Australian Steel Association Inc
A0020339V ABN 24 762 435 928

SUBMISSION

to

PRODUCTIVITY COMMISSION

on

AUSTRALIA'S

ANTI-DUMPING AND COUNTERVAILING SYSTEM

JUNE 2009

P O Box 4303, Geelong Retail, Geelong Vic 3220
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ABOUT THE ASA

THE Australian Steel Association Inc (ASA) is an incorporated non profit organization formed in 1978 with the aim of promoting the use and open trade of steel in the Australian and New Zealand region. Our members are all related to the steel industry whether they be local or international manufacturers, traders, stockists, end users or service providers. The Association encourages direct contact between all its members to keep each member informed of global and domestic market trends and sees its primary roles as a forum to bring together the multitude of interests involved either directly or indirectly in the steel industry and growing the markets for intermediate steel products.

The ASA supports the need for a viable, efficient and responsive domestic steel industry and has been focused in the past on ensuring Australia has a truly competitive market supply for all domestic users and converters of steel products by an active and competitive import sector of intermediate steel products for further value adding domestically. These imports generally have resulted in the domestic suppliers becoming more cost efficient producers of steel specialising in those products they can produce at world competitive prices.

The Association's view is that by promoting a competitive market environment and direct contact by all interested parties, a more efficient and market receptive steel industry will result. In this environment the Australian steel industry as a whole, rather than any particular interest groups within, can only benefit. A competitive efficient domestic steel industry will ensure sustainable long term employment of people in Australia and New Zealand, especially in the downstream value adding manufacturing sectors, as without a viable domestic customer base, there is no need for local steel production.

The ASA openly promotes the economic growth of steel consumption in Australia and fully supports the importation of fairly priced intermediate steel products required by Australian steel users and consumers in the manufacturing, mining, construction and rural sectors.

Australian industry, in the ASA view, therefore comprises downstream users and converters of steel products and not just the local producers of the steel products in question.

The ASA is proactive on industry and trade issues for ensuring the interests of its member companies, involved in the importing, exporting, marketing and logistics of steel products, are taken into consideration.

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Australian steel producers have demonstrated their preferred mechanism for dealing with import competition by resorting to the lodgment of applications for anti-dumping measures and the ASA's primary agenda is to effect changes to how the 'dumping' process and policy is driven in this country including:

- Prior to the imposition of any measures, due consideration of the impact dumping actions and measures have on downstream steel users
- An analysis of the wider economic effect of penalty dumping duties
- Clarification on 'industry standing' so as to exclude producers who are also importers of the goods they claim are being dumped
- Inclusion of affected interests in the initial screening process of applications
- Appointment of a 'third umpire' type referee to preclude capricious type applications being lodged

AIMS

- sustaining truly competitive markets for steel users
- growing the market for intermediate steel products
- maintaining a customer receptive efficient domestic industry
- providing the basis for networking and exchanging views
- ensuring the interests of member companies and their downstream

This web site is designed to help promote the activities of both the Association and its members and new members are encouraged from both inside and outside Australia.

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SECTION B

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AUSTRALIAN STEEL ASSOCIATION SUBMISSION TO THE PRODUCTIVITY COMMISSION INQUIRY INTO AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM

INTRODUCTION

1. This submission concentrates on aspects of Australia's anti-dumping regime, being the key area of contingent protection operating in Australia. Only brief comments are provided in relation to Australia's countervailing system given the low level of use of these provisions. Nevertheless, key comments in relation to anti-dumping, in particular as to procedure, evidence, injury and causation, apply equally to Australia's countervailing system.

2. The Productivity Commission Issues Paper has raised a number of specific questions. These are answered at appropriate places throughout this submission. The Productivity Commission quite rightly calls for evidence based analysis and reform. This submission draws heavily on existing literature as to anti-dumping uses and abuses and anti-dumping action in the steel sector as important case studies of the problems and abuses suggested in the literature. Inevitably, much of that literature concentrates on the United States and to a lesser extent the European Union and Canada. Only a small number of studies have been undertaken in relation to Australia, although where Australia is concerned, the existing studies plus the reasonably regular formal review processes help provide a picture of our experiences.

3. It is reasonable to assume that causes and motivations and political economic considerations would be similar in all liberal democracies, although the complete separation of powers in the US is likely to support more extremely protectionist domestic regulations. Ideally this Productivity Commission inquiry will help fill the gaps in the analysis of Australia's experience. More importantly, the experiences in the steel sector corroborate the fact that many foreign problems are replicated in Australia.

4. While this submission seeks to propose solutions applicable to all aspects of Australian industry, it is lodged on behalf of the Australian Steel Association (ASA). The ASA directly represents a broad range of members related to the steel industry including local and international manufacturers, traders, stockists, end users and service providers. In so doing, it indirectly speaks to the interests of a wide range of users of steel products in the construction, mining, fabrication and general manufacturing sectors. The submission draws on users experiences in that sector as an illustrative case study.

5. The steel sector is in fact the most useful area of the economy for the Productivity Commission (PC) to consider for a range of reasons. First, it is the area of most significant and persistent anti-dumping applications in the past few years. Secondly, since the merger of One Steel and Smorgon, there is now a single entity in each key steel sector that meets the statutory industry standards, giving rise to greater opportunity for market power abuse through anti-dumping applications. The domestic producers are OneSteel which has a monopoly on long products and BlueScope which has a monopoly on flat products. Whether intended or otherwise, this submission shows how this has been occurring with applications on behalf of OneSteel. This is to be contrasted with BlueScope's behaviour where it has only initiated an action on steel plate. That is notwithstanding the fact that the commercial drivers would be broadly similar in the long product and flat product market.

6. Being a significant input product into construction, mining and fabrication, and given the fact that the local producers cannot meet domestic demand from their own production facilities, it is vital to the Australian economy that competitively priced imports are readily and regularly available and that anti-dumping actions cannot be used to deter such competition. This is particularly so in sectors such as steel when distribution networks are considered. OneSteel and BlueScope have vertically integrated distribution networks that compete with independent distributors who rely on imported steel. The independent distributors are denied access to goods from the domestic producers. In some cases, the domestic producers also import product. If anti-dumping actions can attack the independent distribution network, excessive market power will automatically result.

7. Analysis in other countries of the steel sector and anti-dumping also shows why this is a particularly appropriate case study. Mankiw and Swagel (2005) note that the US steel industry has been the leading user of anti-dumping procedures in that country. Nearly half of all anti-dumping tariffs imposed since 1970 have been on steel imports. They note that 158 of the 294 anti-dumping orders in force as of April 2005 were on steel products.

8. While the Australian percentages are not as high, a similar trend is likely. The historical reluctance of BHP to bring actions when it was both a steelmaker and iron ore supplier is no longer relevant. The recent OneSteel/Smorgon merger and current market conditions are highly relevant.

9. The Productivity Commission is urged to consider a range of applications brought on behalf of OneSteel in recent years. Three separate unsuccessful applications were brought against HSS steel products from a range of countries. The third was only terminated recently. An ASA submission pointed to significant differences in that company's statements to Customs officers and to the ASX. Appendix A to this submission contains that detailed analysis of the different public documents. Appendix B to this submission outlines all of the anti-dumping actions on steel products over the last decade and seeks to identify the procedural and evidentiary problems as well as the tactical opportunities for monopolist or oligopolist industries.

10. While a steel case study analysis is recommended, this submission addresses issues more broadly. Section A deals with the policy arguments for and against the utilisation of anti-dumping laws as a protective device for Australian industry. It reiterates the long-recognised lack of economic justification for anti-dumping laws and challenges the fairness arguments commonly used in support of them.

11. It concludes that there is no reason for Australia to maintain its costly and problematic anti-dumping regime. Australia has already led the way in removing anti-dumping laws for trans-Tasman trade under ANZCERTA. The experience with New Zealand should be salutary. Having removed anti-dumping responses within ANZCERTA, there have been no demonstrable problems caused to domestic industry in either country. There is no reason why this model should not apply to all of Australia's import trade.

12. The only tenable conclusion is that if anti-dumping laws are to be maintained, that would only be so for political reasons. Section A also demonstrates that there are no longer tenable political safety valve arguments in favour of their retention.

13. Even if the system is to remain in some form, the substantive and procedural provisions should be constructed so that protectionist tendencies are minimised and the laws cannot be misapplied or used for abusive purposes. Section B deals with the alternative solution whereby the regime is modified rather than removed. It addresses the substantive and procedural deficiencies in the current regime and addresses a range of reform recommendations that would remove the worst protectionist aspects.

14. Given that this Productivity Commission inquiry is operating at the same time as a Doha Draft Negotiation Text is being considered, it would be appropriate to ensure that this public exercise allows an opportunity for interested parties to consider matters under consideration. An examination of the Draft Text shows it to be a highly political compromised document that should not be supported in its current form by Australian negotiators. It brings a number of positive procedural suggestions that are consistent with this submission together with a number of very serious recommended substantive changes that go against any policy justification for anti-dumping provisions and simply make it easier for successful cases to be brought. This submission has not gone into the detail but the ASA would hope that DFAT, Treasury, Attorney-General and the ACCC would use this exercise as a means to promote synergy and consistency between policy developments.

15. While Section B of this submission deals with all aspects of substance and procedure, it argues that a small number of key changes would go a long way to ensuring that, if maintained, the anti-dumping regime would be less able to be abused.

16. The key changes in this regard would be to:

    i) exclude applications that would benefit manufacturers who also import the goods under consideration;

    ii) ensure that the determination of *like goods* limits attention to goods that truly compete and not allow broadly described applications to improperly encompass an unduly wide range of goods;

    iii) provide for a moratorium as to further applications for a reasonable period of time after an unsuccessful one and comprehensive damages obligations from inappropriate applications to dissuade domestic industry from abusive use of the regime. Such undertakings were required by the ACCC on a wide range of products as a result of the OneSteel/Smorgon merger.

    iv) call for reasonable utilisation of investigative powers by Customs administrators to properly find and analyse factors other than dumping that might cause injury;

    v) provide for appropriate expertise in Customs administration to accurately demonstrate whether injury is caused by dumping and what degree is caused by other factors;

    vi) as a corollary of a proper allocation of causative factors, ensure that where a dumping duty is applicable, calculation of a non injurious price is based on a realistic assessment of injurious dumping and current market conditions and is not based on a manufacturer's aspirations;

    vii) provide for the application of a national interest criterion at all stages to ensure that dumping applications on behalf of a particular industry, are not to the overall disadvantage of the Australian economy.

17. While these are the key changes, Section B deals with all aspects of an anti-dumping regime in the order in which they arise in a typical case. Attention is given to policy and comparative issues as well as ASA experiences with the various stages.

18. The ASA would be delighted to have the opportunity to follow-up individual case studies with PC investigative officers and otherwise assist in this ongoing enquiry.

SECTION A

POLICY ISSUES APPLICABLE TO DUMPING AND ANTI-DUMPING REGULATION

GUIDING CRITERIA

19. In considering whether to maintain the existing system, and if so in what form, certain guiding criteria should be applied.

i) Any trade regulation system should ultimately aim to promote the efficiency of the Australian economy and not simply concentrate on particular industries seeking redress.

ii) Non tariff barriers applied by the Australian government as against an otherwise liberal trade policy should have to be justifiable on a cost benefit basis and on fairness grounds. Protective norms, if any, should follow an adequate evidence based inquiry. An anti-dumping system should only be maintained if such an evidence-based inquiry justifies its continued existence.

iii) It should be remembered that the WTO disciplines aim at *limiting* governments' power to respond to dumping to clearly defined circumstances. In particular, anti-dumping laws are not mandated or even recommended by the WTO. They are simply circumscribed. Thus there is no legal requirement to maintain the system. Nor is there any requirement to match systems employed in other jurisdictions. This should not occur unless those systems are exemplars of good policy.

iv) The system should also concern itself with implications for our export industries. Less developed economies are beginning to use anti-dumping laws against exports from developed economies. The more that the developed economies utilise anti-dumping regimes in protectionist ways, the more this would encourage reciprocal behaviour in our export markets, to the long-term detriment of our export sector and the economy in general.

v) If an anti-dumping system is to be maintained, there are a range of policy criteria that should be optimised. The necessarily complex economic and accounting considerations need to be properly integrated within a legal system providing for various rights and obligations, both substantive and procedural. Such systems need to balance the rights of various participants, allow the bureaucracy to deal with a significant volume of applications in a high quality fashion without a requirement of exactitude and still give individuals affected appropriate legal rights to challenge unreasonable bureaucratic behaviour on determinations.

vi) Because anti-dumping disputes can be very costly and time consuming and because anti-dumping activity can have a very significant impact on market shares, a fair and efficient system also needs to ensure that even unsuccessful applications for such duties do not constitute effective indirect barriers to trade.

vii) The system should be fair to all stakeholders, both Australian citizens and corporations and foreign trading entities. It should also concern itself with the interests of producers, end users of input products, consumers and employees.

viii) The system should be consistent with Australia's international legal obligations, particularly those under the World Trade Organisation.

ix) Anti-dumping and countervailing duty laws should not outlaw internationally what is perfectly permissible internally within the Australian economy. Our regulatory regime should not be based on double standards.

x) Australia's domestic laws should be exemplars for strategic as well as efficiency and fairness reasons. As to the former, it is very important for Australia to advocate optimal policies within the WTO in areas such as the regulation of agricultural protectionism. Our government's ability to pursue such arguments would be undermined if in other areas it was demonstrably protectionist in its behaviour.

xi) While the system needs to allow for flexibility in terms of the complex determinations that need to be made, it needs to be as predictable and certain as possible. The procedural regime thus needs to be clearly outlined and devoid of unnecessary ambiguities.

xii) Procedures should not be aimed at mere administrative convenience.

xiii) The process should seek to maximise procedural fairness, giving all parties an adequate opportunity to present their case and understand and meet opposing evidence and arguments.

xiv) Any system should be as transparent as possible, on the one hand giving appropriate protection to confidentiality where it is due, but on the other, ensuring that only truly confidential material is treated as such and further, requiring non confidential summaries that properly allow interested parties to understand the issues and adequately present their views.

xv) Subject to the above principles, those deserving protection through an anti-dumping regime should be able to achieve that protection within reasonable timeframes and without undue cost. On the other hand, the time frame should be long enough to ensure high quality determinations and effective due process for all stakeholders.

xvi) While the administering authority may appropriately assist interested parties in dealing with the procedural issues, particularly small to medium enterprises ("SMEs"), it is important that it be sufficiently independent of political pressure and industry influence, whether actual or perceived.

xvii) While it is appropriate to seek to verify information in foreign countries, due allowance needs to be made for differences in accounting standards and bookkeeping, particularly where developing countries are involved.

xviii) The legislation and procedure should take into account the needs of downstream users of imported products and in turn the national interest more broadly.

xix) If a duty is to be imposed, care should be taken to set its level at a fair and reasonable amount and not allow it to operate as an anti-competitive barrier.

xx) There needs to be sufficient accountability on all participants both private sector and administrative branches, to ensure proper standards are maintained.

ARE ANTI-DUMPING LAWS JUSTIFIED ON ECONOMIC GROUNDS?

20. With these guiding criteria in mind, the gateway policy question is whether there is a demonstrable need for anti-dumping systems. There are three elements of such an analysis, economic, moral and political. Each is addressed in turn.

The economics of anti-dumping

21. It is non-controversial in academic circles that there is no economic justification for the maintenance of an anti-dumping regime. Economists uniformly agree that there is nothing inherently wrong with dumping and consequently, anti-dumping regimes are not required in order to promote economic efficiency. Furthermore, they note how easily anti-dumping regimes can operate in a protectionist manner. Added to the transaction costs of the system, they would generally be inefficient for a host of reasons. In particular they distort markets and provide opportunities for strategic anti-competitive behaviour.

22. For example, Noble Prize winning economist Paul Krugman in his standard text book (Krugman and Obstfeld 2005: 133) states "(t)here is no good economic justification for regarding dumping as particularly harmful ...."

23. "Economists have never been very happy with the idea of singling dumping out as a prohibited practice. For one thing, price discrimination between markets may be a perfectly legitimate business strategy ... also, the legal definition of dumping deviates substantially from the economic definition." (Krugman and Obstfeld 2005: 134). The authors speak of "almost universal negative assessments from economists" as to the value of anti-dumping laws. (Krugman and Obstfeld 2005: 134).

24. Another Nobel prize winning economist, Joseph Stiglitz noted the irony from a static perspective of anti-dumping laws which seek to proscribe price discrimination beneficial to an importing country. (Stiglitz 1997: 403) Sykes notes that "the weight of modern commentary has been highly critical of anti-dumping policy." (Sykes, 2005:44)

25. "The theoretical and empirical information which is now available shows the AD system as it exists currently cannot be justified in economic terms." (Messerlin and Tharakan 1999:1267) "AD laws are fundamentally at odds with the free-trade policies that have dramatically increased global economic welfare over the last half-century." (Barfield 2005:720) "Dumping … is generally beneficial to the importing country in that its distributive effects are favourable and its impact on the domestic economy is, except in the case of predatory discrimination, pro-competitive." (Dale 1980: 40) "Independent of the effect on global welfare, the importing country's welfare increases with dumping because of the inflow of cheap imports." (Niels 2000:475)

26. Banks (1990) noted that ambivalence in the GATT rules "reflects (a) recognition that dumping is a source of cheaper imports, which are normally beneficial to the importing economy, and (b) an awareness that anti-dumping actions have the potential to be an alternative means of protecting industries against (legitimate) world market competition."

27. The Gruen Review 1986 noted that it is "normally in the importing country's overall economic interest to take the external trading environment as given and accept cheap imports, even if they are dumped or subsidised." (Gruen, 1986:iii)

28. As all key text books on micro-economics demonstrate, dumping is merely a form of price discrimination that flows inevitably from certain typical market scenarios. For dumping to occur, markets must be separated so that consumers in one market cannot readily acquire the goods from the other market. Secondly, the relevant industry must be imperfectly competitive.

29. While price discrimination could either favour or disfavour export prices, it is more likely that export prices will be lower. As Krugman and Obstfeld note, "since international markets are imperfectly integrated due to both transportation costs and protectionist trade barriers, domestic firms usually have a larger share of home markets than they do of foreign markets. This in turn usually means that their foreign sales are more affected by their pricing than their domestic sales." (Krugman and Obstfeld 2005: 132).

30. This will be so for Australian manufacturers who export as much as for foreign producers who have a significant share of our import markets. In the steel sector, a comparison of BlueScope's local and export hot-rolled coil prices would be illustrative.

31. As more and more domestic mergers are allowed in Australia from firms seeking to promote export performance, this will become a standard issue facing Australia's most competitive industries.

Dumping in aid of competition

32. In many cases, without competitive pricing that from time to time could be seen as technical but non-intentional dumping, there might not be sufficient competition in the domestic economy. This is certainly so in the steel sector.

33. The DITR Steel Report 2003 notes a number of reasons why domestic producers have competitive advantages and in turn why there would be a significant price premium. The

report notes that "for some types of steel products, the transportation cost into Australia is a brake to imports." (p 28) It also notes customer loyalty and established customer relations together with branding and differentiation associated with quality and reliability. It notes the advantage of established distribution networks and just in time service and finally notes Australian building standards which "may discourage low quality/cost products." (p 28) BlueScope also alluded to these competitive advantages in a submission it made to the Review of Australia's Automotive Industry, 14 May 2008.

34. OneSteel has gone on record as saying that there is an eight to nine percent price premium for domestic steel products owing to timeliness of delivery, quality and the like. If there is to be true competition from imports, import prices must provide some discount to counter these advantages. Yet if import prices are lowered in a naturally competitive environment to deal with these geographical advantages, the imports face an increased threat of dumping. When dumping duty has been applied, it invariably makes the imported product far more expensive than market prices. Even more perversely, many markets worked the other way round. The domestic supplier aware of the competitive advantages can naturally set their own prices slightly higher than import quotes that they hear about from their customers. Thus they create a situation where it looks on its face as their prices are being undercut by imports.

35. This is all exacerbated since the OneSteel/Smorgon merger. The ACCC accepted that viable imports were needed to ensure adequate competition in the Australian economy of such an important input product as steel where a domestic monopoly or oligopoly is allowed to exist. A later section deals with the special ability for such closely owned industries to exploit anti-dumping regimes for anti-competitive purposes.

Dumping and employment levels

36. Local manufacturers who call for anti-dumping actions typically cite the need to protect local labour. This is a perverse contention as anti-dumping actions in fact adversely affect domestic employment in a range of ways.

37. As noted in the Productivity Commission Issues Paper, most actions in Australia are taken against input products such as steel. The Gruen Review itself followed concerns about actions against imported fertilisers with attendant costs on the broader farming community. Thus, one must compare the employment levels in the industry bringing the action with employment levels in downstream users. In addition to the broad figures, one must also consider the relative impact on employment as a result of both abusive and successful anti-dumping actions.

38. It is difficult to accurately identify numbers in both categories in even one sector but Mankiw and Swagel, writing of the US steel industry, noted that in 2005, steel producers employed just under a hundred and sixty thousand workers while more than 1.5 million employees worked at firms manufacturing metal products, more than 1.1 million worked at firms manufacturing machinery and nearly 1.8 million worked at firms producing transportation equipment. They refer to a study which found that for each job saved by steel tariffs, three jobs were lost in steel using industries. The study assessed the economic distortions equal to some US$450,000.00 per job. (Mankiw and Swagel 2005)

39. Their figures show that in the US, there are nearly thirty times the employees working in firms that manufacture metal products than workers within the steel producers themselves who seek anti-dumping protection. There is no reason to assume that the ratios are significantly different in Australia. It is likely that there are less than 10,000 people employed in direct steel making within Australia. The true figure is probably closer to 8000. A further 13,000 appear to be involved in vertically integrated distribution networks, management and marketing systems owned by those steel making enterprises. While these are significant figures and their interests should certainly be taken into account in assessing policy, that total figure is likely to be vastly outweighed by those who depend on competitively priced steel for further manufacturing and fabrication, construction and mining. The crucial observation is that there are likely to be significantly more jobs that depend upon the availability of competitively priced inputs than are involved in the manufacture of the inputs themselves.

40. While it is difficult to provide comprehensive figures as to total jobs in these sectors, it is desirable that the Productivity Commission seek to do so. If time does not permit comprehensive data to be obtained for the whole of the Australian economy, it is recommended that steel be used as a case study for two key reasons. The first is its undeniable importance in supporting downstream user industries. The second is because of the demonstrably large amount of anti-dumping activity in this field. A net welfare analysis of the steel sector would be a valuable predictor of industry-wide implications.

41. It is also crucial that the Productivity Commission apply appropriate economic rigour to assertions as to job implications. For example, the Australian Workers Union has asserted that for every thousand tonnes diminution in domestic steel production there will be sixty jobs lost. Based on current steel production in Australia, that would imply something in the order of half a million job losses if local steel production ceased entirely. The difference alleged must come from downstream users. Yet if local steel inputs were no longer produced, imports would surely replace them. Employment differentials would depend upon direct job losses in steel manufacturing, job increases for the higher import distribution networks required and price implications for downstream users.

42. It is also important to note that ASA members, responsible for independent distribution and importing, account for some thousands of jobs. Again it is certainly the case that their customers employ far more people in value added manufacturing using steel, than the domestic steel producers. Thus the more significant employment impacts will depend on the ready availability or otherwise of competitively priced steel.

43. Most importantly, if competitively priced steel is not readily available, consumers will simply purchase imported finished product. In monopolistic or oligopolistic industries, competitive pricing can only arise if there is a viable import sector. Where an import sector is blocked by tariff barriers, abusive standards or anti-dumping activity, true competition ceases with inevitable inefficiencies. The added inducement to move production facilities offshore would then be significant. That is already a trend in manufacturing in any event and would be significantly exacerbated if excessive anti-dumping duties or harassment based applications became prevalent.

44. Determining impact on jobs as a result of anti-dumping duties may involve complex quantitative analysis. Estimates might need to be made hypothesising on different levels of anti-dumping duties. This in turn would depend on demand elasticities in particular markets. These may vary from time to time as market circumstances change. At the very least, broad parameters of impacted jobs need to be identified to correct the erroneous perception that domestic steel production is good for jobs while imports of steel are bad for jobs. Again the crucial role of inputs into more value added industries is vital.

45. *Recommendation 1: The Productivity Commission should undertake a net welfare analysis, particularly in relation to job implications either economy wide or using the steel sector as a case study.*

Global production and foreign investment

46. Anti-dumping policy also need to consider modern production practices. Some of the most advanced industrial sectors now operate multi-nationally, with manufacturing and distribution facilities in a range of countries. The EU Green Paper on Europe's Trade Defence Instruments in a Changing Global Economy (Brussels, 6.12.2006 COM(2006)763 final) (EU Green Paper) noted that European companies are increasingly using production bases offshore and are now facing EU trade defence measures when products are exported back to the EU.

47. The application of anti-dumping laws should not pose an unnecessary barrier to such forms of foreign direct investment. This would be a barrier to outward looking Australian firms. Again BlueScope would be a typical example in the steel sector with its global production strategy.

48. Another key example in the steel sector is Steelforce. This Australian company undertook significant expenditure to build a state of the art factory in China with the sole aim of exporting production back to Australia. It engages in no domestic sales in China and hence cannot dump. Yet the dumping legislation as it currently stands requires a deemed normal value in such circumstances to raise a hypothetical differential to see if dumping is deemed to occur or not. This makes no policy sense. If the company's sole aim is to export to Australia, it must do so at a profit or it could not survive. If it does so profitably, it is engaging in a viable business model based on its rational foreign investment decisions. The potential application of dumping duties threatens the entire business model and hence the value of the foreign investment.

49. The company concerned was particularly disadvantaged as it established its production during a previous anti-dumping application in relation to HSS steel products, its key area of activity. Because it had not yet commenced production in China, it could not be seen as an existing exporter and be subject to actual verification. On the other hand, given that it commenced production within the period of investigation, it did not fit within Australia's statutory definition of "new exporters" who are entitled to have an expedited individual assessment. Hence the company would have been forced to be subject to a residual dumping margin as found against a very small number of Chinese mills who were uncooperative at that stage.

50. To obviate this problem the company offered an undertaking as per the legislation.

51. In the most recent unsuccessful anti-dumping application against HSS steel products, while the entire investigation was terminated vis-a-vis China, Steelforce is still caught up in an ongoing investigation because the view has been taken that its undertaking from an earlier application is to be reviewed and that it is not the current application that is in issue. The perversity is obvious. Customs has just found that there is no sufficient evidence of injury or causation of injury from China. At the same time this company is being asked to revise its undertaking as to exports from China based on a hypothesis that there might be.

52. Thus a company that consciously will never dump has its entire equity at risk from hypothetical and arbitrary assessments flowing from a gap in the legislation. The WTO obligations do not demand such treatment and there is no justification for its continuance.

Dumping and regional initiatives

53. Another policy issue relates to the applicability or otherwise of anti-dumping laws within a regional trade agreement. As noted at the outset, Australia and New Zealand have abolished anti-dumping laws for trans-Tasman trade under ANZCERTA. The same is true for intra-European trade. NAFTA has taken a different approach, simply because of US anti-dumping interests dominating contrary preferences of Canada. Even then NAFTA has adopted much more cost effective review processes to deal with anti-dumping matters.

54. The Australian Government is currently negotiating a range of additional bilateral free trade agreements and our optimal policy should be consistent with these developments. If we replicate our approach in ANZCERTA in all existing and proposed arrangements, there will be even less utility in any residual regime. There is even a legal question as to the duty to offer similar standards under most favoured nation clause obligations. That is, of course, separate to the economic policy issue before PC. At the very least, policy advice should take into account the important existing and proposed bilateral initiatives that our country has been taking in recent years.

Arguments in favour of anti-dumping regimes – predatory dumping

55. Economists do agree that there is one form of dumping that would require a regulatory response were it found to exist. That involves *predatory dumping*. Predatory dumping would arise if a foreign firm sells at such low prices as to drive local industry out of business. The long-term objective is to then raise export prices to exorbitant levels.

56. Economists have long explained why predatory dumping is unlikely to apply in any meaningful sectors of a modern economy. Studies throughout the world have shown that

predation is not analytically likely (Trebilcock and Howse 2005:257; McGee 2008:761) and does not constitute a significant factor in actual cases. (Whitwell 1997:377) "Predatory pricing behaviour is irrational. ... That is why the studies that have been done on predatory pricing have found that it does not exist in the real world." (McGee 2002:50; Falvey and Nelson 2006:546; Hindley and Messerlin 1996:22; Niels 2000:476) In a major study in 1980, Dale concluded that there is no evidence of predation. Commenting in 1990, Banks suggests that there appears to be no evidence in Australia that dumping activity was part of a predatory strategy. He notes a comment in the Gruen Review that there have been instances where exporters' pricing decisions "appear to reflect a predatory element", but Banks notes that this was not documented.

