Productivity Commission
Inquiry into Australia's Anti-dumping and Countervailing System

Submission by
BlueScope Steel

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Executive Summary

As a large domestic import-competing manufacturer, the operation of Australia's anti-dumping system is an important public policy issue for BlueScope Steel. BlueScope Steel welcomes the opportunity to make this submission to the productivity Commission enquiry.

BlueScope Steel supports the continuation of an Australian anti-dumping and countervailing system.

- The WTO system does not consider anti-dumping action as an exception to the rules, nor does it consider anti-dumping action to be a form of protectionism.
- Anti-dumping action in no way interferes with competitive foreign products reaching Australian consumers and Anti-dumping action does not isolate Australian firms from foreign competition in the Australian market.
- Australian industries have a right to expect that the conditions of competition will be those that result from the natural competitive comparative advantages enjoyed by overseas firms and that they will not be exposed – unilaterally – to injurious dumping.

BlueScope Steel questions the merit of embodying public interest tests within Australia's anti-dumping and countervailing regime.

- It is incorrect to suggest that anti-dumping actions penalize the wider economy by protecting "import-competing industries". Anti-dumping actions normally leave a large number of foreign firms to compete – including on price – with the Australian industry.
- It is also incorrect to believe that it is in the national interest to set up a situation where domestic consumers benefit (temporarily) from artificially low prices offered by dumping firms and where we know from an objective investigation that the domestic industry is suffering material injury that could cause it to go out of business.
- Dumping often occurs during periods of cyclical economic down-turn on global markets. When the economy eventually turns around, there may well be global short supply situations in the same goods and these same firms are likely to raise prices to levels higher than those previously charged by the Australian industry or

abandon the small Australian market altogether. Such an outcome is not in the public interest.

BlueScope Steel also questions the practical implications of the introduction of a national interest test.

- Any attempt to assess economy-wide impact would necessarily involve a complex, time-consuming and potentially expensive process. Such a process would consume precious scarce resources and delay relief for those industries suffering the impact of injury.
- The implementation of such a test would necessarily be subjective and discriminatory. What would be the criteria used to determine "national interest"? Who would be responsible for making the "national interest" determination?

BlueScope Steel believes that Australia's current approach to anti-dumping is probably not seen by foreign firms as a significant deterrent to intermittent dumping.

- Intermittent dumping can have a significant impact on the volatility of prices and supply, particularly when it persists for longer periods.
- Because it can interfere with the domestic industry's marketing plans and force changes in pricing strategy, intermittent dumping can make it more difficult for the domestic industry to pursue a normal investment and marketing strategy.
- There is a widespread perception that Australian authorities will impose anti-dumping measures only on the basis of actual material injury (not threat of injury), and only where such injury is evident over a reasonably long time period. This makes it unlikely that intermittent dumping would lead to a determination to impose anti dumping duties.

1 Introduction

BlueScope Steel ('BlueScope') welcomes the opportunity to make a submission to the Productivity Commission ('the Commission') inquiry into the effectiveness and impact of Australia's anti-dumping and countervailing system ('the anti-dumping system').

As a large domestic import-competing manufacturer, the operation of Australia's anti-dumping system is an important public policy issue for BlueScope.

We have structured our submission in accordance with the inquiry terms of reference and in the same order as the questions posed in the Commission's *Issues Paper* of 17 April 2009. We have provided responses to most of the questions, where they are relevant to BlueScope's interests. Where a question is not considered relevant or we are unable to provide a response, we have simply excluded the question from our submission.

We would be happy to provide further information in support of our submission if required. Any questions regarding this submission should be directed to Tom Carter, Marketing Manager Building Products, Tel: 02 4275 4143, or David Jenkins, Manager Government Relations, Tel: 03 9666 4022.

2 BlueScope Steel overview

Steel products can be divided into two broad categories: flat steel products and long steel products. Flat steel products are used in a wide range of industrial applications including construction sheeting, roofing and facades, automotive sheet metal and white goods manufacturing.

BlueScope Steel is an Australian listed company (ASX: BSL) and the leading producer and supplier of flat steel products in the Australian market. BlueScope Steel produces flat steel products, including slab, hot rolled coil, cold rolled coil, plate and value-added metallic coated and painted steel products for use in the building and construction (commercial, residential and engineering/infrastructure), automotive and manufacturing industries.

The other Australian steelmaker – OneSteel – manufactures long products, mainly for the domestic market.

BlueScope's Australian iron and steelmaking facility is located at Port Kembla (NSW), while a rolling, coating and painting plant operates at Western Port (Vic), along with metal coating and painting plants at Springhill (NSW) and painting plants at Erskine Park (NSW) and Acacia Ridge (Qld). The company operates 38 BlueScope Lysaght building products manufacturing plants. It also distributes both long and flat steel products through 82 distribution outlets and 4 sheet metal supplies outlets, and has 16 BlueScope Water sites in Australia.

The Port Kembla Steelworks is an internationally competitive integrated steel plant, with an annual production capacity of approximately 5.3 million tonnes.

Under normal market conditions, about 50 per cent of BlueScope Steel's raw steel production is converted to coated steel products such as COLORBOND® steel and ZINCALUME® steel, making it amongst the world's largest producers of value-added coated and painted steel products as a proportion of production.

Normally, approximately half of BlueScope Steel's annual Australian production is sold domestically and the balance in the export market. The company's Australian operations are its largest source of exports globally, exporting some $2.3 billion of steel products (approximately 2.5 million tonnes) in the 2007/08 financial year. This places BlueScope Steel in the top one per cent of Australia's exporters by value.[1] While rankings vary year-by-year, steel products are consistently amongst Australia's top twenty goods exports by value. Key export destinations for BlueScope Steel include the United States, South Korea, Thailand and Indonesia, and to a lesser extent Europe, Africa and the Caribbean.

BlueScope Steel has established a substantial international footprint including an integrated steelworks in New Zealand, a flat products steel-mill joint venture in the United States (Delta, Ohio), and metal coating and painting facilities in China, Vietnam, Indonesia, Thailand, Malaysia and under construction in India. Building products manufacturing plants are located throughout the Asia–Pacific region, and the company is a leading manufacturer of steel pre-engineered buildings in the USA and China. In 2008, BlueScope Steel acquired the IMSA steel businesses in North America.

BlueScope Steel has an Australian based direct workforce of approximately 9,500 employees, with a further 9,500 worldwide.

The steel industry is an important segment of the Australian economy. Narrowly defined (as per ANZSIC code 2711), in 2005/06 the Australian steel industry employed approximately 24,000 people, paid wages of $1.5 billion and had an annual turnover of approximately $13 billion. As described, the steel industry is also a major manufacturing exporter.

In many respects, Australia is a natural place to manufacture iron and steel. Australia is one of the few countries in the world with large, high quality reserves of the key iron and steelmaking raw materials, such as iron ore, metallurgical coal and limestone. Labour costs, typically a source of competitive advantage for manufacturers in developing countries, comprise a relatively small proportion of upstream iron and steelmaking costs. This is particularly the case as capital has been substituted for labour over recent decades. This distinguishes steel

[1] Australian Bureau of Statistics, *'Number and Characteristics of Australian Exporters, 2007-08'*, Cat No: 5368.0.55.006. According to the ABS, In 2007-08, less than 1% of goods exporters had aggregate exports of $100m or more, but these exporters contributed 79% by value to total goods exports.

manufacturing from traditional labour-intensive manufacturing industries, which have typically experienced sharp declines in production in Australia over recent years.

Those steelmakers with ready access to raw materials therefore have a degree of inbuilt competitive advantage compared to steelmakers in some countries who need to ship their raw materials. Energy costs also comprise a significant proportion of costs and Australia has historically enjoyed low energy costs by world standards (albeit energy costs will inevitably increase with the introduction of a carbon price in Australia).

The Australian iron and steel industry has a number of competitive advantages, which include:

- Proximity to high quality iron ore reserves;
- Access to high quality sources of hard coking coal;
- Generally modern manufacturing facilities and technologies as a result of the continuing substantial capital investment of the past two decades;
- Strong channels to market through integrated national distribution networks;
- High quality products;
- Strong technical and product support for domestic customers; and
- Supply chain and manufacturing capabilities that present customers a broad product offering, shorter lead times and reliable delivery compared to those traditionally associated with imported steels.

