AUSTRALIA TO QUESTIONS FROM THE UNITED STATES
(G/ADP/W/14/Suppl.1 - G/SCM/W/21/Suppl.1) CONCERNING THE NOTIFICATION OF
AUSTRALIAN LAWS AND REGULATIONS (G/ADP/N/1/AUS/1 - G/SCM/N/1/AUS/1)

Q.1 Is there a provision under Australian law to give guidance to the Minister of which export price should be used?

Answer 1

It is not necessary to give guidance to the Minister on which export price should be used because, wherever practicable, all export prices during the investigation period are used in the determination of dumping margins. 269TACB(1) requires the Minister to compare export prices of goods, established in accordance with 269TAB, exported to Australia during the investigation period with corresponding normal values, determined under 269TAC. In accordance with 269TACB(2), the Minister may make comparisons on a weighted average basis; or a transaction to transaction basis; or a combination of the two.

In certain circumstances, where there are a large number of exporters, sampling may be applied under 269TACB(8).

Q.2 If sales in the export market are found to be below cost, what price will the Australian officials use to begin constructing the export price?

Answer 2

269TAB(1)(b) provides for the export price to be constructed if the purchase of the goods by the importer was determined to be non-arm's length including, if appropriate, where that determination is based on sales by the importer at a loss.

An export price is constructed from "the price at which the goods were so sold by the importer ... less the prescribed deductions" regardless of whether the goods were on-sold by the importer at a loss.