57. As to the first issue, there are a range of reasons why predatory dumping is unlikely. First, a foreign firm must be willing to make significant sales at a loss with a view to driving out domestic competition. As with any price war, competitors would understand that this is temporary behaviour and would do what is necessary to survive the temporary onslaught. (Yarbrough and Yarbrough 2006: 198).

58. Most importantly, a predatory strategy can only succeed if the foreign manufacturer could exploit monopoly power in due course. This can only be so if there are barriers to re-entry into the local industry and a lack of alternative foreign sources of supply. Banks (1990) notes that because "Australia's imports of nearly all commodities come from a range of suppliers in different countries (this) eliminates a fundamental condition for the rational pursuit of such a strategy." This is supported by the fact that most anti-dumping actions involve more than one supplier. It is also commonly large multinationals with significant worldwide market shares that use anti-dumping measures in particular jurisdictions. They are even less likely to be subject to successful predatory action. (Whitwell 1997:377)

59. Even where the conditions for predation exist, other strategies may be more appealing such as collusion with or acquisition of the local targeted firm. (Banks, 1990)

60. Stiglitz (1997: 404) does note certain conditions where predatory pricing might occur but makes the important observation that predation could still occur without dumping.

61. Even if predation were to apply, existing competition laws are already directed at such abuse of market power behaviour. If the only valid concern is with predatory dumping, it seems sensible to allow a single law to apply to both domestic and international predatory pricing, although Stiglitz notes some special features including currency conversion that would have to be addressed if domestic competition laws were to apply to allegations of predatory dumping. (Stiglitz 1997: 420)

62. The steel sector is illustrative. There are numerous steel producers around the world. No individual firm could engage in predatory behaviour and expect to reap monopolistic profits even if they were able to drive the Australian industry out of business. There is simply no evidence of predatory dumping being directed at Australia and this should be wholly discounted as a policy basis for maintenance of the regime.

Arguments in favour of anti-dumping regimes – continuous dumping

63. As noted above, where markets are sufficiently segmented and competition is imperfect, price discrimination may naturally occur. If consumers in different markets have different elasticities of demand, then different prices may be charged in each market.

64. It is commonly the case that relative inelasticity is found in the exporters' market, either because they have larger market share and/or because of domestic protection not found in their key export markets. Continuous or persistent dumping occurs where export prices are regularly lower than prices in the foreign manufacturer's home market.

65. Economists looking at the welfare effects of this phenomenon would naturally criticise the unduly higher prices in the foreign manufacturer's home market. Foreign consumers suffer

because of their own trade barriers and manufacturers' market power. There is, however, no natural inefficiency argument in relation to the prices charged in the import market.

66. Banks (1990) concludes that "(w)hile there may be a theoretical case that in certain circumstances intermittent or temporary dumping could reduce the welfare of the importing country, there is no such case where dumping is a continuing phenomenon. Long term dumping brings gains to consumers and user industries which could be expected to outweigh any losses in production within the import-competing industry. Given the relatively lengthy application of anti-dumping duties in Australia … it might have been expected that doubts would be raised in this country about whether anti-dumping action has been in the 'national interest'."

67. Questions of efficiency should not only look at price differentials but the economic validity of laws which try to force equal prices to be charged in both markets in this scenario. Yarbrough and Yarbrough note "the welfare effect of forcing the firm to charge equal prices in the two markets can't be ascertained without further information about the market in question. Hence, international trade theory provides no clear rationale for policies that prohibit international price discrimination or persistent dumping under the price-based definition." (Yarbrough and Yarbrough 2005: 197).

68. Those in favour of anti-dumping on this basis respond by asserting that excessive profits in the home market cross-subsidise lower export prices. Protection seekers have thus shifted their rhetoric to claims of sanctuary pricing allowing for cross-subsidisation and below cost pricing as a result of governmental support. Finger and Zlate point out that these rationales still do not suggest an import restriction on the basis of national economic interest. (Finger and Zlate, 2005:11) Brian Hindley notes that cross-subsidisation is logically possible but is an inadequate explanation. There is a need to consider why an exporter would want to spend profits in this way. More commonly, the lower foreign price simply meets the natural prices in a more competitive market. (Hindley 2007:342 footnote 4)

69. Where potential cross-subsidisation is concerned, Banks (1990) notes some complex theoretical issues (see also Dale, 1980:35-7). Banks concludes that "the conditions for such cross-subsidisation to be either a feasible or rational strategy are similarly stringent to those for predation. A point that is often missed is that an exporting firm will only derive surplus profits ('economic rent') from protection at home if it has monopoly privileges. It is in any case doubtful that concern about possible cross-subsidisation is an important factor in the Australian anti-dumping process, given that the anti-dumping laws in practice require no examination of it." Others have also noted that strategic dumping requires preconditions to be successful. As Mavroidis, Messerlin and Wauters (2008) point out, "import-competing firms should be 'disadvantaged' enough, in terms of the relative size of accessible markets and scale economies, with respect to the exporter operating from the sanctuary market. In particular, strategic dumping is clearly implausible when the exporters sanctuary market is small relative to the importing market." (Mavroidis, Messerlin and Wauters 2008:17)

70. At the very least, anyone seeking to justify the system under a sanctuary theory needs to prove that the problem exists. Even if they were able to do so, the current rules do not target that problem and do not provide a solution to it. If that was a legitimate concern, the system would need to look at how it identifies prices that are unduly low because of cross-subsidisation. That would be particularly difficult to do, particularly as marginal costing is a rational strategy irrespective of the size of the home market profits. If undue cross-subsidisation was sales at a loss in the export market, that could be dealt with under competition laws dealing with predatory pricing. If the assertion is that even profitable prices are somehow economically unlikely absent government decisions on such matters as mergers and tariff policy, it would be virtually impossible to distinguish between unacceptable and acceptable behaviour given that all governments protect to some degree. For example, would the Australian Government be happy if we had allowed BHP and Rio to merge and then found foreign governments attacking their imports under dumping laws on the basis that this was an improperly accepted merger?

71. It has also been suggested that price discrimination dumping may occur because of oligopolistic market power and cross-subsidisation within multi-product firms. Yet that is

commonly the case in domestic industries. The steel sector is again a prime example. There is no domestic law against such behaviour and it should not be seen as improper international trade. As noted above, BlueScope and OneSteel have monopoly in the product categories they specialise in. They do not compete with each other on production. While the ASA does not have figures, it would be hard to imagine that they make identical profits on every product category they produce. Because market demand for each may vary from time to time, there will be differences to costs factors and natural reasons to have varying profitability.

72. Finally, while various forms of government intervention may distort markets, trade barriers are unlikely to be an appropriate response. General liberalisation negotiations within the WTO framework would be preferable if the problem is high tariff walls in the export country. The WTO system contemplates reciprocal negotiations to reduce such barriers. Anti-dumping laws should not be misused to achieve the same end. It is also a fact that the foreign entity may be operating inefficiently under its home protection measures and not be operating as advantageously as hypothesised. If the government intervention is by means of a subsidy, that should not be addressed under anti-dumping laws but instead under the circumscribed rules of countervailing action.

Arguments in favour of anti-dumping regimes – intermittent or sporadic dumping

73. The third category of dumping involves intermittent or sporadic dumping. The Productivity Commission Issues Paper questions whether this is a problem in the Australian economy and whether there are sufficient disruptive effects to warrant anti-dumping responses.

74. Typically, this is hypothesised to arise infrequently and commonly where manufacturers have had excess stocks which they seek to quit through temporary low prices.

75. This justification should be rejected on both moral and economic grounds. As to the first, Australia's anti-dumping laws should not seek to outlaw foreign behaviour that is perfectly acceptable within the Australian economy. Local producers selling into the domestic market often have rational reasons to clear excess stock and goods are often offered for sale at low prices from time-to-time.

76. As to the economics, Yarbrough and Yarbrough suggest that "(s)poradic dumping may disrupt the domestic markets; however, its unlikely to cause serious permanent injury to a domestic industry, just as a store's market position isn't likely to be damaged irrevocably by a competitor's occasional sale. During the brief period of dumping, domestic consumers benefit from availability of the imported good at an unusually low price." (Yarbrough and Yarbrough 2006: 196)

77. Determining the net welfare benefits from intermittent dumping would depend on a range of factors. Economy wide benefits from lower prices must be set against production losses of the industry concerned. Banks (1990) notes that the more temporary the price reduction, the more that adjustment costs might exceed consumption gains. He notes however that reasonably competitive firms would be likely to be able to cope with such temporary phenomena.

78. There are also a range of practical problems in responding to intermittent dumping via an anti-dumping regime even if it was concluded to be of concern. It is difficult for a domestic industry to be made aware of such atypical sales. The long lead times in investigations and application of duties would lag far behind the transaction in dispute. (Banks, 1990) Countering a temporary problem by allowing for a five year duty to flow is a very blunt policy response. Allowing for reviews to remove the duties on proof that the import surge was temporary would be costly. Unusual surges are also more naturally subject to safeguards provision.

79. In addition to the lack of theoretical concern with intermittent dumping, it is unlikely to occur in those industry sectors where Australia's anti-dumping action has been greatest. Using the steel sector as a key example, most imported Australian steel is made to order and is based on unique specifications, whether as to composition, length or finish. Both imported and domestic steel products are brought to market via competitive distribution chains that seek to

have long-standing relationships with suppliers. An analysis of historical pricing levels would thus show that sporadic dumping is not a phenomenon of any significance.

80. Similar principles are likely to apply in other key sectors where anti-dumping action has been taken.

81. It is also important to understand that there are other reasons besides excess stocks that might lead to variations in the favourability of bringing anti-dumping actions. A key important modern development that places misguided pressure on anti-dumping regimes is problems within the international financial system and exchange rate parities and how this leads to intermittent technical dumping.

82. Anti-dumping regimes should not be the means by which intergovernmental exchange rate policy differences are dealt with such as developed country challenges towards China's exchange rate regime. Changes in trading patterns will naturally counterbalance exchange rate variation or internal inequities in any event.

83. The Productivity Commission also asks whether the current system is a significant deterrent to intermittent dumping. For the above reasons that could not be so. Intermittent dumping is not an economic problem and the temporary nature by definition makes it difficult to deal with under an anti-dumping system requiring examination of twelve months of cost behaviour and five years of injury analysis. A five year remedy is an inappropriate instrument for a temporary problem.

Is it dumping or is it marginal costing? – what's in a name; quite a bit apparently

84. Perhaps the most perverse aspect of anti-dumping regimes is that they attempt to assert that behaviour is unfair where micro economic theory suggests it is rationale and optimal. Virtually every respectable university economics degree would teach students about micro economic theory, including economies of scale and marginal costing. It makes sense for any firm to continue to produce if it can sell product at more than the marginal cost of production, provided that such pricing does not adversely affect existing sales levels.

85. Leading text books expounding upon this concept include Hirshleifer and Hirshleifer (1997); Salvatore (2007); Pindyck and Rubinfeld (1991).

86. To show how bizarre anti-dumping regimes are, many governments extol the virtues of marginal costing as a means to promote export activity by their manufacturing sector, while at the same time supporting anti-dumping regimes and the rhetoric of unfair playing fields.

87. Where Australia is concerned, Austrade, in its publication on *Guide to Pricing for Export*, invites domestic producers to consider marginal costing for this reason.

88. The publication states that "(p)ricing for any market requires an understanding of relative costs, demand and competition in that market. In offshore markets these factors vary greatly from those in Australia. Careful analysis of prevailing conditions in the markets you choose, and an accurate assessment of the way to structure your export price, determine whether you can be competitive and write profitable business."

89. Most significantly, the publication states "(m)arginal (or 'differential') costing is a technique commonly employed in export and produces a more competitive price to assist market entry. This method establishes the base price of a product or service using the direct costs of production and sales, with fixed costs apportioned to the volume of the sale."

90. Another approach suggested in the publication is a "top down" method "working back from a market price that you will have to meet to be competitive." This simply and logically suggests that to make sales in a new market, you would obviously need to consider what competitors are charging in that market even if that is lower than the price naturally charged in the home market.

91. That marginal costing advice has been given from time to time by Australia's then Industry Department was also noted in the Gruen Review.

92. Similar accepted concepts are publicised by the New South Wales Department of State and Regional Development in its advice to small business (http://www.smallbus.nsw.gov.au in its notes on Export Pricing). Time has not permitted a comprehensive survey of all Australian States but this kind of advice is likely to be replicated as it is sensible commercial behaviour.

Arguments in favour of anti-dumping – fairness

93. As noted above, there is no tenable basis to support costly and disruptive anti-dumping systems on economic grounds. Instead, the common rhetoric speaks of the need to respond to "unfair" trade and ensure a "level playing field."

94. The Productivity Commission should, as per its normal practice, assist the politically charged debate by providing intellectually rigorous conclusions as to the fairness arguments in relation to anti-dumping. It is particularly important that the Productivity Commission address the true policy issues. If there is any unfairness in international price discrimination that constitutes dumping, it is generally the unfairly high prices in the foreign exporters' home market. Manufacturing interests in any importing country that struggle to compete with foreign exporter prices are really concerned with those prices themselves and have little interest in the adverse effects on foreign consumers. Hence the fairness rhetoric is illogical.

95. Stiglitz notes that "spurious accusations of unfairness obfuscate the real policy issues involved." (Stiglitz 1997: 419) Mankiw and Swagel suggest that the rhetoric of fairness "bears little relation to economic reality." (Mankiw and Swagel 2005) Sykes comments "that it is not clear why dumping should be perceived as unfair, given that it is really quite a normal business practice for many foreign and domestic firms."

> "...price discrimination is not necessarily an unfair practice but could just reflect different demand elasticities between the domestic and foreign market (with the foreign demand function being more elastic)." (Vandenbussche and Zanardi 2008:97)

96. Hindley notes that "(i)n the anti-dumping world, price less than cost equals unfair. In the real world, a producer might sell below cost for entirely legitimate reasons, without any hint of unfairness. The most obvious case is when an industry experiences a global slump in demand, so that all producers make losses (sell at prices less than cost)."

97. Lindsay and Ikenson note that defenders of anti-dumping are never called upon to define "fairness" and the requirements of a "level playing field". In their view hard core supporters of anti-dumping practices are "concerned primarily with the interests of import-competing industries (notably the steel industry) that use the law regularly. To those supporters, results are all that count: anything that makes it easier for domestic industries to win protection makes the law better, and anything that makes protection harder to achieve is a step backward. That standard, of course, has nothing to do with any notions of fair trade; it is a protectionist standard, pure and simple." (Lindsay and Ikenson, 2002:5).

98. Such rhetoric is actually inherently unfair even to those who use it. An important policy objective is to have a sustainable Australian manufacturing sector. For this to occur, that sector needs to concentrate on those strategies that would lead to viable and sustainable industries. If they are dissuaded from concentrating their attention on the important issues because they wrongly perceive naturally occurring price discrimination as unfair, they are being sheltered from the need for necessary attention to readjustment strategies by the presence of an anti-dumping regime. They are wrongly led to believe that they have a viable industry structure as long as dumping does not occur. Brian Hindley notes that "resistance to adjustment is likely to be strengthened by the availability of false-free doses of anti-dumping even when adjustment is in the best interest of the industry." (Hindley 2007:345)

99. Instead, in a developed economy like Australia, domestic industries need to be encouraged to find higher value added, higher technology approaches to manufacturing that allow them to succeed profitably, rather than presume that the status quo is validly maintainable as long as dumping does not occur. Whether there is a need for government assistance in that regard is a separate policy debate, but anti-dumping is a poor substitute for direct and targeted government adjustment support.

100. Another problem with the fairness rhetoric is that it diverts protectionist pressure from more open and transparent fora that might better be able to deflect it such as the Productivity Commission itself. (Banks, 1990) While Australia's experience has not mirrored the United States, there is also the possibility that other misguided fairness concepts will lead to additional trade barriers. (Banks, 1990)

101. There are also issues with the way anti-dumping systems operate. "… modern antidumping practice actually facilitates the kind of unfair and anti-competitive behaviour it was intended to prevent." (Mankiw and Swagel 2005:111)

102. It is also unconscionable to brand foreign behaviour as unfair when it is perfectly legitimate when it occurs within the Australian domestic economy. Companies can engage in price discrimination between different markets except where this is an abuse of a dominant position. Supermarkets will commonly charge higher prices in differing geographical or demographic suburbs. Suppliers will commonly charge different prices where elasticities of demand in different market segments vary. Loss leader sales are a perfectly natural way to advertise product and to announce entry of a new supplier into the market. As noted above, marginal costing is a highly respectable way to identify the optimal size of a manufacturing entity.

103. If price discrimination was a significant concern, it should operate at the domestic as well as international level. Anyone seeking quotes from OneSteel directly, and at the same time via its distribution network, would find differential price offers from time to time.

104. The Gruen Review recommended changes to "reduce the discrepancy between the concept of 'unfair trading practices' as it is applied within Australia and as it is applied by Australia to its imports of goods …" (Gruen, 1986:iv)

105. The Productivity Commission asks whether fairness rationales depend on the circumstances surrounding dumping, for example, where the price of goods might be artificially reduced by government subsidies. For the above reasons that is not the case. A fairness argument should never apply if there is no economic logic to it. Furthermore, foreign government subsidy behaviour should relate to countervailing actions and not anti-dumping actions. Problems of input subsidies or input dumping that might be hard to deal with in this way are still often not an economic problem. Even if they were, they are separate issues to be addressed in the WTO, not by a misapplication of domestic law.

106. Thus the fairness rhetoric should be refuted once and for all.

Arguments in favour of anti-dumping – political expediency

107. Notwithstanding the absence of a plausible fairness defence, other non-economic reasons are commonly resorted to as justifications for contingent protection. The Gruen Report in 1986 recommended the maintenance of the anti-dumping regime in the main because of what was seen as a "fragile consensus" between a government wishing to promote trade liberalisation and vested interests who felt the need for some safety valve. It is for that reason alone that Gruen recommended continuation of the existing system but subject to crucial recommended changes. Similarly, Boltuck and Litan suggest that a legal safety valve in the form of unfair trade remedies might help prevent support for more transparent protection. (Boltuck and Litan, 1991). The preservation logic has also been used by Bhagwati (1988:35).

108. It is particularly important to reject this view or at least clearly identify it as something other than a fairness issue. An argument that it is based on assessments of political expediency, and

how political consensus is best reached, is also more one for government than for an independent economic advisory body such as PC.

109. Furthermore, the methodology of assessing fairness or political expediency claims in past reviews is problematic. Political economy suggests that those who have most to gain from protection will claim the need for it. It would be a perverse outcome to consider that there is a perceived fairness need simply because those with most to gain from protection go to the bother of making submissions to that end before the Commission. Yet past reports often do so. For example, the EU Green Paper simply listed the number of people that supported the status quo as proof of its utility. That is simply not rigorous policy analysis. The same problem would arise if vested interests lined up to argue that they need protection as a quid pro quo to liberalisation.

110. In any event, the political expediency argument is not logically defensible analytically. Sykes criticises this assertion on simple political economy logic. Those with the power to engender greater protection via direct lobbying will still seek to do so over and above their protective entitlements under anti-dumping regimes. Those without such power can free ride on protectionist oriented anti-dumping regimes which they otherwise have no power to promote. (Sykes, 2005:46) "Lobbying for rule changes, or favourable interpretations, will continue as long as the expected return from such lobbying exceeds the cost. Recent events in Australia suggest that that continues to be the case." (Banks, 1990) This is observable within the steel sector in Australia. As noted above, while the Gruen Review merely recommended retention of the system based on a fragile political consensus, it did not find economic justifications and called for significant changes to bring our international trade practices into line with our domestic trade practices regulatory responses. Much of the latter never occurred. Instead, subsequent reviews such as the Willett Review and the Joint Study led to changes going the other way. Similar lobbying exercises have occurred from time to time to encourage the Minister to make Directions to make it easier for successful applications to be brought.

111. Sykes also suggests that the political constituency for anti-dumping policy is declining industries. (Sykes, 2005:47) They should not be seen as having sufficient political power in a modern economy to require inefficient policies to engender their support.

112. Furthermore, when the Gruen Review spoke of a "fragile consensus, " it did so in 1986. Whatever the compromises needed to effect efficient change in the national interest in 1986, it is now some 23 years later. Australia has had a long standing and almost bi-partisan move to an open economy with liberal trading rules. An anti-dumping regime impacts upon such a small amount of our international trade, (albeit at great expense and inconvenience), that it is hardly a meaningful trade-off for industry and unions in supporting more efficient economic policies. It would be far better to consider general industry policy and adjustment assistance as a quid pro quo for liberalisation, rather than maintenance of an anti-dumping regime.

113. Political economy considerations must also consider retaliation. Maintaining a fragile consensus at home while exacerbating the likely application of anti-dumping duties to Australia's exports would be decidedly suboptimal. The Productivity Commission asks if the WTO arrangements with regard to dumping have any negative systemic effects including the increase of the number of other countries employing anti-dumping regimes affecting Australian exporters. That is certainly the case. The growth rate in use of anti-dumping actions by countries such as India and China is both alarming and expected from a prisoner's dilemma perspective. The fact that significant actions have not as yet been taken against Australia's exports is more a product of the current mix of our exports. However, to the extent that government policy is to promote outward-looking technology-based manufacturing exports, the problem is significant and would be a major factor in Australian industry considering what degree of export orientation its investment strategies should be targeted towards. If all countries seriously misused anti-dumping provisions equally, BlueScope's worldwide business model would be seriously disadvantaged.

114. While it is theoretically possible that excessive and improper retaliation will in due course lead to more rigorous anti-dumping standards, that should certainly not be a reform process advocated by the Productivity Commission. This raises the question whether anti-dumping

activity can inspire liberalisation abroad. The Productivity Commission asks where there is tangible evidence that our system has facilitated tariff and other reforms or whether threat of countervailing action by Australia has led to changes in subsidy arrangements in other countries. The question would be motivated by the proposition that if dumping through price discrimination occurs because of foreign sanctuary markets, perhaps anti-dumping regimes will help discourage other countries from maintaining the tariff and subsidy regimes that support the sanctuaries. Historical analysis of the GATT/WTO system would show that there is no such correlation. Tariff walls come down through tariff negotiations. That is the whole aim of the WTO. Subsidies should be dealt with under countervailing duty laws and not anti-dumping. Australia is a small market and when anti-dumping actions are brought, what often happens is trade diversion occurs, with targeted exporters not usually bothering defending cases and importers shifting to other sources of supply. Hence there is no demonstrable evidence or analytical support for the view that we should maintain the regime to open up other people's markets.

115. Furthermore, even if that was politically possible, it is still a second-best solution requiring a cost/benefit analysis given the serious costs to the Australian economy, particularly as anti-dumping operates against important input goods such as steel, plastics and chemicals. Finally, in such a cost/benefit analysis it would almost certainly be the case that if any reduction in foreign barriers was possible, it would not be in those areas of greatest need to Australia. WTO negotiations to be effective have to be cross-sectoral. We open our markets in some industries in return for promises by our trading partners in others. Where the steel sector is concerned, an anti-dumping action against Korean steel because of high Korean steel tariffs will not have any impact on Korea's imports of beef.

116. In spite of these observations, declining industries tend to cling strongly to anti-dumping regimes. Niels and ten Kate note reasons why anti-dumping is more attractive politically than safeguards mechanisms. First is the fact that dumping has a negative connotation which gains public support. The blame for injury is placed at the feet of foreign firms. Injury thresholds are also lower than with safeguard regimes and there is no obligation to provide compensation. (Niels and ten Kate, 2006)

117. Again, whatever one's view as to the political expediency of such behaviour it is simply wrong to describe it as fairness. If the concern is to prevent vested interests feeling aggrieved and demanding protection, then allowing a system impregnated with the rhetoric of fairness and level playing fields can only exacerbate both industry and public misperceptions as to a belief that contingent protection is their just dessert.

118. The Productivity Commission should thus conclude that there is no fairness justification for Anti-dumping regimes and that political questions as to the consensus underlying the adoption of good economic policies should not be mischaracterised as fairness issues. Arguments based on political expediency should be identified as such. As above-mentioned commentators have done, the Productivity Commission should identify the cases where political arguments are founded on illogical propositions. In all other respects, questions of political expediency should be left to political analysts best suited to accurate evaluation. At the very least, the Productivity Commission should caution the government that if it chooses to maintain the system for political reasons it is particularly important that reform of the laws and procedures go to the greatest lengths to ensure that the system does not unduly interfere with liberalisation efforts. It would be ironical if a politically expedient decision aimed at promoting liberalisation became a mechanism to interfere with it. Yet that is what all of the foreign studies show to be the case with such systems.

What undesirable inefficiencies typically flow from the utilisation of anti-dumping laws?

119. As noted above, there are no positive analytical reasons in support of anti-dumping regimes. In addition, however, there are significant inefficiencies that arise when such systems are utilised.

120. The lack of a theoretical justification for anti-dumping regimes on economic grounds is exacerbated by the ease with which they can operate in a protectionist manner. They invariably have high transaction costs which operate disproportionately on importers and foreign exporter interests. They are riddled with discretions and often lead to arbitrary determinations. Many of the calculations purport to be objective but are in fact highly unrealistic, in particular where non market economies are concerned or when foreign suppliers do not undertake sales in their domestic markets. In smaller economies such as Australia, where small numbers of manufacturers dominate key industries, the potential for anti competitive abuse is high. Because anti-dumping is typically applied to input products, there are serious adverse effects on downstream employment levels as well as commercial activities. Even successful applications often do little to protect domestic industry, instead forcing end users to simply import finished products rather than inputs, again adversely affecting Australia's manufacturing and export interests.

121. There is a very significant and consistent literature that elaborates on these actual and potentially anti-competitive aspects of anti-dumping behaviour.

122. The first issue is the significant burden of being involved in anti-dumping activity. Joseph Stiglitz cites a Washington Post article to the effect that the administrative burden of complying with the required information in the required time "has become so overwhelmingly difficult that more and more foreign companies are either unable or unwilling to try …" (Stiglitz, 1997). An exporter's obligation to participate in a complex verification visit, the potentially large number of assessment exercises and ongoing administrative reviews has been described as a "hidden tax" (Ehrenhaft, Hindley, Michalopulos and Winters, 1997) Stiglitz notes the typical asymmetries in legal costs between those borne by domestic applicants and foreign defendants. (Stiglitz 1994: 411)

123. Secondly, it has long been accepted in the economic literature that tenable but unsuccessful anti-dumping applications have a very serious chilling effect on the market place.

124. Prusa (1999) analysed the United States experience. He found that anti-dumping investigations substantially affect imports whether duties are applied or not. He showed that import volumes dropped by 15% to 20% where rejected petitions were involved. Messerlin's study of the EU indicated that import quantities dropped by 18% one year after the initiation of an investigation (Messerlin, 1988).

125. Staiger and Wolak (1994a) found that firms that have made applications enjoy import relief during the investigation period of about half what they might expect from a positive final determination of duty imposition. That is so whether the application ultimately proves successful or not.

126. UNCTAD (2000) p 7, also found that imports decrease before duty is applied. This is consistent with studies which show that exporters modify their behaviour when under investigation, even before the cases are ultimately determined (Tharakan, 1999).

127. Empirical findings from a study of the early 1980s suggested that suspension agreements led to trade restrictions similar in magnitude to those which would have been felt if anti-dumping duties had been imposed. (Staiger and Wolak 1997:386) The effect of the investigation itself was to reduce imports during the period of investigation by about half the reduction that would have been expected if the anti-dumping duty had been imposed as from the beginning of the investigation. (Staiger and Wolak 1997:386) The latter effect led the authors to identify certain applicants as "process filers" whose strategy was merely to obtain the benefits of the effects that flow from the investigation process itself. (Staiger and Wolak 1997:387) If temporary price increases can cover the costs of legal fees, then applicants for anti-dumping protection have little to lose. Temporary price increases will commonly arise where there is a strong possibility of the imposition of anti-dumping duties.

128. Importers and their distributors who must purchase on a three to four month lead time, or even longer in the steel sector, are stuck not knowing what to do while an investigation is ongoing. Should they presume that the investigation will be successful and build a dumping duty into

the cost, should they try and get an undertaking from the exporter to raise prices or should they rely on the fact that the application will be unsuccessful and maintain the status quo? A further problem is whether they should delay purchases until they are better aware of the likely outcome of the anti-dumping investigation. This in turn has an anti-competitive effect as it means that they will run down inventories and make it harder for small to medium enterprises to meet their needs on an ongoing basis.