A competitive Australian steel industry is an important foundation for a competitive Australian manufacturing sector. Australian-made steel is a key input for a large range of domestic manufacturers.

The Australian Steel sector has built on its competitive strengths with sustained capital investment programs. Over the past decade, BlueScope Steel has invested over $1 billion in capital in its Australian operations. Highlights of this investment program include:

2004 – Sinter Machine Emissions Reduction Project - $94 million

2006 – Hot Strip Mill upgrade - $100 million

2007 – Western Sydney Service Centre (COLORBOND® steel plant) - $150 million

2009 – Blast Furnace re-line – underway, budget $372 million

2009 – Sinter Plant upgrade – underway, budget $134 million

Notwithstanding the competitive strengths of the Australian iron and steel industry, the sector also faces a number of challenges. These include:

- High product complexity and sometimes sub-scale manufacturing operations relative to overseas producers; and
- High distribution costs, largely due to the dispersed nature of the Australian domestic market.

One of the reasons for the closure of BlueScope Steel's tinplate manufacturing plant in 2007 was the sub-scale nature of this operation compared to overseas plants.

3 The trade context for the Australian steel industry

The steel industry is global in nature with steel a highly traded product. Worldwide, output of crude steel has grown from ~900 million tonnes in 2002 to ~1.33 billion tonnes in calendar 2008. China has been the major driver for this growth with its output increasing during this period from 222 million tonnes to 502 million tonnes per annum and up until recent global economic conditions curtailed Chinese export demand, China had been a net exporter of steel products since November 2005. A significant proportion of the growth in global steel production capacity is taking place in the so-called 'BRIC' countries – Brazil, Russia, India and China.

According to the Iron and Steel Statistics Bureau, in calendar year 2008, the 10 largest steel exporting countries accounted for approximately 19% of global steel consumption. China and Japan were the largest exporters of steel, with 56 and 37 million tonnes of steel exported, respectively.

Australian steel production is small in world terms, with total domestic production of about 7.6 million tonnes per annum in 2008, or about 0.6% of global production. Notwithstanding the Australian industry's small output relative to global output, BlueScope Steel's Port Kembla Steelworks is a world scale steelworks of over 5 million tonnes production per annum, and is generally ranked in the second lowest quartile for production of slab and hot rolled coil products according to international industry cost benchmarks.

The Australian steel market has very low tariff and non-tariff barriers and is characterised by substantial and growing levels of imports. Imported steel products are sourced from countries including China, Japan, Thailand, South Korea, Malaysia, Taiwan, Singapore, Vietnam, New Zealand and Indonesia.

Global steel prices have fluctuated significantly over time, driven by demand and supply patterns that are influenced by global construction activity and GDP growth. Many other factors also influence global steel prices including: structural overcapacity in the market, a relatively fragmented industry structure, high exit barrier, high fixed operating costs and the involvement of government and regulatory policies including trade barriers and other subsidies.

Australian domestic steel prices – particularly for lower value-add 'commodity' steel products - parallel and follow similar trends to international prices due to competition from imports.

Over the last ten years, there has been an increase in consolidation, capacity rationalisation and restructuring activity in the global steel sector. Consolidation has provided steel companies with greater flexibility to manage their steel production to meet demand levels, which has, to a certain extent, dampened cyclicality although this has been less evident in China. In addition, increased breadth of operations and enlarged research and development capabilities have enabled these companies to improve production efficiency, expand their production ranges and service global customer accounts such as global automotive manufacturers.

4 BlueScope Steel current and historic Australian trade action

In the past ten years, BlueScope Steel has lodged two applications with Australian Customs for dumping duties. In both instances an affirmative determination was made by Customs. A summary of these applications and Custom's subsequent determinations is shown below.

There are currently no anti-dumping or countervailing measures in place or under review by Customs on the range of products directly manufactured by BlueScope Steel in Australia.

However, it should be noted there are currently anti-dumping measures in place and also under review in relation to certain "Hollow [steel] Structural Sections". These goods are manufactured in Australia by customers of BlueScope, predominately utilising steel manufactured by BlueScope Steel.

2003 Plate Steel Dumping Application

BlueScope Steel lodged an application for dumping duties in 2003 in relation to the dumping of plate steel exported to Australia from China, Indonesia, Japan and Korea. The goods the subject of the investigation were plate steel with a thickness of 4.75mm or more, quoted to Australian / New Zealand Standard (AS/NZS) 3678 grades 250 and 350.

Upon completion of its investigation, Customs concluded that:

- exports of the goods from China, Indonesia, Japan and Korea were at dumped prices;
- the Australian industry producing like goods had suffered material injury as a result of those dumped goods; and
- material injury would continue to be caused to the Australian industry if the goods from China, Indonesia, Japan and Korea continue to be exported to Australia at dumped prices.

Customs recommended that dumping duty notices be published in respect of the goods exported from China, Indonesia, Japan and Korea, with the exceptions in respect of Dongkuk Steel Mill Co., Ltd of Korea and PT Gunung Rajapaksi and PT Gunawan Dianjaya Steel of Indonesia. A dumping duty notice to this effect was published on 25 March 2004.

Following the publication of the dumping duty notice, the TMRO received an application for a review of the Minister's decision. The TMRO accepted the application and a review was undertaken.

In November 2004 at the conclusion of this reinvestigation, Customs affirmed its original findings and recommended that the Minister for Justice and Customs affirm his decision to publish dumping duty notices on the goods in question.

Anti-dumping measures relating to this application expired on the 2 April 2009.

2000 Tin Plated Steel Dumping Application

In March 2000, BlueScope Steel lodged an application for dumping duties in relation to the dumping of tinplate exported to Australia from Taiwan and the United Kingdom. The goods the subject of this investigation were flat rolled coil or cut sheet products of non alloy steel of a thickness of less than 0.5mm and a width of 600mm or more, plated with tin and known as tinplate.

In July 2000, BlueScope Steel formally withdrew that part of its application relating to exports of tinplate from the United Kingdom.

Customs found that tinplate from Taiwan was exported to Australia at dumped prices. The dumping margins of 19 per cent for sheet and coil were based on the weighted average of both export prices and normal values over the period of investigation. Customs found that the dumped imports caused material injury to the Australian industry in the form of loss of market share and declining profits.

Customs recommended that "the Minister take anti-dumping action under s.269TG(1) and s.269TG(2) of the Customs Act 1901 against exports of tinplate from Taiwan".

Subsequent to the Report, the Minister accepted a price undertaking by Ton Yi Industrial Corporation from Taiwan, which became effective on 10 January 2001.

The price undertaking on exports of tinplate by Ton Yi Industrial Corporation expired on the 10 January 2006.

5 General response to the Productivity Commission inquiry

BlueScope Steel supports the continuation of an Australian anti-dumping and countervailing system

There are commentators who suggest that anti-dumping and countervailing regimes and the internationally agreed rules that govern these regimes are "exceptions" to the otherwise liberal trade rules of the World Trade Organization (WTO). These commentators typically maintain that anti-dumping actions are a form of trade protectionism on a par with high border barriers, discriminatory tax regimes, import quotas or bans and subsidies to domestic industries. To characterize properly implemented and WTO-sanctioned anti-dumping action as protectionist is wrong-headed and ignores the role played by anti-dumping action in the global trading system. It would be a serious error in economic policy if the government – particularly in a small and open market such as Australia's – were to conclude that the possibility of effective action against injurious dumped imports should be abandoned in the interest of a "more open" trade policy.

The WTO system does not consider anti-dumping action as an exception to the rules, nor does it consider anti-dumping action to be a form of protectionism. Carefully drawn up multilateral agreements regulate the way in which WTO Members are permitted to take anti-dumping action. The agreed rules have been "on the books" since 1947 and have been refined through three multilateral negotiations. Where a government fails to implement properly the provisions of the agreement, it can be taken to task in WTO dispute settlement and WTO Members have made frequent use of this route to keep the anti-dumping practices of their trading partners in line with the rules. If WTO saw anti-dumping as an exception to expected normal behaviour under the system, the rules would provide for a "cost" to the using government, in much the same way as the rules on emergency safeguards operate. They do not. Anti-dumping action taken in accordance with the rules of the WTO is a right of WTO Members. There is no "cost" associated with a Member's resort to anti-dumping action. There are many sound reasons for this.

