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Productivity Commission

Australia's Anti-dumping and Countervailing System

Productivity Commission
Inquiry Report

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18 December 2009

Senator the Hon. Nick Sherry
Assistant Treasurer
Parliament House
CANBERRA ACT 2600

Dear Assistant Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's final report on *Australia's Anti-dumping and Countervailing System*.

Yours sincerely

Philip Weickhardt
Presiding Commissioner

Mike Woods
Deputy Chairman

Terms of reference

ANTI-DUMPING AND COUNTERVAILING SYSTEM

Productivity Commission Act 1998

I, CHRIS BOWEN, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, pursuant to Parts 2 and 3 of the Productivity Commission Act 1998 hereby request that the Productivity Commission undertake an inquiry into Australia's anti-dumping and countervailing system ('anti-dumping system') and report within nine months of the date of receipt of this reference. The Commission is to hold hearings for the purpose of this inquiry.

Background

Australia's anti-dumping system seeks to remedy the injurious effects on Australian industry caused by imports deemed to be unfairly priced. It allows local industry to apply for anti-dumping duties on goods 'dumped' in Australian markets at prices below those prevailing in the exporter's domestic market or to apply for countervailing duties on goods that have been subsidised by the government of the country of export. Where the dumping or subsidisation results in material injury to local industry, anti-dumping or countervailing duties can be applied.

The Australian Government's legislation review program under the National Competition Policy provided for a review of the anti-dumping arrangements. In January 2006, the Taskforce on Reducing the Regulatory Burden on Business recommended that the current anti-dumping system be reviewed. A broad review would complement and build on the Joint Study by the Australian Customs Service and the former Department of Industry, Tourism and Resources into the administrative elements of the anti-dumping arrangements, finalised in August 2006.

On 3 July 2008, the Council of Australian Governments (COAG) agreed to a list of priority areas for competition reform, which included a review of Australia's anti-dumping system.

The Australian Government believes an inquiry into the effectiveness and impact of Australia's anti-dumping system, including both the policy and administrative aspects, is warranted at the current time.

Scope of the Inquiry

1. The Commission is to report on the policy rationale for, and objectives of, Australia's anti-dumping system, and assess the effectiveness of the current system in achieving those objectives. It is to make recommendations on the appropriate future role of an anti-dumping system within the Government's overall policy framework.
2. In undertaking its assessment, the Commission is to examine the economy-wide costs and benefits of Australia's anti-dumping system, having regard to the administration and compliance costs of the system and taking account of, and where possible quantifying, the impact of the arrangements on:

-
- (a) the overall performance of the Australian economy, particularly economic growth, investment and competitiveness;
 - (b) importers and domestic industry, including small businesses, exporters, firms at different stages in the supply chain; and
 - (c) consumers and the broader community, including regions.
 3. The Commission is also to report on the administration of the anti-dumping system, taking account of the concerns of both importers and domestic industry, including but not limited to, the costs of compliance and administration, timeliness of the process, the effect on business certainty, and difficulties in accessing the system. In doing so, the Commission is to consider:
 - (a)
 - i. determination of dumping/existence of subsidies;
 - ii. assessment of injury;
 - iii. establishment of a connection between the dumping/subsidisation and the injury;
 - iv. determination of appropriate measures; and
 - v. review mechanisms.
 - (b) relevant substantive studies undertaken elsewhere, including the findings of the Joint Study into Australia's Anti-Dumping System undertaken by the Australian Customs Service and the former Department of Industry, Tourism and Resources.
 4. In making recommendations on the appropriate future role of an anti-dumping system in the Government's overall policy framework, the Commission is to:
 - (a) aim to improve the overall performance of the Australian economy, taking into account the interests of industry, importers and consumers;
 - (b) consider the consistency of anti-dumping policy with the overall policy framework, in particular competition, trade and industry policies, and alternative means of achieving the Government's objectives;
 - (c) have regard to Australia's international rights and obligations, including recent developments in international trade law and the current World Trade Organization Doha Round; and
 - (d) suggest practical ways of reducing compliance and administration costs, increasing business certainty and simplifying access to, and the timeliness and effectiveness of, the system.
 5. The Commission is to provide both a draft and a final report. The Government will consider the Commission's recommendations, and its response will be announced as soon as possible after the receipt of the Commission's report.

CHRIS BOWEN

Received 26 March 2009

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OVERVIEW

Key points

- The Australian anti-dumping system, which is based on agreed WTO rules and procedures, benefits a small number of import competing firms, but imposes greater costs on the rest of the economy.
- However, this net economic cost is likely to be very small. And the ability for Australian industries, like those in most other countries, to use the system to address what are perceived by many to be ‘unfair’ trading practices, may have lessened resistance to more significant tariff reforms.
- This ‘political economy’ argument for retaining the system would be strengthened by changes to address a number of deficiencies in the current arrangements which can add to the costs for the community. In particular:
 - there is no consideration of the wider economic impacts of anti-dumping measures
 - measures can too easily become akin to long-term protection, or outdated in the face of changing market circumstances
 - decision-making and its outcomes are not sufficiently transparent.
- Introduction of a ‘bounded’ public interest test, drawing on similar provisions overseas, would be a practical means to take account of wider impacts and prevent the imposition of measures that would be disproportionately costly.
 - The test would embody a presumption in favour of measures where there has been injurious dumping or subsidisation.
 - But it would also detail a small number of specific circumstances where measures would not be in the public interest — for example, where they would be ineffectual in removing injury; or would impose large costs on downstream users relative to the benefits for the applicant industry.
 - Customs would have to complete assessments against the test within 30 days, and then advise the Minister on whether any of these circumstances applied.
- Other changes that should be made to the current arrangements to achieve a better balance between benefits and costs include:
 - allowing only one three-year extension of measures after the initial five-year term
 - providing for annual adjustments to the magnitude of all measures
 - aligning Australia’s list of actionable subsidies with the WTO lists
 - increasing the robustness of the appeals process
 - imposing a time limit on decisions by the Minister
 - enhancing public reporting on the basis for decisions and their outcomes.
- To provide stakeholders with time to adjust, there should be a two-year delay before the public interest test and changed continuation requirements take effect. The new arrangements should be reviewed five years after that.

Overview

Australia's anti-dumping and countervailing system ('the anti-dumping system') seeks to remedy injurious effects of 'dumped' imports on Australian industries.

- Dumping is said to occur when an overseas supplier exports a good to Australia at a price below its 'normal value' in the supplier's home market. If dumping causes, or threatens to cause, 'material injury' to local producers of 'like goods', then remedial action — mainly the imposition of special customs duties — can be taken against the imported goods concerned.
- Similarly, countervailing duties can be imposed on imports which benefit from any of a specified group of government subsidies and which cause or threaten material injury to a local industry producing like goods. (Box 1 and figure 1 provide further explanation and illustration of key concepts and processes.)

Australia's system is based on World Trade Organization (WTO) agreed rules and procedures.

Though there have been periodic reviews of the administrative arrangements, it is now more than twenty years since the last comprehensive examination of the system. In essence, the Commission's task in this inquiry has been to determine whether Australia should retain an anti-dumping system and, if so, how it should be configured to best serve the interests of the community as a whole.

Recent usage of the system

In the past, Australia was one of the major users of anti-dumping measures. However, its recourse to measures has declined in recent years (see figure 2). That said, the proportion of measures which have been extended beyond the initial, standard, five-year term has been growing.

For many years, almost all of Australia's measures have been dumping-related, with only one countervailing measure currently in force. Most of the 27 current measures apply to a relatively narrow range of basic industrial chemicals and plastics, base metal products, paper products and processed agricultural products — the bulk of

which are inputs to further manufacturing processes. And most are against suppliers from the Asian region, and against Chinese firms in particular.

Box 1 An outline of Australia's anti-dumping system

Australia's system is based on WTO agreements that, amongst other things, aim to discipline the use of anti-dumping measures as an alternative form of protection. Though not obliged to enact such legislation, WTO members must comply with the agreed requirements should they wish to take action against dumped imports.

The system is administered by the Australian Customs and Border Protection Service (Customs). It investigates claims of dumping and subsidisation and makes recommendations to the Minister, and also oversees measures in force.

The investigation process goes through several stages (mostly time-limited) and includes appeals arrangements (though some decisions are not appellable). Key requirements that must be satisfied before measures can be imposed include:

- The goods produced by the local industry seeking relief from dumped or subsidised imported goods must be 'like' those imported goods.
- The application must have majority industry support.
- In dumping cases (but not subsidy cases), the export price of the goods must be below the 'normal value'. In the first instance, this value is based on 'arms length' sales in the exporter's own country. However, where there are no or an insufficient volume of such sales, a hierarchy of alternatives comes into play.
- Dumping or subsidisation has caused or threatens material injury to the Australian industry producing like goods. Though 'material injury' is not defined in the legislation, it has been taken to mean 'not immaterial, insubstantial or insignificant and greater than that likely to occur in the normal ebb and flow of business'.

If these requirements are met, then Customs can recommend to the Minister that duties be imposed up to the level of the assessed dumping margin (or the benefit from the subsidy provided by an overseas government). However, under Australia's 'lesser duty rule', a smaller duty sufficient to increase the price of the imported goods to a 'non-injurious' level may be applied. Alternatively, the overseas supplier can make a formal undertaking that would remove the injury.

Once in place, anti-dumping measures typically remain in force for five years, with scope for continuation for additional five-year periods, following further review.

With the exception of New Zealand, these provisions apply even to imports from Australia's bilateral preferential trade partners. Also, though any injurious dumping in Trans-Tasman trade is to be addressed through competition law, the Closer Economic Relations Agreement does not preclude either Australia or New Zealand taking countervailing action against the other.

Figure 1 **How do dumping investigations proceed?**

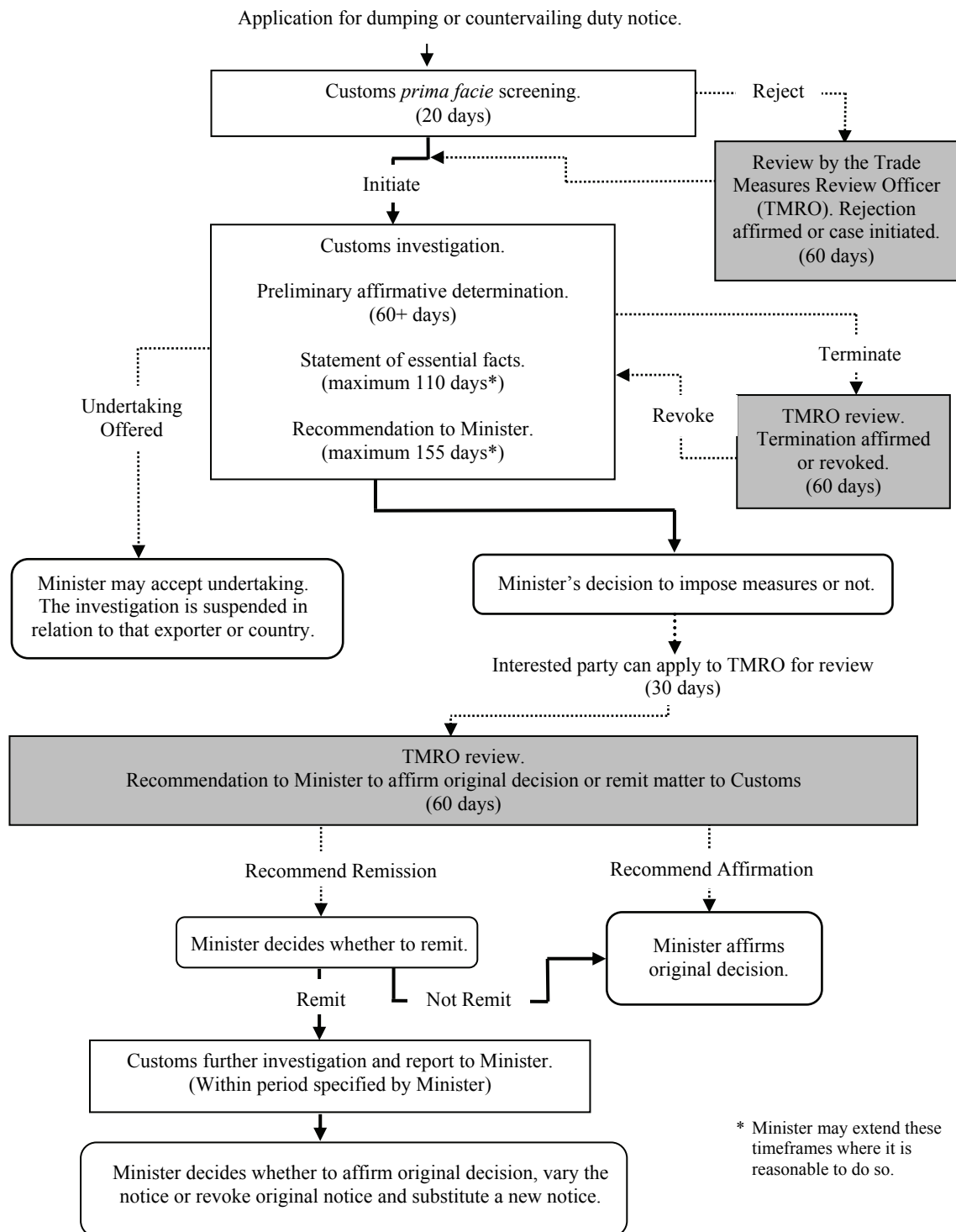
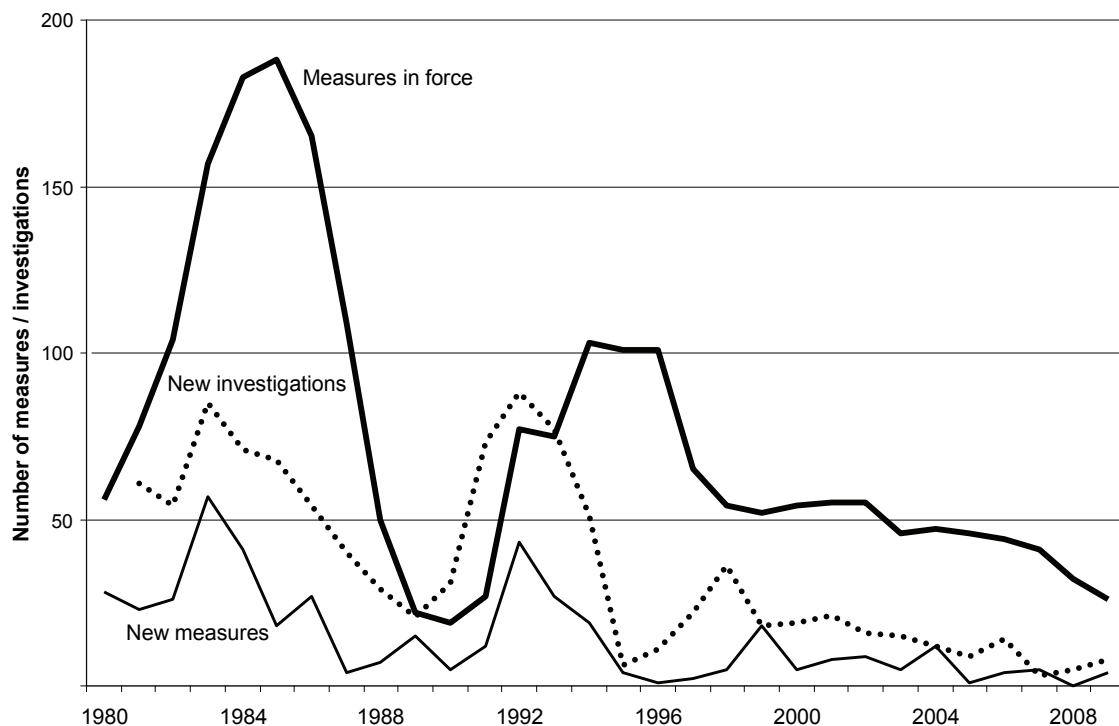


Figure 2 Australia's anti-dumping and countervailing activity



In the past, measures applied to a wider range of goods. But many of these goods (for example, outboard motors, washing machines and hypodermic needles) are no longer manufactured in Australia.

Magnitude of support

The support to local producers from some of the current measures is, at face value, considerable. Though specified in dollar terms, the ad valorem equivalent of a few measures exceeds 100 per cent, with the mean and median being 20 per cent and 8 per cent respectively.

However, the actual price raising impacts will depend on various supply and demand factors. For example, un-dumped 'like goods' (or close substitutes) may be available from overseas suppliers at prices below the duty-inclusive price of the dumped import.

Should Australia retain an anti-dumping system?

The anti-dumping system provides benefits to a small and decreasing range of import competing industries. But these benefits can come at a significant cost to downstream industries and other users of the goods concerned. And there are some adverse impacts on Australia's overall economic performance (see box 2).

However, because of the narrow range of activity encompassed by the system, this net cost is likely to be very small in economy-wide terms. Moreover, there is a broader political economy argument that because local industries have had such a system to fall back on, they may have been less resistant to reductions in import protection generally.

Given the changes in Australia's trade policy landscape over the last two decades, such 'system preserving' benefits from promoting what are perceived to be 'fairer' trading outcomes, are likely to be more modest than in the past. Nonetheless, removal of an anti-dumping 'safety valve' could make it more difficult to address remaining tariff and related reform issues.

The Commission considered the possibility of using competition law as a substitute for a dedicated anti-dumping system. However, there are several practical and other considerations which militate against extending this approach beyond its current partial application to trans-Tasman trade under the CER Agreement.

Given this, and that the potential broader benefits from providing access to anti-dumping protection seemingly come at very small overall cost to the community, the Commission has concluded that an anti-dumping system should be retained.

But this is not an endorsement of the status quo. The current system has a number of significant deficiencies. Through the reforms outlined below, there are opportunities to reduce the costs of the system and thereby strengthen the political economy case for its retention.

In what ways is the current system deficient?

Some of the deficiencies reflect the complex and often arcane nature of the system, and the WTO agreements on which it is based.

Box 2 The benefits and costs of anti-dumping measures

Anti-dumping measures have a range of benefits and costs for those affected by them.

- In boosting the competitiveness of recipient industries against overseas production, they will support greater activity, employment and investment in those industries than would otherwise be the case.
- User industries will face higher prices with negative impacts on their activity and investment — though where measures prevent the exit from the market of upstream local producers, the user industries concerned may be partially compensated by more secure long-term supply.
- When measures are imposed on final goods, consumers may similarly face higher prices. However, for measures imposed on intermediate products, and where the final product can also be imported, consumers may not be greatly affected.

While many of these benefits and costs represent transfers among the different domestic stakeholders, there will be some adverse consequences for Australia's overall economic performance and community well-being.

- Resources attracted to, or retained in, industries by virtue of anti-dumping protection will generally provide a lesser return to the community than if used elsewhere.
- Longstanding anti-dumping measures that become akin to tariffs are likely to lessen the imperative for recipient industries to respond to import competition through innovation and other forms of productivity improvement.
- There are costs for government in administering the system (\$6 million a year) and for local (and overseas) suppliers in complying with its requirements. Reflecting its complexity, and the consequent heavy reliance on consultants, case costs for firms or industry organisations of up to \$400 000 have been reported.
- The undertaking and duty refund provisions mean that some duty revenue that would otherwise accrue to the Australian Government instead flows overseas.

However, as the industry and product coverage of the anti-dumping system is narrow and diminishing, this detriment is likely to be very small in aggregate.

- Reflecting this, since 2006, Customs has collected an average of only \$9 million a year in anti-dumping and countervailing duties (before refunds). These duty collections do not, of course, capture the higher prices for the locally produced like goods — or any increase in the prices of un-dumped imports. Nonetheless, they are minute in comparison to total taxes on trade (\$6 billion a year) and the total value of imported goods (\$240 billion a year).
- While the mere existence of the anti-dumping system may cause some overseas exporters to price less aggressively in the Australian market, there is no evidence to suggest that such effects are significant. Similarly, while there may be incentives for local suppliers to seek to deter imports through threatening to take anti-dumping action, there are several factors diminishing the likely pay-offs from such behaviour.

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- Almost irrespective of any efforts to make the specific assessment criteria more precise, the need to retain the flexibility to deal with a diverse range of cases means that their application will inevitably involve considerable judgement.
 - The complexity of the requirements also means that their application will necessarily be time consuming and costly. Given the changes that have been made over the last decade or so to streamline the system, there is only limited scope for further improvement on this front.

However, there are deficiencies that reflect the particular way that Australia has chosen to implement the requirements in the WTO agreements that can and should be addressed. Paramount amongst these is that decisions to impose anti-dumping measures do not involve consideration of the wider impacts on the economy and the community. The scope for repeated extensions to measures without any requirement to re-examine injury and causality issues, and shortcomings in the mechanisms for adjusting the level of measures in response to changes in market conditions, can similarly detract from good outcomes for the community. And despite various previous initiatives, the lack of transparency in the decision-making process and the outcomes that flow from it continues to be a major concern for most stakeholders (see box 3).

Introducing consideration of wider impacts

For both efficiency and equity ('fairness') reasons, policy in this or any other area should be predicated on promoting the interests of the community as a whole. Though there is currently some discretion for the Minister to take account of the public interest in deciding whether or not to impose anti-dumping or countervailing measures, no recommendation from Customs based on dumping/subsidisation and injury considerations has ever been amended on public interest grounds.

Recognising that there are practical limits on how far consideration of wider impacts can and should reasonably extend, and having regard to approaches in other jurisdictions, the Commission examined several options. However, it concluded that most would have significant drawbacks.

- Under an open-ended public interest test that embodied no presumption in favour of measures when there had been injurious dumping or subsidisation, it would be difficult to factor in a system preserving benefit from achieving a 'fairer' trading outcome in each particular situation.
- By itself, an explicit requirement for the Minister to take account of the public interest would not guarantee appropriate consideration of such matters.

-
- Increasing the stringency of the existing assessment criteria would not necessarily screen out those cases where the imposition of measures would have been most costly.
 - As a stand-alone approach, separate public reporting on wider impacts would be a weak option for encouraging consideration of the public interest in the decision-making process.

Box 3 Lack of transparency

Assessments by Customs of whether there has been injurious dumping or subsidisation and, if so, its extent, rely heavily on information provided by the parties. But important parts of this information are kept confidential. And the provisions requiring public summaries of information submitted in confidence are widely regarded as ineffectual. Hence, the detailed basis for Customs' advice to the Minister cannot be readily determined by those directly affected by the outcome of the process.

Also, when measures are imposed, none of the affected parties receives full information on the key underlying parameters.

- One consequence is that local suppliers cannot be certain what the impacts on selling prices of the imported goods should have been and thus whether they received a good return for the time and cost involved in applying for measures.
- Another is that there is a widespread misconception that the lesser duty rule is applied more frequently than is actually the case (a little under half of the measures currently in place).

Other features of the process that detract from transparent outcomes include:

- the inability for parties to appeal some key decisions — for example, the continuation of measures beyond the initial term
- limited general reporting on the magnitude of measures and on the number of applications for measures that do not lead to investigations.

A 'bounded' public interest test

In the Commission's view, a 'bounded' (presumptive) public interest test, drawing on similar tests that apply in Canada and more particularly the European Union, would be a more practical approach that would continue to give appropriate recognition to the system preserving benefits that underpin the current arrangements. The test would be administered by Customs and, like the EU's community interest test, would apply to all new investigations and reviews to determine whether existing measures should be continued beyond their initial term.

This test would not involve an attempt to calculate the ‘system preserving’ benefit that would arise from imposing a measure to address any particular instance of injurious dumping or subsidisation and then weighing that benefit against the probable direct efficiency cost of doing so. Rather, there would be a starting presumption in favour of measures whenever there had been injurious dumping or subsidisation, with the implicit judgement being that the system preserving benefit would generally exceed the efficiency costs.

However, the test would also specify a small number of circumstances where it would not be in the public interest to impose measures — for example, where those measures would be ineffectual in removing injury, or would impose large costs on downstream users relative to the benefits for the applicant industry (see box 4). Importantly, and in contrast to the somewhat more discretionary test suggested in the Draft Report — these would be the only circumstances where the presumption in favour of measures would not apply. As such, the additional uncertainty for stakeholders would be kept to a minimum. Indeed, given the constrained nature of the test and the proposed accompanying application guidance, there might be less room for discretion than is the case for many aspects of the current assessment process.

Where, based on the advice of Customs, the Minister was satisfied that any of the specific circumstances for overturning the presumption in favour of measures applied, measures would not be imposed (the EU approach) rather than simply reduced in magnitude (the Canadian approach). Where the presumption was not overturned on public interest grounds, there would continue to be scope to apply a duty lower than the full dumping or subsidy margin if this would be sufficient to remove the injury for the applicant industry.

To allow for assessments by Customs against the test, the current investigation period would be extended by 30 days. Given that much of the information needed for these assessments would have been assembled when considering dumping and injury matters, this timeframe should not be unduly demanding. And although the overall process would be longer, provisional measures would be applied in all cases where there was a finding of injurious dumping or subsidisation, prior to consideration of public interest matters.

Finally, Customs’ public interest test assessments would be included in an expanded ‘Statement of Essential Facts’, with a synthesis of the commentary from stakeholders on those assessments included in the final reports to the Minister.

Box 4 When should the presumption in favour of measures be overturned?

The proposed public interest test would specify that if the Minister was satisfied that any of the following five circumstances applied, measures would not be imposed.

- One would be where measures, by removing or significantly reducing the ability of importers of the like goods to participate in the Australian market, could provide an applicant supplier with substantial market power. (Importantly, the price raising effect of measures would not, of itself, trigger this ‘damage to competition’ component of the test.)
- Two would be where measures would not be effective in removing injury being experienced by the applicant industry, and hence where the ensuing costs for other parties would be needlessly incurred:
 - even with the imposition of measures, the (duty-inclusive) price of the imported goods concerned would be likely to remain significantly below local suppliers’ costs to make and sell
 - un-dumped ‘like goods’ could be readily obtained from other overseas suppliers at a comparable price to the dumped imports.

(Though elements of the WTO requirements are ostensibly designed to limit the imposition of ineffectual measures, neither those requirements nor the Australian legislation appear to preclude measures in these sorts of situations.)

- Two would be where the imposition of measures would impose disproportionate costs on downstream users, or otherwise unreasonably penalise them:
 - prior to the commencement of injurious dumping or subsidisation, the applicant industry’s share of the market was low, and would be likely to remain so even with measures in place — meaning that the impost on users would be large relative to the benefits that the industry and its suppliers would receive. (Under the EU’s community interest test, an injury-based finding in favour of measures can also be overturned on this basis)
 - the dumped product is sourced from a plant established primarily to service export markets, at a price which covers the overseas supplier’s (fully distributed) costs to make and sell and the value of any identifiable input subsidies, and provides for a reasonable profit margin. Even within the confines of the anti-dumping framework, invoking measures on profitable exports based on a price differential with a home market that accounts for only a very small proportion of the overseas supplier’s overall sales seems highly problematic.

As noted in the text, this list of circumstances for overturning the presumption in favour of measures where there has been injurious dumping or subsidisation would be exhaustive. It is, of course, possible that other circumstances might arise that would militate against the imposition of measures on public interest grounds. But rather than making the list non-exhaustive with the attendant uncertainty for stakeholders, it would be better to wait until the review of the new arrangements (see later) and then assess the adequacy of the list (and the associated application guidance) in the light of actual case history.

Likely impact of the public interest test

The precise impact of the new test will of course depend on the nature of the cases that come forward (and on whether any applications for measures are deterred). However, in recognition of the system preserving benefits from providing access to an anti-dumping safety valve, the test has been designed so that measures would only be precluded on public interest grounds in a small minority of cases. By way of illustration, the broadly similar community interest test in the EU has apparently resulted in the non-imposition of measures in around 10 per cent of cases where injurious dumping or subsidisation has been established.

Supporting changes to the current arrangements

To avoid complicating the introduction of the public interest test, the Commission has not recommended extensive changes to the existing legislative requirements, or to the accompanying administrative arrangements for applying them. Thus, for example, it is not proposing any changes to the ‘like goods’ test, the basis for determining ‘starting’ normal values, or the injury and causality provisions. Similarly, though it has some reservations about aspects of the current assessment and decision-making arrangements, it is nevertheless recommending that Customs, the Trade Measures Review Officer (TMRO) and the Minister retain their current responsibilities for the time being at least. However, the efficiency and effectiveness of these arrangements within the refocussed system should be examined at the next review.

Further, though Australia’s recognition of China as a market economy raises some particular issues for anti-dumping investigations, this is a much broader policy issue and beyond the purview of this inquiry. In any event, the change to the treatment of Chinese exports in dumping cases has not stopped measures being applied to them. Indeed, there are currently more measures in place on goods from China than on goods from any other country. Also, as in the recent ‘preliminary affirmative determination’ for aluminium extrusions, Customs can employ an alternative calculation methodology in cases where government involvement in markets artificially lowers input costs or output prices.

However, some aspects of the current arrangements clearly detract from the delivery of appropriate and transparent outcomes for stakeholders and the community.

- As discussed above, despite their consistency with the WTO agreements, the provisions that allow for repeated extensions of measures beyond the initial five-year term are difficult to justify. In future, there should only be scope for one

three-year extension. And though the Commission is no longer proposing a two-year freeze on reapplications after a measure has expired, such reapplications should be subject to the same requirements as the original application (including assessment against the public interest test).

- While there are two sets of provisions in the current arrangements for adjusting the magnitudes of anti-dumping measures where there have been changes in market conditions, one set is very cumbersome and costly and thus relatively rarely used, and the other can only be triggered by an importer seeking a refund of overpaid duties. The latter is also a retrospective review and does not adjust measures prospectively. As a result, there is the potential for some measures to quickly become either ineffective in removing injury, or unreasonably punitive.
 - Accordingly, the current provisions should be replaced by a single new mechanism that would allow for more timely and cost-effective adjustments to the magnitude of *all* measures on an annual basis. This mechanism would employ the sort of risk-management approach applied by Customs to the current duty refund provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on desk-audits of information provided by the relevant parties, international price indexes, or other relevant price benchmarks.
 - There should also be related changes to the basis for determining the duties payable on individual consignments of imported goods subject to measures that would see the correct amount of duty collected at the time of importation.
- The current appeals provisions are not sufficiently robust. In particular, some important decisions are not appellable. And where an appeal against a decision by the Minister is upheld by the TMRO, the case is simply returned to Customs for reinvestigation. As well as extending appeal rights to decisions relating to the continuation of measures beyond the initial five-year term, where a Ministerial decision is successfully appealed, the Minister should then make a decision on the basis of the competing advice from Customs and the TMRO, unless the TMRO explicitly recommends reinvestigation.
- As a result of the past emphasis on improving the timeliness of Australia's anti-dumping system — which is now one of the speediest in the developed world — target investigation timeframes are often insufficient to allow for thorough and rigorous assessments in more complex cases. Apart from an increase to the current timeframes to allow for the application of the public interest test, Customs should have greater flexibility to seek extensions of time. However, imposing a 30-day limit on decisions by the Minister would provide a potential

time saving, as would the change to reduce the need for reinvestigations by Customs where a Ministerial decision is successfully appealed.

- In a system that relies so heavily on judgement, it is crucial that the basis for decisions is properly explained and documented, and that the outcomes of the decision-making process are similarly clear. To this end, there should be more extensive public reporting on the magnitude of anti-dumping measures and the underlying calculations, and on the number and nature of applications for measures that are rejected in the initial screening process.

The Commission's reform package also provides for: greater recognition of the outcomes of relevant overseas investigations; better monitoring of the effectiveness of measures in addressing injury; changes to the procedures governing the early revocation of measures; the alignment of Australia's list of countervailable subsidies with the somewhat wider list permitted by the WTO; and adequate and appropriate resourcing for Customs and the TMRO to effectively undertake their functions under the new system. And it is further recommending that:

- Australia not adopt the US practice of converting negative dumping margins on particular sales to zero
- a working group be convened to examine the impacts of the provisions that allow producers of raw agricultural goods to form part of dumping actions against imports of processed primary products, and to advise the Minister on what changes, if any, should be made to the provisions
- the Government consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar information can be publicly accessed through other sources — for example, from the export statistics of other countries. In these circumstances, suppression serves no useful confidentiality purpose, but can make it more time consuming and costly to get anti-dumping cases initiated.

Implementing the reform package

The Commission's reform package is summarised in table 1, with key aspects of the proposed new arrangements depicted in figure 3. While continuing to recognise the system-preserving argument for providing access to protection against injurious dumping or subsidisation, those new arrangements would help to ensure that:

- anti-dumping measures are not imposed if they are likely to be ineffectual or otherwise disproportionately or unreasonably costly for downstream entities

-
- where measures are imposed, they do not become a ‘crutch’, akin to tariff protection, that lessens or delays the need for the industry to adjust to fundamental changes in its competitive position.

Most of the changes should be introduced as soon as practicable. However, to give the parties time to adjust, the introduction of the public interest test and the more stringent continuation arrangements should be delayed for two years. And there should be an independent and public review of the new requirements after they have been fully operational for five years.

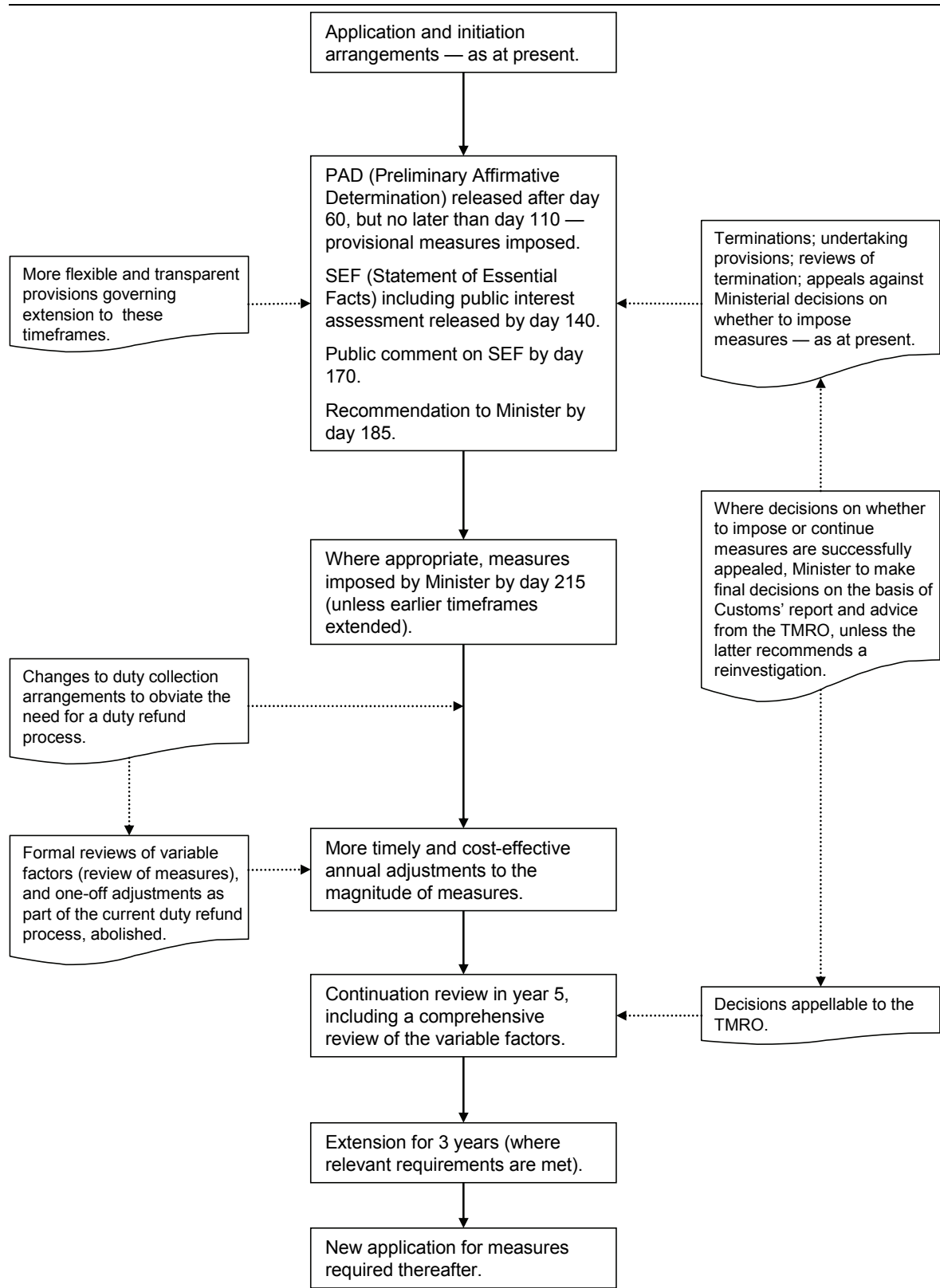
Table 1 A summary of the Commission's recommendations

<i>Current problem</i>	<i>Proposed response</i>	<i>Main benefits of change</i>
Consideration of wider impacts and the broader public interest		
Wider impacts and the public interest currently ignored, at potential cost to the economy and community.	Introduce a 'bounded' public interest test, containing a presumption in favour of measures where there has been injurious dumping or subsidisation, but detailing a list of circumstances where measures would not be in the public interest.	Measures no longer imposed if they would be ineffectual in removing injury or otherwise disproportionately or unreasonably costly for downstream entities.
Supporting framework changes		
Aspects of the current requirements governing the imposition and application of measures (or mooted changes to them) detract from the delivery of cost-effective and appropriate outcomes for the community.	<p>Limit extensions of measures to one three-year period.</p> <p>Provide for more timely and cost-effective annual adjustments to the magnitude of measures.</p> <p>Determine and collect the correct amount of duty at the time of importation and abolish the duty refund system.</p> <p>Impose provisional duties prior to assessments against the public interest test.</p> <p>Require Customs to seek feedback on the impacts of measures, using that feedback as a means, where relevant, to expedite the revocation process.</p> <p>Align Australia's list of actionable subsidies with the WTO lists.</p> <p>Do not introduce 'zeroing' when calculating normal values.</p> <p>Further examine the 'close processed agricultural goods' provisions to determine whether they should be modified or abolished.</p>	<p>Complement the role of the public interest test in achieving a better balance between benefits and costs through:</p> <ul style="list-style-type: none"> • reducing the likelihood that measures will become akin to long-term tariff protection • ensuring that measures do not become outdated in the face of changed market conditions • promoting equitable treatment of the various stakeholders • avoiding some unnecessary administration and compliance costs.
Administration of the system		
Efficacy of current institutional arrangements within a refocussed system still to be determined.	Reconsider roles and responsibilities at time of next review (see below).	<p>Performance of the existing decision-making entities examined in the light of actual experience under the new arrangements.</p> <p>(continued next page)</p>

Table 1 continued

<i>Current problem</i>	<i>Proposed response</i>	<i>Main benefits of change</i>
Administration of the system (continued)		
Deficiencies in appeal arrangements, target timeframes that are often insufficient for more complex investigations, and inadequate public reporting on outcomes and the underlying basis for them, detract from rigorous and transparent assessment and decision-making.	<p>Widen the list of appellable decisions; and require the Minister to make a final decision following a successful appeal without reinvestigation by Customs, unless the TMRO recommends further assessment.</p> <p>Extend assessment timeframes by 30 days to allow for consideration of public interest matters and increase the flexibility for Customs on when to seek extensions of time. (But offset these changes by imposing a 30-day limit on Ministerial decision-making and by reducing the need for reinvestigations where appeals are upheld.)</p> <p>Require Customs to report more extensively on:</p> <ul style="list-style-type: none"> • applications for measures that do not proceed to initiation • the magnitude of measures imposed and the underlying parameters • the timeliness of its investigations • the relevance of similar overseas investigations. <p>Ensure that Customs and the TMRO are adequately and appropriately resourced to effectively undertake their functions under the new system.</p>	<p>Complement the role of the public interest test in achieving a better balance between benefits and costs, through ensuring that:</p> <ul style="list-style-type: none"> • there is appropriate access to merits review; and that any 'moral hazard' from Customs re-investigating itself is minimised • there is adequate time to enable rigorous assessment and to consider public interest matters, while addressing avoidable delays in the current arrangements • the basis for decisions is properly documented and their outcomes are similarly clear • effective application of the new arrangements is not impeded by counterproductive resourcing constraints within Customs and the TMRO.
Other matters		
Suppression of import data by the ABS on confidentiality grounds increases the cost and difficulty of applying for anti-dumping measures.	Government to consult with the ABS on the best way to ensure that such data are not suppressed when the same or similar data can be publicly accessed through other sources.	Applications for measures not impeded by unduly restrictive suppression provisions.
Implementation and review		
	<p>Introduce most reforms as soon as possible, but delay introduction of the public interest test and the new continuation requirements for 2 years.</p> <p>Independently and publicly review the requirements 5 years after they are fully operational.</p>	<p>Parties provided with time to adjust to major changes to the current system.</p> <p>Enable assessment of impacts of the new system, and what further changes may be required.</p>

Figure 3 Key aspects of the new anti-dumping and countervailing system



Recommendations

The new public interest test

RECOMMENDATION 5.1

The imposition and continuation of anti-dumping and countervailing measures should be subject to a ‘bounded’ public interest test, embodying a presumption that measures will be imposed if there has been dumping or subsidisation that has caused, or threatens to cause, material injury, unless one (or more) of the following circumstances apply:

- *the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule*
- *the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers’ costs to make and sell*
- *un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods*
- *prior to the commencement of injurious dumping or subsidisation, the local industry’s share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed*
- *the large majority of the overseas supplier’s output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier’s fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies).*

The explanatory memoranda to the enabling legislation should elaborate on the intent and application of this list of circumstances, having regard to the commentary in the body of this report.

Where, based on the advice from the Australian Customs and Border Protection Service (ACBPS), the Minister is satisfied that one (or more) of these circumstances apply, measures would not be imposed. And where none of these circumstances apply and the Minister has determined that measures should be imposed, then the magnitude of those measures should be set having regard to the existing lesser duty rule arrangements.

Assessments against the public interest test by the ACBPS should generally be completed within 30 days, and draw if necessary on advice from external parties such as the Australian Competition and Consumer Commission. Provisional measures should be imposed in all cases where a finding by the ACBPS that there has been injurious dumping or subsidisation provides the basis for moving to apply the test.

In giving effect to these requirements, the ACBPS should also:

- clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures*
- give interested parties the opportunity to comment on its assessments against the test through detailing those assessments in the Statement of Essential Facts*
- include a synthesis of that commentary from interested parties in its final report to the Minister.*

Supporting framework changes

RECOMMENDATION 6.1

The Australian Government should convene a working group to examine the close processed agricultural goods provisions and report to the Minister on:

- whether the provisions have had a meaningful impact on the outcomes of any past cases*
- if not, whether there is any likelihood that they could, in future, have a meaningful impact and, if so, in what circumstances*
- whether and how it might be possible to make the provisions more practically effective, whilst still complying with WTO requirements, and what benefits and costs would ensue*
- what arguments would justify the retention of the provisions more generally*
- what changes, if any, should be made to the provisions in light of the above.*

The working group should consult with interested parties and publish a draft report for comment.

RECOMMENDATION 6.2

Australia should not adopt the practice of zeroing when calculating normal values.

RECOMMENDATION 6.3

In conjunction with the introduction of the new public interest test (see recommendation 5.1), the arrangements governing the imposition of provisional measures should be modified as follows:

- *If the requirements for imposing provisional measures are met, then prior to the commencement of any assessments against the public interest test, the Australian Customs and Border Protection Service should, without exception, be required to release a Preliminary Affirmative Determination (PAD) and impose provisional measures.*
- *Unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation.*

RECOMMENDATION 6.4

There should be no change to the current five-year default term for anti-dumping and countervailing measures.

However, extensions of anti-dumping and countervailing measures, following a continuation review, should be limited to one three-year term. And an application for new measures following the expiry of a three-year extension should be subject to the same requirements as the original application (including assessment against the public interest test as detailed in recommendation 5.1).

Continuation reviews should, in all cases, comprehensively examine and recalculate the relevant variable factors.

RECOMMENDATION 6.5

The current ‘review of measures’ and ‘administrative review’ provisions should be abolished and replaced by a single new mechanism to adjust the magnitude of all anti-dumping and countervailing measures on an annual basis. The resulting adjustments, which should be determined and notified by the CEO of the Australian Customs and Border Protection Service (ACBPS), should not be appellable.

-
- *The new mechanism should employ the sort of risk-management approach applied by the ACBPS when assessing requests for duty refunds under the current administrative review provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on desk-audits of information provided by the relevant parties, international price indexes, or other relevant price benchmarks.*
 - *Where this adjustment process leads to a zero duty rate, measures should still remain in place for the original term.*
 - *If considered necessary to facilitate greater reliance on desk audits, the ACBPS should be granted additional powers to apply appropriate penalties for false reporting.*

RECOMMENDATION 6.6

The basis for collecting dumping and countervailing duties should be modified. Specifically, for goods subject to a dumping duty, or to a countervailing duty involving the lesser duty rule, the duty collected at the time of importation should be based on the actual export price relative to the export price at which no duty would be payable on the basis of the prevailing, annually adjusted, variable factors. Concurrent with this change, provision for importers to seek refunds of overpaid duties should be abolished.

RECOMMENDATION 6.7

The Australian Customs and Border Protection Service (ACBPS) should, as part of the annual adjustment of measures (see recommendation 6.5), seek feedback from the various parties on the impacts of those measures over the preceding 12 months — including on market prices — and investigate further if appropriate.

Where such feedback indicates that local production of a good subject to measures has ceased, and is unlikely to recommence in the period for which the measures would otherwise remain in place, the CEO of the ACBPS should advise the Minister to revoke the measures. This process should replace the current revocation arrangements.

RECOMMENDATION 6.8

Australia's list of actionable subsidies should be aligned and kept aligned with the lists in the latest relevant WTO agreements.

Administration of the system

RECOMMENDATION 7.1

The Australian Customs and Border Protection Service, the Minister and the Trade Measures Review Officer should retain their broad administrative and decision-making roles within the anti-dumping system, with their specific responsibilities modified, as appropriate, to reflect the Commission's other recommendations.

These roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11) in the light of experience with the new system.

RECOMMENDATION 7.2

The following changes should be made to the current appeals arrangements for anti-dumping decisions.

- *Decisions on whether or not to commence an investigation into the continuation of anti-dumping or countervailing measures beyond the initial five-year term — and any ensuing decisions by the Minister — should be appellable.*
- *Where the Trade Measures Review Officer (TMRO) finds in favour of an appeal against a decision made by the Minister, the Minister should make a final determination without returning the case to the Australian Customs and Border Protection Service (ACBPS) for reinvestigation, unless the TMRO explicitly recommends a reinvestigation. In the event of the latter:*
 - *the reinvestigation and report to the Minister should be conditioned and constrained by a directive from the TMRO on where the initial investigation was flawed*
 - *within the confines of that directive, there should be scope for the ACBPS to consider relevant new information.*

Any such reinvestigations and ensuing decisions by the Minister should not be appellable.

RECOMMENDATION 7.3

Provision should be made for the Australian Customs and Border Protection Service (ACBPS) to seek extensions of the investigation period at any time during an investigation. In addition to notification of extensions through the issue of an Australian Customs Dumping Notice, all correspondence relating to such requests should be made available on the public file.

This new arrangement, together with the adequacy of the general time limits for the various steps in the investigation process, should be assessed at the next review (see recommendation 7.11), having regard to experience in the intervening period under the new system.

Through its ‘Anti-Dumping and Countervailing Actions — Status Reports’, the ACBPS should provide an annual, consolidated, summary of the timeliness of each of its investigations in the preceding 12 month period.

RECOMMENDATION 7.4

Decisions by the Minister in response to advice from the Australian Customs and Border Protection Service, or from the Trade Measures Review Officer, should be subject to a 30-day time limit.

RECOMMENDATION 7.5

The Australian Government should ensure that the Australian Customs and Border Protection Service (ACBPS) and the Trade Measures Review Officer (TMRO) are adequately and appropriately resourced to enable them to effectively undertake their functions under the new system. The level of resourcing should take into account the opportunities for the ACBPS and the TMRO to engage outside expertise to enhance the quality and/or cost-effectiveness of aspects of their assessment tasks.

RECOMMENDATION 7.6

In providing advice to the Minister on whether anti-dumping measures should be imposed or continued, the Australian Customs and Border Protection Service should indicate in its investigation reports whether there have been any comparable recent cases in other countries; what the outcomes of those cases were; and what is the relevance, if any, of those outcomes to the investigation at hand.

RECOMMENDATION 7.7

Through its ‘Anti-Dumping and Countervailing Actions — Status Reports’, the Australian Customs and Border Protection Service should report annually on the number of applications for anti-dumping measures that do not proceed to initiation, and the products and countries that were the subject of those applications.

RECOMMENDATION 7.8

Through its various reports and/or Australian Customs Dumping Notices, the Australian Customs and Border Protection Service (ACBPS) should be required to publish the maximum amount of information on the magnitude of individual anti-dumping and countervailing measures and the underlying variable factors that is consistent with maintaining appropriate protection for commercially sensitive information submitted by individual parties.

- *Where the ACBPS determines that the firm-specific nature of the measures or the variable factors (or some other reason) militates against disclosing full details on those measures, it should reduce the amount of information published by the minimum necessary to provide the requisite protection for the commercially sensitive material concerned.*
- *At the very least, the ad valorem equivalents of measures should be publicly notified at the time of imposition and following annual adjustments under the new adjustment mechanism (see recommendation 6.5).*

Customs should also report annually on the number of cases where the lesser duty rule has been applied.

Other matters

RECOMMENDATION 7.9

The Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.

Implementation of the new requirements

RECOMMENDATION 7.10

All of the proposed reforms should take effect as soon as practically possible, except for the new public interest test (see recommendation 5.1) and the changes to the continuation provisions (see recommendation 6.4). These should take effect two years later.

RECOMMENDATION 7.11

There should be a broad and independent public review of the new anti-dumping system five years after the reform package is fully operative. Amongst other things, that review should examine:

-
- *the impacts on decision-making of the public interest test and whether that case history points to any gaps or deficiencies in the test and/or the accompanying legislative guidance, or to the need for supporting changes to other aspects of the legislative architecture*
 - *the need for changes to the system framework separate from the public interest test requirements*
 - *the efficiency and effectiveness of the Australian Customs and Border Protection Service, the Trade Measures Review Officer and the Minister in administering the anti-dumping system and giving effect to the new requirements, and whether any changes to their responsibilities are warranted in the light of that experience*
 - *whether the resourcing of the assessment and appeals process is adequate and appropriate, having regard to any proposed changes in decision-making responsibilities*
 - *what changes, if any, are required to the statutory timeframes for the conduct of investigations, or to the related provisions governing extensions to those timeframes*
 - *the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, while continuing to provide appropriate protection for commercially sensitive material submitted by the parties, and what more might be done in this regard*
 - *whether there have been changes to overseas anti-dumping regimes that could be relevant to the Australian system.*

1 About the inquiry

1.1 The Commission's terms of reference

Australia's anti-dumping and countervailing system (hereafter the anti-dumping system) seeks to remedy material injurious effects of 'dumped' or subsidised imports on Australian industries.

Dumping is said to occur when an overseas supplier exports a good to Australia at a price below its 'normal value' in the supplier's home market. If dumping causes, or threatens to cause, 'material injury' to local producers of 'like goods', then remedial action — mainly the imposition of special customs duties — can be taken against the imported goods concerned. Similarly, countervailing duties can be imposed on imports which benefit from any of a specified group of government subsidies and which cause or threaten material injury to a local industry producing like goods.