129. An examination of past behaviour shows that exporters in certain countries simply do not seek to defend themselves in investigations, obviously making a cost-benefit assessment as to the value of the Australian market.

130. It has even been shown that the mere presence of an anti-dumping regime, with the mere potential for future applications, has an immediate adverse effect on import prices and levels. (Staiger and Wolak 1997:386) Mankiw and Swagel (2005) note that the mere existence of anti-dumping laws caused firms to change their behaviour. If lower prices are likely to trigger anti-dumping applications, this will lead foreign firms to charge higher prices than they otherwise would wish to do. (Carmichael 1986:11, cited in Banks 1990) The US Congressional Budget Office (2001) came to the same conclusion.

131. The inefficiencies are exacerbated if a positive finding results. If foreign exporters do not provide information or if their information is rejected, it tends to lead to larger dumping margins (Baldwin and Moore, 1991).

132. Mankiw and Swagel point out that anti-dumping tariffs fall most harshly on the least well off and local producers. (Mankiw and Swagel 2005)

133. Anti-dumping duties are invariably much higher than general tariffs.

134. Because they commonly apply to inputs, they adversely affect domestic manufacturers who use domestic inputs as the producers of the latter can raise their prices where they are protected by anti-dumping duties. One study found that successful anti-dumping cases led to significant domestic price mark-ups in the EU. (Konings and Vandenbussche, 2004)

135. "'Non-monopolising dumping' (dumping that is not motivated by the creation of monopoly power) can be entirely consistent with robustly competitive conditions in the importing country's market. In general, economists tend to hold the view that aggregate economic welfare at the level of the country imposing the duty and at the world level will decrease due to anti-dumping action. The imposition of duties will mean a loss in the aggregate economic welfare because usually the diminution in the consumers' surplus will outweigh the domestic producers' gain from protection. This is not only because the consumers will have to pay a higher price for the imported product, but because the prices charged by the domestic producers will remain high compared to what they would have been, if there were no duties." (Messerlin and Tharakan 1999:1253-4)

136. In some industries the differentiated nature of products can lead to the filing of a large number of simultaneous petitions, increasing the protectionist effect. (Moore 1997:90)

137. USITC (1995) noted that imports with high dumping margins declined on average 73% following the imposition of a duty. At the same time unit values increased by 32.7% on average. Prusa (1999) showed that imports fell on average 50% to 70% over the first three years following the imposition of a final duty measure. Import prices rose by more than 30% during the same period.

138. The impacts are lasting. Bown (2004) noted that there is virtually no change in export growth to the US until two years after the removal of an anti-dumping measure.

139. The Auditor General of Canada Report of 2002 found that trade remedy actions only affected about one percent of goods imported into Canada by value. Yet in the key industries where they applied, they had a substantial impact on Canadian producers and industries using the imported goods. (Auditor General of Canada 2002:2) "...higher steel prices help steel

producers, but they hurt the much larger number of firms and workers that use steel." (Mankiw and Swagel 2005:113)

140. Anti-dumping duties will also not often help the industry seeking protection as local producers needing the input products will often shift production offshore, thus causing general harm to domestic employment. Mankiw and Swagel noted how anti-dumping duties on flat panel displays led to US Notebook computer manufacturers shifting to offshore production. (Mankiw and Swagel 2005) This is already occurring in Australia.

141. Just one of many examples in the steel industry is the business decision by D J Palmer to manufacture gate and fencing components in foreign production facilities. While there are a range of commercial factors behind any decision to shift manufacturing facilities offshore, one significant factor was the result of pipe and tube imports being disrupted by anti-dumping duties.

142. Where a dumping duty is imposed it is also typical for foreign suppliers to raise their prices to avoid the duty and collect the rents themselves. As a result the Australian revenue loses the anti-dumping duty and domestic consumers continue to lose low prices. The imposition of anti-dumping duties often leads only to trade diversion, moving exports from targeted countries to non-targeted countries. This will be particularly so with important input goods where there are multiple sources of supply.

143. Numerous commentators note that the net welfare effects are negative.

144. "When the importing country imposes antidumping duties on low-priced imports, its consumers lose these benefits." "The losses to consumers will almost always outweigh any gain to producers who are thereby protected. This is borne out by the empirical evidence." (Trebilcock and Howse 2005:252)

145. "The theoretical conclusion that AD is (almost always) welfare reducing is supported by various estimates." (Zanardi 2006:592)

146. "...the welfare effects of widespread AD protection are negative. ... Moreover, a recent paper by Vandenbussche and Zanardi (2007a) estimated the trade depressing effects of AD proliferation for some new users to be in the range of 8.9% of their annual imports. ... This suggests that adopting and using AD laws can substantially offset gains from trade liberalization and refutes the notion that AD laws are 'a small price to pay'." (Vandenbussche and Zanardi 2008:99)

147. "WTO-sanctioned use of AD surely causes more injury than any reasonable person's notion of economically harmful dumping. Today AD is a bigger problem for international trade than economically meaningful dumping ..." (Prusa 2005:683)

148. USITC (1995) and Gallaway et al (1999) sought to compute the net effects of United States anti-dumping and countervailing orders for 1991 and 1993 respectively. USITC estimated the loss at $1.6 billion. Galloway et al estimated the welfare lost between $2-$4 billion annually. It would be desirable if the PC undertook a similar assessment for Australia.

149. *Recommendation 2: The Productivity Commission should undertake a net welfare analysis of anti-dumping activity in Australia.*

150. In additional to the internal inefficiencies there is also the Prisoner's Dilemma flowing from retaliatory behaviour. Prusa and Skeath have found that increased anti-dumping applications in developing countries are in part motivated by a desire for retaliation against anti-dumping activity in developed countries, in particular the US. (Prusa and Keith 2002) Other studies suggesting that developing countries use anti-dumping policy in a retaliatory manner include Feinberg and Olsen (2004); Aggarwal (2004); and Zanardi (2004). Stiglitz notes that "a more liberal set of import trade laws would bring indirect efficiency benefits – through less restrictive laws abroad – in addition to the direct effects." (Stiglitz 1997: 418) In that regard he notes that any country's most competitive exporters are the ones most likely to be caught by

foreign anti-dumping laws. This may be relevant in the future, as countries such as China increase their use of anti-dumping in relation to imports and would add to the welfare costs. BlueScope exports slab and billet which would commonly be the type of product targeted under anti-dumping regimes.

151. New countries adopting anti-dumping laws typically mimic the behaviour of those with long established regimes. An increase in anti-dumping actions was seen from some developing countries' perspectives as an unpalatable development offsetting liberalisation promises in other sectors such as textiles. (Horlick 2000:181)

152. Retaliatory behaviour involves the fine detail as well as the general applicability of anti-dumping regimes. For example, excessive margins based on facts available, including the domestic industry's own allegations, are particularly problematic when they form the basis of retaliatory behaviour. Lindsay and Ikenson point to extremely high dumping margins based on facts available in the US and also as applied by Indian and South African authorities to US exports. (Lindsay and Ikenson, 2002:36)

153. In a 1985 Draft Report on Assistance to the Chemicals and Plastics Industry, the IAC outlined the costs to user industries and the general economy from anti-dumping activity. It sounded a warning as to the potential for an anti-dumping system to undermine government policies as to reduction of protection. It recommended that national interest consideration should be included. (Banks, 1990)

154. As an outward looking producer, BlueScope is at risk of retaliatory anti-dumping behaviour. It has only brought two anti-dumping applications. Conversely, OneSteel only has to consider anti-dumping rules as a protective device for itself and not a matter of export significance given it low level of exports.

155. A useful comparison could thus be made between the behaviour of OneSteel and BlueScope. Both have monopoly positions within the Australian economy, OneSteel making long products while BlueScope makes flat products. Both would have significant import competition. Because of the nature of steel production and steel cost, and because of the general demand for steel products at any particular stage in the domestic economic cycle, it is a priori likely that dumping conditions and behaviour in one company's market would correlate with similar circumstances in the other market. Yet OneSteel constantly brings anti-dumping actions while BlueScope has not done so since 2004.

156. A corroborating area of concern is that independent importers who choose to import hot rolled coil from China are never subject to anti-dumping duties because of the reluctance to bring cases by BlueScope. On the other hand, they have been subject to constant anti-dumping action from OneSteel in relation to the pipe and tube that is the product made with hot rolled coil.

Inefficiencies through anti-competitive behaviour

157. One of the most significant issues of concern for the ASA is the need to minimise the anti-competitive effects of anti-dumping procedures. As indicated throughout this submission, this operates in a range of ways.

158. First the applicants can be selective in the way they identify like products and relevant timeframes.

159. Once an investigation is initiated, there is already a chilling effect. Studies noted above have shown that the mere announcement of a possible application operates in a similar manner. ASA experience has identified instances where there are refusals to supply by local producers who nevertheless then bring anti-dumping complaints against the imports that must then be made as a result of their refusal to supply. The refusals to supply flow from the vertically integrated distribution networks utilised by OneSteel in particular. Independent distributors are denied access to such goods at commercially realistic prices, are forced to import and then are the subject of targeted anti-dumping activities.

160. Other examples include applications by producers who also import like products and ensure that their supply country is not included in the investigation. That adds a further anti-competitive element to attacks on independent distributors.

161. Another competition law issue is misleading and deceptive conduct, for example, where a local producer says one thing to ACBPS and another thing to the ASX. This is dealt with in Appendix A to this submission. While some differences may be explained and others may be a question of degree or emphasis, the overriding observation is that some fundamental differences remain.

162. A further anti-competitive element is the way non-injurious prices are set if duties are applicable. To fail to give adequate attention to the market impact of non-dumped imports as price setters is wholly disadvantageous to the Australian economy when dumping duties are applied on inputs to further Australian manufacture, as is the case with steel.

163. Another anti-competitive concern relates to who actually bears the burden of any anti-dumping duty. The greater the market power of the exporter, the more it will contractually direct that potential liability is the responsibility of the buyer.

164. An examination of the literature would show an abundance of argument and data on the interface between competition and anti-dumping policy. Competition authorities in other jurisdictions tend to have a greater involvement in monitoring anti-dumping activity. The ACCC has made submissions to the Productivity Commission in the past.

165. Thought could be given to encouraging greater involvement as occurs to some degree in other jurisdictions. An EU case is illustrative. In ……..

166. Proper considerations of competition law issues can arise in a number of ways, either within the anti-dumping system or as a control mechanism on it or as an alternative pathway to deal with market disruption. Those issues are dealt with further below. At this stage it is important to simply identify that the problem is significant.

167. The problem can be demonstrated analytically and empirically. A number of studies have shown a correlation between higher market share and greater political activity seeking protection in the United States. (Schuler, 1996) The higher the concentration of the industry, the more likely there are to be anti-dumping filings (Liu and Vandenbussche, 2002).

168. Stiglitz notes “that the anti-dumping laws are becoming increasingly attractive to firms seeking protection against imports – and not necessarily unfair imports.” (Stiglitz 1997: 410) Various governmental Ministers including the Prime Minister have reiterated that protectionist tendencies are not in the national interest. In his 2007 Financial Times publication, Kevin Rudd recognises that anti-dumping laws are often abused in order to achieve protectionist ends. His article, “Leaders must act together to solve the crisis”, warns other countries against “beggar thy neighbour” policies. He adds that “we are already beginning to see worrying early forays into protectionism. The number of anti-dumping cases rose by 40 per cent in the first half of 2008 and there has been a gradual creeping up of tariffs.”

169. Where price undertakings are given, anti-dumping activity can also effectively operate as a government inspired cartel that might otherwise violate competition laws. (Sykes 2005:47 citing Prusa 1992) and (Staiger and Wolak 1989).

170. Bourgeois and Messerlin (1998) found that there was an inverse relationship between the tariff levels faced by an industry and the frequency of anti-dumping cases. Another study found that tariff reductions increased the likelihood of a country using anti-dumping protection and also the total number of anti-dumping petitions filed. (Feinberg and Olson, 2005). This is relevant for Australia as a low tariff country.

171. A number of commentators and studies have pointed to the use of anti-dumping as a strategic corporate practice with a view to deterring competitive imports. This is understandable given

the benefits that flow from such behaviour. One US study looked at empirical evidence and found that anti-dumping laws significantly increased the returns of US firms that pursue anti-dumping protection. (Marsh, 1998)

172. The then Chairman of the US International Trade Commission was quoted as saying he could identify abusive behaviour. (Financial Times (10 August, 1994) cited in Stiglitz 1997: 411)

173. Stiglitz notes that "(s)tatutes offering even the possibility of protection inevitably engender rent seeking activities that are both direct (e.g. lobbying) and indirect (e.g. manipulating output in order to make a positive injury finding more likely)." (Stiglitz 1997: 420)

174. While anti-dumping laws flow from fairness rhetoric, one study has shown that of the four major users of anti-dumping laws (this includes Australia) in the period 1980-98, real exchange rates and domestic real GDP growth both have statistically significant impacts on anti-dumping filings. (Knetter and Prusa, 2000) Strategic producers can simply wait for currency fluctuations favourable to a dumping finding and know that their consultants can make tenable applications.

175. Some studies suggest that anti-dumping laws are abused with cases filed as harassment, seeking to impose temporary restraints and increased legal costs. (Staiger and Wolak, 1994b).

176. Some studies adopt theoretical models seeking to show that anti-dumping protection facilitates the abuse of market dominance. (Theuringer and Weiß, 2001; Pauwels, Vandenbussche and Weverbergh 1997). Prusa and Skeath (2002) argue that the increased use of anti-dumping activity is because firms learn that it can be used strategically to block foreign competition. Alan Greenspan, then Chairman of the US Federal Reserve Board, when speaking of anti-dumping stated that "these forms of protection have often been imposed under the label of promoting 'fair trade', oftentimes they are just simple guises for inhibiting competition." (Greenspan, 1999). Harvard University Economics Professor Gregory Mankiw in a joint paper stated that anti-dumping policy "is now little more than an excuse for a few powerful industries to shield themselves from competition ...." (Mankiw and Swagel 2005) The authors also suggest that "rather than promote fairness and competition, the American producers petition for anti-dumping tariffs – a powerful and often unrecognised lobby – use them to thwart foreign competition."

177. Competition authorities in other countries have noted the use of anti-dumping measures to abuse dominant market positions. Examples have been soda ash producers in Europe (Bourgeois and Demaret, 1995) and the ferrosilicon cartel in the United States (Pierce, 2000). Messerlin (1990) noted that 27 cartel cases investigated by European antitrust authorities between 1980 and 1997 dealt with chemical products that had been involved in anti-dumping cases. Hindley and Messerlin (1996) reported findings of use of anti-dumping as a standard competitive business strategy. Kelly and Morkre (2002) also established the use of anti-dumping in support of collusion and the establishment of cartels.

178. Finger and Zlate (2005) conclude that "anti-dumping is more about protecting unfair business practices at home than it is about isolating unfair business practices abroad." (Finger and Zlate 2005)

179. Another key reason why strategic behaviour is inevitable in the absence of disincentives is the demonstrated impact upon imports of anti-dumping actions and even anti-dumping regimes themselves as noted above. Messerlin (1989) estimated that use of EC anti-dumping during the early 1980s led to a decrease in imports of approximately 40% three years after initiation of the cases.

180. Competitively priced imports are a key means by which collusive domestic behaviour aiming to keep prices unduly high can be undermined. If the threat of dumping actions prevents such competitive imports, domestic collusion is more likely.

181. In the Review of National Competition Policy Reforms, the Productivity Commission Inquiry Report No 33, 28 February 2005, made the following comments about anti-dumping. It noted

that "… as a barrier to imports, anti-dumping measures, including the resulting countervailing duties, may also serve to restrict competition and, through higher prices, penalize consumers and user industries" (p 260). It called again for an urgent review of the legislation.

182. The Commission concluded this section by indicating "the potential for the inappropriate application of anti-dumping arrangements to jeopardize the benefits that wider trade and competition reform have delivered, makes this one of the more important remaining trade policy issues to be addressed."

183. In the ACCC submission to the Productivity Commission discussions on National Competition Policy Reforms, 10 December 2004, the ACCC also noted some systemic problems in the interrelationship between mergers, anti-dumping and competition and called for reforms. In particular, the ACCC submitted that "reforms are warranted in relation to mergers and acquisitions and anti-dumping laws to protect competition and ensure that legitimate imports provide an effective discipline on domestic firms".

184. The submission noted that certain industries have cited the competitive effects of imports in their merger applications but have had a record of seeking to have imports constrained under the customs laws. It concluded in its submission:

185. "It is the ACCC's view that the relationship between the TPA and the customs laws should be reformed to ensure that the customs laws are not used to restrict competition to the benefit of firms at the expense of legitimate competitive outcomes. Scope for the misuse of the TPA and the customs laws would be minimized through:

- allowing an interested party such as the ACCC, to make submissions in anti-dumping matters where the parties involved have been through a merger process

- legislating that interested party submissions would be taken into account in anti-dumping decisions."

186. Both Allan Fels and Allan Asher write in two separate reports published by the ACCC in 2007 that "trade policy can be highly anti competitive. For example, nearly all forms of import protection whether they be quotas, tariffs, anti dumping laws and so on can reduce competition and damage consumer interests. It is important that the debate about the damaging effect on trade of failures in competition law enforcement be balanced by recognition of the damaging effects on competition and consumers of trade restrictions." (Fells 2000; 6 and Asher 2000; 7)

187. In 2002 when the ACCC considered the Nufarm/Monsanto relationship, the then Chair, Professor Alan Fels said "the ACCC's market inquiries reveal that Monsanto's failed anti-dumping application had already had a negative effect on import competition and that any review of the Minister's decision would be likely to cause further disruption to competition, especially given the length of the review process … The ACCC was concerned that any review would undermine the competitive constraint imposed by actual and potential import competition." The ACCC accepted court enforceable undertakings that they would not review a Minister's negative decision.

188. Industry Department officials have also commented on dumping and the steel industry in general. As noted above, the DITR Steel Report 2003 states "anti-dumping and countervailing actions cause significant distortions in the international markets of certain products. Historically, the market for steel has been particularly influenced by anti-dumping and countervailing actions, and there are ongoing effects on Australia's steel industry." (p 27)

189. Once again the literature provides incontrovertible proof that unmeritorious applications are often brought for strategic reasons based on the knowledge that they immediately provide market benefits to the applicants. While detailed studies have not concentrated on the Australian system, the adverse impacts are likely to be higher in Australia than in other key anti-dumping user countries. This is because we are a relatively small target market in those

fields where most anti-dumping action is taken. It is commonly the case that once an application is accepted, foreign exporters simply cease to supply to Australia, being unwilling to be dragged into such a time-consuming and expensive process when such a small part of their production is involved.

190. A clear example is Saha Thai and its continued inability to export to the Australian market as discussed in detail in Appendix B.

191. An analysis of anti-dumping activity in the steel sector is illustrative of the way anti-dumping laws can readily be used in anti-competitive ways. This will always be more problematic in those sectors where rationalisation of the domestic industry has given domestic producers undue market power.

192. The first aspect is the simple fact that merged local entities can individually meet the industry targets to bring anti-dumping actions. They can thus unilaterally determine whether they wish to strategically bring an action. That removes an important constraint on anti-dumping activity. Where there are a significant number of local producers, to bring an anti-dumping complaint those producers who normally compete with each other must make a rationale decision to work together in response to what they perceive to be foreign dumping activity. That is likely to limit cases to true instances of dumping and limit cases to only the most significant.

193. An inadvertently anti-competitive act occurred recently where Orrcon regularly sourced directly or indirectly from a particular mill in Malaysia but then brought action against those very products from Malaysia, thus attacking its own supply source. Its parent company, Hills Industries, acted in a similar way with a certain supplier in China.

194. A similar story of market power would most likely occur in the plastics industry where again there is a monopoly supplier and an important import sector.

Local manufacturers who also import

195. Where one domestic entity has sufficient market percentage to constitute the domestic industry, it is not only able to complain about true instances of injurious dumping but also use anti-dumping laws for strategic reasons.

196. An analysis of local industries such as steel and plastics shows how this can be used in a way which is demonstrably anti-competitive. A dominant local producer wishes to maximise market share but cannot supply all domestic demand. It will typically develop relationships with foreign suppliers to be able to exclusively import to service that part of the domestic demand that it cannot satisfy. It is then able to bring anti-dumping actions against countries other than the ones it imports from. Whether intentional or otherwise, the outcome of a successful anti-dumping application is that, not only is the domestic production protected, but so also is their import stream. In an extreme case, the domestic manufacturer would end up with a monopoly of domestic supply and a monopolistic import position. In industries such as steel and plastics where these are crucial input goods, the adverse impact on the Australian economy could be immense.

197. Taken together, the studies in the previous section show a strong incentive for ongoing strategic abuse of anti-dumping provisions which in turn will negate the ability of imports to provide a constraint on exercise of market power by the local manufacturers with market power.

198. It is not only the total amount of imports but also import composition that is affected. A number of studies have pointed to the strong trade diversion impact of the use of anti-dumping policies. Studies identifying such diversion include Brenton (2001), Vandenbussche, Konings and Springael (1999) and Bown and Crowley (2006) This will have inevitable welfare costs but is of particular concern in the Australian industry given that the customs authorities allow strategic filings by local producers who also import, presumably under some sort of exclusivity arrangements from certain countries, leaving those countries out of their anti-

dumping applications. Diversion in favour of the merged entities own imports would be particularly problematic.

199. European and Canadian Customs authorities deter such strategic applications by either rejecting protection for producers who also import, or demanding that they include their own export countries in the anti-dumping application so that imports remain on a level playing field. The latter was the approach inspired by the European Court of Justice in *Extramet Industrie SA v Council of the European Communities*, Case C-358/89 ECR 1992, p 1-03813.

200. Australian legislation does not allow for exclusion and Australian officials' practice does not appear inclined to exercise this commercially sensible entitlement of considering the relevance of imports, either as proof of lack of injury or as setting non-injurious prices.

201. The Willett Review recommended that the legislation allow for the potential exclusion of producers who are also importing the allegedly dumped product. (Willett, 2006:126) That Review in fact misunderstood all the implications of such behaviour. The Review suggested that in situations where producers were importing allegedly dumped product and on-selling at a substantial profit "those producers are unlikely to support the application for anti-dumping measures." It suggested that their profit could offset injury caused to those who do not also import. The reality in the steel sector is quite to the contrary. A domestic producer with market power who also imports from exclusive sources is continually found to bring anti-dumping actions against other countries. If successful that not only protects its domestic production but also its close to monopoly importer status. Customs officials do not seem to set off import profits against any claimed injury from domestic production.

202. *Recommendation 3: The Productivity Commission is asked to give particular consideration to the anti-competitive aspects of the current system, particularly in those domestic industries that display monopolistic or oligopolistic tendencies. A range of policy responses should be considered varying from those internal to the anti-dumping system to transference to ACCC jurisdiction.*

Inefficiencies through ambiguities or protectionist biases

203. A comparative examination of procedures shows that there are many complaints raised about the way anti-dumping provisions are administered in key user jurisdictions. Many academic commentators and practitioners regularly demonstrate how administrative procedures tend to be developed that are highly protectionist in nature. An anti-dumping regime will also have protectionist tendencies when certain improper assumptions or procedural steps are taken.

204. The Gruen Review recommended changes so as to "discourage too extensive use of the anti-dumping system as a more readily available system for restricting imports." (Gruen, 1986:iv)

205. That might flow from inadvertence, a failure to accurately consider the policy issues or through capture of the decision-makers by vested interests. Australia's procedure should be an exemplar of fair, balanced and neutral rights and obligations, aiming to protect all interested parties to the extent that they deserve protection. A fair and neutral balance requires consideration of the substance and practical operation of the procedures as well as their technical form. Procedural elements that on their face look to treat all interested parties equally, will often for commercial reasons favour one over the other.

206. This will often arise because of differential cost implications and abilities to comply with apparently equal regulations. An UNCTAD study notes that anti-dumping and countervailing investigations often require presentation of data not readily available in a developing country. It further notes that very little support is gained from government. (Neufeld, 2001, footnote 62). Where Asian exporters are concerned, there is a need to translate masses of documents for the benefit of Australian customs authorities. Chu and Prusa (2004) note that weakness in Chinese corporate governance tends to prevent effective defences in anti-dumping investigations.

207. This should all be of particular concern in Australia where Australian Customs and Border Protection Service (ACBPS – formerly the Australian Customs Service) resources mean that only a small number of foreign exporters can be investigated. Even companies that wish to have their own data examined may find that they are not selected and will have a hypothetical dumping margin applied that has no relationship to their true situation.

208. Even where an exporter is selected, a number of studies have shown that the application of anti-dumping measures is commonly based on technicalities rather than an accurate identification of unfair behaviour (Finger, 1993), putting a lie to the allegation of "unfair" trade and showing why there is a strong incentive to bring cases and why it would be hard to identify applications as frivolous at the outset.

209. Joseph Stiglitz has stated that "misuse of the best-information-available process often meant that useful information submitted by foreign exporters was disregarded. These provisions as well as numerous others, resulted in positive dumping margins when no real dumping had occurred." (Stiglitz, 1997) Stiglitz also asserts that "given the focus on costs and the biases in the process, a dumping finding was almost a foregone conclusion, especially in the capital-intensive, highly cyclical industries that account for the majority of dumping cases." Once again, because of the need to sample, a dumping finding against a small number of suppliers will lead to dumping being found to occur with many other producers.

210. Blonigen (2003) finds an upward trend in US dumping margins, primarily through the evolving discretionary practices of the US Department of Commerce, in particular use of adverse facts available, costs of production tests and cost data. He found an average increase in US anti-dumping duties from around 15% in the early 1980s to over 50% by 2000. At the same time the percentage of affirmative cases rose from 45% to 60%. Increased dumping findings and dumping margins as a result of discretionary practices has also been confirmed by Lindsay and Ikenson (2002). Lindsay (1999) found that customs authorities overstate the exporter's profit in normal value calculations, thus leading to an increased chance of higher anti-dumping duties.

211. Of the studies noting the very high levels of anti-dumping duties, often ten to twenty times higher than the MFN tariff levels, Neufeld notes one of the main reasons being the reference to constructed values. She notes that "defined as full cost plus profits and often based on outdated information, constructed value determination frequently results in anti-competitive findings of dumping as well as in overstated dumping margins." (Neufeld 2001). OECD (1996) asserts that customs authorities apply lower evidentiary standards than those that are applied by competition authorities.

212. Banks (1990) concludes that any "anti-dumping system retains a degree of administrative or ministerial discretion which will always make it vulnerable to the business cycle and the political cycle." In assessing the EU provisions, Davis (2009) concludes:

> "Emerging from the analysis is a clear trend. Once a complaint has been made and an investigation initiated, the overriding bias is towards imposition of definitive duties and thereafter to maintain these duties through extension in expiry reviews. Whether by fault or design, low standards of analysis in anti-dumping investigations leave the door open to politically-motivated decision making."

213. When the discretionary problem is added to the problem of costs of involvement for exporters, the inefficiencies are compounded. In determining normal values, Australian Customs authorities demand evidence of all domestic sales, not merely the products in issue, presumably so that they can analyse amortisation decisions. The larger the supplier, the more likely they are to say why bother with such an expensive exercise for a relatively small market. The perversity of this is that the larger the supplier, the more likely they are to be efficient. Hence values calculated by the smaller suppliers are more likely to lead to higher dumping margins that are then applied to all non-participating exporters. Smaller entities are also less able to comply. Thus margins are more likely to arise on facts available.

214. A number of methodological approaches will also skew the outcome. Dumping is more likely to be found if individual domestic transactions are compared with averages abroad.

215. Dumping is more likely if bureaucrats presume minimum levels of overhead and profit in constructed normal values.

216. Dumping is more likely to be found when bureaucrats do not follow the best information available standards under the WTO agreement but instead reject foreign export information. (Stiglitz 1997: 409)

217. "Because positive dumping margins are almost always found and because any significant fall in sales is sufficient for a positive injury finding (even if most of the fall in sales is caused by other factors), the anti-dumping laws are now effectively acting like market surge statutes, especially for moribund industries." (Stiglitz 1997: 410-1)

218. The ASA does not assert that all of the most egregious actions in foreign jurisdictions are replicated by ACBPS. In our experience, officers aim to be neutral and accurate in their assessments. Nevertheless, protectionist outcomes can arise as much from inadvertent decision making as from conscious aims to protect local industry and regularly do.

