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Countervailing Measures

QUESTIONS CONCERNING THE LEGISLATION OF AUSTRALIA

Responses by Australia

Reproduced herewith are responses by the Australian authorities to the following questions posed to Australia in the Committee on Anti-Dumping Practices and the Committee on Subsidies and Countervailing Measures:

United States - ADP/W/57 and SCM/W/49 of 26 May 1983

EEC - ADP/W/60 and SCM/W/50 of 6 June 1983

Japan - ADP/W/63 and SCM/W/53 of 14 June 1983

Switzerland - ADP/W/68 and SCM/W/58 of 22 September 1983

AUSTRALIA'S REPLY TO THE UNITED STATES DELEGATION'S QUESTIONS
CONCERNING AUSTRALIAN ANTI-DUMPING AND COUNTERVAILING LEGISLATION

(Reference ADP/W/57 and SCM/W/49 of 26 May 1983)

QUESTION 1 -

- . Customs Act 1901 - Section 6 of the Customs Tariff (Anti-Dumping) Act 1975 incorporates the Customs Act 1901 which is read as one with that Act. The purpose of this provision is to incorporate the basic customs law relating to administration, inspection, supervision and clearance of goods under customs control. Of particular relevance to anti-dumping and countervailing administration are the powers and obligations of Customs in the taking of securities and the duration of securities under Sections 42 and 45 respectively of the Customs Act.

Section 42 was amended by the Customs Securities (Anti-Dumping) Amendment Act 1982 to place beyond doubt that securities may be validly taken under Section 42 of that Act for the purposes of the Customs Tariff (Anti-Dumping) Act 1975.

Section 45 was last amended by the Customs Amendment (Securities) Act 1981 where the maximum period for the holding of a dumping security was extended from 3 to 4 months with an extension to 6 months on request of the exporter concerned in conformity with Article 10.3 of the Anti-Dumping Code 1979, and a maximum period of 4 months for the holding of a countervailing security in conformity with Article 5.3 of the Subsidies and Countervailing Duties Code 1979.

The Customs Tariff (Anti-Dumping) Amendment Act 1983 (No. 20 of 1983) made provision for the Minister, by notice in writing, to exempt goods from dumping duty if he is satisfied that a commercial tariff concession order under Part XV(A) of the Customs Act 1901 in respect of the goods is in force. This amendment modified the basis for exempting goods from dumping duty to include those goods which have been granted a tariff concession under the commercial tariff concession system which is a modification of, and a replacement for, the existing commercial by-law system. This is in accord with Article VI.6(A) of the General Agreement on Tariffs and Trade.

- . Customs Tariff Act 1982 - This Act provides for the determining of tariff classification and rates of customs duty. The provisions of the Customs Tariff (Anti-Dumping) Act 1975 which depend upon the tariff classification and hence the rates of duty which apply to those goods are Sections 4A(2), 8(7)(B), (C) and (D), and 10(8)(AA), (B) and (C).

Section 4A(2) relates to, and is in accord with, Article 2.5 of the Anti-Dumping Code. Sections 8(7)(B), (C) and (D) and Sections 10(E) (AA), (B) and (C), relating to the prohibition of the collection of anti-dumping or countervailing duty on a product where it has not caused or threatened material injury to a domestic industry, are in accord with Article VI.6(A) of the General Agreement on Tariffs and Trade.

- Sales Tax Assessment Acts 1930 and the Sales Tax Acts 1930 - These Acts provide for the assessment and determination of the rate of sales tax on goods. Section 4A(2) of the Customs Tariff (Anti-Dumping) Act 1975 includes sales tax as a prescribed deduction.
- Freedom of Information Act 1982 - Under this Act, every person has access to information in documentary form in possession of the Government of the Commonwealth of Australia. The Government is required to :
 - (a) make available to the public information about the operations of Departments and Public Authorities and, in particular, ensure that rules and practices affecting members of the public in their dealings with Departments and Public Authorities are readily available to persons affected by those rules and practices; and
 - (b) give access to information in documentary form in the possession of Ministers, Departments and Public Authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is held by Departments and Public Authorities.

The provision for access to information held on anti-dumping and countervailing matters therefore cover the requirements of Article 6 of the Anti-Dumping Code and Article 2 of the Subsidies and Countervailing Duties Code.

- Ombudsman Act 1976 - The Ombudsman is empowered to investigate complaints about actions of Commonwealth officials (but not Ministers) and statutory bodies which relate to administration. He can recommend corrective action.

The Ombudsman provides an additional safeguard which ensures that interested parties to dumping or countervailing actions receive fair and just administrative treatment.

- Industries Assistance Commission Act 1973 - Section 15 of the Customs Tariff (Anti-Dumping) Act 1975 provides for the Minister to refer to the Industries Assistance Commission for inquiry and report questions as to the existence of a fact or facts specified in a request for the publication of a notice or the revocation of a notice as the case may be.