Australia's anti-dumping system is based on internationally agreed rules and procedures under the auspices of the World Trade Organization (WTO). Nearly all other developed, and many developing, countries have similar anti-dumping regimes. Hence, the objectives and broad concepts underpinning Australia's system have widespread endorsement.

However, some argue that a significant deficiency in most anti-dumping regimes, including Australia's, is that there is insufficient consideration of the wider effects of imposing anti-dumping measures. Aspects of the more detailed design and administration of Australia's arrangements have also come in for criticism.

Over the past two decades, several reviews have been instigated with the aim of improving the administrative efficiency of Australia's anti-dumping system. But it is now more than twenty years since Professor Fred Gruen (1986) conducted a 'root and branch' examination of the system. A comprehensive review had been scheduled under National Competition Policy (NCP) as part of the Legislation Review Program, with the need for such an assessment subsequently highlighted by both the Commission in its examination of the NCP reforms (PC 2005, p. 261) and the Regulation Taskforce (2006, p. 130). In July of last year, the Council of Australian Governments (COAG 2008, p. 4) agreed that anti-dumping should be one of the priority areas for further competition reform.

Against this backdrop, the Australian Government has requested the Commission to inquire into Australia's anti-dumping system, including both policy and administrative aspects, and to:

- assess the policy rationale for, and objectives of, the system and the effectiveness of the current arrangements in meeting those objectives
- examine the economy-wide benefits and costs of the system
- make recommendations on the future role of an anti-dumping system with the aim of improving the performance of the economy, having regard to the interests of industry, importers and consumers
- assess the administration of the system, giving consideration to the key decision-making steps in the investigation process and advising on ways to improve administrative efficiency, reduce compliance costs and increase certainty for business.

The Commission is to have regard to other relevant studies — including the 2006 Joint Study undertaken by the Australian Customs and Border Protection Service (Customs) along with several other Australian Government entities. That study was initiated to ensure that the administration of Australia's anti-dumping system reflects best practice and to respond to concerns of Australian industry about the effectiveness of the system.

The full terms of reference for the inquiry are set out at the front of this report.

1.2 The Commission's approach

A broad focus

Consistent with both its own legislation and the terms of reference (paragraph 4a), the Commission's assessments of the current anti-dumping system and possible options for change have been predicated on furthering the well-being of the community as a whole. That of course encompasses the interests of those industries which support the continuation of an anti-dumping system as a protection against 'unfair' trading practices.

However, anti-dumping measures can raise costs for downstream user industries and consumers (where final consumption goods are involved), and lead to less efficient resource use across the economy. And longstanding measures that become akin to tariffs may reduce the imperative for productivity improvement in recipient

industries, or delay necessary adjustment in response to underlying structural changes in market demand and supply.

Accordingly, the Commission has taken into account both the benefits and the costs of Australia's anti-dumping system with a view to determining:

- whether maintaining a system would be in the interests of the community as a whole
- if so, how the system should be configured to best serve those interests.

Judgements informed by evidence of benefits and costs

Achieving an appropriate balance between the competing interests and policy goals in this area requires considerable judgement. As elaborated on in subsequent chapters:

- 'Fairness' is a multi-faceted and sometimes nebulous concept. Hence, while looming large in this area, it is not an easy notion to translate into specific policy settings.
- There are broad political economy rationales for having an anti-dumping system which transcend the system's more immediate and readily identifiable impacts.
- Australia's obligations under the WTO agreements governing anti-dumping and countervailing action may preclude some changes to the current system which might otherwise offer the prospect of better outcomes for the community.

To inform its judgements, the Commission has had regard to all of the available evidence, qualitative and quantitative, relevant to assessing the benefits and costs of the current system and of alternative arrangements. For example, on the quantitative front it has:

- obtained and analysed information on the magnitudes of anti-dumping measures
- looked at quantitative indicators of the likely significance of the anti-dumping system for Australia's overall economic performance and community well-being.

However, the Commission has not undertaken any formal economic modelling. As elaborated on in chapter 4, all indications are that the economy-wide effects of Australia's anti-dumping system are very small, meaning that such modelling would not provide guidance on the merits of different policy options.

Provision for extensive public input

In preparing this report, the Commission actively sought input from key stakeholders.

- It met informally with a broad cross-section of interested parties within Australia, including: local firms and industries benefitting from anti-dumping measures; those who import products that have been subject to measures; downstream user industries; various industry organisations, consultants and lawyers representing these stakeholders; Customs, the Trade Measures Review Officer, the Australian Competition and Consumer Commission and several other Australian Government entities; the Australian Workers' Union; and some State Governments.
- To get an overseas perspective on Australia's anti-dumping system, and to explore the extent to which the system might usefully draw on different approaches in other countries, the Commission also held discussions (via video and teleconference) with representatives from the European Commission and from the Canada Border Services Agency and the Canadian International Trade Tribunal.
- Shortly after receiving its terms of reference, the Commission released an Issues Paper outlining a range of matters on which it was seeking information and advice. In response to that paper, 34 organisations and individuals — predominantly representing local suppliers that have previously sought anti-dumping measures — made written submissions.
- In September 2009, the Commission released a Draft Report setting out its initial findings and preliminary recommendations for changes to the current anti-dumping system. To elicit feedback on those findings and recommendations, it held a public hearing and invited further written comment.
 - Six parties participated in the public hearing held in Melbourne in October 2009.
 - The Commission received a further 27 submissions.

Further details on consultations and submissions, and on other aspects of the inquiry process, are provided in appendix A.

The Commission thanks all of those organisations and individuals who contributed to the inquiry. It is especially grateful to Customs for its advice on various operational aspects of the anti-dumping system and for the variety of data it provided on the usage and impacts of the system.

1.3 A road map to the rest of the report

The remainder of this report is structured as follows.

- Chapter 2 looks at how Australia's anti-dumping system operates and how it compares with regimes applying in other countries.
- Chapter 3 reports on trends in the usage of Australia's system, the product and country incidence of anti-dumping measures, the nature of those measures and the magnitude of support provided to recipient industries, and how these outcomes sit in an international context.
- Chapter 4 examines the particular benefits and costs of Australia's system. Though concluding that Australia should retain a system, it details some specific deficiencies in the current arrangements that can add to its costs.
- The subsequent three chapters discuss reforms to address these deficiencies and thereby strengthen the case for retaining a system.
 - Chapter 5 assesses options for introducing consideration of wider benefits and costs into the decision-making process.
 - Chapter 6 sets out some additional modifications to the existing legislative framework to support this change to the focus of the system.
 - Chapter 7 canvasses changes to the administrative and public reporting arrangements, as well as detailing how the proposed reform package should be implemented.

Additional supporting analysis is contained in appendixes to the report.

2 The current anti-dumping system

Key points

- Australia's anti-dumping and countervailing system sits within a broader industry and competition framework, which includes other mechanisms that deal with similar issues (such as the *Safeguards* framework).
- Australia's system is based on the World Trade Organization (WTO) *Anti-dumping* and *Countervailing Measures* agreements.
 - These agreements do not oblige member countries to take action against injurious dumping or subsidisation; but when doing so, they must comply with the WTO rules.
 - However, there is some flexibility under the agreements for member countries to tailor their anti-dumping systems to their own requirements. As a consequence, methods adopted by particular countries vary.
- The Australian Customs and Border Protection Service assesses applications for anti-dumping and countervailing measures through a multistage process.
 - The concepts are complex and require the exercise of considerable judgement.
 - Other parties involved in the process include the Minister responsible for Customs and Border Protection and the Trade Measures Review Officer.
- Both the Australian system and WTO agreements focus exclusively on whether dumping and/or subsidisation has occurred, and whether this has caused or threatens material injury to the local industry producing like goods.
 - Under Australia's system, the wider effects of measures are not considered.

An anti-dumping and countervailing system (the 'anti-dumping' system) has long been a part of Australia's suite of industry and trade policies (see appendix B). This chapter outlines the design and features of Australia's current system that shape its operation.

2.1 Overview of Australia's anti-dumping system

As set out in chapter 1, Australia's anti-dumping system seeks to remedy the injurious effects of 'dumped' imports on Australian industries, though neither Australia's domestic legislation, nor the WTO agreements on which it is based,

explicitly state the underlying rationale for doing so. The system applies to trade in goods only — it does not cover trade in services.

World Trade Organization framework

The WTO's *General Agreement on Tariffs and Trade* outlines the international legal framework for anti-dumping and countervailing systems and establishes the procedures that must be followed by member states. As a member of the WTO, Australia is obliged to ensure that its approach complies with the *Anti-Dumping Agreement* and *Countervailing Measures Agreement* (see box 2.1).

Nothing in these agreements requires that action be taken against dumped or subsidised imports that cause or threaten material injury to a local industry. Instead, their focus is on providing a discipline on any such actions by member countries. As such, they constitute a minimum set of standards in relation to the use of anti-dumping and countervailing measures. However, member countries are free to impose more stringent requirements, if they so choose.

Box 2.1 The WTO agreements

The WTO is responsible for determining and administering internationally agreed principles and rules for managing dumping issues, as well as for providing a dispute settlement mechanism. Since 1961, Australia has aligned its domestic anti-dumping and countervailing system to each new GATT (and now WTO) agreement.

Two WTO agreements provide the basis for Australia's anti-dumping system:

- The *Anti-Dumping Agreement* (formally known as the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade*) prescribes rules for the conduct of anti-dumping investigations and the application of measures, including how member countries may: initiate cases, calculate dumping margins, determine injury, enforce remedial measures and review past determinations.
- The *Countervailing Measures Agreement* (formally known as the *Agreement on Subsidies and Countervailing Measures*) regulates measures designed to remedy material injury caused by subsidised imports, along similar lines to the *Anti-Dumping Agreement*.

The requirements in these agreements are discussed further in appendix C.

Legislative framework and system administration

The *Customs Act 1901* is Australia's primary legislation governing claims for anti-dumping and countervailing measures, while the *Customs Tariff (Anti-Dumping)*

Act 1975 (also known as the *Dumping Duty Act*) and the *Customs Regulations 1926* give additional effect to the system.

The Australian Customs and Border Protection Service (Customs) has primary responsibility for the administration of Australia's anti-dumping and countervailing system, including: investigations of applications for new anti-dumping and countervailing measures; reviews or revocations of existing measures; dumping duty assessments; and applications for continuation of existing measures beyond their initial five-year term. Following investigations, Customs makes recommendations to the responsible Minister (currently the Minister for Home Affairs), and also gives effect to the Minister's decisions. In addition, Customs provides an advisory service to assist interested parties that are considering applying for anti-dumping and/or countervailing measures (the Dumping Liaison Unit).

Many, though not all, of the decisions emanating from these processes are appealable to the Trade Measures Review Officer (TMRO). The TMRO is a statutory appointment made by the Minister, located within the Attorney-General's Department, with powers and responsibilities under the *Customs Act 1901*.

In addition to the anti-dumping and countervailing system, Australia has a number of other policies that attempt to remedy the impact of certain forms of injurious pricing in the marketplace. The two primary examples of these are the WTO 'Safeguards' arrangements (also based on a WTO framework agreement) and the *Trade Practices Act 1974* (TPA). These are discussed in section 2.4.

New Zealand

Since 1990, the *Closer Economic Relations* agreement between Australia and New Zealand has precluded the use of anti-dumping measures with respect to goods originating in either country. However, countervailing action can be applied. Also, s. 46A of the TPA, covering the Australian side of the trans-Tasman market for goods or services, prohibits a New Zealand-based business from using its market power to eliminate or damage an Australian competitor, or from preventing entry into (or preventing competitive conduct in) an Australian market. Reciprocal competition laws addressing anti-competitive conduct exist under New Zealand's *Commerce Act 1986*.

With respect to other preferential trade agreements that Australia has negotiated (such as with Chile, Thailand and the USA), parties have agreed to retain their WTO rights to take anti-dumping and countervailing action.

2.2 How the anti-dumping system works

The *Customs Act 1901* outlines the stages in Australia's anti-dumping and countervailing processes (see figure 2.1). In addition, the Dumping and Subsidy Manual (ACBPS 2009) sets out the principles and practices followed by Customs as they normally apply to anti-dumping and countervailing investigations. These processes are complex and require the exercise of considerable judgment.

Application to Customs for anti-dumping measures

An industry that believes dumping or subsidisation is causing, or threatening to cause, material injury can apply to Customs for the imposition of measures to redress the situation. Any person may lodge an application, provided that it is made on behalf of an industry producing goods 'like' those allegedly being dumped or subsidised.

Applicants are required to provide a range of information and supporting evidence to Customs as part of their application. As well as identifying the imported dumped or subsidised goods and the domestic like goods, the country of export and the relevant Australian industry, applicants must provide:

- estimates of the 'normal value' and export price of the dumped goods (to show that dumping has occurred); or an indication of the price-suppressing effect of a subsidy provided by an overseas government
- an estimate of the material injury the industry has suffered (or is likely to suffer)
- some demonstration of causation between the dumping and the injury.

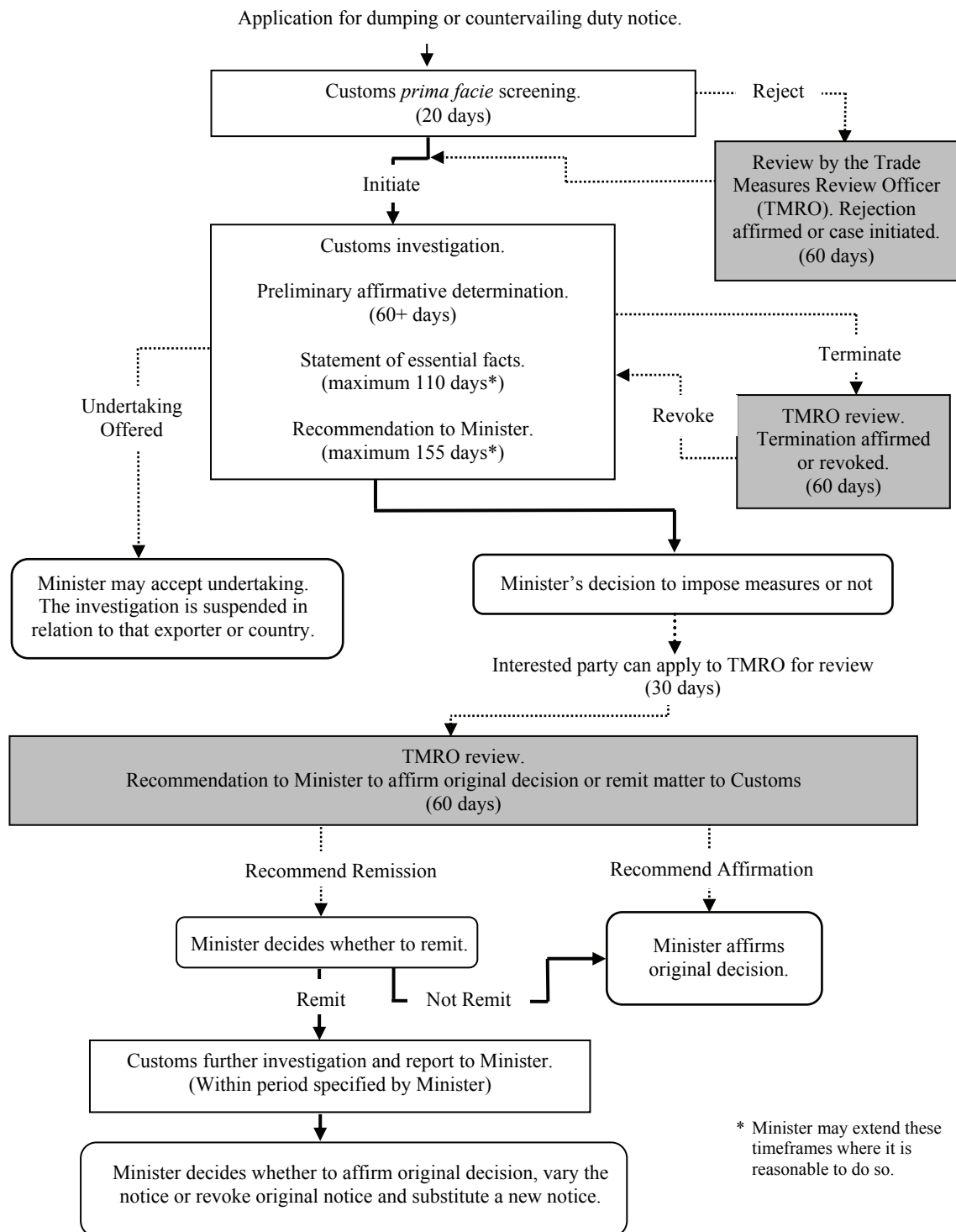
These concepts are considered further in section 2.3.

Customs then has 20 days to undertake a preliminary screening to determine whether or not there is sufficient evidence to initiate a formal investigation. As well as assessing the 'likeness' of the local and imported goods concerned (see section 2.3), the screening process focuses on: the extent of Australian industry support for the application; and whether the *de minimis* thresholds that provide for automatic termination of an investigation apply.

Specifically, to proceed to the next phase of the investigation process, an application needs the support of Australian producers whose collective output comprises both:

- 25 per cent or more of the total Australian production of like goods
- more than 50 per cent of the total production of like goods by those Australian producers who have expressed either support for (or opposition to) the application.

Figure 2.1 How do dumping investigations proceed?



Source: ACS and DITR (2006, p. 7).

These requirements mean that cases are only initiated where a significant proportion of production in the local industry has allegedly experienced (or is threatened with) injury; and, that even where the applicants themselves do not account for the majority of production in the industry, there is (effectively) majority support for the imposition of measures.

In addition, Customs will reject applications or terminate investigations if:

- the dumping margin or subsidy level is *de minimis*
- the volume of dumped or subsidised imports is negligible
- the injury is judged by Customs to be negligible (see box 2.2).

Box 2.2 Termination of applications

The *Customs Act 1901* sets threshold criteria for applications to proceed to initiation. If in its initial assessment of the application Customs determines that any one of the following criteria has not been met, then the application will be terminated.

Dumping or subsidy margins are *de minimis*

A dumping margin less than 2 per cent of the export price of the goods concerned is considered to be *de minimis*.

In countervailing cases, the *de minimis* subsidy margin is 1 per cent. However, a higher threshold applies to developing and least developed countries, where the *de minimis* subsidy margins are 2 per cent and 3 per cent respectively.

Volume of goods is negligible

Customs will also terminate applications where the volume of dumped or subsidised goods is negligible. In cases involving a single country, for an investigation to proceed, the dumped goods must account for more than 3 per cent of total imports of the like goods into Australia (or if the case involves multiple countries, they must collectively exceed 7 per cent).

These same thresholds also apply in countervailing cases where the overseas supplier concerned is based in a developed country. However, where a supplier is from a developing country, the volume of imported goods will be deemed negligible if below 4 per cent of total imports (or where suppliers from multiple countries are involved, collectively 9 per cent).

Negligible injury

If Customs considers that the alleged injury suffered by the Australian industry is not material, then it will terminate the application.

In determining whether an application for countervailing measures against a developing or least developed country should proceed to initiation, the *Customs Act*

1901 sets slightly higher termination thresholds (in effect making applications for measures harder).

As noted above, Customs also provides an advisory service — the Dumping Liaison Unit — to assist parties making applications for measures. In providing advice on the preparation of applications that conform with the legislative requirements, the service is, amongst other things, intended to reduce the number of applications that do not meet the necessary criteria. Customs returns applications that do not meet the necessary criteria to applicants together with reasons for the rejection.

Initiation and investigation of cases

Following acceptance of an application for an anti-dumping or countervailing measure, Customs sets a ‘date of initiation’ to notify the public that an investigation is commencing and invites submissions from interested parties. Public notification is made in the *Commonwealth of Australia Gazette* as well as a national newspaper, and Customs issues an Australian Customs Dumping Notice to explain the procedures and time frames for investigation. The notice will also define the ‘investigation period’ — generally the 12 months preceding the initiation date — over which Customs must determine whether dumping has occurred. Prior to initiation, and in accordance with WTO requirements, Customs is not permitted to contact the overseas suppliers that are subject to an anti-dumping or countervailing application.

For countervailing applications the process is for the most part the same, but with an additional early step. Fifteen days prior to the date of possible initiation, the Australian Government advises the government of the exporting country of the nature of the complaint. The foreign government is offered the opportunity for consultation with the aim of arriving at an agreed solution to the matter. If this consultation process does not resolve the matter within 15 days, then the initiation process applying to anti-dumping cases takes effect.

Once a case has been initiated and an investigation commenced, Customs directly contacts interested parties and invites submissions. These must be lodged with Customs within 40 days of the date of initiation. Following receipt of submissions, Customs investigates and verifies the information. Visits are usually made to importers, exporters and manufacturers to examine company records relevant to the investigation. Where an exporter or importer does not provide Customs with the information needed to determine whether dumping has occurred, Customs may use a variety of alternative methodologies to calculate export prices and normal values (see section 2.3).

From day 60 of the investigation, Customs has the option of making a ‘preliminary affirmative determination’ (PAD) and, in conjunction, imposing provisional measures (usually in the form of a ‘security’ payment) to prevent material injury occurring to the Australian industry concerned while the investigation continues. However, in practice, provisional measures have only infrequently been imposed prior to the release of the Statement of Essential Facts (SEF), with PADs typically issued shortly thereafter. A PAD may also be released without the imposition of provisional measures to enable consideration of an undertaking from an exporter (see below).

The SEF summarises the relevant facts of the investigation and forms the basis of the final report by Customs to the Minister. Specifically, it addresses whether both:

- the goods in question have been dumped or subsidised, and as a result
- the Australian industry has suffered, or is likely to suffer, material injury.

A statutory time limit of 110 days is specified for the release of the SEF following the initiation of an investigation, although Customs may request the Minister to extend the period during which the investigation takes place. When this occurs, the time frame for the final report is commensurately extended.

All interested parties, including foreign governments, exporters, manufacturers, importers, downstream customers and the local Australian industry have 20 days from the publication of the SEF to lodge a response to it.

Customs must complete a final report to the Minister within 155 days of the date of initiation (unless an extension for the preparation of the SEF has been granted) that makes conclusions and recommendations based on its investigation. On the basis of Customs’ recommendations, the Minister decides whether anti-dumping and/or countervailing measures should be imposed.

However, at any time after the release of a PAD (but prior to the Minister’s final decision), an overseas supplier can offer an undertaking to price all future exports at or above the ‘non-injurious’ price. (In countervailing cases, the overseas government can also offer an undertaking to withdraw subsidy support for the exports concerned). Acceptance of an undertaking by the Minister will suspend the investigation in regard to the specific exporter concerned.

There is no time limit on the Minister to make a decision in response to advice from Customs on whether or not to impose anti-dumping or countervailing measures. Also, in reaching a decision, the Minister has discretion to take account of factors beyond dumping and injury. There has previously been some uncertainty in regard to the extent of that discretion.

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- In announcing its response to the Gruen review (1986), the Government indicated that the Minister would take into account the national interest when exercising discretion on whether to impose measures (see appendix B).
 - A 1993 Federal Court case questioned whether the Minister, once satisfied that dumping, material injury and a causal link had been established, was in fact obliged to impose measures (see Law Council of Australia and Law Institute of Victoria, sub. 29, p. 6).

However, the Federal Court recently reaffirmed that the legislation confers a broad discretion on the Minister, though it noted that there must be a reasonable connection between the additional information considered by the Minister and the specifics of the case in question (*Siam Polyethylene Co Ltd v Minister for Home Affairs* [2009] FCA 837, at para. 87).

Revocation and continuation provisions

The WTO *Anti-Dumping Agreement* states that the intended purpose of any anti-dumping measure is to counter the effect of injurious dumping, and that measures should remain in force only as long as is necessary to achieve this.

However, consistent with the WTO agreements, Australia has legislated that measures will generally remain in force for a period of five years.

Moreover, the system allows measures to be extended for further periods of five years. Specifically, at least nine months before the expiry of any measure, Customs must publish a notice inviting local suppliers to apply for an extension. Those suppliers have 60 days to make this application and to provide the required information. Customs then has 155 days to make inquiries and report to the Minister who, on the basis of this advice, may determine that measures should continue for a further five years.

The criteria applied to the continuation of measures are necessarily somewhat different from those applying to the initial investigation, given the ongoing influence of measures in place. In particular, Customs' review focuses on whether expiration of a measure would be likely to lead to the recurrence of the injury that the measure is intended to prevent — meaning that for an anti-dumping measure, for example, it must form a view on whether injurious dumping is likely to recur if the measure were terminated. When undertaking a continuation review, Customs does not recalculate the dumping or subsidy margin, or re-examine the issue of causation, although the former may be simultaneously considered through a concurrent 'review of measures' (see below).

Reviews of the variable factors and duty payable

A party affected by an anti-dumping measure or undertaking (including an exporter, importer, Australian producer of like goods or a foreign government) may, after a measure has been in force for 12 months (and annually thereafter), seek a review of the ‘variable factors’ that determine the magnitude of the measure, including: the normal value and ‘ascertained’ export price, or the subsidy level; and, where applicable, the non-injurious price.

Australia’s anti-dumping system also provides for ‘administrative’ reviews, whereby importers can seek a refund of overpaid duties. Specifically, when a measure is imposed, subsequent consignments are subject to that duty on an interim basis. Where the export price is lower than at the time measures were imposed, an additional duty margin is immediately calculated and imposed by Customs. However, when the export price of subsequent consignments is higher than at the time the measures were imposed, the ‘excess’ duty is not immediately refunded. Rather, the importer may seek a final determination of the duty payable, and a refund of any excess duty paid. An importer can seek a final determination for each six month period it is liable for duties.

Similarly, a new exporter who would otherwise be subject to an ‘all other exporters’ duty rate may seek an accelerated review of the arrangement, to enable the calculation of a dumping duty specific to its circumstances (see section 2.3).

Conduct of investigations and reviews

In conducting investigations and reviews, Customs is subject to various requirements designed to promote transparency. Amongst other things, it must maintain a public file for each dumping investigation containing non-confidential information provided by interested parties. And where parties submit information on a confidential basis, they must provide a summary for inclusion on the public file that contains sufficient detail to allow a ‘reasonable understanding’ of the substance of the information concerned.

As part of this process, Customs publishes its SEF and final report to the Minister on its website. Consistent with the WTO agreements, both reports must include:

- the material findings of fact that support any recommendations
- the particulars of the evidence relied on to support those findings
- the reasons for any recommendation.

Appeal arrangements

Many, though not all, of the decisions made by the Minister (or the CEO of Customs) can be appealed to the TMRO. Some notable exceptions include a decision to accept an undertaking, or a decision to continue or not continue dumping or countervailing measures (see box 2.3). When a decision is appealable, an appeal application must be lodged with the TMRO within 30 days.

Box 2.3 Decisions reviewable by the TMRO

The TMRO may review decisions by:

- the Minister to impose or not impose a measure
- the CEO of Customs to:
 - reject an application for dumping or countervailing measures
 - terminate an investigation
 - recommend to the Minister the refund of an amount of interim duty less than the amount contended.

The TMRO is able to substitute its own decisions for those made by the CEO of Customs. But for decisions made by the Minister, the TMRO can only recommend a reinvestigation by Customs of the matter in dispute.

Decisions not reviewable by the TMRO include:

- a decision by the Minister to accept an undertaking
- a decision by the Minister to vary the amount of the normal value, ascertained export price or non-injurious price underlying a measure from those established by the original investigation (as part of a review of measures)
- a decision by the Minister to continue or not to continue measures
- a decision by the CEO of Customs not to initiate a review of the amount of interim dumping duty.

The range of parties who can appeal also varies according to the nature of the decision. For those decisions made by the CEO of Customs, only applicants for anti-dumping measures (or for duty refunds) may seek a review. However, for decisions made by the Minister, any interested party may lodge an application for a review, including:

- the original applicant
- a party representing, or directly concerned with, either an industry producing ‘like goods’, or with the importation or exportation to Australia of such goods
- trade associations
- the government of the country from which the goods originated or were exported.

In hearing appeals, the TMRO can substitute a decision made by the CEO of Customs. But for decisions made by the Minister, it is limited to recommending a reinvestigation by Customs. In reviewing decisions, the TMRO may only take account of information available to Customs in the course of the original investigation. The TMRO has 60 days to complete its reviews unless granted an extension by the Minister.

Further, parties may be able to challenge decisions by Customs or the Minister on points of law (but not the merits of the case) before the Federal Court. And under the WTO agreements, separate from any appeal arrangements applying within a particular country, member countries may seek a ruling on matters in dispute from the WTO Dispute Settlement Body. This may result in member countries being required to change their anti-dumping legislation to render it compliant with the WTO agreements.

2.3 Key concepts and definitions

Within Australia's anti-dumping system, decisions on whether to impose measures, and the key concepts that underpin those decisions, have been based solely on whether there has been dumping or subsidisation which is, or threatens to be, injurious. This narrow focus is in keeping with the specific requirements in the WTO agreements, although these agreements do not preclude consideration of wider impacts. Indeed, several countries have explicit arrangements in place to consider the public interest (see chapter 5).

Identifying like goods

For a dumping or countervailing application to proceed, there must be Australian production of goods that are identical or substantially similar (known as 'like goods') to the imported goods concerned. Section 269T of the *Customs Act 1901* provides general guidance by defining 'like goods' as:

... goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

In practice, Customs may consider a broad range of product attributes to determine whether goods are 'like'. These can include considerations of: physical likeness (such as size, weight, grade, strength or shape); commercial likeness (degree of competition or substitutability, consumer sensitivity, distribution channels); functional likeness (similarity of end-use); and production likeness (similarity of

manufacturing process or involvement of any patented processes). While no single consideration is sufficient to decide whether goods are ‘like’, and relative weights will partly depend on the nature of the goods, physical attributes will normally carry most weight (ACS 2007). As appropriate, Customs may also draw on previous decisions about other like goods, treatment of the goods under various tariff schedules and information about how the goods are marketed in Australia and the overseas country concerned.

Also, Australia’s specific provisions for cases involving ‘close processed agricultural goods’ directly affect the determination of like goods in these cases.

- Producers of raw agricultural products have the same recourse to anti-dumping and countervailing measures if dumped ‘like goods’ cause or threaten material injury.
- In addition, in cases where the allegedly dumped or subsidised good is a close processed agricultural good, in considering the material injury to the ‘Australian industry’, Customs is, in some cases, able to have regard to impacts on producers of the raw product.

This provision is intended to allow primary producers (in conjunction with a processor) to access anti-dumping measures in situations where it is the importation of processed goods that causes material injury, rather than direct competition from imported primary products. However, such additional access to measures is only potentially available when the following criteria are met:

- the raw agricultural products are substantially devoted to the processed goods
- the processed goods are mainly derived from the raw agricultural products
- the prices of the raw and processed goods are closely related, or the cost of producing the processed goods is closely related to the cost of the raw agricultural products.

As discussed in chapter 6, it is far from clear that, in practice, these provisions have had any meaningful impact on primary producers’ access to the anti-dumping system, or on the outcome of investigations involving processed primary products.

Establishing normal values in dumping cases

‘Dumping’ occurs when goods are exported to Australia at a price below the ‘normal value’ of the goods in their country of origin. The normal value, together with the export price, provides the basis for the level of any dumping measure.

The *Customs Act 1901* defines the normal value of a good exported to Australia as:

... the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods.

Further, the Act specifies that:

- ‘In the ordinary course of trade’ excludes substantial quantities (those not less than 20 per cent of total sales) sold at less than cost over extended periods.
- Sales are considered to be at ‘arms length’ if they are between unrelated parties and do not involve any additional payments between the parties beyond the sale price.

Where Customs determines that comparable sales in the exporting country are not an appropriate basis for determining the normal value, the legislation sets out a hierarchy of alternative methods:

- other sellers’ domestic sales (in the country of export)
- either a constructed price to make and sell the goods in the country of export, including an allowance for profit; or, the overseas supplier’s sales to a third country
- an amount having regard to all relevant information with scope, in some circumstances, to use constructed prices based on the costs to make and sell in surrogate countries, including Australia.

In practice, a number of adjustments have to be made to establish a normal value that is directly comparable to the export price of the goods concerned. For example, Customs will adjust normal values (where possible) to account for differences in conditions and terms of sale, and in taxation arrangements. Once established, the normal value will remain unchanged for the duration of the measure, unless there is a review of the variable factors — though for duty refund purposes, normal values may be recalculated on a one-off basis (see chapter 6).

In the case of applications for countervailing measures, there is no requirement to establish normal values. This is because, other than for an explicit export subsidy, subsidies will generally lower both the domestic and export price of the goods concerned. Hence, applications and the assessment process focus on how the subsidy benefits the overseas supplier by enabling it to charge a lower price for its products.

Moreover, Customs can only impose countervailing measures against ‘actionable’ subsidies; that is, those foreign subsidies that are ‘specific’, and not excluded by the legislation (see box 2.4). A specific subsidy is one that: is available to particular enterprises; a subsidy for meeting export performance criteria; or a subsidy for preferentially using domestically produced goods.

Box 2.4 Excluded subsidies

At their inception, the WTO *Agreement on Subsidies and Countervailing Measures* and *Agreement on Agriculture* specified a range of subsidies that were not ‘actionable’; that is, countervailing measures could not be applied by member countries to remedy any injurious effects from importation of those subsidised goods. These non-actionable subsidies included those:

- for research activities
- to disadvantaged regions (even if involving a specific subsidy for particular firms)
- to enable firms to adapt to new environmental requirements
- for a variety of agriculturally related purposes, such as pest and disease control, training, marketing and promotion, inspection and advisory services, public purchasing of food stockpiles and purchases for food aid.

The relevant provisions in the agreements giving effect to these exclusions have since lapsed, meaning that member countries are now able to take countervailing action against these subsidies if they cause or threaten material injury.

However, Australia has chosen not to update the *Customs Act 1901* to reflect the changed status of these subsidies, and continues to treat them as not countervailable.

Establishing material injury and demonstrating causal links

Before measures can be imposed, dumping or subsidisation must not only have occurred, but must be found to have caused, or threatened to cause, material injury to the Australian industry that is producing like goods.

‘Material injury’ is not explicitly defined under the *Customs Act 1901* or the WTO agreements. Nevertheless, a widely accepted definition originated from the now defunct Anti-Dumping Authority, which concluded that:

... ‘material’ should be considered in terms of its opposite: thus not immaterial, insubstantial or insignificant; greater than that likely to occur in the normal ebb and flow of business. (ADA 1989, p. 1)

In this context, the Act points to a list of factors that Customs might consider when assessing the incidence of injury, for example, changes in: prices, profits, employment, return on investment, market share and capacity utilisation. Further, it provides guidance on what constitutes a negligible impact, including through the *de minimis* provisions which, as discussed earlier, can lead to an investigation being terminated.

If material injury is found, a causal relationship must then be established between the dumped or subsidised imports and that injury to the local industry. In this regard, the *Customs Act 1901* directs Customs to consider whether any factors other than the presence of dumped goods are causing material injury, including:

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- the volume and price of imported like goods that are not dumped
 - changes in the level of demand for the goods
 - changes in technology, export performance or productivity of the Australian industry.

Basis for setting dumping duties and accepting undertakings

Where the requirements for the imposition of measures are satisfied, the Minister may apply duties or accept an undertaking. In dumping cases, the undertaking must be provided by the overseas supplier, not the Australian importer; while in countervailing cases, the undertaking can be made by the overseas supplier or the foreign government.

In the first instance, anti-dumping duties are based on the assessed dumping margin — the difference between the ‘ascertained’ normal value of the like goods and the ascertained export price. Similarly, countervailing duties are based on the quantum of the foreign subsidy concerned.

However, the dumping margin or the amount of subsidy sets the maximum rate of any measure. This is because, under Australia’s ‘lesser duty rule’, the Minister must consider applying measures only to the extent necessary to remove injury to the domestic industry. To do this, Customs will calculate a non-injurious export price for the dumped or subsidised goods — a price that would be sufficient to remove the injury for the Australian industry. This is generally the price at which the local industry might reasonably sell its product if there were no dumped or subsidised imports — known as the unsuppressed selling price — adjusted for any costs incurred in importing the dumped goods. Customs has advised the Commission that 12 of the 27 measures currently in force have been set on the basis of a lesser duty.

Typically, Customs calculates specific anti-dumping and/or countervailing duty rates for those individual exporters examined during an investigation. In doing so, it will also calculate an ‘all other exporters’ duty rate, which also applies to new exporters who begin exporting to Australia after the measures are imposed. However, exporters subject to this rate may seek an accelerated review of the measure, to enable the calculation of a rate specific to their particular circumstances.

As noted above (see section 2.2), Customs can impose a provisional measure in the form of a security payment, in conjunction with the publication of a PAD (from day 60 of an investigation onwards). Additionally, in limited circumstances, there is scope to apply retrospective measures covering a period of up to 90 days prior to the publication of the PAD. This might occur, for example, if the exporter should have

known, or actually knew, that they were dumping. However, advice to the Commission indicates there has not been a case where such retrospective measures have been imposed for many years.

2.4 Related policies

As noted, Australia's anti-dumping and countervailing system sits alongside the WTO *Safeguards Agreement* and the *Trade Practices Act 1974* (see box 2.5). The former deals with injury caused by a surge in imports, while damage caused by predatory pricing behaviour in the domestic market is one of the many competition matters addressed through the TPA.

Notably, both apply a higher hurdle for action than the anti-dumping system. Thus, the safeguards system states that the level of injury, or threatened injury, must be 'serious' rather than 'material', while the TPA prohibits firms from 'eliminating or substantially damaging' competitors. Also, while the anti-dumping system does not take into account the wider effects of measures on the community:

- the safeguards arrangements require consideration of whether a measure would be in the public interest
- the explicit objective of the TPA (s. 2) is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.

2.5 The international context

While Australia has had an anti-dumping and countervailing system for over a century, this is not the experience of many countries. The number of WTO member countries with anti-dumping or countervailing legislation more than doubled between 1980 and 2008, from 36 to 97. Most of this increase reflected the introduction of systems by developing countries. The majority of WTO members now have a system in place.

While the WTO agreements provide the overarching framework for any member country's anti-dumping system, there is flexibility within the agreements for countries to tailor systems to their particular requirements. As a consequence, the models adopted by individual countries vary in a number of key areas, including:

- the number of agencies involved in administering the system
- the time taken to complete the stages of the investigation, and the sequence of investigative tasks

- the breadth and nature of appeals processes
- the treatment of non-market economies and economies in transition
- whether there is provision to consider the broader public interest.

Appendix C elaborates on the features of the anti-dumping systems of a number of the major developed countries, as well as the system in India, which is the largest developing country user of anti-dumping measures.

Box 2.5 Related trade and competition policies

A safeguards measure is a temporary 'emergency protection' (in the form of an increased tariff, a tariff-rate quota or quota) applied in response to a surge of imports that causes, or threatens to cause, serious injury to a domestic industry. Compared with the anti-dumping system, the safeguards system generally sets more demanding qualifying tests and more circumscribed remedial measures. Specifically:

- the level of injury, or threatened injury, must be 'serious' (rather than 'material')
- evidence must include arguments on whether a measure is in the public interest
- measures cannot target imports from a particular country, or individual suppliers within a country
- measures should not last more than four years, although they can be extended for an additional 4 years (but must not exceed eight years in total), and reapplication of an expired safeguard measure that applied for longer than 180 days is prohibited for at least two years
- countries must progressively liberalise measures at regular intervals
- countries applying measures must 'give something in return' to the exporting country.

The TPA has wide-ranging impacts on the conduct of business in Australia. One of its functions is to prevent anti-competitive conduct (including predatory pricing) that would be damaging to competition and hence to the well-being of the community. Of particular relevance is s. 46 which deals with the misuse of market power, and which prohibits corporations that have substantial market power from taking advantage of that power, including by protracted selling at prices below cost, for the purpose of:

- eliminating or substantially damaging a competitor
- preventing entry to markets
- deterring or preventing a person from engaging in competitive conduct.

In 2007, s. 46 was extended to prohibit a firm with a substantial market share from supplying goods or services below cost for a sustained period for the purposes of: eliminating or damaging a competitor; preventing market entry; or deterring competitive conduct (the 'Birdsville Amendment'). Importantly, the application of s. 46 adopts a 'purpose test' that confines its scope to activities undertaken with an intent to damage a competitor, in contrast to the 'effects test' of threatened or material injury under anti-dumping legislation.

3 Recent anti-dumping and countervailing activity

Key points

- Anti-dumping and countervailing activity in Australia has declined over the past decade or so and, until quite recently, was at historically low levels. There are currently 27 measures in place against 19 products and 14 countries.
- Various factors have contributed to the downward trend in usage, including the strong state of the economy for much of the past decade and the changing composition of Australian industry.
- For many years, almost all of Australia's measures have been dumping-related, with only one countervailing measure currently in force.
 - Australia has relied principally on duties to address injurious dumping, with only three of the current measures involving price undertakings, and then only for some of the exporters concerned.
 - The lesser duty rule has been applied to nearly half of the measures currently in force, with the specific rate (dollar per unit) duties concerned being reduced, on average, by 15 per cent.
 - The ad valorem equivalents of the duties collected on the products currently subject to measures vary considerably — from 2 per cent to over 100 per cent, with the mean and median being 20 per cent and 8 per cent respectively.
 - In recent years, the total amount of anti-dumping and countervailing duties collected has averaged around \$9 million, with some 40 per cent (\$3.5 million a year) subsequently refunded.
- The average duration of measures has been growing, with an increasing proportion being extended on one or more occasions.
- The majority of measures in Australia apply to a relatively narrow and diminishing range of basic industrial chemicals and plastics, base metal products, paper products and processed agricultural products — the bulk of which are inputs to further manufacturing processes.
- Around three quarters of Australia's anti-dumping measures apply to goods exported from Asian countries, with China accounting for eight alone.
- Australia's current usage of anti-dumping and countervailing measures is broadly in line with its share of world trade. Over the past decade, Australia has accounted for around three per cent of new measures imposed globally.

The usage of Australia's anti-dumping system, and the nature of that use, are relevant to assessing the benefits and costs of the system. In looking at usage, it is important to recognise that the 'demand' for anti-dumping and countervailing measures has historically fluctuated in response to economic cycles and has been influenced by other trade and industry policies (see appendix B). Over time, usage has also been affected by the composition of Australian industry, itself influenced by these broader policies. Many of the industries that previously used the system no longer exist as manufacturing entities in Australia. Indeed, as is evident from the usage statistics, the system is becoming more narrowly focused on a handful of industries which produce mainly intermediate goods.

3.1 Recent usage of the system

The extent to which Australian industries have used the anti-dumping system is reflected in four metrics — the number of applications for measures, investigations initiated, new measures imposed and total measures in force. However, only limited information is publicly available on the first of these (see chapter 7). Hence, the following discussion is based on the latter three indicators.

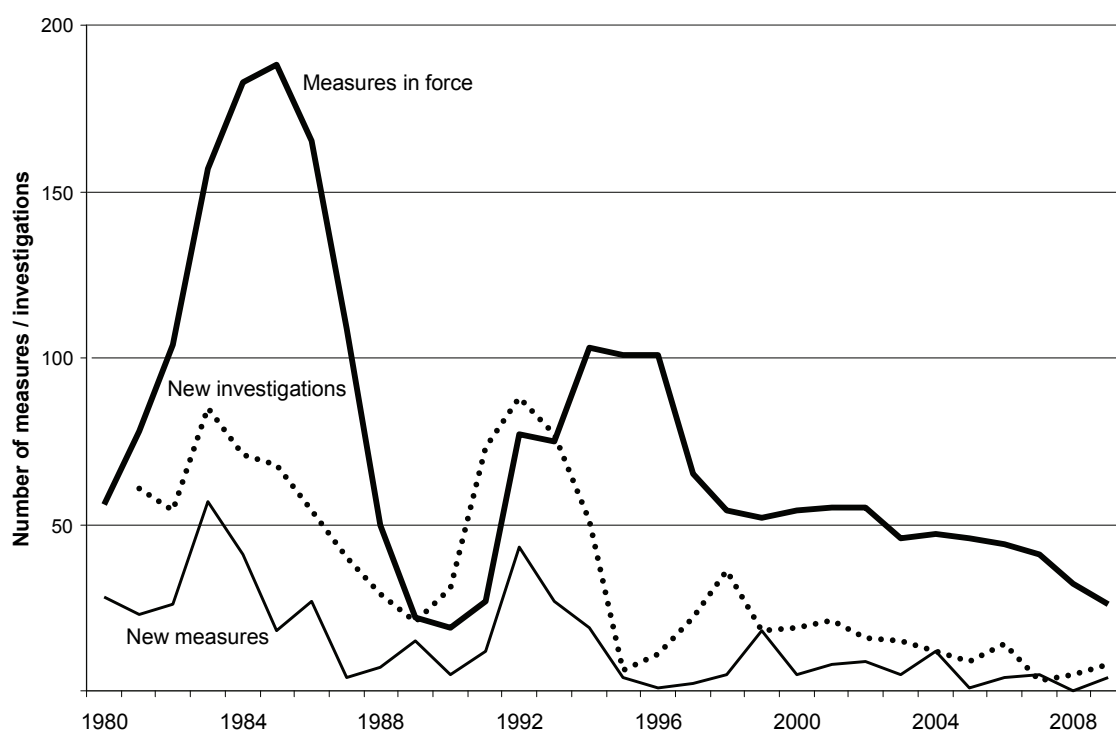
Against each of these, recourse to Australia's anti-dumping system has been declining over the past decade and more (figure 3.1). In sum:

- In the decade to 2008-09, Customs initiated around 12 new anti-dumping investigations each year. In contrast, the number of cases investigated in the 1990s averaged over 40 each year.
- The number of new measures imposed has similarly fallen — from an average of around 14 each year during the 1990s to around five each year over the past decade. Although the declining number of investigations has driven this trend, the impact of that decline has been partially offset by a higher 'success rate'. Nearly 50 per cent of cases initiated in the past 10 years ultimately led to action against the imports concerned, compared to around one third of cases in the previous decade.¹
- In turn, the reduction in new measures, together with the expiration of some existing measures, saw the total number of measures in place fall to 26 at 30 June 2009 (covering 18 products from 13 countries). (The Minister has

¹ In contrast, there has been no discernable trend in the number of requests for measures that have been terminated at the application phase. According to information provided to the Commission by Customs, over the past decade, around half on average have been terminated (that is, not initiated), though with considerable fluctuation in proportions up and down from year to year. With around half of initiated cases also being unsuccessful in the past 10 years, this means that around 25 per cent of applications ultimately lead to the imposition of measures.

subsequently imposed one additional measure, taking the number of measures in place at the time this report was being finalised to 27.)

Figure 3.1 Australia's anti-dumping and countervailing activity^a



^a An investigation or new measure is an action applying to one commodity from one country or customs region during a financial year. The number of measures in force is at 30 June.

Sources: ACBPS Dumping Notices; PC (2009).

Despite the stock of measures declining over time, measures have been tending to stay in place for longer, with an increasing proportion being extended on one or more occasions. Between 2002 and 2009, the average duration of measures increased from 4 years 7 months to 5 years 2 months. Those currently in force that have the longest duration are anti-dumping measures on polyvinyl chloride (PVC) homopolymer resin (from Japan and the USA), which have been in place for nearly 20 years (since 1992), and countervailing measures on brandy (from France), which have been applied continuously 1995.

Factors affecting usage of the system

There was widespread agreement amongst inquiry participants that a key factor affecting the cyclical pattern in anti-dumping activity over the past 30 years has been changes in the strength of the global economy. Past periods of heightened anti-dumping activity in Australia have generally coincided with below average world

economic growth, such as in the early 1980s and early 1990s. This suggests that the diminished usage of Australia's anti-dumping system over the past decade can, to an extent, be attributed to a generally strong domestic and global economy.

However, other factors have almost certainly played a role. For example:

- The changing composition of Australian manufacturing has seen many of the industries that previously used the system cease local production (see box 3.1).
- A relatively more self-reliant attitude among manufacturers, encouraged by a generally more open trading environment, means that today's industries are increasingly competitive and may feel less need to seek protection via the system than their counterparts in the past.
- Increasing globalisation means that a growing proportion of local producers in industries such as chemicals and plastics also import product to complement their locally manufactured ranges. While some have claimed that such importing activity has increased the scope for strategic use of the system (see chapter 4), it may more generally have discouraged recourse to anti-dumping measures.
- Some participants also contended that hurdles for initiating cases have become higher, reducing the incentives for small and medium enterprises in particular to seek the application of measures (see chapter 6).

3.2 Nature and form of measures

Virtually all of Australia's measures have, for many years, been dumping rather than subsidy-related. Only one countervailing measure has been in place over the past 10 years.

In addition, Australia has relied principally on duties to address injurious dumping with only three of the current measures involving price undertakings, and then only for some of the exporters concerned. However, some duties may, in practice, be operating as de facto price undertakings insofar as overseas suppliers have increased their prices and importers have recouped interim duty payments via the duty refund system (see chapter 2).

- In recent years, an average of six importers each year have applied for duty refunds, with around 90 per cent of the duty collected from them having been returned.
- Over the past three years, some 40 per cent of the total amount of anti-dumping and countervailing duties collected has been refunded (around \$3.5 million out of \$9 million on an annual basis).

3.3 Product and country incidence

Product coverage

Almost all of Australia's anti-dumping and countervailing measures apply to a relatively narrow range of basic industrial chemicals and plastics, base metal products, paper products and processed agricultural products, many of which are either raw commodities or semi-finished goods that are inputs to further manufacturing processes (table 3.1). Moreover, the concentration of measures within these industry groups has almost doubled over the past 20 years, from 48 per cent to 92 per cent. This is despite a contraction in the number of firms in, and the range of products manufactured by, these industries in recent years.

Table 3.1 **Australia's anti-dumping and countervailing measures by industry^a**

<i>Industry</i>	<i>1989</i>		<i>1999</i>		<i>2009</i>	
	No.	%	No.	%	No.	%
Chemical products, plastics & rubber	6	26	16	34	11	42
Food & beverage manufacturing & processing	3	13	6	13	8	31
Paper and paper product manufacturing	12	26	3	11
Base metal products	2	9	2	4	2	8
Machinery, mechanical & electrical equipment	5	22	2	4
Other manufacturing	7	30	9	19	2	8
Total	23	100	47	100	26	100

^a Measures are counted as one good from one country or customs region at 30 June.

Source: ACBPS Dumping Notices.

Several factors appear to explain this increasing concentration.

- Although the nature of the anti-dumping system means that measures have always been limited to a relatively small group of products that are often physically similar (and thus more amenable to the like goods test), industry rationalisation has reduced the range of local production activities even within this group. Thus, while some past users have expanded their manufacturing activity, others have moved to importing particular lines, or have ceased domestic production altogether (see box 3.1).
- Globally, the size of new production facilities in these industries has continued to grow, with many being heavily, if not exclusively, export-oriented. The high capital cost of such facilities provides a strong incentive for producers to maximise the use of installed capacity. Thus, during periods of softer demand, or

when new capacity comes on line, selling product on world markets at discounted prices may be an attractive strategy.

- Over time, industries that are aware of the anti-dumping system, or that have a history of successful applications for measures, are more likely to consider repeat actions (see, Casselle Commercial Services, sub. 2, p. 2). Indeed, given the complexities of the system, there may be considerable scope for ‘learning by doing’.

Box 3.1 Industry rationalisation and the narrowing product coverage of measures

As far as the Commission is aware, the following products that have previously received anti-dumping protection are no longer manufactured in Australia.

