

**Committee on Anti-Dumping Practices
Committee on Subsidies and Countervailing Measures**

Original: English

**NOTIFICATION OF LAWS AND REGULATIONS UNDER
ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS**

Questions Posed by the UNITED STATES
Regarding the Notification of PANAMA¹

The following communication, dated 16 October 1998, has been received from the Permanent Mission of the United States.

On 26 March 1998, Panama notified to the WTO Law 29 of 1 February 1996, as amended by Law 23 of 15 June 1997 ("Law 29"). The antidumping and countervailing duty ("AD/CVD") provisions of Law 29 are codified in three titles: Title III ("Unfair Trade Practices"); Title IV ("Provisions Common To The Preceding Titles"); and Title VIII ("Judicial Procedure").

Anti-dumping Methodology

Constructed Export Price – Generally: Art. 75, para. 3.2 of Law 29 is materially similar to Art. 2.3 of the A-D Agreement. However, Law 29 does not specify what deductions the Panamanian authority would make from a starting price in constructing an export price. Law 29 also does not explicitly instruct the Panamanian authority to adjust the export price for further manufacturing or processing of subject imports in Panama, although it could presumably do so pursuant to its authority to adjust prices where merchandise is ultimately sold in a condition other than "the condition as imported".

1. Will Panama promulgate regulations setting forth its export price and constructed export price calculation methodologies?
2. Art. 75 appears to use the terms "import price" and "export price" interchangeably. Are these terms indeed synonymous?

Selection of Normal Value: Art. 75 of Law 29 provides that normal value is "the comparable price, in the ordinary course of trade, for the identical or similar product when destined for consumption in the exporting country." However, when the "import price" cannot be compared to prices in the market of the exporting country, "the margin shall be determined by comparison with a comparable price of the similar or identical product when exported to a third country, provided that this price is representative." Art. 75 does not identify the circumstances that would warrant rejection of the home market for comparison purposes (*e.g.*, a "particular market situation" or low volume of sales in the home market), as specified in Art. 2.2 of the A-D Agreement.

¹ G/ADP/N/1/PAN/1-G/SCM/N/1/PAN/1

3. What circumstances would warrant rejection of the home market for comparison purposes as specified in Art. 2.2 of the A-D Agreement?

Price Averaging: Law 29 makes no provision for averaging prices in either market.

4. Does Panama intend only to make direct price-to-price comparisons, or also to average prices under certain circumstances?

Exclusion of Sales Below Cost of Production: Law 29 contains no provision authorizing the exclusion of comparison-market sales made at prices below the cost of production.

5. Will Panama authorize the exclusion of comparison-market sales made at prices below the cost of production?

Constructed Value: Pursuant to Art. 75 of Law 29, the Panamanian authority may, in the absence of comparison-market sales, construct a normal value, which consists of “the cost of the production of the product in the country of origin plus a reasonable addition for selling cost and profit or returns.” Law 29 provides no further guidance on the calculation of constructed value.

6. Art. 2.2 of the A-D Agreement defines constructed value as “the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.” The formulation in Panama’s law is different, apparently excluding general and administrative costs. Does Panama intend to include such costs in its calculation of constructed value?

Non-Market Economy Countries: Law 29 contains no provision governing the calculation of normal value for imports from state-controlled economies.

7. How would Panama calculate dumping margins for imports from non-market economies?

Countervailing Duty Methodology

Definition of Subsidy: Art. 71 of Law 29 provides that a subsidy is “understood to mean” any of the following:

- The direct or indirect granting of any financial contribution, incentive, tax concession or assistance by the State or any of its institutions to the manufacturing, production or export of a good;
- The foregoing of, or exemption from public revenue which would otherwise be due. The exemption of an exported product from duties or taxes borne by the identical similar product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy;
- The granting of a financial contribution, incentive, tax concession or assistance and foregoing or exemption in respect of inputs subsequently to be used in the production of a final product;

- Any other form of income or price support to the exporter. In all of the above cases, a benefit must thereby be conferred.