Section 20 of the Customs Tariff (Anti-Dumping) Act 1975, reflects the provisions of Article 9 of the Anti-Dumping Code and of Article 4 of the Subsidies and Countervailing Duties Code, requiring the investigating authority to review the need for the continued imposition of the duty. The Australian law allows the facts to be reviewed by the Commission, or a Division of that Commission, which is an independent statutory authority.

- . Administrative Decisions (Judicial Review) Act 1977 - This Act allows for the judicial review of Commonwealth administrative actions made under a statute of the Commonwealth and applies to, amongst other things, the Minister's and other administrative actions under, or associated with, the provisions of the Customs Tariff (Anti-Dumping) Act 1975. The judicial review is by the Federal Court of Australia. The only question for the Court is whether the action is lawful, in the sense that it is within the power conferred on the relevant Minister, official or body. The Court is empowered to enjoin action or to quash a decision it finds unlawful and to direct action to be taken in accordance with the law. It is also empowered to be able to compel action by a person or body who has not acted, but who ought to have done so.

The Act provides that a person may apply for a review of a decision and may obtain from the decision-maker written reasons for the decision, including findings on material questions of fact, prior to the making of any application to the Court.

The Act provides wide ranging grounds for appeal against administrative decisions including a requirement for the observance of the principles of natural justice.

As previously notified in ADP/1/Add.18/Suppl. and SCM/1/Add.1/Suppl., the Customs Securities (Anti-Dumping) Amendment Act 1982 removed from the scope of the Administrative Decision (Judicial Review) Act 1977 decisions made under Section 42 of the Customs Act 1901 to require and take securities in respect of duty that may be payable under the Customs Tariff (Anti-Dumping) Act 1975. However, such decisions are appealable within the original jurisdiction of the High Court of Australia.

QUESTION 2 - The appeal processes available include those under :

- . Ombudsman Act 1976 - Under this Act
 - A complaint is to be made to the Ombudsman in writing.
 - The Ombudsman shall inform the responsible Minister that the action is to be investigated.
 - The Ombudsman shall afford the officer principally concerned an opportunity to appear before him to make submissions, either orally or in writing.

- The Ombudsman may require a person whom he believes to be capable of giving information relevant to an investigation to produce to him such documents and other records being information, documents or records relevant to the investigation.
- The Ombudsman shall furnish to the complainant and the Department or Authority particulars of the results of the investigation of the action.
- Where the Ombudsman is required to report to the Minister concerned and when the action taken by the Minister is not adequate or appropriate in the circumstances, the Ombudsman may inform the Prime Minister and he may make special reports to the Parliament.

Industries Assistance Commission Act 1973 - Section 15 of the Customs Tariff (Anti-Dumping) Act 1975 provides for reference to the Industries Assistance Commission as follows -

- a directly interested person within Australia requests the Minister to cause a notice to be published or revoked as the case may be.
- The Minister may agree to the request or otherwise inform the person in writing that he does not propose to accede to the request.
- The person informed that the Minister has not acceded to the request, not later than 30 days after being so informed, may request the Minister in writing to refer the questions to the Commission for inquiry and report.
- Where the Minister receives such a request he shall refer the question to the Commission for inquiry and report unless the question has been referred to the Commission within the period of 2 years immediately preceding the request.
- The Minister upon receipt of the report from the Commission will then decide having regard to the Commission's report, whether to publish or revoke the notice as the case may be.

Administrative Decisions (Judicial Review) Act 1977 - Section 11 of the Administrative Decisions (Judicial Review) Act provides that an application for an order of review shall be made in the manner prescribed by the Federal Court rules. The Federal Court, in its discretion, may :

- a) make an order quashing or setting aside the decision;
- b) make an order referring the matter to the person who made the decision for further consideration;
- c) make an order declaring the rights of the parties in respect of any matter to which the decision relates; or
- d) make an order directing any of the parties to do, or refrain from doing any act or thing which the Court considers necessary to do justice between parties.

The Court may also make an order directing a person to make a decision where that person is under a duty to make a decision but has failed or refused to do so.

- As a matter of legal policy, the provisions of Australia's statute law and the common law provide for due application of Australia's international obligations.
- The Codes do not form part of the common law of Australia and are not incorporated explicitly in the law of the Commonwealth of Australia. They are not themselves enforceable in an Australian court through litigation by interested parties.