Chemicals and plastics: Di-butyl phthalate; di-isobutyl phthalate; dioctyl phthalate; glyphosphate; levamisole hydrochloride; phthalic anhydride; polystyrene; sodium metabisulfite; sodium stearoyl lactylate; sodium tripolyphosphate; sorbitol.

Machinery: Multi-tyred rollers; outboard motors; washing machines.

Other manufactured products: Air circuit breakers; coloured pencils; fibreglass gun rovings; hypodermic needles; plaster of Paris bandages.

Country coverage

Over the past decade there has been a greater concentration of measures against imports from Asian countries. Three quarters of Australia’s anti-dumping and countervailing measures apply to Asian countries, with China alone accounting for eight measures (table 3.2).

Table 3.2 Australia’s anti-dumping and countervailing measures by exporting country^a

Country or region	1989		1999		2009 ^b	
	No.	%	No.	%	No.	%
Asia	11	48	17	36	20	77
China	3	13	3	6	8	31
Other Asia	8	35	14	30	12	46
Europe	7	30	16	34	4	15
North America	2	9	7	15	2	8
Other regions	3	13	7	15	0	0
Total	23	100	47	100	26	100

^a Measures are counted as one commodity from one country or customs region at 30 June. ^b Since June 30, the Minister has imposed measures on geosynthetic clay liners from Germany.

Source: ACBPS Dumping Notices.

The growing prevalence of measures against Asian exports reflects, at least in part, the relocation of manufacturing to, and growth in manufacturing investment within, Asia and the attendant shift in Australia's trade patterns. Between 1998-99 and 2007-08, the average annual growth in Australia's merchandise imports from Asia was nearly double that from non-Asian countries (11 per cent compared with 6 per cent). Similar anti-dumping and trading trends have been observed in other developed economies such as Canada, the European Union and the USA (see section 3.5).

Extent of import competition for goods subject to measures

In recent years, almost all products subject to new anti-dumping measures in Australia have faced competition from other imports as well as from local production. In almost all instances, there have been at least four distinct suppliers (including those in countries not investigated). In the cases of food service and industrial (FSI) pineapple and PVC resin, measures were simultaneously imposed against three and four countries respectively.

3.4 Magnitude of support

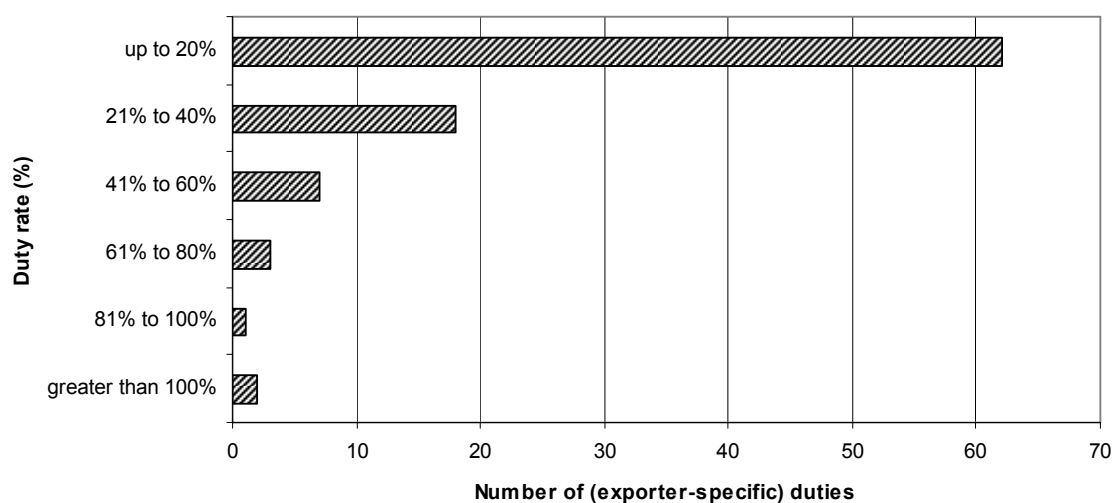
The apparent support provided to local producers by the current measures varies considerably. Though specified in dollar terms, the ad valorem equivalents of a small number of these are over 100 per cent. However, the mean and median are much lower at 20 per cent and 8 per cent respectively (figure 3.2).

For 12 of the measures in force, the lesser duty rule has been applied — meaning that a lower non-injurious price, rather than the normal value (or the full benefit of the countervailable subsidy), was used to set the level of these measures. In these cases, the duty reduction relative to that which would have otherwise applied is up to 45 per cent, and averages around 15 per cent (expressed as a reduction in the duty on a dollar per unit basis).

In addition, anti-dumping measures are often on top of some (typically minor) protection afforded by general tariffs. Over the past decade, around three quarters of new anti-dumping measures have applied to products subject to tariffs of five per cent or less, with the balance largely made up of tariff-free goods.

At face value, the spread of duties depicted in figure 3.2 would suggest that, in some cases, their price raising effects are very significant. However, the actual impact will depend on a variety of supply and demand factors. And while measures may have significant effects in the particular markets concerned, their economy-wide effects are seemingly very small. These matters are discussed further in chapter 4.

Figure 3.2 Anti-dumping duty rates, 30 June 2009^a



^a Customs applies duties at dollar rates per unit. For comparison purposes, the duty rates for measures in place at 30 June 2009 were expressed as a percentage of the most recent ascertained export price. The duty rates applied to 93 individual exporters or groups of exporters (including 'all others'), as part of 23 (out of 26) measures then in place. Three measures could not be included in the analysis on a comparable basis: brandy from France (countervailing) and PVC from Japan and the USA (which operate under the pre-1993 floor price mechanism). The rates of 13 duties (out of 93) were zero.

Data source: ACBPS.

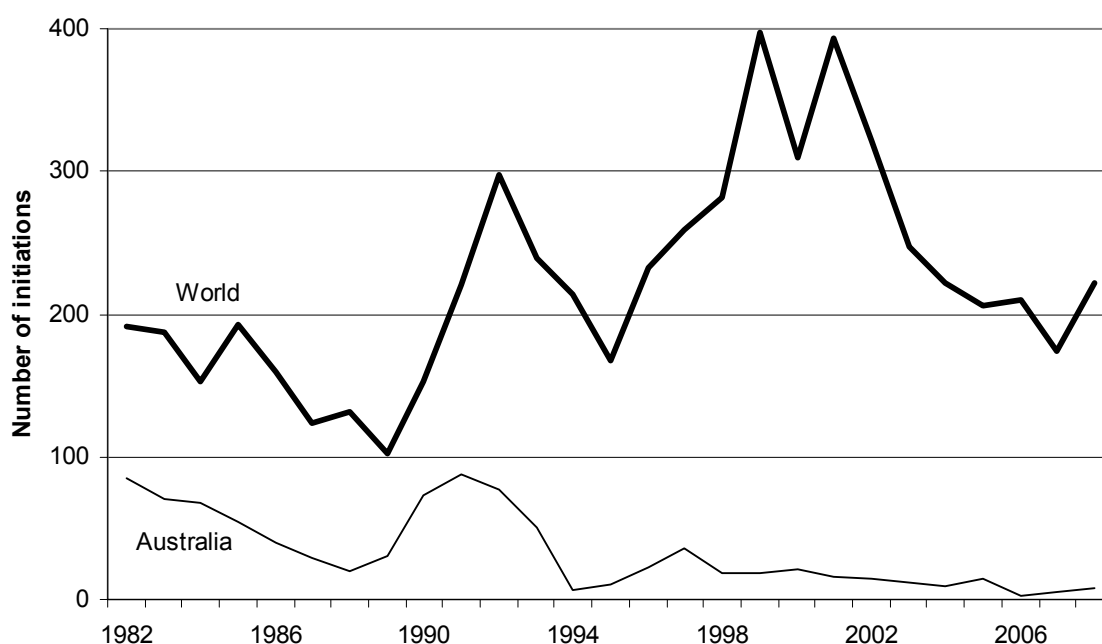
3.5 Global perspective

Between 1990 and 2000, global anti-dumping and countervailing initiations trended up (figure 3.3). In large measure, this reflected growth in the number of countries with anti-dumping systems. And although initiations have declined in recent years, the share accounted for by 'new' users (in particular, India) has continued to grow. In contrast, the share by 'traditional' users (Australia, Canada, the European Union and the USA) has, in aggregate, been declining. It is also noteworthy that although there has been a marked upswing in global initiations following the onset of the global financial crisis, the impact in Australia has so far been less significant.

Further, while there has been a large increase in the number of countries with systems, a small group of countries account for the bulk of the new measures that have been introduced in recent years.

- The European Union, India and the USA have accounted for over 50 per cent of all new anti-dumping measures imposed globally over the past decade.
- Over 80 per cent of new countervailing measures introduced since 1999 have been applied by the European Union, Canada and the USA (table 3.3).

Figure 3.3 **Global anti-dumping and countervailing initiations^a**



^a Each investigation initiated covers one product imported from one country.

Data sources: ACBPS Dumping Notices; Stephenson 2009; PC (2009); Whitwell (1997).

While Australia was one of the more significant users of measures up until the early 1990s (when fewer countries had systems), it is now a relatively small and declining user; with its anti-dumping and countervailing activity broadly in line with its share of world trade. Thus the number of new anti-dumping and countervailing measures imposed by Australia over the past decade (55 and 1 respectively) represents around three per cent of the global total. This decline in Australia's significance as a user of measures is despite the fact that it arguably remains a relatively attractive export market, with well established legal, payment and transport systems and industries that generally need only relatively moderate levels of support service. (Few measures, nine anti-dumping and one countervailing, have been imposed against Australian exports over the past decade.)

As in Australia, new anti-dumping and countervailing measures globally over the past decade have been:

- predominately anti-dumping (95 per cent) rather than countervailing (5 per cent)
- typically applied to a relatively small range of products, including: basic industrial chemicals and plastics, base metal products and paper products
- largely imposed on exports from Asia (over half) and, in particular China (23 per cent of anti-dumping and 14 per cent of countervailing measures) (table 3.3).

Table 3.3 Global anti-dumping and countervailing activity: new measures imposed^a

<i>Country or customs region</i>	<i>1999–2008</i>		<i>2008</i>	
	No.	%	No.	%
Anti-dumping				
<i>Country imposing</i>				
India	347	21	31	22
USA	191	11	23	17
European Union	169	10	15	11
Other	977	58	69	50
<i>Exporting country</i>				
China, P.R.	380	23	52	38
Other Asia	522	31	39	28
Non-Asia	782	46	47	34
<i>Sectors</i>				
Chemical, plastic & rubber products	627	37	68	49
Base metal products	467	28	28	20
Textiles	160	10	10	7
Machinery, mechanical & electrical equipment	104	6	8	6
Wood pulp, paper & paperboard	68	4	11	8
Other	258	15	13	9
Total anti-dumping	1684	100	138	100
Countervailing				
<i>Country imposing</i>				
USA	46	48	7	64
European Union	20	21	0	0
Canada	13	14	3	27
Other	16	17	1	9
<i>Exporting country</i>				
China, P.R.	13	14	10	91
Other Asia	41	43	1	9
Non-Asia	41	43	0	0
<i>Sectors</i>				
Base metal products	48	51	4	36
Chemical, plastic & rubber products	13	14	3	27
Machinery, mechanical & electrical equipment	8	8	2	18
Other	26	27	2	18
Total countervailing	95	100	11	100

^a Each measure covers one product from one country or customs region.

Source: WTO (2009a; 2009b).

4 Should Australia retain an anti-dumping system?

Key points

- The price raising effects of anti-dumping measures give rise to a range of benefits and costs for applicant industries and their suppliers, importers, downstream user industries and, in some cases, consumers; with ensuing effects on employment, activity and investment across the economy.
- Most of these impacts represent transfers between different domestic stakeholders. But there will be some adverse consequences for Australia's overall economic performance and community well-being.
 - Resources attracted to, or retained in, industries by virtue of anti-dumping protection will provide a lesser return to the community than if used elsewhere.
 - Longstanding anti-dumping measures that become akin to tariffs are likely to lessen the imperative for recipient industries to respond to import competition through innovation and other forms of productivity improvement.
 - There are costs for government in administering the system and for local (and overseas) suppliers in complying with its requirements.
 - An effect of the undertaking and duty refund provisions is that some duty revenue that would otherwise accrue to the Australian Government flows overseas.
- However, as the industry and product coverage of the anti-dumping system is narrow and diminishing, the aggregate cost is likely to be very small.
- Also, the ability for local industries, like those in most other countries, to use the system to address what are perceived to be 'unfair' trading practices and outcomes may have lessened resistance to more significant tariff reforms. Thus removal of an anti-dumping 'safety valve' could make it more difficult to address remaining tariff and related reform issues.
- Accordingly, and with practical and other considerations militating against using competition law as a generalised substitute for a dedicated anti-dumping system, there is a case for retaining a system.
- But the current arrangements have a number of significant deficiencies including:
 - a lack of consideration of the economy-wide impacts of imposing measures
 - inadequate mechanisms for updating the magnitude of measures
 - scope for repeated extensions of measures based on less demanding tests
 - insufficient transparency in the investigation process and its outcomes.
- Addressing these deficiencies would reduce the direct detriment of the system, and thereby strengthen the political economy arguments for its retention.

Anti-dumping measures have a range of specific benefits and costs for those affected by them.

To a considerable extent these impacts are offsetting, involving transfers of activity, employment, investment and income between different groups in the community.

But there will also be some broader effects on the efficiency of resource use, as well as a likely leakage of duty revenue to overseas entities. Whether the net impact for the community is positive or negative, and thus whether it will be in Australia's interests to retain an anti-dumping system, depends on whether there are sound efficiency or other rationales for taking action against injurious dumping or subsidisation.

Accordingly, this chapter:

- outlines the various benefits and costs of imposing anti-dumping measures
- discusses the main rationales for taking action against dumped or subsidised imports
- assesses in this light whether retention of an anti-dumping system would be desirable
- highlights some deficiencies in the current system which, if addressed, would enhance the case for retaining a system.

4.1 The benefits and costs of anti-dumping measures

In a general sense, and like other trade protection instruments, anti-dumping measures will potentially affect the price and availability of the goods concerned. However, the requirements that must be satisfied before measures can be imposed — and in particular the like goods test — mean that, in practice, there will rarely be a detrimental longer-term impact on product availability in the broad (see box 4.1). Hence, it is the price raising effects of measures that are of key concern in examining the benefits and costs for the various stakeholders.

The potential price raising effect of some of the current measures is significant. In ad valorem terms, the average measure is around 20 per cent, with some measures in excess of 100 per cent (see chapter 3). As discussed in section 4.2, the actual impact on prices will depend on a range of supply and demand factors and may be much smaller than these duty equivalents would suggest. But if measures are to be of benefit to local suppliers of the goods concerned, then there must be some price raising effect.

Box 4.1 Impacts of measures on the availability of goods

Where the imposition of anti-dumping measures significantly reduces the price competitiveness of the imported product concerned, the overseas supplier may cease exporting it to Australia. For example, the Commission understands that the imposition of measures on coated paper imports in the late 1990s saw Finnish and Japanese suppliers exit the Australian market. As noted by Casselle Commercial Services (sub. 2, p. 6), withdrawal from the market may be particularly likely where other export opportunities are available and where Australia is only a small market for the overseas supplier.

However, the operation of the like goods test means that, where measures are imposed, there must be very close substitutes available from a local supplier(s). And often very close substitutes are also available from other overseas suppliers. Thus, in the coated paper case referred to above, Indonesian and Korean suppliers replaced their counterparts from Finland and Japan. Accordingly, and recognising that product distribution arrangements and/or unique Australian specifications might sometimes preclude immediate access to alternative sources of supply, the withdrawal of a dumped product is unlikely, of itself, to permanently disadvantage downstream users to any significant extent.

That said, there may be some more subtle impacts on product availability over the longer term. In particular, in helping to sustain local production, measures may, at a cost, enhance availability in the Australian market at times when global supply is tight (see text following). Conversely, were measures to provide a local supplier with significant market power, then it is possible that the supplier might seek to boost its overall profits by restricting product volumes and charging higher prices in the domestic market, and redirecting surplus product to export markets. (However, as discussed in chapter 5, application of the lesser duty rule would moderate any impacts of this nature. So too would the commercial incentives which motivate suppliers to maintain good relationships with their customers.)

To the extent that measures do raise prices and thereby boost the competitiveness of recipient local industries against some or all of the overseas suppliers of the goods concerned, they will support greater activity, employment and investment in those industries than would otherwise be the case.

Though it is obviously difficult to isolate these effects from other influences on firm performance, several firms advised that the imposition of measures had been particularly important in giving them greater confidence to invest, with flow-on benefits for their activity and employment over the longer term (see box 4.2). Anti-dumping measures may also boost the competitiveness of competing imports not subject to measures — whether supplied by dedicated importers or by local producers to complement their product ranges. In this regard, Dow Chemical (sub. 3, p. 15) suggested that while penalising opportunistic importing activity, anti-

dumping measures can benefit ‘bona fide’ overseas suppliers/importers with a long-term commitment to supplying and servicing the Australian market.

Box 4.2 Activity, employment and investment effects: the views of stakeholders

A number of users of anti-dumping measures commented on their beneficial impacts, particularly in supporting investment.

- CSBP (sub. 15, p. 6) cited one of the main benefits of the dumping system as being the provision of a degree of certainty over long-term investments.
- Sulo (sub. 12, p. 4) argued that anti-dumping measures can ‘provide certainty for longer-term investment decisions and permit manufacturers to commit to innovative developments to enhance production supply’.
- CSR (sub. 10, p. 2) noted that even small amounts of un-remediated dumping ‘reduce the incentive for further investment or capturing market growth’.
- BlueScope Steel (sub. 19, p. 34) submitted that ‘intermittent dumping can make it more difficult for the domestic industry to pursue a normal investment and market development strategy’.
- Geofabrics Australasia (sub. 4, p. 2) said that access to the anti-dumping system was a crucial factor in the company’s decision to continue to invest in research and development, as well as in capital equipment.

However, as outlined in the text, the benefits to recipient industries typically come at a cost to downstream industries. For example, Palmer Steel (sub. 25, p. 1) said that measures on Hollow Structural (steel) Sections had increased the company’s input costs, and thus had directly impeded its ability to expand production and employment.

A number of participants further contended that the imposition of measures serves to stabilise prices to the benefit of downstream user industries (and final consumers), and that any price raising effects are often offset by the better after sales service provided by local suppliers. And some argued that if industries are forced to cease production in Australia because of persistent dumping, there will be some additional longer-term costs for their customers as a result of a diminution in the security of supply (see, for example, BlueScope Steel, sub. 19, p. 37). In discussions, several downstream user industries told the Commission that the ability to buy from a local supplier is often worth a small price premium.

But there are, of course, offsetting activity and employment effects. While some of these will be borne by overseas suppliers, any decline in demand for products subject to anti-dumping measures may also adversely affect the activities of locally-based importers of those products. And the price raising effects of measures will

have negative impacts on the activity, employment and investment of downstream industries using the goods concerned.

As discussed in the next section, these negative impacts will almost certainly outweigh any benefits for downstream users from greater supply security or better after sales service. By way of illustration, the imposition of measures in late 2003 on High-Density Polyethylene — a major input in the production of mobile garbage bins — was followed by a successful ‘compensating’ application for measures on imported garbage bins. In other words, the benefits of greater supply security and better after sales service will, at best, only partially offset the detriment from higher input prices.

As the preceding mobile garbage bin case also illustrates, in those instances where measures are imposed on final goods, consumers will be similarly disadvantaged. But they will generally be less affected by measures imposed on intermediate goods. This is because, in many cases, they will be able to switch from the now more expensive locally produced final good into an imported product unaffected by the imposition of measures on the intermediate good.

4.2 What is the net impact on resource use efficiency?

Many of the shifts in activity and employment discussed above simply result in a redistribution of income within the Australian community. Even so, there will be some impacts on the efficiency of resource use and thereby implications for overall community well-being.

A variety of efficiency-related arguments for taking action against dumped or subsidised imports have been advanced, including to counter predatory behaviour, address ‘episodic dumping’, promote efficient industry structures or offset ‘strategic predation’ by foreign governments.

However, in the Commission’s view, this suite of arguments does not provide any justification for Australia to retain an anti-dumping system.

An objective assessment of these arguments is made more difficult by the terminology and concepts that characterise the anti-dumping architecture.

- The use of the term ‘dumped’ to describe imports that are sold at a lower price than in the supplier’s home market almost axiomatically implies that the practice is undesirable. But it is only one particular manifestation of the common practice of price discrimination. In fact, as a strategy for helping firms to break into export markets, price discrimination or ‘dumping’ has implicitly been endorsed

by governments around the world. For example, Austrade (2006) has previously issued advice to prospective exporters that:

Marginal (or ‘differential’) costing is a technique commonly employed in export and produces a more competitive price to assist market entry ... It is particularly useful where a company has excess production capacity and needs to reduce its export prices to be competitive.

- ‘Injury’ from a ‘dumped’ product may, in practical terms, be little different from the loss of sales and/or profits that a local producer may suffer for a range of other reasons — including a reduction in its underlying competitiveness against imports or against other domestic suppliers, appreciation of the exchange rate, reductions in tariffs, or shifts in broader demand patterns. But through the link to the practice of dumping, such injury assumes a separate policy significance.

More specifically, as elaborated on in box 4.3 and appendix D:

- There is no evidence that in recent years dumping has been motivated by the sort of predatory intent that would, in a domestic market context, risk breaching the Trade Practices Act (TPA).
- There should be some onus on, and capacity for, otherwise competitive domestic firms to ‘weather the storm’ of episodic dumping during periods of global excess supply — especially as those same firms are likely to benefit when demand is strong and supply tight at other times during the economic cycle. Further, acceptance of an episodic dumping rationale could provide the basis for anti-dumping measures to be applied almost continuously in these sorts of industries, meaning that measures would, in practice, be little different from conventional industry protection.

Allocative and dynamic costs

In the absence of any soundly-based efficiency rationales for taking action against dumped or subsidised imports, resources attracted to (or retained in) industries as a result of the imposition of anti-dumping measures will generally provide a lesser return to the community than if used elsewhere. Though such ‘allocative efficiency’ costs can be hard to directly observe, especially for smaller scale interventions such as the anti-dumping system, they are a generally acknowledged consequence of virtually any trade policy instrument that seeks to artificially boost the competitiveness of particular industries.

Box 4.3 Efficiency arguments for anti-dumping protection

Countering predatory behaviour

A long standing argument for anti-dumping measures is to counter predatory behaviour aimed at driving local suppliers from the market, in order to allow the overseas supplier to ultimately charge higher prices and reap monopoly profits. However, the market circumstances that would allow an overseas supplier to employ dumping to create anything other than a transitory monopoly are very narrow. Specifically, there would need to be limited competition amongst global suppliers of the goods concerned and constraints on the re-entry of local suppliers, or the emergence of new suppliers, once import price levels rose.

Significantly, for almost all of goods recently subject to measures in Australia, there have been multiple sources of global supply (see chapter 3). Reflecting this, most inquiry participants acknowledged that countering predatory behaviour is not the focus of Australia's anti-dumping system.

Addressing 'episodic' dumping

From time to time, suppliers may look to offload surplus product in export markets at heavily discounted prices. Though not predatory, such 'episodic' dumping may still force local suppliers to reduce prices and/or temporarily scale back production.

However, the effectiveness of WTO compliant anti-dumping measures in dealing with 'hit and run' dumping is problematic. More generally, for good reasons, firms rather than governments are usually required to bear the risks associated with uncertainty and volatility in globally integrated markets. And as noted in the text, in capital intensive industries such as chemicals and steel products where demand fluctuates heavily across the economic cycle and where price discounting can occur quite regularly, a concern to remediate episodic dumping might effectively become a rationale for long-term industry protection.

Supply security

In helping to sustain a local supply base, anti-dumping measures may benefit customers through more timely delivery, better after sales service and greater supply security over the longer term. But if customers regard the benefits of access to local supply as being significant, there are various ways that those benefits can be, and are, obtained without the need to mandate higher prices for the goods concerned — and thereby remove customers' capacity to trade off such benefits against the opportunity to secure imported product more cheaply at certain times.

Other efficiency arguments advanced in support of anti-dumping measures include:

- promoting efficient industry structures and development
- countering 'strategic predation' by foreign governments.

However, as discussed in appendix D, none of these additional arguments, or arguments based on support for regional development, are compelling.

Additionally, longstanding anti-dumping measures that become akin to tariffs may lessen the imperative for recipient industries to respond to import competition through innovation and other forms of productivity improvement. It is now widely accepted that much of the gain from Australia's tariff reform program has come from 'dynamic' efficiency improvements resulting from firms' greater exposure to global competition. In this context, some anti-dumping measures in Australia have been in place for nearly 20 years (see chapter 3).

Finally, any system that provides for the restriction of price competition in certain circumstances can create incentives for 'strategic' use — in this case, including through the threat of actions, or the lodgement and subsequent withdrawal of applications (see box 4.4). While there are some factors diminishing the likely pay-offs from such behaviour, one of the potential benefits of the Commission's recommendation (7.7) to improve public reporting on applications for measures that do not proceed to initiation, would be to discourage more egregious applications.

Box 4.4 The strategic use of anti-dumping

The potential for local suppliers to use anti-dumping systems to advance their competitive position in unintended ways has long been recognised. For example:

- A supplier might use the threat of an anti-dumping action to deter downstream users from using an imported product, or to directly induce an importer to raise its prices.
- With greater globalisation of production, an increasing number of firms are augmenting their domestic output through importation, thereby extending the spectre of strategic behaviour to applications or (threatened applications) that target the imports of competing local suppliers.

Contentions of this nature have been widely explored in the literature (see, for example, Mankiw and Swagel (2005)), and were raised in this inquiry by the Australian Steel Association (subs. 28 and DR57). They were also an issue in the decision by the Australian Competition and Consumer Commission to seek an undertaking from OneSteel as part of its acquisition of Smorgon Steel Group in 2007 (ACCC, sub. 35, p. 27).

There are, however, a number of factors that will reduce the expected pay-offs from such strategic behaviour. In particular, the costs for firms taking anti-dumping action are significant. And only around one quarter of applications ultimately result in the imposition of measures (see chapter 3). Yet to be credible, threats of taking anti-dumping action must be underpinned by a reasonable likelihood of success if such action is in fact pursued.

Even so, it would be surprising if there were not some opportunities for local suppliers to use the system in a strategic fashion — just as there may be opportunities for overseas suppliers subject to anti-dumping actions to use aspects of the system to their advantage.

Administration and compliance costs

In addition to the ‘allocative’ and ‘dynamic’ efficiency costs, there are direct financial costs borne by the Australian Government (and consequently taxpayers) in administering the system, as well as costs for firms in taking and defending actions, and complying with measures imposed.

- In the case of the Government, these costs are mainly incurred by Customs — in recent years, expenditure by Customs on investigating dumping complaints and ensuring compliance with measures in place has ranged between \$5 million and \$6.6 million a year. For individual investigations, Customs has advised the Commission that its costs range from around \$250 000 for a relatively simple case to \$1 million for more complex cases. There are also costs attaching to the dumping-related activities of the Trade Measures Review Officer, though the Commission understands that these have generally been modest. And from time to time, there have been further costs for the Government arising from appeals to the Federal Court.
- For local suppliers, there are the costs of preparing applications and providing any follow-up information requested by Customs. As well as internal staff costs, there are usually considerable consultancy expenses, with a handful of specialist anti-dumping consultants or lawyers doing much of the procedural work involved in the lodgement of applications. The cost of an application generally appears to fall in the range \$100 000 to \$250 000 depending on complexity and availability of data, though costs as high as \$400 000 have been reported in particular cases (see box 4.5).
- While some of the compliance burden on those defending actions or subject to measures may be borne by overseas stakeholders, a considerable part of it can fall on Australian-based importers (see, for example, the submission to the Joint Study by the Food and Beverage Importers Association (2006, p. 1)). In addition, the costs for importers of seeking refunds of ‘over-paid’ interim duty payments (see section 6.7) can be considerable.

Transfer of duty revenue overseas

The revenue collected by the Government from a dumping or countervailing duty is an offset to the costs imposed on downstream user industries over and above the benefit received by the local supplier(s) of the goods concerned. As such, it is a part of the transfer of income within the Australian community that ensues when an anti-dumping measure is imposed.

Box 4.5 How costly is the current system for applicant industries?

Several participants provided information about the costs that local industries have incurred in applying for anti-dumping or countervailing measures. For example:

- The NFF (sub. 6, p. 5) reported that in the dumping case brought by Sunbeam Foods and the Australian Dried Fruits Association against Greek currants, the total application cost was approximately \$120 000, and that in the 'preserved mushrooms' case, the Mushroom Growers Association of Australia and Windsor Farm Foods spent approximately \$400 000.
- CSR (sub. 10, p. 5) suggested that launching an anti-dumping case could typically cost a firm \$200 000.
- Australian Pork (sub. DR39, p. 5) similarly suggested that the cost of preparing and lodging an application for measures is around \$200 000, with further costs involved in monitoring outcomes if an application is successful.

And in a submission to the Joint Study, Townsend Chemicals (2006, p. 3) said that it had spent \$235 000 on an application in 2002 for measures against thermoplastic polyurethanes.

The key contributors to these costs include:

- the need to employ consultants to prepare applications because of the complexity of the system requirements
- the amount of information required to establish a prima facie case, including on export prices and normal values, the benefit to the overseas supplier from an actionable subsidy (in countervailing cases) and evidence of injury and causation
- the difficulty in sourcing much of this information, particularly when import data are suppressed by the ABS for confidentiality reasons (see chapter 7).

In regard to the cost of engaging consultants, participants (such as PACIA, sub. 31, p. 11) noted that these are 'significant', although they did not provide numerical estimates of the split between consultancy and internal firm costs. However, in its submission to the Joint Study, Townsend Chemicals reported that \$90 000 of the \$235 000 total cost of its 2002 application was spent on consultants (with a further \$10 000 on legal opinions). Notably, virtually all participants indicated that few firms would have the capacity and experience to launch dumping actions without specialised help.

However, where an overseas supplier offers an undertaking not to export at below the non-injurious price, the revenue that would otherwise have accrued to the Australian Government is instead retained by the overseas supplier, thereby increasing the overall cost of the measure for the community. This may also be the case where a duty applies, but where duty payments are subsequently refunded as a result of the overseas supplier raising its export price.

How big are the direct efficiency costs?

Aside from the administrative and compliance costs, the size of the efficiency costs (and any revenue transfer overseas) arising from the imposition of anti-dumping measures will be correlated to the price raising effects.

In this regard, several local industry participants contended that anti-dumping measures do not in fact have any price raising effect per se, but merely return markets to the ‘normal’ or ‘fair’ conditions that should have prevailed in the absence of dumping (see, for example, Sulo, sub. 12, p. 4).

However, in looking at the direct impacts of measures, this rationales-based contention is irrelevant. Whatever the merits of measures, in practical terms, they are intended to reduce the price competitiveness of the imported products concerned, thereby enabling competing local producers to achieve higher sales and/or set higher prices than would otherwise be the case. And in the absence of any compelling efficiency rationale for measures, these price raising effects will in turn have direct efficiency costs of the sort discussed above.

That said, while the magnitudes of some of the current anti-dumping measures are very significant, and the costs for particular user industries may be sizeable, there are several reasons why the efficiency impacts are likely to be very small in an overall sense.

- The impact of measures on prices will depend on supply and demand conditions in the markets concerned. For example, un-dumped (or non-subsidised) substitute products may be available from overseas suppliers at prices below the duty inclusive price of the dumped import, thereby constraining the price raising effect of the measures. As measures are imposed on the ‘free-on-board’ export price, their proportionate impact on the landed price of the goods into Australia will be diluted by freight costs. And any duty absorption by the overseas supplier via ‘rebates’ to importers or other mechanisms, will similarly limit the price raising effects. In fact, it appears that the resulting uplift in prices for some of the products subject to sizeable measures has been low or even negligible.
- While Australia’s anti-dumping system may, in some cases, deter aggressive pricing behaviour by overseas suppliers — with consequent price impacts that are not reflected in the measures in place at any point in time — any such ‘silent policeman’ effect is unlikely to be large (see box 4.6).
- Most of the measures currently in place apply to a relatively narrow range of basic industrial chemicals and plastics, base metal products, paper products and processed agricultural goods, with this product range narrowing further over time. Indeed, as the like goods test effectively precludes anti-dumping action in

any market where there is more than minimal differentiation amongst product offerings, the range of activity that could be encompassed by the anti-dumping system will necessarily be quite limited.

Box 4.6 The silent policeman effect

Various economists have looked at the extent to which the mere existence of an anti-dumping system can reduce price competition in markets, especially in the context of the EU and US systems (see, for example, Mankiw and Swagel (2005) and Vandebussche and Zanardi (2006)). The underlying premise is that exposure to the possibility of anti-dumping measures may cause overseas suppliers to price less aggressively, thereby diminishing the need for domestic industries to actually take or threaten action.

However, there are several factors that are likely to limit any such silent policeman effects, particularly in the Australian context.

- As well as reducing the likely pay-offs for firms from threatening to take anti-dumping action, the significant costs for industries of bringing actions and the small share of measures that are ultimately successful will also weaken the general deterrent effect of the system.
- Exporters to Australia, particularly in developing countries, may not know a lot about the anti-dumping system until they are caught up in it.
- Even when aware of Australia's system, as noted earlier, opportunistic exporters may view Australia as a potentially expendable minor market, price aggressively and simply withdraw from the market if they become subject to an anti-dumping action.
- Retrospective measures have not been applied in Australia for many years.

Also, in constraining the range of goods that could potentially be subject to measures, the like goods test will limit any silent policeman effect to a similarly narrow group of industries and products.

Indicative of how small the economy-wide efficiency costs are likely to be is the amount of anti-dumping and countervailing duty payments collected by Customs — an average of only \$9 million a year (before refunds) since 2006. These duty collections do not, of course, capture the higher prices for locally produced like goods — or any increase in the price of un-dumped imports. Nonetheless, they are minute in comparison to total taxes on trade (\$6 billion a year) and the total value of imported goods (\$240 billion in 2008-09).

Given the likelihood of a very small overall impact (as well as the difficulty of quantifying some of the specific effects of anti-dumping measures), the Commission has not undertaken any formal economic modelling of the net direct

efficiency costs of the system. However, it notes that the US International Trade Commission (USITC 1995) estimated that removing the directly quantifiable costs of that country's somewhat more 'aggressive' system would have delivered a direct welfare gain equivalent to just 0.03 of one per cent of US GDP.

In responding to the Draft Report, a few participants criticised the absence of any formal modelling. Most notably, the Australian Steel Association (sub. DR57, paras. 296–317) called for quantification of both the overall impacts of the system on efficiency and of its impacts on particular industry sectors. And in a paper prepared for the Association, Professor Pasquale Sgro from Deakin University argued that welfare costs of 0.03 per cent — equivalent to around \$250 million a year in contemporary Australian GDP terms — are non-trivial, and that various other US studies suggest that the modelling approach applied in the USITC exercise understated the true costs (sub. DR57, p. 55).

The Commission agrees that, even though very small in economy-wide terms, a net efficiency cost of the order of \$250 million a year would not be inconsequential. Indeed, viewed in isolation, any direct efficiency cost associated with the imposition of anti-dumping measures would constitute an argument for Australia to abolish its anti-dumping system. However, as discussed in the next section, there are also some important political economy arguments for retaining a system which are relevant in this context.

More specifically, all of the indications are that the outcomes of a general equilibrium modelling exercise would be hard to distinguish from computer 'machine noise'. And modelling focussed on the even smaller impacts on individual industry sectors would be more problematic again. Notably, Professor Sgro (sub. DR57, p. 55) agreed that 'full modelling would be difficult and perhaps not warranted'.

4.3 Political economy considerations

The main arguments

Promoting what are perceived to be 'fair' trading practices and outcomes is a widely posited objective of anti-dumping measures. In undertaking the last comprehensive review of Australia's anti-dumping system, Gruen (1986, p. 24) observed that 'fair trading practices — both nationally and internationally — command widespread Australian community support'. This remains the case today.

For some, the promotion of 'fairness' in trading outcomes is a self standing and sufficient argument for an anti-dumping system (see box 4.7).

Box 4.7 Some views on fairness as a rationale for an anti-dumping system

[I]n the absence of trade barriers the Anti-Dumping System is a 'speed hump' that encourages fair trade. It is an essential remedy in the multi-lateral trading environment that ensures Australian industry can continue to supply its own domestic market — provided it has the opportunity to compete on the basis of fair prices. (Sulo, sub. 12, p. 3)

CSBP committed to large capital investments ... on the understanding that it would compete against fair prices on the Australian market ... Access to anti-dumping measures to remedy unfair trading behaviour is a reasonable expectation for Australian industry ... (CSBP, sub. 15, p. 4)

The CIF does not view the Anti-Dumping System as impacting comparative advantage, rather, it is a mechanism to provide relief from exporters seeking to secure an unfair competitive advantage. (Cement Industry Federation, sub. 9, p. 3)

Rather than being a protectionist measure, tough anti-dumping rules are an entitlement under the WTO to protect open and fair trade. It is important that these rights are exercised in the national interest rather than serving other agendas, including furthering the interests of consumers and importers when it is at the direct expense of local industry. (The Australian Workers' Union, sub. 32, p. 14)

While people may at times legitimately debate the meaning of fairness, in the anti-dumping context the notion is wrongly used to signify some kind of economic unfairness, i.e., it is supposedly unfair to expect local manufacturers to be able to compete profitably against dumped imports. (Australian Steel Association, sub. DR57, para. 324)

For others, the belief is that if Australia's trading partners have anti-dumping systems, then it is only fair that Australia should too. In this regard, OneSteel stated:

It would be inappropriate for Australia to consider any unilateral action regarding reducing access to anti dumping measures, when all our major trading partners (including China) have adopted both anti-dumping and subsidy agreements [and enacted] them into their domestic law. (sub. 22, p. 4)

However, amongst economists and policy makers, catering for what are perceived to be fair outcomes is more commonly linked to building and sustaining support for a more liberal trading order. Bhagwati (1988, p. 35) encapsulated this argument in the following terms.

An economist is right to claim that, if foreign governments subsidise their exports, this is simply marvellous for his own country, which then gets cheaper goods and thus should unilaterally maintain a policy of free trade. He must, however, recognise that the acceptance of this position will fuel demands for protection and imperil the possibility of maintaining the legitimacy, and hence the continuation, of free trade. A free trade regime that does not rein in or seek to regulate artificial subventions will likely help trigger its own demise ...

This line of thought supports the cosmopolitan economist's position that the world trading order ought to reflect the essence of the principle of free trade for all — for

example, by permitting the appropriate use of countervailing duties and anti-dumping actions to maintain fair, competitive trade.

In a similar vein, a number of submissions noted that the broad support of business for Australia's tariff reform program that began in the mid-1980s was underpinned by an implicit understanding that companies would have ongoing recourse to anti-dumping measures. The Trade Remedies Task Force, for example, commented that:

... Australian industry (like industries in other countries) has endorsed the removal of trade barriers, provided that anti-dumping systems remained to deal with unfair and uncompetitive trading practices. (sub. 26, p. 7)

And generalising this argument to the international level, the Cement Industry Federation observed that:

The reduction of tariffs in the Uruguay Round of [WTO trade] negotiations was achievable in the full knowledge that member countries could rely upon the provisions within the Dumping and Countervailing Agreements to remedy unfair trading practices. (sub. 9, p. 3)

The Commission's assessment

In the Commission's view, the key issue from a policy perspective is the significance of any 'system preserving' benefits that flow from promoting what are perceived to be 'fairer' trading outcomes. In its judgement, absent such benefits, fairness would not provide a basis for Australia to retain an anti-dumping system. Indeed 'fairness', as it relates to anti-dumping arrangements, is not a straightforward concept. For instance:

- As discussed earlier, the benefits for import competing suppliers and their employees from anti-dumping measures come at the expense of others in the community, including downstream users and firms which compete with the recipient suppliers for labour and other inputs. Not all would regard these redistributions of income and resources as unambiguously fair.
- The bulk of Australia's anti-dumping measures are imposed on products exported from less developed countries (see chapter 3). Restricting market opportunities for those less well off than most Australians might also be viewed by some as unfair, especially where the suppliers concerned do not have overtly predatory motivations.
- It is debatable whether the fairness arguments for measures apply equally to the two main components of anti-dumping regimes. Thus as Banks (1990, p. 22) argued, action to offset a subsidy provided by an overseas government seemingly has a stronger link to fairness than taking action against an overseas supplier that simply engages in (non-predatory) price discrimination.

Similarly, there should be no automatic presumption that because our trading partners have anti-dumping systems in place, so too should Australia. That is, Australia's decision on whether or not to maintain an anti-dumping system should be determined, in the first instance, by the particular benefits and costs associated with the system, and not on how other countries manage the trade-offs involved.

The Commission further observes that the 'system preserving' benefits that attach to Australia's anti-dumping system seem unlikely to be large in any overall sense.

- Beyond the claimed relationship between Australia's tariff reform program and the maintenance of an anti-dumping regime, there are no obvious examples of reform initiatives in Australia that have been aided by the presence of the anti-dumping 'safety valve'.
- There appear to be very few instances where the threat of anti-dumping action by Australia has influenced the actions of our trading partners. Gruen (1986, p. 25) observed that a decision by a previous New Zealand Government to phase out its main form of export subsidisation 'probably had something to do with the USA's and Australia's new found enthusiasm for countervailing'. However, no other examples have come to light in this inquiry, with the Australian Steel Association (sub. 28, p. 18) contending that there is no demonstrable evidence that anti-dumping measures are effective in driving trade liberalisation in our trading partners.¹
- More broadly, the changes in Australia's trade policy landscape over the last two decades suggest that these benefits would be more modest than in the past.

Even so, in the Commission's judgement, they cannot be dismissed as inconsequential. In particular, the capacity for the Australian Government to point to the existence of an appropriately configured anti-dumping system may continue to be helpful in dealing with aspects of protectionist sentiment within industry and the community, especially during downturns in the economy. Accordingly, removal of an anti-dumping 'safety valve' could make it more difficult to address remaining tariff and related reform issues. In this regard, it is important to recognise there is still a considerable degree of domestic support for the anti-dumping system,

¹ Also, though not a consideration directly relevant to any unilateral decisions by Australia on the future of its anti-dumping system, at the global level, anti-dumping measures are likely to have systemic costs as well as benefits. Most obviously, WTO imprimatur for conforming anti-dumping regimes has underpinned the global proliferation in these regimes in the last two decades. As discussed in chapter 3, in recent years, Australian exporters have only been subject to a small number of anti-dumping actions. However, it seems almost inevitable that for some Australian exporters — and especially those seeking to break into new markets — the growing number of anti-dumping regimes will have constrained what would otherwise have been profit-enhancing export strategies.

including from some who have been disadvantaged by particular anti-dumping measures (see, for example, trans., p. 47).

The Commission further notes that, in a collective sense, the scope for countries to impose countervailing duties on subsidised exports may help to constrain the practice. Hence, even though there are many ways for countries to recalibrate their subsidy support to render it WTO compliant, this component of Australia's anti-dumping system, in conjunction with counterpart components in other systems, can reinforce the more general WTO processes directed at reducing/eliminating subsidies.

4.4 A modified system should be retained

As well as looking at the various benefits and costs for the community of a dedicated anti-dumping system, the Commission considered the alternative of using competition law to deal with dumping matters (see box 4.8). As reflected in paragraph 4(b) of the terms of reference, particular policy interventions should not only deliver a net benefit to the community, but should be more efficient and effective than alternative approaches for meeting the underlying objective.

However, there are several practical and other considerations which militate against extending the competition law approach beyond its current partial application to trans-Tasman trade under the Closer Economic Relations (CER) Agreement.

Given this, and the fact that the potential broader benefits from providing access to anti-dumping protection seemingly come at very small overall cost to the community, the Commission has concluded that an anti-dumping system should be retained.

But this is not an endorsement of the status quo. The current system has a number of significant deficiencies. Addressing these deficiencies would lessen the direct detriment that generally ensues from the imposition of anti-dumping measures without undermining the broader benefits of providing access to an anti-dumping safety valve. The political economy arguments for retaining a system would thereby be strengthened.

Box 4.8 The competition law approach

A possible alternative put forward to a dedicated anti-dumping regime is to deal with dumping through the misuse of market power provisions contained in s. 46 of the TPA. Under the Closer Economic Relations (CER) Agreement, this approach already applies to trade between Australia and New Zealand, though either country can still take countervailing action consistent with WTO rules. Trade within the EU and between Canada and Chile under the Canada-Chile Free Trade Agreement (CCFTA) is similarly exempt from the application of anti-dumping measures that apply to third countries, and instead subject to applicable competition law (though under the CCFTA, it is again permissible for either country to take countervailing action).

As a generally applicable mechanism, the approach has some in-principle attractions.

- In particular, it would limit the imposition of anti-dumping measures to circumstances where dumping was genuinely predatory and hence most likely to be directly detrimental to efficiency.
- Also, bringing dumping matters within the remit of the TPA could increase the scope to take account of inter-relationships with some other competition issues. For example, the strength of import competition might be a potentially important consideration in assessing whether a proposed merger would significantly reduce overall competition in the marketplace.

But notwithstanding its use in a trans-Tasman context, the feasibility of competition law as a general substitute for Australia's anti-dumping system is highly questionable.

- It would require the cooperation of other countries which, based on the retention of the scope to take both anti-dumping and countervailing action in Australia's other preferential trade agreements, could not be guaranteed.
- It would also require better developed competition institutions and legal instruments for enforcing judgements on any dumping-related misuse of market power than exist in some of Australia's major trading partners.
- Most of the penalties prescribed in the TPA for breaches of s. 46 are retrospective and may significantly exceed the gain to the offender from the contravention. Conversely, anti-dumping and countervailing measures provided for by the WTO agreements are generally prospective and set to remediate damage to the local supplier, rather than to punish the transgressor. While a harsher penalty regime that punished and deterred genuinely predatory dumping might be intrinsically desirable, taking punitive action against an overseas supplier benefitting from a countervailable subsidy would be especially problematic — as exemplified by the retention of the generally applicable countervailing provisions under the CER Agreement.

More broadly, it is unclear whether the competition law approach, with its focus on enhancing and preserving market competition, could adequately recognise the system preserving arguments for allowing action against injurious dumping or subsidisation.

Appendix E provides further elaboration on these matters and participants' views on them.

4.5 Deficiencies in the current system

Some of the deficiencies in the current arrangements reflect the complex and arcane nature of the system, and the WTO agreements on which it is based.

- Almost irrespective of any efforts to make the specific assessment criteria more precise, the need to retain the flexibility to deal with a diverse range of cases means that their application will inevitably involve considerable judgement.
- The complexity of the requirements also means that their application will necessarily be time consuming and costly. Given the changes that have been made over the last decade or so to streamline the system, there is only limited scope for further improvement on this front.

However, other deficiencies reflect the particular way that Australia has chosen to implement the requirements in the WTO agreements. These can and should be addressed.

Lack of consideration of wider impacts

As in most other countries, dumping assessments by Customs focus solely on whether dumping or subsidisation has occurred and, if so, whether it has caused or threatens material injury to the local industry concerned. Hence, there is no consideration of the wider impacts and the broader public interest in the advice provided to the Minister. Yet the costs of particular anti-dumping measures for downstream industries, other stakeholders and the community, can be significant relative to the benefits for recipient industries. And while the Minister can ostensibly take into account other factors — including the public interest — when deciding whether to impose measures, as far as the Commission is aware, no Minister has done so.

Significantly, the WTO agreements do not preclude the inclusion of public interest test requirements, with several countries having implemented them (see chapter 5).

Inadequate mechanisms for adjusting the magnitude of measures

As discussed in chapter 2, Australia's anti-dumping system sets measures on a prospective basis, with duties based in the first instance on dumping margins (or the subsidy benefit) determined during the investigation period.

While there are two sets of provisions that allow for adjustments to the magnitudes of measures where there have been changes in market conditions, these provisions have some significant drawbacks (see chapter 6). As a result, there is the potential for some measures to quickly become either ineffective in removing injury, or unreasonably punitive. For example, in a rising market, both the normal value and export price of a good subject to a dumping duty may exceed the unadjusted, duty

inclusive, ‘floor’ price established by that measure. Hence, the measure may no longer be effective in preventing any dumping. Conversely, in a declining market, an unadjusted floor price may become punitive and require the overseas supplier to price above the contemporary normal value.

Other deficiencies in the legislative framework

Some other aspects of the current arrangements are not conducive to securing appropriate and fair outcomes. As elaborated on in chapters 6 and 7, particular deficiencies include:

- the opportunity for repeated extensions of measures without any requirement to re-examine injury and causality issues. Indeed, as noted earlier, some measures have been in place for nearly 20 years
- a lack of robustness in the appeal arrangements. For example, decisions on whether to continue measures beyond the initial five-year term are not appellable
- a more limited list of countervailable subsidies than that permitted by the WTO. As well as reducing the scope for Australian industries to bring countervailing actions, this creates perceptions of unfairness.

Lack of transparency

As submissions from across the spectrum of interests have emphasised, there is insufficient transparency in the decision-making process and the outcomes that flow from it. In particular, assessments by Customs of whether there has been injurious dumping or subsidisation and, if so, its extent, rely heavily on information provided by the parties. But important parts of this information are kept confidential. And the provisions requiring public summaries of information submitted in confidence are widely regarded as ineffectual. Hence, the detailed basis for Customs’ advice to the Minister cannot be readily determined.

Moreover, when measures are imposed, none of the affected parties receives full information on the key underlying parameters. One consequence is that local suppliers cannot be certain what the impacts on selling prices of the imported goods should have been and thus whether they received a good return for the time and cost involved in applying for measures. Another is that there is a widespread misconception that the lesser duty rule is applied more frequently than is actually the case (a little under half of the measures currently in place).

Other features of the process that detract from transparent outcomes include:

- the aforementioned inability for parties to appeal some key decisions
- limited general reporting on the magnitude of measures and on the number of applications for measures that do not lead to investigations.

5 Refocussing the broad approach

Key points

- The highest priority for reform of Australia's anti-dumping system is to introduce consideration of the broader public interest.
- Taking account of overseas approaches, the Commission examined several options for achieving this. However, most would have significant drawbacks.
 - Though some of the concerns about a conventional public interest test are overstated, under such a test, it would be difficult to factor in a system preserving benefit from achieving a 'fairer' trading outcome in each and every situation.
 - By itself, an explicit requirement for the Minister to take account of the public interest would not guarantee appropriate consideration of such matters.
 - Increasing the stringency of the existing assessment criteria would not necessarily screen out those cases where the imposition of measures would have been most costly.
 - As a stand alone approach, separate public reporting on wider impacts would be a weak option for encouraging consideration of the public interest in the decision-making process.
- The Commission's preferred approach is to introduce a 'bounded' public interest test, that would draw on the provisions of similar tests in the European Union and Canada.
 - The test would be administered by Customs and apply to new investigations and to reviews to determine whether existing measures should be continued.
 - It would embody a presumption in favour of the imposition of measures where there has been injurious dumping or subsidisation.
 - But it would also detail a small number of specific circumstances where measures would not be in the public interest — for example, where they would be ineffectual in removing injury, or would impose large costs on downstream users relative to the benefits for the applicant industry.
 - Where, based on the advice from Customs, the Minister was satisfied that one (or more) of these circumstances applied, measures would not be imposed. And where the imposition of measures would not be contrary to the public interest, the current lesser duty provisions would apply as appropriate.
 - Customs would have to complete assessments against the test within 30 days, with provisional measures imposed in all cases where there was a finding of injurious dumping or subsidisation, prior to consideration of public interest matters.
 - The application of these new arrangements would be subject to various consultation and public reporting requirements.