Anti-dumping action is not taken by the government of an importing country in an effort to counter the competitive comparative advantage that foreign firms might enjoy in the Australian market due to their lower cost structures, cheaper inputs (including labour), access to

resources or other factors. Anti-dumping action in no way interferes with competitive foreign products reaching Australian consumers. Anti-dumping action does not target countries and it does not operate domestically for the benefit of individual firms. Anti-dumping action does not isolate Australian firms from foreign competition in the Australian market.

Anti-dumping action is targeted at those export sales of individual overseas firms sold at economically artificial "dumped" prices that produce a cumulative negative effect in the market that is so serious that it leads to material injury to an *entire industry* in Australia. WTO rules require Australia to undertake an exhaustive examination of each situation of alleged dumping and injury in order to prove that the injury to an industry is caused by the effects of the dumping and not by other factors. Where this causal link to injury can be demonstrated, Australian authorities have the right under the WTO to take appropriate prescribed action against the dumped imports.

Before discussing the reasons why Australia must retain a viable system to deal with dumped imports, it is important to set the international legal context in which anti-dumping actions take place.

The WTO system, like the GATT before it, is based on the notion that governments conduct their trade relations on the basis of a reciprocal contract. In fact, under the pre-1995 GATT system, member countries were referred to as "Contracting Parties" to emphasize this relationship. Like any business contract, the GATT, and now WTO, contract is assumed to be balanced and if it should for some reason become unbalanced, the system provides for re-balancing. Related to this notion is something that legal experts refer to as the "doctrine of reasonable expectations". Under this doctrine, WTO Member countries have a right to expect that the conditions of commercial competition they assumed would prevail should not be upset by actions of their trading partners in ways that disadvantage their domestic economic players. If those expectations are not realised the system normally provides recourse through dispute settlement. For example, if country A negotiates a tariff reduction in the market of country B, it has a reasonable expectation that it will be easier for its exporters to sell into that market after B has dropped the level of the tariff. But if B subsequently introduces a production subsidy to the benefit of its producers that allows them to price far below the prices offered by A's exporters, the effect of the tariff cut will be nullified. A now has a case that the contract has been unbalanced and it can take its case to dispute settlement in the WTO.

But what if the contract is unbalanced and A's reasonable expectations in respect of the competitive environment are dashed not by the actions of a government that can be taken to dispute settlement but by the actions of individual foreign firms that are engaged in artificially pricing their exports to A's market in such a way as to materially injure country A's domestic industry? WTO is a state-to-state organization and no dispute settlement action is available to A to right the balance in favour of its domestic industry. Rather, the solution that is provided by the system in this case is found in the carefully crafted and highly constraining rules of the Anti-dumping Agreement.

When the conditions are met, recourse to anti-dumping is not an exercise in protectionism. It is an exercise in the right to ensure that the conditions of competition are not so distorted as to unbalance the contract so seriously that domestic injury occurs through the effects of dumped imports.

There are many possible motivations for dumping. These motivations are not considered relevant by the WTO rules, which are focussed on providing a remedy for the injurious effect of the dumped imports. Like the WTO rules, Australian anti-dumping legislation and practice should ignore the motivations or intentions of foreign firms found to be dumping their product into Australia and focus instead on ensuring that relief is effectively provided to Australian industries that are injured or threatened with injury by the effect of the dumping.

Competition policy is not an adequate substitute for anti-dumping and countervailing laws

Those who argue that anti-dumping could be replaced by competition policy make the mistake of equating the international trading environment with competition in a national domestic market. The markets and competitive opportunities are not the same. In a domestic market situation, firms that engage in price competition are competing for each other's customers. But that opportunity generally doesn't exist in the international trade exchanges in our region. How many Australian firms affected by dumping from China realistically have an opportunity to engage in reciprocal dumping into the Chinese market? WTO figures show that Chinese exporters have been the target of several hundreds of anti-dumping actions in recent years. The red herring of competition policy as an instrument to combat dumping is discussed in greater detail elsewhere in this submission.

Moreover, China, and other major developing countries like India, are themselves major users of anti-dumping measures to shield their own industries from injurious dumping. These countries, and all of Australia's major trading partners, have anti-dumping systems in place that are resorted to frequently by their business sectors. Why, in such a global context, would Australia think that it would make sense to abandon anti-dumping as a tool and expose Australian industries to injurious competition from foreign dumpers?

Finally, there is no compelling reason to think that anti-dumping action as practiced in Australia is likely to create any significant economic problems in the broader economy. Anti-dumping investigations are highly constrained by international and domestic rules and regulations. Anti-dumping measures, when imposed, apply only in the case of a limited range of "like products" with anti-dumping duties calculated separately for each foreign firm found to be responsible in part for materially injuring an Australian industry. Foreign firms that are not dumping are not affected by the case, nor are firms that may be dumping but whose impact on the case is judged negligible. In Australia, we have even taken the step of recognizing China as a market economy for anti-dumping purposes – a step which goes a long way in guarding against abuse of the anti-dumping system in trade with one of our most important sources of imported goods.

To sum up, it would be unwise for Australia to consider abandoning this critically important tool of trade policy. WTO recognizes Australia's right to take anti-dumping action against dumped

imports that cause injury to an Australian industry and Australian industry deserves the opportunity to avail itself of this legal remedy under the appropriate circumstances. Anti-dumping action is not trade protectionism, rather it is a way to ensure an appropriate balance in the system. When Australia reduces its tariffs and other border barriers as a result of a multilateral or bilateral negotiation, Australian industries have a right to expect that the conditions of competition will be those that result from the natural competitive comparative advantages enjoyed by overseas firms and that they will not be exposed – unilaterally – to injurious dumping. The Australian Government operates its anti-dumping system in full compliance with the WTO rules in this sector, ensuring that foreign exporters are not abused and that domestic consumers of imported products that are not injuring Australian producers are not negatively affected.

BlueScope Steel questions the merit and practical implications of embodying pubic interest tests within Australia's anti-dumping and countervailing regime

The notion that it could be contrary to the national interest to take anti-dumping action against dumped imports that are demonstrably injuring an industry in Australia should be dismissed in this review. Anti-dumping action is not like action foreseen in the context of emergency safeguards and it is dangerous to lump together very different types of import remedy policies that are designed for very different purposes.

Emergency safeguard actions are governed multilaterally by the WTO Agreement on Safeguards and Article XIX of the General Agreement on Tariffs and Trade (GATT). Safeguard actions come into play when a national economy is faced with an unforeseen flood of fairly traded imports that threaten or cause serious injury to a domestic industry. When a protective action is taken, it is generally applied on a most-favoured-nation (MFN) basis[2], with a remedy designed to stop the increase in imports for some period. A safeguard action insulates the domestic industry from all external competition, even those foreign suppliers who might not be very price competitive with the temporarily protected domestic industry. This is clearly a situation that could cause harm to the national interest and, as a result, the applicable WTO agreement requires

> "…public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest."[3]

The circumstances and the context in which an anti-dumping action is taken are completely different from those obtaining in the case of safeguards and, as a consequence, the WTO Anti-dumping Agreement (as with the WTO Subsidies and Countervailing Measures Agreement)

[2] WTO rules are silent on the issue of whether safeguard actions should include action against a country's partner in a free trade agreement. Also the WTO safeguards agreement calls for the exclusion from a safeguard action of imports from developing countries whose individual share of imports does not exceed 3 percent provided that developing countries with a less than 3 percent share do not collectively account for more than 9 percent of imports.

[3] WTO Agreement on Safeguards, Article 3.1.

incorporates no suggestion whatsoever that it would be appropriate to include public / national interest testing in WTO Members' anti-dumping actions. There are many good reasons for this.

Firstly, anti-dumping actions are not taken against goods exported by foreign companies that may enjoy a competitive comparative advantage relative to an Australian industry. Rather the targets of anti-dumping action are those foreign firms who are pursuing a short-term profit maximizing strategy in an international market characterized by imperfect competition[4]. Non-dumping foreign firms are not included in the anti-dumping action and we have seen many examples in Australia of foreign firms initially swept up in an anti-dumping investigation later excluded by investigators on grounds they were not dumping into the market. It is misleading to suggest – as some economists do – that anti-dumping actions penalize the wider economy by protecting "import-competing industries". Anti-dumping actions normally leave a large number of foreign firms to compete – including on price – with the Australian industry. Domestic consumers are not left with only the domestic industry as a supplier of the affected product. The situation is very different from that in a safeguards case.