QUESTION 3 -

- (A) Determination of Dumping - Section 5(2) of the Customs Tariff (Anti-Dumping) Act 1975 is in accord with para 4 of the provisions of Article 2. Sections 4(A)(1)(B) and 4(A)(1)(C) of the Customs Tariff (Anti-Dumping) Act 1975 are in accord with paras 5 and 6 of Article 2. Section 5(5) of the Customs Tariff (Anti-Dumping) Act 1975 is in accord with para 6 of Article 2.
- (B) Determination of Injury - Sections 8(1) and 8(2) provide, as a pre-condition for the publication of a notice imposing dumping duty, that material injury to an Australian industry has been, or is being caused, or is threatened or the establishment of an Australian industry has been or may be materially hindered by dumped or subsidized exports. The Code paragraphs, although outlining many factors relating to injury, which it is the administrative practice of the Australian administering authority to consider, do not deem any one or several of these factors to necessarily give decisive guidance.
- (C) Definition of Industry - Reference is made to "an Australian industry" in Sections 8(1) and 8(2) of the Customs Tariff (Anti-Dumping) Act 1975. "An Australian industry" is consistent with the term domestic industry used in the Code; "an Australian industry" being a domestic industry of Australia. The Australian authority has a consistent administrative practice of applying the provisions of Article 4 when determining whether there is "an Australian industry".
- (D) Initiation and Subsequent Investigation - Australia's practice is to apply the provisions of the Code. As outlined in answers to Questions 1 and 2 above, there are general laws of the Commonwealth of Australia covering administrative procedures and decision making. These are considered to more than adequately cover the procedural requirements of Article 5 of the Code.

- (E) Evidence - Australia's administrative practice is fully in accord with the provisions of Article 6 of the Code. The laws of the Commonwealth of Australia as outlined above, ensure relevant disclosure and confidentiality of information and opportunities to obtain information and the obtaining of a hearing by the parties concerned. The provisions of the Code are considered by the administering authority as minimum provisions within the context of Australia's legal administrative requirements.
- (F) Price Undertakings - Section 8(2A) of the Customs Tariff (Anti-Dumping) Act 1975 allows the Minister to accept price undertakings from exporters in accord with the provisions of Article 7 of the Code.
- (G) Imposition and Collection of Anti-Dumping Duties - Sections 6, 7, 8(1), 8(2), 8(3), 8(4), 8(5), 9(1), 9(2), 9(3), 9(4), 9(5) and 18 of the Customs Tariff (Anti-Dumping) Act 1975 allow for the imposition and collection of dumping duties in accord with Article 8 of the Code.
- (H) Duration of Anti-Dumping Duties - Section 20(1) of the Customs Tariff (Anti-Dumping) Act 1975 contains a mandatory provision which states that the Minister shall revoke a notice if he is satisfied that, if the notice were not in force, he would not be authorized by this Act to cause the notice to be published.
- The Investigating Authority is cognizant of the responsibilities incumbent on the Minister with respect to the provisions of Section 20 of the Act and, as such, regularly reviews the need for the continued imposition of the duty on their own initiative or on request.
- Section 15 of the Customs Tariff (Anti-Dumping) Act 1975 provides that, directly interested persons within Australia, may request revocation of a notice. Where the Minister refuses the request and the person further requests within 30 days of that refusal, the Minister shall refer questions as to the existence of certain facts to the Industries Assistance Commission for inquiry and report.
- (I) Provisional Measures - Section 42 of the Customs Act 1901 provides that Customs have the right to require and take security in respect of any duty that may be payable on goods under the Customs Tariff (Anti-Dumping) Act 1975. Section 45(2) and 45(3) of the Customs Act 1901 limit the period for retention of any security for dumping duty that may become payable to 4 months or to 6 months if requested by the exporter of the goods concerned. These provisions are considered to be in accord with Article 10 of the Code.
- (J) Retrospectivity - Section 13 of the Customs Tariff (Anti-Dumping) Act 1975 is in accord with the provisions of Article 11 of the Code, and also includes the retrospective provisions of Article 7 relating to breaches of price undertakings.

QUESTION 4 -

- (A) Domestic Procedures and Related Matters - See comments above on Questions 3(D) and (E).
- (B) Consultations - There are no consultation provisions within the relevant Australian legislation. However, Australia, as a matter of administrative policy, adheres to the consultative provisions of the Code.
- (C) Imposition of Countervailing Duties - Sections 10(2A), 6, 7, 10(1), 10(2), 10(3), 10(4), 10(5), 11(3), 11(4), 11(5), 13(5), 15 and 20 of the Customs Tariff (Anti-Dumping) Act apply the provisions of the paragraphs of Article 4 of the Code concerned with the imposition of countervailing duties. Australia's administrative practice is to apply the principles enunciated in the Code to the relevant provisions of the Act.
- (D) Provisional Measures and Retroactivity - See comments on Question 3(I) above.
- (E) Determination of Injury - See comments on Questions 3(B) and 3(C) above.