5.1 Promoting the public interest should be the goal

Not surprisingly, there is a diversity of views on what should happen to Australia's anti-dumping system.

At one end of the spectrum are most of the recent users of the system who argue that it is an important, fundamentally sound and internationally endorsed part of Australia's trade policy framework. Thus, in synthesising the views of its member companies, the Trade Remedies Task Force (TRTF) said that it:

... strongly supports the retention of an anti-dumping system, and believes that it is an integral component to the overall policy framework in relation to supporting Australian industry to meet unfair international trade competition ...

- Australian industry has every right under international trade rules to employ mechanisms to counter predatory pricing.
- Accordingly, our current anti-dumping and countervailing system operates on a fundamental and internationally-accepted basis.
- The current system supports a stable business environment for industries affected by dumped imports, upon which material injury has been inflicted ...
- ... it contributes to Australian efforts to ensure that international trade remains fair through a process which has been designed to level a 'playing field' which has been distorted by overseas suppliers.
- The current system provides a mechanism to impose discipline on foreign exporters and overseas suppliers to dissuade the practice of dumping onto the Australian market. (sub. 26, p. 1)

According to this group of stakeholders, major changes to the focus of the current system are not required, though almost all argued for some modifications to its detailed requirements to give better effect to the intent of the system and to improve transparency and administrative efficiency.

At the other end of the spectrum, the Australian Steel Association — representing the interests of various users of steel products which have been burdened by measures on some of their inputs — questioned the case for retaining a system, and argued that if one is to continue, then key components of it should be overhauled:

Even if the system is to remain in some form, the substantive and procedural provisions should be constructed so that protectionist tendencies are minimised and the laws cannot be misapplied or used for abusive purposes. (sub. 28, para. 13)

And in between, are those who consider that there is a clear case for retaining an anti-dumping system of some description, but that the current arrangements require substantial modification to render them less costly for the community. For example, Dow Chemical submitted that:

... an unfortunate outcome of the anti-dumping system, as it is currently legislated and interpreted, is that it is open to misuse and may, to the extent it is abused, protect uncompetitive local industries and deny access of downstream industries to globally-sourced products and technologies at a competitive cost. Therefore we believe the system is in need of significant revision in order for it to deal effectively with a new era of international investment in production capacity particularly in the Asia-Pacific region. (sub. 3, p. 1)

Some further commentary on the efficacy of the current system from submissions to this inquiry and to the 2006 Joint Study is provided in box 5.1.

As discussed in the previous chapter, the Commission also sees the need for significant change to the current arrangements. Indeed, without significant change, the case for Australia to retain an anti-dumping regime would be much weaker.

The highest priority is to introduce consideration of the wider effects of imposing anti-dumping measures. In other words, the anti-dumping system should serve the broader public interest, rather than only consider the interests of particular firms or sectors, recognising that:

- the system preserving benefits of providing access to anti-dumping protection are a key part of this public interest calculus
- there are practical limits on how far consideration of wider impacts can and should reasonably extend.

Having had regard to approaches employed in some overseas countries, this chapter explores four broad options for taking account of wider impacts and the public interest, namely:

- augmenting the current assessment criteria with a public interest test (sections 5.2 and 5.5)
- explicitly requiring the Minister to take account of public interest matters (section 5.2)
- increasing the stringency of the current assessment criteria (section 5.3)
- separate, and self standing, public reporting on the likely wider impacts of imposing measures (section 5.4).

Some of the changes which the Commission is recommending to address more specific deficiencies in the current legislative requirements, and to further improve the transparency of the system (see chapters 6 and 7), would also help to promote the public interest, albeit less directly.

Box 5.1 Where to on anti-dumping: stakeholder perspectives

Those endorsing a continuation of the current approach

Competitive, world-class producers in Australia have nothing to fear from a level playing field in domestic and international markets. But even the largest, most competitive companies can be hurt seriously by dumped goods an effective antidumping system ... to deal with such potential situations is extremely important. (BlueScope Steel, sub. 19, p. 39)

In the absence of tariffs in an open market such as Australia's, access to remedies to address unfair trading practices is considered essential. As a signatory to the WTO Anti-Dumping [and Countervailing Agreements], Australia has elected to enact fair-trade provisions in its domestic legislation. Qenos fully endorses Australia's application of the provisions within the Customs Act and considers that access to the available remedies is essential to underpin investment in Australia by manufacturers. (Qenos, sub. 13, p. 1)

CSR Limited strongly supports the anti-dumping provisions and believes it is an important element in ensuring the health and growth opportunities for the Australian manufacturing industry. (CSR Limited, sub. 10, p. 1)

Rather than being a protectionist measure, tough anti-dumping rules are an entitlement under the WTO to protect open and fair trade ... The risk of passive anti-dumping regulation during the GFC has been identified by this submission in terms of lost output and benefits to the economy at a time when unemployment is rising and capacity utilisation is falling. (The Australian Workers' Union, sub. 32, p. 13)

The NFF is committed to ensuring Australia's anti-dumping system is WTO-consistent, and that industries with legitimate claims against dumped imports have the opportunity to seek remedy through the system. Australian farmers, for differing reasons, depend on a transparent, efficient and defensible anti-dumping system. (National Farmers' Federation, sub. 6, p. 3)

Australia's agricultural, fisheries and forestry industries are ... significantly exposed to the unfair policies and practices of other countries. Accordingly it has been important that [these] industries have had recourse to the full suite of retaliatory measures, authorised by WTO rules, where it can be established that significant harm is being caused as a direct result of external policies or practices. (Department of Agriculture, Fisheries and Forestry, sub. 34, p. 2)

Those arguing for significant change

[It is] not in the national interest of any trading country to 'protect or cocoon' non performing and non competitive industries ... Australia should not strengthen our existing anti-dumping and countervailing system ... and over time, should wind down these barriers to free trade, productivity and innovation. (W.W. Wedderburn, sub. DR38, pp. 1–2)

Australia's anti-dumping regime may provide assistance to certain producers, but the broader impact of anti-dumping actions should be recognised. There can be no presumption the benefits generated by anti-dumping action outweigh the costs associated with increased prices and reduced competition. (Food and Beverages Importers Association, 2006, p. 3)

Currently the system operates in such a manner that the interests of those directly affected by the allegedly dumped imports, that is, the Australian industry producing like goods, are taken into account to the exclusion of interests of other parties. (Rio Tinto, 2006, p. 7)

5.2 A public interest test

As discussed in previous chapters, advice from Customs to the Minister on whether to impose anti-dumping measures is based solely on whether there has been dumping or subsidisation that is, or threatens to be, injurious, with no regard to wider impacts on the economy. And though the legislation seemingly gives the Minister some scope to take account of other factors in responding to that advice (see chapter 2), the Commission has not been advised of any recommendations from Customs that have been amended by a Minister on the basis of wider impacts, or the public interest more generally.

The WTO Agreements do not preclude countries from including a public interest test in their specific requirements, with the European Union and some individual countries (for example, Canada and Brazil) having done so.

However, such tests are typically ‘bounded’ in that there is a presumption in favour of measures if dumping/subsidisation and material injury are found. For example:

- The EU’s community interest provision (box 5.2) specifies that while intervention must be based on an appreciation of all the various interests taken as a whole, ‘the need to eliminate the trade distorting effects of injurious dumping/subsidisation and to restore effective competition’ is to be given special consideration. Hence, once injurious dumping has been found, there must be ‘compelling reasons’ that lead to the ‘clear conclusion’ that measures would not be in the community interest. (EC 2006, pp. 2–3)
- Under the Canadian system (see box 5.3), assessment of the public interest does not occur automatically. Indeed, the relevant legislative guideline (CITT 2004) indicates that ‘normally an injury finding leads to the imposition of antidumping or countervailing duties’. But on request from an interested party, the Canadian International Trade Tribunal may conduct a public interest inquiry if it decides that there are reasonable grounds to believe that the imposition of duties, in full or part, may not be in the public interest.

Such requirements to consider the public interest have not had a major impact on the outcomes of anti-dumping investigations. For example, the Commission has been advised that application of the EU’s community interest test has led to the non-imposition of measures in about 10 per cent of cases where injurious dumping or subsidisation has been found — with decisions not to impose measures mainly based on industry viability and ‘inability to benefit from measures’ considerations. And in the nearly 160 investigations since the public interest inquiry process was introduced in Canada in 1984, there have been only six such inquiries, in turn leading to the imposition of lesser duties on four occasions. Moreover, only one of these duty reductions has occurred since guidance was provided in 2000 on factors to be considered in public interest inquiries (see box 5.3).

Box 5.2 The EU's community interest test

To help ensure that the imposition of anti-dumping and countervailing measures against imports from non-EU countries is in the community interest, Articles 21 and 31 of the relevant regulation specify, amongst other things, that:

- intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers
- all parties are to be given the opportunity to make their views known
- measures found to be appropriate on the basis of dumping and injury may not be applied if the relevant authorities can clearly conclude, on the basis of all the information submitted, that this would not be in the community interest
- interested parties may request a hearing from the assessment body, with requests to be granted if accompanied by appropriate community interest reasons.

However, these articles also specify that, in considering the community interest, special consideration is to be given to the 'need to eliminate the trade distorting effects of injurious dumping/subsidisation and to restore effective competition'.

In giving effect to these requirements, the analysis (which is carried out by the European Commission):

- is of an economic nature, with no regard given to political or broader policy considerations (for example, foreign and regional policies)
- takes into account the viability and future prospects of the applicant industry
- may have regard to any impact of measures on the degree of competition in the market, including the creation or strengthening of a dominant position for the applicant industry
- is not a cost-benefit analysis in the strict sense where the various interests are weighed against each other quantitatively, but rather involves the application of a proportionality test that considers whether the costs of imposing measures on other parties would be disproportionate to the benefits for the applicant industry. This would be the case where, for example, it was found that the industry:
 - was not viable, even with measures in place
 - would clearly not benefit from measures for other reasons — for instance, because there would be a shift in demand into substitute products
- focuses on the situation of entities that would be directly affected by measures, meaning that assessments will normally only go one step up or down the production chain. For products not commonly sold at the retail level, consumer interests are to be involved only if they can demonstrate an 'objective link' with that product.

Contrary to the perception of many participants in this inquiry, the test applies to *all* new investigations and to reviews to determine whether measures should be considered beyond their initial term. And where measures are found to be in the community interest, a lesser duty sufficient to remove the injury for the applicant industry may still be imposed.

Source: EC (2006).

Box 5.3 The Canadian public interest inquiry mechanism

Under Canada's bifurcated assessment process, the dumping/subsidisation component of that assessment is undertaken by the Canada Border Services Agency. In the event of a positive finding, the case is then referred to the Canadian International Trade Tribunal (CITT) which examines injury and causality matters, and which may also consider public interest matters.

Specifically, when commencing an injury inquiry, the CITT will indicate how it may consider public interest issues if it makes an injury finding. In response to a request from an interested party, it may initiate a public interest inquiry. Such inquiries are informed by submissions from interested parties and will usually involve a public hearing. (The Tribunal is also able to self-initiate a public interest inquiry, but has never done so.)

The CITT may, on the basis of these processes, determine that it would be in the public interest to impose a lesser (or no) anti-dumping or countervailing duty. And though the Tribunal is free in this context to take into account any relevant factor, some specific factors are listed in a schedule to the guideline as requiring consideration, including whether:

- goods of the same description are readily available from countries or overseas suppliers not encompassed by the action
- imposition of full duties would be likely to:
 - eliminate or substantially lessen competition in the domestic market for the goods concerned
 - cause significant damage to downstream industries, including by limiting their access to necessary inputs
 - significantly impair competitiveness by limiting access to technology
 - significantly restrict the choice or availability of goods at competitive prices for consumers, or otherwise cause them significant harm
- reducing or eliminating the duty is likely to cause significant damage to those supplying inputs (including primary commodities) to local producers of the goods concerned.

Notably, under the Canadian regime, a lesser duty cannot be imposed separately from any public interest test assessment (on the basis that it would be sufficient to remove injury for the applicant industry). That is, if the CITT determines that there are no public interest grounds for reducing the magnitude of a measure, then that measure must be set to equate to the full dumping margin (or the benefit of the countervailable subsidy).

Sources: CITT (2004); Special Import Measures Regulations [Canada](SOR/84-927).

But such modest impacts are not a reason to dismiss the public interest test approach. Indeed, under tests involving a presumption in favour of measures, it would be surprising if the observable impact was anything other than modest. Yet

as well as precluding the imposition of measures in circumstances that could be disproportionately costly for the community (or at least reducing that cost through the imposition of a lesser duty), even a presumptive test will ensure that wider impacts are not disregarded.

Participants' views

A few participants supported the addition of a public interest test to the Australian requirements, or at least consideration of the wider impacts of imposing measures. Representative of downstream users, the Australian Steel Association recommended that:

A national interest test based on objective economic criteria should be included. It should be evaluated throughout and be used to redirect appropriate cases to suitable and more general assistance mechanisms that look to sustainability. (sub. 28, para. 837)

The Law Council of Australia and the Law Institute of Victoria suggested that:

... consistent with the approach taken in some overseas jurisdictions ... consideration should be given to ensuring that 'national interest' is taken into account when making a decision as to whether any dumping-measure should be imposed. (sub. 29, p. 8)

(Others to voice support for considering wider impacts included: the Australian Competition and Consumer Commission (sub. 35, p. 29); the Department of Agriculture, Fisheries and Forestry (sub. 34, p. 6); and the Food and Beverage Importers Association (sub. DR46, p. 2).)

However, virtually all of the submissions from local companies that have sought anti-dumping measures, or from organisations or individuals representing those interests, were strongly opposed to the introduction of *any* form of public interest test. Such opposition was based on a variety of considerations:

- The public interest would be difficult to define or put boundaries around, leading to added uncertainty for those taking or defending anti-dumping actions.
... the inclusion of a non-defined 'public interest' requirement would create increased levels of uncertainty. Further subjectivity would arise, including:
 - Who would determine what is in the community's interests?
 - What is meant by 'in the community's interests'?
 - How would the public interest test be objectively measured, and over what period of time would such an assessment be made?
 - How does the decision-maker decide what benefits are more important in one industry sector versus the costs to another industry sector?

-
- Were the stakeholders provided ample opportunity to input to the community interest issue? (Qenos, sub. 13, p. 9)
 - A test would likely give undue weight to the interests of downstream user industries and consumers at the expense of industries suffering injury from dumping or subsidisation.

How is the public interest to be assessed against the parochial interests of one consumer party or group? In many consumers eyes, pricing of products ranks importantly in any procurement or sourcing decision. But it is not the only important criterion. (Orica Australia, sub. 18, p. 13)

- It would be difficult to properly account for the longer-term costs of failing to address dumping.

The NFF believes that it is inappropriate to incorporate an emphasis on economy-wide impacts in relation to [the] anti-dumping system ... it can often be extremely difficult to foresee the longer term domestic price outcome of dumping. For example, if the injury incurred by the domestic industry from dumping leads to domestic participants leaving the industry, in the longer term this can lead to market power issues and increased domestic prices as competition dissipates. (National Farmers' Federation, sub. 6, p. 7)

- The need to consider the public interest would increase administrative and compliance costs and the time taken to finalise investigations.

The existing process is long relative to market place action. An additional process of determining public interest is likely to add more time and cost to what is now already a costly process. This is likely to make it even more difficult to bring cases forward and will deny Australian companies the rights to fair trade prescribed by the WTO and our own provisions ... The cost of establishing public interest machinery and running it would not appear justified based on the extent of anti-dumping actions undertaken in Australia and the formidable barriers to undertaking such a case. (CSR, sub. 10, p. 6)

- It would politicise decision-making.

... any determination not to impose antidumping duties on the grounds of 'national interest' would necessarily need to be taken at the political level because there would undoubtedly be important political ramifications arising out of such determinations. It is easy to imagine headlines in the national press highlighting the numbers of local jobs to be lost as a result of a determination not to act on injurious dumping ... Then there is the possibility that a Minister from one party making a determination primarily protecting firms in his or her party's constituencies would be seen to be playing politics with employees' livelihoods. (BlueScope Steel, sub. 19, pp. 48–49)

- Aspects of the current arrangements provide for implicit consideration of the public interest and make a formal test unnecessary.

Whilst the Australian Anti-Dumping System does not explicitly include [a public interest] provision, the discretion of the Minister to impose anti-dumping measures is at least an implicit provision which exists under the current system. The ADFA would also highlight that Australia applies the 'lesser duty rule' when considering the

imposition of anti-dumping measures ... The combined effects of the Minister's discretion and the operation of the lesser duty rule within Australia's Anti-Dumping System are considered by ADFA to be adequate measures that presently operate to cater for the 'public interest'. (Australian Dried Fruits Association, sub. 14, p. 6)

- It would be dangerous for Australia to unilaterally introduce a test ahead of any developments in this regard in Doha (see box 5.4).

The WTO Negotiating Group on Rules in the Doha Round has considered whether ... the Anti Dumping Code ... should be amended to insert a requirement that members take due account of representations made by domestic interested parties ... whose interests might be affected by the imposition of measures. The Chair of the Group describes the positions of the various members as being 'very far apart' and the participants being 'sharply divided' on the desirability of the proposal. Unless and until the WTO reaches consensus on this issue and amends Article 9 accordingly, it would be premature and dangerous for Australia to unilaterally adopt a public interest test. (OneSteel, sub. 16, p. 20)

Synthesising these concerns, the Trade Remedies Task Force contended that similar comments made in the Gruen Review (see below) remain valid and that:

The creation of a public interest test would politicise the dumping process, and would cause considerable delays in timely implementation of measures for an industry which is being materially injured. It is notoriously difficult to define what is in the public interest, or to create a test which is acceptable to all parties. (sub. 26, p. 11)

And BlueScope Steel concluded that:

Overall, there is nothing in the Australian experience or those of other countries that have introduced something akin to a 'national interest' test that would support an argument that the potential benefits of such an approach would outweigh the political and economic costs it would undoubtedly engender. (sub. 19, p. 51)

(Others to express opposition to a public interest test included: Australian Paper (sub. DR41, p. 2); Australian Pork (sub. DR39, p. 4); A3P (sub. DR45, p. 3); the Cement Industry Federation (sub. 9, p. 11); CSBP (sub. 15, pp. 9–10); Geofabrics Australasia (sub. 4, p. 3); James Stevenson (sub. DR42, p. 2); PACIA (sub. 31, pp. 11–12); PolyPacific and Townsend Chemicals (sub. 36, p. 6); Sulo (sub. 12, p. 7); and Windsor Farm Foods (sub. 37, p. 11).)

Previous reviews

The practicality and appropriateness of the public interest approach was also addressed in the Gruen Review (1986, s. 6.4). In keeping with the sentiments expressed by the large majority of participants to this inquiry, it concluded that 'introducing national interest provisions into every case from the outset would compound the difficulties of administration and legislation substantially'. In

particular, the review contended that it would be difficult to precisely define the national interest, yet without such definition the range of considerations that could be introduced to anti-dumping cases would be greatly increased.

Box 5.4 Doha discussions on a public interest test

The compilation of issues and proposals to amend the WTO Anti-dumping and Countervailing Agreements, circulated at the outset of the Doha Round, raised a number of public interest-type issues, including:

- the need to clarify the rules/disciplines pertaining to the treatment of the broader public interest in dumping matters
- consideration of putting more onus on assessment bodies to take substantive account of information relevant to the public interest and to consult with sectors other than applicant industries and the overseas suppliers of the goods concerned
- consideration of adding a public interest test to the requirements that must be met before anti-dumping measures can be imposed
- examination of the unintended effects of anti-dumping measures, with a view to giving greater emphasis in the agreements to the consequences of measures for broader economic, trade and competition policy goals.

In late 2007, the Chair of the Negotiating Group on Rules put forward a range of proposals to modify the agreements, including to make it explicit that assessment bodies have the right to take account of the views of domestic parties which would be adversely affected by the imposition of anti-dumping measures.

However, the current proposal, supported by Australia, is that decisions on whether or not to impose measures when the dumping and injury criteria have been met, or to apply a lesser duty rule, should be left to individual member countries. Moreover, the accompanying text from the Chair noted that 'Participants are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty'.

According to the Department of Foreign Affairs and Trade (sub. 22, p. 5), timing for the conclusion of the Doha negotiations remains 'uncertain'.

Sources: WTO (2003, 2008a, 2008b).

In a similar vein, in a recent report on Australia's relations with the Republic of Korea, a Joint Parliamentary Standing Committee commented that:

Due to the highly subjective nature of the term, 'national interest', the Committee believes that introducing any debate over 'national interest' would be creating fertile ground for opinion, legal arguments and appeals, which may effectively slow the anti-dumping review process. (JSCFADT 2006, p. 57)

The Commission's assessment

As indicated by the preceding commentary, the public interest test issue is contentious and far from straightforward. In particular, assessments of the efficacy of the approach must go beyond the superficial appeal of such a test as a means to promote the interests of the overall community, and look at its workability and likely impacts.

Even so, in the Commission's view, several of the concerns raised by participants have little merit.

- The argument that a public interest test would 'a priori' favour particular stakeholders is to misunderstand the concept of a public interest test. Though application of a test could of course lead to outcomes that would be more or less favourable for specific interests than those delivered by the current arrangements, a properly designed assessment process would involve a balancing of competing interests. In contrast, under the current assessment process, the interests of parties other than those who have suffered material injury from dumping or subsidisation are not even considered.
- The apparent discretion available to the Minister on whether to impose duties where there has been injurious dumping or subsidisation, together with the scope to apply the lesser duty rule, cannot reasonably be construed as a substitute for application of an explicit public interest test.
 - As noted earlier, the Commission has not been advised of any cases where the Minister has overturned recommendations from Customs (based on dumping/subsidisation and injury considerations) on public interest grounds.
 - Application of the lesser duty rule is linked solely to the circumstances of the industry seeking measures — specifically, where a duty smaller than the full dumping/subsidisation margin would be sufficient to remove injury. Thus although lessening the impost on users of the goods concerned, unlike the Canadian arrangements (see box 5.3), in applying the rule, there is no capacity to weigh the benefits for the applicant industry against the costs for other stakeholders.

The Commission notes that it would be possible to replace the current discretion available to the Minister with an explicit requirement for him/her to take account of wider impacts and the public interest. But without supporting guidance and the establishment of a process to enable the Minister to access information on these wider impacts, such a change would be unlikely to be sufficient to ensure that public interest matters were given appropriate consideration. And were there to be guidance detailing specific matters which the Minister should take into account, together with a supporting information gathering process, then the

arrangement would be little practically different from an explicit public interest test. This would also be the case were the grounds for applying the lesser duty rule broadened to take account of factors other than the circumstances of the applicant industry.

- The WTO agreements currently leave it up to member countries to decide whether to include a public interest test in their anti-dumping regimes. Though discussions at Doha are yet to be finalised, it seems highly unlikely that this ‘permissive’ approach will be fundamentally changed — especially as a number of jurisdictions have chosen to implement such tests. Accordingly, there would seemingly be little WTO-related risk were Australia to decide to introduce a test on the basis of unilateral considerations.

Also, the other concerns appear overstated.

- Though a public interest test would involve some additional uncertainty for stakeholders, this could be contained through appropriate guidance on the application of the test. Indeed, there is now much greater experience in Australia on the application of public interest tests than at the time of the Gruen review — including as part of the National Competition Policy legislation review program. And the anti-dumping-specific requirements in the European Union and Canada (boxes 5.2 and 5.3) provide more direct guidance on how such a test might be configured.

Moreover, the degree of uncertainty would most likely diminish over time as decision-making precedents were established. As the European Commission (2006, p. 20) has noted in relation to the EU’s test:

... over the years the Institutions have developed a clear practice, reflected in the [case history], which gives guidance on how the Community interest test is interpreted and applied.

In turn, guidance and decision-making precedents could constrain politicisation of the assessment process and, by discouraging non-meritorious public interest claims, help to limit additional administration and compliance costs.

- While assessment of the likely longer-term impacts of imposing or not imposing measures would typically require greater judgement than analysis of the more immediate effects, much of the cost-based information required to support such assessments is already collected by Customs. The Commission further notes that there is already some assessment of longer-term outcomes under the current arrangements — for example, the consideration in continuation reviews of whether the termination of measures could lead to the recurrence of dumping.
- Though the need to examine a wider range of issues would lengthen assessment timeframes, such increases would be in the context of an assessment process that is one of the most rapid in the world (see appendix C). In addition, the extent to

which applicant industries would be disadvantaged would partly depend on whether public interest assessments were themselves time-bound, and whether other changes were made to ameliorate the impacts of a longer process. For example, were wider impacts only considered after injurious dumping/subsidisation had been found, and with provisional duties routinely imposed before this last stage of the assessment process began, then those seeking relief would not be disadvantaged by the longer overall assessment period.

In the Commission's view, a more compelling argument against a public interest test that embodied no presumption in favour of measures in the presence of injurious dumping or subsidisation, is that it would be difficult to factor in a system preserving benefit from achieving a 'fairer' trading outcome in each and every situation. Yet as the Trade Remedies Task Force (sub. 26, p. 13) observed, without the inclusion of such a benefit, the public interest test approach would seemingly subvert the key rationale for having an anti-dumping regime (see chapter 4).

A 'bounded' (presumptive) public interest test

As the Gruen Review noted, question marks over an 'unbounded' public interest test need not preclude the introduction of a more circumscribed test. The passage of time has rendered some of the particular models proposed by that review (1986, para. 6.4.8) less relevant. However, the EU and Canadian approaches, embodying a starting presumption in favour of measures if there has been injurious dumping or subsidisation, provide the basis for a more contemporary 'bounded' option.

In the Commission's view, such a 'bounded' public interest test would overcome the key high level deficiency in a completely neutral test. This type of test would not involve an attempt to calculate the 'system preserving' benefit that would arise from imposing a measure to address each particular instance of injurious dumping or subsidisation and then weighing that benefit against the probable direct efficiency cost of doing so. Rather, through the starting presumption in favour of measures whenever there had been injurious dumping or subsidisation, the implicit judgement would be that the system preserving benefit would generally exceed the efficiency costs. However, there would be scope to overturn that presumption where there were good reasons to believe that the wider costs would be excessive or otherwise unreasonable relative to the benefits for the applicant industry and its suppliers.

Of course, the approach is not without costs and implementation challenges.

- It would still involve some additional uncertainty, higher administrative and compliance costs, and longer investigation timeframes. Two particular issues are

how far the consideration of wider impacts should extend and what opportunities there should be for public input on those impacts.

- And there would need to be workable guidance to those administering the test on the circumstances that would warrant overturning the presumption in favour of measures where there had been injurious dumping or subsidisation.

However, such costs and challenges must be considered in the context of the benefits that the approach would bring in allowing for consideration of wider impacts, while still giving a heavy weighting to the notions that underpin the current assessment criteria. Moreover, as discussed above, these costs and challenges should not be overstated — especially given the guidance available from the EU and Canadian regimes and the potential to constrain the additional costs in various ways.

5.3 Increasing the stringency of the current criteria

An alternative to an explicit public interest test would be to increase the stringency of the existing assessment criteria with the goal of precluding the imposition of measures in those cases where the costs are likely to be high relative to the benefits for applicant industries. Specific criteria that could potentially be modified for this purpose would include the injury and causal link requirements and the *de minimis* thresholds for terminating applications.

However, in the Commission's view, this would be an indirect and practically problematic way of seeking to promote the public interest.

- As currently configured, any relationship between the injury and causal link requirements and the wider costs associated with the imposition of anti-dumping measures is weak. Accordingly, the cases 'screened out' by, say, requiring a greater level of injury before measures could be imposed, or increasing the evidentiary burden for establishing causality, would not necessarily be those where measures would have been most costly.
- Raising the minimum import share thresholds that dictate when applications for measures are automatically terminated might be seen as having a somewhat stronger link to predatory, and therefore efficiency reducing, dumping. But the circumstances that would potentially allow an overseas supplier to employ dumping to create an enduring monopoly position in the market concerned (see chapter 4 and appendix D) are very narrow and are only partly related to the share of imports accounted for by that supplier. In any event, it is widely acknowledged that little or no dumping in Australia in recent years has been motivated by predatory intent. Hence, again, increasing these automatic

termination thresholds is unlikely to be an effective way of precluding more costly anti-dumping measures.

That said, some tightening of the current legislative requirements — especially in regard to the continuation of measures beyond their initial term (see chapter 6) — may be useful in supporting more explicit initiatives to take account of wider impacts and the public interest.

Finally, the Commission notes that rather than simply increasing the stringency of the assessment criteria as they are currently configured, it would be possible to embody considerations more directly targeting the public interest within those criteria. However, as discussed in section 5.5, this approach would also have drawbacks.

5.4 Public reporting of wider impacts

A ‘light-handed’ alternative to the regulatory approaches outlined above would be to use explicit, but separate, public reporting of wider impacts as a means to ‘discipline’ decision-making. As noted, Ministers have not previously exercised the discretion that is seemingly available to them to amend a recommendation from Customs on public interest grounds. But if information and analysis on wider impacts were to be included in the advice provided, and also available to the general public, the onus on the Minister to consider the public interest would arguably be somewhat greater.

More specifically, under this sort of approach, the formal assessment process would continue to look only at whether there had been dumping or subsidisation and ensuing material injury for the applicant industry. However, in parallel, Customs could be required to:

- seek input from interested parties on the wider impacts of imposing measures
- analyse and publicly report on these impacts.

Like a public interest test, this approach would add somewhat to the administrative and compliance costs of investigations and provide new grounds for lobbying the Minister. Indeed, these impacts might be more significant under a loosely defined analytical and reporting requirement than under a formal test, where the Commission envisages that the potential outcomes of public interest assessments would be constrained and shaped by explicit legislative guidance (see below).

More fundamentally, with no onus on the Minister to take account of its outcomes, separate public reporting is unlikely, by itself, to ensure that wider impacts are given appropriate consideration in the decision-making process.

This is not to deny the general value of public reporting in enhancing the quality of decision-making and promoting the accountability of decision-makers. To this end, the Commission is putting forward a number of proposals to increase public reporting by Customs (see chapter 7). However, as a stand-alone rather than a supporting mechanism, public reporting is likely to be a weak option for addressing the key deficiency in the current assessment process.

5.5 The Commission's preferred approach

For both efficiency and equity ('fairness') reasons, policy in this or any other area should be predicated on promoting the interests of the community as a whole.

As explained above, the current discretion for the Minister to take account of factors other than dumping/subsidisation and injury when deciding whether or not to impose measures, in combination with the lesser duty rule, is not sufficient to meet this imperative. Replacing this discretionary power with a specific requirement for the Minister to take account of the public interest would also be insufficient — unless accompanied by supporting guidance that would render the arrangement little different from an explicit public interest test. More generally, an 'unbounded' public interest test, more stringent versions of the current dumping and/or injury hurdles, or reliance on a self-standing public reporting regime, would all have significant draw-backs.

Accordingly, the Commission is recommending that Australia's anti-dumping system be augmented with a 'bounded' (presumptive) public interest test that would draw on the same sort of tests that apply in Canada and more particularly the European Union.

By having a starting presumption in favour of measures where there had been injurious dumping or subsidisation, the implicit judgement would be that the system preserving benefits of imposing measures would generally exceed the efficiency costs. However, there would be scope to overturn this presumption in a specific range of circumstances.

This new test would involve some additional uncertainty for stakeholders, and somewhat higher administrative and compliance costs. But the constrained nature of the test and the proposed accompanying application guidance would keep these impacts to a minimum. Indeed, there might well be less room for discretion than is the case for many aspects of the current assessment process.

The Draft Report proposal

In the Draft Report, the Commission proposed that the test should apply to new investigations and to reviews to consider whether existing measures should be continued beyond their initial five-year term. It further proposed that, in retaining responsibility for administering the anti-dumping system (see chapter 7), Customs would undertake the assessments against the new test and that, in retaining their current responsibilities within the system:

- the Minister would continue to decide whether or not to impose measures, having regard to these assessments by Customs
- the Trade Measures Review Officer would also be able to consider public interest matters where a decision was appealed on the basis that the test had been misapplied.

Matters to be considered in assessing the public interest

The Commission proposed that the test should:

- include general guidance on the stakeholder interests that could be considered in applying the test — including those of industries seeking measures and their upstream suppliers, importers, downstream industries and consumers (at least where final consumption goods were involved)
- provide for assessment of not only short-term outcomes, but also the likely longer-term effects of imposing (or not imposing) measures.

However, it further specified that to help ensure a focus on the main interests and more important effects, like the EU's community interest test (see box 5.2), assessments should generally stop at one step up or down the production chain.

Also, to reduce the degree of judgement involved in applying the test, the Commission proposed that there should be a list of six specific circumstances where *prima facie* the imposition of measures would not be in the public interest.

- One of these was directly efficiency-related — namely, where there was advice from the Australian Competition and Consumer Commission (ACCC) that the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned.
- Three were where measures would not be effective in removing injury being experienced by the applicant industry, and hence where the ensuing costs for others in the community would be needlessly incurred:

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- The imposition of measures equivalent to the assessed dumping margin (or the benefit from a countervailable subsidy) would result in an import price still well below local suppliers' costs to make and sell.
 - 'Like goods' could be readily obtained from an un-dumped source at a comparable price, meaning that the imposition of measures would simply lead to substitution into un-dumped imports with little or no benefit for competing local suppliers.
 - Dumped or subsidised imports may be a contributing factor to the material injury being experienced by a local industry, but are not the major cause.

As outlined in box 5.5, neither the WTO requirements, nor the current Australian legislation, appear to preclude measures in these sorts of situations.

- Two were where the Commission judged that the imposition of measures would impose disproportionate costs on downstream users or unreasonably penalise the overseas supplier and/or importer of the goods concerned:
 - The applicant industry's share of the domestic market for the like goods is low, meaning that (unless there was newly commissioned and yet to be utilised capacity) the impost on users would be large relative to the benefits that the industry and its suppliers would receive. In this regard, the Commission noted that, under the EU's community interest test, an injury-based finding in favour of measures can similarly be overturned on this basis. To preserve the starting presumption in favour of measures, the Commission suggested that a minimum local market share threshold in the order of 20 per cent would be reasonable.
 - The dumped product is being exported at a price which covers the overseas supplier's costs and a reasonable profit margin (plus the value of any identifiable input subsidies), even if that price is below the normal value in the supplier's home market.

The Commission observed that, to cater for at least some of these situations, it would be possible to directly amend the current legislation. However, given the way in which the WTO agreements are structured, it concluded that the public interest test approach offers greater flexibility in giving effect to changes of this nature — as evidenced by the similar requirements in the EU and Canadian regimes. And it further noted that although the proposed list would not be exhaustive, there would have to be good reasons for introducing other considerations to overturn a finding in favour of measures based on the existence of injurious dumping or subsidisation.

Box 5.5 The potential for imposition of ineffectual measures

The WTO agreements and the Australian legislation contain provisions that are at least partly designed to limit the imposition of ineffectual measures. For example, when assessing injury, Customs must examine whether any factor other than the importation of dumped or subsidised goods is causing or threatening material injury, including the prices and volumes of like goods which are not dumped or subsidised (see chapter 2).

However, as only one of a number of factors which must be taken into account, ready access to comparably priced, un-dumped or non-subsidised imports from other sources might not be sufficient to rule out the imposition of measures. As noted in chapter 4, the Commission understands that measures imposed on coated paper from Finland and Japan in 1998 were largely ineffectual because of the availability of comparably priced, un-dumped, product from Korea and Indonesia.

More generally, in reflecting on their experiences in defending anti-dumping actions, Moulis and Gay (2005, p. 80) alleged that ‘In most instances, when faced with this type of situation, Customs will not have due regard to the fact that other [un-dumped] imports are available at the same price’. And in an extensive commentary on the issue, the Australian Steel Association (sub. 28, paras. 706–722) pointed to inconsistencies in the way that Customs has addressed the issue in individual cases. The Association further claimed that the potential for ineffectual measures to be imposed is increased by Customs’ failure to use its statutory powers to call for evidence from other importers of like goods — referring in this context to comments made by the TMRO in hearing an appeal in the galvanised pipe case (sub. DR57, para. 206). Notably, the EU community interest test makes specific reference to the situation where the applicant industry would not benefit from measures because of a shift in demand into substitute products (see box 5.2).

Also, in the recent appeals against decisions to impose measures on currants and toilet paper (see TMRO 2009a, 2009b), a particular point of contention was whether factors unrelated to the volume and price of imports had been a major cause of ‘material injury’. Such debate again indicates the potential under the current arrangements for the application of measures that may not be particularly effective in removing injury, but which could still be costly for downstream users of the goods concerned.

Consequences of the public interest assessment

The Commission proposed that where, based on the assessments and advice from Customs, the Minister was satisfied that public interest considerations outweighed the benefits from removing injury for the applicant industry, measures would not be imposed (the EU approach). And it further proposed that where the case for measures based on a finding of injurious dumping or subsidisation was *not* overturned on public interest grounds, there should still be scope to apply the current lesser duty rule. Thus, when determining whether and what level of

measures should be imposed, the sequence of decision-making for the Minister (and the basis for the advice from Customs) would be as follows:

- Has there been dumping or subsidisation that is, or threatens to be, injurious?
- If so, are there public interest reasons for not imposing measures?
- If not, and measures are to be imposed, would a lesser duty be sufficient to remove the injury to the local supplier(s) of the goods concerned?

Time limits and provisional duties

The Commission argued that with most other aspects of the decision-making process being time-bound (see chapter 2), it would be anomalous if assessments against the public interest test were not similarly constrained. It concluded that a 30-day extension to the current investigation timeframe should usually be sufficient given that:

- specific guidance on when imposition of measures would not be in the public interest would simplify and constrain the purview of assessments
- the collection of relevant input from stakeholders could commence at the outset of the assessment process, with much of the information relevant to the public interest component also being necessary to examine issues of dumping and injury
- the constrained nature of the proposed test and the scope for stakeholder input via submissions would obviate any need for public hearings to consider public interest matters.

The Commission further noted that with the scope to apply provisional measures (see chapter 2) while public interest test assessments were conducted, there need not be any disadvantage from this extension to the investigation timeframe for those seeking relief from injurious dumping or subsidisation. To this end, it proposed that the release by Customs of a ‘preliminary affirmative determination’ indicating that there had been injurious dumping or subsidisation, and the imposition of provisional measures, should be mandatory prior to its assessment of whether there were public interest grounds for the Minister not ‘confirming’ those measures. (The specific implications for the operation of the provisional duty arrangements are considered further in chapter 6.)

Consultation and reporting requirements

To build and sustain confidence in the robustness of the new public interest test, and to facilitate appropriate stakeholder input, the Commission spelt out a range of accompanying consultation and reporting requirements for Customs, including that:

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- Its initial invitations to interested parties to comment on applications for measures should clearly indicate the nature, requirements and limits of the test.
 - Its public interest assessments should be included in an expanded ‘Statement of Essential Facts’ (SEF), with a synthesis of the commentary on those assessments provided in the final report to the Minister.

Participants’ responses

As for the initial input on a public interest test, responses to the Draft Report proposal were heavily polarised.

A few participants were strongly supportive of the general approach. For example, the Food and Beverage Importers Association (sub. DR46, p. 2) stated that the sort of bounded public interest test proposed in the Draft Report would be ‘a practical way of giving some recognition to the wider effect of anti-dumping measures’. And the Australian Steel Association (sub. DR57, para. 68) referred to Commission’s ‘laudable criteria [that] logically integrate with the key aspects of causation and lesser duty that an optimal system should promote’.

However, recent users of the anti-dumping system and their representatives both reiterated their general opposition to a public interest test, and expressed significant misgivings about the specific test put forward by the Commission.

Their key concern was that the proposed test would greatly reduce access to protection against dumping. For example, Qenos argued that the test would:

... extend well beyond the public interest tests applied in Canada and the European Union. The proposal accompanied by additional “guidance” and “directives” are means by which anti-dumping outcomes will be severely restricted ... (sub. DR48, p. 1)

In elaborating on this concern, the TRTF stated that:

Under the proposed test, where an industry does not account for more than 20% of the local market, it will be denied access to measures. By contrast, if an industry holds a significant proportion of the market, it would also be denied measures due to proposed “lessening of competition” provisions.

For any industry which overcomes either restriction, it must also be a globally efficient producer, as measures will also not be imposed if:

- the export price of the allegedly dumped goods recovers all costs and some contribution to profit; or
- the resulting non-dumped price (after imposition of measures) is significantly below the Australian industry’s cost-to-make-and-sell. (sub. DR44, p. 1)

It went on to contend (p. 2) that, in limiting access to measures, the proposed test would discourage future investment in large scale manufacturing.

Others to raise similar concerns — which are considered further below — included: the Australian Dried Fruits Association (sub. DR52, p. 2); Australian Paper (sub. DR41, p. 2); OneSteel (sub. DR49, pp. 4–5); Penrice Soda Products (sub. DR54, p. 1); and SCA Hygiene (sub. DR60, pp. 1–2).

At the same time, some of those opposed to the proposed test also argued that its constrained nature might prevent consideration of factors relevant to the public interest. For example, BlueScope Steel (sub. DR55, p. 8) contended that the circumstances listed in the Draft Report when measures would *prima facie* not be in the public interest focussed unduly on income transfers, and that a more comprehensive basis for assessing the public interest was required. Similarly, the CFMEU (sub. DR50, pp. 2–3) said that the test should not be limited to examination of effects one step up or down the production chain and should encompass social and environmental impacts (‘the triple bottom line’).

And while supporting the general thrust of the proposed test, the Australian Steel Association (sub. DR57, para. 41) likewise expressed concern about any limitation of assessments to one step up or down the production chain. It also suggested that additional criteria could be added to the test (para. 37), and noted the importance of Customs integrating consideration of the public interest into its existing investigation processes and timeframes (paras. 13–15). As discussed below, comments on specific aspects of the proposed test were also received from the ACCC (sub. DR62, pp. 6–9) and Customs (sub. DR61, pp. 1–2).

The Commission’s assessment

Notwithstanding the preceding concerns, the Commission remains of the view that:

- The anti-dumping system should serve the interests of the community as a whole.
- The best way of balancing the interests of those materially injured by dumping or subsidisation and those who bear the cost of anti-dumping measures is through the sort of presumptive public interest test proposed in the Draft Report.
- Decisions on whether there are public interest grounds for overturning the presumption in favour of measures where there has been injurious dumping or subsidisation should be made by the Minister, based on advice from Customs (and where relevant the TMRO) — though as outlined in chapter 7, the Commission is recommending that administrative roles and responsibilities be re-examined at the next review.

Also, it notes that some specific aspects of the Draft Report proposal were relatively uncontroversial — for example, those relating to the application of provisional measures prior to the commencement by Customs of public interest assessments and to public reporting on those assessments. Accordingly, the discussion that follows focuses on addressing those concerns and critiques of the draft proposal that bear upon the detailed configuration of a presumptive test.

How open-ended should the test be?

In determining how broadly the assessment of public interest issues should extend, three key considerations are:

- the need to retain a presumption in favour of measures where there has been injurious dumping or subsidisation
- the correlation between the comprehensiveness of assessments and the time, cost and uncertainty involved for stakeholders
- the likely lesser implications for community well-being of impacts outside of the market for the goods subject to an anti-dumping measure.

In the Commission's judgement, these considerations militate against a more open-ended test than the one proposed in the Draft Report. It further notes that:

- The anti-dumping and countervailing system in general, and the public interest test in particular, would be a poorly targeted instrument for pursuing wider goals, such as promoting environmental or social outcomes.
- Some of the other matters specified in the EU or Canadian requirements would rarely, if ever, be of any practical significance. For example, the Canadian requirements make reference to the possibility that the imposition of measures could deny access to new technology. Yet given the specificity of the like goods test, it is hard to see how this could be so.

Indeed, having reflected further on these issues in the light of the feedback from stakeholders, the Commission now considers that some additional constraints on the breadth of the new test would be desirable.

- As outlined below, its final recommendation omits one of the circumstances for not imposing measures included in the Draft Report proposal, and involves some modifications to others, with the intent of providing greater surety that the test will only influence outcomes in a small minority of cases. This would in turn help to ensure that the broader benefits from providing access to an anti-dumping safety valve are not unduly diminished.

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- In addition, it is now recommending that the list of circumstances that would cause the Minister not to impose measures on public interest grounds should be exhaustive. As well as reducing uncertainty for stakeholders, in practical terms, this would serve to define the nature and breadth of matters encompassed by the test. Thus, there would no longer be a need to:
 - explicitly constrain the consideration of impacts to one step up or down the production chain
 - provide specific guidance on the range of stakeholder interests that may be relevant in applying the test, or to make explicit provision for consideration of longer-term as well as more immediate impacts.

As discussed below, recasting the public interest test as a definitive list of considerations would also help to address concerns about its subjectivity and the degree of interpretation involved. And with a more constrained test drawing heavily on matters that Customs must already examine as part of its dumping and injury assessments, any concerns about the adequacy of a 30-day timeframe for assessments against the test should be similarly diminished.

Finally, were experience with the new test to indicate that its scope was too narrow or too broad, this could be addressed at the time of the next review (see recommendation 7.11). However, consistent with the intention of the test and the related cost, timeliness and uncertainty issues, the Commission's expectation is that any augmentation would most likely involve adding to a still exhaustive list of circumstances when measures would not be in the public interest, rather than providing a general discretion to those applying the test to consider any other 'relevant' factors.

How tightly should the test requirements be specified?

Several participants contended that the concepts and terminology in the Draft Report proposal were subjective and/or ambiguous. For example, BlueScope Steel stated:

There is still considerable ambiguity and subjectivity associated with the simplified prima facie public interest tests being proposed by the Commission. BlueScope is concerned that an unintended interpretation of these tests may further impact on the future viability of Australian industry. (sub. DR55, p. 10)

The Commission readily acknowledges that application of the new test would involve the exercise of judgement related to the particular circumstances of each case. But this is also a feature of the existing legislative architecture.

More generally, it would be extremely difficult to draft legislation to prescriptively cater for every individual circumstance that might arise in applying even the sort of highly constrained public interest test that the Commission is recommending. In its view, a preferable approach, and one which is commonly used in other regulatory contexts, is to specify the legislative requirements in principles-based terms and supplement those requirements with more detailed application guidance for Customs, the Minister and the TMRO. Indeed, with such application guidance and the now exhaustive list of circumstances when measures would not be in the public interest, the Commission reiterates that assessments and decisions against the proposed new test might well entail less judgement and discretion than is required for many aspects of the current requirements.

That said, the Commission has reformulated some of the specific requirements to help ensure that they can be operationalised in a way that reflects their underlying intent.

How extensively should the test be integrated with injury/causality assessments?

In responding to the Draft Report, the Australian Steel Association (sub. DR57, para. 14) reiterated its concern that if public interest test assessments are divorced from injury and causality assessments, then there could be both ‘illogical inconsistencies’ in conclusions and wasted investigative effort. And Customs (sub. DR61, p. 2) went further, suggesting that those components of the test relating to causality might instead be explicitly considered at the time of the causality assessment — with this achieved through either specific mention in the administrative guidelines, a Ministerial Directive, or a change to the legislation.

As noted earlier, the Commission has formulated the requirements of its proposed test to, as far as possible, build on the existing requirements. Therefore, some linkages between the current and new investigative tasks should be neither surprising nor a cause for concern. Indeed, there are similar linkages between individual components of the current assessment task — for example, a de minimis dumping margin is taken to mean that there cannot have been material injury leading to the termination of an investigation (see chapter 2).

However, the Commission considers that a formal separation of the public interest phase of the assessment task, including in regard to matters impinging on causality, is appropriate for several reasons.

- The starting presumption in favour of measures where there has been injurious dumping or subsidisation means that the public interest test can be characterised as an ‘after-the-event’ mechanism to screen out a relatively small proportion of outlier cases where measures would clearly be inimical to the public interest.

Integrating some of the components of the test within the existing assessment task would make it difficult to evaluate its effectiveness in performing this screening function.

- As alluded to above, modifying the existing assessment process to try to encapsulate the concepts in the proposed test could be problematic — especially for those components that are not reflected in the WTO agreements and thus not considered at all under the existing arrangements.
- And even if such changes could be made without raising WTO concerns, there would be some risk that the causality-related components of the proposed test would simply be treated as one of several matters to be taken into account, rather than being definitive in precluding the imposition of measures.

In any event, the Commission considers that the risk of wasted investigation effort, or inconsistency between Customs' examination of injury and causation and its causality-related assessments against the test, would be small. Give the linkages between the two, Customs would obviously be mindful of the test requirements in its earlier consideration of injury and causality matters (and also in determining information requirements at the outset of an investigation). And were any inconsistencies to arise, they could then be tested through the appeals process.

Reformulations to the specific requirements of the test

As well as the shift from a non-exhaustive to an exhaustive list of circumstances when measures would not be in the public interest, some modifications to the particular inclusions and requirements of the list put forward in the Draft Report are warranted. Consistent with the thrust of the discussion in the preceding sections, the intent of these modifications is to avoid requirements that would:

- be open to varying interpretations, or would otherwise be practically difficult for Customs to apply in advising the Minister on whether measures should be imposed.
- preclude measures in too many cases, and thereby undermine the system preserving benefits afforded by the current arrangements.

Damage to competition

In the Commission's view, measures should not be applied where they would enable a local supplier to exercise significant market power. Were this to be the outcome, then there would be adverse impacts not only for the supplier's customers, but for resource use more generally. Notably, both the EU and Canadian public interest test arrangements provide scope for decision makers to consider such impacts on competition (see boxes 5.2 and 5.3). In fact, the proposed wording of the

requirement in the Draft Report to preclude measures where this ‘could eliminate or significantly reduce competition in the domestic market for the goods concerned’, was based on the wording in the Canadian test.

Importantly, the proposed provision was not intended to automatically deny access to anti-dumping measures whenever a local supplier has a substantial share of the market, or when measures might cause market prices to rise significantly. Indeed, given that the intent of an anti-dumping measure is to boost the local supplier’s competitiveness by raising the price of competing imports, there would be a logical inconsistency in a provision which, in the absence of any market power concerns, precluded such an outcome.

Rather, the Commission’s objective was to focus attention on circumstances where the imposition of measures could remove or significantly reduce the ability for importers of the like goods concerned to compete in the Australian market and leave users with little choice but to purchase from the applicant supplier. As discussed below, the Commission’s expectation is that the potential for such an outcome would only very rarely arise.

Moreover, the provision was not intended to involve the sort of lengthy and broad-ranging assessments of possible competition impacts that are required for various matters dealt with under the TPA. Evidently, such assessments would be incompatible with a timely, cost-effective and presumptive public interest test. And the purpose of the proposed consultation between Customs and the ACCC was simply to ensure that where any competition concerns could not be quickly dismissed (see below), the subsequent assessments by Customs against the provision were well informed.

However, several respondents to the Draft Report expressed concerns that such a provision could frequently lead to the non-imposition of measures — see, for example, A3P (sub. DR45, p. 3) and the TRTF (sub. DR44, p. 1). These concerns have highlighted both the need to reformulate the provision to ensure that the focus is on the potential for measures to create a situation where a local supplier could end up with unchecked market power, and for some clear application guidance.

