

# WORLD TRADE ORGANIZATION

RESTRICTED

**G/ADP/AHG/W/29**

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**Committee on Anti-Dumping Practices  
Ad Hoc Group on Implementation**

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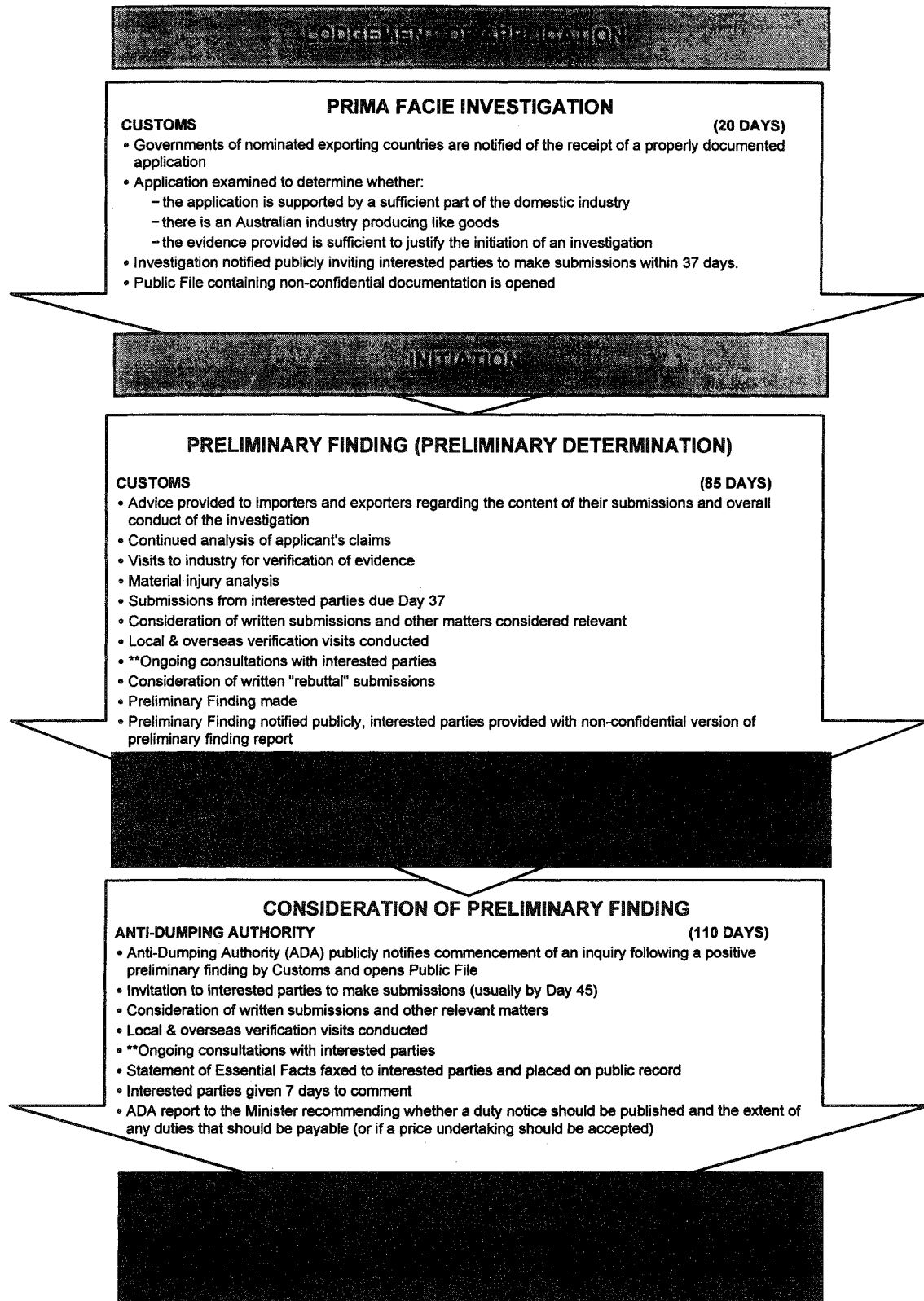
TIMELINE, CONFIDENTIAL INFORMATION, AND LESSER  
DUTY RULE (PARAGRAPH 3 OF WTO/AIR/643)

Information Provided by Australia

The following communication, dated 7 October 1997, has been received from the Permanent Mission of Australia.