Para. 3 regarding inputs applies more broadly than Art. 1.1(a)(1)(iii) of the SCM Agreement in that the latter provides that a subsidy exists only where “a government *provides* goods or services other than general infrastructure.”

8. Upon what authority in the SCM Agreement does this aspect of Panama’s definition of a subsidy rest?

Unlike Art. 1.1 of the SCM Agreement, Art. 71 identifies “financial contribution” merely as a type of subsidy, rather than as a precondition for identifying subsidies.

9. How will Panama implement the definition of financial contribution as used in Art. 1.1 of the SCM Agreement?

Specificity: Art. 72 of Law 29 enumerates the principles that Panama will apply in determining whether a subsidy is specific. Art. 72 largely mirrors Art. 2 of the SCM Agreement, except that it does not require the Panamanian authority to consider “the extent of diversification of economic activities within the jurisdiction of the granting authority,” as Art. 2.1(c) requires, and there is no provision enacting the Art. 2.4 mandate that “[a]ny determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.”

10. How does Panama intend to implement the evidentiary threshold outlined in Art. 2.4 of the SCM Agreement?

Conferral of Benefit and Amount of Subsidy: Beyond the general language of Art. 85, which provides that a countervailing duty is “a special duty, independent of import duties, established with a view to counteracting any subsidization of the manufacture, production or export of a foreign product”, Law 29 offers no guidance on the calculation of countervailing duties.

11. Does Panama intend to codify the provisions of Art. 14 of the SCM Agreement (e.g., Art. 14(a)’s requirement that a government’s provision of equity capital not be considered as conferring a benefit unless such action is inconsistent with the usual investment practices of private investors within the territory of the WTO Member under investigation)?

Investigative Procedures

Treatment of Proprietary Information: Law 29 contains no provision addressing the treatment of proprietary information.

12. Does Panama intend to adopt any procedures for the release of proprietary information under protective order in AD/CVD investigations?

Timetable for Investigations: Law 29 provides no overall time frame for the conduct of AD/CVD investigations by the Panamanian authority. However, pursuant to Art. 167, parties are given three working days from the day of the hearing to submit comments, and pursuant to Art. 168, “the Substantiating Commissioner shall have ten working days in which to issue a substantiated [final] decision.” While these deadlines anticipate an expedient process, Law 29 does not indicate how soon after initiation of an investigation the hearing described in Art. 167 must occur.

13. How will Panama ensure that investigations conclude within the time limits established in Art. 5.10 of the A-D Agreement and Art. 11.11 of the SCM Agreement?
14. Will the administering authority publish its preliminary determination before conducting the hearings described in Art. 167?

Provisional Measures: Articles 158 through 164 of Law 29 set forth the authority for the imposition of provisional measures. Provisional measures may be imposed to prevent “imminent injury or prejudice to domestic industry or production that is difficult to repair, provided it is determined that the imports that are the subject of unfair trade practices cause or threaten to cause material prejudice or injury.” Specifically, Art. 158 provides that provisional measures may not be applied earlier than 60 days from the date of initiation, and Art. 160 provides that “the duration of the provisional measure *should not* exceed four months in the case of subsidies, and six months in the case of dumping” (emphasis added). Art. 160 also specifies that “[t]he amount of the guarantee shall not exceed the subsidy or margin of dumping provisionally calculated.”

15. Do circumstances exist in which the Panamanian authority would allow provisional measures to extend beyond the four and six-month periods?

Critical Circumstances: Art. 163 of Law 29 authorizes the imposition of definitive countervailing duties “within a period not exceeding 90 days prior to the date of the application of the provisional measures” under circumstances like those authorized by Art. 20.6 of the SCM Agreement.

