Productivity Commission Inquiry:
Antidumping and Countervailing System

Department of Foreign Affairs and Trade Submission

1. Introduction

1.1 The Department of Foreign Affairs and Trade (DFAT) submits the following background comments to assist the Productivity Commission in addressing, in particular, paragraph 4(a) of its terms of reference, requiring it to provide recommendations having 'regard to Australia's international rights and obligations, including recent developments in international trade law and the current World Trade Organization Doha Round'.

1.2 Australia's international rights and obligations with respect to the administration and application of its antidumping and countervailing systems arise primarily in the context of Australia's membership of the World Trade Organization (WTO). Other sources of international law are unlikely to impact directly on the present inquiry.

1.3 Background on the following matters of relevance to the Productivity Commission's inquiry is provided:

(i) Trade Remedies in a WTO policy context – striking a balance
(ii) Trade Remedies in the WTO Agreement
(iii) Trade Remedies in Practice
(iv) Trade Remedies and the Doha Round of WTO negotiations
(v) Possible implications of the Doha negotiations for Australia's practice with respect to antidumping, subsidies and countervailing measures.

2. The World Trade Organization – striking a balance

2.1 The WTO aims to raise standards of living and support growth in production, trade and income through trade liberalisation and the elimination of discrimination in international trade relations. However, in creating the WTO, Members recognised that certain government policies and trade practices may be trade-distorting but may nonetheless be desirable for other reasons.

2.2 The WTO Agreement thus strikes a balance between the desire of Members to retain certain flexibilities (to achieve, for example, environmental, social or economic objectives) and Members' collective desire to liberalise world trade in order to optimise global economic output, income and living standards.

2.3 The WTO's *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) is one example of this balance. It provides Members with the flexibility to provide subsidies to their domestic industries. However, it prohibits the most trade-distorting subsidies – those linked to export performance or local content requirements - and provides for measures ('countervailing duties') to redress any trade-distorting effects of other subsidies.

2.4 The practice of 'dumping' (the export of goods at a price lower than their 'normal value' in the domestic market) can also distort trade flows. However, the WTO Agreement (and previously the GATT) does not prohibit the 'dumping' of products into the market of a WTO Member. Rather, it disciplines Members' responses to incidences of dumping, providing rules to govern the application of 'anti-dumping duties' on dumped products.

2.5 Both countervailing duties and anti-dumping duties are applied to 'level the playing field' where subsidies or 'dumping' give a product an unfair advantage in a market place. In so doing, they go some way to remedying the trade-distorting impacts of government subsidies and dumping.

3. Subsidies and Trade Remedies in the WTO Agreement

3.1 Anti-dumping and countervailing duties are longstanding exceptions from the core WTO principle that tariffs should be applied equally to all trading partners (ie the 'most favoured nation' (MFN) principle). These exceptions were confirmed as legitimate in Article VI of the *General Agreement on Tariffs and Trade (1947)* (GATT 1947), which subsequently became part of the *Marrakesh Agreement Establishing the World Trade Organization (1994)* ('the WTO Agreement').

3.2 GATT Contracting Parties agreed during the Uruguay Round of trade negotiations that further clarity in the interpretation and implementation of these provisions was required. The *Agreement on Implementation of Article VI of the GATT 1947* ('the Anti-Dumping Agreement') and the SCM Agreement were thus created and became part of the WTO Agreement.

3.3 The Anti-Dumping Agreement confirms the legitimacy of anti-dumping duties as a trade remedy and recognises that Members may employ different methodologies/ practices in applying them (eg Article 17.6). Similarly, the SCM Agreement confirms that WTO Members may provide subsidies and may, where a domestic industry is injured by imported products benefitting from subsidies, apply countervailing duties.

3.4 In order to prevent these trade remedies being used as a tool of trade protectionism, the Anti-Dumping and SCM Agreements regulate the actions countries can take to counter the effects of dumping and subsidies. Imposing anti-dumping or countervailing duties in the absence of certain conditions being met would put Australia in breach of its WTO obligations and open to challenge by another WTO member (Article 18 of the Anti-Dumping Agreement, Article 32 of the SCM Agreement).

WTO Conditions for the Imposition of Anti-Dumping Duties

3.5 An exporting company is said to be 'dumping' when it exports its product at a price lower than its normal value (that is, the price at which that product is sold on the domestic market in the exporting country). The Anti-Dumping Agreement provides that anti-dumping measures may be applied only where:

(i) products are 'dumped'; and
(ii) the dumping causes or threatens material injury to an established industry or materially retards establishment of a domestic industry in the importing country.