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**THE ANTI-DUMPING INVESTIGATION PROCESS**  
**A FLOWCHART OF EVENTS**



\*\* Australian legislation does not contain a specific provision which provides for interested parties to meet (those parties with adverse interests). However, interested parties are given a full opportunity for the defence of their interests through the course of the investigation. This is accomplished through the maintenance of a public record where written allegations and rebuttals may be made. Interested parties may also present further information during verification visits at company premises (information given orally must be subsequently put in writing for inclusion on the public record - subject to confidentiality considerations). Further, the authorities will consult with interested parties at their request during any stage of the investigation, and will arrange a meeting of parties where all participants are agreeable.

This flowchart represents the investigative process where the prima facie investigation, preliminary finding and final finding decisions are positive. Avenues of appeal to the Anti-Dumping Authority exist where:

- an application is rejected (a negative prima facie decision);
- an investigation is terminated;
- a negative preliminary finding is made.

The time-frames shown are for a typical anti-dumping and/or countervailing investigation. These time-frames may be extended in exceptional circumstances, including, in particular:

- the complexity or novelty of the issues to be considered;
- the variety of goods to be considered;
- the number of persons whose activities must be investigated; or
- the difficulty of obtaining evidence.

## INFORMATION WHICH IS CONFIDENTIAL BY NATURE

### Introduction

Article 6.5 of the WTO Anti-Dumping Agreement provides that any information which is by nature confidential, or which is provided on a confidential basis, upon good cause shown, be treated as such by the authorities.

### Australian Legislation

Sections 269ZI and 269ZJ of the *Customs Act 1901* (see pages 82-86 of G/ADP/N/1/AUS/1) set out the requirements for the provision of information to an investigation which is claimed to be confidential or information whose publication would adversely affect a person's business or commercial interests. Interested parties are required to provide a non-confidential summary which contains sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

Section 269ZJ(5) of the Customs Act provides that where the authorities disagree with a person's claim that information is confidential or whose publication would adversely affect a person's business or commercial interests, and despite the authorities opinion, the person making the claim will not prepare a non-confidential summary for inclusion in the public record, the authorities may disregard that information.

Australian legislation *does not* provide a definition of information that can be considered to be confidential or information whose publication would adversely affect a person's business or commercial interests.

Australia does not provide for disclosure pursuant to a protective order.

### Information that is Confidential by Nature

In order for the authorities to treat information as confidential by its nature, it must be "secret" i.e. the facts or knowledge must not be in the public domain. This is shown where the information or documents are not part of public knowledge or are not accessible to the public. Documents or information with this status must have some particular "value" which sets them apart from commonly available material. The latter can not be rendered confidential by the mere presence of a stamp of "secret" or "confidential".

It is accepted that any information which would give a commercial advantage to a competing party, or the disclosure or publication of which would cause an adverse affect to the competitive position of the person, will be considered confidential by nature. Such information generally relates to "trade secrets" including materials composition production processes and equipment specifications. Information also considered "confidential" will generally include commercial information such as costs, sales, purchases, client identification, inventories, profit, losses and expenditure.

### Other Information

It should be noted that there is a second category of information, which, although not of itself confidential by nature, nevertheless is provided to the investigating authorities on the understanding that it will be treated as "confidential". Information in this second category is claimed as "confidential" by a desire to protect the interests of the source of the information. Although this type of information is not commonly submitted to an investigation, this circumstance generally arises in relation to information within the exporter's domestic market, but has included information on material injury claims. Where the investigating authorities are satisfied that disclosure of information may be harmful to the source of that information, it will be treated as "confidential".

### List of Information Treated as Confidential by Nature

Typically, the following non-exhaustive list of information is gathered in the course of an investigation and is treated as confidential by its nature.

## COMMON ELEMENTS

### 1. Company Background

Information concerning public companies (e.g. "Proprietary Limited" or "Limited" companies) and other companies incorporated under Corporations Law is readily available via Government agencies. However, there is no requirement for publication of information relating to private companies (e.g. sole traders, family companies and trusts) thus this information may be considered confidential by nature. This background information includes:

- ownership
- organizational structure and functions of divisions
- audited profit and loss accounts
- administrative, selling & general costs
- non-operating income and expenses
- total sales revenue per annum

Company and market information (for all companies) which would normally be considered confidential by nature includes:

- accounting structure e.g. profit centres or central accounting
- charts of account and ledgers
- commercial relationships with suppliers
- agreements/contracts with suppliers
- levels of sales (e.g. distributor, retail)
- methods of sale (e.g. bulk, containers)
- projections and marketing strategies
- factors affecting sales and competition
- market share of company
- major competitors
- market price leaders/discounting practices
- major customers
- selling and distribution arrangements

