

GENERAL AGREEMENT ON

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TARIFFS AND TRADE

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Committee on Anti-Dumping Practices

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UNITED STATES RESPONSES TO QUESTIONS SUBMITTED BY CANADA
ON REVISED ANTI-DUMPING REGULATIONS OF THE UNITED STATES
(19 CFR 353, Anti-Dumping Duties; Final Rule
as published in the US Federal Register, 28 March 1989)

1. Section 353.41: Calculation of United States price

Question:

In section 353.41(a), the Secretary "will use sales or, in the absence of sales, likely sales" in calculating the United States price. "Likely sales" is defined in section 353.2(t) as being "an irrevocable offer to sell". Does the inclusion of "likely sales" include unaccepted tender bids? If so, are the particular circumstances of the bid factored into the consideration of the bid price in the calculation of US price?

Response:

US authorities normally consider "likely sales" only when actual sales are unavailable. "Likely sales" may include unaccepted tender bids, whether rejected or not yet accepted, to the extent that the bids constitute irrevocable offers. The "particular circumstances of the bid" will be factored into the calculation of US price if the bid involves terms and conditions that differ from those associated with comparison sales or offers to sell in the home (or the third country) market, or if the bid involves the provision of services or merchandise not covered by the investigation. In conformity with Article 2:6 of the Anti-Dumping Code, the United States will make due allowance in each case, on its merits, for differences affecting price comparability.

2. Section 353.42: Fair value

Question:

In section 353.42(b), the Secretary normally will examine not less than 60 per cent of the dollar value or volume of the merchandise during the course of the investigation. What criteria, if any, govern the exercise of the Department of Commerce's discretion in choosing to examine either the dollar value or volume of merchandise sold?

Response:

It is not always possible to obtain both firm-specific sales value data and firm-specific sales volume data at the outset of an investigation. Consequently, it is US practice to select potential respondents on the basis of the best data which is available at the time an investigation is commenced.

Arguably, the identification of respondents on the basis of sales volumes rather than sales values in most cases will permit the Department to capture a broader cross-section of the total imports subject to investigation. Therefore, if data on both value and volume are available, the Department typically prefers to investigate those exporters which account for as great a volume (as measured by a simple count of units or quantity sold) of imports as possible. In some cases, however, an investigation will encompass a range of physically different merchandise. In these situations, it may be difficult to "equate" the different merchandise, and a simple count of units or quantity sold is apt to have little meaning as a measure of volume. In such circumstances, the Department may have to resort to an alternative measure of volume, such as weight, or it may be necessary to use value. In any event, the Department strives to investigate exporters accounting for all imports of the product under investigation, but where this is not possible, normally those firms accounting for at least 60 per cent of the total imports under investigation are requested to respond.

3. Section 353.43: Sales used in calculating foreign market value

Question:

In section 353.43(b), the Secretary will "reject any fictitious sale or offer" in calculating foreign market value. What criteria are to be used in determining what is a "fictitious sale of offer"?

Response:

Section 773(a)(5) of the Tariff Act of 1930, as amended, offers the following guidance as to the definition of a "fictitious market":

"The occurrence of different movements in the prices at which different forms of any merchandise subject to an anti-dumping duty order...are sold (or, in the absence of sales, offered for sale) after the issuance of such order in the principal markets of the foreign country from which the merchandise is exported may be considered...as evidence of the establishment of a fictitious market...if the movement in such prices appears to reduce the amount by which the foreign market value of the merchandise exceeds the United States price of the merchandise."

Section 353.43(b) implements section 773(a)(1)(B) of the Tariff Act of 1930, as amended, which requires the Department of Commerce to disregard any sale or offer for sale intended to establish a "fictitious market".

The Department has had to consider this provision in the context of only one anti-dumping case, involving cyanuric acid and its chlorinated derivatives from Japan. In the final results of an administrative review of that anti-dumping order, published in January of this year, the Department considered an allegation by the petitioner that home market sales of cyanuric acid in granular form constituted a fictitious market. After reviewing the data, the Department found that home market prices of all forms of cyanuric acid generally moved in tandem. Moreover, granular cyanuric acid was the product form that was predominantly sold in the Japanese market. For these reasons, the Department considered that sales of cyanuric acid in granular form were bona fide transactions and, therefore, used them as a basis to calculate normal value.