Secondly, it is illusory to believe that it is in the national interest to set up a situation where domestic consumers benefit (temporarily) from artificially low prices offered by dumping firms and where we know from an objective investigation that the domestic industry is suffering material injury that could cause it to go out of business. Dumping often occurs during periods of cyclical economic down-turn on global markets, sometimes in an effort by producers to unload inventories or utilize excess production capacity. At such times, even small markets like the Australian market can be targeted by foreign dumpers. When the economy eventually turns around, there may well be global short supply situations in the same goods and these same firms are likely to raise prices to levels higher than those previously charged by the Australian industry or abandon the small Australian market altogether. How does this serve the national interest?

Apart from these very basic arguments, there are many other reasons why the introduction of a national interest test in Australian anti-dumping actions would be a very poor policy choice.

[4] Paul Krugman and Maurice Obstfeld explain how dumping can be a short-term profit maximizing strategy for a firm in their textbook, International Economics, Theory and Policy on pages 131-133.

The implementation of such a test would necessarily be subjective and discriminatory. It would introduce subjectivity and discrimination on top of a process which, in its current form, is objective and non-discriminatory. To do so would not seem to be an exercise in the good governance approaches that the Australian Government normally supports.

The subjectivity of the test's implementation would flow from a number of considerations. What would be the criteria used to determine "national interest"? Who would be responsible for making the "national interest" determination? Most likely the decision would be made by a Minister, who is unavoidably subject to both direct and indirect political pressures. In such circumstances, it seems unlikely that the decision on "national interest" would be made in a transparent environment. How long would the Minister take to make his decision and over what period of the country's economic history would the Minister consider the Australian "national interest"?

The discrimination that would be introduced by the implementation of a national interest test in anti-dumping is another serious problem with the idea. In all cases, we know that we would be starting from the standpoint that a domestic industry had been found to be injured by reason of dumped imports. But only some industries would obtain relief from the dumping and others would be allowed to suffer or go out of business. Some industries that had invested considerable time and expense in the prosecution of an anti-dumping case would gain relief after such expenditure, while others would be left with wasting their scarce resources at a time when they are already under attack.

With the introduction of a national interest test in anti-dumping, an important new element of uncertainty would be introduced into the process for all Australian industries. In addition, anti-dumping cases are already lengthy and expensive undertakings and the national interest test would be certain to further extend the time period for the case and add to the expense faced by the domestic industry.

One final point deserves mention in this context. The objective of a properly run anti-dumping investigation is not to impose a new barrier at the border that insulates an Australian industry from competition. The objective is to offset the dumping margin or – if a lesser amount of anti-dumping duty can prevent injury – to try to prevent injury through this lower duty. Australia is a country that applies the "lesser duty" rule in its anti-dumping cases. This means that the

authorities are already applying a non-discriminatory policy designed to mitigate any adverse impact of the anti-dumping action on Australian purchasers of the dumped goods.

5 BlueScope Steel's responses to specific questions raised in the Productivity Commission's Issues Paper

Recent anti-dumping activity – Usage levels

Question: *What factors explain the declines in usage of Australia's anti-dumping system? Have buoyant economic conditions for much of the last decade reduced the incidence of dumping, diminished the incentives for local industries to seek protection against it, and/or made injury more difficult to prove? Is the current economic downturn likely to lead to an increased number of applications for anti-dumping measures? (Issues paper page 7)*

In general, dumping is less likely to occur during times of buoyant economic conditions, because in such times demand for many of the commodities where competition on the basis of price tends to outweigh other competitive considerations leads to tighter supply situations and manufacturers can sell all or most of the product they produce at non-dumped prices. In the same way, dumping is likely to increase when there is a fall-off in domestic and international demand for these products during recessionary periods. In addition, at such times, industries that are already likely to be adversely affected by the economic downturn are doubtless less likely to be inclined to tolerate harmful dumping in their home market.

A certain time-lag is likely to be involved between (a) the onset of a recession (b) an increase in dumping (c) a domestic industry's decision to petition for relief, but it would seem that we could still draw a rough connection between Australian recessions in 1981-82 and 1990-91 with the increased anti-dumping activity reflected in Figure 2 of the Productivity Commission's Issues Paper of April 2009.

In the context of a country like Australia that implements anti-dumping policy consistent with its obligations under the WTO agreement, buoyant economic conditions should not "make injury more difficult to prove". Article 3.5 of the Anti-dumping Agreement makes clear that injury determinations must in all cases be based only on the effect of the dumped imports and not on other factors, such as the Agreement's explicit reference to "contraction in demand". In other words, it cannot be easier to prove injury during a recessionary period.

Because the current global economic downturn (we note that as of the date of this submission Australia is not in technical recession) is likely to reduce global demand for many of the price-sensitive commodities manufactured by Australia's main trading partners, there is clearly an increased risk that foreign firms will dump their product onto the Australian market. Under such

circumstances, it would not be unusual to see an increased number of requests for anti-dumping action from Australian industries affected by the dumping.

Recent anti-dumping activity – Product and country incidence

Question: *Why is anti-dumping activity heavily concentrated in a few key industries? Is it because cost structures in these industries lend themselves to price discrimination across markets? Are the outputs of these industries relatively homogenous, making it easier than in other industries to meet the 'like goods' test? (Issues paper page 9)*

Assuming that a foreign firm has made a conscious decision to engage in dumping, dumping is most likely to occur in the first instance in industries where there is either a ready presence of excess production capacity or where units of the product can be produced at the margin easily without important new investments in fixed costs. In addition, the competition in the market where the dumping is taking place will likely be mainly on the basis of price, suggesting that the outputs are largely homogenous. Clearly, there are some industries where this is more likely to occur than others. Where branding (or a reputation for quality) is an important consideration for consumers, dumping is less likely to be effective as a marketing strategy.

Although it might often be the case that homogeneity of the output of domestic and foreign producers makes it easier for investigators to arrive at a like product decision, products need not be alike in all respects if they have common characteristics and compete directly in the marketplace.

The global steel industry is an example of an industry where anti-dumping measures are more frequently pursued. This industry is characterised by, high fixed operating costs, periods of structural overcapacity in some markets and products that are relatively homogeneous and readily transportable. These factors combined with a relatively fragmented market structure result in there being little incentive for producers to cut production during times of suppressed demand. Consequently it is not unusual for some manufacturers to direct surplus production into markets outside their home markets at dumped prices.

Recent anti-dumping activity – Product and country incidence

Question: Does the growing concentration of Australia's anti-dumping measures on exports from Asia reflect the broad shift in our trading patterns, or are other factors at work? (Issues paper page 9)

The growing concentration of anti-dumping measures on exports from Asia is entirely to be expected given the rising importance of China and East Asia in global trade and in Australia's own trade relations. In 2007/08, China was Australia's number one source of imports and these imports were growing at an annual rate of increase of 14 per cent. Japan was our third most important source of imports in 2007/08 (with a growth rate of 12 per cent) and imports from Thailand, our sixth most important supplier, showed an annual growth in 2007/08 of 29 per cent. Under these circumstances, it would be unusual if anti-dumping activity were not concentrated on those countries which are rapidly growing in terms of their significance in our import market.

A concentration of anti-dumping activity on Asia is something that also characterizes the anti-dumping actions of other countries that are similarly placed as Australia. In New Zealand, for example, 75 per cent of definitive anti-dumping duties involved at least one Asian country in the 1999-2003 period, but 86 per cent of anti-dumping action in the 2004-2008 period involved at least one Asian country. In the case of Canada, 50 per cent of definitive anti-dumping actions involved at least one Asian country in 2004, but in 2008, 100 per cent of Canadian actions targeted at least one Asian country. For the 2004-2008 period, 80 per cent of Canadian definitive duties were applied against at least one Asian exporter. In the United States, where many more anti-dumping actions are taken, 79 per cent of final anti-dumping actions in the 1999-2003 period involved at least one Asian country. In the more recent 2004-2008 period, 94 per cent of all anti-dumping measures in the United States involved at least one Asian country.