16. Why does Law 29 authorize retroactive imposition *only* of countervailing duties?

Determinations Based on Facts Available: Art. 157 provides, in full: “When the authorities of the exporting country or the interested parties deny access to the necessary information, refuse to provide such information within a reasonable time-period or seriously impede the investigation, preliminary or definitive conclusions may be reached on the basis of the facts available, including those appearing in the application for the initiation of the proceedings submitted by the domestic industry or production.”

17. Will Panama provide respondents with the opportunity to cure deficient submissions, as required by Annex II of the A-D Agreement?

Administrative Reviews

Nature of Deposit/Assessment System: While Art. 87 provides for “periodic review” of AD/CVD measures, Law 29 does not indicate whether the Panamanian authority would employ a prospective, retrospective, or hybrid, (e.g., bifurcated) assessment methodology. The only assessment provision is Art. 170, which clarifies that, once a final resolution has been made executory, the AD/CVD duties “shall be imposed by the Cabinet council or by such entity as the Law specifies, and applied by the Directorate-General of Customs of the Ministry of Finance and the Treasury.”

18. What type of assessment methodology does the Panamanian authority intend to utilize? If a retrospective or hybrid methodology, would deposits or guarantees in excess of the finally established duty be refunded?

Standard for Obtaining Administrative Reviews: Art. 87 of Law 29 *requires* “periodic review” of AD/CVD measures “at least every 12 months.” Reviews may be conducted *ex officio*, or upon request. Unlike Art. 11.2 of the AD Agreement, Law 29 is non-discretionary. The Panamanian administering authority appears to have no authority not to review AD/CVD measures annually.

19. Would the Panamanian authority nonetheless claim discretion not to review AD/CVD measures annually?

New Shipper Reviews: Law 29 does not explicitly authorize new shipper reviews. However, nothing in the law appears to prevent the Panamanian authority from conducting one.

20. Does Panama intend to conduct new shipper reviews?

Sunset: Art. 86 of Law 29 requires the termination of AD/CVD duties within five years of their imposition “unless following a court review initiated *ex officio* or at the request of an authorized party it is determined prior to that date that the termination of the duty would result in the continuation or repetition of the damage and of the subsidy or dumping”.

21. Does the Panamanian authority have discretion to continue to impose duties pending the outcome of a sunset review past the five-year anniversary of the imposition of the measure?

Injury

Injury – Definition: Art. 78 defines “injury” and “material prejudice” to mean “any material loss or impairment or deprivation of any significant lawful, normal gain which the domestic industry or production suffers or may suffer as an immediate result of any of the unfair trade practices.”

22. Are “injury” and “material prejudice” synonymous?

Volume of Imports: In examining the volume of imports that are either dumped or subsidized, Art. 79 states that Panama will consider “whether there has been a significant increase in imports either in absolute terms or relative to domestic production or consumption.”

23. Is this a reference to all imports or only dumped or subsidized imports in accordance with Art. 3.2 of the A-D Agreement and Art. 15.2 of the SCM Agreement?
24. How does Art. 80 comport with Art. 3.7 of the A-D Agreement and Art. 15.7 of the SCM Agreement, which state that investigation authorities should consider whether there is “a significant rate of increase of dumped/subsidized imports into the domestic market indicating the likelihood of substantially increased importation” as a factor in analyzing whether or not there is a threat of material injury?

Effect on Prices: Art. 79 requires Panama to analyze the effects of a significant increase of dumped/subsidized imports on prices by considering whether these imports “are sold at a lower price, or whether the effect of such imports is otherwise to depress the prices of domestic production to a significant degree or prevent price increases which would otherwise have occurred.”

25. How does this comport with Art. 3.2 of the AD Agreement and Art. 15.2 of the SCM Agreement, which require an evaluation of “significant” price undercutting and price suppression to a significant degree?