In regard to the latter, the commentary from the ACCC on the potential for any anti-competitive effect from the application of measures is germane. While noting that the effect will depend on the particular circumstances, it said that:

... as a general guide, it is likely to be most significant when the affected imports play a considerable role in influencing the pricing and supply decisions of domestic firms — for example, where domestic markets are already highly concentrated, barriers to entry are significant and there are few (but significant) alternative import sources. (sub. DR62, p. 6)

In the Commission's view, the operational implication is that where there are readily accessible alternative import sources for the goods concerned, this provision should immediately be determined not to be relevant. This should also be the case even where there are no readily accessible alternative import sources, but there is more than one local supplier. For virtually all of the products subject to measures in Australia in recent years, either one or both of these situations would have applied.

In any cases where there were not readily accessible alternative supply sources of like goods, or very close substitutes for them, it would then be appropriate for Customs to consult with the ACCC on the potential implications of measures for the degree of competition in the market concerned. However, in contrast to the early stage consultation suggested in the Draft Report, this would most appropriately occur at the point of the investigation when the dumping margin was evident — the smaller that margin, the less likely it would be that any ensuing measures would deliver significant market power to the applicant supplier. And even where the ACCC advised that the imposition of measures could have this effect, Customs would need to give consideration as to whether an appropriate application of the lesser duty rule could largely remove any scope for monopoly pricing by that supplier.

In light of the likely minimal impact of the provision and the potential to counter any market power afforded by measures via the lesser duty rule, the Commission considered whether it was in fact necessary to retain a competition-related provision within the public interest test. But even where any scope for monopoly pricing was constrained by the lesser duty rule, it is possible that more subtle mechanisms for exploiting market power might be employed to the detriment of customers (for example, less favourable trading terms, longer delivery times and reduced after sales service). Accordingly, in circumstances where it cannot be quickly established that a market would remain sufficiently competitive with measures in place, it would be prudent to retain the scope for Customs and the Minister to be able to consider competition issues that might militate against the application of measures. That said, the Commission reiterates its view that only very rarely would such circumstances arise.

Resulting import prices remain injurious

Again, the Commission considers that a provision which precludes measures where the resulting (duty-inclusive) price for the imported goods concerned would still be significantly below competing local suppliers' costs to make and sell, is fundamentally sound. As it argued in the Draft Report, there is little point in imposing ineffectual measures that will nonetheless burden downstream user industries.

The Commission recognises that, worded in these general terms, the provision could be open to variable interpretation.

Thus it gave consideration to some explicit tightening of the wording — in particular, to embody the sentiment that even with measures in place the local industry would not be profitable. But based on the proportion of recent cases where the lesser duty rule has not been applied, this more demanding formulation could rule out measures in a significant number of cases.

Also, a formulation of this sort could see profitability assessed at a specific, and likely low, point in the demand cycle when dumping may be more prevalent. As the TRTF observed (sub. DR44, p. 3):

The proposal that there be no measures if the export price plus dumping margin is below the Australian industry's cost-to-make-and-sell does not take into account that all sectors of the economy cycle up and down. In the ordinary ebb and flow cycle, a business may endure periods of loss in anticipation of the return to the profitable part of that cycle. This is particularly relevant in industries involving large capital outlays. To suggest that an industry would be denied a measure at the low part of the cycle is unreasonable. Protection of fair market prices is particularly important at this stage.

This sort of time-specific interpretation was not what the Commission had in mind. Rather, the objective is to prevent measures being imposed in cases where, over the full demand cycle, it would be highly unlikely that those measures would restore the applicant industry's profitability to reasonable levels.

Given the longer timeframe involved, and the challenges of predicting future movements in market conditions, this more 'applicant friendly' interpretation could sometimes entail significant judgement. But there would be an obvious incentive for (and onus on) the applicant industry to provide evidence on how measures would impact on its profitability over time. In this regard, and though not being definitive in a prospective sense, historical data is likely to provide some guidance on the future prospects of the industry with and without measures. More specifically, the size of any gap between the duty-inclusive import price and the applicant industry's cost to make and sell at the time of the application, relative to the magnitude of past fluctuations in market prices, could be one pertinent consideration.

For the reasons outlined above, the preceding matters would be best encapsulated in the application guidance, rather than in the legislative wording of this component of the test. Nonetheless, the Commission has slightly modified its recommended wording to help clarify the underlying intent.

Access to comparably priced, un-dumped, like goods

In reflecting on the responses to the Draft Report, the Commission gave further consideration to the need for a provision specifying that measures should not be imposed in cases where un-dumped or non-subsidised 'like' imported goods are

readily available at a comparable price to the dumped or subsidised goods. Amongst other things:

- In determining whether dumping or subsidisation has been the cause of material injury to an industry, Customs is already required to consider other sources of injury, including the availability of un-dumped like goods.
- While the availability of comparably priced, un-dumped, imports means that measures are likely to be ineffectual in remediating injury for the applicant industry, it also means that those measures will have few direct costs for downstream user industries.

Nonetheless, the Commission remains of the view that there is value in retaining this ‘final check’ on the imposition of ineffectual measures, particularly given the concerns about Customs’ current assessments of causality (see box 5.5). Also, as noted earlier, even if ineffectual, measures still entail administrative and compliance costs for the various parties. And retaining this check would provide some additional insurance if the more problematic ‘primary source of injury’ provision were to be removed (see below).

At a more detailed level, the Commission does not see any need for wording changes to address the concern raised by the TRTF (sub. DR44, pp. 3–4) that this component of the test could unreasonably prevent local suppliers of premium products seeking protection against dumping. Specifically, the TRTF saw potential for a cheaper and inferior imported product to be interpreted as comparable to the premium product — thereby ruling out measures against a dumped premium product. However, under the interpretations of likeness provided for in both Australia’s legislation and the WTO agreements, it is hard to see how this sort of outcome could arise.

A potentially more significant issue is how comparable like goods are to be determined as un-dumped or non-subsidised. But this issue must already be addressed in assessments under the current causality provisions and thus does not, in the Commission’s view, require explicit treatment in either the legislative wording of the new test or the accompanying application guidance. Indeed, omitting the reference to ‘un-dumped or non-subsidised’ — by, for example, shifting to a formulation that referred to comparably priced like goods ‘not encompassed by the action’ — would remove an important signal that this component of the test is designed to prevent the imposition of ineffectual measures, not to sanction ‘country hopping’ and the like.

Primary cause of injury

Provision to preclude measures when dumping (or subsidisation) is not the primary cause of injury was intended to obviate the sort of debate that has arisen in some

recent cases about the materiality of the injury resulting from dumping relative to that caused by other factors (see box 5.5). As noted earlier, Customs must already consider non-dumping related causes of injury. However, the Commission was seeking to provide a clear legislative signal that dumping (or subsidisation) must be an important contributor to the injury suffered by the applicant industry.

In the Commission's view, for measures to be in the public interest, the latter is an important general principle. Quite simply, if dumping or subsidisation is only a minor contributor to injury, then measures are again likely to be ineffectual.

But, as a legislative requirement, it could be practically difficult to apply — a concern raised by a number of participants, including Customs (sub. DR61, p. 2). In particular, the multitude of factors that can cause injury to an industry mean that the assessment task could be very complex, placing analytical demands on Customs that could be difficult to accommodate within the proposed 30-day assessment timeframe, and creating new grounds for disputation and appeals.

Further, given the other provisions in the test, a specific requirement of this nature is to a considerable extent, as characterised by CSR (sub. DR47, p. 3), a 'test upon a test', and therefore probably unnecessary. That is, if the price of the dumped or subsidised imports after the imposition of measures is likely to remain well below the local price, and/or if other un-dumped or non-subsidised like imported goods are available at comparable prices, then dumping/subsidisation is unlikely to be a major cause of injury.

Hence, the Commission will not be retaining a 'primary cause of injury' provision in its recommended test.

Low industry market share

Several participants contended that precluding anti-dumping measures where the applicant industry accounts for less than 20 per cent of the Australian market for the like goods would be unfair to smaller scale local manufacturers — see, for example, Australian Paper (sub. DR41, p. 2). And some, such as the Australian Dried Fruits Association (sub. DR52, p. 2), went on to suggest that the proposed provision could encourage predatory dumping by overseas firms so as to reduce the applicant industry's market share below this threshold.

However, the Commission remains of the view that it is unreasonable (as well as inefficient) to impose measures in cases where the cost of doing so is many times larger than the benefit derived by the recipient industry. And while it is possible that setting a local market share threshold below which measures would not be imposed could, in particular instances, encourage more aggressive price competition, with

that threshold set at 20 per cent, it seems unlikely that this would be a common scenario. For the types of products that have typically been subject to measures, the local industry's market share has usually been well in excess of 20 per cent.

The market share of an industry can, of course, change significantly over time, including as a result of recently installed capacity coming into service. Also, the imposition of measures might, itself, significantly boost market share. Hence, on further consideration, the Commission will now be recommending a more general formulation, focussing on the underlying intent — namely, that the large majority of user industries (and consumers) should not be burdened with the cost of measures when the applicant industry's market share was low prior to the commencement of dumping or subsidisation, and is likely to remain low even with measures in place. This would give Customs greater scope to take account of the particular circumstances surrounding an application, rather than being tied to 'a one size fits all' requirement.

Nonetheless, the Commission continues to see merit in using a minimum market share of 20 per cent, prior to when dumping or subsidisation commenced, as an initial threshold when applying this component of the test. This indicative share should be included in the application guidance accompanying the new test. That guidance should also make it clear that there is scope to take account of newly installed capacity in the local industry that is not yet operating at planned output levels, and of any facilities under construction.

Profitable sales by export-oriented overseas suppliers

In proposing that measures should not be imposed when the imported goods were exported at price which covered the overseas supplier's costs and a reasonable profit margin (plus the value of any identifiable input subsidies), the Commission's intention was to address the particular circumstances of production facilities established to cater primarily for export markets.

The core anti-dumping concepts were developed at a time when the dominant production model in most industries involved domestic supply, with residual output directed to export markets. However, globalisation has seen a shift in some capital intensive industries towards establishing very large plants designed to service global or regional markets. In such cases, sales in the country in which the plant is located may comprise a very small proportion of total output, making those sales largely irrelevant to the commercial fortunes of the operator. Even within the confines of the anti-dumping framework, invoking measures on profitable exports based on a price differential between a very small domestic market and a very much larger (aggregate) export market seems highly problematic.

But, as several participants noted, as formulated in the Draft Report, this component of the test could also prevent the imposition of measures where a significant part of an overseas supplier's output was sold in the domestic market. That is, as long as any residual dumped exports were profitable (as determined by Customs), measures would be precluded. Though not unreasonable in isolation, to generally deny access to measures in these circumstances would undermine the core intent of the anti-dumping regime and the system preserving benefits that it can generate.

Even so, the Commission remains of the view that there should be explicit recognition in the public interest test for the particular circumstances of export plants. Hence, it has augmented this component of the test to require not only that the goods are imported into Australia at a price which covers the overseas supplier's fully-distributed costs and a reasonable profit margin (plus the value of any identifiable subsidies), but also that the large majority of the output of the plant concerned is exported. The Commission suggests that the application guidance specify that a 90 per cent or more export share — meaning that no more than 10 per cent of such a plant's output is sold in the home market — should be the indicative trigger for applying this component of the test.

Other matters

Some respondents to the Draft Report (for example, Qenos, sub. DR48, p. 2) reiterated concerns about the increase in investigation timeframes consequent upon the introduction of the public interest test and questioned whether the task could be completed within the 30 days proposed by the Commission.

But in the Commission's view, provided that Customs is adequately resourced (see section 7.3) to undertake this and the other new tasks proposed elsewhere in the report, 30 days should be sufficient. As noted earlier, the Commission has deliberately configured the public interest test to align closely with Customs' current assessment tasks and the information it collects — with the changes proposed in response to the feedback on the Draft Report further reducing the need for separate new assessment effort.

Further, and irrespective of the time taken to complete the public interest test assessment in any particular investigation, the proposed application of provisional measures prior to such assessment (see section 6.5) would remove any disadvantage for the applicant industry.

There was also some reiteration of concerns that introducing public interest considerations would open up new grounds for lobbying the Minister and, more particularly, encourage overseas suppliers and importers to test the new

requirements at both the investigation phase and through the appeals process. (See, for example, Penrice Soda Products, sub. DR54, p. 2.)

However, soundly-based testing of the proposed new arrangements is precisely what is intended and required — including to establish precedents that would serve to minimise the uncertainty inevitably attaching to any new arrangement of this nature. Also, the changes that the Commission has made to tighten its proposed test in response to the feedback on the Draft Report would reduce the incentives and opportunities for more speculative testing of the requirements, or for lobbying of the Minister.

The likely impact of the public interest test

The proposed new public interest test is designed to preclude measures that would be excessively or unreasonably costly relative to the benefits provided to the applicant industries concerned. However, its precise impacts in this regard will of course depend on the nature of the cases that come forward (and on whether any applications for measures are deterred). Hence, in developing and refining the test requirements, the Commission's primary point of reference has necessarily been on how those requirements might have affected past cases.

With this past case history in mind, the changes that the Commission has made to the requirements proposed in the Draft Report are explicitly intended to give greater weight to the system preserving benefits of providing access to anti-dumping protection. As in the EU and Canadian systems, the Commission's expectation is that the presumption in favour of measures would only be overturned on public interest grounds in a small minority of cases. Whether the balance that in fact emerges is appropriate in promoting the interests of the community as a whole is a matter that should be assessed as part of the next review of the system (see recommendation 7.11).

RECOMMENDATION 5.1

The imposition and continuation of anti-dumping and countervailing measures should be subject to a 'bounded' public interest test, embodying a presumption that measures will be imposed if there has been dumping or subsidisation that has caused, or threatens to cause, material injury, unless one (or more) of the following circumstances apply:

- *the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule*

-
- *the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers' costs to make and sell*
 - *un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods*
 - *prior to the commencement of injurious dumping or subsidisation, the local industry's share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed*
 - *the large majority of the overseas supplier's output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier's fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies).*

The explanatory memoranda to the enabling legislation should elaborate on the intent and application of this list of circumstances, having regard to the commentary in the body of this report.

Where, based on the advice from the Australian Customs and Border Protection Service (ACBPS), the Minister is satisfied that one (or more) of these circumstances apply, measures would not be imposed. And where none of these circumstances apply and the Minister has determined that measures should be imposed, then the magnitude of those measures should be set having regard to the existing lesser duty rule arrangements.

Assessments against the public interest test by the ACBPS should generally be completed within 30 days, and draw if necessary on advice from external parties such as the Australian Competition and Consumer Commission. Provisional measures should be imposed in all cases where a finding by the ACBPS that there has been injurious dumping or subsidisation provides the basis for moving to apply the test.

In giving effect to these requirements, the ACBPS should also:

- *clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures*
- *give interested parties the opportunity to comment on its assessments against the test through detailing those assessments in the Statement of Essential Facts*
- *include a synthesis of that commentary from interested parties in its final report to the Minister.*

6 Supporting framework changes

Key points

- Aside from the introduction of a bounded public interest test, the Commission has been circumspect in the changes that it is recommending to the current system framework.
- The Australian Government should convene a working group to examine whether the Close Processed Agricultural Goods provisions should be retained and, if so, what changes, if any, should be made to them.
- Australia's decision to recognise China as a market economy is an issue beyond the purview of this inquiry.
 - In any event, Customs can already employ alternative assessment methodologies to deal with any concerns in this area.
- Australia should not adopt the practice of zeroing in calculating normal values.
- Changes proposed as part of the new bounded public interest test would provide for somewhat earlier access to provisional measures in some investigations.
- Tightening and improving the continuation provisions is a high priority reform.
 - While the default term for measures should remain at five years, extensions should be limited to one three-year term.
 - Applications for new measures following the expiry of a three-year extension should be subject to the same requirements as the original application.
- The current review of measures and duty refund provisions should be abolished and replaced by a single new mechanism that would allow for timely and cost-effective adjustments to the magnitude of all measures on an annual basis.
 - Where this adjustment process leads to a zero duty rate, measures should still remain in place for the original term.
 - There should also be related changes to the basis for determining the duties payable on individual consignments of goods subject to measures that would see the correct amount of duty collected at the time of importation.
- As part of the annual adjustment of measures, Customs should pro-actively seek feedback on the impacts of measures. Such feedback should also be used, where appropriate, to provide for a more streamlined revocation process. Where it indicates that local production of a good subject to measures has ceased, and is unlikely to recommence in the period for which the measures would otherwise remain in place, the measures should be revoked.
- Australia's list of countervailable subsidies should be aligned with the WTO lists.

In chapter 5, the Commission recommended the introduction of a ‘bounded’ public interest test that would allow for consideration of wider impacts in anti-dumping investigations. This chapter considers what additional modifications to the existing system framework would be appropriate to complement this change to the focus of Australia’s anti-dumping system.

6.1 How much additional change is warranted?

Reflecting the complexity of the anti-dumping system, participants suggested a large number of changes to the current assessment criteria and related requirements, as well as to the administrative arrangements for giving effect to those requirements. Many of these changes and the underlying issues have also been canvassed in the administrative reviews of the system over the last two decades.

However, in the Commission’s view, there are several reasons to, at this stage, limit the number of changes additional to the introduction of a bounded public interest test.

- Given the considerable judgement involved in applying the current assessment requirements, it is far from clear that there would be a material pay-off from many of the suggested refinements to the associated assessment methodologies and processes. That is, the changes in outcomes resulting from adding more layers of complexity to assessments may be small in relation to the variations in outcomes associated with the judgemental component of the process.
- In some areas, the WTO agreements potentially constrain the degree and nature of change that can be made to the current requirements.
- A large number of detailed changes to the assessment requirements would make it harder to simultaneously bed down the new public interest test and to discern its impacts at the time of the next review.

Thus the Commission is not proposing any changes to the ‘like goods’ test, the basis for determining (starting) normal values, or the injury or causality provisions. However, it is recommending a significant tightening of the provisions governing the continuation of measures and more regular adjustments to the magnitude of measures. And it has suggested a circuit breaker to deal with the vexed issue of the provisions relating to close processed agricultural goods. Moreover, the discussion on the various steps in the investigation process raises several issues that could usefully be revisited at the time of the next review (see draft recommendation 7.11).

6.2 Initiation requirements

Various factors affect who can access Australia's anti-dumping system and how easily. In addition to the key tests for dumping, injury and causality, which are discussed later, Customs screens applications using the like goods test, the standing requirements and, where relevant, the provisions allowing primary producers to be considered as part of an expanded domestic processing industry. The level of information required to mount a *prima facie* case can also affect access.

Like goods test and industry standing requirements

Although submissions to the inquiry suggested a number of refinements to these provisions, there is nothing, in the Commission's view, to suggest that they are contributing to materially flawed decision-making.

The current like goods test is based on WTO requirements developed to ensure that the concept is not too permissive in terms of the ease of making a case for measures. And while some participants suggested that the test is inflexible, Customs can take into account a wide range of factors bearing upon 'likeness' and exercise judgement as to their relative importance in any particular situation.

There will, of course, be cases where Customs' judgement on 'likeness' is disputed (see, for example, *PolyPacific* and *Townsend Chemicals* (sub. 36, p. 3) and *TMRO* (2005, para. 51)).

But it is far from clear that it would be possible to avoid such debate through legislative change — even were change possible within the WTO framework. Here, as in most aspects of the assessment process, opinions will continue to differ irrespective of how the particular requirements are framed. Also, in cases where the issue of likeness is particularly complex, Customs can release an issues paper inviting commentary from interested parties and/or seek expert advice before any final decision is made. In the Commission's view, and that of many participants (see, for example, *Bradken*, sub. DR59, p. 1 and *CSR*, sub. DR47, p. 3), recourse to expert advice should be considered whenever likeness issues are likely to be contentious.

Similarly, where there is significant support within a local industry for an application for anti-dumping or countervailing measures, the standing requirements do not generally appear to be a barrier to moving to the initiation phase. Those requirements have been of concern to some primary producers — see for example, *National Farmers' Federation* (sub. 6, p. 5) and *Australian Pork* (sub. DR39, p. 5). However, the crux of their 'access' issue seemingly lies with the 'close processed

agricultural goods’ provisions (discussed below). Moreover, to facilitate access by ‘diffuse’ industries, the current requirements already allow for the coordination of applications through trade organisations and other persons representing an industry.

It may, of course, be that changes in the standing rules will be required as a result of initiatives emerging from the Doha round. For example, one issue being discussed is whether an application for measures should only proceed when supported by a majority of the overall local industry (based on production values), as distinct from a majority of those expressing a view on the application (WTO 2008a, article 5.4). As the Australian Steel Association (sub. 28, para. 302) observed, currently, if 25 per cent of producers are enjoined in an application and the remaining 75 per cent are silent, the application can proceed. But absent any such amendments to the WTO agreements consequent on Doha, the need for unilateral changes of this nature does not seem strong.

Provisions for primary producers

Like Canada and the USA, Australia has provisions that allow primary producers to join processors in applying for measures against dumped processed agricultural goods (see box 6.1). The intention is to extend anti-dumping protection to primary producers were they to experience injury as a result of dumping of the processed product rather than the raw commodity.

However, several participants — including the NFF (sub. 6, p. 5), the Australian Dried Fruits Association (sub. 14, pp. 4–5) and Australian Pork (sub. DR39, p. 1) — contended that the ‘close processed agricultural goods’ (CPAG) provisions are ineffective, insofar as primary producers cannot apply alone for measures against a dumped processed product because their raw product is not generally ‘like’ the processed item.

These participants went on to reiterate arguments put to the Joint Study that changes should be made to facilitate direct access to the anti-dumping system for producers of CPAGs without the need to rely on the cooperation of processors. In support, they contended that processors standing to benefit from the availability of cheaper imports may be unwilling to ‘lead’ the application process. And Australian Pork (sub. DR39, p. 2) further noted that the conditions for primary producers to enjoin in an application with a processor — for example, that the raw product must be devoted completely or substantially to the processed product — can similarly preclude cooperative action.

Box 6.1 **Close processed agricultural goods**

Under the *Customs Act 1901*, 'like goods' can be 'close processed agricultural goods' if the Minister is satisfied that:

- (a) the raw agricultural goods are devoted substantially or completely to the processed agricultural goods; and
- (b) the processed agricultural goods are derived substantially or completely from the raw agricultural goods; and
- (c) either:
 - (i) there is a close relationship between the price of the processed agricultural goods and the price of the raw agricultural goods; or
 - (ii) a significant part of the production cost of the processed agricultural goods, whether or not there is a market in Australia for those goods, is, or would be, constituted by the cost to the producer of those goods of the raw agricultural goods. (s. 269T(4B))

These provisions, which were introduced in 1991, are intended to help address:

... the vulnerability of vertically integrated agricultural producers, who are generally price takers in their markets, with the prices they receive dependent on the prices their buyers are able to command for their processed products. Agricultural producers can, therefore, be materially injured as a result of the impact of dumping or subsidisation on the processors to whom they sell their produce. (Beddall 1991)

If locally produced goods are close processed agricultural goods, then the Australian industry can be expanded to include producers of the raw agricultural input. Further, if all of the criteria set out above are met, then that expanded industry should be considered when assessing material injury (ACBPS 2009a, p. 5).

For its part, the Commission observes that the consistency of Australia's CPAG provisions with WTO rules (and that of the similar provisions in Canada and the USA) has, at various times, been questioned.

- During the recent investigation into currants exported from Greece, the European Commission was unsuccessful in requesting Customs to clarify to what extent Australia's CPAG provisions comply with WTO rules (EC 2008, p. 1).
- The similar Canadian and US provisions have been the subject of cases before GATT/WTO dispute panels. For example, the WTO Appellate Body found the USA had acted inconsistently by including lamb growers as part of the US industry when taking safeguard action against lamb exported from Australia and New Zealand (WTO 2001, para. 197b).
- A GATT dispute panel was established (at the request of the European Union) to consider the imposition by Australia of countervailing duties on imports of glacé cherries from France and Italy on the grounds of an inconsistent definition of the

‘domestic industry’ (GATT 1992). However, the European Union later requested that proceedings be suspended and so a finding was not made (GATT 1993).

It is also unclear that, in practice, the provisions could be of benefit to primary producers.

- Although some have contended that injury to upstream producers has been a significant element in testing for injury (Ludwig 2006, p. 39), the Commission has received no evidence that the outcomes of any cases have been materially affected by a capacity to examine injury over a wider output base.
- As noted by the Senate (SSCIST 1991, para. 2.3), primary producers may well experience injury beyond any suffered by the processor — for example, if the processor is able to offset competition from dumped imports by paying a lower price for the raw product. But, in such cases, it is not clear why an (independent) processor would take the lead in applying for measures. As well as presumably sharing the costs of taking action, it would also expose its purchasing practices to external scrutiny.
- If measures are applied to a processed good, and if the processor has significant buying power, it may pass little of the price benefit back to primary producers.

Indeed, an alignment of the interests of the two parties and strong incentives for cooperative action would only be likely when primary producers have an equity interest in the processing entity — as occurs, for example, in producer cooperatives. The Commission notes that such cooperative arrangements are less common than when the CPAG provisions were enacted nearly two decades ago (see, for example, Lewis 2006). And, given the strictures of the like goods framework, it is hard to see how the provisions could be rendered more ‘useful’ for primary producers — were this judged to be desirable.

More broadly, the question arises as to why primary producers should be treated differently from other upstream producers which must rely exclusively on their customers to take action against any injurious dumping and/or subsidisation. In this regard, Gruen (1986, para. 5.9) pointed to a list of stakeholders who could mount no less valid claims for CPAG-style provisions.

In light of the above, in the Draft Report, the Commission proposed that, in consultation with interested parties, the Australian Government should convene a working group to examine the CPAG provisions and report to the Minister on whether and how the preceding concerns might be resolved.

Participants responding to the Draft Report were highly supportive of this approach, including the Law Council of Australia and the Law Institute of Victoria

(sub. DR56, table item 2); the Trade Remedies Task Force (TRTF, trans. p. 3); and Australian Pork (sub. DR39, p. 5).

However, in some cases, such support was couched in the context of a review process designed to render the provisions more useful for primary producers, rather than a more comprehensive assessment that included a consideration of the broader merits of the current approach.

The ADFA welcomes the Commission’s Draft Recommendation ... to convene a working group to examine the provisions relating to ‘close processed agricultural goods’ within the *Customs Act 1901*. The ADFA does not support abolishing the provisions: ADFA members and other raw agricultural growers and suppliers require access to the Anti-Dumping System as is available to all other producing industries in Australia. (Australian Dried Fruits Association, sub. DR52, p. 4)

Such commentary has reinforced the Commission’s view that a thorough review of these provisions is required. However, it emphasises that the review should be an open one, rather than focussed solely on examining whether it would be possible to make the provisions more useful for primary producers. For the reasons outlined above, a comprehensive review might conclude that the CPAG provisions should be abolished — a conclusion that should not be precluded by the terms of reference.

RECOMMENDATION 6.1

The Australian Government should convene a working group to examine the close processed agricultural goods provisions and report to the Minister on:

- ***whether the provisions have had a meaningful impact on the outcomes of any past cases***
- ***if not, whether there is any likelihood that they could, in future, have a meaningful impact and, if so, in what circumstances***
- ***whether and how it might be possible to make the provisions more practically effective, whilst still complying with WTO requirements, and what benefits and costs would ensue***
- ***what arguments would justify the retention of the provisions more generally***
- ***what changes, if any, should be made to the provisions in light of the above.***

The working group should consult with interested parties and publish a draft report for comment.

Prima facie information requirements

Concerns about the amount of information required to have anti-dumping cases initiated are longstanding (see, for example, TRTF (2006, pp. 5–7) and Willett (1996, p. 32)). Specifically, there is a view that the requirements concerned go beyond that necessary to establish a prima facie case — a view that was also evident in this inquiry. Thus, OneSteel stated that:

Customs currently places an undue onus on the applicant to provide evidence beyond reasonable doubt regarding all assertions made in an application concerning exporters and the relevant overseas markets for the goods under consideration. (sub. 16, p. 13)

(Others to express a similar view included: the Australian Plantation Products & Paper Industry Council (A3P), sub. DR45, p. 6; the Australian Dried Fruits Association, sub. 14, p. 3; Bradken, sub. DR59, p. 3; CSR, sub. 10, p. 3; James Stevenson, sub. DR42, pp. 2, 8; and Qenos, sub. 13, p. 7.)

The costs of collecting and assembling the required information can be particularly onerous for small to medium sized enterprises (SMEs) (see, for example, PolyPacific and Townsend Chemicals, sub. DR51, p. 14). Further, SMEs often lack the resources to deal with the complexities of the anti-dumping system and are therefore likely to be even more reliant on external consultants than larger firms.

To address these concerns, and in response to recommendations from the Joint Study, Customs has made a number of changes to its operating practices — for example, the introduction of an SME liaison function within its Trade Measures Branch — and to its application forms and related guidance to applicants. In this regard, the TRTF (sub. 26, p. 32) said that the better guidance on assessment criteria and methodologies is an improvement over the previous system.

And more generally, BlueScope Steel said that:

A review of the Australian Customs Service ‘Application for Dumping and/or Countervailing Duties’ document does not suggest that Australian authorities are requiring information from Australian industries that goes beyond what is required under the WTO Agreement. (sub. 19, p. 46)

As signalled in the Draft Report, the Commission is not recommending any changes to the arrangements covering prima facie information requirements. In this regard, determining the stringency of the initiation requirements involves a trade-off between, on the one hand, not discouraging meritorious claims and, on the other, not attracting excessive numbers of questionable claims. Some might argue that the latter should not be a significant concern because non-meritorious cases will be ‘weeded out’ by the formal investigation process. But taking cases to the next stage entails some additional administrative and compliance costs. Moreover, the lower

the initiation bar, the lower will be the application cost for firms, leading to a possibly greater likelihood of strategic filing behaviour designed to ‘chill’ imports.

To sustain a case for an easier initiation hurdle, there would need to be evidence that significant numbers of cases that would have had a reasonable prospect of success are being discouraged. However, the fact that measures are ultimately imposed in only half of initiated cases (see chapter 3) suggests that the initiation hurdle is not especially onerous or otherwise detrimental to appropriate outcomes.

Given this, the Commission considers that any substantive easing of the initiation bar would need to be accompanied by some offsetting discipline to guard against what the Australian Steel Association (sub. 28, para. 334) described as ‘fishing expeditions’. One possibility would be to reduce the level of evidence required from an applicant to sustain a case for initiation in return for the lodgement of a bond that would be forfeited in the event measures were not applied. But this would impose a new cost on all unsuccessful applicants for measures, including on those willing and able to meet the current thresholds. And giving practical effect to a lower initiation hurdle — whether linked to a forfeitable bond arrangement or introduced on a self-standing basis — would itself be a highly judgemental process.

In light of the above, and given that there was no specific evidence submitted to rebut the same set of arguments made in the Draft Report, the Commission remains of the view that changes in this area are not warranted.

6.3 Normal value calculations

Along with the so-called ‘ascertained’ export price, the normal value of the overseas good determines whether dumping has occurred and (unless the lesser duty rule is applied) the magnitude of any measure imposed. In line with the WTO Anti-Dumping Agreement, Customs considers a normal value to be the average price paid for like goods sold in the exporter’s home market. However, where a specified set of conditions is not met (see box 6.2), Customs uses a hierarchy of alternative methodologies for calculating a normal value.

In their submissions to the inquiry, users of the anti-dumping regime argued that aspects of the current arrangements for calculating normal values (and of the other ‘variable’ factors) have the effect of depressing dumping margins, thereby reducing the level of measures imposed. As elaborated below, they were particularly concerned about the implications of treating China as a market economy for the purposes of these calculations.

Box 6.2 **How are normal values calculated?**

As noted in the text, in the first instance, Customs considers normal values to be the average price paid for like goods sold in the exporter's home market. However, for Customs to accept such sales as a suitable basis for calculating normal values, they should, among other things:

- be at arms length (that is, not be influenced by a commercial relationship between the buyer and the seller)
- occur in the ordinary course of trade (that is, reflect the total cost to make and sell the goods)
- not reflect artificially low input prices
- generally account for greater than five per cent of the total volume of like goods shipped by the exporter to Australia.

In cases involving exports from market economies, where these conditions are not met (or overseas suppliers have not cooperated in providing sales records), Customs uses a hierarchy of alternative methodologies, depending on the specific circumstances:

- other sellers' domestic sales (in the country of export)
- either a constructed price to make and sell the goods in the country of export, including an allowance for profit; or, the overseas supplier's sales to a third country
- an amount having regard to all relevant information with scope, in some circumstances, to construct prices based on the cost to make and sell in surrogate countries, including Australia.

For 'economies in transition' (or for non-market economies), the alternatives listed above are not hierarchical. Rather, the approach to estimating normal values is simply to draw on all relevant information.

Conversely, participants representing downstream industry interests contended that aspects of the calculation process often lead to normal values, dumping margins and dumping duties that are artificially high. (See, for example, Australian Steel Association, sub. 28, paras. 463–466.)

That said, there was broad agreement among participants that the methodologies for calculating the variable factors should give greater regard to established trading conventions and should not involve the use of 'zeroing' in determining normal values. In addition, as discussed in chapter 7, the black-box nature of the calculation process and the ensuing lack of clarity of its outcomes are also of a considerable concern to all parties.

For its part, the Commission acknowledges that many of the observations about the deficiencies in the methodologies used to calculate normal values (and the other

variable factors) have some intrinsic merit. So too do some of the suggested changes to overcome those deficiencies — at least when considered in isolation.

However, making a significant number of changes to the current methodologies, or to particular aspects of their application, could introduce considerable new uncertainty and complexity to the assessment process, and distract from more important systemic reforms.

Also, some of the proposed changes would have offsetting effects. Hence, it is not clear to the Commission how significant the collective impact on dumping margins would be, or even whether those margins would, as a result, generally be higher or lower. By way of illustration, any methodological initiatives designed to deliver more rigorous and economically ‘precise’ normal values would need to look at the basis for allocating costs in any constructed cost to make and sell calculation — including whether the costs of supplying particular markets should be determined using ‘fully distributed costs’ or ‘avoidable costs’. As discussed by the Commonwealth Competitive Neutrality Complaints Office (CCNCO 1998), the latter may have merit in some circumstances. Yet any application of the avoidable cost approach that reduced constructed normal values might well swamp the collective impact of the various changes sought by local industry interests.

In responding to the Draft Report, the Australian Steel Association (trans. p. 47) argued that the Commission should more precisely test the effects of some of these detailed changes. But, as the preceding avoidable cost example illustrates, the outcome of such testing would be highly sensitive to the particular suite of initiatives that were examined. More importantly, the Commission reiterates that the uncertainty and complexity that would attach to changes in the computational methodology — even if having some merits in the light of the sort of testing advocated by the Australian Steel Association — would be an unhelpful distraction to the more important reform options the Commission is proposing.

Exports from China

Since April 2005, and as a precursor to free trade negotiations, Australia has recognised China as a market economy by permanently agreeing, among other things, not to seek recourse to section 15 of the *Protocol of Accession of the People’s Republic of China to the WTO* (DFAT 2005). Section 15 allows WTO members to treat China as a non-market economy for the purposes of applying anti-dumping duty laws until 2016 or until China establishes, under the national laws of an importing WTO member, that market conditions prevail in a particular industry or sector.

Thus, where Chinese goods are subject to an anti-dumping action in Australia, the normal value will, in the first instance, be calculated on the basis of prices in the Chinese domestic market. In contrast, the USA treats China as a non-market economy, while jurisdictions such as the European Union treat it as an economy in transition — allowing for more ready recourse to constructed normal values (see appendix C).

Local industry interests contended that the growth in China's exports to Australia, in the context of its treatment as a market economy, poses a significant challenge for the anti-dumping system (see box 6.3). Specifically, many argued that this treatment makes it difficult to take account of various forms of indirect support that are 'seemingly available' to Chinese producers — with the consequence being that, when actions are successful, normal values, dumping margins and the level of measures imposed are depressed. The ensuing perception of unfairness is compounded by the less favourable treatment of Chinese exports in some other jurisdictions. (See, for example, Cement Industry Federation, sub. 9, p. 6.)

Box 6.3 Some participants' views on issues concerning China

The outcome of the present arrangements requires Australian industry to compete with prevailing prices and costs for Chinese exporters which are understood to be artificially low. As a result, Australian industry — unlike its counterpart industry in the US, Canada and the EU — are disadvantaged and operating at unprofitable levels. (CSBP, sub. 15, p. 12)

Having business operating experience in China, Orica understands that local Chinese producers can gain access to incentives worth a considerable value, which may render prices for goods artificially low compared to a WTO rule based assessment. These incentives cover such factors as land grants, environmental allowances, relocation allowances, tax incentives, raw material input price concessions and export rebates ... Customs' lack of recognition of these local business practices needs to be addressed. (Orica, sub. 18, p. 14)

This Australian company [Steelforce] undertook significant expenditure to build a state of the art factory in China ... It engages in no domestic sales in China and hence cannot dump. Yet the dumping legislation as it currently stands requires a deemed normal value in such circumstances to raise a hypothetical differential to see if dumping is deemed to occur or not. This makes no policy sense. (Australian Steel Association, sub. 28, para. 48)

The Commission understands these concerns and also China's economy and policy settings. However, Australia is not alone in the status it affords China. According to media articles posted on the Chinese Government's website, 97 WTO members have recognised China as a market economy, including New Zealand, the Republic of Korea, Russia and South Africa (MOFCOM 2009a, 2009b).

And, in any event, Australia's decision to recognise China as a market economy has not stopped measures being applied to Chinese exports. Indeed, there are currently more measures in place on goods from China than on goods from any other country (see chapter 3). Further, over the last decade, the share of anti-dumping measures applying to goods originating from China has grown from less than 10 per cent to more than 30 per cent.

As outlined above, there are also generally applicable provisions in the current system to cater for circumstances where sales in an exporter's domestic market are not an appropriate basis for calculating normal values. In particular, Customs can employ an alternative calculation method where government involvement in a market artificially lowers input costs or output prices. Such an alternative was employed by Customs in relation to the recently released Preliminary Affirmative Determination for aluminium extrusions from China (ACBPS 2009b) and the ensuing imposition of provisional measures.

More broadly, Australia's decision to recognise China as a market economy would have had regard to a variety of trade policy matters and goals. Hence, it would not be appropriate in this inquiry to recommend changes to the decision on the basis of the preceding dumping-specific concerns, whatever their particular merits might be.

That said, there may well be scope for Customs to allay some of the concerns about the treatment of Chinese imports (and of market situations more generally) through some of the initiatives proposed in chapter 7, including:

- ensuring that it clearly documents whether and how it has taken into account any input subsidies and other government support in calculating normal values (see recommendation 7.8)
- engaging, where appropriate, experts to assist in such assessment (see section 7.3)
- giving due consideration to relevant findings in overseas anti-dumping and countervailing cases (see recommendation 7.6).

Due regard for established trading conventions

A number of submissions contended that Customs' methodologies are sometimes at odds with widely observed, international, business practices:

In general, the administration of the current antidumping system is highly weighted towards a strictly accountant-driven process with little regard for business intentions or the usual conventions and mechanisms surrounding the conduct of any particular business under investigation. (Dow Chemical, sub. 3, p. 2)

... Customs needs to take greater heed to standard practices within an industry in determining normal values. Inconsistent determinations can have a material impact on calculated dumping margins creating the effect of ‘moving the goal posts’ for any applicant, potentially making a valid dumping claim, invalid. (OneSteel, sub. 16, pp. 5–6)

However, to a large extent, Customs’ hands are tied with respect to the broad methodologies used to determine normal values and dumping margins — with any significant departure from the WTO requirements likely to provide additional grounds for appeals. And seeking to amend the requirements to give effect to ‘normal business practice’ would also be problematic — especially as the sort of price discrimination that can lead to dumping actions is regarded in most other market contexts as normal practice (see appendix D).

Nonetheless, the flexibility and discretion provided to Customs in applying the current requirements presumably gives it some scope to employ common sense approaches that have regard to commercial realities. At the very least, as suggested by CSBP (sub. 15, p. 8), there should reasonably be an expectation that Customs will consult regularly with stakeholders to identify any potential issues of this nature.

‘Zeroing’

Zeroing is the practice of inflating the average dumping margin by converting negative dumping margins on particular sales to zero (see box 6.4). The practice, which is employed by the USA, has been strongly debated at Doha.

Box 6.4 What is zeroing?

‘Zeroing’ is a methodology applied to the calculation of normal values in some jurisdictions — most notably the USA. To determine whether dumping exists and its magnitude, authorities normally compare a ‘weighted average normal value’ of the product with a ‘weighted average of prices of all comparable export transactions’. However, when zeroing applies, authorities disregard any exports where the export price is higher than the normal value; that is, they give them zero weighting.

Opponents of zeroing say it is a ‘biased and partial method for calculating the margin of dumping and inflates anti-dumping duties’ (WTO 2008a, p. A-10). They have sought to codify WTO dispute settlement findings outlawing zeroing in most circumstances. Conversely, the USA has argued that zeroing is a legitimate practice and should be expressly permitted under the Anti-Dumping Agreement (DFAT, sub. 22, para. 5.3).

However, Australia should not adopt the practice even if it is subsequently sanctioned at Doha. The Commission can see no reason to bias the calculation of the normal value in this way.

In fact, under Australia's arrangements (where dumping and material injury are simultaneously considered), the practice would seemingly have a more prejudicial effect on outcomes than in the USA (where zeroing is applied after a case has been initiated and injurious dumping or subsidisation found). That is, under the Australian arrangements, unless the *de minimis* provisions applied, zeroing could make a finding of dumping almost axiomatic. Significantly, there was no support from industry participants for Australia to follow the US approach (see, for example, Australian Steel Association (sub. DR57, para. 98); the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 3); and the TRTF (sub. 26, p. 25)). The Department of Foreign Affairs and Trade (sub. 22, para. 5.3) also opposes its introduction.

RECOMMENDATION 6.2

Australia should not adopt the practice of zeroing when calculating normal values.

6.4 Material injury and causality

As outlined in chapter 2, anti-dumping measures cannot be imposed unless a local producer has suffered (or is threatened with) material injury from dumped or subsidised imports. Although not defined in the Act, the Dumping Manual defines 'material injury' as:

... injury which is not immaterial, insubstantial or insignificant, and is greater than that likely to occur in the normal ebb and flow of business. (ACBPS 2009a, p. 11)

The three main injury indicators examined by Customs in this component of the assessment process are:

- the relative prices of the imported and locally manufactured like goods
- sales volumes, including changes in domestic market shares
- profit levels and profits relative to turnover.

Although Customs may examine a range of other injury factors (including changes in employment levels, capital investments, return on investments, cash flows, productivity, inventories, rates of growth, and research and development), a 1990 Ministerial Direction indicates that a 'material' diminution of profits is a key requirement for proving material injury (ACBPS 2009a, p. 11).

In addition, for measures to be imposed, there must also be a direct or discernable causal link between the material injury and the dumping/subsidisation. In assessing

causality, Customs may consider the influence of a wide variety of potential causal factors other than dumping, including:

- the availability and price of un-dumped and non-subsidised imported like goods
- any relevant changes in consumption patterns
- whether capacity constraints have hindered the ability of local producers to maintain their share of a growing market.

Submissions to the inquiry were divided on the evidentiary standards for demonstrating injury and the basis for assessing causality.

- On the one hand, recent users of the anti-dumping system argued that the current requirements are too demanding. For example, the TRTF (sub. 26, p. 29), among others, claimed that Customs gives insufficient account to ‘profits forgone’ when assessing material injury, focussing instead on an industry’s historical profits which are more amenable to verification. James Stevenson (sub. DR42, p. 12) went further, arguing that harm must necessarily follow if goods are being dumped, meaning that there should be no need to determine ‘material’ harm at all.
- However, some others contended that the current requirements are not sufficiently rigorous. For example, the Law Council of Australia and the Law Institute of Victoria (sub. 29, p. 12) stressed that a finding of injury should only occur where there is evidence of reduced revenues and profits. Likewise, the Australian Steel Association (sub. 28, paras. 683–686) indicated that Customs seemingly relies too heavily on two-dimensional correlations which do not prove causation.

On this latter point, at least, the TRTF (sub. 26, p. 38) agreed that some more detailed analysis may be useful in cases where the linkage between dumping and injury is less clear. And whatever their particular views on evidentiary standards, participants from all sides voiced concerns about the lack of transparency accompanying Customs’ assessment processes (see box 6.5).

In the Draft Report, the Commission did not make any explicit recommendations regarding the assessment of injury and causality, observing that this is yet another aspect of the anti-dumping system where judgement is paramount. Accordingly, it argued that, at best, legislation (and changes to it) can shape and somewhat constrain the degree of judgement required — and that even here there is a trade-off with giving Customs sufficient flexibility to tailor assessments to the particular circumstances at hand.

Further, while recognising that, in principle, the loss of potential profits as a result of dumping is no less relevant than the loss of actual profits, the Commission

observed that there are significant practical constraints on taking the former into account in injury assessments. Most obviously, it would involve a considerably higher degree of speculation than an assessment of what has actually happened to profits, meaning that any shift in this direction would require the exercise of even greater judgement by Customs and potentially provide new grounds for appeal.

Box 6.5 Injury and causality assessments: transparency concerns

Though views on evidentiary standards and the basis for assessing causality differed markedly, most participants considered that there is insufficient transparency in Customs' assessments of injury and causality and the findings that emerge from those assessments.

Putting the perspective of applicant industries, the Cement Industry Federation (sub. 9, p. 7) said that it would 'encourage a more open approach to the methodology' while BlueScope Steel argued that:

Providing greater transparency in relation to the criteria used in assessing whether material injury has occurred or is threatened, and the extent to which threatened injury is taken into account in practice, would be helpful. It would be particularly helpful to clarify how damage caused by intermittent dumping would be assessed. (sub. 19, p. 45)

Commenting on the issue from the perspective of overseas suppliers, Casselle Commercial Services said that:

Suppliers are particularly aggrieved by a system that imposes specific sanctions against them for allegedly causing material injury in a foreign market while denying them the opportunity to properly test whether that injury was correctly attributable to their exports. (sub. 2, p. 6)

And as a user of products that have been subject to anti-dumping measures, in a submission to the Joint Study, Rio Tinto (2006, pp. 4–5) argued that:

The causal link is often tenuous and difficult to differentiate from changes in normal day-to-day business. Injury is usually assessed from evidence of lower prices and lost market share which is always privileged information and cannot be independently verified. The bottom line is that Customs and proponents from industry have significant scope through the administration of the existing legislation to achieve favourable outcomes that translate into protection from import competition.

Given this, the Commission concluded that a preferable approach for achieving better injury/causality assessment would be to increase the accountability of those involved in the assessment and decision-making process through better public reporting on the outcomes of investigations and the basis for findings and recommendations (see chapter 7).

Responses to the Draft Report were generally supportive of moves to enhance the transparency with which Customs reports on the injury and causality dimensions of investigations. For example, A3P (sub. DR45, p. 5) maintained that improvements

in this area would ease potential misunderstandings among applicants. And OneSteel (sub. DR49, p. 2), which had initially sought a more definitive recognition of profits forgone as a potential causal factor in injury assessments, subsequently supported the Commission's draft recommendation to refrain from further refinements in this area.

However, others, though not disputing the need for greater transparency in decision-making, reiterated some of their initial concerns in this area. In particular, the Australian Steel Association (sub. DR57, para. 198) maintained that causality should be objectively tested (using quantitative techniques) to isolate the effect of any dumping and/or subsidisation from other factors that may be negatively impacting on the domestic industry under consideration.

For its part, the Commission remains unconvinced that further refinements to the injury and causality provisions are warranted at this juncture, and especially any mandatory requirement for Customs to quantitatively test for causality.

There may, of course, be circumstances where quantitative testing might shed some light on causality issues. But the current requirements do not preclude such testing where it would clearly add value. The scope for, and usefulness of, such testing might be matters which Customs could give further consideration to — especially were there to be a greater willingness to contract out aspects of the assessment task (see chapter 7).

Even so, any such quantitative testing would not obviate the need for judgement. Indeed, various statistical and data limitations would often make more formalised quantitative testing highly problematic, not least, the likely very small magnitude of the impacts involved, as well as the assumptions and commercial sensitivities that typically contribute to the current 'black box' perceptions.

6.5 Provisional measures

There was relatively little comment in submissions on many aspects of the form of measures applied under the Australian system — including, the heavy reliance on duties rather than undertakings, the calibration of duties in specific rate rather than ad valorem terms and the stringency of the requirements governing retrospective measures, which have not been applied in Australia for more than two decades. However, there was considerable commentary on the application (or non-application) of provisional measures. There was also some input on the duty refund system (see section 6.7).

From day 60 of an investigation, Customs is able to impose provisional measures to prevent further injury (or threat thereof) to the applicant industry for the remainder of the investigation process and until the Minister makes a decision on whether or not to ‘confirm’ those measures. The imposition of provisional measures is contingent on Customs making a preliminary affirmative determination (PAD) that there are sufficient grounds for doing so. Such measures may include guarantees, bonds, cash deposits or combinations thereof. In practice, however, they typically take the form of unsecured undertakings that bind an importer to pay any duties consequent on the Minister’s final decision on imports in the intervening period.

In practice, Customs has typically waited two to three weeks after it has completed its exporter verification reports and released a Statement of Essential Facts (SEF) before making PADs. Hence, over the past decade, provisional measures have, on average, been applied around day 140 of an investigation, and as late as day 210 (that is, 230 days after application), with the earliest application at day 80 still being later than permitted by the legislation. And in the recent toilet paper case, provisional measures were not imposed, even though Customs ultimately recommended to the Minister that anti-dumping duties should be implemented.

Notwithstanding that Customs’ practice meets the WTO requirements, many submissions to the inquiry contended that Customs adopts an unduly cautious approach to making a PAD and that provisional measures could be, and should be, applied earlier (see, for example, CSBP, sub. 15, p. 12 and TRTF, sub. 26, pp. 38–42).

This issue is a longstanding one, having been raised during the Senate Inquiry (SSCIST 1991), the Willett Review (1996) and, more recently, the Joint Study (2006).

- Understandably, those affected by dumping and/or subsidisation will want the earliest possible relief. Where the requirements for provisional measures are satisfied, they should be applied.
- Equally, it is important that a desire to provide early relief does not come at the expense of investigative rigour. Indeed, the generally late stage of the investigation process when measures are imposed could, at least partly, reflect the complexity of cases. In this regard, the general consensus is that case complexity has been increasing.

Given the latter, the Commission does not see a case for initiatives to make it any easier to obtain provisional measures or to fast-track their imposition as suggested by Sulo (sub. DR58, p. 2) — even if a practical legislative way to do so could be found. Similarly, it does not see grounds for imposing provisional measures consequent solely on the Minister extending an investigation’s timeframe, as

suggested by the Australian Dried Fruits Association (sub. 52, p. 4) in response to the Draft Report proposal to increase the scope for Customs to seek extensions of time (see section 7.2). In other words, the Commission believes that Customs should apply provisional measures no earlier than it can establish a sound case that there has been injurious dumping or subsidisation.

But nor should it delay imposing provisional measures once such a case has been established. Hence, it is desirable that the provisional measures arrangements are such that assessments against the proposed public interest test do not lead to delays in relief for applicant industries where injurious dumping or subsidisation has been established — especially as the test is only intended to preclude measures in a small minority of cases.

The Commission is therefore recommending that under the new public interest test, the release of a PAD finding that there has been injurious dumping or subsidisation, and the imposition of provisional measures, should be necessary precursors to the assessment of whether there are any public interest grounds for not ‘confirming’ those measures.¹

Further, to fit in with the proposed assessment sequence, the Commission is recommending that unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation. Given that PADs are sometimes released a little time after the SEF (currently due by day 110 unless there has been an extension), this change would bring forward the imposition of provisional measures in some cases.