QUESTION 5 -

- (A) and (B)
Australia complies with obligations under Article VI of the GATT, Article 16(6) of the Anti-Dumping Code and Article 19(5) of the Code on Subsidies and Countervailing Duties through domestic statutes, administrative procedures and common law rights. The Australian Government is currently reviewing the relevant domestic statutes and administrative procedures. There are administrative procedures for public notifications of initiations, provisional measures and of notices by the Minister imposing duties. The report on which the Minister's decision is based is a comprehensive document available to any interested parties. In addition there are administrative law provisions relating to the obtaining of information, and reasons for decisions are available under the Freedom of Information Act and the Administrative Decisions (Judicial Review) Act as outlined in answer to Question 1 above. Australia's administrative procedures for initiation and investigation of complaints follow the standards set down in the Codes. On the question of periodic review of notices, imposing duties, see answer to Question 3(H) above.
- (C) In terms of domestic procedures, authority specifically rests with the Minister as the decision maker for the imposition of duties under the Customs Tariff (Anti-Dumping) Act 1975. The Ministerial discretions in this Act are by no means unfettered and must meet any claim under the Administrative Decision (Judicial Review) Act 1977.

- (D) It is Section 5(2)(D) of the Customs Tariff (Anti-Dumping) Act 1975 which relates to the use of the highest price for export to a third country. The highest price as a matter of policy is interpreted to be a representative price for like goods sold in the ordinary course of trade in the country of export for export to a third country, being sales that are arm's length transactions.

The use of the Australian price is referred to under Section 5(3)(F) of the Customs Tariff (Anti-Dumping) Act 1975. This provision is a measure which may be invoked where information is not available to assess a normal value under the preceding paragraphs (C), (D) and (E). This provision reflects Article 15.3 of the Subsidies and Countervailing Duties Code.

- (E) The amendment of the Customs Tariff (Anti-Dumping) Act 1975 removing the original Section 14 in no way lessens Australia's adherence to its international agreements. The Australian Government's view is that issues concerning Australia's obligations under international agreements are more appropriately considered within the context of the dispute settlement provisions of the particular agreements rather than in the Australian courts.
- (F) Australia's policy is to apply the concept of subsidy consistent with the GATT and the "material injury" test as outlined in the Code. However, the amendments to Section 10 of the Act in 1982 followed the Government's decision that as a matter of trade policy, and notwithstanding the "injury test" requirement of the Code, that Australia needs the facility to be able to take countervailing action without requiring proof that exports to Australia, if subsidised, are causing or threatening material injury to a domestic industry in cases where countries do not accord Australian exports the same test in their countervailing actions. Additionally, Australia will adopt a similar approach to the definition of subsidy to that applied by other countries in countervailing actions against Australian exports.

Specifically, the provisions allow Australia to take reciprocal countervailing action in any case where another country applies countervailing duty against Australian exports without applying an injury test or by using a concept of a countervailable subsidy broader than embodied in Section 10(4)(A) in the Customs Tariff (Anti-Dumping) Act 1975.

- (G) Further explanation is needed on this question. There is no intention in the drafting of Australia's legislation to allow for the waiving of duties on a discriminatory basis.
- (H) Section 11 allows for the imposition of countervailing duties in accordance with Article 16.8 of the Australia New Zealand Closer Economic Relations - Trade Agreement and Article VI.6 of the General Agreement on Tariffs and Trade.

QUESTION 6

See appropriate comments on answers to questions above.

AUSTRALIA'S REPLY TO THE EUROPEAN COMMUNITIES DELEGATION'S
QUESTIONS CONCERNING AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING
LEGISLATION

(Reference ADP/W/60 and SCM/W/50 of 6 June 1983)

The following replies are given with respect to

QUESTION 1 -

Section 15 of the Customs Tariff (Anti-Dumping) Act 1975 is a review provision which allows an interested person within Australia, affected by the decision, to seek repeal of the notice, and if this request is unsuccessful then to have questions of fact relevant to the making of the notice enquired into and reported on by an independent authority, the Industries Assistance Commission.

QUESTION 2 -

Customs Tariff (Anti-Dumping) Act 1975 is a taxing Act and therefore, under Australian constitutional law constraints, does not contain administrative procedures such as outlining initiation of investigations. Administrative procedures are implemented to conform with the provisions of the Anti-Dumping Code and Code on Subsidies and Countervailing Duties. Public notification of initiation of an investigation is given if there is sufficient evidence of material injury caused or threatened by dumping (or subsidisation) and the complaint is supported by the major proportion of the local industry.

QUESTION 3 -

It is Australia's administrative practice to notify by public notice the initiation of investigations and to immediately inform the foreign Government and all interested parties.

QUESTION 4 -

It is not in accord with Australia's policy with respect to constructing normal values for margins for selling and administration expenses and for profit to be specified in the law. A more reasonable attitude is adopted and each case is dealt with on its merits, and the margins determined on the basis of available relevant information, e.g. margins in profitable sales, the profits history of the exports or of overseas industry.