219. In the Second Reading Speech of the Customs Legislation (Anti-Dumping Amendments) Bill 1998 the relevant Minister noted that "the government recognises that anti-dumping and countervailing investigations and review can be disruptive for all interested parties. The investigations may give rise to trade chilling effects, which are to the detriment of exporters, importers and consumers alike. Australian industry views such investigations as creating uncertainty within the marketplace which may delay investment decisions thereby retarding their economic development and overall efficiency."

220. From a political science perspective anti-dumping also helps a government to administer protection in a way that appears impartial, automatic and rule-based. Yet as noted, many of the procedures are biased towards a positive finding. (Boltuck and Litan 1991.

221. A particular concern with anti-dumping rhetoric is that it would often lead to misapplication of the laws. For example the European Union Green Paper alleged that the problem is government assistance in the foreign market that distorts competition. Yet if that is the problem, it is not a dumping issue but rather, is a foreign government subsidy issue.

222. Another problem with undue use of anti-dumping laws noted above is that it will interfere with foreign investment by Australian entities. Modern manufacturing commonly involves a range of production and assembly and distribution facilities in different regions. It would be unfortunate if the anti-dumping laws allowed the least sophisticated local producers to attack imports of finished products from those entities that have developed sophisticated worldwide production and distribution networks.

223. Where the steel sector is concerned, once again a comparison of the business models of OneSteel and BlueScope ought to be illustrative. OneSteel concentrates primarily on the Australian market. BlueScope has developed itself as a worldwide company. Its key export is hot rolled coil. Hot rolled coil is commonly used in the production of pipe and tube. The most significant area of anti-dumping actions in recent years has been against pipe and tube imports. Hence anti-dumping actions indirectly hurt BlueScope's exports. Furthermore BlueScope has established production facilities in a range of foreign countries. Anti-dumping laws that allow a tax on its exports would undermine those strategic investments.

Previous government enquiries

224. The Productivity Commission mandate includes consideration of previous enquiries into the policy and substance of Australia's anti-dumping regime. It is certainly important to build on the valuable work done on previous occasions but it is equally important to re-evaluate issues afresh without being biased by previous findings that might be flawed to some degree in methodology or logic or not applicable to current circumstances.

225. Some governmental reports have been particularly problematic. An example is the Commission of the European Communities Green Paper. This paper was published in 2006 with a view to fully evaluating Europe's trade defence measures including anti-dumping provisions. By 2008, political reaction meant that reform initiatives were shelved. The paper itself however, is a poor example of an intellectually rigorous exercise.

226. For example, the introduction suggests that "defending against unfair trade is a politically and economically crucial part of defending free trade." (Green Paper 2006:2) No attempt is made to justify this assertion or to define what makes trade unfair.

227. The Green Paper then provides erroneous logic suggesting that the economic rationale for anti-dumping and anti-subsidy measures follows from the fact that the international economy has no mechanism for correcting anti-competitive practices as is the case domestically. That is an erroneous assertion as anti-dumping and anti-subsidy instruments simply do not deal solely or necessarily with matters that would be seen as anti-competitive domestically. Price discrimination between market segments is perfectly acceptable domestically unless it is predatory in nature. As noted above, dumping legislation is not directed at predatory behaviour and nor is such behaviour likely to be found within international trade.

228. The Green Paper goes on to assert that "(t)rade defence instruments have developed in international law as a means of correcting the trade distorting effects of uncompetitive practice at the international level." Again no attempt is made to explain why such practices are uncompetitive and why they are trade distorting. As noted at the outset, experts in micro economics accept that price discrimination is highly rational and will often support competition. Those bold assertions are exacerbated by the fact that the Green Paper indicates that it "does not question the fundamental value of trade defence instruments ...." (Green Paper 2006:3) While the Green Paper notes that "(t)he economic justification for trade defence instruments remains controversial amongst economists ...." it seems to imply that such a justification exists. It is commendable that this Productivity Commission inquiry has been set up to consider these foundational questions.

229. The Green Paper wrongly conflates the notion of imperfectly competitive international markets with anti-competitive behaviour. International markets may be imperfectly competitive because of transaction costs, protectionist measures and barriers to parallel importing. This does not constitute anti-competitive behaviour of a nature giving rise to competition responses. Domestic competition laws also do not prohibit sales below cost except where there constitutes an abuse of a dominant market position.

230. The Green Paper also demonstrates how anti-dumping laws can be too easily misapplied to policy issues other than price discrimination. The Green Paper suggests that dumping usually occurs "as a result of the lack of competition and/or state interference in the production process that allows an exporter to artificially lower the cost of an export." Yet state interference would more commonly bring into question subsidy and anti-subsidy laws. The Green Paper gives examples of export tax breaks, artificially lower raw material and/or energy prices as examples of such interference, all potentially countervailable subsidy scenarios.

231. A US report similarly argues that trade remedy laws are needed "to respond to and discourage trade-distorting government policies and the market imperfections that result."('Basic Concepts and Principles of the Trade Remedy Rules', Communication from the United States to the WTO Negotiating Group on Rules, TN/RL/W/27, October 22, 2002) This is an incorrect assessment of the core aim or application of anti-dumping rules.

232. Care should also be taken with the conclusion of the 1996 Willett Review. That Review was framed within the then government's policy to fast track Australia's anti-dumping and countervailing procedures. The Review expressly noted that the terms of reference did not extend to anti-dumping and countervailing policy considerations. (Willett, 1996:10)

233. This submission argues strongly against a fast tracked approach, arguing that it unduly favour speed over due process and accuracy. In addition the Willett Review recommendations are

more honoured in the breach as a result of extensions of the time taken for final determinations. Most importantly, however, it was a review built on the presumption of the validity of the system.

234. Where the 2006 Joint Study is concerned it also had a limited mandate and a more constrained process than normally applies with Productivity Commission inquiries. It indicates that it was initiated "to respond to concerns of Australian manufacturers …". Obviously the Productivity Commission is empowered to consider a broader and more balanced perspective. The Joint Study was in no way empowered to consider policy issues. It noted in its final report that it did not seek to resolve issues where different stakeholders took rightly different positions. Instead the "analysis and findings of the study focused on those issues for which a broad consensus for change emerged …".

Incidence of anti-dumping measures

235. The Commission has called for information as to the incidence of anti-dumping activity. This will not only show its importance but will also generate data that would help show whether anti-dumping activity correlates to dumping or demand for protection. There are however a number of methodological problems. First, it is important to consider not only the decline in recent overall numbers but the targeting of specific sectors, in particular steel. Throughout this submission we urge the Productivity Commission to look at the steel sector as an important basis for qualitative analysis.

236. Equally importantly is the need to consider the recent significant increase in anti-dumping activity worldwide at the same time as the global financial crisis has taken hold. Recent WTO figures allude to that and are indeed a likely basis of the Prime Minister's recent caution against protectionism.

237. There is also a problem in a country such as Australia in dealing with broad figures. Historically Australian figures were completely out of proportion to the size of our economy. It makes sense for that to go down over time. There is no economic reason why Australia should have at some points in history been the highest numerical user of anti-dumping laws when we had such a small percentage of the world economy.

238. The important reasons to look at usage levels is to try and determine whether anti-dumping activity in fact correlates to increases in dumping or whether it is simply a by-product of difficult economic circumstances or strategic behaviour. Its policy justification diminishes greatly if there is not a true correlation between anti-dumping activity and dumping.

239. Even then there are methodological problems in deciding just what we mean by dumping. The Productivity Commission has asked whether buoyant economic conditions reduce the incidence of dumping. Does this mean predatory dumping, continuous dumping or intermittent dumping? Does it mean true cases of price discrimination or technical dumping by reason of currency value changes? Does it mean dumping that arises simply because of the methodologies of determining normal values, particularly where non-market economies' figures are rejected?

240. As the studies below show, properly constructed economic analysis has argued strongly that anti-dumping applications are affected by general economic circumstances and not by dumping per se. Furthermore, companies that export are less likely to use anti-dumping rules as an import protection device. Thirdly, there is a correlation between the level of anti-dumping activity and the protectionist bias in the rules and processes. There is no logical reason to suggest that the same issues would not arise in Australia. Submissions from vested interests are likely to simply assert problems to the Productivity Commission. These should be rigorously tested by the same economic measures and logic that permeates the abundant literature alluded to in this submission.

241. A second aspect of that question is procedural. The Productivity Commission has asked whether higher hurdles have been set for complainants and/or better guidance being provided as to claims that would be unlikely to succeed. These are important questions but again

methodologically it would be difficult to form clear conclusions without analysis of individual cases. Once again, domestic industry with a vested interest to increase protection will no doubt argue as they have in the past that the hurdles are too high. At times they have employed a grossly improper methodological rhetoric in suggesting that it is harder to get a case accepted in Australia than in other jurisdictions such as the United States. That may be so but that does not indicate whether our system is at fault or is indeed the exemplar in those circumstances. Once again this submission urges a critical evaluation of the recent activity in the steel sector. Three separate unsuccessful cases have been brought against HSS steel products. In the second of these, Customs continually rejected the applications for their inadequacy in terms of the failure of the applicants to provide sufficient of their own information. It was only after the then TMRO overturned that decision that the expensive and ultimately futile investigation proceeded.

242. The Productivity Commission also asked whether there is evidence that importers price less aggressively to reduce the risk that they may be subject to anti-dumping action. It is not clear whether the focus should properly be on importer or exporters. In some cases exporters might consider volumes in the light of *de minimus* targets. In most sectors, few exporters will know whether they are perceived as dumping at the time they offer their product. Prices will be set by normal supply and demand factors. The suggestion that there may even be a conscious aggressive intent may not be appropriate in many circumstances. Again where the steel sector is concerned, the Productivity Commission needs to consider the difference between the independent distribution network and the distribution network that is tied to domestic monopoly producers. It also needs to consider the order in which prices are set. More often than not the domestic producers set prices with a view to import parity.

243. Thus while it makes perfect sense to wish to consider incidence factors, it is highly unlikely that any meaningful conclusions could be drawn from the submissions alone, absent a robust and independent study by the Productivity Commission itself.

244. The Productivity Commission has also asked why anti-dumping activity is heavily concentrated in a few key industries. That is also a highly pertinent question. Importantly, if the theoretical arguments in favour of predatory, continuous and intermittent dumping are not consistent with it arising in certain industries alone, the fact that it is concentrated raises a strong hypothesis that the anti-dumping activity is caused by factors other than dumping. Again overseas studies show that anti-dumping is more used in declining industries. It is used by industries without a strong export oriented focus.

245. The Productivity Commission also asks whether the cause might be cost structures that lend themselves to price discrimination across markets. Yet as noted throughout, in many case where dumping is found, it is not because of any true price discrimination but merely because of discretionary decisions about calculations of normal value.

246. The Productivity Commission questions whether it might be because outputs of those industries are relatively homogeneous. That is built on a contentious question as to the like goods analysis. As addressed below, the ASA believes that the like goods test is applied too broadly and not in a way consistent with good economic practice. It makes sense to limit a like good test to goods that truly compete. After all material injury could not ever be caused from goods that do not in any way directly or indirectly compete.

247. The Productivity Commission has asked whether the growing concentration on exports from Asia reflects the broad shift in our trading patterns. That would almost certainly be so unless someone could demonstrate evidence of conscious and systematic dumping from those countries. Where China is concerned, a particular problem is the failure to properly delineate between concerns with subsidisation and concerns with dumping.

248. Time has not permitted the development of sophisticated data as to anti-dumping incidence both in Australia and overseas. The ASA believes that as much can be learned from a careful qualitative analysis of individual cases within the steel sector as can be discerned from broad data. This submission contains an overview in Appendix B and regularly refers to ASA

experiences throughout this document. The PC is invited to engage in an ongoing analysis of the anti-dumping saga in relation to HSS steel and other steel products over the last decade.

249. Nevertheless, general incidence data is also highly valuable in identifying and testing various hypotheses. A study by Blonigen and Prusa (2003) demonstrates that anti-dumping complaints are dependent on the levels of import penetration, employment in the domestic industry and capital stock or intensity of the relevant sector. This goes against the view that dumping itself motivates anti-dumping behaviour, but it again depends on what is meant by "dumping". The correlations they found not only indicate conditions which motivate strategic behaviour but they are also areas where under particular procedures, injury and causation are more easily provable under biased regimes. (Mavroidis, Messerlin and Wauters 2008:19)

250. Zanardi (2004) shows that the more an industry exports, the less it is likely to bring anti-dumping actions against competitor imports in its home country. Yet a firm's export behaviour cannot have any correlation to whether dumping actually occurs or not. Thus other commercial considerations are at play.

251. Studies seeking to look at the causes of anti-dumping activity have also looked at currency issues. That is complicated because exchange variations operate in conflicting ways. If firms are slow to adjust for currency fluctuations, dumping margins are likely to increase. On the other hand, under a robust injury analysis, that would be less likely. (Mavroidis, Messerlin and Wauters 2008:19)

252. The important point from all of the studies is that the better view is that anti-dumping activity does not strongly signify the presence of dumping. Furthermore, there are so many different concepts of dumping, whether predatory, continuous or intermittent or deemed dumping via regulations and administrative practices that there should be a very strong evidentiary and methodological onus on anyone seeking to assert that anti-dumping activity actually shows a problem of dumping.

253. Banks (1990) also noted how figures may be impacted upon by changes in legislation or interpretative practice. For example, excluding sales that are at a loss increases the amount of dumping that is technically found. On the other hand, Banks (1990) suggests that the rise and fall of anti-dumping cases broadly correlated with movements in the international competitiveness of Australian industry.

254. Banks concluded that a study of anti-dumping activity in the 1980s "suggests that that cycle has had more to do with domestic economic conditions than the degree of permissiveness in anti-dumping rules and their interpretation than with dumping as such." (Banks, 1990)

255. The WTO recently announced that anti-dumping initiations had risen significantly since the global financial crisis after reductions in previous years. An analysis of the incidence data as to total applications and the targets of applications suggest three hypotheses:

i) Anti-dumping applications go up as general economic conditions deteriorate. This hypothesis is supported by a number of economic studies.

ii) As countries increase their international exports, anti-dumping actions arise at a commensurate level. This is supported by the high number of cases brought against China worldwide.

iii) The increase shift to use of anti-dumping actions in developing countries suggest retaliatory and mimicking behaviour. This all adds to the inefficiencies caused by anti-dumping regimes and the prisoners dilemma that they produce.

256. These issues are particularly relevant to the US and Australia where anti-dumping is concerned. These two countries have consistently been among the biggest users of anti-dumping regimes. In the 1980s the four big users accounted for 97.5 per cent of all actions brought. The US was responsible for 30 per cent. Australia was responsible for 27 per cent.

Canada was responsible for 22 per cent, with the balance of 19 per cent brought by the EU. (Trebilcock and Howse 1999:166)

257. The Gruen Review noted that Australia makes greater use of anti-dumping action than other comparable countries. (Gruen, 1986:iii)

258. This submission only seeks to draw attention to some of the publicly available studies. Between 1980-1 and 1988-9 Australia took 218 anti-dumping actions, a greater total number than Canada and a figure reasonably equivalent to the EC. (Banks, 1990) Australia's anti-dumping activity peaked in 1984 when actions were in the order of one-third of total GATT actions. (Banks, 1990) The figures dropped significantly in the late 1980s, partly as a result of the revocation of old measures and a decline in new cases.

259. By 1997 there were 94 per cent more cases world-wide initiated than in 1987. (Horlick 2000:180) Forty-nine per cent of the cases in 1997 were in countries other than the five biggest users. The negotiating ambience had also changed with the US now as much on the receiving end. By 1998, the US had become the second largest target of anti-dumping cases after China. (Miranda, Torres and Ruiz 1998:10)

260. In the EU, in 1998, 28 out of 29 new investigations were against DCs or countries in transition. 60 out of 67 in 1999 were of a similar nature. (Didier 2001:47) On the basis of such figures Didier even suggests that "anti-dumping has thus become properly speaking a developing countries issue."

261. The Green Paper notes that between January 1996 and December 2005, the EU imposed 194 definitive anti-dumping measures. The most frequent targets were China, with 38 measures and India with 16 measures.

262. In that same period the US imposed 201 definitive measures out of 352 investigations and India imposed 309 definitive measures out of 419 investigations. The EU imposed the 194 measures out of 294 investigations.

263. The WTO reports that 2,938 anti-dumping actions were initiated between 1 January 1995 and 30 June 2006. Most importantly, it reports that anti-dumping actions have increased significantly since the global financial crisis commenced.

264. Banks (1990) suggests that Australian anti-dumping activity increased rapidly in the early 1980s reflecting various factors including "the global and national recessions, combined with a rising Australian dollar, and the increased difficulty of obtaining industry assistance through conventional means …" All of these factors are again present and correlate to recent increased Australian anti-dumping activity.

CONCLUSION AS TO THE POLICY VALIDITY OF ANTI-DUMPING REGIMES

265. The preponderant view is that the economic justification for anti-dumping duties is non-existent or at best, minimal. Secondly, a wealth of studies have sought to show from a public choice perspective how anti-dumping regimes are of particular value to key declining industries in supporting an administered protection regime under the guise of an objective and impartial adjudicatory framework. Mavroidis, Messerlin and Wauters conclude their detailed and comprehensive study as follows:

> "The WTO AD Agreement is an incomplete contract, in the sense that a lot of information necessary for the functioning of the contract is itself missing. … The AD Agreement contains substantial ambiguity. Its expressions are often very unclear and the relationship among the various provisions equally hazy … What is the outcome of all this? A contract which makes little (if any) economic sense has been interpreted in a manner that allows investigating authorities to abuse it even more. So the heart of the problem lies in the law itself and not in its interpretation … It is remarkable

> that anti-dumping policy does not even target dumping practices. It relies on procedures so strongly biased against foreign exporters that it catches many pricing policies having little to do with dumping (but rather reflecting healthy competitive behaviour) and it does not necessarily catch all possible dumping practices."

266. Mankiw and Swagel suggest that "(o)utright repeal of US anti-dumping laws would certainly be the best policy for the United States wellbeing ...." (Mankiw and Swagel 2005:)Michael Finger has also consistently and strongly advocated the repeal of all anti-dumping laws. If this occurred "(t)hen all the evils of such policy – its power politics, its bad economics, and its corrupted law – would be eliminated." (Finger 1992:57) Finger speaks of anti-dumping laws as protectionism with good public relations. (Finger 1992:13)

267. While there is not the same literature analysing the Australian experience, impressionistic views of government and public officials suggest that the same problems arise in Australia.

268. The Productivity Commission asks how critical to the effective functioning of the multilateral trading system is access to anti-dumping protection. The proper answer is not at all. The entitlement to take anti-dumping action is part of the WTO system and will remain so. But it is always important to remember that those rules are permissive. No-one is mandated to take anti-dumping action. No-one is asked to ban their exporters from dumping. The only sense in which it could be said that anti-dumping is critical to the system is that without those permissive rules some countries would be less interested in the WTO. That has never been the case with Australia. More and more our concerns are to have an open and liberal trading system built on justifiable policy grounds. It is vital to Australia in pursuing the opening of international agricultural markets to remain policy pure in our own domestic behaviour.

269. The Productivity Commission has asked what are the longer term implications of Australia's anti-dumping system for investment, innovation and productivity across the economy. For reasons outlined above, it is an inefficient system that occasions significant transaction costs and uncertainty into sectors where input goods are vital to Australia's manufacturing interests. Allowing domestic industry to concentrate on concerns with the rubbery notion of dumping rather than mechanisms to be competitive under modern global conditions can only be to the detriment of Australia's investment, innovation and productivity. Retaliatory concerns overseas also affect our foreign investment activity. Hopefully the Productivity Commission will be able to quantify some of these inefficiencies through their analysis.

270. Consequently the PC should advise government that the anti-dumping regime is not in the national interest, even for those interests who utilise it to a significant degree; it is not in their long term strategic and sustainable interest; there is no basis in fairness for the maintenance of a system against actions that are perfectly legitimate in Australia and recommended by Austrade for our export industries; and finally, that if the system is to be maintained this would only be for political reasons. Whether there are sensible reasons for doing so in a modern liberal trading environment is questionable but at best an issue for government. There is certainly no longer the same need for some political trade-off to support liberalisation by Australian manufacturing industries. If a trade-off is still needed, it ought to be a trade-off that is efficient and supports a sustainable future based on proper inquiry by the PC.

271. *Recommendation 4: Australia's existing anti-dumping regimes should be repealed and replaced with similar anti-competitive measures as apply in ANZCERTA.*

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SECTION B

KEY REFORM ISSUES IN ANTI-DUMPING REGIMES

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REFORMING ANTI-DUMPING LAWS

272. The previous section argued that there is no policy justification for maintenance of an anti-dumping regime. If such a regime is to be maintained, it would be so for political reasons.

273. While that would be regrettable without clear justification, there is still a very broad range of possible regimes that would vary in their degree of unfairness and inefficiency. This section seeks to deal with all aspects of the regime in broadly chronological order from application stage through extension and review.

274. Two general observations should be made at the outset. First, the WTO regime which circumscribes Australia's legislative mandate originated from a policy aim to constrain the use of anti-dumping measures that would otherwise interfere with the anticipated benefits from tariff concessions. (Jackson, 1969, cited in Sykes, 2005:24-5). Furthermore, WTO Members are not obliged to prevent their own exporters from dumping (Sykes, 2005:25). The legislative mandate is only in relation to permitted responses from importing countries. Hence there is nothing to prevent Australia opting for an optimal model.

EVIDENCE AND PROCEDURAL ISSUES

275. An optimal system needs to consider both substantive and procedural issues. Because anti-dumping applications are contests between local producer interests and local users, and foreign producer and importer interests, questions of procedure and evidence are crucial to the outcomes.

Evidence generally

276. Questions of proof, burden and standard of evidence permeate the system and go a long way to determining its fairness and efficiency.

277. Evidentiary standards should be fair and reasonable as should the obligations on interested parties, including questions of timing and provision of sufficient information.

278. While individual comments are left to the specific sections dealing with each of these matters, at this stage a number of broad observations can be made. The biggest failures are with the lack of a demand through the application forms for relevant information and the complete failure of investigating officers to use their statutory powers to get evidence that is so obviously central to the deliberations. The latter should be contrasted with the approaches of other regulatory agencies such as the ACCC which regularly uses its section 155 TPA notice powers.

279. The second biggest concern relates to confidentiality and the lack of effective non-confidential summaries as is required under both ADA and domestic legislation. The third key concern is situations where unfair or inappropriate burdens and standard of proof are applied. For example, while the ADA indicates that decision makers must ensure that other injury factors are not attributed to the dumping, because the onus is on a complainant to show fault in methodology, the review procedure effectively shifts the burden of proof. Similar problems arise on extension applications.

280. The onus should be on those seeking to have a duty imposed to provide sufficient evidence and reasoning. Those being accused of injurious dumping need to be "presumed innocent" and expect to have the accusation rigorously tested, with appropriate and timely input from them. As noted above, this is particularly so as it is widely recognised world-wide that the mere lodging of an application has chilling effects in the market even before determinations are made.

281. At the outset, the question is what evidence is called for in the initial application. The next question is what information is called for from interested parties. After that there is the issue of the way verification visits are conducted. Related to this is the question of the amount of information required and the form in which it is expected in order to be considered as probative.

282. Another issue is the extent to which the administering authorities will investigate broadly, either by asking further questions of interested parties or using their statutory powers to seek information from other entities with relevant information.

283. Another issue is how particular forms of data are used. For example, ABS statistics are often too broad in their coverage or subject to confidentiality to allow for meaningful conclusions. The administering authority needs to be able to break out the data in relation to *like product* and also to determine imports by producers and related parties. Once again, standard of proof and the nature of the evidence sought are inextricably linked when trying to promote optimal policy outcomes.

284. The next issue is the way evidence is viewed, whether it is rejected in toto, whether adverse inferences are drawn from gaps in the information and how authorities deal with their entitlement to operate by way of the best evidence available.

285. At the next stage there is the question of the extent to which interested parties are able to consider the evidence of others and provide evidence in response.

286. Finally, there are the evidentiary issues that relate to the ability to challenge both administratively and judicially. These include questions such as whether the review is based on the historical evidentiary record or whether new material may be provided, and what is the appropriate burden and standard of proof on review.

287. As is to be expected, these evidentiary issues cannot be viewed in isolation from the substantive norms dealing with each stage. Hence as indicated, more specific comments are left to the sections below dealing with each discrete stage.

288. Another issue that might well be considered is that of appropriate resource levels. This is certainly an issue of procedure. Administering authorities have a particularly difficult task where, as in most cases, the WTO Anti-Dumping Agreement (ADA) provides little guidance as to how complex questions of accounting and economics are to be dealt with. This is exacerbated by the level of resources allocated to the Australian bureaucracy when compared to the US and the EU, which in some years have had similar levels of anti-dumping applications.

289. The Productivity Commission Issues Paper also queries whether use should be made of overseas information. The PC should strongly recommend against undue use of the results of foreign inquiries. An anti-dumping investigation involves the bureaucracy acting as an umpire, carefully researching and analysing competing arguments and forming a balanced conclusion. The system requires certain principles of natural justice including the right of each party to be heard, to have access to relevant evidence, to present arguments, to understand the findings of fact of the bureaucracy, to understand its reasoning and have an ability to respond. It is all about the exercising of independent judgment. To take note of a decision made by a foreign bureaucrat would be to either fetter or bias that judgment.

290. By all means, relevant and valuable information provided to other inquiries can be provided to Australian Customs officials, but that is simply something that the interested parties can do in any event. Furthermore, any logic, reasoning and legal analysis tendered to other bureaucracies can be used again in an Australian inquiry. But in those cases their value should depend on their intellectual rigour, and not how many other bureaucracies have adopted them.

291. Attention to the behaviour in other jurisdictions can be relevant to the extent that one valuable aim of the WTO system is to provide consistency. In addition Australia's regime aims to give effect to its international obligations. If a WTO anti-dumping committee takes a particular view on an ambiguous matter and that view has been adopted in a range of other jurisdictions, no doubt that may validly influence the decision of those making a decision in Australia. In all other senses, however, undue concern with findings in other jurisdictions goes against fundamental principles of justice.

292. One could question whether the suggestion to take note of other decisions is motivated by protectionist and unfounded assertions that it is somehow harder to succeed in getting anti-dumping duties in Australia than in other jurisdictions. First, one would need to consider the relevant data to evaluate this hypothesis. Secondly, one would need to consider the reasons. There are a range of reasons why more might be rejected in Australia. The applications themselves might be worse here. That is certainly the experience of the ASA; most recently with conflicting statements in the application to statements to the Australian Stock Exchange. Secondly, Australia's regulations may be less protectionist in nature. For example, the Productivity Commission Issues Paper raises the question of zeroing. Under the American system, the illegal use of a zeroing

methodology is devoid of commercial reality and inflates normal values to promote dumping margins where these otherwise would not occur. Where China is concerned, the US and others have not offered market status to that country, hence making it far more likely that dumping will be found where that country is concerned. Because of its involvement in international trade, it is to be expected that there will be more adverse findings in countries that have rules that disadvantage Chinese exports. In the main, studies show that protectionist rules lead to more positive findings.

293. A further reason why more might be rejected is that Australia's bureaucrats are more balanced and fair in their approaches. ASA experience has certainly been that there is no perceivable protectionist bias by case officers.

294. Anyone seeking to assert that justified applications are wrongly terminated should present clear evidence and reasoning before the PC. Absent that, those assertions should be ignored.

295. A particular concern is the way the administration operates where all relevant information is not provided. ADA allows for decisions to be made on "facts available". Much depends on how this methodology is employed. The policy aim should be to allow the administrators to proceed even if a full picture is not obtainable, but still require them to undertake appropriate investigations and make inferences based on logical assumptions. Most Customs administrations throughout the world do not follow these principles to anywhere near an adequate degree. It is important to consider the policy behind the specific elements contained in Article 6.8 ADA. The three situations where best information available may be utilised is where the interested party refuses access, fails to provide information within a reasonable period of time or significantly impedes the investigation. The first and third are clearly examples of improper behaviour. A failure to provide something within a reasonable period of time is also impliedly of the same nature. Where foreign exporters with poor resources and experiences try their best and fail to meet high evidentiary standards, it is strongly arguable that it does not meet the policy behind Article 6.8. It certainly does not allow for their information to be rejected in toto. There are also important notice requirements before a best information available approach can be proceeded with. The notice period must be to give them a further opportunity to provide information. (Appellate Body Report, *Mexico-Anti-Dumping Measures*, para 259)

Resources

296. The inquiry should consider whether the resource levels within the ACBPS are sufficient.

297. It should also consider the range of skills required and whether current resources give sufficient support to investigators and decision-makers in the complex field of economics and accounting. Thus PC might, for example, consider whether more regularised links should be developed between ACBPS and other government agencies such as ACCC and PC.