WTO Rules on the Imposition of Countervailing Measures

3.6 If a WTO Member suffers injury to its own domestic industry as a result of another Member providing a subsidy,[1] it is permitted to apply special import duties ('countervailing duties') on the imports of the subsidised products – provided the subsidy is 'specific'.

3.7 A subsidy exists if there is a *financial contribution* by a government that confers a *benefit* (that is, an advantage in the marketplace). This includes grants, tax concessions, foregone revenue, provision of goods and services (other than general infrastructure), income or price support, loan guarantees and equity infusions.

3.8 A subsidy is considered 'specific' if its availability is limited to a particular enterprise or group of enterprises or if its availability is contingent on exports (actual or potential) or the use of domestic inputs. A subsidy will not be considered specific, on the other hand, if it is generally available and objective criteria or conditions governing eligibility for the subsidy are applied.

3.9 Subsidies that are 'specific' are called 'actionable subsidies'. The so-called 'actionability' of subsidies means that another WTO Member can take 'bilateral' action through the use of countervailing duties/measures if certain conditions are met or can take a 'multilateral' remedy through dispute settlement action.

3.10 A WTO Member whose domestic industry suffers injury from the import of a product benefitting from an 'actionable subsidy' may apply a countervailing duty on those products to offset the amount of subsidisation. Alternatively, the Member can use the WTO's dispute settlement procedure to seek withdrawal of the actionable subsidy or removal of its adverse effects.

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[1] A subsidy, as defined by Article 1 of the Subsidies Agreement, contains three elements:
(i) a financial contribution
(ii) by a government or any public body within the territory of a WTO member
(iii) which confers a benefit.

3.11 Under Article 8 of the SCM Agreement, subsidies were defined as 'non-actionable' if they were not 'specific' or if they fell within one of three provisions relating to (a) research activities, (b) assistance to disadvantaged regions or (c) adaptation to new environmental requirements. Article 8 lapsed in 1999, meaning the only subsidies that are not actionable now are those that are not 'specific' as defined in Article 2 of the SCM Agreement.

3.12 The SCM Agreement is the agreement that sets out the rules for the provision of subsidies in general. However, the Agriculture Agreement ('AA') is also relevant in the case of agricultural goods. It sets out special rules disciplining government support, including export subsidies, for agricultural products.

3.13 The AA included a 'peace clause', whereby WTO Members agreed they would show 'due restraint' in initiating countervailing action in respect of certain agricultural support. Further, 'green box' support (as defined in Annex 2 of the AA) was a non-actionable subsidy for the purposes of countervailing measures. (Green box support is that which has no, or at most minimal, trade-distorting effects or effects on production.) As the peace clause has now expired, WTO Members are no longer subject to the restrictions on countervailing actions set out in the peace clause.

Is Australia's system consistent with WTO Rules?

3.14 Australia's anti-dumping and countervailing systems are designed to reflect the WTO Agreement. However, under the *Customs Act 1901* (Cth), the Australian Government does not have the power to exercise its full WTO rights.

3.15 Section 269TAAC(6) of the *Customs Act 1901* (Cth) has not been updated to reflect the fact that Article 13 of the AA (the 'peace clause') and Article 8 of the SCM Agreement have now lapsed. This Section defines an 'excluded' subsidy (i.e. one under the Act that is not countervailable) as one that is (i) a "domestic support measure" that falls under Annex 2 of the WTO AA (i.e. a so-called 'green box' measure) or (ii) "described" under Article 8 . In other words, the *Customs Act* continues to exclude certain forms of support for agricultural products from countervail action as well as a range of subsidies for non-agricultural goods (research and development, environmental upgrades, subsidies for regions which are economically disadvantaged). The *Customs Act* therefore does not reflect the full range of trade remedies available under WTO law.

3.16 Key consequences flowing from Australia's current approach include

(i) the potential number of countervailing duty cases initiated is diminished;
(ii) the level of subsidisation, as assessed by Australian Customs and Border Protection, is reduced (by virtue of the exclusion of certain countervailable subsidies from their calculation);
(iii) the likelihood of a determination of injury is reduced (as not all subsidies have been taken into account);
(iv) the impact of subsidised imports on domestic industry is potentially weaker (again, as not all subsidies have been taken into account);
(v) as a consequence, even where investigations are initiated, the likelihood of measures being imposed is reduced;
(vi) even where measures are imposed, the countervailing duty rate imposed may be lower than would otherwise be the case (i.e. as measures have been excluded from the calculation of the full amount of the subsidy); and
(vii) Australian producers do not receive the full protection offered by the WTO system as the safety net against subsidised imports is effectively removed in several cases.