In relation to Section 5(2)(D) of the Customs Tariff (Anti-Dumping) Act 1975, the highest export price, as a matter of policy is interpreted to be a representative price for like goods sold in the ordinary course of trade in the country of export for export to a third country, being sales that are arm's length transactions.

QUESTION 5 -

Australia's policy is to apply the concept of subsidy consistent with the GATT and the "material injury" test as outlined in the Code. However, the amendments to Section 10 of the Act in 1982 followed the Australian Government's decision that, as a matter of trade policy and notwithstanding the "injury test" requirement of the Code, Australia needs the facility to be able to take countervailing action without requiring proof that exports to Australia, if subsidised, are causing or threatening injury to a domestic industry in cases where countries do not accord Australian exports the same test in their countervailing actions. Additionally, Australia will adopt a similar approach to the definition of subsidy to that applied by other countries in countervailing actions against Australian exports.

Specifically, the provisions allow Australia to take reciprocal countervailing action in any case where another country applies countervailing duty against Australian exports without applying an injury test or by using a concept of a countervailing subsidy broader than the concept currently embodied in Section 10(4)(A) of the Customs Tariff (Anti-Dumping) Act 1975.

Section 12 of the Customs Tariff (Anti-Dumping) Act 1975 outlines the circumstances in which the Minister shall be deemed to be satisfied for the purposes of Section 10 or 11 of the Act, that reduction of freight has been granted on carriage of goods. A reduction or remission of freight occurs when goods exported to Australia have been carried from the country of export freight free, or the amount of freight paid is less than the "normal freight", essentially the ruling rate.

The administering authority, in examining a complaint of reduction or remission of freight in terms of Section 10 of the Act, investigates the rate of freight which is applicable to the particular shipment under inquiry and determines whether at the time of exportation, such a rate was freely available under the same terms and conditions to any shippers.

In the current depressed circumstances of world shipping, it is recognised that extremely low freight rates are available in many areas through conference and non-conference line trade vessels, tramp vessels and vessels on charter (e.g. bulk cargoes).

Freight rates which are available in an open competitive market, and are not subsidised rates, are not seen to reflect unfair trading practices to be corrected by action under Section 10 of the Act.

QUESTION 6 -

There are general laws of the Commonwealth of Australia covering administrative procedures and decision making. These are considered to more than adequately cover the procedural requirements of Article 5 of the Code.

Australia's administrative practice is fully in accord with the provisions of Article 6 of the Code. The provisions of the administrative laws of the Commonwealth of Australia ensure relevant disclosure and confidentiality of information and opportunities to obtain information and the obtaining of a hearing by the parties concerned. The provisions of the Code are considered by the administering authority as minimum provisions within the context of Australia's legal administrative requirements.

The Administrative Decisions (Judicial Review) Act 1977 provides that a person whose interests are or would be adversely affected by a proposed decision, may apply for a review of a decision and may obtain from the decision-maker written reasons for the decision, including findings on material questions of fact.

Section 15 of the Customs Tariff (Anti-Dumping) Act 1975 allows an interested person within Australia to seek through the Minister to an independent statutory authority, the Industries Assistance Commission, a review of questions of fact relating to the publication of a notice or revocation of a notice under the Act.

Sections 8(1) and 8(2) of the Customs Tariff (Anti-Dumping) Act provide, as a pre-condition for the publication of a notice imposing duty, that material injury to an Australian industry has been or is being caused or is threatened or the establishment of an Australian industry has been or may be materially hindered by dumped exports. The Code paragraphs, although outlining many factors relating to injury, which it is the administrative practice of the Australian administering authority to consider, do not deem any one or several of these factors to necessarily give decisive guidance.

Reference is also made to "an Australian industry" in Sections 8(1) and 8(2) of the Customs Tariff (Anti-Dumping) Act 1975. "An Australian industry" is consistent with the term domestic industry used in Article 4 of the Code; "an Australian industry" being a domestic industry of Australia. Australia has a consistent administrative practice of applying the provisions of Article 4 when determining whether there is an Australian industry.

QUESTION 7 -

Section 42 of the Customs Act 1901 provides that Customs have the right to require and take security in respect of any duty that may be payable on goods under the Customs Tariff (Anti-Dumping) Act 1975. Sections 45(2) and (3) of the Customs Act 1901 limit the period for retention of any security for dumping or countervailing duty that may become payable to 4 months, or to 6 months in the case of dumping securities if requested by the exporter of the goods concerned. These provisions are considered to be in accord with Article 10 of the Anti-Dumping Code and Article 5 of the Subsidies and Countervailing Duties Code.