Another factor that can come into play here is the evident ability of Asian (particularly Chinese) exporters to rapidly ramp-up production volumes of certain types of goods.

Finally, in many product categories, Asian exporters are likely to be competing intensely with each other in export markets, which may increase the likelihood that they would engage in dumping into the Australian market.

Recent anti-dumping activity – How does Australia compare internationally?)

Question: *How does Australia's anti-dumping regime compare with that in other countries? Are there particular features of Australia's regime and its usage which are notable in an international context? (Issues paper page 9)*

At the request of the Productivity Commission during preliminary interviews, BlueScope Steel provides this commentary regarding the comparison of the Australian and New Zealand anti-dumping regimes.

Although there are several differences, Australia's anti-dumping regime closely resembles that of New Zealand in many respects. In both regimes, a single government agency is responsible for the investigation of both dumping and injury to a domestic industry (in some countries, like the USA, these responsibilities are bifurcated). Australia's anti-dumping regime has slightly shorter overall time limits than the New Zealand regime – with a final result likely 155 days after initiation, compared to 180 days in New Zealand.

Both Australia and New Zealand apply the "lesser duty" approach, imposing duties less than the full dumping margin if this lesser duty is judged sufficient to remove injury to a domestic industry. Neither Australia nor New Zealand currently make use of a "national interest" test in anti-dumping cases.

From a technical standpoint, New Zealand authorities appear to give more regular consideration to the possibility that an anti-dumping action could be based on *threat* of injury, but they note in a discussion paper[5] on the subject that where an examination of evidence does not establish an actual or potential decline in examined factors, other evidence (addressed to the points listed in Article 3.7 of the WTO agreement) would need to be particularly persuasive. A brief examination of current New Zealand actions does not seem to show any action where a final outcome has been based on threat of injury.

A particular feature of the Australian anti-dumping regime not found in New Zealand and notable in the international context is the presence in the process of the Trade Measures Review Officer (TMRO). The TMRO provides an independent administrative review and appeal function in relation to Australian anti-dumping and countervailing duty actions. The legislation and regulations establishing the function of the TMRO set out decisions that are

[5] "Trade Remedies in New Zealand: A Discussion Paper", Ministry of Commerce, Wellington (February 1998), page 45.

reviewable by the TMRO and include such things as the rejection of a petitioner's application for anti-dumping action, termination of investigations, and actions on refund of interim duties collected. The TMRO also has the power to make recommendations to the Minister on ministerial decisions, such as decisions to publish or not to publish anti-dumping notices.

In its on-line description of the functions of the TMRO, the website of the Australian Attorney General's Department suggests that an important *"raison d'etre"* for the TMRO is to ensure that Australian anti-dumping legislation and procedures comply with Australia's obligations under the WTO.

It is our view that other countries could perhaps benefit from the introduction into their system of an agent charged with a similar role to that of the TMRO.

The rationales for Australia's anti-dumping system – Fairness and political economy rationales

Question: How critical to the effective functioning of the multilateral trading system is access to anti-dumping protection? (Issues paper page 10)

Access to an effective remedy against injurious dumping is critical to the effective functioning of the multilateral trading system because carefully crafted "safety valves" like anti-dumping make it more likely that trade liberalization and government respect for international obligations will enjoy the strong support of the business community. Certain industries are likely to be more exposed to injurious dumping than others, but even for an industry with minimal exposure, the knowledge that there is an effective remedy available in case of need increases business support for meaningful participation in the open multilateral system.

This linkage is not mere supposition on our part but is supported by on the record statements from industry leaders. In August 2008, Heather Ridout, CEO of the Australian Industry Group, made the following comment in a news release:

> "Anti-dumping mechanisms are an internationally accepted way to handle unfair trade. They enable countries such as Australia to open up their economies to international competition, while at the same time ensuring such competition remains fair."

A connection between defending free trade and maintaining the ability to counter dumping was also made by the Commission of the European Communities in its Green Paper on Europe's Trade Defence Instruments in a Changing Global Economy (6 December 2006):

> "The European Union, like most other importing economies, operates a system of trade defence instruments. These instruments – Anti-Dumping, Anti-Subsidy and Safeguard measures – allow the European Union to defend its producers against unfairly traded or subsidised imports and against dramatic shifts in trade flows in so far as these are harmful to the EU economy.
>
> The EU's use of these instruments is based on rules derived from the WTO agreements that establish trade defence instruments and the principles on which they operate as a legitimate part of the multilateral system of free trade. Like the urgent work to suppress counterfeiting and intellectual property theft, including

through the abuse of electronic communications, defending against unfair trade is a politically and economically crucial part of defending free trade. It allows us to support the interests of European workers and European competitiveness, and is therefore an important part of helping Europe manage the consequences of globalisation."

There are probably very few economists on the world stage that could be characterized as being more pro-free trade than Columbia University's Professor Jagdish Bhagwati. Nevertheless, Bhagwati has advanced a powerful argument in favour of anti-dumping action in what is referred to as his "prudential argument". Writing in 1988, Bhagwati advanced the view that:

> "The institutional procedures for ensuring "fair trade" through operation of CVD and AD mechanisms under a free trade regime have a rationale in the *cosmopolitan* theory of free trade. The optimal allocation of world activity requires that no country artificially distort its comparative advantage by substantial subsidies to specific commercial activities or by permitting firms to indulge in disruptive dumping designed to destroy cheaper producers and then stick it to consumers with higher prices by more expensive suppliers. I also believe that there is a *prudential* argument for maintaining such "fair trade" processes as a complement to a free trade regime: if governments willingly ignore such artificial aids to foreign suppliers, it will certainly produce a backlash and imperil the free trade regime itself."[6]

Clearly, this trade-off was appreciated by those who crafted the original GATT agreement in 1947, when they provided for anti-dumping action and even "condemned" injurious dumping. Anti-dumping has been retained as an important trade policy tool through eight rounds of multilateral trade negotiations, and refined in the Kennedy, Tokyo and Uruguay Rounds. There has never been a serious suggestion that anti-dumping action should be outlawed in the WTO system because its role in helping the system to function effectively is widely appreciated by governments and businesses around the world.

[6] Jagdish Bhagwati, "The United States and Trade Policy: Reversing Gears", *Journal of International Affairs*, Vol. 42 (1988).

The rationales for Australia's anti-dumping system – Fairness and political economy rationales

Question: Does the strength of the 'system preserving' and fairness rationales depend on the circumstances surrounding dumping? For example, do these rationales have greater currency where the price of goods from an overseas supplier is artificially reduced by government subsidies, as distinct from cases where a supplier simply differentiates prices across markets according to what each will bear? (Issues paper page 10)

The WTO agreement does not draw a distinction between the different circumstances that might surround particular foreign firms' decisions to dump their product on export markets or whether government subsidies contribute to making it possible for a foreign firm to artificially reduce its export prices. Such considerations are immaterial to the thrust of the multilaterally agreed rules, which focus exclusively on dealing with the effect of dumped imports on an industry in an importing country.

This is an appropriate focus and it is a focus that should be primary in Australia's administration of its anti-dumping legislation. The legislation – like the WTO agreement – should be concerned with the injurious effect that the dumped imports are having. It matters not at all to the affected domestic industry in the importing country what the circumstances are surrounding its overseas competitor's decision to dump. It is the responsibility of the Australian Government to ensure that anti-dumping measures counter injury from dumping whatever the motivation of the dumper.

The reference in the question to simple price differentiation "across markets according to what each will bear" suggests both an imperfect competition model in which the supplier is not under price pressure in its own market and an effort by the exporter to keep prices in overseas markets as high as possible. If that is in fact how the exporter is behaving, dumping margins would likely be negligible, unlikely to cause injury and eventually not the object of a definitive anti-dumping action.

The rationales for Australia's anti-dumping system – Avoiding the costs of 'intermittent' dumping

Question: What effects does intermittent dumping have on local industries? How significant, relative to other factors, is its impact on the volatility of prices and supply? (Issues paper page 12)

Intermittent dumping, which generally occurs when foreign manufacturers have a short-term need to off-load supply over-hangs, can be a important cause of uncertainty in the market. Because it can interfere with the domestic industry's marketing plans and force changes in pricing strategy, intermittent dumping can make it more difficult for the domestic industry to pursue a normal investment and market development strategy.