Judicial Review

Administrative Process: In outlining Panama’s AD/CVD methodology, Law 29 refers variously to “the court” and “the Commission” without defining these terms. For example, Art. 75 suggests that

“the court” will determine how to calculate constructed export price, while Art. 146, dealing with the initiation of AD/CVD proceedings, states that they may be initiated under exceptional circumstances by “the Commission.”

26. How is responsibility for administering Panama’s AD/CVD law divided between these two entities? Is “the court” referenced in Art. 75 independent from the court or courts that provide judicial review of AD/CVD determinations?
27. Art. 141(2) appears to give the civil circuit courts jurisdiction over antidumping and countervailing duty matters. However, Art. 141 also states that “[a]n exception [to the grant of court jurisdiction] is made for cases assigned exclusively to the Commission.” The law does not expressly specify the jurisdiction of the Commission. Please explain the difference between the jurisdiction of the civil courts over antidumping and countervailing duty matters and the jurisdiction of the Commission.
 - (a) What are the duties and responsibilities of the Commission? Please explain its organization and membership.
 - (b) What are the duties and responsibilities of the Substantiating Commissioner? Are there any other Commissioners with different responsibilities? It appears under Article 235 that the Commission can act as a consultant to the court. Is the Substantiating Commissioner an officer of the Commission or of the court? To whom does (s)he report?
 - (c) What are the specific duties and responsibilities of the civil circuit courts referenced in Art. 141 concerning AD/CVD investigations?
 - (d) Is the entity that conducts an AD/CVD investigation also the entity that renders a determination in the investigation? Various sections of the law suggest that the entity that renders a determination may be the Substantiating Commissioner (Article 167), a judge at his or her own discretion (Art. 235), or a judge with the advice of the Commission (Art. 235). Which of these entities has actual responsibility for rendering final determinations in AD/CVD investigations?
 - (e) Does the provision in Art. 141 giving the civil circuit courts jurisdiction for “preventive purposes” have any applicability to AD/CVD matters? If so, please explain.
28. Do the provisions of Art. 141(6) regarding “proceedings for repair of collective damage, restoration of property to the state prior to the impairment and monetary compensation for overall damages to the community concerned” apply to AD/CVD investigations? If so, please explain how they apply to the investigations.
29. Do the provisions of Art. 141(8) regarding the imposition of penalties for violations of “this Law” apply to AD/SCM administrative procedures? If so, what penalties may be imposed, and how would the imposition of the penalties be consistent with the A-D and SCM Agreements?

30. How does Art. 167 regarding proceedings conducted by the Substantiating Commissioner, relate to Art. 155 regarding the examination of evidence conducted by a court and the procedural regulations set out in Art. 145?
31. Under Art. 169, the only remedy against the final resolution issued by the Substantiating Commissioner is an appeal before the “higher court of appeals.”
- (a) Does this mean that the final resolution is not reviewed by a lower court?
 - (b) What are the duties and responsibilities of the higher court of appeals? Is the “higher court of appeals” the same as the “High Court of Appeals” referenced in Art. 233? If not, please explain the distinction between the two courts and indicate whether the High Court of Appeals considers appeals relating to AD/CVD investigations.
 - (c) If the Substantiating Commissioner is an officer of the lower court, does the “higher court of appeals” provide an independent review of its decision, as required by Article 13 of the A-D Agreement and Article 23 of the SCM Agreement?
32. How does the “substantiated” decision issued by the Substantiating Commissioner in Art. 168 fulfill the requirements of A-D Art. 12.2 and SCM Art. 22.3, to publicize the “findings and conclusions reached on all issues of fact and law considered material by the investigating authorities?”
33. Does Art. 172 on Class Actions apply to AD/CVD administrative procedures? If so, how is permitting organized consumer associations to bring such actions consistent with A-D Art. 5.1 and 5.6 and SCM Art. 11.1 and 11.6?
34. Do Articles 173-232, titled “Authentication of Evidence” and containing provisions on disclosure, penalties, interrogatories and written and oral examination, apply to AD/CVD investigations?
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