### 2. Sales on the Domestic Market

- sales history
- inventories
- sales volumes
- net sales revenue
- purchase orders
- confirmation orders
- price lists
- sales invoices
- sales costs
  - packaging*
  - inland freight*
  - handling charges*
  - insurance*
- agreements/contracts with customers
- forward orders
- payment documentation e.g. T/Ts, Letters of Credit, Bills of Exchange
- bank statements
- payment terms
- sales tax payable
- sales incentives

COMPLAINANT

1. <u>Company Background</u> - as above
2. <u>Sales on the Domestic Market</u> - as above
3. <u>Manufacturing</u> <ul style="list-style-type: none"> <li>- technical specification sheets</li> <li>- materials content data</li> <li>- production processes information</li> <li>- production equipment specifications</li> <li>- production capacity</li> <li>- production standards and variances</li> <li>- production volumes</li> <li>- no. production staff</li> <li>- costs of production             <ul style="list-style-type: none"> <li><i>factory overheads</i></li> <li><i>labour costs</i></li> <li><i>raw materials cost</i></li> <li><i>research and development costs</i></li> <li><i>royalties/licence fees</i></li> <li><i>finance costs</i></li> </ul> </li> <li>- changes in stocks</li> </ul>

EXPORTER

1. <u>Company Background</u> - as above
2. <u>Sales on the Domestic Market</u> - as above
3. <u>Manufacturing</u> - as above
4. <u>Exports</u> <ul style="list-style-type: none"> <li>- volume and value of trade per country and importer</li> <li>- level of trade</li> <li>- models/types of goods exported</li> <li>- purchase orders</li> <li>- confirmation orders</li> <li>- contracts</li> <li>- price lists</li> <li>- invoices</li> <li>- packing</li> <li>- Bills of Lading or Air Waybills</li> <li>- place of export</li> <li>- level of sales e.g. f.o.b., c.i.f.</li> <li>- terms of sales e.g. sight, 60 days from Bill of Lading</li> <li>- forward orders</li> <li>- sales costs             <ul style="list-style-type: none"> <li><i>packaging/packing</i></li> <li><i>inland freight</i></li> <li><i>container handling charges, port charges</i></li> <li><i>customs charges</i></li> <li><i>drawback</i></li> <li><i>overseas freight</i></li> <li><i>insurance</i></li> </ul> </li> <li>- payment documentation e.g. T/Ts, Letters of Credit, Bills of Exchange</li> <li>- any rebates/discounts not shown on invoice</li> <li>- any financial assistance, advertising materials, warranty etc. supplied to importers</li> <li>- currency and conversion rate</li> </ul>

IMPORTER

1. <u>Company Background</u> - as above
2. <u>Sales on the Domestic Market</u> - as above
3. <u>Imports</u> <ul style="list-style-type: none"> <li>- import volumes</li> <li>- price lists</li> <li>- forward orders</li> <li>- purchase orders</li> <li>- confirmation orders</li> <li>- sales invoices</li> <li>- customs entries</li> <li>- packing lists</li> <li>- Air Waybills/ Bills of Lading</li> <li>- level of sales e.g. f.o.b., c.i.f.,</li> <li>- terms of sales e.g. sight, 60 days from Bill of Lading</li> <li>- payment documentation e.g. T/Ts, Letters of Credit, Bills of Exchange</li> <li>- finance costs</li> <li>- forward exchange contracts</li> <li>- import costs <ul style="list-style-type: none"> <li><i>freight charges</i></li> <li><i>insurance</i></li> <li><i>container handling charges, port charges</i></li> <li><i>customs duty/sales tax</i></li> <li><i>customs brokers fees</i></li> <li><i>inland freight</i></li> <li><i>warehousing</i></li> </ul> </li> </ul>

NON INJURIOUS PRICE CALCULATION - THE LESSER DUTY RULEIntroduction

The difference between the normal value and export price (or the amount of countervailable subsidy) sets the maximum amount of duty payable.

Article 9.1 of the WTO Anti-Dumping Agreement notes that it is desirable that anti-dumping duty be *less* than the dumping margin if such lesser duty would be adequate to remove the injury to the domestic industry. Article 19.2 of the Agreement on Subsidies and Countervailing Measures mirrors this provision in relation to countervailing duty.

Australian Legislation

In accordance with ss. 8(5A), 8(5B), 9(5A) 10(3C), 10(3D), and 11(5) of *the Customs Tariff (Anti-Dumping Act) 1975* (see pages 93-101 of G/ADP/N/1/AUS/1), the Minister must have regard to the desirability of fixing a lesser amount of duty such that the sum of the export price and the lesser amount of duty does not exceed the non-injurious price. In other words, a price sufficient to remove the injury caused by the dumping and/or countervailing.