The Department's analysis under section 353.43(b) is not limited to relative price movements and relative sales, but can extend to other factors such as the frequency of sales and the models or product types that are customarily sold in the market and the prices charged for them. A provision concerning "fictitious markets" has been a feature of US anti-dumping law since its inception in 1921. However, to our knowledge, the provision has never been used as a basis to disregard home market sales. (The Committee may also wish to refer to previous US responses to questions posed concerning section 1319 of the Omnibus Trade and Competitiveness Act of 1988.)

4. Section 353.44: Sales at varying prices

Question:

In section 353.44(c), the Secretary will use any other method for calculating foreign market value which he deems appropriate if the methods set out in section 353.44(a) or (b) are not applicable. Please enumerate what other methods the Department of Commerce would use in circumstances not found in section 353.44(a) or (b)?

Response:

As is the practice of Canada and many other signatories to the Anti-Dumping Code, it is the practice of the United States generally to weight-average varying prices in the home or third country market(s) in determining normal value. Section 353.44 is the regulatory provision which authorizes the Department of Commerce either to calculate a weighted average of the varying prices (in sub-section (a)), or to use a single price as the basis for normal value if not less than 80 per cent of the sales were made at the same price.

To our knowledge, the Department has never faced a situation in which it has been necessary to resort to some other reasonable method to calculate normal value, as is contemplated by section 353.44(c). Conceivably, however, this could arise in the context of a case in which an exporter was somehow unable to report sales quantities. Presumably, in such circumstances, the Department could decide to calculate normal value pursuant to section 353.44(c) on the basis of a simple average of prices.

5. Section 353.47: Exportation from an intermediate country

Question:

The Secretary will calculate foreign market value on sales in an intermediate country if the criteria in section 353.47(a)-(d) are met. Section 353.47(c) specifies one condition as being that the merchandise enters the commerce of the intermediate country but is not "substantially transformed". What is meant by the term "substantially transformed"?

Response:

We are unable to offer any definitive guidance as to the manner in which the term "substantial transformation" might be interpreted or applied, particularly insofar as this would necessarily depend on the product and factual circumstances involved. As a general rule, "substantial transformation" would presumably be interpreted to mean a transformation of the product sufficient to make the imported merchandise a product of the country of export under US customs and anti-dumping law and practice.

6. Section 353.50: Calculation of foreign market value based on constructed value

Question:

In section 353.50(c), involving transactions with related parties, the Secretary may disregard any direct or indirect transaction and calculate the amount (in determining an element of value) based on available information as to what the amount would have been if the transaction had occurred between unrelated parties. What would constitute "available information" in such circumstances? What criteria will the Department use in determining whether an indirect transaction should be disregarded?

Response:

In the absence of unrelated party transactions, the Department of Commerce relies on whatever measure of market value formed the basis for the decision to disregard the related party transaction. Such a measure can be a public price list or the related supplier's cost, including reasonable amounts for profit and general and administrative expenses.

An indirect transaction between related parties can involve an unrelated "middleman", e.g., firms A and B are related to each other, neither is related to firm C, A sells to C, and C sells to B. In determining whether to disregard such sales, the Department would take into consideration such factors as (1) whether A sells to C knowing that the merchandise will be sold to B, (2) whether B buys from firms other than C, and (3) whether C sells to firms other than B. The Department would likely also inquire into B's motivation for buying from C if B can buy more directly from A. If the Department determines that C does nothing more than facilitate transactions between A and B, it would verify that C's price to B is comparable to (other) unrelated party transaction prices.

7. Section 353.51: Calculation of foreign market value if sales are made at less than cost of production

Question:

In section 353.51(a), the Secretary will disregard sales if they have been made over an extended period and in substantial quantities. What criteria are used in determining an "extended period" and "in substantial quantities"? Will consideration be given to the nature of the merchandise if below-cost sales are a commercial necessity - such as in the case of a perishable product or products at the end of its/their life-cycle?