298. The ASA strongly supports the view that agencies such as this should be invited to contribute to the inquiry process as they would surely have highly valuable insights.

STANDING

Industry

299. Article 4.1 of ADA defines a domestic industry to be those domestic producers of the like products whose collective output constitutes a major proportion of the total domestic production of those products.

300. In some sectors there may be a concern with the calculation of "a major proportion". One issue is how the administering authority determines accurately what total production in the particular industry comprises. That will not be a problem in certain sectors such as steel where the key producers tend to join together and where monopoly or oligopoly situations are prevalent.

301. In addition there is an additional legislative requirement that the complaint be supported by 50 per cent of the industry that expressed an opinion one way or another. The policy implication of this is that if the majority of those canvassed do not believe an investigation is warranted, it should not even proceed past the screening stage. The logical extension ought to be

that the balance of the process should carefully take into account the situation and views of those who do not support a complaint.

302. ADA deals with adverse inferences that may be drawn when parties do not present self-serving evidence. Applying that principle to the question of standing would suggest that companies that express no opinion whatever cannot be concerned to have a dumping investigation commenced. We are aware that this is a criticism of ADA itself and not Australian domestic procedures. The important procedural point is to not lose sight of the fact that in some cases, a significant number of local producers do not support the application and their data may be very relevant to questions of injury and causation.

Related parties and applicants who import

303. Article 4.1(i) also indicates that where producers are related to exporters or importers or are themselves importers of the allegedly dumped product, they "may" be excluded from the domestic industry consideration. Relationship is determined based on principles of control as enunciated in footnote 11 to Article 4.1(i) of ADA. (Didier suggests that the EC uses far lower tests to determine control in cases of minimal shareholding. Didier 2001:48)

304. There is a need to ensure that a proper control test applies to all instances where relationship is relevant. Australia's legislation appears to have appropriate standards but it is not always clear whether actual decisions on relationship issues for those standing and normal value questions follow a strict control test.

Standing for monopolists and oligopolists

305. As noted above, in recent years, Australian competition authorities have been more willing to allow domestic mergers to enable Australian entities to compete on the world stage. From a world trade perspective, that may be highly desirable but the corollary is that the merged entities have undue power under anti-dumping regimes.

306. If the domestic system is to be maintained, it should give particular attention to this issue. Most importantly, Australia's regulatory framework should not allow a policy hiatus between competition and anti-dumping objectives.

307. Another issue is where foreign interests acquire local entities. In a world with increased foreign investment, mergers and acquisitions, it will be important to ensure that foreign producers cannot acquire domestic industries and then use anti-dumping to attack competitor export countries.

308. Section A highlighted the degree to which anti-dumping laws in Australia are already used for strategic anti-competitive purposes. A corollary of allowing a greater number of mergers in strategic industries, is to ensure that anti-dumping cannot be used as an abusive device to engender greater market power.

309. Appropriate solutions would include early involvement of ACCC, a national interest test control and proper remedies for abusive applications. These are all discussed below.

Standing for manufacturers that import

310. As indicated above, Australia's procedures do not draw attention to imports by the domestic industry and hence prevent the administering authority from considering what will often be crucial information.

311. Article 4.1 ADA is merely permissive in allowing producers who import to be excluded from the analysis. Legislation in the EU and Canada follows this approach.

312. It is strongly recommended that appropriate legislative responses be recommended to deal with manufacturers that import and bring anti-dumping applications.

313. Obviously they will not intentionally bring applications against their own sources of supply (although behaviour to that effect by Orrcon was noted above). Whether intentionally or otherwise, allowing a local manufacturer to bring strategic anti-

dumping applications against other sources of foreign supplies on its own sources gives them an ability to use anti-dumping laws as a weapon to promote import market share as well as domestic production share.

314. *Recommendation 5: There are a range of policy response that ought to be considered where claims are made my manufacturers who also import:*

(a) Excluding the manufacturers from the benefit of the regime.
(b) Forcing applications to deal with their own import sources if they wish to persist.
(c) Utilising their own imports as a key factor in identifying injury and causation.
(d) Using their own import values as an automatic non-injurious price to allow others to meet their import pricing strategy regardless of source.
(e) Ensuring that the ACCC is brought in from the outset to advise on the potential anti-competitive aspects of strategic anti-dumping applications of this nature. That could either be by a direction within Customs legislation or via an extension of general ACCC powers.

CONTENTS OF APPLICATION - EVIDENTIARY STANDARDS IN APPLICATION AND STANDARD OF PROOF FOR ACCEPTANCE

315. An important aspect of the current system is that applications must go through a preliminary screening to determine whether a full investigation is warranted. On the one hand, evidentiary standards should not be so high as to preclude potentially meritorious applications, (to the extent that there is any merit in anti-dumping systems). On the other hand, a mandated preliminary review stage should have sufficient standards to be meaningful and ensure that only meritorious cases are brought.

Content

316. The current forms ought to provide clearer guidance as to the evidentiary requirements and ensure that all relevant information is sought.

317. The application forms should try and draw out all of the important information that could reasonably be asked of the applicants. This is not the case at present. Currently the information called for on the Australian forms is too vague and there are some significant gaps. There needs to be clear direction as to the evidentiary requirements.

318. For example, the Australian form does not specifically ask complainants whether they import like products or whether they are affiliated with corporations that do. The situation is different in Canada. The Australian position is unacceptable. For example, to fail to ask the question means that it is impossible for the Australian administrator to properly utilise potentially relevant information. If the question is never asked, the administering authority will simply not be able to consider the issue.

319. *Recommendation 6: To remove doubt, Australia's legislation should mandate that applicants advise whether they have imported like goods or have any desire to do so. This would be in conjunction with the range of options in terms of policy responses to such applicants.*

320. As noted above, that information is also highly relevant for other aspects of the analysis. A local manufacturer that also imports may need to explain why its loss of manufacturing market share is not caused by its own import behaviour.

321. Another possibility is that its own imports should set a non-injurious price. If it is offering imports into the market, there is no reason for anti-dumping laws to attack its import competitors.

322. Questions might need to be asked whether its own imports are also dumped and why in some circumstances an application is brought against other countries and not the country from which imports are made. In some circumstances, this could raise issues as to whether the anti-dumping regime is intentionally or accidentally being utilised in an anti-competitive manner.

323. If there is insufficient guidance in the Manuals, this can cause other problems. For example, this might at times necessitate ACBPS going back and forward to the applicant trying to give them a chance to present sufficient information. While it is appropriate that ACBPS should not be too strict and should offer some leeway, because of the chilling impact of an application itself, it should also be the case that if an applicant cannot even present a challenging case, particularly from data within its own possession and control, the application should be rejected. The clearer the forms, the fairer it is to reject an inadequate application.

Evidentiary standards on initiation

324. Evidentiary standards is a key issue where insufficient guidance is provided by the legal instruments. Article 5.3 ADA indicates that upon receipt of such an application, the administrators must "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation." Article 5.8 of ADA merely states that an application should be rejected "as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case." No attempt is made to indicate what may or may not justify proceeding.

325. The Australian legislation in section 269TC asks the CEO to determine, based on the evidence and other information, whether or not he is satisfied that there appear to be reasonable grounds for the publication of a dumping notice. There are a number of problems in trying to compare the concept of "reasonable grounds" in Australia's legislation and the concept of "sufficient evidence" in the controlling ADA. ADA suggests that there should at least be a prima facie case in the sense that there is enough evidence, absent contrary arguments that would support a finding of dumping and causation and material injury. While the WTO jurisprudence is not always consistent, a number of cases have supported rejection based on evidentiary inadequacy. This occurred in *Argentina-Poultry Anti-Dumping Duties* where only some transactions had been included in the dumping analysis; in *Guatemala-Cement II* where threat of injury was claimed but not supported by any evidence; and in *Mexico-Steel Pipes and Tubes* where import volume was only provided at the tariff line level without any data break-up as to individual products.

326. A "reasonable grounds" test could certainly be interpreted in that way although it is not clear whether it alludes to a likelihood or a mere possibility that a dumping duty might be recommended. By not drawing express attention to the concept of evidence as does ADA, it is additionally vague as it does not indicate what would constitute reasonable evidentiary grounds, as all relevant information would not be at hand at that stage.

327. Local producers will presumably suggest that it merely needs to be a possibility that there is injurious dumping.

328. *Recommendation 7: If the anti-dumping system is to be maintained, it would make sense that the evidentiary standard at the application stage requires a belief that the application has a likely chance of success based on the evidence provided.*

329. Any lesser standard would occasion significant transaction costs. To give rise to the chilling effect and the transaction costs merely based on an unlikely possibility, is not a fair and reasonable balance between the rights and obligations of all of the parties. Any lesser standard would simply mean that the process is only designed to exclude frivolous applications. This was not the intent of ADA and is unlikely to be the intent of the Australian legislation. It is certainly not good policy.

330. One policy question with such a recommendation is what if any verification ought to occur at the initiation stage. On the one hand, a full inquiry would not be appropriate. On the other hand, to merely accept assertions in an application as sufficient prima facie evidence would undermine the screening process. Judgment will need to be exercised on a case by case basis. This is also affected by other policy issues, including the ASA recommendation that an application be notified to interested parties in confidence, offering them a right to provide basic responses relevant to the initiation decision alone.

331. As always, evidentiary standards must be looked at in context. It is important to distinguish between two broad types of evidence, evidence within the control of the applicants and evidence of competitors' behaviour, about which they must engage in some degree of conjecture.

332. It is particularly important that the highest standards be applied to the former category. Applicants who have complete control over their own information, such as injury data, should be expected to have the highest quality material lodged with their application. There are no time limits on an applicant when considering whether to bring a case and there is no excuse not to have a fully documented case as to their own injury.

333. Important guidance should be obtained from WTO jurisprudence including the *Poultry* and *Lumber* disputes, although these in some ways add to the uncertainty. There are numerous proposals in the Doha Round for clarification of these issues.

334. Where dumping is concerned, some allowance must naturally be made for the fact that the domestic industry does not have ready access to all foreign confidential information. Nevertheless, an anti-dumping application should not be a fishing expedition. It should instead be based on enough evidence that leads the domestic industry to truly believe that dumping is occurring. The application should force an identification of the evidence that is being relied upon and the reasons why conclusions of dumping have been drawn.

335. An applicant should have some evidence of normal value and not merely rely on conjecture. Examples would include price lists, quotations, invoices either directly or via market research. These were all referred to in Willett (1996).

Information burden

336. Some meaningful evidence of dumping is needed. While an applicant cannot know all normal value details, it asserts it has a reasonable belief that dumping has occurred. The evidentiary basis for that view needs to be identified and tested. The European Commission suggests that invoices, formal offers, surveys, advertisements, statistics indicating domestic price, or evidence from market surveys or other reliable sources can be used to establish domestic prices. If these prices cannot be obtained, evidence to support a constructed normal value is required. The Commission suggests that market surveys, statistics, invoices or formal offers that provide evidence charged by a supplier to a third country could be used. If the investigation concerns a non-market economy, information supporting the choice of an analogue country is required. The Commission suggests that information about competition in the market, the volume of the market and the production process, derived from surveys or official statistics be supplied.

337. The application should also address all matters relevant to identifying a causal link including factors other than dumping. Thus Willett (1996) suggests that "(o)ther factors likely to have a bearing on the injury should also be described, e.g. seasonal fluctuations, non-dumped import competition or general economic influences." This is rarely found in applications.

338. Willett (1996:28) also suggests that where possible an industry's verification visit should occur prior to initiation.

339. Willett (1996:29) suggests that Customs must be satisfied that the evidence and information available "is acceptable and adequate to establish the facts." If key information is lacking, an explanation must be given as to why it has not been provided and what steps were taken to obtain it. The Review suggests that relevant evidence must be "credible and reliable, and prima facie, indicate that dumping/subsidisation is causing material injury to the Australian industry." The Willett Review considered this requirement to be particularly significant given the best information available provisions that allow consideration of the information supplied in the application.

340. Given the large number of cases where applications are ultimately rejected, there is a significant cost of inappropriate applications.

341. Having a robust screening stage is particularly important when there is no time bar that flows from an unsuccessful application. In some systems there is a bar on bringing a new application within the following 12 months. This should be applied in Australia and is discussed below.

342. In addition to the transaction costs, as noted in Section A, even unsuccessful applications have a chilling effect on the marketplace and adversely affect the rights of importers, end users and foreign suppliers.

343. Furthermore, even where dumping is found, there is typically a significant variation between the dumping margins alleged and the dumping margins found in due course. These factors provide indirect evidence that the evidentiary standard in applications is low. (Lindsay and Ikenson, 2002:29)

344. *Recommendation 8: More information should be provided and verified at the initiation stage as to all factors, to ensure that only viable applications go forward.*

Who gets notified when an application is made? What input could there be from other parties to challenge a decision that might be made?

345. It is of particular concern that parties do not get notified at the time an application is made. Using the steel industry as an example, domestic purchasers of imported steel often operate under contracts that demand that any ensuing duty will be passed on to them. If they are aware of an application, they could seek to defer the purchases or try and negotiate changes to these obligations.

346. In addition, exporters will often cancel orders when they hear rumours that an application has been accepted simply because they do not wish to become embroiled in an anti-dumping investigation. The later the parties are notified, the more disruptive such cancellations are likely to be.

347. Rumours of possible applications are disruptive in other ways. Importers are not able to advise customers whether there is likely to be disruption to their supply chain.

348. Most alarmingly, at times domestic producers will themselves promulgate the rumours as a means of attracting business. Anecdotally, customers in the steel industry have been told from time to time that an anti-dumping application is imminent and that they should buy from the local supplier to guarantee sourcing. Steven Pearson CMC: “Prior to each recent anti-dumping application, I have been called by a number of customers who have very clearly indicated that such representations have been made.”

349. The current system is thus unfair and inefficient.

350. The WTO anti-dumping agreement is to some degree confusing as to policy options and provides for two potentially irreconcilable obligations. On the one hand there should not be “publicising” of applications until they are adjudicated upon. On the other hand there is an express obligation to notify foreign governments of the targeted suppliers *prior to* a decision being made on the application. While the prohibition on publicising would prevent the application going on a public record, it does not prevent known interested parties being notified on a confidential basis.

351. That is the only sensible interpretation to make sense of the concurrent obligation to notify foreign governments before a decision is made to initiate. There is no bar on those governments notifying interested exporters and indeed there is an expectation that this will occur.

352. At present ACBPS takes the view that it should not notify any interested importer or foreign exporter prior to a decision being made on the application. This is an undesirable position and is not supported by WTO obligations. The policy argument for a prescription on publication is to stop negative market outcomes to interested importers where an application might in due course be rejected. There is no policy reason to refuse to advise them privately so they can begin the task of preparing for a potential defence.

353. As noted above, it would be perverse to allow the applicant to publicise its intent at will but not allow interested parties adversely affected to be told.

354. *Recommendation 9: The Productivity Commission is asked to recommend that known interested parties should be advised in confidence as soon as an application is received.*

355. Another problem is that the applicant will often wrongly identify the exporter. ACBPS send a questionnaire to whoever is identified by the applicant. This adds a further reason to notify interested parties as soon as an application is made. If the wrong exporter is identified, there is at least a further time period wasted to find the right one.

356. Australia's provisions may not even be fully consistent with ADA as section 269TC(7) of the Australian legislation allows notification to the exporting government to be deferred until after the initiation decision has been taken.

357. *Recommendation 10: The Australian procedure should comply with ADA and foreign governments be notified of an application as soon as possible.*

Opportunity to respond at application stage

358. Where other interested parties are concerned, it is important to remember the role of the screening process. The administering authority needs to be satisfied that there is enough rigour in the application and enough potential evidence to make the time and expense of an investigation worthwhile, particularly given its chilling effect and its immediately adverse effects on the economy at large.

359. If other interested parties have relevant evidence that shows the inadequacy of the application, that can only help the administering authority perform its task in an optimal manner. The aim is not to have a full contested adjudication at this stage but simply to invite other interested parties to point to what they see as major defects in the application. We do not suggest that interested parties ought to be entitled to present voluminous submissions. Nevertheless, being vitally involved in the market, they will often have key information that the administering authority would have wished to see in the application itself. Thus the intent would be to allow for challenges to the adequacy of the application rather than the presentation of conflicting economic and accounting evidence that in due course would need to be considered.

360. This suggestion is again impacted upon by the nature of the forms utilised and the degree to which the administering authority calls for further information at the screening stage. If the form forced the complainant to provide all evidence and if there was sufficient penalty for false or misleading information, there is less need to call on other interested parties to comment. However, to fail to have an adequate form and to fail to call on interested parties is decidedly suboptimal.

361. The most recent unsuccessful anti-dumping application against HSS steel products is illustrative. After the application against both China and Malaysia was accepted, verification visits were conducted in Malaysia only to find that allegations of dumping were unfounded. Customs officers then received a submission from the ASA arguing that there was no reliable evidence of injury and expensive site visits to China should not eventuate. (Appendix A) In particular the ASA submission pointed to inconsistencies between the applicants' statements to customs with the anti-dumping application and their statements to the stock exchange as to the general profitability of the company and its relevant divisions. If we had been able, we would have provided this information at the initiation stage, hopefully obviating the whole wasted Malaysian verification exercise.

362. That kind of simple response, if allowed at the application stage, would help customs administrators to save all parties damaging transaction costs as a result of inadequate applications that cannot be viewed as such on their face. Without customs officers being directed to the conflicting statements in the ASX material, they might understandably have accepted the application on its face.

363. *Recommendation 11: Interested parties should be entitled to provide information that may clearly show the inadequacies of the application prior to the initiation decision being taken.*

NATIONAL INTEREST AT APPLICATION STAGE

364. The Productivity Commission has asked whether a national interest criterion should be included in the analysis. In a subsequent section, this submission argues in favour of such an addition to Australia's legislative regime.

365. If the national interest criterion is to be included, it should be considered at the outset, including at the application stage. An application should only proceed to a full investigation if on balance it seems likely that injurious dumping will be proved and further, that it would be at least arguably in the national interest to impose an anti-dumping duty.

366. It is particularly inappropriate to leave a national interest consideration until after injurious dumping has been found. This puts undue political pressure on the relevant politicians who might have a discretion to nonetheless reject the application. Local manufacturers already know that injurious dumping has been found and they will only lose their right to protection if a governmental officer concludes that the national interest predominates over their own vested interest.

367. A further reason to consider national interest throughout is that an optimal system would consider national interest based solely on objective data and proper economic methodology. For example, where anti-dumping applications are made against input goods such as steel, evaluation of the national interest would consider impact on end users and Australian value added manufacturing as a result of the imposition or non imposition of dumping duties. That kind of an objective analysis by an independent adjudicator is far more preferable than leaving it to the discretion of an elected public official. It also supports due process with all interested parties having a right to be heard. It would also be necessary if national interest considerations were to be considered by a separate body such as PC, which ASA recommends.

368. Having said that, considerations of national interest at the initiation stage could not be expected to make complex assessments.

369. *Recommendation 12: It should only be in cases where the application would be highly unlikely to be in the national interest that rejection should then occur. From a policy perspective such a power would be more palatable to domestic industries where it also came with a right to refer the industry to other assistance mechanisms at that stage. PC should consider this.*

MULTIPLE APPLICATIONS AND MORATORIA AFTER UNSUCCESSFUL ONES

370. As noted above, the economic literature has established how anti-dumping applications are commonly used intentionally or otherwise as abusive devices. The mere bringing of an application already provides protective benefits to local industry. Furthermore, the many discretions promote the likelihood of positive findings. The lack of rigorous causation analysis exacerbates this. Hence there are many positive incentives for local industry to bring applications.

371. An ideal system provides neither net incentives nor disincentives to bringing applications. It should instead be neutral or provide incentives to bring meritorious cases and disincentives to unmeritorious and abusive ones.

372. There are a range of options. It is sensible when repeated applications are made for the administering authority to ask at the screening stage why this application is likely to be more successful than the last. If the applicant cannot provide robust evidence that improves on the earlier application, it ought to be the case that it is more likely to be validly rejected again.

373. Another desirable reform is to mandate a moratorium after an unsuccessful application before a further application can be brought. This would provide a strong incentive to only bring meritorious claims. During the Doha Round, a suggestion was made at Seattle that "no investigation shall be initiated for a period of 365 days from the date of finalisation of a previous investigation for the same product." (Didier 2001:33, footnote 1) The Doha Draft Negotiating Text is contemplating a one year moratorium (Article 5.10 BIS). Such a reform would help prevent abusive applications and allow certainty of investment decisions. It would also provide greater equity with the time limits on review of imposed measures.

374. A most important issue is the role of the ACCC when repeated unsuccessful applications are made. There is now a reasonably long list of companies who have been barred from bringing repeated applications, at least without getting independent advice. Work needs to be done to establish a more regularised system of co-operation between ACBPS and ACCC and perhaps PC to help prevent repeated unsuccessful applications. The problem goes well beyond industries where there have been significant domestic mergers, the area where ACCC has tended to become involved. While ACCC interest is to be commended, merely asking for consideration by independent consultants is unlikely to be an adequate protection without some meaningful way to challenge applicants' assertions.

375. Another possibility is to require the applicant to pay reasonable damages as a result of an unsuccessful application, or at least one which is considered by an independent adjudicator sufficiently unmeritorious.

376. An undertaking as to damages is an important and valuable consideration as it provides the only true commercial disincentive to making strategic applications once a moratorium period has expired. As indicated above, the cost of bringing applications is very small compared to the market disruption they cause and the immediate economic benefits that arise through cancelled import contracts and general uncertainty as to pricing by importers. If local producers get a commercial benefit from both successful and unsuccessful anti-dumping applications, anything less than such an undertaking would simply not operate as a disincentive.

377. If such an approach was taken, it would be important to devise a mechanism that would allow for a speedy, fair and efficient assessment to be made. An independent adjudicator such as a major accounting firm, could be appointed to look at specified data and make a binding assessment in a timely manner.

378. Where the steel sector is concerned, the recent merger between OneSteel and Smorgon saw undertakings as to damages provided in relation to unsuccessful anti-dumping applications over the majority of products produced by the merged entities. Since those undertakings were provided, no anti-dumping actions have been brought in relation to the relevant products subject to those undertakings. Conversely, in the key product category where the ACCC did not call for an undertaking, namely HSS products, there has been a further widespread unsuccessful application in relation to imports from Malaysia and China and in addition, an application for extension of anti-dumping duties on products from Thailand where a key supplier has not made any sales to Australia for some 15 years.

379. Careful consideration also needs to be given to using statutory penalties in relation to false and misleading information to ensure applications and indeed submissions by all parties are accurate and open about all relevant data necessary for consideration.

380. Because the Australian legislation provides no disincentives, it can only be expected that inappropriate applications will continue to be brought.

381. *Recommendation 13: A combination of moratoria and damages undertakings is needed to counter the demonstrable incentives in favour of abusive cases and the harm they clearly cause.*

CONCURRENT AD AND CV APPLICATIONS

382. An optimal system would consider how best to deal with applications that claim both anti-dumping and subsidisation. Where both occur, it is perfectly reasonable for a local industry to make concurrent applications. On the other hand, the WTO Anti-Dumping Agreement rightly requires that the same circumstances should not lead to independent anti-dumping and countervailing duties.

383. This is a further example of potential misapplication of anti-dumping laws. Anti-dumping should only apply if at all to price discrimination by a firm. It should not apply to price differentials caused by governmental subsidy activities. That should be addressed, if at all, under countervailing duty laws.

SUPPORT FOR APPLICANTS, PARTICULARLY SMEs

384. Because anti-dumping laws and procedures are highly complex and technical, it is reasonable for a government to wish to provide appropriate systems to help interested parties preserve their legitimate entitlements. As such the 2006 Joint Study called for greater assistance to potential applicants, particularly small to medium enterprises.

385. There are two flaws with the current model. First, there should be complete separation between bureaucrats providing assistance, and bureaucrats making a preliminary determination as to whether the application ought to proceed or not. It must put undue pressure on those empowered to make a determination in relation to the adequacy of an application, to know that a colleague in the bureaucracy provided advice that the application was adequate.

386. In addition there is no reason to provide support for domestic small to medium manufacturers and not provide equivalent assistance to small to medium foreign manufacturers and importers. In an adjudicatory environment where Australian customs bureaucrats act as a quasi umpire between importer and producer interests, assistance for those without sufficient funds to fully protect their interests should not favour one group over another.

387. It is also important to understand that there are likely to be just as many small to medium enterprises among the foreign exporters that are subject to anti-dumping applications. There is no justification for treating them any less favourably just because they are foreigners.

388. A particular example of concern was co-operation with domestic steel producers as noted in the September 2003 Manifest publication. Customs had developed an early warning system which sought to analyse statistical data and allow notification to domestic manufacturers of possible dumping. While this may be seen to assist SMEs in bringing applications, it can also lead to inappropriate inferences. For example, just because import figures rise rapidly, this would not show issues of concern if the increase is because a local producer has also started importing. Once again, this shows how procedural issues overlap.

389. Customs also ought not to go so far as "assisting industry to present their application in a format which best presents their argument" as noted in the September 2003 Manifest. It would again be a conflict for Customs to help develop the case and then review it for the purposes of a recommendation to the Minister. (Moulis and Gay (2005:77) Even in the absence of actual bias, it is important to alleviate any perceptions of bias in order to promote respect for the system as a whole. (Moulis and Gay (2005:77)

390. A related problem arises if the application is then rejected or the investigation terminated in due course if applicants rightly or wrongly consider they were encouraged by Customs during the assistance phase.

391. The Willett Review rejected a suggestion to shift the assistance function from Customs to AusIndustry (Willett, 1996:47). The rejected suggestion was aimed at preferencing Australian industries and was rightly rejected for that reason alone. However the Willett Review also suggested that such a shift would dilute experience and reduce access to customs information systems. There is no reason why that should be so. An appropriately constituted independent body could still have access to information and data. The important policy issue is to remove any connection between persons providing assistance and persons adjudicating on the adequacy of the application.

392. *Recommendation 14: Assistance to interested parties should be provided by a completely separate entity and should occur in a way which does not presume a positive finding. Instead, the relevant bureaucracy should simply help explain anti-dumping laws and processes to potential applicants and indicate the kind of evidence and analysis that would optimise the application. Equal treatment should be given to responding interests.*

CONFIDENTIALITY AND NON-CONFIDENTIAL SUMMARIES

393. An optimal anti-dumping system would ensure that each side has the fullest opportunity to present its case to the best of its abilities so that the independent adjudicator may make a fair and reasonable assessment.

394. The policy challenge is how to deal with confidential information. On the one hand, all interested parties should be aware of the essence of the confidential information so that evidence that either corroborates the confidential assertions or challenges them may be provided. On the other hand, commercial entities involved voluntarily or otherwise in anti-dumping proceedings, should be given comfort that truly confidential information will not be released in a way which undermines their business interests.

395. While confidentiality is an important issue, it must be subordinate to the overall due process aim of the ADA which in Article 6.2 indicates that "throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."

396. There are two policy aspects of this challenge. The first is to have a sufficiently robust test of confidentiality so that it is not applied in cases where information is readily available in any event. An example would be claims of confidentiality in an anti-dumping environment when the relevant information is provided as a matter of legal obligation under Australian Stock Exchange requirements.

397. A robust test of confidentiality would require that information not be otherwise publicly available and further, that release of the information would give rise to legitimate concern that the relevant company's commercial interest would be significantly adversely affected.

398. Customs' own anti-dumping manual suggests that a cautious approach should be taken to claims of confidentiality. It is often the case that inflated claims of confidentiality are made.

399. Even if certain data would satisfy such a test of confidentiality, there is still a need to allow other interested parties to properly present their case. Thus WTO ADA calls for non confidential summaries in such circumstances. The Customs manual indicates that simply deleting information does not meet the requirements.

400. The Customs Act requires ACBPS to maintain a public record of the investigation. Non-confidential summaries must contain "sufficient detail to allow a reasonable understanding of the substance of the information."

401. It is important to understand that the WTO Anti-Dumping Agreement is also very strict in that regard, calling for non confidential summaries "in sufficient detail to permit a reasonable understand of the substance of the information submitted in confidence." (Part 6.5.1) Even then that requires an indication why such information is not susceptible of summary and a statement of reasons. (Part 6.5.1) The agreement goes on to say that only in circumstances where non- confidential summaries meeting that standard are not possible are they not required.