Section 269TACA of the *Customs Act 1901* defines the non-injurious price as the "minimum price necessary ... to prevent the injury ...", but does not give a method for calculating this price.

### Practice

The usual method for determining a non-injurious price (NIP) is, first, to determine an "unsuppressed selling price" (USP) for the goods in Australia. In assessing the USP, customs preference is to examine the market for prices of the locally produced goods at a time when the market was not affected by dumping or subsidization.

The market may not always, however, allow a reliable measure of the USP. The prevailing market price may not be a reliable measure because it is affected by dumping. Further, if dumping has been occurring for some time then it may not be possible to use a price before the dumping occurred as the price is dated and no longer relevant. The industry may have undergone significant structural changes since the time it was unaffected by dumping or subsidization.

In such circumstances it may be necessary to calculate the USP from the local producer's current cost to make and sell, plus an estimate of the profit (if any). Profit on sales by closely related industries may be examined using published profit surveys (e.g. from stock exchange information, business publications or the Australian Bureau of Statistics); or the industry may provide details of the margin on sales they normally would have achieved in the absence of dumping or subsidization. Where it is apparent that the industry would be selling at a loss (even in the absence of dumped or subsidized goods in the marketplace) a "nil" profit will be allocated.

Once the USP has been determined, all relevant costs which would be incurred by an importer are deducted to arrive at a Free-On-Board (f.o.b.) price. The NIP is normally calculated in f.o.b. terms for the country of export as the majority of anti-dumping and countervailing duties are based on f.o.b. prices. (It is however possible for the NIP to be set at an ex-factory level.)

Deductions are made using information relating to the most efficient representative importer (i.e. usually the importer with the lowest on-costs, at the chosen level of customer). Deductions will include all costs incurred in getting the goods from the export f.o.b. point (or another point if appropriate) to the chosen level of customer in Australia, including all into-store costs and duties. These costs are usually identified during verification visits to importers in the ordinary course of an investigation. An example of the calculation of a NIP derived from a USP is shown below:



EXAMPLE OF NON-INJURIOUS PRICE CALCULATION

	<u>\$A/unit</u>
USP (market or costs based)	1.200
Less Profit (if any)	0.150
Less AS&G expenses	0.175
Less packaging costs	0.089 <sup>1</sup>
Less into store costs	0.005
Less o/s freight & insurance	0.064
Duty inclusive price	0.717
Less duty at 10%	<u>0.065</u> <sup>2</sup>
NIP (N)	<u>0.652</u>
NIP per dozen	7.824
\$US per dozen (\$1A= \$US0.7858)	6.148

<sup>1</sup> An example of where an importer engages in a value-added activity; in this case packaging.

<sup>2</sup> 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

$$N + (Y \times N) = X, \text{ then } \frac{X}{1+Y} = \frac{0.717}{1.10} = 0.652$$

So, duty \$ = (X-N)  
= 0.717-0.652  
= 0.065

OR,

$$N = \frac{X}{1+Y} \quad \text{therefore duty amount} = Y \times \frac{X}{1+Y} = 0.10 \times \frac{0.717}{1.10} = 0.065$$

Alternatively, if the duty rate were to be expressed as a percentage then the duty amount

$$= \frac{Y}{100+Y} \times X, (i.e., \frac{10}{110} \times 0.717 = 0.065)$$

The deductions shown are examples only; there may be other deductions required e.g. for sales tax. Costs of importation are usually obtained from actual costs incurred by the importer, although in some cases costs may be calculated e.g. profit or AS&G expenses could be based on a percentage of the USP.

All NIPs are expressed in Australian dollars. Any costs incurred in another currency are converted to Australian dollars at the rate of exchange applying on the date that the charge was levied. In calculating the USP and the NIP, a cash price basis will be used. If export sales to Australia are for more than 30 day terms, then an amount for credit terms will be added on to the cash NIP.

The actual duty rate applicable to the goods when entered for home consumption in Australia is the rate used in calculating the NIP. It is possible that there may be two separate NIPs for the one country, one for goods which are eligible for, and attract the preferential duty rate (for developing countries), the other for goods at the general rate.

#### The Duty Payable

The calculated NIP is compared to the ascertained normal value to determine which is lower. Where the NIP is lower, the interim dumping duty payable is the difference between the ascertained export price and the ascertained NIP.