Intermittent dumping can have a significant impact on the volatility of prices and supply, particularly when it persists for longer periods. Because Australia's current approach to injury determinations in anti-dumping cases can make it difficult to convince authorities to take action against intermittent dumping, there is a sort of "loophole" in the system today that operates to the disadvantage of affected Australian industries. This might be addressed in some degree if the Australian anti-dumping authorities were more willing to proceed with investigations and determinations made on the basis of *threat* of material injury. See our comments on this aspect of the Australian system elsewhere in this submission.

The rationales for Australia's anti-dumping system – Avoiding the costs of 'intermittent' dumping

Question: Is Australia's current anti-dumping system a significant deterrent to intermittent dumping? Are there any recent anti-dumping cases that have been specifically concerned with such behaviour? Is the imposition of dumping duties for periods of five years an appropriate way to deal with instances of intermittent dumping? (Issues paper page 12)

Australia's current approach to anti-dumping is probably not seen by foreign firms as a significant deterrent to intermittent dumping. There is a widespread perception that Australian authorities will impose anti-dumping measures only on the basis of actual material injury (not threat of injury), and only where such injury is evident over a reasonably long time period. This makes it unlikely that intermittent dumping would lead to a determination to impose anti-dumping duties. We suspect that foreign firms know this and likely gamble that they can therefore get away with intermittent dumping into the Australian market if the dumping is restricted to a short time period.

Australian industries also appreciate that they are unlikely to be able to make an injury case stick with Customs in cases of intermittent dumping. Because it is expensive and time-consuming to file for anti-dumping relief, industry will typically do so only where it judges that it has a reasonable chance of success. As a result, intermittent dumping tends to go unchallenged.

This is a loophole in the system's ability to counter the adverse economic impact dumping can have on Australian industries, but apart from addressing the problem through injury investigations based on *threat* of injury, there is little that could reasonably be done about it. The same problem exists in the case of large one-off sales (an aircraft order, for example) or sales of large capital equipment items where a product might be one of a kind produced in response to a special order (e.g. turbines or large transformers). The anti-dumping system as it operates today is not designed to deal well with these situations.

Depending upon the industry and its business cycle, intermittent dumping can be a very serious problem. In some cases, dumping might occur for 3 to 18 months at a time only to stop and reoccur with the next dip in the business cycle. Some would argue that taking action against this kind of dumping might punish consumers unnecessarily when the business cycle turns around and prices rise. But that argument ignores the fact that a cyclical upturn will typically

lead to a situation where other suppliers (who are not dumping) are free to enter the market and compete against domestic producers at the new higher prices likely to be prevalent in the market.

Is it appropriate to deal with intermittent dumping through the imposition of an anti-dumping measure that may last for as long as five years even when the dumping is sporadic over that period? We believe that it is. Intermittent dumping, as we have already noted, can seriously disrupt the stability of the market and complicate business decisions. When an industry comes to the conclusion that it is so injured by reason of dumped imports that it is prepared to invest in the lengthy and costly process of filing for anti-dumping relief, it is reasonable for that industry to have an expectation that, where it is found to have been injured, it can expect the relief from that injury to last for a reasonable period of time. Government should understand that an industry injured by dumping is justified in expecting a reasonable period of relief, given the significant time and resources that need to be invested to raise and pursue an application for anti-dumping duties and the time required for the industry to recover from material injury. There is no guarantee that intermittent dumping that might appear to end after 18 months will not suddenly start up again six months after an anti-dumping measure is lifted, so it is better to leave the measures in place for the expected five-year period.

The rationales for Australia's anti-dumping system – Avoiding the costs of 'intermittent' dumping

Question: Are there any other rationales for Australia's Anti-dumping system? Is the current system a well-targeted instrument for pursuing them? (Issues paper page 12)

In general, Australia's current approach to anti-dumping is a well-targeted instrument for realizing government objectives in the broad management of the Australian economy. For starters, we need to bear in mind that the objective of anti-dumping action is not to stop dumping, per se. Dumping, where there is no Australian industry or where the effect of the dumping is not to injure an Australian industry is perfectly acceptable. The accepted objective of anti-dumping is to preserve the participation in the national marketplace of domestic suppliers who might otherwise be forced out of business by the effects of dumping.

A competition policy advocate might say that it is only "competition" that needs to be preserved in the market and not "competitors". There are, however, important second order benefits to the broader economy of using anti-dumping measures to prevent material injury to a domestic industry. 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.

It is also possible to counter the argument in economic theory that dumping is generally welfare enhancing.

> "…does imposing an anti-dumping duty (other than in the case of predation) always misallocate resources, thereby harming economic welfare? … In particular, in a small open economy where the domestic price is equivalent to the world price, if dumped imports reduce prices in the importing market below world price, it can be argued that the dumping may cause a misallocation of resources. Under these

> circumstances, the imposition of anti-dumping duties, if set at the correct level, would be welfare maximizing."[7]

So, there is one situation where anti-dumping action in a "small open economy" (such as Australia) could be seen as a welfare-enhancing instrument.

The famous trade economist Jacob Viner wrote about the dangers of allowing dumping to go unanswered as long ago as 1926 when he suggested that the prime justification for taking action against dumped imports was the fact that the economic benefit to a country from cheap (dumped) imports was likely to be so temporary that it results in greater injury to domestic industry than benefit to consumers. Viner also believed:

> "It is not a matter of importance, however, whether dumping in general or any particular species of dumping should be classified with unfair competition or not. What is important with respect to dumping is its economic effect, which is not greatly dependent upon what happens to be its motive."[8]

[7] Clarisse Morgan, "Competition Policy and Anti-dumping: Overview of Basic Issues", paper presented to a Conference on Anti-dumping and Competition Policy, Geneva, July 1996.
[8] Jacob Viner, "A Memorandum on Dumping", League of Nations, Geneva, 1926.

The benefits and costs of the current system

Question: *What impacts has Australia's anti-dumping system had on your activities as: - a local producer facing competition, or the threat of competition, from dumped goods….. (Issues paper page 13)*

Dumping and its adverse effects are very serious potential problems for all Australian industries in today's highly globalized environment and where most products imported into the Australian market face very low duties or enter duty-free. Generally speaking, this open liberalization is beneficial to Australian firms and the Australian economy more broadly. But it does leave us exposed to unexpected and artificially stimulated competition from overseas, including dumping.

In addition, the increasing concentration of our trading relationships in Asia – and in particular with China – has heightened the risk of our being affected by very large volumes of goods dumped at considerable margins with very little notice. Under such circumstances, it is extremely important for Australian industry to have access – in appropriate circumstances – to relief through anti-dumping action not against competition but against injurious dumping.

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, particularly where customers purchase mainly on the basis of price, dumping margins are large and import volumes are significant. Having an effective anti-dumping system in place to deal with such potential situations is extremely important.

The benefits and costs of the current system

Question: Are there features of the current system that diminish the benefits received, or add to the costs imposed? What are the longer term implications of Australia's anti-dumping system for investment, innovation and productivity across the economy? (Issues paper page 13)

In most sectors of the modern economy, technological developments dictate the need for significant decisions on new investment in the expectation of being able to profit from early entry into new market segments. Assumptions need to be made about the likely actions of known or potential competitors in the business. Because the investment decisions that need to be made often involve a huge commitment of resources, it is important that business can enjoy a certain basic level of confidence that competitive conditions in the market will not change on short notice. The existence of potential avenues of relief from an unexpected competitive situation (like the Australian anti-dumping system) can help to build a certain level of confidence and enable Australian industry to make the already risky commitments to new projects allowing the exploitation of new ways of producing products or introduction of new products.

Today, in our region, these considerations are considerably complicated by our trading relationship with China where, notwithstanding China's designation as a market economy for the purposes of Australia's anti-dumping regime, state-owned enterprises (SOEs) can still act in ways that are not normal for private firms. It is very frequently difficult to ascertain the degree to which these SOEs are motivated by normal profit considerations and it is clear that their activities have contributed importantly to unsettling global markets through their dumping. The threat posed by Chinese dumping is illustrated by the fact that in Canada, 100 per cent of definitive anti-dumping actions taken in the 2005-2008 period involved exports from China. Over the same period, 75 per cent of New Zealand anti-dumping actions involved China. Exports from China have already been the subject of more than 400 anti-dumping actions (worldwide) since 2000. It should be noted in this context that of the ten largest Chinese steel companies by production volume, nine are majority state-owned.

