GENERAL AGREEMENT ON

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Committee on Anti-Dumping Practices

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RESPONSES TO QUESTIONS FROM THE UNITED STATES ON NEW ZEALAND'S ANTI-DUMPING LEGISLATION

The following are responses to questions posed by the United States.

References to "the Act" in the responses, are to the Dumping and Countervailing Duties Act 1988, which has replaced Part VA of the Customs Act 1966 (ADP/1/Add.15) as the legislation governing anti-dumping and countervailing duty actions. The text of the Act has been circulated in ADP/1/Add.15/Rev.1.

The New Zealand authority responsible for the administration of the Act is the Ministry of Commerce. The Ministry is cognizant of New Zealand's obligations as a signatory to the Anti-Dumping Code, and as a matter of policy applies the Act consistently with those obligations.

It is not the practice of the New Zealand authorities to provide responses of a hypothetical nature in relation to matters which may be the subject of judicial review. This position is reflected in the responses to a number of the questions raised.

Question: Section 186A(1) - "Dumping":

Could New Zealand clarify, by way of illustration or definition, what the term "goods ... intended to be imported" is meant to encompass.

Response s.3(1) [s.186A(1)]

The term "goods ... intended to be imported" encompasses goods which have not actually been through the process of importation, but for which there is a reasonable basis to determine that they will be imported. The definition needs to be read in the context of the Act as a whole. Thus, references in the Act to intended imports are qualified, where appropriate, by references to purchases or purchase prices. This indicates that a sale has taken place and would include constructive sales such as contractual arrangements which have all of the essential characteristics of sales, but which may not be termed "sales" by the parties involved. The term does not encompass the simple possibility that goods may be imported, nor mere allegation or conjecture that the goods will be imported.

Question: Section 186A(1) - "Industry":

The exclusion of importers from the definition of domestic industry appears to be an absolute one. Could there not be circumstances under which a firm may have imported the product under investigation and yet still be legitimately considered as part of the domestic industry - e.g., when the ratio of the firm's imports to its production of the like product is negligible? How would New Zealand authorities treat a domestic firm which is related to an exporter under investigation but which does not import the product being investigated?

Response s.3(1) [s.186A(1)]

The definition excludes from "industry" importers of the allegedly dumped goods, i.e. goods from the exporters and countries named in the complaint, as provided for in Article 4:1(i) of the Anti-Dumping Code.

A domestic firm which is related to an exporter under investigation but which does not import the product being investigated, would generally be considered part of the industry if it was a producer of like goods.

Question: Section 186A(4)(e)-(g):

What is meant by the term "direct or indirect control"? Could New Zealand provide examples of how direct or indirect control might be identified in the course of an investigation?

Response s.3(4)(e)-(g) [s.186A(4)(c)-(g)]

The question of whether or not control is direct or indirect for the purposes of the implementation of the Act will be determined on the basis of the particular circumstances of each individual case. In general, direct control will exist, inter alia, where a majority shareholding or voter rights or ownership of capital or assets in a company is held, while indirect control can be through beneficial entitlement to such direct control or through a chain of ownership.

Question: Section 186B(2):

Could New Zealand provide examples of the possible bases or methodologies for determining the export price under the circumstances described in the subsection?

Response s.4(2) [s.186B(2)]

In the circumstances provided for in s.4(2) of the Act, the export price may be constructed or determined on such reasonable basis as the Minister considers appropriate, in accordance with Article 2:5 of the Code.

Question: Section 186C:

When an exporter has no home market sales, or none that can be used for comparison purposes, what is the theoretical basis for establishing normal value on the basis of home market sales by other sellers of like products rather than on the basis of the exporter's sales to third country markets? Why should the home market experience of other producers provide a better indication of whether a particular firm may be dumping, especially when that firm's actual experience in a third country market may be available?

Response s.5 [s.186C]

The basis for establishing normal value on the basis of home market sales by other sellers of like products rather than on the basis of the exporter's sales to third county markets, is that the GATT, in Article VI:1(a) states that dumping occurs when the export price

> "is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, ..."

Question: Section 186C(2)(a)(ii):

Could New Zealand clarify what is meant by the phrase "the situation in the relevant market is such that sales in that market that would otherwise be relevant for the purpose of determining a price ... are not suitable for use in determining such a price"?

Response s.5(2)(a)(ii) [s.186C(2)(a)(ii)]

In determining whether or not there are relevant domestic sales the particular facts of the individual case will be taken into account. In particular, it would be established on the facts whether any sales were in the ordinary course of trade and were arms length transactions.

The situation in which it might be found that the sales that would otherwise be relevant for determining a price (for normal value) are not suitable, will depend on the individual circumstances of each case. The section is intended to cover those situations where there may be a price in the ordinary course of trade for a like product destined for consumption in the exporting country, but where for reasons particular to the case concerned, that price does not provide an appropriate comparison for the purposes of the Act, such as sales at different levels of trade or at significantly different periods of time.

Question: Section 186C(2):

The language of this section seems to imply that constructed value is generally preferred over sales to third country markets in determining normal value, when sales in the home market cannot be used. Would such a preference exist in practice?

Response s.5(2) [s.186C(2)]

Like Article 2:4 of the Code, s.5(2) of the Act provides the options of constructed or third country values without mandating any order or hierarchy of use. In practice, selection of either option as the basis for determining normal value will be determined by the particular facts of individual cases, including the availability of information on the necessary criteria of each option.

Question: Section 186M:

Subsection (1) allows for the acceptance of undertakings when the foreign government or exporter commits to "conduct future export trade to New Zealand ... to avoid causing or threatening material injury ..." Subsection (2) refers specifically to price increases in an undertaking. Is this section intended to apply to both anti-dumping and countervailing duty proceedings? Are price undertakings the only form of undertakings provided for? If not, why is there no reference to other forms, such as cessation of exports or, in the case of countervailing duty investigations, the limitation or elimination of the subsidy?

Response s.15 [s.186M]

Undertakings may be offered at any time from the initiation of an investigation and while the investigation is underway in respect of the consignment of goods concerned, until a final determination is made.

The exporter proposes a level of price undertaking, and it is in within the minister's discretion to accept it if he is satisfied on the question of preventing material injury.

The conduct of future trade with New Zealand can include the cessation of imports.

Question: Section 186P

It is unclear whether this section is intended to refer to the application of anti-dumping and countervailing duties on behalf of third country industries, or only anti-dumping duties. In addition, there is no reference to obtaining the agreement of the Contracting Parties in doing so. Could New Zealand clarify these points?

Response s.18 [s.186P]

It is the intention that s.18 of the Act should apply to both anti-dumping and countervailing actions. The amendment of the section to clarify this intent is under consideration.

Before taking anti-dumping or countervailing measures under s.18 of the Act, New Zealand would meet the obligation under Article VI:6 of the General Agreement to obtain the agreement of the CONTRACTING PARTIES. Consideration is being given to the need for including in the Act a specific reference to this obligation.