Provisional measures by way of cash or documentary security are imposed after a preliminary finding of dumping/subsidisation causing or threatening material injury to an Australian industry has been established, and the action is considered necessary to prevent injury to that industry pending the finalisation of the formal investigation and final determination of the complaint.

Where significant quantities of allegedly dumped/subsidised goods are involved, provisional measures have been publically notified, on occasions, at the same time as formal initiation of the investigation (that is, after a preliminary finding has been made). Actual collection of securities occurs when shipments arrive after the date of notification.

QUESTION 8 -

Section 13(2) of the Customs Tariff (Anti-Dumping) Act 1975 was drafted to include the provisions of Article 11.1(I) of the Anti-Dumping Code and Article 5.5 of the Subsidies and Countervailing Duties Code. The words "had the right to require and take such a security" included in Section 13(2) of the Act are considered to be synonymous with the words "application of provisional measures" used in the relevant Code articles.

QUESTION 9 -

See answer to Question 5 above.

QUESTION 10 -

Section 8(4) of the Customs Tariff (Anti-Dumping) Act 1975 provides that the amount of dumping duty that may be collected is the difference between the normal value and export price of the goods, i.e. the full dumping margin. Section 8(5) allows the Minister to direct a rate of dumping duty provided that the amount collected is

not greater than the full dumping margin. In fact, the rate may be less than the full margin for example, where a lesser amount is required to eliminate the injury caused by dumping to an Australian industry. This is in accord with Article 8 of the Anti-Dumping Code.

Similar provisions are contained in Section 10 of the Act which are in accord with those of Article 4 of the Subsidies and Countervailing Duties Code.

QUESTION 11 -

Article VI of the General Agreement on Tariffs and Trade provides for Contracting Parties to implement, in prescribed circumstances, countervailing measures on behalf of another Contracting Party. Article VI 6(B) of the General Agreement refers to an industry, not a domestic industry as defined in the Codes. Australia considers, within the context of the General Agreement, that an industry can refer to a producer or manufacturer of the product in question. With respect to Section 11 of the Customs Tariff (Anti-Dumping) Act 1975 it is considered that the provision does not conflict with those of Article VI.6 of the General Agreement. Firstly, the CONTRACTING PARTIES' prior approval is not precluded by the provisions of the Section, and secondly where paragraph (c) of Article VI.6 applies, the prior approval of the CONTRACTING PARTIES is not required before publication of a notice.

QUESTION 12 -

The amendment to the Customs Tariff (Anti-Dumping) Act 1975, removing the original Section 14, in no way lessens Australia's adherence to its international agreements. The Australian Government's view is that issues concerning Australia's obligations under international agreements are more appropriately considered within the context of the dispute settlement provisions of the particular agreements rather than in the Australian courts. Removal of this provision does not in any way lessen Australia's adherence to its international agreements. The administrative legislation and the common law ensure that Australia's anti-dumping and countervailing practices are in conformity with its obligations.

AUSTRALIA'S REPLY TO THE JAPANESE DELEGATION'S QUESTIONS
CONCERNING AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING
LEGISLATION

(Reference ADP/W/63 and SCM/W/53 of 14 June 1983)

The following replies are given with respect to

QUESTION 1 -

- (A) The two Codes are part of Australian domestic law only to the extent that the Customs Tariff (Anti-Dumping) Act 1975 is a domestic implementation by the Commonwealth Parliament of the Codes.
- (B) See comments on Questions 2 and 5 below.
- (C) The Codes themselves are not enforceable as domestic law. However, there is provision in Australian law for the courts to seek out the intention of legislation in ruling on its interpretation. Where a court considers it appropriate, it may look beyond the literal meaning of the statute including making reference to, for example, an international Convention or Code, if the intention of the legislators was to give effect to that Convention or Code.

QUESTION 2 -

Yes, As a matter of policy the term "the highest price paid" is interpreted to be a representative price for like goods sold in the ordinary course of trade in the country of export for export to a third country, being sales that are arm's length transactions.

QUESTION 3 -

- (A) Yes.
- (B) Yes. The provisions of Sections 42 to 45(3) of the Customs Act 1901 are as follows :
 - . Section 42
 - (1) The Customs shall have the right to require and take securities for compliance with this Act, for compliance with conditions or requirements to which the importation or exportation of goods is subject and generally for the protection of the revenue of the Customs, and pending the giving of the required security in relation to any goods subject to the control of the Customs may refuse to deliver the goods or to pass any entry relating thereto.

