

GENERAL AGREEMENT ON

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TARIFFS AND TRADE

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Committee on Subsidies and
Countervailing Measures

RESPONSES TO QUESTIONS FROM CANADA ON
NEW ZEALAND'S COUNTERVAIL LEGISLATION

The following are responses to questions posed by Canada (SCM/W/171) on New Zealand's legislation governing countervailing duties.

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 (SCM/1/Add.15/Rev.2) as the legislation governing anti-dumping and countervailing duty actions. The text of the Act has been circulated in SCM/1/Add.15/Rev.3. *

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 Subsidies 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 1: Transparency

It is noted that the injury investigation will be conducted by the Minister, as well as the investigation of the alleged subsidization. While it is recognized that there is no requirement in the Code for two separate investigating authorities, there is value in a separated system for reasons of transparency. Why did New Zealand choose not to have a separate adjudicative body for the injury determination? Will special procedures be instituted to ensure the process is as open and transparent as possible? What appeal mechanisms are available to parties to a countervail action?

Response:

In New Zealand, matters relating to the provision of information by Government agencies are governed by the Official Information Act 1982. The basic principle of this act is that information shall be made available unless there is good reason for withholding it.

Accordingly, it is an objective of the New Zealand dumping and countervail legislation to provide for transparency within the constraints of the need to respect commercial confidentiality. For this reason, the law includes those requirements set out in s.10(4) regarding the need to provide reasonable opportunity for interested parties to present evidence, to have access to non-confidential information, and for meetings of the parties. Such requirements to assure transparency would apply equally to separate adjudicative bodies, and the number of such bodies would not, therefore, affect the level of transparency.

The question of whether or not to have separate adjudicative bodies to determine questions of subsidy and injury was considered at the time of the earlier revision of the legislation. It was decided that on balance the creation of an independent body to deal specifically with injury determinations was not the most appropriate administrative arrangement in the New Zealand situation.

The legislation includes provision in s.10(4) for interested parties to argue their case.

There is no appeal mechanism with regard to the subject matter of decisions made by the Minister or the Secretary of Commerce. However, there is a review mechanism available to parties to an anti-dumping or countervailing action on application to the High Court for judicial review of a decision made under a statutory power. The mechanism is contained in s.4 of the Judicature Amendment Act 1972. More specifically this allows an application for review in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, and provides for the grant of any relief that the applicant would be entitled to in, inter alia, proceedings for a declaration against that person. The applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, or the Court may set aside the decision. The Court has specific power to direct that the matter be reconsidered and determined, and can give directions as it thinks just.

Question 2: Notifications

Section 186H.(6) provides for the consultations envisaged by Article 3:1 of the Code but there does not appear to be a provision for notification of the exporting country government when a request for initiation of investigation is received from the domestic producer by the Comptroller. How will the exporting country be notified of such action?

Response s.10(6) [2.186H(6)]

When a request for the initiation of a countervailing duty investigation is accepted, i.e. when a complaint is considered to be adequately documented to allow an assessment of the sufficiency of the evidence, the Government or Governments of the country or countries of

export will be advised, through their accredited representatives, so that they can avail themselves of the opportunity for consultations in accordance with Article 3:1 of the Subsidies Code.

Question 3: Access to Information

Section 186H.(4)(b) provides for the access to non-confidential information relevant to the interested parties presenting their cases during the course of the investigation. Does the legislation envisage counsel for those interested parties having access to pertinent third party confidential materials/submissions?

Response s.10(4) [s.186H(4)]

Access to official information is governed by the Official Information Act 1982. Under this Act information may be withheld only in certain specified circumstances, including, inter alia, where making it available would disclose a trade secret or would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information.

Under the Official Information Act 1982 the New Zealand authorities are obliged to allow access to official information, including information used by the authorities in reaching decisions on countervail matters, except where the information may reasonably be withheld under the specific criteria set out in the Act (refer also to response on Transparency in relation to access to confidential information by counsel).

Access to confidential information pertaining to complainants is not available to counsel for importers/exporters during the course of an investigation.

Question 4: Reviews

The provisions of Sections 186(L).(5) & (6) put some onus on the Minister to review the need for the continued imposition of the countervailing duty, but there are no specified sunset clauses for the expiration of a decision/finding after a certain period of time unless a review has confirmed the need for the continuation of the injury finding. Was the inclusion of such a sunset provision considered, and if so, what was the rationale for its exclusion?

Response: s.14(5) [s.186L(5)]

Provided a party is an "interested party" there are no additional conditions which must be met before a review is requested, other than the need to submit evidence justifying the request. The evidence which it would be necessary to submit would include evidence of a change in the existence or amount of subsidy; the extent of material injury; or any change in the causal link between the subsidy and the material injury; or evidence relating to the "industry" or "like goods" which would justify a review.

The reviews provided for 'n s.14(5) relate to the need for the continued imposition of the countervailing duty. The review would accordingly cover the existence of subsidization, the extent of injury, and the causal relationship between injury and the subsidization of like goods. Where no request for a review is received from an interested party an administrative decision has been taken that the Minister will review the need for the continued imposition of countervailing duty within two years. The amount of countervailing duty actually imposed may be subject to more frequent reassessment view in order to ensure that the level of duty is not greater than is necessary to prevent material injury. A sunset provision has not been considered necessary.

Question 5: Price Undertakings

Do the provisions of Section 186M envisage price undertakings only? Is it the intention of the New Zealand legislation to allow for undertakings in countervail investigations which offer the reduction or elimination of the subsidy or which offer limitations on the quantity of the subject goods exported to the investigating country?

Response s.15 [s.186M]

The provisions of s.15 are not limited to price undertakings, but cover any undertakings under which the "Government or the exporter, as the case may be, will so conduct future export trade to New Zealand of like goods ... to avoid causing or threatening material injury to an industry or materially retarding the establishment of an industry."

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 level of price undertaking will be determined so as to prevent material injury, based on the particular circumstances of each individual case, and may be less than the level of the subsidy.

Question 6: Amount of Subsidy

It is generally noted that the New Zealand legislation seems to give broad discretion to the Minister in the determination of the amount of the subsidy. Is it the intention of New Zealand to introduce Regulations which would provide further interpretative guidance, and if so, when will these be submitted to the Committee for review?

Response s.7 [s.186E]

The term "subsidy" is defined in s.3(1) of the Act. The discretion provided to the Minister relates to the manner in which the amount of subsidy is determined where the Minister is satisfied that sufficient information has not been furnished or is not available to enable the amount of the subsidy to be ascertained for the purposes of the Act. There is no provision for regulations to be made under the Act.