How might the current system be improved – modifications within the existing system architecture

Question: Do the current requirements pay sufficient heed to threatened, rather than actual, injury from dumped imports? (Issues paper page 14)

See response page 45 which addresses the issue of whether Australia gives sufficient heed to threatened injury in its anti-dumping investigations.

How might the current system be improved – modifications within the existing system architecture

Question: Does the way in which local producers respond to dumping affect the likely success of an anti-dumping complaint? For example, are the outcomes of investigations likely to be the same where a local supplier matches dumped prices and thereby suffers reduced per unit profitability, as distinct from maintaining its prices and thereby suffering a loss of sales?

The way in which local producers (a domestic industry) respond to dumping should not affect the likely success of an anti-dumping complaint. It should not make a material difference to the investigating authorities looking at injury whether a firm suffers losses from reduced market share at pre-dumping prices or losses resulting from its attempt to maintain market share by matching the price depressing impact of the dumped goods. This idea is backed up in Article 3.4 of the WTO Anti-Dumping Agreement which clearly stipulates that an examination of injury should look at relevant economic factors and indices to include (*inter alia*) profits and market share. There is no indication that these should be looked at in any kind of hierarchical order.

How might the current system be improved – modifications within the existing system architecture

Question: What particular changes (if any) should be made to the requirements governing: the determination of normal values (including in regard to the use of 'third country' prices where non-market economies are involved); whether there has been material injury; the linkage between dumping and injury; the calculation of the non-injurious price; and/or the imposition of provisional duties? (Issues paper page 15)

In general, we do not believe it is necessary for Australian Customs to materially change its approach to the issues raised in this question. However, the fact that Australia no longer considers China to be an "economy in transition" or "non-market economy" for the purposes of anti-dumping actions and the very important presence of Chinese exporters (often SOEs) in Australia's international trade makes it important that we take this opportunity to address the issue of where 'third country' prices might still be used in determinations of 'normal value' for Chinese produced goods.

If the Australian anti-dumping investigation at issue does not involve a country treated outside of the normally applicable rules for normal value determinations (a country not in the economy in transition (or EIT) category), then the Anti-dumping Agreement is clear that investigating authorities must look first to "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" (Article 2.1). If prices of those sales do not permit a proper comparison, investigating authorities can fall back to use of either (there is no hierarchy) (a) the comparable price of the like product when exported to an appropriate third country or (b) with the "*cost of production in the country of origin*, plus a reasonable amount for administrative, selling and general costs and for profits" (Article 2.2) (emphasis added)

Article 2.2 of the WTO Agreement limits the investigators to the use of information on the cost of production in the country of origin – meaning surrogate third-country information is not appropriate. However, Article 6.8 of the Agreement makes clear that where the interested party under investigation refuses access to or otherwise *"does not provide, necessary information"* the investigating authorities are free to make their determinations on the basis of the facts available. (emphasis added)

Annex II of the WTO Agreement, which governs recourse to "facts available" or "best information available" makes clear that those under investigation cannot escape application of

the “facts available” simply by cooperating and providing the investigating authorities with any kind of local information. The first phrase of paragraph 3 of the Annex makes it clear that the information provided in the course of the investigation must be (inter alia) *“verifiable”.* (emphasis added) In other words, “necessary information” is “verifiable” information. Where the locally provided information is not verifiable, then the investigating authorities may fall back on *“information from a secondary source”* (Annex II, para 7) (emphasis added). At this point, there is nothing in the Agreement that precludes the investigating authorities from using “surrogate (third country) information” to reach their determination – although paragraph 7 urges circumspection.

So the answer to the question of whether recourse to the use of surrogate (third country) information to determine the normal value of a product under investigation is available where the product is from a country which is not in the EIT category is “yes”, provided the authorities have taken all of the necessary steps to get to a point where it is decided information in the country of origin on the cost of production is not verifiable (or alternatively has simply not been provided through lack of cooperation).

It is, we believe, important that Australian Customs authorities investigating dumping from China keep this in mind as they conduct their investigations of Chinese firms alleged to be dumping in Australia.

How might the current system be improved – modifications within the existing system architecture

Question: In practice, could the current criteria and assessment process be readily reconfigured to give greater emphasis to some of the less tangible effects of dumping such as threatened injury or profits foregone? (Issues paper page 15)

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.

Whilst we do not have any recent experience in lodging anti-dumping applications, it has been suggested to us that it is practice to require that injury be experienced for some extended period, perhaps over twelve months. Such a practice, would unnecessarily disadvantage Australian industry and be inconsistent with guidance provided in the WTO Agreement, and Customs' publications, which clearly envisage the possibility of action against threatened injury, even if it does urge special care in reaching a determination on this basis. Australian firms should not have to wait until they have already been negatively affected by dumped imports for some period of time when dumping is proven and there are clear and substantiated signs of threatened injury.

How might the current system be improved – modifications within the existing system architecture

Question: Are the information burdens imposed on local producers seeking relief from dumping excessive, especially where subsidies from overseas governments are involved? If so, could this be addressed through changes to the way the provisions are administered, or are amendments to the legislation itself required? (Issues paper page 16)

The information burdens placed on a domestic industry in Australia seeking relief from injurious dumping are very substantial and complying fully with the authorities' requirements is a time-consuming and expensive proposition. That said, the Australian anti-dumping authorities have to comply with Australia's international obligations under the WTO Anti-dumping Agreement and Article 5 of that Agreement mandates the provision by an applicant for anti-dumping action of very substantial quantities of information to back up a claim of dumping, injury and a causal link between the two.

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.

However there is an opportunity to reduce some of the burden of information collection on applicants in relation to Australian based data. A current hindrance to the collection of the information necessary to confirm the existence of dumping and subsequently support an application with Australian Customs for import duties is the existence of confidentiality restrictions on a range of Australian Bureau of Statistics' series relating to certain import commodity codes. A consequence of these confidentiality restrictions is that the publicly available statistical data from Australian Bureau of Statistics on some import steel categories is incomplete and unclear.

Examples of the confidentiality restrictions applied to the import statistics include "no commodity details" (details of import not reported except at an overall level with other non-steel products) and "No Country Details" (country of origin not reported).

BlueScope Steel recognizes the need to restrict the availability of some trade data to protect the legitimate commercial interests of business, however it asks that where import data

confidentiality restrictions are in place, they be comprehensively reviewed on a more regular basis and their use minimized.

How might the current system be improved - Improving administration of the existing system

Question: What role should the minister play in a future anti-dumping system? Should there be a time limit on any ministerial decision-making in this area? (Issues paper page 18)

Ideally, politics should not play a role in the administration of Australia's anti-dumping system and decisions should be made strictly on the basis of objective processes with a maximum degree of transparency and predictability. The essential role of the Minister should be to sign-off on all recommendations that result from an objective process where he is confident that the recommendation is based on a sound and adequately documented investigation. In other words, Australia's interests are best served by ministerial decisions that are automatic. The Minister's decision should, under such circumstances, be made as quickly as possible within a matter of days of his receipt of a recommendation from the relevant officials.

In the event that Australia were to introduce discrimination and subjectivity into the anti-dumping system through incorporation of a costly and time-consuming "national interest" test, the decision on whether or not to grant relief to an industry materially injured by the effects of dumping would necessarily need to be made at a political (e.g. Ministerial) level. Consideration might also be given to having such a weighty decision made by the Prime Minister following discussion in Cabinet. In this event, it would still be advisable for the parties to be informed of the Minister's decision in as short a time frame as possible.

Here it might be worthwhile to note that in Canada – a country that makes provision for public interest determinations in respect of anti-dumping measures[9] – it is the Minister of Finance who has responsibility for taking a decision as to whether or not anti-dumping duties should be imposed. The Canadian Finance Minister's decision is informed by a recommendation from the Canadian International Trade Tribunal.

As in Canada, there is no question that here in Australia any determination not to impose anti-dumping 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

[9] Public interest assessments in anti-dumping cases are not automatic in Canada. They must be triggered by a request for initiation of a public interest inquiry that must be made within 45 days of the final injury determination in an anti-dumping case.

numbers of local jobs to be lost as a result of a determination not to act on injurious dumping by some East Asian state-owned enterprises. 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. What would a Minister be likely to do if he or she knew the impacted industry was mainly located in constituencies held by another party?