- (1A) The right of the Customs under Sub-Section (1) to require and take a security includes the right to require and take securities for payment of any penalty that a person may become liable to pay to the Commonwealth under the Customs Undertakings (Penalties) Act 1981.
- (1B) The right of the Customs under Sub-Section (1) to require and take a security includes the right to require and take securities in respect of any duty that may be payable on goods under the Customs Tariff (Anti-Dumping) Act 1975.
- (2) The right of Customs under Sub-Section (1) to require and take securities includes the right to require and take a security for a purpose or purposes for which security may be taken under that Sub-Section and for a purpose or purposes for which security may be taken under Section 16 of the Excise Act 1901 - 1957 and the succeeding provisions of this part apply to, and in relation to such a security in the same manner as they apply to and in relation to any other security required and taken under Sub-Section (1).
- (3) The rights of the Customs under this section may be exercised by a Collector on behalf of the Customs.

. Section 43

A security shall be given in a manner and form approved by a Collector and may, subject to that approval, be by bond, guarantee, cash deposit or any other method, or by two or more different methods.

. Section 44

When security is required for any particular purpose, security may by the authority of the Comptroller be accepted to cover all transactions for such time and for such amount as the Comptroller may approve.

. Section 45

- (1) All customs securities may, after the expiration of 3 years from the date therefor or from the time specified for the performance of the conditions thereof be cancelled by the Comptroller.
- (2) A security in respect of any duty that may be payable on goods under Sections 8, 9, 10 or 11 of the Customs Tariff (Anti-Dumping) Act 1975 shall be cancelled before the expiration of the prescribed period after the date of the security.

(3) In Sub-Section (2), "prescribed periods" means -

(A) in relation to a security in respect of any duty that may be payable on goods under Sections 8 or 9 of the Customs Tariff (Anti-Dumping) Act 1975 - a period of 4 months or such longer period (not being a period exceeding 6 months) as is requested by the exporter of the goods concerned; or

(B) in any other case - a period of 4 months.

(C) Provisional measures by way of cash or documentary security are only imposed after a prima facie case of dumping/ subsidisation causing or threatening material injury to a local industry has been established and the action is considered necessary to prevent injury to that industry pending the finalisation of the formal investigation and final determination of the complaint.

Where significant quantities of allegedly dumped/subsidised goods are involved, provisional measures have been notified, on occasions, at the same time as formal initiation of the investigation (that is, after a prima facie case has been established). Actual collection of securities occurs when shipments arrive, normally well after that date of notification.

Australia's actions in taking provisional measures are fully in accord with Article 10.1 of the Anti-Dumping Code.

QUESTION 4 -

Section 13(5) of the Customs Tariff (Anti-Dumping) Act 1975 is a discretionary provision and would not be applied inconsistently with Australia's obligations under the GATT and is in accord with Article 5.9 of the Subsidies and Countervailing Duties Code.

QUESTION 5 -

Australia's practice is to apply the provisions of the Code. There are general laws of the Commonwealth of Australia covering administrative procedures and decision making. These are considered to more than adequately cover the procedural requirements of the Codes.

The provisions of the administrative laws of the Commonwealth of Australia ensure relevant disclosure and confidentiality of information and opportunities to obtain information and the obtaining of a hearing by the parties concerned. The provisions of the Codes are considered by the administering authority as minimum provisions within the context of Australia's legal administrative requirements.

AUSTRALIA'S REPLY TO THE SWISS DELEGATION'S QUESTIONS
CONCERNING AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING
LEGISLATION

(Reference ADP/W/68 and SCM/W/58 of 22 September, 1983)

Section I

The two Codes are part of Australian domestic law only to the extent that the Customs Tariff (Anti-Dumping) Act 1975 is a domestic implementation by the Commonwealth Parliament of the Codes.

The relationship and hierarchical order between the Customs Tariff (Anti-Dumping) Act 1975 and the other provisions of general application is that they are all laws of the Commonwealth of Australia, but none is predominant.

The relevant legislation and regulations for implementing the Codes in addition to that notified in ADP/W/Add.18 and SCM/1/Add.18 are the Customs Act 1901 and the Customs Tariff (Anti-Dumping) Amendment Act 1983. Other legislation having general application to the implementation of the Codes includes the Custom Tariff Act 1982, the Administrative Decisions (Judicial Review) Act 1977, the Ombudsman Act 1976, the Freedom of Information Act 1982, the Industries Assistance Commission Act 1973, the Sales Tax Assessment Acts 1930 and the Sales Tax Acts 1930.

Departmental guidelines exist in the form of general orders, and except for confidential instructions these are available to the public. The Department of Industry and Commerce is preparing comprehensive guidelines in the form of a manual, in conformity with the requirements of the Freedom of Information Act. The manual is expected to be available in early 1984. The content of the manual is expected to include the Codes, legislation, information booklet, general instructions, glossary of terms, questionnaires, flow chart and an organisation chart.

Section II

QUESTION 1 -

Australia's practice is to apply the provisions of the Codes. There are general laws of the Commonwealth of Australia covering administrative procedures and decision making.