4. The Doha Round Negotiations

4.1 The Doha mandate on Rules, covering trade remedies (anti-dumping, subsidies and countervailing measures), is to clarify and improve the existing disciplines while preserving the basic concepts and effectiveness of the rules. Timing for the conclusion of the negotiations remains uncertain, though momentum is again building in the negotiations.

4.2 The Chair of the Rules Negotiating Group (Ambassador Valles-Galmes, Uruguay) has received over 150 proposals to amend the Anti-Dumping Agreement and the SCM Agreement. He tabled draft amended texts of the agreements in November 2007 and December 2008, which have underpinned recent negotiations.

4.3 A number of WTO Members want to strengthen WTO anti-dumping (AD) disciplines to enhance certainty and predictability for exporters and to reduce discretion for AD authorities to impose AD duties. They have tabled detailed and extensive proposals for change to the Anti-Dumping Agreement.

4.4 Other WTO Members are concerned to avoid any amendments to the Anti-Dumping Agreement that would require changes to their existing AD practices.

4.5 Australia's position is in the middle of the spectrum. Australia is among the top 10 users of anti-dumping measures, with an efficient and transparent system by international standards. Australian companies have also been targets of anti-dumping measures. Australia is an active participant in the AD negotiations, presenting moderate views encouraging transparency and clarification of anti-dumping practices rather than prescriptive, mandatory rules which favour one practice over another. Australia also has an interest in ensuring Australian exporters are treated fairly and due process is afforded them.

4.6 **Subsidies** raise sensitive issues for many WTO Members and they have been the subject of previous and current high profile WTO disputes such as US/Canada – Softwood Lumber, US – Foreign Sales Corporations, EC/US – Airbus and Boeing and Canada/Brazil – Regional Aircraft.

4.7 Australia has been an active participant in the subsidies negotiations. We seek to preserve the overall structure and core principles of the existing WTO subsidies disciplines. However, there are some areas where we seek clarification and improvement of existing WTO rules.

4.8 Australia has submitted two subsidy proposals– on prohibited export subsidies and enforcement of their withdrawal. On *prohibited export subsidies,* Australia has suggested the current definition of prohibited export subsidies discriminates against small and medium-sized economies (such as Australia) in determining what is "export contingent". The proposal seeks to clarify the facts or factors which must be considered in determining export contingency. Australia considers that WTO dispute panels have put too much emphasis on the export propensity of a product (that is, how much of domestic production is exported) in the range of factors which are examined to determine export contingency. This lends itself to discriminatory treatment of WTO Members which have small to medium sized markets in a product.

4.9. On *'withdrawal of the subsidy'*, Australia has proposed amendments to clarify what is required to achieve withdrawal of a subsidy, to ensure that the remedy is effective.

4.10 Other subsidy proposals cover definitional issues. These include the existence and amount of subsidization; whether subsidies are 'specific'; whether the benefit of a subsidy to an input 'passes through' to a processed product; whether the benefit of a subsidy should be calculated over a period (for example, a grant for the purchase of capital equipment) rather than in the year a subsidy is provided; expansion of the prohibited subsidy and actionable subsidy categories; calculation rules for countervailing measures; and export credits and guarantees.

4.11 If adopted, these proposals could impact on Australia's rights and obligations with respect to the administration and application of its anti-dumping and countervail systems.

4.12 The Australian Government regularly consults with industry on issues in the negotiations and is cooperating with partner governments to build support for Australia's negotiating priorities.

5. Possible Implications of Negotiations for Current Practice

5.1 The various proposals for amendments to the Anti-Dumping and SCM Agreements remain under consideration by WTO Members in the Rules Negotiations Group (RNG). The RNG Chair has issued draft texts for both agreements but discussions are ongoing, including on proposals not incorporated into the draft text. Several proposals may have implications for the administration and implementation of Australia's anti-dumping and countervail systems. These include:

(i) Proposals on the practice of 'zeroing'

5.2 'Zeroing' is an investigative methodology used by (primarily the United States') anti-dumping authorities, which allegedly makes it easier for an authority to find dumping. It also results in findings of higher dumping margins. To determine whether dumping exists and its magnitude, authorities normally compare a 'weighted average normal value' of the product with a 'weighted average of prices of all comparable export transactions'[2]. When zeroing, authorities convert to zero value any negative dumping margins (ie where the export price is higher than the normal value) for the purpose of determining the average of prices of 'all comparable export transactions'.