402. Australian practice falls well below these policy criteria. Most importantly there is usually insufficient detail in the non-confidential summaries and they often do not allow for a fair and reasonable response by the party accused of dumping or purchasing dumped products. (Moulis and Gay 2005:79) The Willett Review in fact recommended that "investigating authorities should be more vigilant in insisting that interested parties comply with requests for the provision of non-confidential versions of all relevant documents and ensure that such documentation is placed upon the public file in a timely manner." (Willett, 2006:55) There need to be very clear guidelines as to what is in fact confidential and an open challenge procedure. An examination of applications and other submissions shows that allegedly confidential information is simply extracted and is replaced by bracketed material that in no way attempts to provide a non confidential summary that properly allows opposing parties to understand the case they are asked to meet and be in a position to refute it.

403. An adequate non-confidential summary is one that allows interested parties to understand the allegations in the application and the reasoning of customs administrators. It should allow them to understand what arguments they need to meet and make accurate assessments as to whether determinations are valid or not.

404. Having said that we recognise that it is a challenging question as to what is a useful non-confidential summary of truly confidential information.

405. The European Commission has recommended a number of methods that can be used which preserve confidentiality of information but also give the party under investigation a clearer understanding of the complaint.

406. Firstly, complainants can use indices when information concerns figures.

i.e. Confidential summary

1994	1995	1996
20,000 Euro	30,000 Euro	40,000 Euro

Non-confidential summary

1994	1995	1996
100	150	200

407. Secondly, a margin of +/- 10% can be added to figures so the actual amount need not be disclosed. If the confidential information is 500 EURO, instead state that the amount is 550 EURO, and that actual amounts have been amended +/- 10% to protect confidentiality.

408. Thirdly, if a statement contains a name which is confidential, remove the name but indicate the function of the party. (European Commission, 'Guide on how to draft an anti-dumping complaint' http://trade.ed.europa.ed/doclib/docs/2006/december/tradoc_112295.pdf, Annex 3)

409. A particular area where confidentiality is of concern is where one is seeking to calculate non-injurious prices. Importers simply cannot address the possibility of a dumping duty less than the full dumping margin without understanding the costings and profitability of domestic producers and data about other non-injurious sources of supply. Once again this overlaps with other policy concerns. As discussed further below, the Australian system is unduly protectionist in concentrating on local producers' costings in determining non-injurious prices and giving little if any attention to other important price setting influences such as other non-dumped imports with significant market share.

410. Australia lags behind world best practice when confidentiality issues are integrated with due process considerations. At present confidential information is only disclosed to legal advisers when Federal Court proceedings are current. One consideration should be to allow for release of confidential information under an administrative protective order as is the case in the US and Canada. (Horlick and Vermulst 2005:68, 69)

411. Counsel may give appropriate undertakings and be subject to disciplinary action for breaches of confidential information although it is recognised that provisions that allow release to independent legal representatives do add costs where interested parties would otherwise not wish to be represented. The related issue is whether confidential information may be given to expert witnesses to allow them to best represent the interests of the parties they represent.

412. There may be concerns as to the provision of confidential information to foreign counsel but this can be supported by undertakings or even domestic controlling counsel who would have primary liability, although it may be the case that some foreign exporters would not wish their confidential information to be released to local lawyers acting for their competitors. (Horlick and Vermulst 2005:69)

413. *Recommendation 15: The highest priority should be to rigorously test claims for confidentiality and ensure that non-confidential summaries go as far as possible to present meaningful data.*

414. A further problem with non-confidential summaries is the time it takes for these to be publicly available even when they are written in a meaningful fashion. (Moulis and Gay 2005:77) The first stage is to make a proper determination as to whether the claim of confidentiality is warranted. Even if that is so, the next question is whether the supplier has provided an adequate non-confidential summary. If they have failed to do so, the information may be disregarded unless a valid explanation is provided or the information can be obtained from other sources.

415. These provisions should be strictly applied otherwise interested parties are denied their entitlements to be informed of the essential facts prior to a decision being made.

416. A further issue is the extent of access to information. Section 269ZJ requires the maintenance of a public record. ADA indicates that information must be given to "interested parties" but does not define that term. The 2006 Joint Study took the

view that the public register should be limited to parties directly involved in anti-dumping proceedings. That is contrary to the statutory mandate and at most justified under a limited interpretation of the phrase in ADA.

417. There is no justification for limiting broad access to non-confidential summaries on a public record. End users of input products such as steel have a significant commercial interest in presenting evidence as to injury and causation. The ACCC has a significant interest in ensuring that anti-dumping is not conducted for anti-competitive purposes. It is also impossible for those who are truly interested in a particular matter, to do comprehensive research on other concurrent investigations to try and see if Customs practices are applied consistently. Advisers with less experience of the system will find it harder to identify precedents for submissions. Researchers are less able to analyse the system from a policy perspective.

418. *Recommendation 16: It is recommended that the public record as defined in the statute should truly be open to the public.*

419. There is also the question of timing as to when material is placed on the public record. The PC should explore this with Customs officials as impressionistically, the suggestion is that there have been inordinate delays from time to time. In the most recent HSS case, it would be interesting to consider when a view was taken that there was no injury to the domestic industry and when final termination notification was presented.

SIMULTANEOUS DUMPING AND INJURY ANALYSIS

420. There are three elements of an anti-dumping investigation; is there dumping; is there injury; and does the dumping cause or threaten material injury. The WTO Anti-Dumping Agreement demands that customs bureaucrats simultaneously assess dumping and injury.

421. There are a number of strong policy reasons why analysis should be simultaneous. From an efficiency perspective, if injury analysis is left too late in the piece, all cases will require an expensive and elaborate dumping investigation, including foreign site visits. Conversely, if simultaneous analysis is undertaken and if the customs bureaucracy follows the anti-dumping agreement mandate to terminate an investigation as soon as lack of justification is identified, there will be many situations where an application can be rejected without the expensive transaction cost of foreign site visits.

422. This has occurred on two separate occasions in relation to anti-dumping applications in the steel sector. In each case the investigations were terminated with less severe transaction costs as compared to the situation where site visits would have occurred.

EXPERTISE AND BIFURCATION OPTIONS

423. Considerations of simultaneous analysis of dumping and injury raise questions as to who is the most appropriate body to undertake the analysis.

424. Different countries use differing models as to the way anti-dumping administration should be conducted. The key division is between those using a single bureaucratic entity and those which divide dumping analysis from injury and causation analysis. Canada and the US adopt a bifurcated approach, with one administrative entity considering questions of dumping while another considers questions of injury and causation. Australia previously had a similar system through use of the Anti-Dumping Authority. The Willett Review recommended its abolition, but only within the context of a policy mandate limited to expediting the decision-making process.

425. The Auditor General of Canada made the following comment about the bifurcated system:

426. “The change was intended to let each organisation concentrate on its area of expertise, reduce institutional duplication, provide a more streamlined and efficient system, promote greater transparency and procedural fairness, and cause unwarranted complaints to be settled or dropped earlier in the process.”

427. Whether the Productivity Commission recommends a bifurcated approach or a maintenance of the status quo, in each case it is important that there is sufficient expertise to analyse the three elements appropriately.

428. There are costs and benefits of any model of administration and it is important that proper decisions be made on a consideration of all relevant factors. The Willett Review was constrained by its mandate to speed up the process. A consideration of the appropriate investigative and adjudicatory bodies also depends upon the issues to be considered.

429. Where dumping is concerned, because of the need to determine cost of production, appropriate questions of amortisation and proper adjustments to make reasonable comparisons, there is a need for sufficient cost accounting expertise within the bureaucracy.

430. Where injury and causation is concerned, there is a need for sufficient economic expertise in order to make objective and robust conclusions.

431. The more that a robust and economically defensible causation analysis is to be applied, the more there is the need for appropriate expertise. The same is so where national interest considerations are to be involved. This submission also points to the important competition law issues that are growing in the anti-dumping sphere.

432. Whatever the final recommended structure, it should be one that best meets all these competing goals, save that some inevitable trade-offs must be made. Because of the significant impact on interested parties it is preferable that the quality of the decision making be optimal and not be diminished by concerns as to speed and duplication.

433. A history of Australia's anti-dumping regime has shown persistent lobbying by local industry to downgrade the value of independent adjudication by expert economists. Until 1984, appeals were allowed to the Industries Assistance Commission. In the early stages, the IAC investigated whether dumping criteria were satisfied. In 1984, its appeals powers were reduced to consider the facts alone and not consider economy-wide implications. (Banks, 1990). In 1988, the IAC was removed from the process. Similar criticisms were raised in relation to the Anti-Dumping Authority, which in turn led to the Willett Review recommending its abolition in 2006.

434. *Recommendation 17: The PC should recommend that accounting and economic decisions be made by persons with appropriate expertise. It should then consider the relative advantages and disadvantages of bifurcated versus unitary approaches.*

MEETINGS OF INTERESTED PARTIES

435. In any adversarial environment it is important to bring all interested parties together to promote fair and efficient adjudication. This is so for a number of reasons. First, each party is best able to defend its own interests if it directly hears the articulated reasoning of opposing parties. If no face-to-face discussion is held, interested parties need to rely on descriptions from adjudicators or inferences from published submissions. It puts undue pressure on adjudicators if they are asked to précis representations from other parties. This is particularly so when they are then obliged to determine how non-confidential summaries ought to be presented.

436. A related reason is to promote transparency. A meeting of the parties will help the bureaucrat hone in on the key issues that need to be resolved.

437. The WTO Anti-Dumping Agreement mandates that interested parties have the right to call for such meetings and simply says that adverse inferences cannot be drawn against a party that refuses to attend.

438. This process was followed when the IAC had involvement in anti-dumping matters. It no longer appears to be the norm and might even be something that Customs might not prefer. The ASA recommends that this process be reinstituted. Ad hoc meetings such as those which occurred under the 2006 Joint Study can easily degenerate into inefficient exercises.

Conversely, well thought out processes such as those used by the PC in public hearings can meet all appropriate due process criteria.

439. *Recommendation 18: Regular use should be made of the entitlement to meetings. The PC is asked to recommend guidelines as to how such meetings should occur.*

LIKE GOODS

440. A determination of what constitutes like goods frames the entire anti-dumping process.

441. There is insufficient clarity and consistency in the way like goods determinations are made. For example, in the *Cherries in Brine* case Customs and the IAC took different views as to which grades of cherries were properly under consideration.

442. The issue is too readily left to the applicant who may intentionally or inadvertently select a product category that maximises the chance that a positive finding of injurious dumping will be made. While an applicant has a general right to frame its application as it wishes, the administering authority ought to ensure that its identification of like products is fair and reasonable, particularly in view of the chilling effects of applications as noted at the outset.

443. Furthermore, if it is simply left to the discretion of the applicant, this gives them a tactical ability to make it more likely that the application itself will be disruptive and/or lead to excessive transaction costs.

444. Article 2.6 ADA defines like product as being "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." The definition of like product in ADA is much narrower than that contained in Article III GATT. The interpretation and application should reflect that difference. A conscious effort was made to provide a narrower definition in the anti-dumping regime.

445. The Australian legislation defines like goods in similar manner (section 269T), although crucially it leaves out the phrase "or in the absence of such a product …". Australia's international obligations indicate a clear priority. If identical goods are present, they are the like product.

446. *Recommendation 19: The Australian legislation should be clarified to ensure consistency in determining what are "like goods". The policy aim is to limit the analysis to truly competitive goods and minimise the chance that broad ranging applications will be brought.*

447. In particular, there is insufficient guidance as it is not clear just which characteristics are worthy of consideration.

448. It has been noted that the administering authorities in Australia look at a range of factors besides physical characteristics including "functionality, substitutability, end-use, consumer recognition and market competition …". (Moulis and Gay 2005:78) In the USA its Anti-dumping and Countervailing handbook directs the International Trade Commission to look at (1) physical characteristics and uses (2) interchangeability (3) channels of distribution (4) common manufacturing facilities, production processes, and production employees (5) customer and producer perceptions and when appropriate (6) price.

449. A crucial factor relevant to the steel industry is a consideration of channels of distribution. Customs administration is repeatedly advised that steel comes to market in Australia either via OneSteel and BlueScope distribution networks, or independent networks. Competitor distributors simply cannot buy domestically made product at competitive prices. In some cases markets are sufficiently segmented that a like goods analysis alone could obviate the need for costly investigation.

450. It would make sense to get guidance from other government agencies such as ACCC that have a long experience of identifying markets and considering price and similar tests for issues of substitutability.

451. Even then while a range of factors may at times be relevant, it is important that a wide range does not simply allow for a broader category of like goods to be identified. The ultimate aim is to find truly competitive goods as that is the only way that material injury can possibly be caused.

452. The Canadian approach appears to achieve a better balance between the interests of importers and the interests of the domestic industry. The test appears to be narrower and more directive "the goods in issue compete directly with [one another] … [They] are relatively identical and interchangeable products that can be used for the same applications … [They] are sold at the same prices." *Macsteel International (Canada) Limited v Commissioner of the Canada Customs and Revenue Agency*. This test takes a more practical and realistic approach by focusing on how the products compete with each other and on the uses they are put to. Accordingly, this test ensures that a product will only be defined as a "like product" if there is a realistic potential for it to have an impact on the domestic industry and not simply because it appears to resemble a domestic product.

453. One issue is where the Australian producer makes to a high specification. If anti-dumping succeeds in frightening off foreign supply, as has been the case with galvanized pipe from Thailand, this means that the local customer must pay for an unnecessary premium in quality of product. This is because the Australian product is made to a higher structural standard that is not required by most customers of imported product.

454. As with many policy issues, it can be addressed at a number of points along the spectrum of anti-dumping administration.

455. The broad approach by OneSteel in alleging that its HSS products should be seen as elements of one like product category and their recent pricing structure which divides between structural and non-structural products shows how easily the anti-dumping process can be removed from commercial reality and used in a way to gain unfair protection.

456. *Recommendation 20: Where "like goods" analysis is concerned, either there needs to be proper competition based product differentiation, or an appropriate adjustment when considering whether dumping exists, or more importantly a true understanding that there cannot be injury between non-competitive and differential products.*

457. For anti-dumping duties to be imposed in these circumstances is clearly anti-competitive and best demonstrates the extent to which local producers are likely to go to in utilizing existing legal entitlements. In the steel sector, this particularly applies to products such as temporary fencing where there is a huge demand in building construction sites and security and farm gates and railings.

458. A further concern with broad like product categories is that the broader the categories that can be compared, the more obvious that there will be price differences and hence technical dumping in some circumstances at least, unless adequate adjustments are made for those differences.

NORMAL VALUES

459. Article 2 of ADA provides three possible benchmarks for determination of normal value but clearly prioritises the comparable price of the like products sold by the exporter in its home market. It is important that the domestic legislation and administrative practice adhere to this prioritisation. While there may be some cases where this is not possible, e.g. where there are no domestic sales, administrators should not readily reject actual prices in favour of alternative benchmarks.

460. The WTO Anti-Dumping Agreement requires that foreign exporter figures as to normal value should be accepted provided that they meet the accepted accounting standards in the exporter countries. It does not require that they meet normal standards within Australia.

461. It is particularly important to make appropriate allowances for accounting standards in developing countries.

462. Anecdotally, it appears that in some cases the accounting standards required do not meet the ADA concessions.

Rejection of actual values

463. An important question is how readily administering authorities reject actual normal values and resort to constructed normal values. Numerous studies have suggested that cost estimates are much higher than general accounting principles would suggest. (Boltuck and Litan, 1991; Lindsay, 1999 and Lindsay and Ikenson, 2002) A key related concern is whether constructed normal value calculations are too artificial and discretionary. (Horlick and Vermulst 2005:70)

464. The Gruen Review criticised the then bureaucracy's widespread practice of rejecting actual normal values and applying constructed values. He recommended that the latter should only be used "when there is no conceivable alternative."

465. Banks (1990) saw that only 42% of cases in the 1980-85 period used actual local selling prices.

466. Lindsay and Ikenson suggest that the cost test "is probably the single most egregious methodological distortion in contemporary anti-dumping practice." It artificially inflates dumping margins. (Lindsay and Ikenson, 2002:14) It is asymmetrical because similar tests are not applied to export prices.

467. Lindsay and Ikenson also point out that the cost test prevents a clear indication as to whether a foreign firm is truly engaging in price discrimination behind the shelter of a sanctuary market. Actual sales at a loss in commercial circumstances undermine that hypothesis. (Lindsay and Ikenson, 2002:15)

Facts available

468. Another issue is whether all aspects of normal value should be rejected if one key piece of information is insufficiently validated. That should not be a fair response in most cases and goes against the mandate in Article 6.8 and Annex II of ADA and Customs Act provisions dealing with facts available and the use of all relevant information. (Moulis and Gay 2005:79)

469. A number of important observations should be made in relation to Annex II. First, it only elaborates on the basis upon which decisions are to be made "on the basis of the facts available." The reference is to facts, not conjecture.

470. Paragraph 3 of Annex II describes the information which should be taken into account when determinations are made. Most importantly, such information must be "verifiable".

471. Paragraph 5 indicates that even though information may not be ideal in all respects "this should not justify the authority from disregarding it, provided the interested party has acted to the best of its ability." Where normal value is concerned, that ability must take into account the size, experience, and language competence.

472. Paragraph 7 states "if the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection." This is permitted only if they "have to" reach their findings in this way. Secondly, it only relates to "information" and not broad allegations that could not on any substantive view be seen as such. Thirdly, the concept of "special circumspection" should be looked at in the context of the normal presumptions that the person seeking protection should have the burden of proving that they are entitled to it. Finally, in such circumstances the authority should check the information from independent sources. That should require them in considering the actual figures of the exporter even if those figures are not otherwise complete.

473. It does not appear that current practice is consistent with these dictates.

Evaluation of cost to make

474. Where relevant, extra guidance should be given to customs adjudicators to ensure that consistent methodologies are applied to determining cost to make, amortisation and representative profit.

475. Other costs issues relate to accounting questions such as FIFO or LIFO inventory valuations.

476. An anti-dumping system must consider variations of costs and prices over the relevant time period. It must consider how overheads are to be amortised. Commonly these apply to a range of products and over a differential period to that within the anti-dumping investigation. If general costs are allocated to different products that have significantly different values, and if each product is treated separately, sales at a loss are more likely to be found with a low value product. (Lindsay and Ikenson, 2002:30)

477. There are requirements to add reasonable amounts for selling costs and profit and hence the need to determine what is reasonable. Any profit rate used should be based on industry-wide averages and not averages from profitable sales alone. Adjustments may be needed to take into account differences in terms of sale and product characteristics.

478. Cost allocation should not be required below levels that are applied generally for accounting purposes. (Mavroidis, Messerlin and Wauters 2008:45)

Start up costs

479. It is commonly the case when a new product or facility is established that costs to make are high and volumes low until such time as experience leads to optimal outcomes. Normal value calculations at that stage could lead to higher than reasonable dumping margins.

480. Article 2.2.2.1 of the ADA requires that "costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations."

481. A footnote indicates that adjustments for start-up operations should reflect the costs at the end of the start-up period or if that extends beyond the period of investigation, the most recent costs which can reasonably be taken into account during the investigation.

482. Targeting industries in a start-up phase is particularly unfair and will often unduly affect the interests of developing countries.

Normal values – sales below cost

483. In designing rules to identify dumping, one issue is whether domestic sales below cost are to be treated as relevant for the purposes of determining normal value.

484. The Gruen Review noted that "selling goods at prices which do not recover full cost … is not regarded as an unfair trading practice internally. It should not be treated as unfair in international trade." (Gruen, 1986: 38)

485. The ability to exclude normal value sales below cost but not replicate this for export sales is problematic on a range of grounds.

486. Banks (1990) suggests that "(i)t is difficult to find any justification in economics or equity for this new rule." Furthermore, given that normal accounting practices would not seek to identify whether sales at a loss were for an extended period of time and for substantial quantities, foreign exporters may have problems of proof in establishing that their normal value should be accepted. (Banks, 1990)

487. Sales below cost rules are particularly relevant to an analysis of a third policy option whereby anti-dumping rules might be replaced by competition law principles. Where the latter are concerned, the only real concern with dumping is where it is predatory in nature. Where this is of concern, legislators need to find appropriate tests of predation. Subjective intent would be difficult to prove. Hence legislators look for objective models that allow for likely inferences of predatory intent. Here sales that are at a loss at least raise the hypothesis of such intent. Nevertheless, because there are many commercially justifiable reasons for such sales on a temporary basis at least, competition law regimes tend to have much stricter loss sales

provisions that those concluded under the Uruguay Round for inclusion in the ADA. That is particularly so given the rational basis of marginal costing.

488. The Uruguay Round negotiating aim was to circumscribe the ability of administrators to automatically exclude sales on this basis. This can operate as a protectionist device where foreign exporters are commencing production, are using loss leaders in order to get brand recognition, or are dealing with a significant adverse currency position. More perverse would be situations where sales at a loss are deemed to apply simply because of the amortisation decisions that are made in the analysis.

489. Article 2.2.1 ADA provides that such sales may be treated as not being in the ordinary course of trade only if made within an extended period of time in substantial quantities and at prices which do not provide for recovery of all costs within a reasonable period of time. These requirements are cumulative.

490. Particular care should be taken to ensure that assumptions made and discretions applied should not lead to inappropriate findings of sales below cost.

491. Excluding sales at a loss can also inflate findings as to profit levels in the export country where constructed cost is applied. (Hindley 2007:344)

492. It should also be noted that unusually low export prices are not excluded for the same reason. Hence there is a particular protectionist bias if low normal values are excluded but not low export prices. This is particularly so when both prices are affected by global conditions.

493. Anecdotally, some aspects of Australia's bureaucratic practice do not meet ADA specifications or sensible policy norms. The concept of "extended period of time" is defined in a footnote as one which "should normally be one year but shall in no case be less than six months." In some cases at least, Customs compares quarterly production costs with individual domestic sales in the foreign country. On no basis can this meet the six month minimum standard. Furthermore, biases always arise when averages on one side are compared to individual transactions on the other. If a quarterly cost of production is being determined, so too should quarterly average sales. If the odd sale is below cost, countered by others at higher profit, there is simply no pattern emerging that satisfies the concept of an "extended period of time".

494. For example, if sales are technically at a loss because of problems in the market, that is still within the ordinary course of trade. The sales at a loss provisions are only there to exclude a particular form of transaction outside of the ordinary course of trade where the losses are systemic.

495. In addition such an approach would be in violation of the requirement that there be "substantial quantities" involved. This is because footnote 5 to Article 2.2.1 ADA defines substantial quantities as arising where weighted average selling price is below weighted average per unit cost. Thus there is no justification for looking at individual transactions and ignoring weighted average sales, unless the alternative methodology of 20% by volume is utilised. Even then, because the two methodologies are provided in the alternative it would not be reasonable for Customs administrators to ignore the first one as a matter of public policy. If that occurred, a calculation of "substantial quantity" would wrongly be seen as proving an extended period of time and would avoid the more important question of whether these sales could truly be seen as being outside "the ordinary course of trade …".

496. Increased problems arise if like goods are unduly segmented for sales below cost analysis. It makes sense to do so on an injury and causation basis but too ready a rejection of sales below cost will be exacerbated the more narrowly the figures are examined.

497. A most significant problem is the administrative belief that every normal value must be checked to see if it is a sale below cost. Thus while the ADA promotes actual domestic prices as the key normal value criterion, in all cases administrators conduct a cost to make exercise to check whether there are sales below cost that are then to be excluded. This is not mandated under the legislation. A proper burden of proof approach would be to say that an examination of possible sales below cost should only occur if there is any legitimate evidence to think that this is happening. If the company's accounts for

its domestic sales show buoyant profits over all sectors, it is simply a waste of time and resources to engage in the exercise. It is protectionist if that exercise extracts individual transactions that fall below hypothesised production costs based on complex discretion based costing methodologies.

498. *Recommendation 21: Australia's sales at a loss laws, procedures and administrative behaviour should be brought into line with WTO obligations and sound commercial practice that only seeks to exclude sales that could not reasonably be seen to be in the ordinary course of trade.*

Normal values – government influence and NMES

499. As noted above, one of the guiding criteria ought to be that anti-dumping laws are not misapplied to situations better dealt with under other policy instruments. This is particularly relevant to rules dealing with non market economies and situations where foreign governments are thought to unduly influence price. In most such circumstances, subsidies will be involved and that would be the normal means of seeking redress.

500. Where there are no subsidies involved, there is no inherent reason why some government involvement or influence should negate the utilisation of actual figures. In one sense Australia has led the way by recognising China as a market economy as part of the proposed free trade negotiations. On the other hand in the most recent unsuccessful anti-dumping application in relation to HSS steel, at one point in time the Chinese Government was asked by the Australian bureaucracy to indicate its equity ownership in all Chinese steel mills. Absent clear evidence of control, that would be an inappropriate request. For example, within the Australian economy, Telstra is rightly presumed to operate in a fully commercial way notwithstanding majority or significant government ownership.

501. This submission does not address other significant aspects of attempting to apply anti-dumping laws to non-market economies, primarily because the decision in relation to China has removed a significant aspect of the practical utility of that debate within this jurisdiction. Nevertheless, trading patterns vary from time to time and this is one opportunity for the PC to give broad-ranging policy advice.

502. There are two important policy observations in that regard. Even if trade with non-market economies is a problem, it is inappropriate to describe it as unfair trade and link it with general anti-dumping rhetoric.

503. Secondly, if allegations of dumping from non-market economies are dealt with by identification of a surrogate country, the process is devoid of reality; accusations of unfairness are based on figures in a totally separate country and can hardly be a fairness issue; and from an efficiency point of view, the non-market economy concerned can never be treated appropriately if it is truly the world's most efficient supplier. This is because in the event that they are, any surrogate country must by definition be less efficient and consequently deemed normal values will be inappropriately higher. More general issues as to surrogate countries are dealt with in the next section.

Normal values – surrogate countries

504. If normal values are to be rejected, an important question is how the customs adjudicator identifies an appropriate surrogate country where that alternative methodology is to be employed.

505. An appropriate surrogate country must be the one that most closely resembles the targeted exporter country. Experience around the world shows that inappropriate countries are often selected, simply because of ease of access to data or perhaps for protectionist reasons.

506. Sykes suggests that importing countries "will often choose the one that yields the highest benchmark (and thus the highest margin of dumping)". (Sykes, 2005:28)

507. As noted above in relation to non-market economies, from a policy perspective it is also important to understand that application of the surrogate approach denies the exporter country the benefit if it is the world's most efficient supplier. Figures from a less efficient country will be selected, with a greater chance that dumping will be found.

508. *Recommendation 22: If a surrogate country test is to be used for normal value, there should be an express and objective test to identify an analogue country operating under similar economic conditions both generally and in the industry concerned.*

Normal values – related parties

509. An identification of appropriate values for calculation purposes must also take into account the possibility that transactions between related parties might be affected by the relationship and hence not be appropriate for comparison purposes.

510. On the other hand, much of modern world trade is between related parties and this alone should not be a basis for rejecting actual costs and prices. It is commonly the case that different parties within a group are required to act as independent cost and profit centres and their figures can be accepted as reliable.

511. Hence there is a need for very clear criteria as to when a relationship would prevent the utilisation of actual data.

512. As noted above, a desirable test would look at questions of control and the ability to influence the related party on price.

EXPORTER QUESTIONNAIRES

513. Normal values are calculated after first calling for responses to a questionnaire by foreign exporters. There are a number of problems with the current process.

514. First, it often takes too long for individual exporters to be notified. This is because customs administrators will typically notify the foreign government, perhaps by their local embassy or consul and rely on those foreign government officials to find and notify relevant exporters. It would be far more reasonable for Customs to concurrently seek to identify and notify all relevant exporters directly. It has also previously been noted that applicants at times wrongly identify relevant exporters.

515. A second and related issue is how long is the timeframe for completion of questionnaires. Because questionnaires are commonly filled out by those who do not speak English as a first language and because most anti-dumping actions are taken against exports from developing countries, it is important that the timeframes be sufficiently long to enable the marshalling of resources, and the obtaining of appropriate professional advice.

516. A further issue is how to treat exporters who fail to complete the questionnaire within the given time or fail to do so without errors. This has been discussed above in the context of facts available. Administrators should not reject partially useful information entirely because of some errors.