These laws also ensure relevant disclosure and confidentiality of information and opportunities to obtain information and the obtaining of a hearing by the parties concerned. The provisions of the Codes are considered by the administering authority as minimum provisions within the context of Australia's legal administrative requirements.

The following is a brief outline of the relevant laws of the Commonwealth of Australia relating to administrative practices of the administering authority -

- . Freedom of Information - under this Act every person has access to information in documentary form in possession of the Government of Australia. The Government is required to :
 - A) make available to the public information about the operations of Departments and Public Authorities and, in particular, ensure that rules and practices affecting members of the public in their dealings with Departments and Public Authorities are readily available to persons affected by those rules and practices; and
 - B) give access to information in documentary form in the possession of Ministers, Departments and Public Authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs in respect of whom information is collected and held by Departments and Public Authorities.

The provisions for access to information held on anti-dumping and countervailing matters therefore meet the requirements of Article 6 of the Anti-Dumping Code and Article 2 of the Subsidies and Countervailing Duties Code.

- . Ombudsman Act 1976 - The Ombudsman is empowered to investigate complaints about actions of Commonwealth officials (but not Ministers) and statutory bodies, which relate to administration. He can recommend corrective action.

The Ombudsman provides an additional safeguard which ensures that interested parties to dumping or countervailing actions receive fair and just administrative treatment.

- . Administrative Decisions (Judicial Review) Act 1977 - This Act allows for the judicial review of Commonwealth administrative actions made under a statute of the Commonwealth and applies to, amongst other things, the Minister's and other administrative actions under, or associated with, the provisions of the Customs

Tariff (Anti-Dumping) Act 1975. The judicial review is by the Federal Court of Australia. The only question for the Court is whether the action is lawful, in the sense that it is within the power conferred on the relevant Minister or official or body. The Court is empowered to enjoin action or to quash a decision it finds unlawful and to direct action to be taken in accordance with the law. It is also empowered to be able to compel action by a person or body who has not acted, but who ought to have done so.

The Act provides that a person may apply for a review of a decision and may obtain from the decision-maker written reasons for the decision, including findings on material questions of fact prior to the making of any application to the Court.

The Act provides wide ranging grounds for appeal against administrative decisions including a requirement for the observance of the principles of natural justice.

As previously notified in ADP/1/Add.18/Suppl. and SCM/1/Add.18/Suppl., the Customs Securities (Anti-Dumping) Amendment Act 1982 removed from the scope of the Administrative Decision (Judicial Review) Act 1977 decisions made under Section 42 of the Customs Act 1901 to require and take securities in respect of duty that may be payable under the Customs Tariff (Anti-Dumping) Act 1975. However, such decisions are appealable within the original jurisdiction of the High Court of Australia.

Sections 8(1), 8(2), 10(1) and 10(2) of the Customs Tariff (Anti-Dumping) Act 1975 provide, as a pre-condition for the publication of a notice imposing dumping/countervailing duty, that material injury to an Australian industry has been or is being caused or is threatened, or the establishment of an Australian industry has been or may be materially hindered by dumped/subsidised exports. The Code paragraphs, although outlining many factors relating to injury, which it is the administrative practice of the Australian administering authority to consider, do not deem any one or several of these factors to necessarily give decisive guidance.

Section 42 of the Customs Act 1901 provides that Customs have the right to require and take security in respect of any duty that may be payable on goods under the Customs Tariff (Anti-Dumping) Act 1975. In order for dumping/countervailing duty to become payable, Australian administrative practice, which is in conformity with the requirements of Australia's administrative law, requires a preliminary determination and an investigation of the complaint before a final determination is made. Provisional measures by way of cash or documentary security are only imposed after a preliminary finding of dumping/subsidisation causing or threatening material injury to a local industry has been established and the action is considered necessary to prevent injury to that industry pending the finalisation of the formal investigation and final determination of the complaint.

QUESTION 2 -

Reference is made to "an Australian industry" in Sections 8(1), 8(2), 10(1) and 10(2) of the Customs Tariff (Anti-Dumping) Act 1975. "An Australian industry" is consistent with the term domestic industry used in the Codes; "an Australian industry" being a domestic industry of Australia. Australia has a consistent administrative practice of applying the provisions of Articles 4 and 6 of the relevant Codes when determining whether there is an Australian industry.

QUESTION 3 -

The Industries Assistance Commission is an Australian independent statutory authority established under the Industries Assistance Commission Act 1973.

The Commission consists of not less than five or not more than nine Commissioners, one of whom is the Chairman. The Commissioners are appointed by the Governor-General for a period not exceeding five years.

The Minister for Industry and Commerce, after consultation with the Chairman, may appoint Associate Commissioners for a period not exceeding five years, or the duration of specific inquiries.

As at 25 October 1983, the Commission comprised five Commissioners and five Associate Commissioners.