5.3 Opponents of zeroing say it is a 'biased and partial method for calculating the margin of dumping and inflates anti-dumping duties'.[3] They seek to codify WTO dispute settlement findings outlawing zeroing in most circumstances. The United States argues it is a legitimate practice and that any Doha Rules outcome clarify the use of 'zeroing'. Members on both sides of the debate have proposed amendments, with the United States calling for zeroing to be expressly permitted and several other Members calling for it to be expressly prohibited. Australia does not practice 'zeroing'. In our view, 'zeroing' is not permitted under the Anti-Dumping Agreement and no amendments to the text are required to preserve this position.

5.4 Adoption of proposals to either prohibit or permit zeroing could have implications for both the practice of Australian authorities and the interests of Australian exporters. In particular, if zeroing were to be permitted, more WTO Members may adopt the practice, exposing Australian exporters to more and/or higher anti-dumping duties. Australian practice could be a factor considered by our trading partners in determining whether or not to use zeroing in investigations of dumping by Australian companies. The interests of Australian exporters should be taken into account in any consideration of possible changes to Australian investigating authorities' approach to zeroing.

[2] See Articles 2.4 and 2.4.2 of the Anti-Dumping Agreement.
[3] TN/RL/W/215.

(ii) Proposals on a 'lesser duty rule'

5.5 There are proposals to make mandatory the current voluntary imposition of a 'lesser dumping duty'. This is a duty at a level sufficient to remove the injury to the domestic industry rather than the full dumping margin, which may be a higher amount. Currently, the Anti-Dumping Agreement leaves to the discretion of the investigating authority whether the amount of an anti-dumping duty to be imposed represents the full margin of dumping or less.

5.6 In Australia, authorities are obliged to consider whether or not to apply a lesser duty but are not obliged to reach any particular conclusion on this issue. In practice, Australian authorities normally apply the 'lesser duty rule', and Australian industry is used to the current system. Depending on the outcome of the negotiations, some change in our legislation may be necessary. This issue is closely linked with the public interest test (see following).

(iii) Proposals on a 'public interest test'

5.7 There are proposals to introduce a mandatory public interest test which would require authorities to consider whether it is in the broader public interest to impose anti-dumping duties. For example, consumers may argue against anti-dumping duties in favour of lower priced imports. Australian legislation does not include a public interest test and industry is not in favour. We, along with some other WTO Members, have opposed a mandatory test in the negotiations on the basis that it potentially undermines the legal right to a trade remedy and the balance between exporter and domestic industry rights.

(iv) Proposals on "sunset" reviews

5.8 Anti-dumping duties remain in force only as long as and to the extent necessary to counteract injurious dumping. Duties must be terminated within five years unless authorities determine that the expiry of duty would likely lead to continuation or recurrence of dumping and injury (the so-called 'likelihood' test). Some WTO Members have proposed the absolute termination of measures after five years. Japan has proposed an automatic sunset of measures at a defined point in time beyond the current five years. In other words, sunset reviews would be conducted and completed not later than five years from first imposition of measures, with an absolute termination at some point after that. Australia is supportive of clarification of the sunset provisions without removing the right to continue measures beyond the five-year period. While Australia does not exercise its full WTO rights in regard to sunset reviews, amendment to these provisions in the Anti-Dumping Agreement may require changes to Australia's legislation and practice.

(v) Proposals to enhance transparency

5.9 At this stage of the negotiations, there appears to be broad support for proposals to improve transparency in the investigation of dumping and countervail cases and the application of related measures. If adopted, enhanced transparency requirements under the two agreements would likely necessitate extension of the period of time available for investigations and/or findings to be finalised. For example, our anti-dumping investigations must be completed within 155 days, amongst the swiftest in the world. Increased requirements for transparency and due process could put pressure on these timeframes

6. Trade Remedies in Practice

6.1 Australia is perceived as a traditionally active user of trade remedies, alongside other developed countries including the United States, the European Community and Canada. However, developing countries, particularly India and China, are increasingly imposing anti-dumping duties on imported products. Whereas in the period 1996 to 1998 only four of the top ten users of anti-dumping measures were developing countries (see table 1), in the period 2006-2008 eight of the top ten, including the top two users of anti-dumping measures, were developing countries (see table 2).