This approach was strongly endorsed by BlueScope Steel (sub. DR55, p. 4) and the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 4) in their responses to the Draft Report.

RECOMMENDATION 6.3

In conjunction with the introduction of the new public interest test (see recommendation 5.1), the arrangements governing the imposition of provisional measures should be modified as follows:

¹ For the most part, this might not require any specific changes to the current provisional measures regime. That is, Customs will normally impose provisional measures where it is satisfied that there are dumping/injury grounds for doing so. But, as noted above, in the recent toilet paper case where Customs ultimately recommended anti-dumping duties, it did not impose provisional measures. In this case at least, a public interest test assessment would have added to the delay in relief for the applicant industry (presuming, of course, that the case for measures would not have been overturned on public interest grounds).

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- *If the requirements for imposing provisional measures are met, then prior to the commencement of any assessments against the public interest test, the Australian Customs and Border Protection Service should, without exception, be required to release a Preliminary Affirmative Determination (PAD) and impose provisional measures.*
 - *Unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation.*

6.6 Duration of measures and continuation arrangements

Under Australia's anti-dumping system, measures are typically imposed for five years (the WTO maximum). The default term was increased from three years in 1991 following a Senate Committee report on means to facilitate access to anti-dumping protection (SSCIST 1991). Few measures have been revoked before term. Also, in keeping with the WTO agreements, measures can be extended for further periods of five years if a continuation review finds there is a case for doing so.

But while providing for extensions, the WTO agreements also specify that measures should remain in force only as long as is necessary to counter injurious dumping or subsidisation. An important issue for this inquiry is, therefore, whether the Australian requirements and the way they have been applied are consistent with the high-level WTO objective and with the goal of promoting the public interest more generally.

Participants expressed a diverse range of views about the duration of measures and continuation arrangements. Most recent users of the anti-dumping system contended that: five years is appropriate for both initial terms and continuations; and that there should be no pre-specified limits on continuations — that is, applications should be assessed on their merits. (See, for example, the Australian Dried Fruits Association, subs. 14, p. 5 and DR52, p. 3; BlueScope Steel, sub. DR55, p. 17; CSR, sub. 10, p. 5; PolyPacific and Townsend Chemicals, sub. DR51, p. 7; SCA Hygiene, sub. DR60, p. 2; and the TRTF, subs. 26, p. 35 and DR44, p. 5.) In contrast, users of goods that have been subject to measures contended that three-year terms should be adequate protection in the first instance and that the requirements for extensions should be more demanding (Australian Steel Association, sub. 28, para. 883 and Dow Chemical, sub. 3, p. 13).

In considering the efficacy of these aspects of the current arrangements, the Commission has been cognisant of the costs that firms incur in applying for measures. Too short a period of protection where a case for measures is established would unreasonably discourage meritorious applications — an equally inappropriate

outcome to overly lengthy protection. Given this, it considers that the current five-year default term for the initial imposition of measures is not unreasonable.

However, notwithstanding their consistency with the WTO agreements, the Commission considers that the appropriateness of the current continuation requirements that determine the total duration of Australia's anti-dumping measures is highly questionable.

- As noted in chapter 3, an increasing proportion of measures have been extended on one or more occasions. The longer that measures remain in force, the more they become protective devices that undesirably shield recipient industries from the need to adjust to underlying structural pressures. At the extreme end of the spectrum, the measures which have been in place on PVC exports from Japan and the USA for nearly 20 years, and on brandy from France for almost as long, cannot reasonably be construed as anything other than long-term industry protection.
- The current requirements governing the continuation of measures are necessarily less demanding and of a different ilk to those for initial investigations. This is because, with measures already in place, it is not possible to directly test for injury and causality. Thus continuation reviews are forward looking with Customs required to make a judgement about whether dumping is likely to recur upon expiration of measures. But this means that measures could, in theory, be extended in perpetuity without ever testing whether the injury or causality considerations that underpinned their initial imposition were still valid.
- Some continuation decisions also appear to have been highly speculative in nature. For example, one of the considerations in the recent decision to continue measures applying to linear low density polyethylene exports from Korea and Thailand was that impending capacity increases in the Middle East were 'supportive' of the possibility that exports from Korea and Thailand might be dumped in the future (ACS 2008, pp. 8–9). Yet as continuation decisions are not currently appellable to the TMRO, the merits of such speculation cannot be separately scrutinised.

The Commission further notes that:

- The continuation requirements for anti-dumping measures are less demanding than those for the WTO safeguard provisions. Initially, safeguard measures can only be applied for a maximum of four years, with the total duration of a measure (that is, the sum of the provisional, initial and extension periods) restricted to eight years. Moreover, reapplication of an expired safeguard measure that applied for longer than 180 days is prohibited for at least two years.

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- The desirability of tightening the WTO requirements governing the continuation of anti-dumping measures has been canvassed at Doha (see appendix C).

But even if the Doha discussions do not lead to any changes to these aspects of the WTO Agreements, the other considerations set out above suggest that Australia's continuation requirements should be tightened. Indeed, in the Commission's view, aside from the introduction of a bounded public interest test, this is one of the highest priority changes to the current system.

Draft Report approach

In the light of the above, in the Draft Report, the Commission proposed that while the current five-year default period of initial protection should be retained, extensions should be limited to one three-year term. It observed that this would still provide for up to eight years protection without the need to resubmit a new case for measures.

And to ensure that there is some sort of distinction between anti-dumping measures and longer-term tariff protection, the Commission further proposed that there should be a two-year freeze on new applications for measures at the end of this eight-year period (or if measures are not continued, beyond the initial five-year term).

Finally, to mesh with a separate proposal to replace the current 'review of measures' arrangements with a more timely and cost-effective adjustment mechanism (see next section), it proposed that continuation reviews should automatically recalibrate the variable factors. (Though there is currently provision for such recalibration, it happens relatively infrequently.)

Responses to the Draft Report proposals

Reflecting their general position on the duration of measures (see above), users of the system strongly supported the Commission's proposal to maintain the current five-year default term for anti-dumping and countervailing measures. And there was no overt opposition from downstream industry interests.

However, respondents were (unsurprisingly) divided over the proposed limitation on extensions to a single three-year term, followed by a freeze on reapplications.

Downstream users, as represented by the Food & Beverage Importers Association and the Australian Steel Association, were strongly supportive of such amendments, with the former arguing that:

After eight years of assistance through the dumping system, any further calls for assistance should be treated as a request for longer term industry assistance. (sub. DR46, p. 2)

and the latter going further, contending that a freeze should also apply to unsuccessful applications (ASA, sub. DR57, para. 278).

In contrast, many users of the system strongly opposed the proposed changes. Typical of this viewpoint was CSR, which argued that:

... the two year freeze on applications is completely unacceptable. There is a long history in certain segments whereby as soon as measures are removed, dumping recommences ... Furthermore it can take 12 months to prove the new case, leaving applicants to tough it out for another 3 years. (sub. DR47, p. 4)

In elaborating on the above, several participants said that the Commission's proposal would provide a two-year window for unfettered dumping. For example, BlueScope Steel contended that:

The notion of providing an importer, or group of importers, who have previously been proven to be causing injury to Australian industry with dumped product, a period of time during which they can re-offend and dump without fear of retribution is highly unusual. What is being proposed is analogous to releasing an offender from jail, and giving them permission to re-offend with impunity during a defined period. (sub. DR55, p. 12)

Some also noted that in placing limits on the extension of measures, the Commission was going further than the sort of changes in this area that have been canvassed at Doha. (See, for example, Penrice Soda Products (sub. DR54, p. 3).) And, in regard to the implications for countervailing actions, A3P (among others) noted that:

... subsidies and support in exporting countries that directly lead to dumping activities do not just disappear or cease delivering an unfair competitive advantage after an arbitrary term. (sub. DR45, p. 3)

(Others expressing opposition to the proposed time limit on measures and reapplication freeze included: the Australian Dried Fruits Association (sub. DR52, p. 3); OneSteel (sub. DR49, p. 2); Qenos (sub. DR48, p. 3); Sulo (sub. DR58, p. 2); and the TRTF (sub. DR44, pp. 4–5).)

The Commission's assessment

The Commission recognises that the proposals in the Draft Report would represent a significant change to the current continuation arrangements, especially against the backdrop of an increasing proportion of measures being extended. It also recognises

that, for this component of the system at least, it would mean Australia's requirements would become more stringent than those in other countries.

However, neither of these outcomes constitute a reason for retaining the current provisions. In the Commission's view, none of the commentary from local industry interests has detracted from the broad rationale for the tightening proposed in the Draft Report — namely that the increasing proportion of measures which are being extended is further blurring the boundary between anti-dumping measures and long-term industry protection. And it reiterates that the regime proposed in the Draft Report, though stringent in an anti-dumping context, would be no more stringent than the WTO safeguard provisions (see above).

Nonetheless, the input from participants and its own further analysis has caused the Commission to reconsider the merits of a freeze on reapplications following the expiry of a measure.

In principle, as the Commission acknowledged in the Draft Report, there is a case for permitting immediate reapplications where countervailable subsidies are involved — these subsidies do not disappear simply because a measure has reached the end of its term. The same is also true of non-countervailable input subsidies that may be relevant in some dumping cases.

To cater for these situations in particular, the Commission looked at the possibility of an arrangement that would allow the Minister to waive the reapplication freeze in 'exceptional' circumstances and the scope for greater use of retrospective measures.

- But without very strong constraints on a waiver arrangement, there would be a considerable risk that waivers would become the norm. Also, the granting of a waiver could unreasonably condition the outcome of the subsequent investigation process.
- And retrospective measures could only offer a small offset to the continuation of injurious subsidisation (or the resumption of injurious dumping) during a two-year freeze period. This is because, in keeping with the strictures in the WTO agreements, Customs can only apply retrospective duties to goods imported in the 90 days prior to the imposition of provisional measures.

Further, as several participants pointed out, given the time taken to consider an application and undertake an investigation, a two-year reapplication freeze would involve closer to a three-year interregnum before measures could be reapplied.

In fact, this latter observation calls into question the need for a reapplication freeze to provide an opportunity to again test injury and causality issues. That is, following the expiry of a measure — which would, under the Commission's recommendations,

occur no later than eight years after commencement — evidence of injurious dumping or subsidisation over a subsequent 12-month period would normally be required to support a new application for measures. And with a further six months or more required to undertake an investigation, it would be close to two years before measures could be reapplied.

Accordingly, while the Commission is still recommending there only be scope for one three-year extension of a measure beyond the initial five-year term, it will no longer be recommending a freeze on reapplication following the expiry of a measure.

Nor will it be recommending any moratorium on reapplications following one (or several) unsuccessful applications for measures. The Australian Steel Association (sub. DR57, para. 278) argued that such a moratorium could reduce the incentives for strategic filing behaviour, as well as offering some administrative cost savings. But as discussed in chapter 4, the Commission is not convinced that, within the Australian system at least, the incentives for strategic filing are particularly strong. And its recommendation (7.7) for enhanced annual reporting by Customs on applications for measures that do not proceed to initiation, could reduce these incentives further. More generally, a moratorium of this nature could exclude some potentially meritorious cases that, because of the system's complexity, are often refined through a series of iterating applications before all the requirements are met.

RECOMMENDATION 6.4

There should be no change to the current five-year default term for anti-dumping and countervailing measures.

However, extensions of anti-dumping and countervailing measures, following a continuation review, should be limited to one three-year term. And an application for new measures following the expiry of a three-year extension should be subject to the same requirements as the original application (including assessment against the public interest test as detailed in recommendation 5.1).

Continuation reviews should, in all cases, comprehensively examine and recalculate the relevant variable factors.

6.7 Maintaining the currency of measures

For the sorts of products that feature prominently in Australia's anti-dumping system, market conditions and hence prices can change rapidly. Thus, as explained in chapter 4, if not regularly adjusted, anti-dumping measures can, in some cases,

quickly become either ineffective in remediating injurious dumping or subsidisation, or unreasonably punitive.

Once a measure has been in place for at least 12 months, at the request of an affected party or at the direction of the Minister, Customs can review the ‘variable factors’ setting the level of that measure. Though injury and causality matters are not usually considered (unless revocation is specifically sought), this ‘review of measures’ process requires Customs to examine the variable factors (normal value, export price, benefit of the subsidy and non-injurious price) as if it were a new investigation.

However, such reviews occur infrequently. Over the past decade, Customs has, on average, reviewed only three measures each year — less than 10 per cent of the average number of measures in place over this period. Moreover, some 40 per cent of these reviews have been at the direction of the Minister (rather than directly requested by either a local supplier, importer or overseas supplier). Although related matters arising in other investigations have often prompted the Minister’s involvement, a further consideration has been the significant periods of time that have sometimes elapsed (up to five years) since previous updates.

Customs also re-examines all of the variable factors when considering requests from importers for duty refunds. However, any changes made to the variable factors as part of this ‘administrative review’ process do not carry forward to subsequent consignments of the goods concerned. And, as well as being dependent on requests by importers, the extent to which this process re-examines the variable factors is partly contingent on the amount of duty involved (see box 6.6).

Evidently then, the current adjustment mechanisms do not constitute an efficient or effective way of ensuring that anti-dumping measures retain their currency in changing market circumstances. Accordingly, a more timely and cost-effective, though still rigorous, adjustment mechanism is required to regularly update all measures in place.

In the Draft Report, the Commission proposed updating the variable factors (and, in turn, the magnitude of each measure) through an auditable self-assessment process, or some other cost effective mechanism determined at the time measures were imposed. It further suggested that this self-assessment process could involve:

- exporters submitting estimates of their contemporary normal values and export prices to Customs as a basis for adjusting the relevant duty (or floor price specified in an undertaking)

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- where the lesser duty rule had been applied on a constructed basis, the local industry lodging a simple pro-forma indicating how its relevant costs had changed in the preceding 12-month period.

Box 6.6 Duty refunds and collection arrangements

An importer can apply for a duty refund assessment where it considers that the duty it has paid on a consignment of goods subject to an anti-dumping measure exceeds the actual dumping margin. This situation may arise, for example, where the actual export price exceeds the normal value or non-injurious price that was determined when the measures were first imposed or last adjusted following a review of measures. Some duty would also be (prima facie) refundable where the export price is below the normal value or non-injurious price, but is above the ascertained export price.

Applications for duty refunds can only be lodged at six-monthly intervals and any refunds do not include a component for interest foregone. Customs requires importers to provide various information in support of their claims, including on the export price and normal value which the importer contends were applicable to each consignment and the information used by the importer to establish those amounts (ACS 2000, p. 15).

As part of these reviews, Customs re-examines all of the variable factors (including subsidy rates), though any changes do not carry forward to subsequent consignments and the extent of re-examination is dependent on the amount of duty involved.

Although only a few importers apply for duty refunds (around six each year since 2004), where refunds have been sought, the vast bulk (around 90 per cent) of the duty collected has been returned. And not surprisingly, those importers seeking refunds tend to be those with large initial duty liabilities. Hence, over a third of total duties collected have been refunded in recent years (see chapter 3).

The other notable feature of the duty refund arrangements is the asymmetric method for determining the amount of duty payable when the goods are entered into Australia.

- Where the actual export price is lower than the ascertained export price, the duty established by the prevailing normal value or non-injurious price, plus an additional variable duty, is immediately paid by the importer.
- But when the export price is higher, the 'excess' duty (based on the existing variable factors) is not immediately refunded. Rather, the importer must formally seek a refund via the administrative review process outlined above.

This asymmetry can thereby give rise to outcomes for importers that many might regard as inequitable.

However, the Commission also recognised that the self-assessment process might not always be the best and most cost-effective approach. For example, it suggested that in some situations, it might be possible and preferable to use international price indexes, an option raised by Dow Chemicals (sub. 3, p. 7) and previously applied by Customs

to a price undertaking (ACS 2001, p. 37). Consequently, it sought further input from participants on how the proposed adjustment mechanism might be best configured.

Additionally, the Commission proposed changes to the basis for collecting dumping and countervailing duties on individual consignments of goods subject to measures. In essence, the proposal involved collecting the ‘correct’ amount of duty at the time of importation, with adjustments down as well as up to reflect movements in export prices subsequent to the imposition of measures. With this new collection arrangement in place, the Commission argued that a duty refund system would no longer be required and thus proposed that the administrative review provisions be terminated.

Responses to the Draft Report

Most respondents to the Draft Report supported the ‘in principle’ case for regular, cost-effective, adjustments to the magnitude of measures. Typical was BlueScope Steel (sub. DR55, p. 18) which stated that:

In principle BlueScope supports annual reviews of normal values, non-injurious prices and applicable dumping duties, or the floor price in undertakings to ensure that anti-dumping measures remain effective in remediating injurious dumping/subsidisation.

Others supportive or accepting of the broad approach included: A3P (sub. DR45, p. 4); Australian Paper (sub. DR41, p. 4); CSR (sub. DR47, p. 4); Law Council of Australia and Law Institute of Victoria (sub. DR56, table item 6); Penrice Soda Products (sub. DR54, p. 3); Sulo (sub. DR58, p. 2); and the TRTF (trans. p. 15).

However, several industry participants expressed strong reservations about a self-assessment approach for adjusting the variable factors, suggesting that it would be no substitute for decision-making based on properly verified information and be open to abuse. For example:

The proposals to have self assessment determine adjustments flies in the face of the commitment by parties to obtaining the best outcome in the first determination. It would not be unexpected to find that parties are unwilling to cooperate with spot audits and that it is not possible to prosecute overseas parties. This provision is wide open to abuse ... annual adjustments should be limited to where there is open transparent data which is of sound integrity. (CSR, sub. DR47, pp. 4–5)

The recommendation on self-assessment fails to recognise that if an overseas supplier is continuing to dump in Australia, it would have little incentive to admit that. There must be checks and balances to ensure that there is an incentive to provide accurate information during review of measures. (TRTF, sub. DR44, p. 4)

Others to raise this issue included: OneSteel (sub. DR49, p. 6); PolyPacific and Townsend Chemicals (sub. DR51, p. 8) and Qenos (sub. DR48, p. 3). And Qenos

further argued that all interested parties should be afforded the opportunity to participate in any adjustment to measures to ensure that Customs is able to comprehensively determine new variable factors.

Finally, several local industry interests also opposed the proposed changes to the duty collection system, with the Australian Dried Fruits Association (sub. DR52, p. 3) claiming that it would, in effect, lead to duty evasion. However, the proposal was supported by the Australian Steel Association (sub. DR57, para. 281).

The Commission's assessment

Adjustments to the magnitude of measures

The Commission remains of the view that there is a clear need for a new mechanism that would allow for more timely and cost-effective adjustments to the magnitude of *all* measures on an annual basis. Notwithstanding the concerns of some participants about the form of mechanism that should be adopted, regular adjustments are important to ensure the currency of measures and thereby minimise the risk that they may become either ineffective in removing injury or unreasonably punitive.

The current provisions do not meet these requirements. One set is very cumbersome and costly — involving what amounts to a new investigation, including exporter verification visits — and is only infrequently used. The other can only be triggered by an importer seeking a refund of overpaid duties, meaning that again reviews will not necessarily occur in every case where market conditions have changed significantly. It is also a retrospective review and does not adjust measures prospectively.

However, on further consideration, the Commission accepts that there would be some drawbacks in too heavy a reliance on self-assessment, especially if the cooperation of some of the parties were difficult to secure. Also, depending on precisely how the arrangement operated, there could be tension with the principle of verifiable information that underlies the WTO Agreements.

Thus the Commission is of the view that a preferable approach would be to employ a streamlined and generalised version of the sort of risk management approach currently used by Customs for adjusting the variable factors on a one-off basis under the duty refund process. Specifically:

- Customs would collect the data necessary to recalculate the variable factors via annual returns from overseas suppliers and, where the lesser duty has been applied, from the local supplier(s). Assembling such data should not be overly onerous for firms, particularly if they knew in advance that it would be required.

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- Customs would employ the sort of ‘risk managed’ verification of these data that it applies to the current duty refund provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on the use of desk audits of information provided by the relevant parties, reference to international price indexes, or other relevant price benchmarks. The Commission’s expectation is that this sort of approach would often obviate the need for costly and time consuming onsite verification. It further notes that application of the current adjustment provisions already involves trade-offs between precision and investigative cost. As such, the Commission’s recommended approach would be an extension of, not a fundamental change to, the current risk-management framework.
 - As a working objective, Customs should aim to complete the annual verification and updating process for each measure within 30 days. This would be considerably shorter than the time taken for most of the adjustments under the current arrangements.

Some form of sanction — or recourse to an alternative basis for making the adjustments — would be required when particular parties subject to measures do not provide the necessary information, or provide misleading information. In regard to the latter, the Commission has been advised that there is some uncertainty about the extent to which the existing penalty provisions might apply to the proposed adjustment process. Accordingly, were it judged necessary to facilitate greater reliance on desk audits, Customs could be granted additional powers to apply penalties for false reporting specific to this process. (Any such penalties would presumably need to make the importer liable for false reporting by its overseas supplier, and might also need to be of a somewhat different ilk where a local supplier had falsely reported on matters relating to the magnitude of a lesser duty.)

The adjustment process outlined above could, in some cases, lead to measures being set at a zero level (as can currently occur through the ‘review of measures’ arrangements). But to allow for the possibility that circumstances might, in future, see a return to a positive duty outcome, the Commission considers that measures should remain in place for the original duration. It also notes that there would seemingly be no problem in applying the proposed adjustment process to undertakings — a concern raised by Australian Paper (sub. DR41, p. 3). Though undertakings effectively involve a commitment by the overseas supplier not to export at below a particular price level, there is no reason why provision could not be made in an undertaking to annually adjust that price level.

Finally, the Commission considers that the outcomes of the adjustment process should be determined and notified by the CEO of Customs without the involvement of the Minister. This would be consistent with the streamlined nature of the new

adjustment mechanism — which is intended to be a timely and cost-effective, though still soundly based, means for ensuring that measures retain their currency, and not a more fundamental reassessment of whether those measures are appropriate. For the same reason, allowing appeals against the outcomes of the process would not be appropriate. In this context, the Commission notes that decisions made under the current review of measures arrangements are likewise non-appellable. (The Minister would, however, continue to make the final decision on the outcomes of continuation reviews (see above) which would, in future, automatically recalibrate the variable factors.)

RECOMMENDATION 6.5

The current ‘review of measures’ and ‘administrative review’ provisions should be abolished and replaced by a single new mechanism to adjust the magnitude of all anti-dumping and countervailing measures on an annual basis. The resulting adjustments, which should be determined and notified by the CEO of the Australian Customs and Border Protection Service (ACBPS), should not be appellable.

- The new mechanism should employ the sort of risk-management approach applied by the ACBPS when assessing requests for duty refunds under the current administrative review provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on desk-audits of information provided by the relevant parties, international price indexes, or other relevant price benchmarks.***
- Where this adjustment process leads to a zero duty rate, measures should still remain in place for the original term.***
- If considered necessary to facilitate greater reliance on desk audits, the ACBPS should be granted additional powers to apply appropriate penalties for false reporting.***

The basis for collecting duties

In keeping with the approach outlined in the Draft Report, the Commission is recommending a concurrent change to the basis for collecting dumping and countervailing duties. Notwithstanding the contentions of some local industry interests, it sees no reason why the current asymmetric collection approach is necessary to maintain the integrity of the system.

Specifically, it is recommending that the duties payable on individual consignments of goods subject to measures be based on the actual export price relative to the export price at which no duty would be payable given the prevailing variable factors. In practical terms, this would mean that duty would only be collected when

the actual export price was below the ‘price floor’ established by the applicable normal value or non-injurious price.²

This change would also allow for the abolition of the duty refund system. In the Commission’s view, there would be much less reason to retain a refund system within a regime where the magnitudes of all measures were adjusted on an annual basis to retain their currency, and where duty payments at the time of importation were based on these more contemporary levels.

The Commission notes the contention of Sulo (sub. DR58, p. 2) that, where the lesser duty rule has been applied, the sort of duty collection approach outlined above would not be possible. The Commission interprets this to be a concern about the potential for revelation of confidential information rather than a technical issue. That is, armed with single consignment-based information on the adjusted duty payable together with information from the overseas supplier on the relevant normal value, it might be possible for the importer to calculate the non-injurious price which may, in turn, have been based on the local supplier’s cost to make and sell.

But as discussed in the next chapter in regard to improved public reporting on the magnitudes of anti-dumping measures and the underlying basis for them, where the variable factors are based on aggregated information from several parties, these sorts of confidentiality concerns will be greatly diminished. And even where there are constraints on the amount of detail that can be overtly published because the variable factors are based on the circumstances of individual firms, it will be hard to prevent overseas suppliers and importers combining the information provided to them individually, to deduce this detail. Accordingly, the Commission does not consider that confidentiality concerns should preclude the introduction of the proposed new duty collection arrangements.

RECOMMENDATION 6.6

The basis for collecting dumping and countervailing duties should be modified. Specifically, for goods subject to a dumping duty, or to a countervailing duty involving the lesser duty rule, the duty collected at the time of importation should be based on the actual export price relative to the export price at which no duty would be payable on the basis of the prevailing, annually adjusted, variable factors. Concurrent with this change, provision for importers to seek refunds of overpaid duties should be abolished.

² Where a countervailing duty is based on the full benefit of the subsidy provided by the overseas government, rather than on the non-injurious price, the measure will not, of course, establish a price ‘floor’. Instead, the duty will simply be an add-on to the export price of the good concerned.

Revocation matters

While the main component of the current review of measures provisions would be rendered redundant by the recommended new annual adjustment process, those provisions also address some separate revocation matters. Thus there is provision for affected parties to apply for a revocation review where it is shown that, were the measure not in force, there would be no grounds for its introduction. (There have been two such revocations since 1998.)

However, if there were better monitoring by Customs of the impacts of measures (see box 6.7), then a more streamlined revocation process linked to that monitoring, and integrated with the annual adjustment of measures, would be possible.

Specifically, Customs should seek feedback on the impact of measures as part of the proposed new process for adjusting them. In the event that it received information indicating that local production of a good subject to measures had ceased, and was unlikely to recommence in the period for which the measures would otherwise remain in place, then it would recommend to the Minister that the measure concerned be revoked.

And were it judged necessary to maintain a self-standing revocation review process for WTO or other reasons, then at the very least, there should be an interlinkage with the new annual adjustment process and the related feedback provided to Customs on the effectiveness of measures. That is, if the circumstances outlined in the previous paragraph applied, Customs should then be able to initiate an (expedited) revocation review for consideration by the Minister.

RECOMMENDATION 6.7

The Australian Customs and Border Protection Service (ACBPS) should, as part of the annual adjustment of measures (see recommendation 6.5), seek feedback from the various parties on the impacts of those measures over the preceding 12 months — including on market prices — and investigate further if appropriate.

Where such feedback indicates that local production of a good subject to measures has ceased, and is unlikely to recommence in the period for which the measures would otherwise remain in place, the CEO of the ACBPS should advise the Minister to revoke the measures. This process should replace the current revocation arrangements.

Box 6.7 **Monitoring by Customs**

Following the imposition of measures, Customs is required to ensure that correct amounts of duty are paid and/or that the conditions in undertakings are adhered to. However, it does not disclose details of these monitoring activities. Nor do its monitoring activities normally extend to examining the impact of measures on the prices of the imported goods when sold in the domestic market.

To help address concerns about the lack of monitoring of the effectiveness of measures — including in regard to duty absorption by importers, circumvention through rebates and ‘country hopping’ — the Joint Study (2006) recommended that Customs should:

- assess the need for a formal compliance monitoring exercise, encompassing circumvention of measures, within 12 months of the imposition of measures (recommendation 19)
- explore existing review mechanisms available to it which may address duty absorption concerns (recommendation 20).

Nonetheless, concerns about the ineffective nature of current monitoring endeavours were again evident in this inquiry, with a number of participants suggesting that Customs should give much greater attention to what is happening to input costs in downstream markets. For example, OneSteel proposed that:

In addition to the duty collection function, Customs should also be involved in monitoring the effect of the interim duties imposed on market selling prices for the [goods under consideration] — to ensure that the duties imposed have the desired effect of enabling the industry’s prices to recover to non-injurious levels. (sub. 16, p. 18)

In the Draft Report, the Commission proposed that, as part of the annual adjustment of measures, Customs should actively seek feedback from local suppliers on the impacts of measures and, on the basis of this feedback, determine whether further action is required. This approach was endorsed by a number of respondents to the Draft Report, including: A3P (sub. DR45, p. 4); the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 15); PolyPacific and Townsend Chemicals (sub. DR51, p. 12); Qenos (sub. DR48, p. 5); and Sulo (sub. DR58, p. 3). As discussed in the text, the Commission is now recommending that this feedback also be used to underpin a more streamlined revocation process.

6.8 **Countervailing issues**

Australia’s anti-dumping system does not differentiate, in broad terms, between dumping and countervailing in regard to the information required to mount a case for measures. Nor does it differentiate in terms of the burdens of proof applying in relation to matters such as material injury and causality.

Nonetheless, it is clearly harder to mount countervailing cases. As noted in chapter 2, only one of the current measures in place is a countervailing measure. And while

there have recently been a handful of countervailing cases initiated — for example, toilet paper from China and currants from Greece — all have been withdrawn prior to the investigation being finalised.³ Some particular difficulties referred to by participants in this context included those resulting from the need to:

- identify the nature of an actionable subsidy and how an overseas supplier directly benefits from it
- determine its likely effects on trade
- establish a causal link between the subsidy and any material injury incurred.

Other countervailing-specific concerns raised by participants included:

- the European Union's recent change to the basis for most of its agricultural subsidies which has rendered them non-countervailable (Australian Dried Fruits Association, sub. 14, p. 5)
- Australia's narrower list of actionable subsidies relative to the list permitted by the WTO (see chapter 2).

Especially given that the 'fairness' case for taking action to offset subsidies provided by other governments is arguably stronger than for action against dumping, the concerns about the difficulty of mounting countervailing cases are understandable.

However, it is unclear how this difficulty could be addressed in a fundamental way without reducing the rigour of the assessment process. For example, even were there to be a shift in the information burden from those seeking measures to Customs, many of the information-related difficulties of satisfying the requirements for measures would remain. And given broader 'relationship' issues with other governments, any reduction in the rigour of the process would be problematic. Not surprisingly, therefore, concerns about the difficulties of bringing countervailing actions have been evident in many countries, with such measures being generally minor in number relative to anti-dumping measures (see chapter 3).

Similarly, it is hard to see how actions by countries to recalibrate their subsidies so as to quarantine them from countervailing action could be addressed independently of WTO reform processes. Moreover, the recent recalibrations by the European Union are hardly unique, with many countries taking care to ensure that their subsidies conform with WTO requirements.

³ The Commission notes that the current investigation of the alleged dumping and subsidisation of certain aluminium extrusions exported from China is ongoing, with Customs due to report to the Minister by 15 April 2010.

Nonetheless, the Commission is recommending two initiatives directed at improving the arrangements governing Australia's countervailing system.

- Where countervailing cases are initiated, there may be greater scope for Customs to take account of relevant overseas investigations (see recommendation 7.6.), thereby reducing the evidentiary burdens on applicant industries.
- Australia's list of actionable subsidies should be aligned and kept aligned with the wider WTO lists. While change in this area — which was canvassed by DFAT (sub. 22, paras. 3.14–3.16), and supported by many other participants (see, for example, Department of Agriculture and Food Western Australia, sub. DR43, p. 2; OneSteel, sub. DR49, p. 7) — would most likely have only a minor impact on the scope for Australian industries to bring countervailing actions, it would have a more general benefit by addressing a perceived unfairness in the current system.

RECOMMENDATION 6.8

Australia's list of actionable subsidies should be aligned and kept aligned with the lists in the latest relevant WTO agreements.

7 Administration of the system and implementation arrangements

Key points

- Customs, the Minister and the Trade Measures Review Officer (TMRO) should retain their broad roles within the anti-dumping system, though with some changes to their specific responsibilities. These roles and responsibilities should be reconsidered at the time of the next review.
- Current appeals processes should be modified to remove the need for reinvestigation of matters by Customs (unless the TMRO explicitly recommends such reassessment) and to widen the list of appellable decisions.
- Target investigation timeframes are often insufficient to allow for thorough assessment. As well as an increase of 30 days to allow for considerations against the public interest test, Customs should have greater flexibility to seek extensions in more complex cases.
 - Imposing a 30-day limit on decisions by the Minister and the reduced need for reinvestigations would provide offsetting time savings.
- Customs and the TMRO should be adequately and appropriately resourced for their functions under the new system.
- Customs should indicate in its investigation reports the relevance, if any, of the outcomes of any comparable overseas cases to the investigation at hand.
- To further improve the transparency of the anti-dumping system, there should be:
 - greater and more accessible public reporting on the number and nature of unsuccessful applications for anti-dumping measures
 - enhanced public reporting on the magnitude of anti-dumping measures and on the underlying variable factors.
- The Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.
- To give the parties time to adjust, there should be a two-year delay before the new public interest test and the changes to the continuation provisions take effect. The new arrangements should be independently and publicly reviewed five years after that.

In the two previous chapters, the Commission has proposed a small number of changes to the legislative basis for Australia's anti-dumping system which it considers would deliver a better balance between the system's benefits and costs.

But whatever legislative changes are made in response to this inquiry, some changes to the current administrative arrangements are warranted to promote more transparent and fair outcomes and to ensure that there is an appropriate balance between timely decision-making and a rigorous assessment process. In framing its recommendations on these matters, the Commission has had regard to the analysis and findings of the various administrative reviews over the last decade, including the 2006 Joint Study (see box 7.1).

This chapter also discusses the implementation of the Commission's proposed reform package and future review arrangements.

7.1 Decision-making responsibilities

The Commission is recommending that the Australian Customs and Border Protection Service (Customs), the Minister and the Trade Measures Review Officer (TMRO) should retain their current administrative and decision-making responsibilities within the anti-dumping system. However, their roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11), having regard to their efficiency and effectiveness within the refocussed system which the Commission is recommending.

The assessment of applications for measures

Submissions to the inquiry provided a range of commentary on Customs' performance as an assessment body.

While pointing to opportunities for improvement in that performance, those in favour of retaining a 'strong' anti-dumping system argued that Customs should retain its current responsibilities — observing that it has accumulated considerable expertise and is fair and balanced in applying the legislative requirements. Typifying these views, CSBP stated that it saw Customs as:

... housing built up expertise across all facets of an anti-dumping inquiry — injury analysis, market assessment, normal value and export price; having ... historical knowledge of past inquiries; ... strong contacts with other dumping administrations; and housing built up knowledge of the WTO Anti-Dumping Agreement and Australia's commitment in this regard ... (sub. 15, p. 11)

Box 7.1 The 2006 Joint Study

The Joint Study was initiated to ensure that administration of Australia's anti-dumping system reflects best practice and to respond to concerns of Australian manufacturers about the effectiveness of the system. The study was carried out by Customs and the Department of Industry, Tourism and Resources, along with the Department of Foreign Affairs and the TMRO. Its terms of reference specifically excluded examination of anti-dumping policy or the legislative basis for the system.

The study put forward more than 20 recommendations to improve the administrative arrangements — a number of which are discussed further in the text. All of the recommendations were accepted by the Government and, according to the advice received by the Commission, except for one (relating to warnings about making false and misleading statements), have now been implemented.

As well, the study briefly documented a range of issues, including some policy questions, that it judged were outside its terms of reference. Several of these — including the adequacy of access to anti-dumping protection for agricultural producers; consideration of wider benefits and costs; consideration in injury assessments of additional or potential profits; easing the so-called 'standing' requirements; giving the TMRO the power when reviewing a Minister's decision to substitute new findings; and introducing a time limit for the Minister's decision — were discussed in the previous two chapters, or are examined below in this chapter.

These participants went on to suggest that any relocation of the assessment function to a body such as the Australian Competition and Consumer Commission (ACCC) or the Productivity Commission would see dumping issues afforded lesser priority in view of the other functions of these bodies, and fairness given insufficient weight in the assessment process relative to efficiency.

There was also opposition to a return to a bifurcated assessment regime on the grounds that it would involve wasteful duplication of investigative effort and diminish the role of Customs in the assessment process. For example, the Cement Industry Federation stated that:

A single administration of the Anti-Dumping System is considered the most effective means of delivering timely outcomes and does not incur the additional resources involved in liaising with two separate administrative agencies. (sub. 9, p. 4)

A few other participants were, however, more open to the possibility of changes to assessment responsibilities. For example, the Australian Steel Association (sub. 28, para. 432) emphasised that, in view of the significant impacts that decisions have on interested parties, 'the quality of the decision making [should] be optimal and not be diminished by concerns as to speed and duplication'.

For its part, the Commission considers that there would be little merit in returning to a bifurcated assessment model such as applied during the tenure of the Anti-Dumping Authority from 1988 to 1998. The potential for duplication of effort, with consequent adverse impacts on timeliness and costs, and the uncertainty for stakeholders associated with the rehearing of the facts by a second body, are two important considerations in this context.

There is a somewhat stronger case for a separation of organisational responsibility for determining dumping and material injury/causality along the lines of some overseas regimes (such as in Canada and the USA — see appendix C). In particular, assessing material injury and causality requires different expertise from the task of establishing dumping. Also, the bifurcation of the process on this basis would involve less potential for duplication of effort. However, the number of anti-dumping cases is now probably too small to justify the costs of establishing a specialist agency to undertake the second stage of the assessment function.

The Commission is similarly unconvinced that there would be a net benefit from shifting responsibility for undertaking assessments under the new arrangements from Customs to a different body. The main argument for doing so would centre on the capacity of Customs to analyse wider impacts under the proposed public interest test. But, as discussed in chapter 5, the Commission has framed its recommended, exhaustive, list of circumstances when the imposition of measures would not be in the public interest to draw heavily on the analysis already undertaken by Customs in assessing dumping and injury matters. And in any cases where public interest issues were especially complex, it would obviously be open for Customs to seek advice from entities more experienced in the analysis of such matters.

Also, it would take considerable time and resources for a new assessment body to acquire the specific knowledge that currently exists within Customs in relation to the complexities of the system and the World Trade Organization (WTO) rules and procedures, and to replicate the linkages that Customs has established with overseas investigation bodies and the WTO.

Nonetheless, the Commission considers that the issue of assessment responsibilities should be revisited at the next review when Customs' capacity to effectively and efficiently undertake the new and revised functions would be more evident. The proposal in the Draft Report to retain Customs as the assessment body was widely supported — see, for example: the Australian Dried Fruits Association (sub. DR52, p. 1); the Australian Plantation Products and Paper Industry Council (A3P) (sub. DR45, p. 2); James Stevenson (sub. DR42, p. 13); Penrice Soda Products (sub. DR54, p. 3); Qenos (sub. DR48, p. 4); and Sulo (sub. DR58, p. 2).

Final decision-making responsibility

The final decision on whether to impose anti-dumping or countervailing duties, or to accept an undertaking from an overseas supplier, currently rests with the Minister. This separation of decision-making from the investigation process provides for independent scrutiny of the outcomes of that process.

Indeed, a number of participants argued that Ministerial involvement is important to maintain the integrity of the system, especially given the commercial and broader economic ramifications of the decisions involved. For example, the Trade Remedies Task Force (TRTF) stated:

To allow a Minister to be in a position to form his or her own evaluation is ... seen as a worthwhile exercise of discretion in appropriate circumstances ... Submissions could be made [to the Minister] as to the weight of evidence or to raise legal issues that have been ignored or inadequately considered during the investigation. (sub. 26, pp. 38–39)

In practice, however, there has only been one instance in the last decade where the Minister has departed from the recommendations of Customs (and then not on the basis of the discretion for the Minister to consider factors beyond dumping, injury and causality matters). This (and some question marks about the extent of the Minister's discretion — see chapter 2) led the Law Council of Australia and the Law Institute of Victoria (sub. 29, p. 6) to conclude that 'the responsibility for the anti-dumping system and decision-making should be undertaken by a government agency (or agencies) rather than through elected Parliamentary Representatives'.

Similarly, James Stevenson (sub. DR42, p. 11) stated, 'If an appropriate and lawful system concludes dumping is occurring then there is no need for the Minister to be involved.' And the Australian Steel Association (sub. DR57, para. 240) opposed any role for the Minister in the system, particularly if a public interest test were introduced, because there might be 'undue political pressure on the Minister'.

The Commission also sees considerable advantages in removing the Minister from the process. Given that Customs' advice has almost always prevailed, there have seemingly been few benefits from Ministerial involvement to offset the slower decision-making entailed. And, as discussed below, the Administrative Appeals Tribunal (AAT) or other specialist body would arguably be better equipped than the Minister to take on the enhanced decision-making responsibility that would be necessary under a more robust appeals process.

However, as also discussed below, an AAT approach would be more costly than an enhanced appeals mechanism that retained the role for the Minister. More broadly, at least until the public interest test is bedded down, retaining the Minister as the

ultimate decision maker may help to assuage concerns that the test will unreasonably deny access to anti-dumping protection.

On balance, the Commission considers that a cautious approach is warranted and that, for the time being at least, the Minister should continue to be responsible for making the key decisions within the system. But if the public interest test is operating effectively at the time of the next review, it might well then be appropriate to dispense with Ministerial involvement and instead leave all decision-making to non-political entities.

Responsibility for hearing appeals

As in the case of the assessment function, the proposed consideration of wider impacts in anti-dumping cases raises the question of whether responsibility for hearing appeals should be relocated to another body.

Most participants saw the TMRO as a cost-effective appeals mechanism. However, a smaller number considered that there should be a more robust arrangement. For example, the Australian Steel Association (sub. DR57, para. 256), suggested that consideration be given to a strengthened merits review process, such as through the AAT (see box 7.2). The Law Council of Australia and the Law Institute of Victoria, while not opposing an ongoing role for the TMRO, advocated that any subsequent litigation be undertaken on the basis that:

... the decision maker can substitute a new decision “on the merits” in a manner consistent with the reviews undertaken by the Administrative Appeals Tribunal. (sub. 29, p. 21)

And Richard Whitwell (trans. pp. 77–78) argued for the elevation of the review process to the level of a judicial tribunal, such as the Australian Competition Tribunal, in order to improve the veracity of the process.

The Commission similarly sees some advantages in using the AAT (or other specialist tribunal) in the appeals process. The AAT is the appeals body in some broadly comparable regulatory areas and has expertise that could be relevant in the anti-dumping area. Further, as noted earlier, use of the AAT would obviate the need to retain the Minister in the decision-making process.

However, the AAT approach could entail higher costs for the parties involved and possibly a more lengthy process as well. More importantly, for the reasons outlined above, the Commission is recommending that, for the time being at least, the Minister be retained as the ultimate decision maker.

Box 7.2 The Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) provides independent merits reviews of a wide range of administrative decisions made by Australian Government Ministers, departments, agencies, authorities and other tribunals.

In undertaking most reviews, it considers afresh the relevant facts, law and policy and will either affirm, vary or set aside the decision under review.

Proceedings of the AAT are conducted with as little formality and technicality, and with as much expedition, as the requirements of the *Administrative Appeals Tribunal Act* and a proper consideration of the matters permit. The AAT is not bound by the rules of evidence and can inform itself in any manner it considers appropriate.

The AAT falls within the portfolio of the Attorney-General.

Further, the Commission considers that the robustness of the TMRO arrangement could be enhanced through a small number of procedural changes (see below). And though, as with Customs, there are some questions over the TMRO's capacity to assess wider impacts, it too could draw on independent advice were any assessments under the public interest test to be especially complex. Of course, this would require the TMRO to be adequately resourced (see section 7.3).

On balance, the Commission considers that the TMRO should retain its role for the time being. Again, however, the Commission recommends that, in conjunction with the reassessment of the roles of Customs and the Minister, the benefits and costs of instead employing the AAT (or some other specialist appeals tribunal) should be revisited at the time of the next review.

RECOMMENDATION 7.1

The Australian Customs and Border Protection Service, the Minister and the Trade Measures Review Officer should retain their broad administrative and decision-making roles within the anti-dumping system, with their specific responsibilities modified, as appropriate, to reflect the Commission's other recommendations.

These roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11) in the light of experience with the new system.

7.2 The configuration of the appeals mechanism

As outlined in chapter 2, the extent of parties' rights to merits review, and the powers of the TMRO, differ across the different steps in the process. For example:

- While any interested party may appeal decisions concerning the imposition of anti-dumping duties, not all measures-related decisions are appellable (see below).
- Where an appeal relates to a decision by the CEO of Customs — for example, to terminate an application or investigation — and the TMRO reaches a different conclusion, it can substitute another decision. But where an appeal relates to a decision to impose or not impose anti-dumping duties, the TMRO can only recommend to the Minister that Customs reinvestigate the finding(s) concerned.

In reviewing decisions, the TMRO may only take account of information available to Customs in the course of the original investigation.

Over the last five years, the TMRO has reviewed around 80 per cent of the decisions by the Minister relating to the imposition of anti-dumping duties and around 90 per cent of the decisions by the CEO of Customs to terminate an investigation. The TMRO recommended that Customs reinvestigate around 60 per cent of the cases where measures had been imposed, and affirmed around 80 per cent of the decisions to terminate investigations.

Most local industry interests argued that the scope of the current arrangements is appropriate and that there is no need to extend the powers of the TMRO. Typifying these views, the TRTF stated:

Any consideration of extending the function [of the TMRO] to include more than the present role would have resource implications for the present role which is performed by one officer. Additional resources would need to be provided and different set of skills needed for the role of the TMRO. The position of the TRTF is that the present role of that officer is sufficient and there is no need for change. (sub. 26, p. 42)

However, others, such as the Australian Steel Association (sub. 28, paras. 849–857), contended that the mandate of the TMRO is unduly limited. Similarly, the Law Council of Australia and the Law Institute of Victoria stated:

In many cases, the TMRO does not have the jurisdiction to review decisions. Even when the TMRO has jurisdiction to review decisions, the subsequent reinvestigation of decisions by Customs and the Minister leave aggrieved parties with recourse only to Federal Court litigation. Such litigation is, obviously, expensive and time-consuming. (sub. 29, p. 21)

The Commission concurs that the current appeal arrangements are not sufficiently robust, especially in the context of the introduction of a public interest test that

would require Customs and the Minister to have regard to wider impacts. Some of the current restrictions on the types of appellable decisions and the process that sees many successful appeals simply reinvestigated by Customs are particularly questionable.

The list of appellable decisions

Decisions that are not currently appellable, include those relating to:

- the continuation of dumping or countervailing measures beyond the initial five-year term — that is, the decision whether or not to commence a continuation inquiry and the Minister’s subsequent decision if one is undertaken
- the acceptance of undertakings
- variations to the variable factors and magnitude of measures made under the current ‘review of measures provision’
- not initiating a review of the amount of interim dumping duty.

Obviously, there will be costs in adding to the list of appellable decisions. However, for continuation decisions in particular, the Commission considers that these costs would be warranted. While the basis for a decision to continue — or not to continue — anti-dumping and countervailing measures is different from the basis for the original decision to impose measures, in terms of the ensuing commercial implications, there is little or no difference between the two. Several submissions, for example from Penrice Soda Products (sub. DR54, p. 3), Qenos (sub. DR48, p. 3) and Sulo (sub. DR58, p. 2), supported the Draft Report proposal that continuation decisions should be appellable.

In practice, permitting appeals against decisions to accept undertakings may be of limited value. That is, an overseas supplier whose offer of an undertaking is not accepted can raise its prices, thereby creating a de facto undertaking (albeit one that currently involves the importer applying to Customs for a refund of duties paid). Similarly, as discussed in chapter 6, the Commission considers that allowing appeals against changes to the magnitude of measures under the proposed new adjustment mechanism could undermine the timeliness and cost-effectiveness of this mechanism. (However, the recalibration of the variable factors as part of a continuation decision should be appellable, consistent with the Commission’s recommendation on the other elements of continuation decisions.)

The reinvestigation process

The provision which limits the TMRO to ordering a reinvestigation by Customs where it disagrees with a decision made by the Minister is, in the Commission's view, a further significant shortcoming in the current arrangements. An appeal arrangement which simply leads to reinvestigation by the provider of the advice on which the decision was based cannot reasonably be regarded as robust or fair.

There are several ways in which this deficiency could be addressed:

- remove the need for reinvestigation by handing final decision-making responsibility where there is a successful appeal to the AAT or another specialist tribunal
- allow the TMRO to substitute a decision made by the Minister
- require Customs to reinvestigate the case on the basis that the findings in the original investigation that were successfully appealed were flawed — as canvassed by the Law Council of Australia and the Law Institute of Victoria (sub. 29, pp. 17–18)
- remove the need for reinvestigation by requiring the Minister to make a final determination having regard to the findings of both the TMRO and the initial advice from Customs.

The Commission's view

The previously discussed considerations that militate against using the AAT (or other specialist tribunal) in place of the TMRO and the Minister, are also germane to the option of using the AAT in situations where the TMRO's view differs from that of Customs. In particular, at least until the public interest test is bedded down, retaining the Minister as the ultimate decision maker would be beneficial. This same consideration also weighs against allowing the TMRO to substitute decisions made by the Minister (as distinct from those made by the CEO of Customs).

Ordering a reinvestigation by Customs starting from the premise that some of the initial findings were flawed could preclude Customs merely reaffirming its original advice to the Minister. But if acceptance of the grounds on which an appeal has been upheld would necessarily lead Customs to overturn its original advice, then the question arises as to what a reinvestigation would add.

As it argued in the Draft Report, in the Commission's view, the best general approach would be to require the Minister to make a final decision based on the original advice from Customs and the advice from the TMRO. This would avoid the moral hazard problems associated with Customs investigating its own decisions and

reduce the time taken to finalise appealed cases. Though there are no pre-specified time limits for reinvestigations by Customs, in recent years they have averaged around 80 days, (not including the time taken for the Minister to make a second decision).

In responding to the Draft Report, CSR (sub. DR47, p. 5), the Food & Beverage Importers Association (sub. DR46, p. 2), Poly Pacific and Townsend Chemicals (sub. DR51, p. 9) and SCA Hygiene (sub. DR60, p. 3) supported this general approach, with several commenting that it would speed up the decision-making process. However, OneSteel (sub. DR49, p. 7), Sulo (sub. DR58, pp. 2–3) and Qenos (sub. DR48, p. 4) opposed the change, with the latter arguing that the conflicting advice would cause a dilemma for the Minister.

The Commission accepts that an approach requiring the Minister to make a decision based on two sets of competing advice could be seen as putting the Minister ‘on the spot’. But this is not a reason to maintain the flawed current arrangements. If it transpires that the proposed general approach is not effective — for example, were it to significantly increase the spectre of lobbying, or simply lead to de facto reinvestigation by Customs — then this would strengthen the case for moving to an AAT-type approach and removing the Minister from the decision-making process.

However, on further consideration, the general approach could be usefully augmented with scope for the TMRO to recommend reinvestigation by Customs having regard to specific matters. This would cater for situations where the TMRO found Customs’ analysis and/or findings to be flawed, but did not have the information available to determine what the appropriate conclusion should be. Such flexibility would help to ensure that the TMRO was not forced to come to a definitive position simply to provide the Minister with a competing recommendation. Provision for a conditional and constrained reinvestigation would also enable the introduction of relevant new information if circumstances had changed, or if particular information germane to the case had not been considered in the initial investigation.