Response:

The Department of Commerce normally equates "extended period" with the period of investigation or review and "substantial quantities" with at least 10 per cent of sales volume during the period. Thus, if sales are made at prices less than the cost of production over the period of investigation or review and in quantities greater than 10 per cent of the total quantity of merchandise sold during the period, it has been the Department's practice to disregard such sales on the basis that they were not made at prices sufficient to allow recovery of all costs within a reasonable period of time.

While the US Court of International Trade (CIT) has upheld the Department's general approach, it has ruled that the Department must also include in its analysis consideration of such factors as the degree to which prices are below cost, the rate and magnitude of future reductions in unit cost, and whether such reductions are sufficient to enable the producer to recover all costs at current below-cost prices in a reasonable period of time. Although the appellate court has not yet ruled on the CIT's decision, the Department is re-examining its approach to this issue to determine whether changes in practice may be appropriate.

In any given case, the Department will consider claims by the producer/exporter concerned that all costs will be recovered despite the existence of below-cost sales made over an extended period of time and in substantial quantities. Moreover, in certain circumstances, the

Department will modify the "substantial quantities" rule if either the respondent or the petitioner provides evidence based on actual experience that the 10 per cent threshold is inappropriate for the particular product under investigation. For example, in cases involving highly perishable agricultural products, such as fresh winter vegetables and fresh cut flowers, the Department has disregarded below-cost sales only if they account for 50 per cent or more of total sales volume during the period. There is no established practice concerning products sold at the end of their life-cycle, but the Department would entertain any reasonable and supportable arguments concerning appropriate time periods and thresholds.

8. Section 353.56: Differences in circumstances of sale

Question:

According to section 353.56(b)(2), the Secretary has the right to cap deductions to foreign market value for indirect selling expenses by the amount of indirect selling expenses incurred on sales to the US market. How is such a cap justified in light of Article 2:6 of the Code, which states that "[d]ue allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability"?

Response:

The United States generally considers that only those selling expenses which can be directly related to the sales under consideration are able to demonstrably affect price comparability. Thus, it is general US practice only to make due allowance for differences in direct, not indirect, selling expenses. However, in situations where the sale to the first unrelated US party occurs through a US subsidiary or importer related to the foreign exporter (so-called "exporter's sales price" situations), section 772(e)(2) of the Tariff Act of 1930, as amended, requires that all selling expenses, both direct and indirect, be subtracted to arrive at an ex-factory comparison price. In such circumstances, section 353.56(b)(2) provides a limited exception to the general US practice not to adjust for indirect selling expenses. As identical amounts are deducted from both prices, this practice likely has no substantially different effect on the price comparison than would merely adjusting for direct expenses, which we understand may be the practice of several other signatories.

9. Section 353.58: Level of trade

Question:

What criteria will the Department of Commerce use in determining "adjustments" for differences affecting price comparability when levels of trade in the subject merchandise do not permit comparisons? What criteria will be used in determining "the most comparable commercial level of trade"?

Response:

When comparing sales at different levels of trade, the Department of Commerce will make an adjustment to normal value if the respondent exporter can reasonably quantify the price difference in the home market that is attributable to a difference in level of trade. In the typical case, this would involve calculating the difference between the selling expenses incurred on sales in the home market to, e.g., end-users and to dealers, with the difference constituting the basis for the price adjustment. Of course, in order to calculate this difference, it is necessary that there be sales in the home market at the same level of trade as in the United States. These sales will not be sufficient in quantity for comparison with US sales (otherwise there would be no need to compare prices at different levels of trade), but they must provide a sufficient basis for calculating "benchmark" selling expenses.

If sales to the United States are made to dealers only, home market sales are made to wholesalers, dealers and end-users, and the volume of home market sales to dealers is inadequate for comparison purposes, either home market sales to wholesalers or end-users could be considered to be "at the most comparable commercial level of trade". The choice would depend primarily on whether sales volume is adequate for comparison purposes and whether the necessary selling expense data is available for purposes of making the level of trade adjustment.