6.2 Australian products are rarely subject to anti-dumping duties. Most anti-dumping duties are applied on products from developing countries, with more than one-third of all anti-dumping duties imposed by WTO Members (including 85 per cent of AD duties imposed by the United States) imposed on products from China (see table 3).

6.3 Since the birth of the WTO, countervailing duties have been imposed primarily on products from developing countries (see table 4). Only one product from Australia has been subjected to countervail measures by a WTO Member: the European Communities imposed countervailing duties on 'synthetic polyester fibres' from Australia in 2000. In the period 2006 to 2008, products from China accounted for 69 per cent of countervail measures imposed by WTO Members. Only one countervail measure was imposed on a product from a developing country in the same period (see table 5).

6.4 The United States was the most active user of countervailing measures in the period 2006-2008, applying more than half of all countervailing measures applied globally, all against products from developing countries – China (7), India (1) and Indonesia (1). Brazil was the only developing country to apply countervailing measures in the same period (see table 6).

Annex 1: Trade Remedy Statistics

Table 1: New Anti-Dumping Measures: By Reporting Member (1996-1998)

Rank	Reporting Member	1996	1997	1998	Total
1	European Community	23	23	28	**74**
2	United States	12	20	12	**44**
3	Argentina	20	11	12	**43**
4	South Africa	8	18	14	**40**
5	India	2	8	22	**32**
6	Korea, Rep. of	5	10	8	**23**
7	Brazil	6	2	14	**22**
8	Australia	1	1	17	**19**
9	Mexico	4	7	7	**18**
10	Canada	0	7	10	**17**
	Totals for 01/01/96 - 31/12/98 (All Members)	**92**	**125**	**170**	**387**

Table 2: New Anti-Dumping Measures: By Reporting Member (2006-2008)

Rank	Reporting Member	2006	2007	2008	Totals:
1	India	16	25	31	**72**
2	China, P.R.	24	12	4	**40**
3	European Community	12	12	15	**39**
4	Turkey	21	6	11	**38**
5	United States	5	5	23	**33**
6	Argentina	5	10	6	**21**
7	Brazil	0	9	11	**20**
8	Korea, Rep. of	8	0	12	**20**
9	Egypt	12	2	3	**17**
10	South Africa	7	1	3	**11**
12	Australia	4	1	3	**8**
	Totals for 01/01/06 - 31/12/08 (All Members)	**137**	**107**	**138**	**382**

Table 3: New Anti-Dumping Measures: By Exporting Country (2006-2008)

Rank		Exporting Country	2006	2007	2008	Totals:
	1	China, P.R.	37	48	52	137
	2	Korea, Rep. of	10	6	8	24
	3	Chinese Taipei	7	7	8	22
	4	India	12	3	6	21
	5	United States	9	4	7	20
	6	Indonesia	10	3	6	19
	7	Japan	8	4	4	16
	8	Thailand	8	4	4	16
	9	Malaysia	6	5	2	13
	10	Singapore	2	5	3	10
	22	Australia	0	0	2	2
Totals for 01/01/06 - 31/12/08 (All economies)			137	107	138	382

Table 4: New Countervail Measures: By Exporting Country (1995-2008)

Rank	Exporting Country	Totals:
1	India	27
2	China, P.R.	13
3	European Community	9
4	Italy	9
5	Brazil	8
6	Korea, Rep. of	8
7	Indonesia	7
8	France	6
9	Argentina	4
10	South Africa	4
18	Australia	1
Totals for 01/01/95 - 31/12/08 (All economies)		128

Table 5: New Countervail Measures: By Exporting Country (2006-2008)

Rank	Exporting Economy	2006	2007	2008	Totals:
1	China, P.R.	0	1	10	11
2	India	1	0	1	2
3	France	0	1	0	1
4	Indonesia	1	0	0	1
5	Korea, Rep. of	1	0	0	1

*no other economies had CV measures applied against their products in the period 2006-2008

Totals for 01/01/95 - 31/12/08 (All economies)	3	2	11	16

Table 6: New Countervail Measures: By Reporting Member (2006-2008)

Rank	Reporting Member	2006	2007	2008	Totals:
1	United States	2	0	7	9
2	Canada	0	1	3	4
3	Australia	0	1	0	1
4	Brazil	0	0	1	1
5	Japan	1	0	0	1

*no other Members reported applying CV measures in the period 2006-2008

Totals for 01/01/95 - 31/12/08 (all Members)	3	2	11	16