The Commission in turn gave consideration to the question of whether the outcomes of reinvestigations involving new information should be appellable. On in-principle grounds, there would be some case for allowing merit reviews in these situations. However, the risk is that this could lead to a series of reinvestigations. Therefore, in the Commission’s view, broadening (merit) appeal rights to encompass this subgroup of reinvestigations, would not be warranted. But there should continue to be scope for parties to appeal the Minister’s final decision — whether based on competing advice from Customs and the TMRO, or a reinvestigation by Customs — to the Federal Court on matters of law.

Finally, the Commission notes that even though the fundamental role of the TMRO in examining whether the original decision was reasonable would remain unaltered, this would not preclude fine tuning or clarification of that role to facilitate the introduction of the proposed new arrangements (as suggested by Customs (sub. DR61, p. 2)).

RECOMMENDATION 7.2

The following changes should be made to the current appeals arrangements for anti-dumping decisions.

- *Decisions on whether or not to commence an investigation into the continuation of anti-dumping or countervailing measures beyond the initial five-year term — and any ensuing decisions by the Minister — should be appealable.*
- *Where the Trade Measures Review Officer (TMRO) finds in favour of an appeal against a decision made by the Minister, the Minister should make a final determination without returning the case to the Australian Customs and Border Protection Service (ACBPS) for reinvestigation, unless the TMRO explicitly recommends a reinvestigation. In the event of the latter:*
 - *the reinvestigation and report to the Minister should be conditioned and constrained by a directive from the TMRO on where the initial investigation was flawed*
 - *within the confines of that directive, there should be scope for the ACBPS to consider relevant new information.*

Any such reinvestigations and ensuing decisions by the Minister should not be appealable.

7.3 Timeliness and resourcing issues

What is the scope to further reduce assessment timeframes?

Expediting assessments of applications for anti-dumping measures has been an ongoing focus in the administrative reviews of the system over the past two decades. As a result, Australia now has one of the speediest systems in the developed world (see chapter 2).

Significantly, a common view among inquiry participants was that there is not much slack left in the system. Indeed, a number suggested that there is now not enough

time allowed for more complex investigations. For example, the Cement Industry Federation contended that:

It is not always practical to align each and every investigation with the legislated timeframe of 155 days (hence the need for timeframe extensions, from time to time). (sub. 9, p. 10)

And the TRTF suggested that:

It may be worthwhile considering having the investigation period extended by an additional 30 days, rather than having constant extensions of time. (sub. 26, p. 38)

In this regard, Customs indicated that it has been seeking and receiving extensions to standard time limits in a growing number of cases. In fact, over the past decade, Customs has completed only around 40 per cent of investigations within the 155-day timeframe, with the average extension on the remainder being close to 60 days. It noted that the amount of time required for an investigation is dependent on many factors including:

... the number of interested parties, number of countries involved, complexity of issues (including whether there is a simultaneous dumping and countervailing application) and available resources. (Australian Customs and Border Protection Service, sub. 33, p. 12)

It is conceivable that better resourcing of the investigation process or improvements in investigatory skills (see below) could facilitate somewhat speedier assessments. Improvements in the timeliness of particular investigations might also be possible were Customs able to more expeditiously secure necessary information from overseas suppliers. However, the provisions covering the determination of the variable factors where sufficient information is not furnished by the overseas supplier, suggest that any such time savings would be generally modest.

The Commission therefore concludes that a more balanced and nuanced approach to investigation timeframes is now required. Timeframes that necessitate frequent appeals for extensions are in many respects tokenistic and can create unrealistic expectations which can be hard to manage. And the Commission's proposed consideration of wider impacts as part of the assessment process will require specific recognition within the statutory timeframes (see recommendation 5.1).

That said, a generalised and significant increase in the current time limits could reduce the discipline on parties to proceed in the most expeditious fashion. Accordingly, at least for the time being, a preferable approach to a generalised increase in the specified time limits would be to increase the flexibility provided to Customs in seeking extensions of time for more complex cases. At present, Customs can only seek an extension once and then only at a relatively early stage in the investigation process. A requirement for Customs to include all correspondence relating to extensions on the public file — in addition to notification through the

issue of an Australian Customs Dumping Notice — would help to ensure that this greater scope to seek extensions was used appropriately.

Further, it would be useful if Customs reported annually, and in a publicly accessible and consolidated fashion, on the actual times taken on all investigations. Its ‘Anti-Dumping and Countervailing Actions — Status Reports’ would be an appropriate vehicle for doing so.

Some respondents to the Draft Report supported this approach — for example, A3P (sub. DR45, p. 5) and PolyPacific and Townsend Chemicals (sub. DR51, p. 10). However, others raised concerns about any lengthening of investigation timeframes through either increases in the statutory time limits or ‘easier’ access to extensions — for example, the Australian Dried Fruits Association (sub. DR52, p. 4), CSR (sub. DR47, p. 5), Qenos (sub. DR48, p. 4) and Sulo (sub. DR58, p. 3). Some went on to suggest that longer time frames could be avoided by better resourcing for Customs and, that when extensions are granted, provisional measures should automatically be applied from day 110 of an investigation.

The Commission understands the concerns that underlie opposition to greater scope for extensions to investigation timeframes. Indeed, to keep the number of extensions to a minimum, it has emphasised the importance of appropriate resourcing for Customs (see below).

However, as noted above, given the increasing complexity of investigations, without a significant increase in statutory timeframes, extensions will necessarily be part and parcel of the system. To avoid easing the time discipline in less complex cases, as it argued in the Draft Report, the Commission considers that a more accessible and transparent extension arrangement would be preferable at this stage. Indeed, the ability of Customs to seek extensions when required might reduce any incentive it may have under the current system — where there is only one opportunity to seek an extension — to make ‘ambit claims’ to provide for contingencies. Accordingly, a more flexible extension arrangement could, in practice, sometimes result in speedier investigations.

The Commission further considers that it would not be appropriate to automatically put in place provisional measures at day 110 whenever an extension is granted — even if this were possible without breaching WTO requirements. The merits of an application are not correlated to the complexity of an investigation and therefore the need for additional time. And though securities would not be collected if the application for measures was ultimately unsuccessful, their impost could clearly disadvantage the importer/overseas supplier in the intervening period.

The change which the Commission is recommending to the investigation extension arrangements may well prove sufficient to balance competing timeliness and

thoroughness considerations. Nonetheless, the adequacy of the general time limits should be assessed as part of the next review, having regard to experiences with a more liberal extension provision and the time demands associated with consideration of wider impacts, as well as to the efficiency of Customs in deploying the resources available to it.

Ministerial decision-making timeframes

In the Commission's view, it is incongruous that Ministerial decision-making is the only step in the non-appeals component of the process which is not subject to a time constraint — even if in practice most decisions have been forthcoming without undue delay. This deficiency should be rectified. Accordingly, the Commission proposes that all decisions by the Minister should be subject to a 30-day time limit (including decisions relating to appeals).

In conjunction with the proposed changes to the appeal arrangements to significantly reduce the need for reinvestigations by Customs, the proposed time limit on the Minister would be an offset to the additional time required to allow for the application of the public interest test and the greater scope for Customs to seek extensions of the investigation period.

Responses to the Draft Report were consistently supportive of the introduction of such a time limit — see, for example, A3P (sub. DR45, p. 5), the Food & Beverage Importers Association (sub. DR46, p. 2) and Sulo (sub. DR58, p. 3) — although, as noted above, some participants suggested the Minister be removed from the decision-making process altogether.

RECOMMENDATION 7.3

Provision should be made for the Australian Customs and Border Protection Service (ACBPS) to seek extensions of the investigation period at any time during an investigation. In addition to notification of extensions through the issue of an Australian Customs Dumping Notice, all correspondence relating to such requests should be made available on the public file.

This new arrangement, together with the adequacy of the general time limits for the various steps in the investigation process, should be assessed at the next review (see recommendation 7.11), having regard to experience in the intervening period under the new system.

Through its 'Anti-Dumping and Countervailing Actions — Status Reports', the ACBPS should provide an annual, consolidated, summary of the timeliness of each of its investigations in the preceding 12 month period.

Decisions by the Minister in response to advice from the Australian Customs and Border Protection Service, or from the Trade Measures Review Officer, should be subject to a 30-day time limit.

Resourcing and skilling issues

Some of the Commission's proposed changes, and in particular the public interest test requirement, would increase the costs of undertaking investigations. Other changes, such as the proposed annual adjustments to the magnitude of all measures and enhanced monitoring of the impacts of measures, would also add to the demands on Customs' resources. However, these impacts would be offset to at least some extent by: the removal of the need for Customs to reinvestigate appealed cases when the Minister makes a decision based on the competing advice of Customs and the TMRO; and the changes to the duty collection arrangements in conjunction with the abolition of the duty refund system.

Nonetheless, several participants argued that the investigation process should be better resourced and that the range of skills available to Customs, in particular, should be augmented. For example, the Plastics and Chemicals Industries Association contended:

Greater resources ... need to be provided to Customs to ensure the appropriate expertise is available. This expertise could be brought in on a case by case basis, but it is vital that those dealing with the case ... have greater sectoral/industry specific knowledge, preferably with expertise in business and markets. (sub. 31, p. 11)

Further commentary of this nature is reported in box 7.3.

The Commission is obviously not in a position to determine precise resourcing requirements for either Customs or the TMRO. These will depend on several factors, including:

- the ultimate configuration of the new arrangements determined by the Government
- whether any new skills are required (although the Commission reiterates that it does not see the public interest test as adding significantly to current skill needs)
- the efficiency with which available resources are used and hence on the effectiveness of the governance arrangements for the two entities. (In this regard, on the basis of its informal discussions with stakeholders, the Commission has formed the impression that the concerns reflected in box 7.3 may have as much

to do with governance practices within Customs, as with a lack of access to appropriate skill sets)

- the balance between in-house and outsourced resources. Were infrequently required skills contracted in, rather than maintained on a permanent basis (within Customs in particular), then the overall costs of appropriately resourcing the system would most probably be lower.

Box 7.3 Stakeholder views on Customs' investigative capacities

Stakeholders raised a number of specific concerns about Customs' investigation skills. For example:

[Bradken] recommends that the investigation teams are well resourced with personnel and expertise commensurate with the case under review, with access to industry specific experts, capable of really understanding the nuances of the industry under consideration, and industry-seasoned personnel with a track record of success in forensic accounting, legal and international marketing. (Bradken, sub. DR59, p. 1)

Customs would benefit substantially from an increased understanding of investigative processes and research methodologies in anti-dumping investigations as undertaken by other administrations (e.g. USA and EU). (Cement Industry Federation, sub. 9, p. 6)

More attention should be paid to the adequate resourcing of inquiries ... [including] ... more productive use of personnel, ... improved planning, ... the mandatory inclusion of industry expert resources on investigative teams and access by Customs to forensic financial investigators. Customs should not be limited to resourcing investigations with its own personnel, but must include outside expertise on its teams. (CSR, sub. DR47, pp. 5–6)

A number of NFF members have ... raised concerns over the drain of corporate and industry-specific knowledge within Customs' Trade Measures Division and with the Dumping Liaison Unit, particularly as it relates to the specific treatment of agricultural products ... The NFF believes that it is critical that Customs maintain a body of expertise on the application of Australia's anti-dumping system across all sectors, in particular, agriculture. (National Farmers' Federation, sub. 6, p. 7)

Our experience has been one where Customs officers were basically incapable of determining 'like goods' in circumstances where it was a contestable issue. They relied upon and were influenced by the customers of the goods under investigation ... The misinformation basically led to the collapse of our application until such time as it was resurrected at the 'eleventh hour' with the assistance of academic input. Unfortunately at that point of the investigation we were already 'dead in the water'. (PolyPacific and Townsend Chemicals, sub. DR51, p. 11)

The Commission further notes that implementation of the skill-related initiatives ensuing from the Joint Study should, over time, also help to address some of the concerns voiced in this inquiry. For example, consistent with a greater emphasis on contracting in required skills, the Joint Study recommended that Customs develop procedures to facilitate the use of experts to improve its analysis and decision-making.

That said, without adequate and appropriate resourcing, the effectiveness of the new arrangements — and especially the public interest test in screening out cases where measures would be ineffectual or disproportionately costly — will inevitably be compromised. The recommendation in the Draft Report related to the sufficiency of resourcing was widely endorsed by participants irrespective of their views on the specific requirements of the system.

RECOMMENDATION 7.5

The Australian Government should ensure that the Australian Customs and Border Protection Service (ACBPS) and the Trade Measures Review Officer (TMRO) are adequately and appropriately resourced to enable them to effectively undertake their functions under the new system. The level of resourcing should take into account the opportunities for the ACBPS and the TMRO to engage outside expertise to enhance the quality and/or cost-effectiveness of aspects of their assessment tasks.

The outcomes of overseas investigations

Though the Commission is not making any detailed recommendations on skilling issues, there is one aspect of the investigation process impacting on the quality of assessments where there appears to be some ‘low hanging fruit’. Specifically, several participants contended that Customs is overly reluctant to draw on the outcomes of, and analysis in, overseas anti-dumping cases, to the detriment of the investigation process. For example, Orica Australia stated:

Increased recognition is required of investigations by other administrations (eg. EU, Canada and the USA) in respect of goods exported by the same exporter (or related party) the subject of the Australian industry’s application. For example, the EU and USA have anti-dumping measures applicable to ammonium nitrate exported from Russia – non-confidential information available from the EU and USA investigations could assist the Australian investigation. Similarly, investigations by other administrations into related products to ammonium nitrate could also assist – eg. EU and USA investigations into urea and urea ammonium nitrate solutions would provide insight into normal value considerations. (sub. 18, p. 8)

In a similar vein, Windsor Farm Foods observed:

WFF’s experience with its preserved mushrooms case was that Customs paid little attention to the findings of the US administration in its investigations ... There were aspects of the US investigations relating to government ownership and participation in the Chinese food processing sector which should have been considered in the Australian investigation. It is unacceptable for the findings by other administrations to be totally discounted in favour of simple question and answer responses from exporters. (sub. 37, p. 11)

Of course, every investigation will have unique aspects, meaning that caution is required in transposing any overseas analyses to Australian circumstances. In elaborating on this point in response to the Draft Report, the Australian Steel Association (sub. DR57, para. 265) noted that specific key variables in overseas cases — such as normal values, like goods and injury determinations — may not be directly transferrable to an Australian investigation. Similarly, PolyPacific and Townsend Chemicals said:

We see dumping cases in Australia as having circumstance peculiar to the Australian market and therefore distinctly separate from circumstances applicable in other markets. Decisions should only be made based on the merits of the information, data and arguments, as presented in Australia. (sub. DR51, p. 11)

However, the Commission considers that Customs may be overlooking some opportunities to usefully draw on overseas experience and investigations — particularly in countervailing cases or those involving claims of subsidised inputs, where information on subsidies may otherwise be difficult to obtain.

Importantly, the use of such information, where appropriate, need not distract from a proper assessment process, a point of concern to the Law Council of Australia and the Law Institute of Victoria (sub. DR56, p. 3). Rather, information assembled as part of overseas cases may provide a means to both test and augment the information available to domestic investigations, and thereby enhance rather than compromise thorough assessment. At the very least, there should be the expectation that Customs will take proper account of relevant overseas outcomes and that its reports should provide assurance to stakeholders that it has done so. The proposal to this effect in the Draft Report was welcomed by several participants, for example, the Australian Dried Fruits Association (sub. DR52, p. 4) and Qenos (sub. DR48, p. 4).

RECOMMENDATION 7.6

In providing advice to the Minister on whether anti-dumping measures should be imposed or continued, the Australian Customs and Border Protection Service should indicate in its investigation reports whether there have been any comparable recent cases in other countries; what the outcomes of those cases were; and what is the relevance, if any, of those outcomes to the investigation at hand.

7.4 Increasing transparency

The benefits of transparent regulatory arrangements in promoting procedural fairness, reducing risks to firms and promoting the public interest more generally are widely recognised.

Significantly, as noted in chapter 4, submissions from across the full spectrum of stakeholders raised concerns about the lack of transparency in the current anti-dumping arrangements. The same concerns were also evident in submissions to the Joint Study and led to several (now implemented) recommendations to deliver more transparent outcomes. These included: more comprehensive ‘public file’ summaries of confidential information submitted to investigations; prompter lodgement of material on the public file; access to public file information via the Customs’ website; and a variety of improvements to Customs’ public reporting of its activities, policies and analytical approaches.

Some of the Commission’s recommendations elsewhere in this report would also have transparency benefits, including reporting by Customs on the wider impacts of anti-dumping measures (recommendation 5.1) and strengthened appeals processes (recommendation 7.2). And its proposed easing of some of the current time pressures on Customs (recommendation 7.3) would more generally facilitate greater transparency in the assessment process. In addition, the Commission sees scope for a small number of further reforms to address some particular transparency issues.

Information on applications that do not proceed to investigation

Public notification of applications for anti-dumping and countervailing measures prior to initiation is precluded by the WTO agreements. Specifically, the Anti-Dumping Agreement indicates that:

The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. (WTO Anti-dumping Agreement, Article 5.5)

This prohibition on early public notification presumably reflects a concern to avoid any unnecessary trade chilling effects from applications that do not subsequently proceed to the initiation phase. And in countervailing cases, it enables discussions ‘out of the public glare’ with the government alleged to have provided an actionable subsidy.

However, these provisions have led to the situation where typically very little aggregated information is published after-the-event on unsuccessful applications for measures. This means that there can be a less than complete public picture of the usage of anti-dumping systems and trends over time. Thus in Australia’s case, while Customs has provided some limited information in its Annual Reports on aggregate

numbers of applications, including on those which are rejected or withdrawn prior to initiation, there is nothing to this effect on Customs' anti-dumping website or in its regular 'Anti-Dumping and Countervailing Actions — Status Reports'. Moreover, the information in its Annual Reports does not provide any detail on the sectoral or country break-up of rejected or withdrawn applications that would allow for comparison with the much more extensive information published on the nature of initiated cases and measures in force.

Accordingly, in the Draft Report, the Commission proposed that Customs should report annually — in its 'Anti-Dumping and Countervailing Actions — Status Reports' and on its anti-dumping website — on the number of applications for measures that do not proceed to initiation, and the products and countries that were the subject of those applications.

This proposal attracted strong criticism from several participants. While supporting more accessible reporting on the number of applications that do not proceed to initiation, the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 13) contented that disclosure of the products and countries that were the subject of such applications would serve no useful purpose and could, in fact, be commercially detrimental to the local producers concerned. Local industry interests expressed similar concerns — see, for example, the Australian Dried Fruits Association (sub. DR52, p. 4), Qenos (sub. DR48, p. 5) and Sulo (sub. DR58, p. 3). Indeed, A3P (sub. DR45, p. 5) was one of the few participants to support the draft recommendation.

However, in the Commission's view, information on product coverage and the countries involved is highly relevant from a transparency perspective, not least by shedding additional light on the usage and impacts of the system. By way of analogy, were information on initiated cases limited only to numbers of cases, public scrutiny would be substantially compromised.

Moreover, it is difficult to see how commercial interests would be significantly prejudiced by more detailed, after-the-event, reporting on non-initiated applications on a consolidated basis. Indeed, if a case is initiated — that is, the application is sufficiently meritorious to warrant investigation — details of the applicant companies and the countries of origin of the imported goods concerned immediately become public. And to the extent that greater after-the-event reporting on non-initiated applications deterred less meritorious claims, there could be both some cost savings and lesser incentives to engage in strategic filing behaviour.

There might be a concern that even consolidated, and after-the-event, reporting on unsuccessful applications could be potentially inconsistent with Article 5.5 in the Anti-Dumping Agreement and its counterpart in the Countervailing Measures Agreement. But as alluded to above, the intent of these Articles is seemingly to

preclude reporting at the time of application on a case-specific basis. Thus, the Commission does not see an extension to Customs' current after-the-event reporting on unsuccessful applications as being particularly problematic in a WTO context.

The Commission is therefore not inclined to modify its Draft Report proposal.

RECOMMENDATION 7.7

Through its 'Anti-Dumping and Countervailing Actions — Status Reports', the Australian Customs and Border Protection Service should report annually on the number of applications for anti-dumping measures that do not proceed to initiation, and the products and countries that were the subject of those applications.

The treatment of confidential material submitted to Customs

While having due regard to the protection of commercially sensitive information, a well functioning anti-dumping system should give adequate opportunity for parties involved in investigations to respond to contentions made by others. And more general access to such information can have broader transparency benefits by facilitating scrutiny of the quality of the assessment process and its outcomes.

To these ends, the WTO agreements require investigating authorities to maintain a public record containing the non-confidential component of submissions and other relevant public material, together with non-confidential summaries of confidential material 'in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'. However, the Agreements do not provide more specific guidance on what is to be included in these non-confidential summaries.

In previous reviews, there has been considerable disquiet about this aspect of the Australian arrangements. For example, submissions to the Joint Study expressed concerns about the content of non-confidential documents — and, in particular: the practice of simply blacking out text to create non-confidential summaries; the slow placement of documents on the public file; and difficulties of accessing the file which, at that time, had to be viewed in person.

In response, the Joint Study recommended that:

- every deletion in non-confidential summaries should be followed by a bracketed summary containing sufficient detail to permit a reasonable understanding of the substance of the deleted information
- all relevant documents should be available on the public file at least two weeks prior to the publication of the Statement of Essential Facts
- the public file records should be available electronically.

But while these changes have now been made, there continue to be concerns about the adequacy of the public file arrangements and, in particular, the amount of detail typically provided in non-confidential summaries. Thus, the Australian Steel Association contended that:

... the highest priority should be to rigorously test claims for confidentiality and ensure that non-confidential summaries go as far as possible to present meaningful data. (sub. 28, para. 413)

It is clearly the case that the current confidentiality arrangements can make it very difficult for parties to contest ‘the facts’ of the matter. As a result, and notwithstanding the changes to the public file arrangements emanating from the Joint Study, the verification of facts and data submitted to an investigation remains heavily reliant on Customs.

One option for reducing this reliance on verification by Customs — and allowing for more ‘contesting of the facts’ — would be the introduction of arrangements known as Administrative Protective Orders (APOs). Such orders would provide legal representatives for interested parties with access to the confidential information provided by other interested parties during an investigation. Confidentiality arrangements of this nature are widely used in the USA and Canada and can, in fact, be used in Australia if an anti-dumping matter goes to the Federal Court on administrative appeal. Their generalised introduction to Australia’s anti-dumping system was advocated by several participants, including the Law Council of Australia and the Law Institute of Victoria (sub. 29, p. 9), the Australian Steel Association (sub. DR57, paras. 258–261) and Richard Whitwell (trans. pp. 77–78).

The case for an APO arrangement was examined in the Willett Review (1996), which recommended against introduction, largely on account of the associated increase in the costs of taking and defending anti-dumping actions. Cost considerations similarly led the Commission to reject the introduction of APOs in the Draft Report, though it noted that allowing professionals other than lawyers to act as agents within the APO framework could somewhat lessen such impacts.

In response to the Draft Report, the Australian Steel Association questioned whether the introduction of APOs would, in fact, generally increase costs. It said that stakeholders are already spending time and resources ‘hypothesising’ over the data submitted by other parties:

You’re doing the work in any event, you’re just doing it very badly and in a more time-consuming way than if you were given the material. (trans. p. 46)

And the Law Council of Australia and the Law Institute of Victoria (sub. DR56, p. 4) contended that any increase in costs associated with APOs would be offset by an improvement in the quality of decision-making.

Nonetheless, having further considered the arguments, the Commission is still not attracted to an APO approach. While allowing for greater contesting of facts and thereby somewhat improving the information available to decision makers, these benefits would come at a cost of a more adversarial, longer and potentially more expensive process — especially if access to confidential information under these orders were limited to lawyers. And decisions could still rely heavily on the judgement of Customs, the TMRO and the Minister, given that the APO approach would not necessarily resolve competing claims.

In the Commission's view, a better approach, for the time being at least, would be to apply the non-confidential summary arrangements more rigorously and implement better public reporting on the outcomes of investigations (see below). As well as enhancing general transparency, such greater public disclosure would increase the scope for participants to challenge decisions through the appeals process if they were based on flawed information. However, if such incremental initiatives prove insufficient, then the introduction of an APO arrangement — providing scope for the involvement of a range of relevant professions and drawing on their associated sanctions — might become warranted.

Reporting on the outcomes of investigations

In a system that relies so heavily on judgement, and where there are significant constraints on participants' ability to contest the facts of the matter, even if an APO arrangement were to be introduced, it is crucial that:

- the basis for decisions is properly explained and documented
- the outcomes of that decision-making process are similarly clear.

This is not the case at present.

The focus in the first instance must be on reports by Customs to the Minister setting out whether the conditions for the imposition or continuation of anti-dumping measures have been met. However, transparency in regard to the magnitude of measures imposed, and changes in their levels over time, is also important.

What are the concerns?

The Joint Study (2006) recommended that Customs examine means to improve its reporting, specifically through:

- improving its analysis and reporting of material injury and causal link, taking into account the approaches of other jurisdictions (recommendation 15)

-
- amending the anti-dumping website to provide access to all relevant information and reports with improved navigation links and making approved forms available in an electronic format (recommendation 22).

But, as is evident from submissions to this inquiry, the adequacy of Customs' reports in regard to the basis for, and explanation of, its findings continues to be a source of concern. Particular matters on which reporting is seen to be deficient include: likeness; normal values and the other key parameters relevant to the magnitude of any anti-dumping measures; the analysis of injury and the determination of causality; and the threat of a reoccurrence of dumping if measures were discontinued.

In essence, key parts of the investigative process and its outcomes are still widely viewed as a 'black box'. For example, Dow Chemical commented that administration of the system is at times:

... contradictory as well as obscure and does little to engender confidence that the formal assessments of non-injurious pricing, material injury and causality are managed in an impartial and equitable manner. (sub. 3, p. 19)

In a similar vein, A3P observed that:

... members' experience regarding the transparency of the anti-dumping system and outcomes is somewhat negative in that there is limited transparency, lack of feedback, and some inconsistencies in the assessment and investigation process. Improvement in these areas would ease potential applicants' concerns pre-application and avoid follow-up and misunderstandings post-outcomes being applied or dismissed. (sub. 21, p. 6)

Moreover, when measures are imposed, the information that is provided to affected parties on the basis for those measures will depend on the circumstances of the case. Rarely will any of the parties receive full information on the underlying parameter values or, in some cases, even the duties that have actually been imposed. As a result:

- Several local suppliers that have 'won' anti-dumping cases noted that they could not be certain what the impacts on selling prices of the imported goods concerned should have been, and thus whether they had received a good return for the time and cost involved.
- Following the imposition of measures, new exporters and importers may not find out what precise duties are applicable to them until they have entered into contracts to supply goods to parties in Australia and are able to provide contract prices to Customs.
- The Commission's discussions with stakeholders revealed that there are widespread misconceptions about the frequency with which the lesser duty rule is applied (a little less than half of the current measures).

-
- For the parties not directly involved in a case, and which cannot immediately access the public file for investigations, the availability of information on the magnitude of measures is even more limited.

What improvements are possible?

Given the WTO rules, and the nature of the assessment process and the measures that may ensue from it, there are limits on the extent to which the concerns outlined above can be addressed. In particular, while it is relatively easy to specify what matters should be covered in reports, assessing the adequacy of what is produced is much more subjective. The aforementioned confidentiality issues will also constrain what information can be placed in the public domain.

That said, an environment in which even key stakeholders cannot reasonably evaluate some of the foundations for Customs' advice, or the particular effects of the measures imposed, is not conducive to creating confidence in the system. With the proposed consideration of wider impacts, stakeholder confidence in the veracity of assessments will be even more important.

Thus, in the Commission's view, there needs to be much more information in the public domain on the magnitude of measures in place and the basis of the underlying calculations. As well as reducing the current uncertainty for stakeholders, provision of such information would allow for greater scrutiny of Customs' assessments and of the implications of the ensuing decisions for stakeholders and the community. As alluded to earlier, it would also increase the scope for decisions to be challenged through appeals if those decisions had been based on flawed information.

Indeed, there is an argument that transparency considerations should, to at least some extent, override confidentiality issues in determining how much information is publicly available. That is, a consequence of seeking measures, or being found to have engaged in dumping, might reasonably be that some otherwise confidential material will be made available to other stakeholders and the general public.

Notably, the sort of confidentiality concerns that are cited in a dumping context were apparently less of an issue when tariffs were set on a needs basis to ameliorate the publicly discussed cost disadvantages of local producers. And the Gruen Review (1986, para. 7.2.5) recommended that all normal values and non-injurious prices should be made publicly available at the time of a decision, and that Customs should each year publish ad valorem equivalents of measures. It also recommended that Customs and the Industries Assistance Commission exchange information to allow a 'thorough analysis of the impact of the system on the levels of protection afforded to different industries'.

The Commission further considers that concerns that the release of a greater amount of information on normal values and other variable factors might reduce cooperation by overseas suppliers in anti-dumping investigations may be somewhat overstated. Were these suppliers to be less cooperative because of the disclosure implications, then they would be at greater risk of having measures set using the alternative, and potentially less favourable, benchmarks.

But though the Commission considers that more information should be publicly available, determining just how much, and in what form, is far from straightforward. For example, the variability in export prices from consignment to consignment means that ‘real-time’ public reporting of actual duties collected could involve considerable time and effort for Customs. And from a general transparency perspective, a plethora of constantly changing information could confuse rather than illuminate. Also, there are challenges in finding ways to present such information while still complying with the confidentiality provisions in the WTO agreements, which prevent the disclosure of confidential information unless the parties concerned give permission.

Given this, the Draft Report canvassed some ‘half way house’ options for increasing transparency which would not involve the direct disclosure of any commercially sensitive information submitted by parties involved in particular cases. Specifically, it suggested that:

- As recommended by Gruen (1986), Customs could, on an annual, and non-case attributed, basis provide details of the ad valorem equivalents of all new measures introduced in the previous 12 months.
- Alternatively, or additionally, Customs could periodically report the range of actual duties paid on individual products subject to measures.

However, given the sensitivity of the issue, the Commission sought further input from participants on precisely what additional information might reasonably be disclosed — having regard to both the major information gaps under the current arrangements and the desirability of maintaining appropriate protection for commercially sensitive information.

Several participants responded to this request, but only in general terms. The Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 14) said a balance needs to be struck between transparency and disclosure of confidential information which could provide some parties with a competitive advantage. The TRTF expressed a similar general view, and added:

A company who is already suffering injury from predatory dumping practices should not have any additional injury caused by the passing of information to its competitors. The effectiveness of the anti-dumping system relies on its ability to ensure that both

local and overseas suppliers have confidence in the protection of the sensitive information provided in the course of any investigation. (sub. DR44, p. 4)

Several other local producers — for example, BlueScope Steel (sub. DR55, p. 21) — made similar observations.

However, A3P (sub. DR45, p. 5) supported the publication of more information on the magnitude of measures and the underlying parameters, stating that such disclosure would lessen misunderstandings and the need for follow-up after measures had been applied. Windsor Farm Foods (sub. 37, p. 9) likewise advocated greater transparency, notably in the areas of normal value determination and adjustments to normal values.

Notwithstanding the very general nature of these responses, the Commission's own further analysis has:

- reinforced its view that there needs to be greater disclosure
- suggested ways of going further than the options canvassed in the Draft Report, while still maintaining appropriate protection for commercially sensitive information.

In particular, variables such as normal values and dumping margins are often calculated using information submitted by several parties. In such circumstances, making these variables public would not seemingly be a breach of the confidentiality of the information submitted by a particular party. Further, the Commission notes the European Union's practice of publishing actual dumping duties in ad valorem terms, as distinct from the Australian practice of simply reporting dumping margins and not revealing whether the lesser duty rule has been applied.

In essence, the Commission is recommending that, as a general principle, Customs should in future seek to publish full information on the actual magnitude of any anti-dumping measures imposed and the underlying variable factors, unless these would directly reveal commercially sensitive cost or price data submitted by one of the parties. And in this latter case, Customs should reduce the amount of information published on the measure in question by the minimum necessary to provide the requisite protection for the data involved. Also, it is recommending that information on annual adjustments to measures under the proposed new adjustment mechanism (see recommendation 6.5) be published on the same basis, and that there be summary (after-the-event) reporting on the number of cases in which the lesser duty rule has been applied.

Through its various reports and/or Australian Customs Dumping Notices, the Australian Customs and Border Protection Service (ACBPS) should be required to publish the maximum amount of information on the magnitude of individual anti-dumping and countervailing measures and the underlying variable factors that is consistent with maintaining appropriate protection for commercially sensitive information submitted by individual parties.

- *Where the ACBPS determines that the firm-specific nature of the measures or the variable factors (or some other reason) militates against disclosing full details on those measures, it should reduce the amount of information published by the minimum necessary to provide the requisite protection for the commercially sensitive material concerned.*
- *At the very least, the ad valorem equivalents of measures should be publicly notified at the time of imposition and following annual adjustments under the new adjustment mechanism (see recommendation 6.5).*

Customs should also report annually on the number of cases where the lesser duty rule has been applied.

7.5 Information issues

Access to ABS import data

For those seeking the imposition of anti-dumping or countervailing measures, lack of access to Australian Bureau of Statistics (ABS) import data suppressed on confidentiality grounds has been a perennial issue in past administrative reviews and one that has again been raised in this inquiry. In essence, the concern is that without access to such data, whether directly or through a third party, it can be difficult to mount a sufficiently robust case for Customs to initiate an investigation. For example, the Plastics and Chemicals Industries Association stated that:

It has become all too easy for the ABS to suppress vital market information on confidentiality grounds. The suppression of this data restricts the capacity of participants to ... pursue action where there is suspicion that injurious behaviour is occurring. (sub. 31, p. 11)

OneSteel contended that making such import data more widely available could have other benefits:

Perhaps if this information was readily available, claims of ‘frivolous and vexatious applications’ may fall as potential applicants can better assess their material injury claims prior to making a decision to lodge an application. (sub. 16, p. 14)

And Australian Paper went as far as to advocate full disclosure of details of individual import shipments.

Suppression of country of origin information in Customs/ABS import statistics is common in tariff codes affecting the pulp and paper industry. The problem is deeper than just country of origin volumes and prices. Even when import data for an individual tariff code and country of origin is available, there may be several suppliers of a good, or one tariff code may contain several distinct goods at quite distinct prices, some dumped or subsidised ... The only way this can be resolved is by full disclosure of individual import shipments as takes place in the US system. (sub. DR41, p. 3)

The Commission understands these frustrations. Indeed, it is somewhat incongruous that export data published or available on request from government agencies in other countries — which may closely approximate data that has been suppressed by the ABS — is sometimes used by an applicant for anti-dumping measures. In these circumstances, from the applicant's perspective, the effect of the confidentiality provisions is simply to increase the time and expense involved in seeking anti-dumping protection without having any ultimate material impact on the availability of the information concerned.

The confidentiality provisions concerned are, of course, generally applicable and set out in the ABS's enabling legislation. As such, they encompass considerations that extend beyond the anti-dumping system. In particular, the ABS stated that it:

... enjoys a high level of community trust and cooperation because the community is confident that the information it provides to the ABS will be protected ... [If the ABS lost] that confidence, the community may not provide information to the ABS, or may not provide accurate information, both of which would reduce the quality of ABS statistics. (sub. DR53, p. 2)

The ABS further indicated that it had made two submissions along these lines to the very recently finalised review by the Australian Law Reform Commission (ALRC) of the relevant laws and practices relating to the protection of Commonwealth information, including the scope and appropriateness of legislative provisions regarding secrecy and confidentiality. In that review, the ALRC considered options for ensuring a consistent approach across government to the protection of Commonwealth information, balanced against the need to maintain an open and accountable government through providing appropriate access to information. The ALRC reported to the Attorney-General on 11 December 2009.

In the Draft Report, the Commission proposed that the ALRC consider recommending a change to the legislation governing the operation of the ABS to preclude the suppression of import data when the same or similar information can be publicly accessed from the export statistics of other countries.

The proposal received strong support from participants, though several suggested that it did not go far enough. For example, BlueScope Steel contended that:

... the ABS takes an overly conservative approach and suppresses information beyond that which is required to protect the legitimate commercial interests of international suppliers and the local importing industry. (sub. DR55, p. 21)

And, as noted above, some participants suggested that the confidentiality restrictions be relaxed completely, such as along the lines of the arrangements in the USA.

However, reflecting its general concern to preserve confidence in the use of information supplied to it, the ABS (sub. DR53, pp. 1–2) was strongly opposed to the Draft Report proposal, suggesting that such a change would require it to play a direct role in administering the anti-dumping system. It further posited that there will always be differences between the records of goods imported into Australia and the counter-party export records (observing, for example, that differences between the date of export and the date of import could lead to differences in monthly data).

As it transpires, the Commission now understands that this particular matter was outside the scope of the ALRC review.

Nonetheless, the Commission still sees a strong case for some change to the current arrangements. And it does not share the concerns of the ABS that the Bureau's reputation for integrity, and the public's confidence in the security of material provided to the Bureau, would be undermined by a common sense approach to publishing data that is available elsewhere. In this regard, it is notable that for import data, the ABS does not rely on any voluntary participation by stakeholders — rather, it acquires that data directly from Customs. Also, while there may be small differences in import and export data ensuing from timing differences and variations in statistical codes, this does not negate the general argument in favour of publication.

The Commission accepts there may be some internal administrative costs associated with changing the relevant practices — and that these costs would need to be balanced against the associated reduction in costs for applicants for anti-dumping measures. Accordingly, and given that the matter appears to have been outside the scope of the ALRC review, the Commission is now recommending that the Government should consult with the ABS on the best way to ensure that the publication of such import data is not in future unreasonably precluded in circumstances where broadly equivalent data are publicly available from other sources.

The Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.

Access to other price information

Several participants also raised concerns about the difficulties for local industries of obtaining overseas price information to enable calculation of normal values and hence to support a prima facie case of dumping. Thus, the National Farmers' Federation contended that the Government should:

... take on a far greater role in assisting affected industries to compile market information on pricing and subsidy arrangements in overseas countries suspected of dumping products into Australia ... [utilising] Australia's extensive international network of diplomatic posts, Austrade and Customs representatives ... (sub. 6, p. 6)

The Plastics and Chemicals Industries Association (sub. 31, p. 11) echoed this view, suggesting that Australia's extensive international network, and in particular its diplomatic posts, could have a greater role in assisting affected companies. Australian Pork (sub. DR39, p. 6) also supported such initiatives, with a view to reducing the compliance costs for industries pursuing anti-dumping and countervailing activities. And, to further assist firms contemplating action against products imported from countries such as China, A3P suggested that:

... Customs (in conjunction with industry and potentially Austrade) [be] more proactive in benchmarking prices and costs in other 'Free Market Economies' in order to form an opinion if a 'Market Situation' exists or what the 'Normal Value' may be. This potential approach would be a significant improvement over the current approach where it is up to the applicants to prove pricing in a foreign country. (sub. DR45, p. 10)

However, the Commission does not see a case for initiatives of this sort. There are obvious limits on how heavily the Government can become involved in assisting Australian firms to take anti-dumping action. Also, in response to recommendations by the Joint Study (2006, pp. 16–17), Customs' new application guidelines have clarified the information requirements for normal values, as well as inviting applicants for measures to contact Customs for advice on accessing supporting trade data. The TRTF (sub. 26, p. 32) said that these and other changes to the application process made in response to the Joint Study have resulted in 'major improvements' over the previous arrangements.

7.6 Implementation and review of the new arrangements

Transitional issues

When making significant changes to policy settings, it can be beneficial to give those who may be adversely affected by them time to adjust — either through a phasing arrangement, or through a delay before the changes take effect.

In this case, many of the Commission’s proposed reforms do not raise adjustment issues and should be implemented as soon as practically possible. However, in the case of the proposed public interest test and the changes to the continuation provisions, immediate introduction would not, in the Commission’s view, be reasonable. Accordingly, in the Draft Report, the Commission proposed that once the legislation to give effect to the proposed reform package is passed, there be a two year delay before these particular components take effect.

The need to delay the introduction of the public interest test in particular was questioned by the Law Council of Australia and the Law Institute of Victoria (sub. DR56, p. 3). In commenting on the Draft Report proposal, they argued instead that applications not already in the system should immediately be subject to the public interest test, with only investigations underway, or applications for measures already submitted, dealt with under the current legislative requirements.

However, as several local industry interests argued, considerable work goes into the lodgement of applications prior to filing, which could be rendered redundant under such a grandfathering approach. More generally, the proposed public interest test and the new continuation requirements are significant changes to the current regime, with potentially substantial commercial ramifications for the particular parties concerned. Hence, in the Commission’s view, some additional breathing space, beyond that which would be offered by quarantining those ‘in the system’ at the time the reforms take effect, is appropriate.

At the same time, the Commission does not see the need for a more extended delay to enable, for example, further study of overseas approaches — as suggested by the Department of Agriculture and Food Western Australia (sub. DR43, p. 4). In the Commission’s view, such further assessment would be better conducted in the context of the next review (see below), once the new arrangements have been bedded down and there is a case history against which to assess the effects.

RECOMMENDATION 7.10

All of the proposed reforms should take effect as soon as practically possible, except for the new public interest test (see recommendation 5.1) and the changes to the continuation provisions (see recommendation 6.4). These should take effect two years later.

Review arrangements

The Commission further proposes that there be a broad and independent public review of the revised arrangements five years after the reform package is fully operational (or seven years after the enabling legislation is in place). The review should examine the impacts of the new requirements and what further changes, if any, are required, having regard to relevant policy developments in other countries.

RECOMMENDATION 7.11

There should be a broad and independent public review of the new anti-dumping system five years after the reform package is fully operative. Amongst other things, that review should examine:

- *the impacts on decision-making of the public interest test and whether that case history points to any gaps or deficiencies in the test and/or the accompanying legislative guidance, or to the need for supporting changes to other aspects of the legislative architecture*
- *the need for changes to the system framework separate from the public interest test requirements*
- *the efficiency and effectiveness of the Australian Customs and Border Protection Service, the Trade Measures Review Officer and the Minister in administering the anti-dumping system and giving effect to the new requirements, and whether any changes to their responsibilities are warranted in the light of that experience*
- *whether the resourcing of the assessment and appeals process is adequate and appropriate, having regard to any proposed changes in decision-making responsibilities*
- *what changes, if any, are required to the statutory timeframes for the conduct of investigations, or to the related provisions governing extensions to those timeframes*
- *the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, while continuing to provide appropriate protection for commercially sensitive material submitted by the parties, and what more might be done in this regard*
- *whether there have been changes to overseas anti-dumping regimes that could be relevant to the Australian system.*

APPENDIXES

A Inquiry processes and consultation

In line with its normal inquiry procedures, the Commission actively encouraged public participation in the inquiry.

- Soon after receiving the Terms of Reference on 26 March 2009, it advertised the inquiry in national and metropolitan newspapers and sent a circular to likely interested parties.
- In April 2009, it released an Issues Paper to assist those wishing to make written submissions. And to enable more targeted feedback, in September 2009, the Commission released a Draft Report outlining its preliminary analysis and reform proposals.
- During the course of the inquiry, the Commission met with various domestic stakeholders and government agencies and also held discussions (via video and teleconference) with representatives from the European Commission, the Canada Border Services Agency and the Canadian International Trade Tribunal. Following the release of the Draft Report, it also held a public hearing in Melbourne, at which six parties presented evidence.
- The Commission received a total of 61 written submissions — 34 prior to the release of the Draft Report and 27 thereafter. The public parts of these submissions are available on the Commission’s website (www.pc.gov.au).

Further details on submissions received, meetings and the public hearing are provided in the tables below. (Submissions received following the release of the Draft Report are prefixed by ‘DR’ in table A.1.)

The Commission thanks all those who contributed to the inquiry.

Table A.1 Submissions received

<i>Participants</i>	<i>Submission no.</i>
Australia-China Chamber of Commerce and Industry of New South Wales	7
Australian Bureau of Statistics	DR53
Australian Competition and Consumer Commission	35, DR62
Australian Customs and Border Protection Service	33, DR61
Australian Dried Fruits Association	14, DR52
Australian Paper	DR41
Australian Plantation Products and Paper Industry Council	21, DR45
Australian Pork Limited	DR39
Australian Steel Association Inc	28, DR57
Australian Workers' Union	32
BlueScope Steel Ltd	19, DR55
Bosworth, Malcolm	DR64
Bradken Limited	DR59
Casselle Commercial Services Pty Ltd	2
Cement Industry Federation	9
Construction Forestry Mining Energy Union	27, DR50
Crisp, Peter MP	30
CSBP Ltd	15
CSR Ltd	10, DR47
Cutbush, Greg	DR63
Department of Agriculture and Food WA	DR43
Department of Agriculture, Fisheries and Forestry	34
Department of Foreign Affairs and Trade	22
Dow Chemical (Australia) Ltd	3
Food & Beverage Importers Association	DR46
Geofabrics Australasia Pty Ltd	4
Gunns Ltd	8
Horticultural Market Access Committee of Horticulture Australia	24
Hudson Trade Consultants	17
Huntsman Chemical Company Australia Pty Ltd	5
Law Council of Australia Ltd and Law Institute of Victoria (joint submission)	29, DR56
Longworth, Norman	DR40
National Farmers' Federation	6
OneSteel Ltd	16, DR49
Orica Australia Pty Ltd	18
Palmer Steel Trading (Australia) Pty Ltd	25
Penrice Soda Products	DR54
Plastics and Chemicals Industries Association	31
PolyPacific Pty Ltd and Townsend Chemicals Pty Ltd (joint submission)	36, DR51
Qenos Pty Ltd	13, DR48
SCA Hygiene Australasia Pty Limited	DR60
Stevenson, James	DR42

(continued next page)

Table A.1 (continued)

<i>Participants</i>	<i>Submission no.</i>
Sulo MGB Australia Pty Ltd	12, DR58
Trade Remedies Task Force	26, DR44
Windsor Farm Foods	37
W. W. Wedderburn Pty Ltd	1, DR38

Table A.2 Meetings

Australia Korea Business Council
Australian Bureau of Statistics
Australian Chamber of Commerce and Industry
Australian Competition and Consumer Commission
Australian Customs and Border Protection Service
Australian Dried Fruits Association
Australian Industry Group
Australian Paper Industry Association
Australian Plantation Products and Paper Industry Council
Australian Pork Limited
Australian Processing Tomato Research Council
Australian Steel Association Inc
Australian Vinyls Corporation Pty Ltd
Australian Workers' Union
BlueScope Steel Ltd
Canada Border Services Agency
Canadian International Trade Tribunal
Cement Industry Federation
Clayton Utz (on behalf of Woolworths)
Coles Group Limited
Crisp, Peter MP
Department of Foreign Affairs and Trade
Department of Innovation, Industry, Science and Research
Dow Chemical (Australia) Ltd
European Commission
Food & Beverage Importers Association
Fruit Growers Victoria Ltd
Kimberly-Clark Australia Pty Ltd
Law Council of Australia Ltd
Leigh Purnell
LyondellBasell Australia Pty Ltd
Moulis Legal
Murray Valley Citrus Board
National Farmers' Federation
New South Wales Government

(Continued next page)

Table A.2 (continued)

Nufarm Ltd
OneSteel Ltd
Orica Australia Pty Ltd
Plastics and Chemicals Industries Association
Qenos Pty Ltd
Rio Tinto Ltd
SPC Ardmona
Sulo MGB Australia Pty Ltd
Sunbeam Foods
The Treasury (Australian Government)
Trade Measures Review Officer
Victorian Farmers Federation
Victorian Government
Victorian Peach and Apricot Growers' Association
Windsor Farm Foods

**Table A.3 Participants in the public hearing, Melbourne,
15 October 2009**

Trade Remedies Task Force
Law Council of Australia Ltd and Law Institute of Victoria
Australian Steel Association Inc
Construction Forestry Mining and Energy Union
PolyPacific Pty Ltd and Townsend Chemicals Pty Ltd
Richard Whitwell

B A brief history of Australian anti-dumping policy

Key points

- Though Australia's anti-dumping system has been in place for over 100 years, it was not until the early 1980s that usage of the system became significant.
 - This was triggered by global recession, falling commodity prices and the Government's reluctance to raise tariff levels.
- Usage of the system peaked in the mid-1980s, which led to a backlash against the system from some users of the products subject to measures.
- Since the mid-1980s (aside from a brief upsurge in the early 1990s) usage of the system has steadily declined.
- The last major review of the anti-dumping system was carried out in 1986 (the Gruen Review). Subsequent reviews — including the Willett Review in 1996 and the Joint Study in 2006 — have focussed largely on the administration of the system.

Australia's anti-dumping legislation dates back to the *Australian Industries Preservation Act 1906*. Distinct from general tariff matters, the legislation aimed to prevent 'predatory' dumping of imports that was intended to drive domestic competitors out of business. However, no action was ever taken under this Act, largely because of the difficulty of proving that an importer was 'acting with intent to destroy or injure' an Australian industry, as required under the Act (Whitwell 1997, p. 11).

Removal of notions of predatory behaviour

Following an inquiry in 1921 by the then newly established Tariff Board, and drawing on Canadian and US legislation, the *Customs Tariff (Industries Preservation) Act 1921* established 'broader procedures for the imposition of penalty duties on imports deemed to have been sold at prices lower than in their suppliers' home markets'. Through changes to the normal value provisions, the Act greatly expanded the scope of 'dumping'. It also removed a previous requirement to seek the agreement of the High Court before anti-dumping measures could be

imposed. The Tariff Board assumed responsibility for investigating cases and advising the Minister, who in turn was responsible for making decisions regarding the imposition of duties.

The introduction of the Act also marked the separation of anti-dumping legislation from anti-trust law. The latter continued to operate under the *Australian Industries Preservation Act 1906* until its repeal and replacement by the *Restrictive Trade Practices Act 1965* and subsequently the *Trade Practices Act 1974*.

1921–1960: anti-dumping takes a back seat to tariffs and import licensing

Over the next four decades, Australia's anti-dumping system was relatively uncontroversial. Its role in helping to support Australia's expanding manufacturing sector was largely overshadowed by high levels of tariff protection, particularly between the two world wars, and import licensing (quantitative import restrictions). The latter was introduced as a wartime measure in 1939 and used extensively through much of the 1950s, particularly after March 1952 in response to balance of payments concerns. Indeed, the Government applied dumping duties on only 60 occasions over this entire 40-year period (Whitwell 1997, p. 18).

The major international development of relevance during this period was the formation of the *General Agreement on Tariffs and Trade* (GATT) in 1947. The GATT was approved by the Australian Parliament with the passage of the *International Trade Organisations Act No 73 1948*. The GATT did not proscribe dumping. Rather, through *Article VI: Anti-dumping and Countervailing Duties*, it permitted the application of anti-dumping or countervailing duties where 'the effect of the dumping or subsidization ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry'. However, *Article VI* did not specify any procedures for imposing anti-dumping duties, with the result that there continued to be differences in the systems of the relatively small group of developed countries which at that time had legislation to deal with dumping.

Amendments to the anti-dumping legislation in 1957 provided for countervailing duties on imports subsidised by an overseas government, and also for action against dumping which injured the trade of a third country. The latter amendment was designed essentially as a reciprocal arrangement with the United Kingdom to protect, from potential injury by 'third countries', trade between the two countries (Whitwell 1997, p. 17).

The 1960s and 1970s: emergence of anti-dumping as a significant instrument

Following the abolition of most import licensing controls in 1960, anti-dumping measures emerged as an important element of Australia's industry support arrangements. In May 1961 only nine goods were subject to dumping duties; by July 1971, that number had risen to 46 (Whitwell 1997, pp. 18–19).