517. As suggested above, there is always a need to balance the way exporters are treated with the way applicants are treated. If ACBPS is prepared to go back and give an applicant a chance to fix an inadequate application, the same opportunity should be afforded to those who respond to questionnaires, particularly given the language and cultural barriers.

518. Another important feature is the need to be sensitive to developing countries and their accounting capability when undertaking site visits and evaluating the quality of questionnaires. To expect developing countries to meet Australian accounting standards, failing which their actual prices will be rejected, would itself be an unfair barrier to trade, give rise to artificial dumping findings and be contrary to the express requirements of the WTO ADA.

519. This is another example where seemingly equal treatment is in fact unbalanced, although in this instance necessarily so. Applicants primarily provide information from their own records. While an accusation of dumping is made against a foreign exporter, it will typically be the Australian importer who has to take the running on defence of the application. Importers primarily have to thus get key information from exporters in third countries over whom they rarely have any legal or commercial control. The contrary is normally the case with foreign exporters often being unwilling to continue to supply goods or information the minute an anti-dumping investigation is commenced. This adds to the cost imbalance between importers and local producers in an anti-dumping dispute.

520. The importers not only have to get the information from the exporters, but also often have to convert it to accounting records of sufficiently high standards. At the very least, this should be taken into account in setting appropriate timeframes.

521. While Australia's Customs administrators do aim to be supportive, evidentiary demands vary from time to time. In a recent case, an exporter was warned of being considered as unco-operative if English translations of board minutes could not be provided in a timely manner. Overall, the evidentiary burdens on some mills are too high.

VERIFICATION VISITS

522. Australia's bureaucratic practice is to undertake verification reports in foreign jurisdictions. Each visit takes approximately one week. To properly protect their interests, foreign exporters will typically engage an experienced consultant to ensure that documentation is readily available and the appropriate paper trail that a customs investigator looks for is at hand. Without this, the business is unnecessarily disrupted and the potential for rejection of their normal values is high.

523. At present ACBPS bends over backwards to try and accommodate the time schedules of interested parties. Nevertheless, the growing number of anti-dumping actions against countries such as China, where there are such a large number of suppliers, means that inevitably all interested parties will have their resources stretched to unreasonable limits.

524. Consultants acting for a range of exporter interests will find that they are required to be in two places at once. As a side issue, this would be a particular disadvantage to small to medium enterprise consultancies and would give an undue advantage to international chartered accounting firms who can devote more significant resources to such exercises.

525. While there is no simple solution to this problem, an important aspect is to make a robust determination at the application stage. Because an applicant requires some evidence of dumping, that should relate to each and every foreign exporter that is being targeted. By demanding rigorous evidentiary standards appropriate to the initiation stage, the number of foreign exporters under review is likely to be reduced, making it easier for an appropriate number of verification visits.

526. *Recommendation 23: WTO evidentiary standards should be applied in a balanced and reasonable way, particularly where exporter questionnaires and site visits are concerned.*

EXPORT PRICE

527. Export price is not defined in ADA. Thus agencies must consider the concept of when a product is exported from one country to another.

528. This is complicated when there are intermediaries and trading houses involved. In international trade there will often be a number of contracts relating to goods. Attention could be given to the first contract that calls for the goods to be exported, the contract that is applicable at the time the goods are actually exported or the contract applicable at the time the goods are imported into the country considering anti-dumping action.

529. The EC approach is to determine export price at the level of the first sale known to be for export. (Didier (2001:39), citing *Wooden Pallets from Poland* (OJ L150 of 7 June 1997) Inconsistencies may arise if an export price is calculated from a manufacturer that does not build in the costs of the export process, although these issues could be adjusted in any event.

530. Where globalisation of production is concerned, an important question is whether the amounts for profit within a group of companies are all added together directly or indirectly in the final export price. If not, it will be artificially lowered. (Didier 2991:39-40)

531. PC might seek input from the Attorney-General's Department in considering some of the contractual complexities permeating modern trade and identifying the test that would best fit the policy aims of the anti-dumping regime.

Export price – related parties

532. The same issues of control tests of relationship should apply to export prices as apply to normal values.

New Exporters

533. As noted above, the legislation currently has a gap in the treatment of exporters who commence production in the middle of an investigation period.

534. Another problem with new exporters is that they will typically have low volumes and may need to price at highly competitive levels to establish their brand in a new market. Yet this gives rise to technical dumping. This was noted above in relation to start-up costs. It will be desirable that there is a policy direction to make appropriate allowance in such circumstances.

ADJUSTMENTS

535. The rhetoric in support of anti-dumping provisions is that dumping is unfair. This implies some conscious intent on the part of the foreign exporter. The reality is quite to the contrary. As noted in Section A, in most circumstances dumping is found as a result of complex accounting discretions being applied under vague legislative provisions.

536. The Willett Review spoke of "the subjective nature of many of the decision made in the course of anti-dumping or countervailing investigations." (Willett, 2006: 101)

537. In the complex modern trading world, the comparisons required to determine dumping will be inefficient and unfair in the absence of fair and reasonable adjustments for the many variations in the way commerce is conducted.

538. The first question is how are these made and what is and is not accepted? The policy question is whether adjustments ought to be made for differences in taxation, currency, levels of trade, quantities, physical characteristics, sales expenses, administrative overheads and particular conditions and terms of sale. Are adjustments also to be made for differences in input costs, differences in quality, differences in brand recognition and reputation, bonuses and rebates provided by manufacturers, duty drawback on inputs to manufacturing and differences in currency projections.

539. Because it is difficult to provide exact guidance on this issue, much uncertainty remains and potential for inconsistency remains.

540. Article 2.4 of ADA demands that fair comparison be made between export price and normal value. It is mandatory. It concludes by saying that the authority shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

541. As the Panel in *US-Stainless Steel* noted, the essence of Article 2.4 ADA is to make due allowances "to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing." (Panel Report, *US-Stainless Steel*, para 6.77)

542. A crucial issue where adjustments are concerned is who has the burden of proof. This was considered in *EC-Tube or Pipe Fitting* (Panel Report, para 7.158). While the statement of the Panel is to some degree confusing, it importantly ensures that the burden cannot simply be placed on the foreign exporter. This is because the obligation under Article 2.4 is on the investigating authority. The Panel considered that "the investigating authority must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited." Interested parties must do what they can to substantiate their assertions but the distinct duty on the investigating authority is clear. The Panel in *Egypt-Steel Rebar* even indicated that in some circumstances the investigating authority must make adjustments not even asked for

by the parties if it is shown "by the data itself that a given difference affects price comparability …". (Panel Report, *Egypt-Rebar*, para 7.352)

543. There are thus two issues, one substantive and the other evidentiary. Australia's legislation in section 269TAC(8) is drafted in different language and leaves open to debate just how broad the circumstances of adjustment are required. First, a lot depends on the meaning of the phrase "circumstances of the sales" as referred to in that provision. Furthermore, adjustments are to be based on directions given by the Minister which may not necessarily correlate with best accounting and commercial practice.

544. The next issue is an evidentiary one.

545. The most significant concern is the evidentiary standards that some Customs officers require before an adjustment will be made. Australian practice tends to require conclusive evidence of differences in price before adjustments will be made. The adjustment process must be conducted within the obligations under ADA and Australia's domestic legislation. Such an approach is contrary to ADA and the jurisprudence noted above. A significant number of commentators, as well as adjudicatory bodies recognise that determinations of normal value and dumping margins are not exact science but contain numerous questions of judgment. It is both obligatory and reasonable for estimated adjustments to be made.

546. A key example relates to quantity discounts. Anyone would recognise that it is highly likely that the larger the quantity, the lower the price that a particular buyer can negotiate. Yet Customs officers, in seeking to compare transactions at different quantity levels, will at times only make an adjustment if some clear evidence of the relationship between quantity and price is demonstrated.

547. While some evidentiary basis is reasonable, it should only be such that on balance demonstrates an appropriate adjustment and be consistent with commercial reality. While it would be ideal if a particular entity had a price list which correlated price and quantity, that is simply not the way many people do business. More often than not, spot negotiations occur where a prospective buyer asks what discount it will receive if quantities are raised. In some circumstances, a number of prospective purchasers are grouped together to increase their buying power.

548. Customs administrators should be prepared to evaluate an evidentiary trail that on balance indicates that such adjustments are genuinely made. If an examination of historical circumstances shows that there are various adjustments within a range, it is of course appropriate for Customs officials to make adjustments based on a weighted average. They may even be justified in taking a conservative approach to the calculation in some cases at least, but completely ignoring an entitlement to adjustment simply because a direct document is not available would be improper.

549. This problem is exacerbated by the fact that in many countries, there are no domestic customers that purchase sufficient quantity to engender such volume based discounts for comparator purposes.

550. Once again there will be a trade-off between fairness and simplicity. It would be more desirable to promote fair estimates even on modest information, rather than to impose dumping duties in the absence of consideration of commercial factors worthy of adjustment.

551. A recent example in the steel sector is illustrative. In Thailand, domestic pipe and tube is made from local hot rolled coil. Exported pipe and tube is made from imported pipe and coil. The imported pipe and coil is subject to nominal import duties but these are not paid because of a duty drawback scheme. If imported hot rolled coil was used for the domestic product, duty would be payable and the price would be higher. The failure to adjust for this difference provides for technical dumping when in reality there is a completely understandable reason for price differentials. Either the adjustment is inappropriately denied under Australia's legislation or that legislation is inappropriately restrictive as compared to the more broadly described ADA provisions.

552. *Recommendation 24: Australia's legislation should be broadened to ensure that adjustments should be made on all reasonable grounds. Regulations and procedures should ensure that these need not be based on unduly restrictive*

evidentiary standards. Estimates commensurate with the commercial realities of the true situation should be made where on balance they are demonstrated. The administrator's own investigatory obligations need to be reinforced.

Lesser quality and secondary merchandise

553. Sales of lesser quality merchandise are likely to give rise to high dumping margins unless appropriate allowances are made.

554. Dumping margins will also be found if domestic sales of similar merchandise are excluded on the basis of being sales below cost. (Lindsay and Ikenson, 2002:24) the problem could be overcome if domestic sales at a loss of secondary merchandise were correctly seen as being in the ordinary course of trade.

CURRENCY DUMPING AND CURRENCY CONVERSION

555. Currency issues arise in two broad ways. The first is to make the actual conversions necessary so that comparisons of export price and normal value can be made. Where calculations are concerned, key questions include what is the appropriate date of sale? Is it the shipment date or the contract date?

556. The second key issue relates to the appropriateness of adjustments for currency fluctuations to make comparisons a true reflection of whether there is any unfair price discrimination. Currency fluctuations can easily lead to technical dumping per ADA 2.4.1. Thus exporters who try hard to avoid dumping may be caught in any event. (Sykes, 2005:33)

557. In volatile financial circumstances, it is important to understand that much technical dumping simply arises because of variations in the Australian dollar. If the value of the Australian dollar drops dramatically, more must be paid for imported product, increasing export prices and reducing the likelihood of dumping. The converse is also true. An importer cannot avoid dumping through hedging as such costs may not be appropriately adjustable under Australia's legislation as it is not a condition of the sale.

558. These issues also affect the way investigation periods are broken up for analysis purposes.

559. In *US Stainless Steel Plate and Strip from Korea* (22 December 2000) the Panel considered that the depreciation of Korea's currency meant that pre- and post-evaluation sales were not comparable. (Para 6.109)

560. An overriding policy question is whether anti-dumping action should be permissible if dumping only arises from cyclical currency fluctuations beyond the control of interested parties. That is surely not good policy, particularly so where it wrongly encourages an unfairness rhetoric.

561. Allowances for currency exchanges can also be a problem where corporations have forward cover over a broad range of transactions and where it is not easy to link to particular shipments. (Didier 2001:43)

562. The WTO only has a minimal response for this legitimate concern. Article 2.4.1 ADA allows for adjustments where there are "sustained movements in exchange rates …"Where the latter is concerned, a trader concerned that it is to be paid much later in a depreciating currency might either ask for a higher price or might take separate forward cover. Anti-dumping procedures should be neutral regardless of the choice made.

563. *Recommendation 25: The Productivity Commission should consider the most appropriate policy means to ensure that anti-dumping laws are not automatically triggered by unavoidable currency movements that in no way could be described as price discrimination.*

SAMPLING AND AVERAGING AS TO NORMAL VALUE CALCULATIONS

564. More and more anti-dumping actions are being brought against China. In due course this is likely to occur against India. In each case there may be numerous suppliers and great difficulty for importers and customs officials to engage in verification visits to each and every relevant factory. There are two conflicting policy concerns. On the one hand the transaction costs should not be exorbitant and decisions need to be made within a reasonable period of time. On the other hand, every interested party should only find that a dumping duty is imposed against them if there has been appropriate analysis of their own situation.

565. The WTO Anti-Dumping Agreement recognises this problem. First it allows the administrator to engage in sampling if the number of suppliers is too high. It does state that the samples must be "statistically valid". No indication is given as to the minimum standards of such a concept .

566. It is particularly important that the administration has sufficient expertise to properly identify a representative sample under such a test.

567. Any sampling system that does anything other than identify the most efficient foreign suppliers, will simply not produce the competitive checks and balances that administrators should be looking for.

568. They currently provide no indication of the basis upon which they sample but any selection under such a relatively small number is unlikely to be fair on a mathematical basis and certainly cannot be fair to an individual exporter who happens not to dump but who is found to do so simply because they were given an industry-wide average and was not individually investigated.

569. Secondly, ADA indicates that notwithstanding a decision to sample, individual exporters who wish to be reviewed may demand this except where it would be unreasonable to do so.

570. It is not clear in what circumstances an administrator would limit attention to a certain number of suppliers on logistics grounds, but then find a way to expand the number of exporters considered upon a request to do so. ACBPS simply does not have the resources to investigate each significant exporter.

571. The latter is exacerbated by tight time frames where Customs asks exporters to answer a preliminary questionnaire to indicate whether they are willing to be investigated. Because of the language difficulties and the small Australian market, many foreign suppliers who would ultimately be interested in being involved, simply do not meet these deadlines and hence are not separately considered. Given that the local applicants must get some evidence of dumping to get past the initiation stage, and given that they are likely to seek out those figures most favourable to their application, a need to sample which looks at the applicant's identified targets will skew the process towards their interests.

572. Article 6.10.2 goes on to say that notwithstanding sampling, authorities shall nevertheless determine an individual margin for a person submitting the necessary information in time for that to be considered except where the number of targets "is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation." No indication is given as to what would constitute an undue burden and whether the commercial and justice rights of the exporters concerned are a relevant factor or merely the financial and time constraints on bureaucrats. Needless to say, our system looks problematic if we only concern ourselves with the needs of the bureaucracy.

573. Furthermore for any individual consultant it is impossible to be in more than one place at a time and hence a large action such as the recent HSS case where a vast number of exporters were to be looked at, simply could not have been serviced adequately if Chinese site visits had gone ahead.

RESIDUAL MARGINS AND UNCO-OPERATIVE EXPORTERS

574. A related issue is the proper way to treat exporters who were willing to cooperate but who were not selected within the sample. Articles 6.10 and 9.4 ADA indicate that such exporters will be subject to duties that "shall not exceed" average dumping margins for those exporters who were investigated.

575. At present, if the sample shows that there was dumping, those other suppliers will be deemed to have dumped. That is grossly unfair. The better approach is to provide them with a favourable outcome if the sample shows no dumping but allow them to be individually assessed in the alternative scenario.

576. While this might seem unbalanced, it is the only fair policy response to a decision to remove those exporters from a realistic assessment in the first place purely for bureaucratic financial grounds. Dumping actions should only be applied to real cases of dumping and should only catch companies that truly engage in that practice. Where the administration seeks to determine a countrywide position via sampling and no dumping is found, it is logical to presume at that stage that the investigation should be terminated for all concerned. Conversely if for their own financial and timing reasons ACBPS officers are not able to turn attention to a number of cooperative exporters but find dumping by other entities, it is grossly unfair to presume that companies not analysed are behaving in the identical commercial manner to those companies found to be dumping.

577. A simple example would show how unfair this is. The result would be perverse if, for example, ten exporters were examined, nine found not to be dumping with the tenth found to be dumping at 100%. The average dumping margin would be 10%, yet only one out of ten of those selected was found to be doing so.

578. To use a fairness rhetoric in support of such a legal solution in such a scenario borders on the ludicrous.

579. If dumping is determined based on actual sales in the domestic market, it would be relatively easy to look at the behaviour of the non selected entities. If dumping is determined based on cost of production, there is no logical reason to believe different factories operate on identical cost structures.

580. There is also a questionable justification for even higher levels on those deemed to be unco-operative. Section 269T of the Act defines a residual exporter as an exporter not selected for investigation. Article 9.4 of ADA indicates that where only a subset of exporters has been investigated, anti-dumping measures applied to residual exporters shall not exceed the weighted average margin of dumping established for the selected exporters. This does not require that they be given a weighted average but rather that this be the maximum imposed. Section 269TG(3B) of the Act requires a weighted average to be applied.

581. Australian practice seems to be in violation of both ADA and the domestic legislation. Residual exporters are commonly given dumping margins far in excess of the weighted average of those investigated. This is both a matter of law and a question of evidence.

582. It appears to be impacted upon by a bureaucratic decision to divide people into cooperative and non-cooperative categories. Only the cooperative category is seen to be entitled to the weighted average dumping margin. Uncooperative persons are presumably analysed on a facts available approach. While details of the methodology are not publicly available, it seems a reasonable hypothesis that the approach taken is really a worst case scenario, namely, taking the worst possible evidence on any issue to get the highest dumping margin that is conceivable. Such an approach would be illogical, unfair and illegal. Only limited adverse inferences should be permitted and only then based on a plausible logical foundation.

583. It is particularly perverse when a person is put in an uncooperative category where they tried to cooperate but failed to meet tight deadlines, including obligations to translate foreign material into a non-native language for them.

584. ADA does not expressly allow for such a punitive tax but that may arise through a lax application of the facts available methodology as noted above. For example, Customs administrators might give undue reliance to broad allegations of dumping in the application itself as applied to exporters deemed unco-operative. That is not only methodologically flawed but more problematic given that exporters may be deemed unco-operative simply because they have not been able to deal

with a complex foreign language questionnaire within a tight time frame. Language in ADA 6.8 Annex II allows for this data to be considered but requires it to be carefully circumscribed from a probative point of view.

585. Because the obligation on the authority is to consider all relevant and verifiable information, it cannot be right methodologically to disregard favourable information and try and get the worst dumping margin for even unco-operative parties, although where a party is seemingly intentionally unco-operative, some adverse inferences might be appropriate but only then when the behaviour suggests that this is the most logical inference to draw. The issue is also not whether an exporter has failed to meet a specified deadline but whether in all the circumstances the lack of information is unreasonable. That includes obligations on the administrating authority to seek information in other ways. (Appellate Body Report, *US-Hot Rolled Steel*, paras 84-6)

586. The Panel in *Mexico-Steel Pipes and Tubes* (para 7.193) indicated that if authorities simply rely on information in the application "'as is' without verification of the accuracy of such information, the investigating authority is not complying with this obligation." While a methodology of always seeking the worst information for intentional unco-operative parties may be a disincentive to non-co-operation for others, it does not seem consistent with the legislative mandate. There still ought to be an attempt to find the correct figures for that party, albeit utilising the adverse inferences noted above. The more that specific questions are asked of such a party, the easier it is to identify the appropriate adverse inference. For example, if a party refuses to provide data to show whether sales were at a loss, it may be an appropriate inference to reject their figures and go to an alternative methodology. But to simply take the worst figures on every element of costs from anyone examined to construct a hypothetical MARGIN seems wholly unreasonable. This issue was not resolved by the Appellate Body in *US-Hot Rolled Steel* footnote 45. In due course it would be necessary to interpret what is meant by a "less favourable" result as referred to in paragraph 7 of Annex II.

587. Undue reliance on domestic industry's own assertions is shown by the differences in dumping margins between cases where actual data and facts available was used. Lindsay and Ikenson found average dumping margins of 27.22% in the US when the foreign producers' data were used while dumping margins averaged 95.58% when calculated on the basis of facts available. (Lindsay and Ikenson, 2002:36)

588. *Recommendation 26: Australia's legislation and practice should strictly adhere to WTO obligations as to residual margins for exporters not investigated. Presumptions of innocence should remain. Co-operative exporters who are ignored for expediency reasons, should never receive a deemed dumping margin simply because of the cost structures of others who were investigated. No-one should face an anti-dumping duty who is not actually found to have been dumping.*

589. *Recommendation 27: Exporters should not be branded unco-operative simply because they have tried but failed to meet the time and evidentiary standards in questionnaires. Even those who could be validly seen as unco-operative should not end up with a dumping margin higher than WTO mandated averages although fair and reasonable adverse inferences should be permitted in appropriate cases. Australia's international obligations do not mandate punitive and arbitrary figures in such circumstances.*

APPROPRIATE DATA PERIODS FOR NV, EP AND INJURY

590. Anti-dumping actions should only be brought if there is sufficient evidence of dumping that causes or threatens material injury. Because costs, prices and currency values vary over time, as do general market and injury conditions, appropriate data periods must be selected.

591. From a policy perspective, if the period is too short it will not provide an accurate picture of whether dumping exists or not or the historical reasons for alleged injury. If the period is too long, all parties are engaging in unnecessary transaction costs dealing with a vast array of data.

592. The WTO AD Committee recommended 12 months for the dumping determination with a minimum of six months, and three years for the injury determination.

593. ACBPS practice is typically to allow a one year period for dumping and a five year period for injury. While it is preferable to give ACBPS a discretion on a case-by-case basis, it may be preferable to allow each party to argue for the optimal time period as part of a preliminary procedural determination by the adjudicator. Ideally the application should call for articulated reasoning as to whether a shorter period is to be preferred and why. Interested parties could be given a chance to respond, after which ACBPS would make a determination on a case-by-case basis.

594. On the injury side, a five year period is unduly long. It rarely if ever adds more meaningful data and simply adds to the costs.

595. A three year period is likely to give an indication of the market features prior to and post the decision to bring an anti-dumping application.

596. A most important aspect of the selection of appropriate data periods is to undermine the ability for applicants to strategically time their applications to maximise the chance of a favourable outcome. Any static picture of a market scenario is to some degree misleading. Too rigid an approach would encourage applicants to consider when imports are temporarily high, when currency exchange rates increase the potential spread of dumping margins and when domestic economic circumstances are poorest, to maximise the chance of an anti-dumping duty being applied.

597. It is important that the administration turns its mind to not only the length of the period but how representative it is of the normal situation. To the extent that the relevant period is abnormal to some degree, at the very least appropriate adjustments would need to be made to account for those differences.

598. The recent global financial crisis shows the problem in having fixed approaches. The most recent unsuccessful anti-dumping action brought against HSS steel products used 2008 as the relevant year for dumping analysis. Because the global financial crisis hit with some rapidity around September of that year, there were really two distinct blocks, the period prior to that and the period after that in terms of injury analysis. A rigid application of a quarterly methodology would simply render the third quarter as a useless time period for any kind of sophisticated conclusion to be based upon.

COMPARING EXPORT PRICE AND NORMAL VALUE

599. Where averaging is concerned, the WTO Anti-Dumping Agreement provides for a number of alternatives but directs as a priority that averages should be compared to averages rather than to individual transactions. Given that individual transactions will typically vary from a mean, comparing individuals with averages will exacerbate the chance of finding technical dumping and should be avoided at all costs. Australia's administration has a good record in this regard.

ZEROING

600. "Exporters typically have multiple transactions with the importing country that is investigating dumping... and hence dumping margins in practice are almost invariably based on some 'average' amount of dumping." (Bown and Sykes 2008, 123). When calculating the average export price of a particular exporter, "[t]he zeroing method of calculation treats all instances of 'negative dumping' [i.e. instances where the export price is, in fact, above the normal value] as zero dumping... so that only the transactions in which the export price is below normal value 'count' in computing the numerator for purposes of averaging." (Bown and Sykes 2008, 123).

601. Zeroing has the effect of increasing overall dumping margins. (Bown and Sykes 2008, 123; Prusa and Vermulst 2009, 218; Vermulst and Ikenson 2007, 231). "...[Z]eroing inflates dumping margins without any sound economic rationale for doing so." (Bown and Sykes 2008, 130). Moreover, "[z]eroing will almost always inflate the dumping margins and can never lower the margins." (Prusa and Vermulst 2009, 224).

602. There are a number of arguments put forward by proponents of zeroing. However, the practice of zeroing has been widely criticised as having no sound economic basis. One argument put forward in its favour is that "...firms that dump should not enjoy any offset for the occasions on which they price above normal value", (Bown and Sykes 2008, 129) – that "...it is the

low-price transactions that really cause the injury..." (Prusa and Vermulst 2009, 234). However, Bown and Sykes (2008) suggest, in line with almost all literature on the subject, that "...most instances of dumping are perfectly normal and benign manifestations of ordinary market conditions." (Bown and Sykes 2008, 130). "[I]ndividual transactions at 'dumped' prices are generally of no concern whatsoever." (Bown and Sykes 2008, 130). Another argument put forward in favour of zeroing is that zeroing is necessary to "...accurately capture the impact of the low-price transactions" (Prusa and Vermulst 2009, 234). That is, "[w]ithout recourse to zeroing, incidences of dumping would be masked or diluted by resorting to methodologies that give equal weight to non-dumped sales." (Vermulst and Ikenson 2007, 233). However, Prusa and Vermulst assert that this "...violates basic econometric principles." (Prusa and Vermulst 2009, 234).

603. The Appellate Body of the WTO has strongly denounced the practice of zeroing in several decisions. (See, Bown and Sykes 2008; Ikenson and Vermulst 2007; Nye 2008; Prusa and Vermulst 2009; Voon 2007). This condemnation of zeroing is supported by economic theory.

604. A zeroing methodology should be rejected regardless of whether the US is able to impose its views on other members during the Doha negotiations. ADA is merely permissive. The Productivity Commission should only recommend commercially realistic and fair means of making the necessary assessments. Zeroing does not satisfy these criteria.

605. *Recommendation 28: Australia should not adopt an illegal and economically unjustified proposal to allow zeroing. Even if permitted through WTO negotiations, unless mandated, it should not be followed as it is bad policy.*

DE MINIMUS MARGINS

606. Article 5.8 ADA sets out *de minimus* standards in relation to the margin of dumping and volume of imports. A margin of dumping is *de minimus* if less than 2 per cent of the export price. Volumes are normally regarded as negligible if volumes from a particular country account for less than 3 per cent of imports of a like product in the importing Member unless countries which individually account for more than 3 per cent of the imports of a like product collectively account for more than 7 per cent of imports.

607. There is nothing to prevent a WTO member raising these numbers. That is particularly low and ought not to be supported on a cost benefit basis. Identifying an optimal figure would require some further analysis of the industries that are most prone to anti-dumping action.

608. Because of the costs involved and the methodologically uncertainties, a *de minimus* standard should be set sufficiently high that all parties can be confident in the validity of a positive finding. A 5% standard would be more reasonable in that regard. (Lindsay and Ikenson, 2002: 31)

609. The data selected is also problematic. The WTO rules and domestic legislation look at percentages of *imports*, and not percentages of the *domestic market*. This is poor policy. Because the alleged injury is in a domestic market, it is the percentage share of that market that should determine the potential for causation of injury. To concentrate instead on the percentage of imports, takes no account of how important imports are in a particular domestic market. Because the *de minimus* figures are very low, it is entirely possible that a very small share of import market volume will be caught up in an expensive investigation simply because it meets the threshold under that import market share test. This is particularly relevant in the steel sector. The domestic producers account for some 80% of the local market. A large number of importers operating from a large number of countries account for the remaining 20%. In those circumstances it is naturally the case that there will be many suppliers who have small percentages of a relatively small market.

610. Lindsay and Ikenson point out that concentrating on share of total imports also makes the standard operate in a variable and perverse manner. The higher the total level of import penetration in the relevant market, the more actual market share an exporter can gain and still be considered negligible under a percentage test. (Lindsay and Ikenson, 2002:28)

611. *Recommendation 29: In considering de minimus standards, it would be appropriate to look at values and volumes as well as percentages to ensure that it is only entities with significant potential impact that are caught up in the process.*

DEVELOPING COUNTRIES AND SPECIAL AND DIFFERENTIAL TREATMENT

612. Proper attention needs to be given to identifying appropriate levels of special and differential treatment for developing countries.

613. This may relate to the evidentiary standards, time limits for compliance, assistance in understanding the Australian procedural requirements, different types and levels of remedies if injurious dumping is found to exist and appropriate recourse to undertakings.