For all of the reasons we have discussed elsewhere in this submission, it would be bad public policy to introduce a discriminatory subjective decision-making process on top of what is today an objective and non-discriminatory anti-dumping regime. In addition to those arguments, we do not believe it is desirable to determine by Ministerial fiat which Australian industries have been selected to perish and which are to survive.

How might the current system be improved - Alternate Approaches. Should there be more emphasis on economy-wide impacts?

Question: Should Australia's anti-dumping system have regard to economy-wide impacts? If so, what are the options for introducing such a focus and what would be their benefits and costs? (Issues paper page 19)

Earlier in this submission, we described why we believe it would be entirely inappropriate to try to give regard to economy-wide impacts of dumping and anti-dumping actions (see item 2 relating to the question of a "national interest" test). In addition to our position that such an approach would introduce unjustifiable discrimination and subjectivity into the anti-dumping process, there would certainly be some very serious costs associated with trying to make an assessment of economy-wide impacts work in practice.

Any attempt to assess economy-wide impact would necessarily involve a complex and time-consuming process where responsible authorities would need to try to measure producer costs, consumer benefits and adjustment costs throughout the economy. Sophisticated technical resources would need to be marshalled in order to try to accurately quantify the supposed consumer gains and producer costs associated with marginal changes to production. Assessing consumption and production effects accurately would require an estimate of the responsiveness of these activities to price changes and calculating such values would doubtless be difficult.

The process would be costly for the government and for affected producers and basing a final decision on whether or not to apply anti-dumping measures on an economic finding that would be bound to be in some way inaccurate would be fraught with the potential to get it wrong. What would be the tipping point at which the decision would go one way or the other and who would make the decision? Over what period would the Government make an assessment of the national interest? It is almost certainly true that very different assessments of where the national interest lies in any particular case would result from short- and longer-term evaluations. This is a very serious consideration since any responsible government should be concerned with protecting its long-term national interests.

The process would also likely add considerably to the time it would take to get a clear decision on whether injury from dumping would be remedied or not through anti-dumping action. These

are economic and political costs that Australia does not need to incur in the context of its anti-dumping system.

The potential problems associated with the introduction of some kind of "national interest test" for anti-dumping actions are illustrated by the way in which the Canadian system operates. A "public interest" test is not automatic in Canada, but where one is triggered under Canadian legislation and regulation, it adds a full six months[10] of uncertainty to the anti-dumping process.

At least the Canadian system does not impose a burden on the industry injured by dumped imports to make an argument "up-front" that its preservation and relief from the effects of dumping are in the "national interest". It would be very wrong and unfair to a domestic industry to force the industry to develop such an argument on top of the already very heavy burdens it faces in providing information to support claims of dumping, injury and causation. But even the Canadian system would still force the injured industry (remember that the process starts only after a final determination of injury) to invest in an undoubtedly expensive response to the request for initiation of a "public interest" review procedure.

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.

[10] Requests for an inquiry must be filed within 45 days of a final determination of injury. Other parties are then given 21 days to respond to the request. Ten days later the Tribunal must decide whether there are reasonable grounds on which to conduct an inquiry and then, when an inquiry starts, the Tribunal has up to 100 days in which to develop its opinion.

How might the current system be improved - Alternate approaches. Should there be more emphasis on economy-wide impacts?

Question: Would there be merit in deeming certain forms of dumping to be automatically actionable if there has been material injury – for example, where government subsidies are involved – but applying a public interest test to other cases? (issues paper page 19)

It would be a very bad idea to consider that some forms of dumping should be automatically actionable and others subjected to a national interest test where the starting point is in both cases an Australian industry has been found to be materially injured by the effect of the dumped imports. Australian law and practice in this area should concern itself solely with ensuring that affected Australian industries have an effective route to relief when they are injured by dumping. The multilaterally agreed WTO Anti-dumping Agreement does not concern itself with the motivation or circumstances surrounding the decision to dump and neither should Australian anti-dumping law or practice.

In addition, we would expect the question of government subsidies to be addressed in the context of Australia's countervailing duty system whenever the effect of the subsidies is to cause or threaten injury to an Australian industry. There is no reason to mix anti-dumping and countervailing systems on this point.

How might the current system be improved - Alternate approaches. Could dumping be addressed within competition policy?

Question: What are the pros and cons of addressing dumping through competition law and related legislation? Until such time as all of Australia's major trading partners have well-developed competition institutions, is the approach mainly relevant in the context of particular bilateral or regional trade agreements? (Issues paper page 21)

Suggestions that anti-dumping action might be replaced by the application of competition policy to problems resulting from dumped imports reflect a basic misunderstanding of the very different goals and objectives of anti-dumping policy and competition policy. These suggestions also fail to take into account the very different circumstances of most international markets as opposed to integrated "domestic" markets. In nearly all cases, we are talking about two different approaches designed to deal with two very different problems through different solutions and, with rare exception, it would not be a workable proposition to replace anti-dumping action with competition policy.

It is widely stated that the most basic goal of competition policy is to promote and maintain healthy inter-firm rivalry in markets, wherever this is viable. A fundamental principle or premise that permeates the application of competition policy is the belief that, in most circumstances, the free operation of competitive markets, undistorted by government intervention, will generate economically and socially efficient outcomes. While markets may not need to be perfectly competitive to achieve these results, they need to be workably competitive. This implies that firms in competition with each other have the ability to compete for each other's customers in all parts of whatever is defined as the "market".

How often is this "workably competitive" model applicable in the case of trade between different national markets? Any good economics textbook will explain that dumping is only possible in imperfectly competitive markets. In their widely used textbook, Paul Krugman and Maurice Obstfeld explain that:

> "Dumping can occur only if two conditions are met. First, the industry must be imperfectly competitive, so that firms set prices rather than taking market prices as given. Second, markets must be segmented, so that domestic residents cannot easily purchase goods intended for export."[11]

[11] Paul R. Krugman and Maurice Obstfeld, International Economics, Theory and Policy, Seventh Edition, Pearson International (2006), page 131.

In other words, dumping is not expected to occur whenever the home market of the dumping firm is open to workable competition. If it were open, it would not be possible to sustain a higher price in the domestic market than the price charged for exports.

There are situations in "international" trade where governments have judged that two or more countries' markets had become integrated to such a point that the combined "international" market is workably competitive to a degree that anti-dumping measures could be replaced by competition policy instruments. This is the case in the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) and also in the customs union context of the European Communities. There are few, if any, other examples where it has been possible to integrate international markets to such a degree and it is certainly not the case that any of Australia's other free trade agreements have produced anything like the across-the-board economic integration of ANZCERTA.[12]

Another very important practical problem that stands in the way of proposals to supplant anti-dumping with competition policy is that, in order to be workable – even in a workably competitive international (two or more country) market – there needs to be a comparably high level of competition policy, institutions and enforcement in place in each / all of the national jurisdictions. 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.

At the international level, competition policy also suffers from the fact that – unlike anti-dumping and other WTO-agreed instruments of trade policy – fundamental principles of competition policy have not been codified in multilateral law and jurisprudence. Rather, the jurisprudence that exists has been developed with reference to diverse national laws and policies. If there

[12] The fact that Canada and Chile have replaced anti-dumping with competition policy in their bilateral FTA should be discounted in this discussion. The two countries actually trade very little with each other compared with their trade with third countries and dumping has not historically been an issue in bilateral relations. Governments of both countries are also on record at the WTO as being philosophically opposed to anti-dumping as an instrument of trade policy.

appear to the casual observer to be principles and policies that seem common to several jurisdictions, it is certainly not the case that such principles are present in all jurisdictions having competition policies – at least in all respects. In other words, we are a long way today from any situation where one could say with much confidence that Australia's trading partners would be able to work with us in effectively applying competition policies to corporate practices like dumping even if we judged that the market was workably competitive.

So long as the international market remains imperfectly competitive to the degree it is today, Australian industries will need to enjoy access to anti-dumping remedies as a way of fending off material injury that can be the result of dumping into the Australian market. The unilateral application by the Australian Government of competition policy could not deal with the distortions to the competitive environment created by injurious dumping.

- Ends -