The political environment for anti-dumping action at this time was generally supportive. Legislative amendments in 1961 widened the criterion of normal value to address dumping from countries where cost or price information was not available, principally the communist bloc countries (Lloyd 1973).

A Committee of Economic Inquiry, appointed by the Prime Minister in 1963, reported that anti-dumping measures supplemented tariffs and that, in the absence of those measures, pressures on tariff levels would be significantly greater. Amendments to the Act in 1965 included rules for determining the export price in related party transactions to address a potential loophole under which export prices could be artificially inflated to avoid duty.

In 1967 the *Anti-Dumping Code*, the precursor to the current World Trade Organization (WTO) agreements, was negotiated as part of the Kennedy Round of multilateral trade negotiations (1964–1967). Building on the provisions in the GATT, the Code set out rules for the application of anti-dumping measures.

A key outcome of the Kennedy Round was an obligation on member countries to align their anti-dumping systems with the requirements of the Code. Although Australia's existing anti-dumping legislation was broadly consistent with the Code, Australia did not immediately accede because of concerns that the scope for discretionary interpretations afforded under its existing arrangements might be affected (Snape, Gropp and Luttrell 1998).

However, Australia came under growing pressure from its trading partners to accede. And in 1973, the newly elected Whitlam government set up an interdepartmental committee to review Australia's anti-dumping legislation and examine the case for accession. The Government accepted the committee's recommendations to accede and amended the legislation accordingly in 1975.

The 1975 amendments also transferred responsibility for investigating dumping complaints and making recommendations to the Minister to the Australian Customs and Border Protection Service (formerly the Australian Customs Service). Until this time, these responsibilities had resided with the Industries Assistance Commission

(IAC) (formerly the Tariff Board). However, the IAC was retained as a review body to hear appeals against Ministerial decisions (Whitwell 1997).

Despite assuming an increasingly important role over the 1960s and 1970s, the dumping arena remained relatively ‘non-controversial’ (Gruen 1986, p. 8). Many industries showed little interest in the anti-dumping provisions because they were already highly protected by tariffs and other import barriers.

One significant technical change arose as a result of amendments to the US Tariff Act in 1974. Up to this point, ‘normal value’ had been defined by most countries as the price prevailing in the exporter’s home market. But as a result of the US amendments, sales in the exporter’s home market that were deemed to be ‘below cost’ were no longer regarded as an acceptable basis for determining normal values. Following informal discussions in 1977-78 between anti-dumping authorities in Australia, Canada, the USA and the European Communities, the thrust of the American approach was adopted and maintained by these other authorities, even though the change was not formally introduced into Australian legislation until 1984 (Gruen 1986).

The Tokyo Round of multilateral trade negotiations (1973–1979) revised the GATT *Anti-Dumping Code* and also heralded the introduction of the *Subsidies and Countervailing Duties Code*. While the Australian Government subsequently acceded to both codes in the early 1980s, the accessions appeared to have little practical effect on the capacity for Australia to take anti-dumping or countervailing action (Snape, Gropp and Luttrell 1998).

The early 1980s: anti-dumping activity accelerates

With the onset of global recession and sharply falling commodity prices in the early 1980s, and the Government’s reluctance to raise tariff levels or implement other border protection measures, political pressure mounted for action against low priced imports.

Several legislative changes were made to facilitate easier access to anti-dumping measures and to ensure that protection afforded local industries was not undermined. Amendments in 1983 allowed the Minister to disregard domestic sales in the exporting country altogether if they did not incorporate all production and marketing costs, thereby moving Australia closer to US practice at the time. More specifically, these amendments allowed for the construction of a normal value that covered all costs, including production, selling and administration expenses, plus a reasonable profit margin (Snape, Gropp and Luttrell 1998). The section of the Act

which obliged the Minister not to take action ‘inconsistent with Australia’s international obligations’ was also removed.

Perhaps not surprisingly, given the prevailing economic and political landscape, the number of new anti-dumping measures accelerated sharply over the first half of the 1980s, with the total number of measures in force rising from 82 at the end of June 1981 to a peak of 190 at the end of June 1984 (Gruen 1986, p. 8).

However, an ‘offsetting’ legislative change that came into effect in 1984 was the provision that an amount of duty no greater than sufficient to remove injury be applied (the so-called ‘lesser duty rule’). An indicative, but not exhaustive, set of factors defining material injury was also added to the legislation at this time (IAC 1985).

The mid-1980s: backlash and the Gruen Review

In late 1985, dumping duties were re-imposed on certain fertilisers from the USA. This decision brought to a head the differing perspectives on the anti-dumping system between producers seeking action against dumped imports and users of those imports (see box B.1). In early 1986, the Government responded to growing concerns about the anti-dumping system by establishing an independent review of the *Customs Tariff (Anti-Dumping) Act 1975*, conducted by Professor Fred Gruen.

Box B.1 Backlash against the system — the fertilisers case

In 1985, as part of its industry policy reforms, the Government terminated a subsidy on purchases of fertilisers. World prices of fertilisers were low at the time, in part because of a surge in global production capacity. The Australian fertiliser industry, under pressure from the removal of the subsidy and low prices of imports, applied for anti-dumping measures.

The Government subsequently imposed anti-dumping duties on fertiliser imports from the USA, even though their selling price in Australia, after adjustments for costs such as freight, was no lower than in the USA (calculated using the 1983 legislative amendments which allowed the Minister to disregard domestic sales in the exporting country if it were considered that such sales would not permit recovery of all production and marketing costs).

Australian farmers, hit by the removal of the fertiliser subsidy and the imposition of dumping duties on imports, voiced their anger. Amid a political backlash, the Government provided farmers with temporary payments to offset the increased costs resulting from the anti-dumping duties until a major review of the anti-dumping system could be conducted.

Gruen's report (Gruen 1986, p. iii) noted that Australia made greater use of anti-dumping measures than other comparable countries, with the potential to 'frustrate the achievement of other government objectives in the industry, trade, competition and economic policy areas'. Gruen (p. 26) further observed that 'it is normally in an importing country's overall economic interest to take the external trading environment as given and accept cheap imports, even if they are dumped or subsidised'.

However, he also said that the principle of 'fairness' in international trade was widely supported in the Australian community, and noted the 'existing fragile consensus between Government, industry and unions on the need for change towards a less assisted, more outward-looking, restructured industry'. Gruen (1986, p. 42) therefore recommended the system be continued, but subject to some substantial changes, particularly in the area of calculating normal values. In addition, he recommended the introduction of a sunset clause to 'signal clearly to industry that the anti-dumping system was seen predominantly as emergency protection from unfair trading' (p. 42).

Legislation to implement the Government's response to Gruen's report was introduced into Parliament in April 1988. A two-tier administrative system was implemented, with Customs conducting investigations and taking cases to a preliminary finding stage, while a specialist tribunal — the Anti-Dumping Authority (ADA) — reviewed the preliminary findings and made final recommendations to the Minister. The IAC's role in the process was terminated. Other changes included the introduction of a three-year sunset clause for anti-dumping measures and, as also recommended by Gruen, the introduction of specific time limits for the various steps in the assessment process.

Moreover, while the Government agreed with Gruen's recommendation not to introduce a public interest test, it indicated the Minister would take into account national interest criteria in exercising his/her discretion when considering reports from the ADA. And the Government further directed the ADA that 'anti-dumping duties are not to be used as a substitute means of providing assistance to import competing industry in Australia, nor to shield industry from the need to adjust to changing economic conditions' (Jones, 1988).

The 1990s: another (short-lived) upsurge

After declining sharply in the second half of the 1980s, anti-dumping activity again increased in the early 1990s, with the number of new investigations initiated exceeding the previous peak a decade earlier (although the number of new measures imposed and the total number of measures in force remained well below the 1980s'

peak). The Government enhanced the system's accessibility in 1991 by reducing the assessment timeframes introduced in 1988 and extending the default term for measures from three to five years. The Minister also urged Customs and the ADA to be more sympathetic to the predicament of local industry when making their assessments (Snape, Gropp and Luttrell 1998).

However, by 1995 the numbers of new anti-dumping investigations and new measures imposed had dropped to very low levels, with the ADA speculating the sharp declines were related to improving economic conditions. Usage of the system has since remained at relatively low levels (see chapter 3).

The main international development of relevance in this period was the establishment of the WTO to replace the GATT, following the Uruguay Round of multilateral trade negotiations (1986–1994). The Uruguay Round resulted in only minor changes to Australia's anti-dumping and countervailing law and administration, largely relating to the transparency of inquiry procedures (Snape, Gropp and Luttrell 1998).

The current arrangements

The current legislative framework and arrangements for the administration of Australia's system were introduced in 1998 following the Willet Review in 1996. The 1998 amendments abolished the ADA, ending the two-stage investigation system. Customs again assumed sole responsibility for all anti-dumping investigations, while the Trade Measures Review Officer, located within the Attorney General's Department, was established to provide an independent administrative appeals mechanism.

In 2006, a Joint Study was carried out by Customs, the then Department of Industry, Tourism and Resources, the Department of Foreign Affairs and Trade and the Trade Measures Review Officer. It was initiated to ensure that the administration of the anti-dumping system reflected best practice and to respond to concerns of Australia's manufacturers about the effectiveness of the system. The terms of reference specifically excluded examination of anti-dumping policy or the legislative basis for the system. The outcomes of this study are discussed in box 7.1.

C Anti-dumping in a global context

Key points

- The WTO is the primary global body regulating trade-related matters.
 - The *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures* are the key agreements relevant to this report.
 - These agreements set the substantive rules on when action can be taken against dumping and subsidisation, as well as the procedural rules member countries must follow if they have an anti-dumping system.
- However, flexibility in the way the agreements can be implemented by member countries gives rise to some substantial differences between anti-dumping systems. For example:
 - The time taken for dumping investigations varies, with Australia having one of the quickest investigation processes in the world.
 - Parties' lack of access to confidential information under the Australian system is in line with similar restrictions in New Zealand, India and the European Union. In contrast, the USA and Canada allow access to confidential information by way of 'administrative protective orders'.
 - Australia's treatment of China as a market economy when calculating normal values is more 'permissive' than under the US, EU and Indian systems.
 - Unlike the European Union and Canada, Australia's system provides no explicit scope to take account of wider interests in determining whether to impose measures.

The World Trade Organization (WTO) is the primary global body regulating trade-related matters between member countries. As discussed in chapter 2, member countries are not obliged to have an anti-dumping and/or countervailing system; but having chosen to do so, their systems must conform to the relevant global agreements.

Section C.1 of this appendix summarises the content of the two WTO agreements that govern anti-dumping and countervailing measures globally. Section C.2 details how some of the key features of the agreements are treated by other developed and developing nations, while section C.3 examines the current Doha round of WTO negotiations as they relate to the anti-dumping and countervailing agreements.

C.1 The WTO agreements

Two WTO global agreements govern the implementation of anti-dumping and countervailing systems in member countries:

- the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, also known as the Anti-Dumping Agreement
- the *Agreement on Subsidies and Countervailing Measures*, also known as the Countervailing Measures Agreement.

It is important to note that, in the context of global trade, the WTO does not prohibit the practice of dumping per se; rather the agreements discipline members' use of trade measures against the injurious effects of dumped (or subsidised) imports. This is because the WTO governs the trade actions of member countries rather than dictating the pricing practices of private firms.

The Anti-Dumping Agreement

The Anti-Dumping Agreement comprises 18 articles and two annexes, and has two primary goals; namely, to establish the rules that must be met in order for alleged dumping to be substantiated, and the procedures that authorities must follow to investigate allegations of dumping and to impose measures.

However, the agreement is largely principles-based, and member countries have considerable flexibility in interpreting certain aspects of the agreement and its implementation. As result, there are some significant differences in anti-dumping systems across the world.

In effect, the agreement comprises a 'minimum standard' for domestic anti-dumping systems, and in certain areas, countries are able to impose more demanding requirements on local industries seeking the imposition of measures.

Substantive rules

Articles one to four of the agreement outline the substantive rules concerning dumping. The basic principle of the agreement is that member countries may not impose remedial trade measures against imports unless it is shown that those imports are dumped, and that they have caused (or threatened to cause) material injury to a domestic industry producing like goods. The agreement deals with these concepts in turn.

A key requirement is that an investigating authority should determine dumping on the basis of the definitions in the agreement. A good is considered to be dumped if it is exported to another country at below its normal value. The agreement outlines the methodologies to be used to calculate the normal value of the dumped good, particularly in circumstances where the price of the good in the supplier's home market is not a 'commercial' one, or information about its price is not readily available.

The agreement guides investigating authorities as to what constitutes injury to a local industry, as well as how to determine a threat of injury. It also requires that there be evidence of a causal link, and suggests factors other than dumping that might be causing injury to the local industry.

Procedural rules

Articles 5 to 15 of the agreement deal with the procedural requirements for anti-dumping investigations. Member countries are bound to follow certain procedures, thus somewhat limiting their freedom to tailor a system that best suits their particular circumstances.

The rules outlined in the agreement deal with the initiation of cases and their subsequent investigation, including the evidence thresholds required before measures can be imposed. It specifies who 'interested parties' are for the purposes of joining an investigation, and deals with the treatment of confidential information (including the requirement that parties provide non-confidential summaries of any confidential information submitted).

The agreement also provides for the imposition of provisional measures while an investigation continues, and the imposition and collection of final dumping duties (and the retrospective imposition of measures). And it specifies a role for undertakings, as well as the maximum duration of any measures imposed.

Further, the agreement requires investigating authorities to maintain a public record of all files in a dumping investigation, and that member countries provide for judicial reviews of cases.

Dispute resolution

WTO member countries can challenge another country's implementation of the agreement through the WTO Dispute Settlement Body. In addition, there is a WTO Committee which regularly reviews individual member countries' anti-dumping systems.

The Subsidies and Countervailing Measures Agreement

The Subsidies and Countervailing Measures Agreement deals with similar issues to the Anti-Dumping Agreement, but given the different nature of subsidisation, there are some variations. For example, the concepts of normal values and ascertained export prices are not relevant in countervailing cases.

The agreement defines a subsidy, and then further delineates between ‘prohibited’ subsidies and ‘actionable’ and ‘non-actionable’ subsidies. It also specifies consultation requirements between the investigating authority and the country alleged to have provided a countervailable subsidy.

However, most of the procedural rules for countervailing cases are substantially the same as for anti-dumping cases, including in regard to applications, investigations, injury, evidence, definition of a domestic industry, and imposition of provisional and final measures.

C.2 Anti-dumping and countervailing systems in other countries

Given the principles-based nature of the WTO agreements, there are various differences across countries in the configuration of anti-dumping systems. Some of the more important areas in which requirements and procedures vary include:

- the number of agencies involved in administering the system
- the time taken to complete investigations and the sequence of the investigative tasks
- the breadth and nature of appeals processes
- the treatment of non-market economies and economies in transition
- whether there is provision to consider the broader public interest.

Table C.1 provides a summary of the arrangements in Australia, New Zealand, the USA, Canada, the European Union and India.

System administration

There are differences in the number of agencies involved in administering anti-dumping systems. Australia, New Zealand, India and the European Union use one agency. However, in Canada, the Canada Border Services Agency investigates dumping, while injury is determined by the Canadian International Trade Tribunal.

Table C.1 A comparison of anti-dumping and countervailing systems

	<i>Australia</i>	<i>New Zealand</i>	<i>USA</i>	<i>Canada</i>	<i>European Union</i>	<i>India</i>
<i>Bifurcated administration</i>	No	No	Yes	Yes	No	No
<i>Investigating authority: Dumping and subsidisation</i>	Australian Customs and Border Protection Service	Ministry of Economic Development	United States Department of Commerce	Canada Border Services Agency	European Commission	Ministry of Commerce
<i>Investigating authority: injury and causal link</i>	Australian Customs and Border Protection Service	Ministry of Economic Development	United States International Trade Commission	Canadian International Trade Tribunal	European Commission	Ministry of Commerce
<i>Target investigation timeframe (days)</i>	155	180	280	210	365	365
<i>Treatment of China</i>	Market economy	Market economy	Non-market economy	Starting presumption of market economy	Economy in transition	Economy in transition
<i>Public interest test</i>	No	No	No	Yes	Yes	No
<i>Decision maker on imposition of measures</i>	Minister	Minister	United States International Trade Commission	Canadian International Trade Tribunal	Council of Ministers	Ministry of Finance
<i>Merit and judicial reviews</i>	Merit (TMRO) Judicial review	Judicial review	Judicial review	Judicial review	Judicial review	Judicial review
<i>Lesser duty</i>	Yes	Yes	No	Yes (as part of the public interest test)	Yes	Yes

Sources: Australian Customs and Border Protection Service (sub. 33, p. 7); India Ministry of Commerce (2009); New Zealand Ministry of Economic Development (2009).

Similarly, the US Department of Commerce investigates allegations of dumping, while its International Trade Commission makes determinations about injury.

The scheduled time from initiation to the imposition of measures also varies. With a target timeframe of around 5 months, Australia operates one of the most rapid systems in the world. In comparison, the scheduled timeframes are around 6 months in New Zealand, 7 months in Canada, 9 months in the USA, and 12 months in the European Union and India. However, systems typically provide for extensions, so that in India, for example, the investigation process can extend to 18 months. While these differences in time frames reflect various factors, a contributor to longer time frames in the European Union is the requirement to consider ‘community interests’ in all cases.

Another significant difference between systems relates to the handling of confidential information provided by interested parties during the course of an investigation.

- In Australia, New Zealand, the European Union and India, confidential information provided to the investigating authority cannot be disclosed to the opposing parties in the case. Those parties must rely on public summaries of such information when responding to claims.
- In contrast, in the USA and Canada, confidential information can be provided to the legal counsel of an opposing party where that information is covered by an ‘administrative protective order’ (APO). On the one hand, APOs can enhance natural justice in dumping cases and potentially deliver more rigorous outcomes, because parties have full knowledge of (and can respond to) the specific allegations being made about them. However, the involvement of legal counsel increases the costs to parties involved in cases. APOs are considered in more detail in chapter 7 of the report.

The appeal process

Article 13 of the Anti-Dumping Agreement requires, as a minimum, that each member country have some form of judicial review of anti-dumping measures and procedures, independent of the investigating authority. The nature of this review body is not prescribed and may take the form of a court, tribunal or other body. Moreover, Article 13 does not limit a member country’s ability to complement judicial review provisions with other administrative review mechanisms.

As discussed in chapter 2, Australia provides for merits reviews by the Trade Measures Review Officer, and for further appeals on points of law to the Federal Court.

In New Zealand, decisions of the Trade Remedies Group (within the Ministry of Economic Development) and the Minister can be appealed to the High Court. In the USA, interested parties may appeal to the Court of International Trade. Canada provides for appeals on both matters of fact and law to its Federal Court of Appeals, while India allows appeals to the Customs, Excise and Gold (Control) Appellate Tribunal. In the European Union, appeals by interested parties may be brought before the European Court of First Instance.

Non-market economies and economies in transition

In determining normal values for the purposes of assessing dumping, the WTO agreements allow countries to consider the ‘market situation’ in the exporting country; that is, whether a country has a predominantly market economy, or whether there is substantial government involvement that artificially lowers the normal value of the goods. Article 15 of the Anti-Dumping Agreement further allows member countries to treat developing economies differently when calculating normal values and export prices.

One key point of difference between the Australian anti-dumping system and that of many other countries is the granting of ‘market-economy status’ to China. This means that in dumping cases involving exports from China, in the first instance, Australia considers the Chinese domestic price to be the normal value of the goods concerned. That said, via other non-country specific provisions, Australia can adopt alternative methodologies for constructing normal values when the domestic price of the allegedly dumped good is determined to be artificially low (for example, because of significant government intervention in the economy concerned).

In contrast, the USA treats China as a non-market economy. And the European Union and India adopt an intermediate position, based on Article 15 of the WTO’s *Protocol on the Accession of the People’s Republic of China*; in the first instance, treating China as a ‘country in transition’ to being based on market principles. This allows for the use of alternative methodologies for constructing normal values (such as prices in a surrogate third country) (Ikenson, 2005). However, if the importer can show that market economy conditions prevail in the Chinese industry concerned, then the Chinese domestic price may form the basis of the normal value for the purpose of determining whether there has been dumping. And in Canada, the approach is even closer to that in Australia. Specifically, the Canada Border Services Agency begins investigations with a presumption that the non-market alternative methodologies do not apply, unless there is evidence to suggest the overseas industry under investigation operates in a non-market fashion.

Public interest tests

A significant difference in anti-dumping systems is whether they embody a ‘public interest test’ that allows for wider impacts to be taken into account in determining whether measures should be imposed. As discussed in the body of the report, Australia does not have such a test. Nor do New Zealand, the USA and India.

In contrast, under the EU system, a ‘community interest test’ applies to all investigations (see box 5.2). And in Canada, there is scope to impose a lesser duty (which may be zero) if public interest considerations so dictate (see box 5.3).

Use of undertakings

As noted, the WTO agreements do not prohibit the practice of dumping per se, and indicate that any measures imposed should be remedial rather than punitive. Accordingly, provision is made in the agreements for an investigating authority (or decision-maker) to accept an undertaking from an exporter to price future exports above the non-injurious level.

However, undertakings comprise only a small share of total measures in most jurisdictions. For example, the WTO reported that between October 2007 and October 2008, of the 28 new measures imposed in the USA only 1 was an undertaking, and that all of the 11 new measures imposed in the European Union involved duties. Similarly, as discussed in chapter 3, only 3 of the 27 measures currently in place in Australia involve undertakings, and in all of those cases, duties also apply to some exporters.

Balance between anti-dumping and countervailing cases

As noted in chapter 3, measures against dumping predominate in most countries, including Australia. For example, between 1999 and 2008, only 95 new countervailing measures were imposed globally, compared to nearly 1700 anti-dumping measures (see table 3.3).

A number of factors appear to explain this, including:

- less awareness among local industries about the countervailing system
- the greater difficulty of demonstrating that a subsidy is the cause of material injury to a local industry
- the scope for countries to design subsidy support to render it ‘non-actionable’.

C.3 Doha negotiations

As the primary organisation overseeing multilateral trade negotiations and rules enforcement, the WTO evolves by member countries updating the agreements through negotiation ‘rounds’. The current Doha negotiating round began in November 2001, when member countries agreed, amongst other things, to clarify and improve the disciplines imposed by the *Anti-Dumping Agreement* and the *Subsidies and Countervailing Measures Agreement*.

Although the Doha round has not yet concluded, some 150 member countries have submitted suggested changes to the two agreements and, in December 2008, the Chairman of the Negotiating Committee circulated an updated draft of the anti-

dumping and countervailing agreements, reflecting the state of negotiations at that time (WTO, 2008b). However, the draft acknowledges that there are significant differences of opinion amongst member countries.

Key issues for negotiation in the Doha round

WTO members have recognised that there would be potential benefits from improving the clarity and precision of anti-dumping and countervailing processes and concepts. They have also expressed a desire for incremental change, rather than wholesale reform.

Public interest tests and lesser duty rules

The current anti-dumping and countervailing agreements are silent on the scope and means for member countries to take account of wider impacts in anti-dumping cases.

Not surprisingly, there has been significant disagreement amongst member countries about the possible provision for a public interest test in the agreements. Some, including Australia, have argued that the decision on whether to employ a public interest test should be left to individual countries, while others have contended that such a test should be a mandatory component of the system.

A similar divergence of views has been evident in relation to lesser duty arrangements. Some countries consider that a mandatory lesser duty rule would be in the spirit of the agreements (in that it would help to ensure that measures are remedial only and not punitive), while others question the ability to calculate an ‘injury margin’ in every circumstance.

Causation of injury

Those parts of the agreements relating to injury indicate potential factors other than the dumped imports that may be causing injury, including the volume and price of un-dumped imports, as well as changes in domestic demand, technology, and the export performance and productivity of the domestic industry.

Member countries have discussed, but have so far failed to agree on, whether it should be mandatory for the investigating authority to distinguish the effects of dumped imports from other factors, and whether there should be a requirement to undertake quantitative analysis of causation.

Material retardation to the establishment of an industry

As a general principle, for an anti-dumping or countervailing case to proceed to initiation, there must be production of like goods by the domestic industry. And, in most cases where measures are imposed, it will be on the basis of actual dumping or subsidisation.

However, the agreements also allow for the imposition of measures where:

- the possibility of dumped or subsidised imports threatens material injury to a domestic industry
- dumped or subsidised imports retard the establishment of a domestic industry; that is, where no local production currently exists.

That said, there is uncertainty around the application of these provisions, with participants at Doha having discussed, for example, whether the latter should only apply if there is no local production of the like goods concerned. (As far as the Commission is aware, this provision has not been used to support the imposition of anti-dumping measures in Australia.)

Sunset provisions

There has also been considerable debate at Doha about the sunset provisions for measures imposed. While some countries are in favour of measures automatically terminating after five years without consideration of a possible extension, others argue that dumping terms should be determined on a case-by-case basis, and that automatic termination is inappropriate if the initial circumstances allowing for measures remain.

And there has been debate about proposed changes to the rules on the initiation of sunset reviews (including whether the investigating authority can unilaterally review measures prior to their expiry), the evidence thresholds to be met before measures can continue, and the timeframes for undertaking reviews.

Currently, some countries (including Australia) commence a sunset review prior to the expiry of a measure, whereas others wait until measures have been in place for the full five-year term.

Countervailing measures

Possibly reflecting the greater acceptance by member countries of the underlying rationale for countervailing measures, there have been relatively few changes proposed to the countervailing-specific provisions at Doha.

D Could anti-dumping protection improve efficiency?

Key points

- Much dumping is similar to the sort of price discrimination that is frequently observed and sanctioned in other market contexts.
- Very few, if any, of the anti-dumping and countervailing measures currently in force in Australia apply to suppliers likely to be in a position to exercise market power were the local competitor or competitors to cease operations.
- There should be some onus on local suppliers to ‘weather the storm’ of episodic dumping, not least because these same firms are likely to benefit when demand is strong and supply tight at other times during the economic cycle.
- The use of anti-dumping measures to promote ‘strategic’ Australian industries, or to counter support provided by other countries, is likely to be costly relative to any benefits.
- If the benefits for downstream industries from having access to a local supply base are significant, these can generally be captured through normal commercial transactions, without the need for anti-dumping measures.
- Given that the direct efficiency arguments for anti-dumping measures are not compelling, the case for Australia to retain a system hinges on the broader political economy arguments discussed in the body of the report.

In chapter 4, the Commission has concluded that Australia should retain an anti-dumping system. However, that conclusion is based on the presence of broader political economy benefits rather than on the grounds that anti-dumping measures can more directly enhance economic efficiency. Indeed, the Commission’s assessment is that the narrow efficiency rationales are not compelling. This appendix provides more details on the underlying basis for this assessment.

D.1 The terminology detracts from dispassionate assessment

Efficiency rationales for anti-dumping measures have been widely explored in Australia and overseas, including in the last comprehensive review of the Australian system (Gruen 1986, pp. 24–26). However, an objective assessment of those rationales is made more difficult by the terminology and concepts that characterise the anti-dumping architecture.

- The use of the term ‘dumped’ to describe imports that are sold at a lower price than in the supplier’s home market almost axiomatically implies that the practice is undesirable. But it is only one particular manifestation of the common practice of price discrimination (see box D.1). Indeed, as a strategy for helping firms to break into export markets, price discrimination or ‘dumping’ has implicitly been endorsed by governments around the world. For example, Austrade (2006) has previously issued advice to prospective exporters that:

Marginal (or ‘differential’) costing is a technique commonly employed in export and produces a more competitive price to assist market entry ... It is particularly useful where a company has excess production capacity and needs to reduce its export prices to be competitive.

- ‘Injury’ from a ‘dumped’ product may, in practical terms, be little different from the loss of sales and/or profits that a local producer may suffer for a range of other reasons — including a reduction in its underlying competitiveness against imports or against other domestic suppliers, appreciation of the exchange rate, reductions in tariffs, or shifts in broader demand patterns. But through the link to the practice of dumping, such injury assumes a separate policy significance.

Such considerations have led some commentators to call into question the whole basis for anti-dumping protection. Thus Litan (1994, p. 106) observed that the structure and administration of US anti-dumping laws were ‘riddled with economic nonsense’. Others have suggested that, stripped of the emotive descriptors, anti-dumping measures are little different from tariffs and other forms of border protection (see, for example, Lindsey and Ikenson 2001).

However, despite the problematic nature of aspects of the underlying foundations, there are some specific efficiency rationales for taking action against dumped or subsidised imports that cannot be immediately dismissed.

Box D.1 Non-predatory price discrimination: not normally a policy target

Price discrimination across geographic markets or individual customers at a point in time, or across time, is a widely practised commercial strategy. In particular instances, price discrimination may be motivated by predatory considerations. As such, it may be in contravention of the competitive conduct rules in place in most developed countries. However, in many cases, it will simply be directed at improving firms' more immediate commercial performance (and be perfectly legal). For example:

- Airlines typically differentiate fares within the same class of travel in order to tap demand from more price sensitive consumers. Though making relatively little contribution to airlines' overhead costs, carrying these more price sensitive consumers will still be preferable to having empty seats. Similarly, many hotels differentiate their room prices by using third parties such as Wotif.com to sell, at a discounted price, rooms that would otherwise be vacant.
- Retailers commonly use loss leaders to entice customers into their stores. Likewise, firms may be prepared to temporarily discount their product range to break into an export market.
- To the extent that they are able to maintain separate markets across Australia, retailers may seek to differentiate prices according to perceived capacity of their customers to pay.

Viewed in this light, the price discrimination focus of anti-dumping policy is somewhat unusual. Indeed, unless dumping is genuinely predatory, its main difference from geographic price discrimination within the domestic market — between customers in say Sydney's north shore and its western suburbs — is that the customers facing the higher prices are outside the national border. The 'tyranny of distance' may of course make it easier to price discriminate between countries than within the domestic market. But this does not alter the fundamental commonality of the practice.

D.2 Countering predatory behaviour

A longstanding argument for anti-dumping measures is that dumping may sometimes be motivated by predatory objectives — namely, to drive local suppliers out of the market and thereby allow the overseas supplier to reap monopoly profits. Were this to be the case, then any short term benefits for consumers and user industries from access to cheaper imported goods could potentially be outweighed by higher prices over the longer term. In this regard, the National Farmers' Federation noted:

... if the injury incurred by the domestic industry from dumping leads to domestic participants leaving the industry, in the longer term this can lead to market power issues and increased domestic prices as competition dissipates. (sub. 6, p. 7)

The predatory behaviour argument is not without some in-principle merit, especially as there is no clear line between such behaviour and normal market competition. In a general sense, market competition is all about gaining an advantage over rival suppliers with the long-term objective of boosting sales and profitability. The benefits from addressing predation are explicitly recognised in s. 46 of the *Trade Practices Act 1974* (TPA) which prohibits behaviour designed to eliminate or substantially damage a competitor or prevent entry into a market. And as there is no international competition policy regime, the anti-dumping system is the only means by which predatory behaviour could be dealt with at the global level.

However, the market circumstances that would allow an overseas supplier to employ dumping to create anything more than a transitory monopoly in an export market are very narrow.

- In particular, for the dumping firm to secure an enduring monopoly position, there would need to be no, or only limited, competition amongst suppliers at the global level, or other constraints on effective foreign participation in the Australian market (such as prohibitive transport costs for most potential suppliers). Otherwise, any attempt by the dumping firm to charge a monopoly price after the exit of local suppliers from the market concerned would be likely to attract additional competition from abroad or from substitute products.
- Additionally, there would need to be constraints — such as large fixed costs — on the re-entry of local suppliers, or on the emergence of new local suppliers, once import prices rose to levels at which domestic production had previously been profitable.

Further, even in those rare circumstances where conditions allowing for predation did exist, as noted by the Australia-China Chamber of Commerce and Industry of New South Wales (sub. 7, p. 5), there may be other ways for an overseas supplier to secure a strong position in the domestic market were this to be its objective — for example, by merging with, or acquiring, a major domestic competitor.

In any event, it is clear that, in practice, Australia's anti-dumping system does not focus solely or even primarily on dumping that could be predatory in nature. Unlike the provisions in the TPA prohibiting predatory behaviour, there is no requirement that an overseas supplier subject to a dumping action have significant market power and/or a major share of the market. As outlined in chapter 2, the minimum market share for imports above which an application for anti-dumping or countervailing measures can proceed is very low. For example, in a dumping case involving goods from a developed country, this share can be as low as 3 per cent of total imports of like goods, with the share of the total domestic market, inclusive of locally supplied products, being potentially lower still.

In fact, very few, if any, of the anti-dumping and countervailing measures currently in force in Australia apply to suppliers likely to be in a position to exercise market power were the local competitor or competitors to cease operations, a point acknowledged by many of those inquiry participants which have taken anti-dumping action. And Customs (sub. 33, p. 10) noted that ‘while aggressive selling by importers has been observed on occasion, [it] has not observed any instances of predatory behaviour in recent investigations’. Reinforcing this observation, for almost all of the products on which measures currently apply, there are multiple sources of imported supply (see chapter 3).

Thus, in sum, the scope to counter predatory behaviour by overseas suppliers does not provide a justification for Australia’s anti-dumping system, at least as it is currently configured and applied. Indeed, it is now close to a century since the predatory notions that underpinned early anti-dumping laws were superseded by much less restrictive criteria (see appendix B).

That said, the Commission notes that there are reasons to distinguish the arguments related to the general concept of predatory behaviour from those pertaining to what might be regarded as ‘state sanctioned’ predation through the provision by governments of subsidies that artificially boost the competitiveness of their exporters. The arguments that might apply in the latter circumstances are considered separately below.

D.3 Addressing ‘episodic’ dumping

From time to time, overseas suppliers may look to offload surplus product in export markets at substantially discounted prices. In some cases, such ‘dumping’ may be of a one-off nature. But particularly in industries such as chemical or steel products, that are dominated by capital intensive, large scale manufacturing facilities, and where demand fluctuates considerably across the economic cycle, price discounting in export markets can occur quite regularly.

Though not predatory in nature, such ‘episodic’ dumping may nonetheless force local suppliers to temporarily scale back production, and even cease operations for a period of time. At the extreme, it is possible that the prospect of continued episodes of dumping might lead to the permanent cessation of local production (or impede the entry of additional domestic suppliers). And as Dow Chemical (sub. 3, p. 12) noted, such dumping can also have an adverse impact on established, long-term, importers.

In practice, WTO compliant anti-dumping measures are rarely likely to be helpful in remediating the damage from ‘hit and run’ dumping. For example, in the case of a

large shipment of goods supplied under tender, once a binding contract has been signed, it will be impossible to avert injury to the local industry, even if dumping duties are subsequently imposed. And though the WTO agreements and Australian legislation allow for action against dumped imports that threaten material injury, few measures have been imposed on this basis because the threat of injury is very difficult to substantiate. Thus, in Australia, it is more than two decades since the last finding of injury to a domestic industry was based on threat alone.

However, measures may be helpful to the local industry where an episode of dumping would otherwise have continued for a significant period of time. Also, as measures are normally applied for five years, a single measure might prevent some future dumping episodes.

Nevertheless, a rationale based on deterring or remediating episodic dumping remains problematic. If dumping is genuinely episodic, then there should be some onus on, and capacity for, otherwise competitive domestic firms to ‘weather the storm’ — especially as those same firms are likely to benefit when demand is strong and supply tight at other times during the economic cycle.

More generally, the possibility of a future episode of dumping is only one of many sources of risk, uncertainty and volatility that confront domestic firms in globally integrated markets. For good reasons, firms rather than governments are usually required to bear these risks and, as necessary, to take action to ameliorate their impacts. Indeed, in industries where demand is highly cyclical, acceptance of an episodic dumping rationale could provide the basis for anti-dumping measures to be applied almost continuously. There would then be little practical difference between anti-dumping measures and conventional industry protection.

D.4 Promoting efficient industry structures

Some analysts have argued that governments can employ trade policies to promote the development of ‘strategic’ industries. In essence, the contention is that trade policies, including anti-dumping measures, can be used to foster industries in which there is potential to earn ongoing economic rents, or which generate significant ‘spillover’ benefits for other industries and therefore operate as engines for economic growth. (For an overview of the strategic trade theory argument, see Krugman 1987). In a similar vein, Ludwig (2006, p. 28) raises the possibility that persistent dumping, if not addressed, could lead to the diminution of the industry skill base. Likewise, Orica Australia (sub. 18, p. 4) contended that the anti-dumping system has a role in assisting ‘the retention of core skills and capabilities in Australian industry’.

This suite of arguments again highlights that the distinction between anti-dumping measures and other forms of border protection is not always clear cut. That is, for the purposes of these arguments, anti-dumping measures and other border protection instruments are largely substitutable.

More importantly, the Commission sees little merit in the arguments. As several of those outlining an ‘in principle’ case for strategic trade interventions have acknowledged, the circumstances in which there could in practice be a benefit are very limited, especially when the costs imposed on ‘non-strategic’ industries are taken into account. And for the most part, the theories ignore the likelihood of retaliation by other countries which could see attempts to employ strategic trade interventions degenerate into a costly exercise for all involved (see IAC 1989, appendix 5). The global proliferation of anti-dumping regimes and the marked increase in the number of anti-dumping measures implemented, particularly in developing countries (see chapter 3), are noteworthy in this context.

Countering ‘strategic predation’ by other governments

The flip side of the argument that anti-dumping measures can be used proactively to promote the development of strategic industries is that those same measures can be used to offset ‘strategic’ support from overseas governments for their industries. As alluded to earlier, if such support allows those countries’ exporters to undercut prices in overseas markets, it can in some senses be viewed as ‘state sanctioned’ predation.

The argument is most commonly made in regard to the provision by overseas governments of subsidies that in one way or another reduce costs for their exporters. It is sometimes also extended to the imposition of tariff barriers — specifically, where a tariff provides firms with an additional revenue stream in the domestic market that could, in theory, be used to subsidise sales in the export market.

However, the ‘direct’ economic case for using anti-dumping measures to respond to assistance provided by overseas governments is questionable. Especially for a small country such as Australia, such an approach could be economically costly. Reflecting this, in the last few decades, Australia has generally sought to address the distorting effects of subsidies and tariffs on global trade through participating in various multilateral and regional trade fora and negotiating bilateral trade agreements.

That said, as discussed in chapter 4, there may be broader political economy reasons for taking action through the anti-dumping system against specific instances of such distorting government support — particularly when subsidies are involved.

D.5 Enhancing supply security

Some local suppliers contend that anti-dumping measures benefit not only their activities but also assist their customers — in particular, through helping to sustain a local supply base, leading, in turn, to more timely delivery, better after sales service and greater supply security over the longer term. For example, BlueScope Steel stated:

The presence in the local market of domestic suppliers can have important benefits for customers, particularly those for whom short supply chains and just-in-time deliveries are important competitive considerations. In addition, in a small market like Australia's, it could be risky to depend for supplies on an overseas firm that has demonstrated through its dumping its ability to control prices and sales volumes. In times of a buoyant business cycle and possible short supply situations resulting from unexpectedly strong global demand, the Australian customer could find himself without a reliable, price competitive supplier. (sub. 19, p. 37)

Such benefits have been acknowledged by some of the customers of industries in receipt of anti-dumping measures.

However, to the extent that measures effectively mandate payment of higher average prices to sustain the domestic supply base, they remove a customer's capacity to trade-off the ensuing benefits against the freedom to secure imported product more cheaply at certain times in the economic cycle. Indeed, if the benefits from access to local supply are regarded by customers as significant, there are various ways that these can be, and are, obtained without the need for anti-dumping measures.

- For example, to reduce the risks of supply disruption and/or high prices associated with periods of global undersupply, customers can, and often do, enter into long-term purchasing contracts or establish commercial relationships with a range of suppliers.
- And those customers who value more timely delivery or a higher level of after sales service, whether from a domestic supplier or importer, would presumably be willing to pay a premium for it.

The Commission also notes that companies supported through anti-dumping measures will still have incentives, during periods of strong global demand, to charge their local customers higher prices or to redirect product to other markets — at least to the extent that such actions would be consistent with maintaining productive commercial relationships with those local customers.

D.6 Supporting regional development

While not based on efficiency, another commonly cited rationale for anti-dumping protection is that it can support regional development. Some of the local industries that have benefitted from anti-dumping measures are significant contributors to employment and industrial activity in regional areas of Australia. For example, the Australian Workers' Union commented that consideration of the effects of dumping:

... must account for the impact on centres which are disproportionately reliant upon steel for a living, such as Port Kembla, Whyalla, Newcastle and Westernport ... Where dumping occurs, it will have a disproportionate impact on the sustainability of employment in regional Australia relative to metropolitan centres. (sub. 32, p. 12)

The Australian Plantation Products and Paper Industry Council (sub. 21, pp. 1–3) noted its members employ more than 13 000 people, mainly in rural and regional areas. It went on to argue that the continued availability of a strong anti-dumping and countervailing system is 'vital to the future of Australian industry'. And the Member for the Victorian seat of Mildura, Peter Crisp, stated:

Based on horticulture and the industries that support horticultural production, Mildura has become a significant regional centre in Australia ... Anti Dumping and countervailing measures form a vital part of risk management for the Growing Industry in the Mildura region ... [They] must remain as an effective and available instrument to protect Mildura's industries from short term attack resulting in long term harm. (sub. 30, p. 1)

While recognising the regional importance of such industries, the Commission emphasises that the anti-dumping system is not intended to operate as a regional development mechanism. And though particular measures may benefit regional activities in a general sense, the system would, for the most part, be a poorly targeted and uncertain mechanism for delivering regional support. Thus, in the Commission's view, any public support of this nature would be better provided explicitly and transparently through dedicated and targeted instruments.

D.7 Concluding remarks

In light of the preceding assessment, the Commission has concluded that the imposition of measures on dumped or subsidised imports is highly unlikely to enhance efficient resource use. Indeed, the opposite is likely to be the case, with measures detracting from resource use efficiency over both the short and long term, as well as having administrative and compliance costs (see chapter 4).

Hence, in the Commission's view, the case for retaining an anti-dumping system must be based on the broader political economy benefits that it can provide. Specifically, as discussed in chapter 4, removal of the anti-dumping 'safety valve' could make it more difficult to address remaining tariff and related reform issues.

E The competition law alternative

Key points

- A possible alternative to a dedicated anti-dumping regime is to deal with dumping matters through competition law.
 - The approach already applies to trade between Australia and New Zealand (though either country can still take countervailing action), and within some other free trade areas and customs unions overseas.
- The approach has some in-principle attractions.
 - It would limit the imposition of anti-dumping measures to circumstances where dumping was most likely to be directly detrimental to efficiency.
 - Bringing dumping matters within the remit of the Trade Practices Act could increase the scope to take account of inter-relationships with some other competition issues.
- But notwithstanding its use in a trans-Tasman context, the feasibility of using competition law as a general substitute for Australia's anti-dumping system is highly questionable.
 - It would require the cooperation of other countries, which could not be guaranteed.
 - It would also require better developed competition institutions in some of Australia's major trading partners.
 - As a court-based approach, it would be much more time consuming and costly.
 - The punitive nature of the remedies provided for under competition law would be problematic, especially in countervailing cases.
 - It is unclear that there could be adequate recognition of the 'system preserving' arguments for taking action against injurious dumping or subsidisation.

An important element of rigorous policy analysis is assessment of the relative merits of different ways of pursuing particular policy goals. Thus paragraph 4(b) of the Terms of Reference asks the Commission to consider potential alternatives to a dedicated anti-dumping regime.

A possible alternative approach put forward in this context is to deal with dumping under s. 46 of the Trade Practices Act (TPA). Amongst other things, that section prohibits firms with substantial market share from supplying goods or services at

below cost for a sustained period, for the purposes of eliminating or substantially damaging a competitor (see box 2.5). This approach is already employed under the Closer Economic Relations (CER) Agreement with New Zealand in respect to trans-Tasman trade, though the parties are still able to take countervailing action (see box E.1). Trade within the European Union and between Canada and Chile under the Canada-Chile Free Trade Agreement (CCFTA) is similarly exempt from the application of anti-dumping measures that apply to third countries, and instead is subject to applicable competition law. However, like the CER Agreement, the CCFTA allows Canada or Chile to take countervailing action against subsidised imports from the other.

E.1 Some in-principle attractions

Prima facie, across-the-board reliance on the misuse of market power provisions in the TPA to deal with injurious dumping would have some attractions. In particular, it would limit the imposition of measures to circumstances where dumping was most likely to be directly detrimental to efficiency. More specifically, measures could only be imposed where:

- the overseas supplier had significant market power as a result of having a substantial share of the market in question — in contrast to the current anti-dumping provisions where action can be taken when the volume of dumped imports is as little as 3 per cent of total imports of like goods (see box 2.2)
- dumping was found to be motivated by predatory intent (that is, a purpose test) — in contrast to the current arrangements where action can be taken whatever the motivation for dumping, provided a local industry producing like goods suffers, or is threatened with, material injury.

Also, bringing dumping matters within the remit of the TPA could increase the scope to take account of inter-relationships with some other competition issues. In discussing this matter in the context of mergers policy, the Australian Competition and Consumer Commission (ACCC) said that:

... in Australia, an important element of the competitive environment in many markets is competition from imported products. In certain circumstances, however, the existing anti-dumping regime may give rise to outcomes which are inconsistent with the TPA's focus on promoting and protecting a competitive environment for the benefit of consumers. (sub. 35, p. 29)

The current arrangements do not of course preclude consideration of such inter-relationships. Thus the ACCC (sub. 35, p. 26) said that it will 'where appropriate' liaise with Customs. And in three merger cases over the last decade, approval by the

ACCC has been subject to the merged entity offering an undertaking not to take anti-dumping action for a specified period, or agreeing to compensate importers for expenses or losses arising from unsuccessful applications for measures (sub. 26, pp. 27–28).

Box E.1 Dealing with dumping under the CER Agreement

Prior to 1990, anti-dumping measures could be, and were, imposed by Australia and New Zealand on goods sourced from each other. For example, in the eight-year period until 1990, 10 of the 26 dumping cases initiated in New Zealand, and 6 of the 10 dumping duties imposed, involved Australian goods (New Zealand Ministry of Commerce 1998, p. 8). And of the 23 dumping and countervailing measures in place in Australia at 30 June 1989, one (frozen peas) was against imports from New Zealand (ACS 1989).

However, under the CER Agreement, anti-dumping (but not countervailing) measures against goods which meet the ‘rules of origin’ are prohibited. Instead, the agreement specifies that any misuse of market power in relation to trans-Tasman trade is to be dealt with through each country’s competition laws.

In terms of the legislation this involved:

- inserting a new provision in s. 46 of the TPA, and a mirror provision in New Zealand’s Commerce Act, covering misuse of market power in trans-Tasman markets
- amending various other pieces of legislation in both countries to address matters relating to the collection of evidence, judicial procedures and the enforcement of each other’s judgements.

Since the introduction of the new arrangements, there have been no dumping cases in regard to goods traded across the Tasman. Moreover, though the CER Agreement allows for countervailing action consistent with WTO rules, if a countervailing matter arises, both countries are required to have regard to the objectives of the agreement. Again, there have been no cases since the agreement was enacted.

Even so, promoting such integrated decision-making would seemingly be easier if dumping matters were addressed under the same piece of legislation as other competition matters and administered by the same body. In this regard, the Australian Steel Association (sub. 28, para. 306) — one of only two participants to endorse the use of competition law as a generalised alternative to dedicated anti-dumping provisions — commented that ‘Australia’s regulatory framework should not allow a policy hiatus between competition and anti-dumping objectives’.

E.2 Significant practical problems

However, and notwithstanding its use in a trans-Tasman context, the feasibility of relying on competition law as a generalised substitute for Australia's anti-dumping system is highly questionable — a view shared by the ACCC and many other inquiry participants (see box E.2).

- It would require the cooperation of other countries which, based on the retention of the scope to take both anti-dumping and countervailing action in Australia's other preferential trade agreements, could not be guaranteed.
- It would also require better developed competition institutions and legal instruments for enforcing judgements on any dumping-related misuse of market power than exist in some of Australia's major trading partners.
- And, as a court-based approach, it would be much more time consuming and costly, with the ACCC (sub. 35, p. 13) observing that s. 46 cases can take 'a matter of years' to finalise.

Also, the penalties prescribed in the TPA for breaches of the s. 46 provisions are generally retrospective and may significantly exceed the damage caused by the contravention. Conversely, measures provided for under the WTO Anti-dumping and Countervailing Agreements are generally prospective and set to remediate damage to the local supplier, rather than to punish the transgressor.

- A harsher penalty regime that punished and deterred genuinely predatory dumping might well be desirable.
- But taking punitive action against a supplier benefitting from a countervailable subsidy provided by a foreign government would be especially problematic, as exemplified by the retention of the generally applicable countervailing provisions under the CER Agreement and the CCFTA.

More generally, it is unclear whether the competition law approach, with its focus on enhancing and preserving market competition, could adequately recognise the 'system preserving' arguments for taking action against injurious dumping or subsidisation (see chapter 4).

Thus, the Commission concludes that it would not be appropriate to use competition law as a generalised alternative to the current dedicated anti-dumping system.

Box E.2 Participants' views on the competition law alternative

Differences in underlying focus and philosophy

PACIA ... believes that a proposal to address dumping through competition policy is fundamentally flawed. While in broad terms both dumping policy and competition policy are compatible, the focus of each is different. The former is about industry activity and practice within global markets whereas the latter is focused on domestic competition where the consumer benefit is central. As such, PACIA would see the two approaches sitting side by side. (PACIA, sub. 31, p. 12)

OneSteel would submit that institutions and laws designed for domestic issues are very unlikely to be a constructive source of solution for international issues. Thus, the Trade Practices Act and the ACCC — whilst having a proven track record in successfully addressing domestic issues — are not a suitable foundation for improvements on international issues because they have not been created for that purpose. (OneSteel, sub. 16, p. 22)

While anti-dumping and competition policy share a common focus on unfair competition, CSBP would be strongly opposed to any move from Customs and Border Protection to the ACCC on the basis of fundamental philosophical differences that such a change in administration would bring ... The ACCC is on the public record as promoting reductions in tariffs and removal of the anti-dumping system altogether in order to [prevent anti-competitive conduct and safeguard the interests of consumers]. (sub. 13, pp. 10–11)

Practical difficulties

Australia could not begin to make competition policy work in the context of trade with another country that had no competition policy or which was unwilling to take action against anticompetitive actors domiciled in its country. Discussions at the WTO have shown that only about half of the Organization's members even have a competition policy and far fewer have competition policy laws and institutions that approach the quality of competition policy in Australia. (BlueScope Steel, sub. 19, p. 54)

The TRTF considers that the practical difficulties are insurmountable and could not be seriously entertained ... Competition laws can only be a substitute were two countries share strong political, cultural and economic ties but more importantly similar legal systems so that it is possible to have similar competition laws, and legal systems that allow cross vesting of powers. This was possible in the case of New Zealand, but not with other major trading partners. (Trade Remedies Task Force, sub. 26, p. 44)

The ACCC is of the view that the effectiveness of the CER Agreement and resulting legislative amendments to bring trans-Tasman dumping activity within the ambit of competition policy rests largely on the high degree of convergence in the legal systems, competition law and enforcement regimes, and business practices operating in Australia and New Zealand.

... there are some key practical implications which need to be considered when determining whether dumping could be [generally] addressed under the anti-competitive conduct provisions of the TPA. These include:

- the time required for investigations and court processes
- approach to transparency of investigations
- potential jurisdictional hurdles and
- whether applicable remedies are appropriate. (ACCC, sub. 35, pp. 11, 29)

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