614. Suggestions have included higher *de minimus* tests of negligible import volumes and providing special rules for cottage industries. (Didier 2001:34)

615. Proper treatment of all developing countries is of particular concern if the only reason for finding dumping is the lack of a competitive market in the developing country. A developing country exporter that competes fairly on an open and well-established world market properly regulated by competition authorities, but which has undue market power at home, might be engaging in technical price discrimination, but the unfairness is to the consumers in their own country, not to foreign manufacturing competitors.

616. The spirit of the Doha Round focus and the obligation to provide special and differential treatment, which in all cases should be fair and reasonable treatment, does not justify anti-dumping action in such circumstances. Australia had very high tariff barriers until relatively recently and developing countries behaving similarly should not be treated as engaging in unfair actions. The proper approach to high tariff barriers in other countries is to engage in tariff reduction negotiations within the WTO environment.

INJURY FACTORS

617. Both the WTO Agreement and Australia's legislation list a range of injury factors. WTO jurisprudence makes it clear that customs administrators must address each and every one of the injury factors, otherwise their analysis is flawed.

618. While the Australian administration's practice would appear to be consistent with this, much depends upon the evidentiary requirements that they call for from local industry. It is difficult to know how thorough this is given the undue claims of confidentiality. That issue has been addressed above but the key policy aim should be that all relevant matters are addressed and all interested parties given sufficient information to be able to respond and allow customs administrators to make a fair and reasonable decision on a case-by-case basis.

619. Article 3.1 ADA is mandatory and indicates that a determination of injury shall be based on positive evidence and involve an examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and the consequent impact of these imports on domestic producers of such products.

620. Where the latter is concerned, Article 3.2 requires the investigating authorities to consider whether there has been significant price undercutting or whether the effect of imports is otherwise to depress prices to a significant degree or prevent price increases. It concludes by stating that no one or several of these factors can necessarily give decisive guidance.

621. Article 3.4, which is also mandatory, requires "an evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry" (emphasis added).

622. Again, this Article concludes by stating that the "list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance".

623. Where threat of injury is concerned, Article 3.7 lists a number of factors that should be considered. It again concludes that no one factor can necessarily give decisive guidance but the totality of the factors considered must lead to the necessary conclusion.

624. Cases such as *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* indicate that Article 3.4 is mandatory and the "language makes it clear that the listed factors in Article 3.4 must be considered in all cases."

625. While the list is broad, it is important that it is not applied in a technical fashion. The ultimate aim is to determine whether the injury is material and whether it was caused by the dumping. Simply looking for some evidence of one of the listed factors would not help for a robust conclusion on these other issues. For example, while the express reference to price effects in ADA is part of the legal framework, it would be poor economics if it dominated the analysis. The Gruen Review recommended that "price effects by themselves should not be sufficient evidence of injury. Further injury should be seen in the context of the entire operations of the relevant establishment." (Gruen, 1986:32).

626. An unduly technical approach would raise other problems when built upon presumptions made in other aspects of the analysis. For example, in considering whether there has been an increase in dumped imports, the Appellate Body in *EC-Bed Linen (Article 21.5 – India)* made it clear that exporters not investigated who are given a weighted average dumping margin under Article 9.4, cannot be presumed to be dumping for this injury determination. (Appellate Body Report, *EC-Bed Linen (Article 21.5 – India)* para 132)

627. The Gruen Review also recommended that injury should be significant for the relevant establishment and not simply for the specific product under review.

628. The US Court of International Trade approved the following statement by the International Trade Commission that :

629. "If increase in penetration alone were adequate to show injury, such a conclusion could be reached by a computer, negating the need for the conceived scheme of economic analysis, and weighing of all factors such as production, shipments, capacity utilisation, employment and profitability by a collegial body of human beings."

630. The court concluded that it fully agreed "with the Commission's rejection of what in essence amounts to a per se injury rule based upon significant market penetration."

Injury in face of profit

631. The Productivity Commission has asked whether outcomes of investigations are likely to be the same depending on how the local supplier deals with its response to dumped prices. First there is the question whether a local supplier is in truth responding to dumped prices or merely to import competition. It would be difficult to seek to draw meaningful conclusions from the relatively small number of cases in the sample. The overall point is that the causation analysis is wholly inadequate regardless of whatever responses the local supplier chooses to make.

632. The Productivity Commission also asks whether the current criteria and assessment processes should be reconfigured to give greater emphasis to some of the less tangible effects of dumping such as threatened injury or profit forgone. The answer should be an emphatic no. As noted throughout, allegations that these are problems in the systems are erroneous aspects of protectionist lobbying. In all cases it is about proper evidence. It is entirely permissible to bring an action in relation to threatened injury or in cases where profits are alleged to have been suppressed. In those cases, however, the evidentiary standards under ADA should be complied with and the administrator should determine whether on balance a claim has been made out.

633. It has been asserted by interests representing certain local manufacturers that there is a flaw in Australia's system in that a local industry cannot obtain anti-dumping duties where they are operating profitably. That is simply not the case but a vast amount of time and money has been wasted with lobbying the then Minister to give a statutory direction to customs officials in that regard.

634. Part of the confusion arose from a misreading of a previous Ministerial Direction.

635. A Ministerial Direction of September 1990 stated that "the government expects that material injury, or the threat thereof, will only rarely be taken as proven where the Australian industry producing like goods has not suffered, or is not threatened with, a 'material' diminution of profits or when the dumped or subsidised imports do not hold (or threaten to hold) a sufficient share of the Australian market to cause or threaten 'material' injury …" The Direction considered that material injury was "injury which is not immaterial, insubstantial or insignificant; injury which is greater than that likely to occur in the normal ebb and flow of business." The Direction does acknowledge that in rare cases it will still be possible to show material injury absent reduction in profits.

636. Another cause of that erroneous assertion has been the unsuccessful anti-dumping applications in relation to HSS steel products. If an application was found to be unsuccessful and the investigation terminated because it was demonstrably the case that the local industry was operating at increased profits, *and* at close to full capacity and in some years, was putting its customers on rations because it could not meet their demands, it is the cumulative factors that are the reason. In those circumstances it is logical to conclude that they cannot be injured by any dumping even if found. A local manufacturer cannot sell what it cannot make. There is no legal bias against a claim for reduced profits in other circumstances.

637. The decision to that effect in no way sought to assert that injury cannot ever be found where there is profit or indeed increased profit from previous time periods. Both the WTO Agreement and Australia's legislation make clear that that is possible.

638. The issue is one of evidence and not flaws in the law or administrative practice. Just as a local manufacturer can show injury via price suppression, namely, prices lower than they would have been but for dumping, they must be able to show injury via profit suppression for the same reason.

639. On the other hand, it must be extremely difficult to adequately meet the evidentiary standards when profit is rising. An anti-dumping duty is a serious inroad into the commercial rights of Australian consumers, manufacturers and importers and as such should only be based on cogent evidence of injury. In these circumstances it makes sense to concentrate attention on proof of adverse profit effects.

640. On the other hand, there are strong policy reasons to look to profitability as the key injury factor.

641. Lindsay and Ikenson recommend that there should be no affirmative injury determination in the absence of a substantial correlation between increased imports and declining operating profits to the domestic industry during corresponding periods. (Lindsay and Ikenson, 2002:26) They note that while there are many other indicators of industry performance besides operating profits, these "go to the heart of an industry's wellbeing. Profit levels reflect both volumes and prices, and they have a direct impact on investment and employment. A bright-line requirement of a substantial (i.e. statistically significant) correlation between increased imports and declining operating profits is therefore eminently sensible on the merits and has the added advantage of establishing some minimal analytical transparency in the injury process." (Lindsay and Ikenson, 2002:26)

642. The Gruen Review recommended that in order to emphasise the causal link to material injury, price suppression must be backed by other factors such as "seriously reduced profits".

MATERIALITY

643. The former Anti-Dumping Authority addressed the issue of materiality in its Report No 4 of March 1989.

644. It was not able to provide guidance beyond seeking to define material in terms of its opposite that is, injury is material if "not immaterial, insubstantial or insignificant; greater than that likely to occur in the normal ebb and flow of business."

645. *Recommendation 30: The Productivity Commission should attempt a more economically oriented definition of "material" in the context of the required degree of injury.*

THREAT OF INJURY

646. The Productivity Commission Issues Paper questions whether changes should be made to increase the ability to claim a threat of injury. There is no evidence to suggest that Australia's practice is suboptimal in treatment of allegations of mere threat. The issues were dealt with above in relation to whether injury can be claimed in the face of profitable domestic activities. Once again it is simply a question of due process and evidence.

647. Because anti-dumping action is permitted where there is a threat of injury, this raises difficult evidentiary questions. On the one hand, if anti-dumping is inappropriate behaviour, an importing country should not have to wait until an industry is destroyed before taking remedial action. On the other hand, challenges to threats of injury run the risk of positive findings in the absence of sufficient evidence. While it may make sense from a policy perspective to allow a domestic industry that is likely to be injured to raise the argument before injury occurs, there is no justification for laxer evidentiary standards.

648. ADA in fact calls for stricter evidentiary standards for logical policy reasons. Cases of threat of injury must be decided with "special care" and the threat must be "clearly foreseen and imminent …".

649. In addition under Articles 3.7 and 3.8, administering authorities must also be based on facts and not conjecture or remote possibility, must be based on changed circumstances clearly foreseen and imminent and must, inter alia, consider rates of increase of dumped imports, capacity, price effects and inventories. Most importantly, the evidentiary standards require that the totality of these factors show that they "must" lead to the conclusion that further dumped exports "are" imminent and that unless action is taken, material injury "would" occur. This is a very high evidentiary threshold. ASA experience has not noted any problems with Customs administration of these properly high standards. There is no policy reason to make the standards laxer and if that was to occur Australia would be in violation of its WTO obligations.

WHAT QUESTIONS ARE ASKED OF LOCAL MANUFACTURERS INCLUDING THOSE WHO ARE NOT PARTY TO THE APPLICATION?

650. In most cases, there is no follow-up questionnaire to local producers. It is all based on the initial application. That is perfectly reasonable as long as the initial application calls for all relevant data. As indicated above, because the initial forms need modification, the current procedures are inadequate in the way they deal with local manufacturers.

651. The foreign literature also suggests that the level of scrutiny of local producers is often less than that imposed on the site visits of foreign exporters. In the Australian context the ASA suspects that the greatest problem is the failure to use statutory powers to force information or make appropriate adverse inferences, rather than any bias in terms of levels of vigilance.

CUMULATION

652. The WTO Anti-Dumping Agreement and Australia's legislation allows for cumulation of different imports to determine whether material injury is caused or threatened.

653. While cumulation per se is said to be a reasonable policy response if viewed from the local industry's perspective alone, it is equally important not to allow smaller imports to be caught up in the mess of an anti-dumping action where they cannot have any realistic potential to cause serious injury. Thus the agreement and legislation provides the discretion to exclude importers who have small percentages of volume as discussed above in the context of de minimus.

654. While the value of cumulation might appear intuitive from the perspective of the industry, it can have methodological flaws. Cumulation leads to a higher chance of a positive injury finding even in conditions where the same market share exists.

(Hansen and Prusa 1996) This arises because the greater the number of defendants, the more likely there are to be competitive pressures and therefore lower prices in the import market. In addition, the larger the number of defendants, the more they may seek to free ride on each other and not properly organize a defence.

655. As noted above, nothing in the agreement prevents Australia's legislation excluding exporters with higher market share. Proper economic analysis of past experiences would be likely to support a view that higher figures should be applied. To allow small exporters to be caught up in an investigation not only would be problematic on cost-benefit analysis but also goes against any theoretical justification for anti-dumping regimes. A small exporter is highly unlikely to be operating from the kind of sanctuary market that allows conscious price discrimination or predatory behaviour. (Lindsay and Ikenson, 2002:28)

656. There are other policy issues. The low level *de minimus* rule and the ability to cumulate exports encourages applicants to take a scatter gun approach and bring in as many countries and exporters as possible as targets. Raising the threshold would act as a disincentive to shotgun applications. (Lindsay and Ikenson, 2002:29) Such applications raise other significant problems, including treatment of small exporters as unco-operative, impossibility of satisfying all requests for verification visits and the need to determine representative sampling.

657. Special rules should also be applied in favour of least developed countries to ensure that they are not caught up unnecessarily in complex anti-dumping actions.

MARKET ANALYSIS

658. An important issue in an injury calculation is to decide what is the relevant market. For example, in the *HSS* case, ASA contended that ACBPS needed to consider the situation of downstream users as it was necessary to go below the distribution chain level to understand how competition actually arises in this particular domestic market. It is believed that better guidance is required in this regard to ensure uniform practice.

CAUSATION

659. It is important to recall that dumping, whether inadvertent, intentional or deemed via statutory tests, is not in any way improper or illegal. Article VI of GATT 1994 and the Anti-Dumping Agreement itself limit governmental responses to dumping to one situation only, namely, where the dumping causes or threatens to cause material injury to a domestic industry. The causation analysis should be crucial to a determination of when anti-dumping action is permitted or not.

660. Unfortunately the ADA provisions are unclear, in large part because of disagreements between protectionist and anti-protectionist negotiators. ADA Article 3.1 indicates that a determination of injury must be based on "an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products."

661. Brian Hindley notes that "domestic producers whose difficulties have nothing to do with dumping are tempted to claim that their injuries *are* due to dumping. And in the absence of a strong cause-of-injury test, that claim will not be rigorously examined. Hence, the domestic producers will be able to parlay their troubles into protection." (Hindley 2007:342)

662. The important question is whether the causal link must be shown between dumping itself and material injury or merely between imports that happen to be dumped and material injury. (Sykes, 2005:37) Sykes uses the example of exporters under investigation with a 20% market share in the importing country where the dumping margin is exactly 2%. If one concentrates on the market share, that is the imports themselves, one might find that impact to be material. If one instead focuses on the very small dumping margin, one might come to a different conclusion.

663. Sykes notes the common positive findings of causation when increased volume or market share is found alongside declining prosperity for domestic industries. He makes the obvious point that correlation does not prove causation, particularly so if the

link must be to dumping itself and not merely imports. In speaking of the US system, Lindsay and Ikenson state that the causation analysis "has absolutely no analytical rigour … there are no standards for distinguishing between mere coincidence and actual causation …" (Lindsay and Ikenson, 2002:25)

664. In discussing the safeguards regime, Sykes makes the important point that if one only looks at imports, it is somewhat meaningless to talk about them as *causing* injury. As "from the standpoint of economic logic … import quantities are not a causal or exogenous variable – they are endogenous and *result* from other forces. For example, if imports and domestic products are perfect substitutes, then the quantity of imports will simply equal the difference between domestic demand and domestic supply at the equilibrium price. Within this framework, the exogenous factors are the determinants of domestic supply, domestic demand, and the import supply curve. Domestic demand is affected by such things as consumer tastes and incomes; domestic supply by the cost of inputs into production and the state of available production technology; and import supply by factors affecting supply and demand in other countries. The quantity of imports is then a *result* of the interaction of these forces; it is not a causal variable at all."

665. In looking at graphs where imports have increased and output and profitability have fallen, such an observation only shows consistency with a hypothesis that dumping has caused injury but does not demonstrate it. (Hindley 2009) Imports may be attractive for other reasons.

666. The most important gap in the causation analysis is to fail to properly consider what Hindley describes as "self-injury", namely problems arising from poor business activities and decisions and disadvantageous changes in the relative cost structure between the domestic industry and foreign competitors. (Hindley 2009) The domestic industry may be suffering because of cost increases, poor production, capacity difficulties and quality.

667. In the case of the Australian steel sector, the decision by OneSteel to concentrate on structural grade products has meant that it consciously has chosen a price structure to make it uncompetitive for consumers only needing non-structural grades. Yet it targets import increases that are predominantly caused by demand for such non-structural grades. Changes in consumer preferences to plastic piping has also taken away much of the historical market share of steel pipe and tube manufacturing. These factors are generally ignored in any analysis.

668. Another gap pertinent to the steel industry is to concentrate on the way the products get to market. There are demonstrably two distinct distribution chains, one flowing from the domestic monopoly producers and the other independents. Each compete for some of the same end customers but the domestic producers cannot satisfy all demand hence imports are required. Thus a competitor distribution network is necessary for an efficient market. The monopoly producers refuse to supply the competitor independent distributors for obvious reasons. Yet they attack their behaviour through anti-dumping applications. Imports that arise because of a refusal to supply competitors cannot be the cause of injury. It is another self-injury category.

669. Another approach is to not simply look at consistency between data sets but consider alternative hypotheses to injurious dumping and show that these are not inconsistent with the data being examined. (Hindley 2009) Hindley points out that a foreign supply curve might shift downwards because of technological advances, improved efficiency, new and cheaper sources of input supplies or dumping. Costs of production of the domestic industry might rise because of wage pressure, the price of other inputs, losses of efficiency and product characteristics making them less attractive to buyers as compared to the imported goods.

670. Hindley (2009) notes that if price increases for the domestic industry go up higher than for imports, this raises a strong hypothesis of self-injury.

671. An analysis of the practices in all key jurisdictions shows that causation analysis is the weakest element of the exercise and fails to follow proper economic and statistical methodology. Hindley (2009) evaluates EU behaviour and concludes that causation analysis "is dominated by the incorrect notion that mere consistency between dumping and injury proves that the dumping has caused the injury. Alternative hypotheses are 'examined' at the end of its investigations, true, but this exercise is perfunctory – ticking the boxes of a standard list. … The Commission does not go out of its way to generate alternative

hypotheses about causation, fails to notice hypotheses that stare it in the face, and ignores suggestions made to it." Australia's approach is particularly problematic and is significantly worse than other key users.

672. Banks (1990) suggested that at that stage "the administration appears to have been more concerned with establishing that an industry had been injured, by reference to one or more of the criteria … than the question of whether the imports in question had caused that injury." A similar finding was made by McGinnis (1985:38).

673. The IAC submission to the Gruen Review considered that considerations of causation in an environment which places emphasis on the domestic producer would display a tendency for outcomes to favour those producers even where significant other factors are contributing to injury. (Carmichael, 1986:5-6 cited in Banks, 1990)

674. The primary problem is the lack of appropriate economic expertise to engage in the analysis and deal with these theoretical challenges.

675. Most typically, after a finding of dumping and injury, ACBPS merely looks to see whether imported prices undercut local prices. If so, they often conclude that injury was caused by dumping. Sykes rightly criticises this approach, noting for example that price differentials might simply reflect the fact that dumped imports are lower quality products that must sell for less in equilibrium. (Sykes, 2005:39) If price cutting occurs there is a particular need to consider the causes of it. It may be differences in costs of input, currency conversion or actual product differentiations that are not caught up in the way like goods were originally identified.

676. That is particularly so in the recent unsuccessful dumping applications against HSS steel products where the bulk of imports are at a lower non-structural grade than the Australian standard produced by local manufacturers.

677. Most commonly, price undercutting is seen as the crucial factor proving causation.

678. An analysis of the way competition truly occurs in Australia in key sectors shows why undue reliance on price undercutting is perverse. To anyone reading the phrase "price undercutting", one would presume that the foreign exporter looks at the local price and then consciously decides to undercut it. More often the converse is the case. As noted above, any Australian producer must command a price premium over imported products because of a range of commercial advantages. In the steel sector these include the lack of a need for international transport costs and insurance, the removal of currency conversion uncertainties, the immediate appropriateness of the local product for domestic standards, quicker time to market because of the lack of necessity of international shipping and at times more reliable quality. As noted above, OneSteel has publicly suggested that this price premium is in the order of 8-9%. Anecdotally, ASA members and customers point out that domestic steel producers will typically approach end users seeking to make sales. They will ask those end users what prices they are quoted by import interests. They will then quote a price in response, taking into account what they know to be their price premium advantage.

679. A simple example will suffice. If an imported product is quoted at $1000 per tonne and if the natural domestic price premium for the local is 9%, then the equilibrium price that should be quoted by the local is $1090. If they wish to entice the consumer, they might cut that back to $1075. The price is consciously higher than the imported price. Customs administrators commonly see the latter as undercutting the former when the converse is the commercial reality. It is doubly perverse if that conscious commercial decision by the domestic producer is seen as both sufficient proof of injury and then sufficient proof of causation.

680. Examples from recent ACBPS anti-dumping reports show the greatest attention given to price undercutting.

681. An example is Trade Measures Report number 142, 8 December 2008. *Certain Tubeless Steel Demountable Rims from China*.

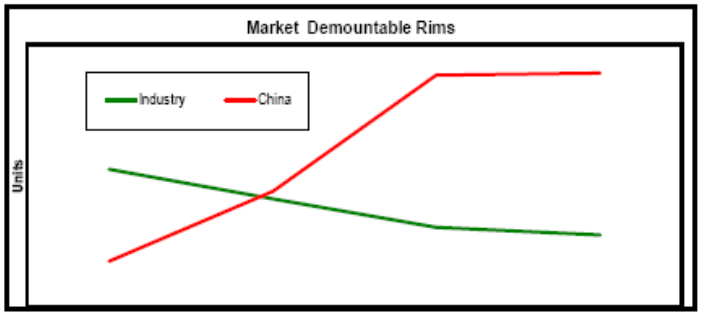
682. In this report no economic analysis appears to have been conducted in order to determine causation. Positive causation was found on three factors:

i) Price is a key consideration when purchasing demountable rims.

ii) Demountable rims imported from China and sold at dumped prices that also undercut Australian industry's prices is the primary cause of the industry's material injury.

iii) Other possible causes of injury, such as the un-dumped exports of the goods by Jining Centurion (see section 9.4.1), and changes in consumer preferences (see section 9.4.2) may have had some minor impact on prices and sales but were not primary causes of the Australian industry's material injury/

683. The potential impact of "other possible causes of injury" was discussed briefly but was not included in a statistical analysis when considering the relationship between injury to the domestic market and the dumping of imported goods. This is demonstrated by the following graph which was included in the report.



684. This graph plots the volume of the Australian industry's sales against the volume of Chinese import sales. Under this graph it is written "Customs considers that Arrowcrest [the domestic producer] has experienced injury from lost sales". While at this stage of the report customs do not conclude that this injury has been caused by dumping, plotting one against the other and observing the inverse relationship between the two, appears to be used at a later stage in the report as justification for drawing a causal link.

685. Having found undercutting as an injury factor, using the same factor to prove causation ipso facto, is in fact a complete failure to address the causation analysis in a comprehensive and intellectually rigorous way. For example, if imported goods were found to have a dumping margin of 2.1 percent but undercut local product by 50 percent and were better in quality, it would be nonsensical to assert that the dumping per se is causing any material injury. It is the complete inability of the local industry to meet the price/quality standards of non dumped imports that is crucial.

686. As indicated throughout, particular policy issues permeate a number of the headings in this submission. A key aspect of the causation determination is to ensure that the administering authority has an accurate picture of the state of the particular market. For example, in the steel industry, it is necessary to consider the various distribution chains and the refusals of local producers to supply competitors of their own related distribution arms. Other cases would have other examples of underlying market distortions that need to be taken into account.

Causation methodology options

687. Identifying an optimal methodology involves considering the most important factors and also tests that show more than correlation. A previous section considered the importance of profit effect as a key injury factor. Where causation is concerned, Sykes notes that price suppression is a more logical issue from an economic perspective than undercutting although the difficulty is to find a methodology to determine its presence. A common practice of relying on correlations between import quantities or prices and domestic prices is an inadequate methodology. (Sykes, 2005:39)

688. There are a range of statistical techniques that are better suited to determining causation. The Productivity Commission is asked to critically evaluate differing methodologies, and provide a recommendation as to the method to be applied.

689. Econometric or simulation modelling has been suggested by Boltuck (1991); Kaplan (1991); Knoll (1989); and Murray and Rousslang (1989). The Productivity Commission could also consider the work of the Bureau of Economics at the USITC which produces simulation results based on modelling exercises. (Sykes, 2005:41) Sykes suggests that if done carefully this would bring much more economic coherence to injury assessments (Sykes, 2005:41) although he questions anti-dumping policy in toto and the merits in improving one element alone.

690. Lindsay and Ikenson suggest that under an appropriate causation analysis using quantitative economics to determine if the domestic industry is materially worse off because of dumped imports a key issue would be the substitutability of subject and non-subject imports, subject imports and domestic production and domestic production and other goods. The authors note that "if non-subject imports substitute easily for subject imports, then the effect of anti-dumping remedies will be limited, since non-subject imports will simply fill the place formerly occupied by subject imports." That is exactly the case in the steel sector where there are numerous alternative sources of supply for most products at least. (Lindsay and Ikenson, 2002:27)

691. The other choice is between "bifurcated" and "unitary" injury analyses. The first, as adopted in Australia, is to first consider whether there is material injury and then consider causation. Unitary analysis on the other hand looks to whether domestic industry would be materially benefited absent the dumping.

692. The unitary approach uses standard tools of economic analysis to determine the effect of dumped goods on the domestic industry. Economic models such as, the Comparative Analysis of Domestic Industry Condition (CADIC) or the Commercial Policy Analysis System (COMPAS) are mentioned in the literature to simulate the performance of the domestic industry but for it having to compete with the dumped imports. Information on elasticities, price and quality data must be collected at the investigation stage in order to be used in the economic model. In the US, both petitioners and respondents are given the opportunity to submit information and commentary regarding elasticity estimates.

693. The bifurcated approach asks two questions (1) did the domestic industry suffer material injury over the period of the investigation and if so, (2) did the dumped imports contribute to this material injury? This approach does not use an economic analysis but rather observes trends and correlations. Injury determinations based on this approach have been rejected by a number of reviewing bodies because the methodology does not distinguish between injury caused by dumping and injury caused from other factors, such as demand or supply changes. For example, both a US court and the WTO have overturned injury determinations by the United States International Trade Commission (USITC) on this basis.

694. In rejecting a USITC injury determination using the bifurcated approach, the US Court of Appeals for the Federal Circuit explained that "a showing that economic hardship to domestic industry occurred when LTFV [less than fair value] imports are also on the market is not enough to show that imports caused material injury … Hence, the anti-dumping statute mandates a showing of causal – not merely temporal – connection between the LTFV goods and material injury."

695. The WTO expressed a similar position when it overturned another USITC injury determination based on the bifurcated approach. The WTO Appellate Body explained that in applying Article 3.5 of the WTO Agreement, which outlines the need to "demonstrate a causal relationship", investigating authorities must "ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury which, under the Anti-Dumping Agreement, justifies the imposition of anti-dumping duties."

696. Accordingly, it appears that a causation test based on economic analysis is considered best practice. Economic models enable investigators to ascertain a realistic distinction between injury caused by dumping and injury caused by other factors.

697. The Commission can then consider what additional expertise is needed to engage in this analysis in a robust and rigorous way, whether through added resources to ACBPS or through a bifurcated system or both.

698. *Recommendation 31: The Productivity Commission should develop an appropriate economics based causation test and consider the best adjudicatory system within which it should be employed.*

NON-DUMPED CAUSES OF INJURY – EVIDENCE, VERIFICATION AND INVESTIGATIVE POWERS

699. Both the WTO Agreement and Australia's legislation demand that the customs administration consider non dumped causes of injury and ensure that those causes should not be attributed to dumping.

700. In response to the Gruen Review's call for a substantial effort to be made to allow for the influence of factors other than dumping in causing injury, the then Minister, in the Second Reading Speech for the 1988 Anti-Dumping Authority Bill stated:

> "Assessments of material injury and the causal link must be vigorous and anti-dumping measures should not be used as a de facto form of protection: they have to be seen as a set of measures to discourage unacceptable short-term trends to knock out an industry … The Authority will take into account the influence of factors other than dumping causing injury."

701. This is still one of the weakest elements of Australia's administrative practice. Most investigations fail to adequately consider non dumped causes of injury. Even when they are found to be present, little is done to reduce the anti-dumping duty to ensure that these factors are excluded from the duty calculation.

702. Article 3.5 provides an inclusive list of such non-dumping factors being "the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry." (para 86)

703. In referencing "trade-restrictive practices of and competition between the foreign and domestic producers …" issues of competition and competition policy must be considered by Customs administrators even though they do not have a direct mandate under TPA. As noted throughout this submission, in monopoly and oligopoly situations, this is crucial. This is certainly the situation in the steel sector which has dominated the last decade's anti-dumping activity in Australia.

704. Proper attention needs to be given to other issues that could account for the injury such as differences in quality, brand recognition and reputation, reliability of meeting deadlines, lower costs of exporters and even importers "betting" on favourable currency returns through their foreign trade.

705. One aspect of the identification of injury caused by factors other than dumping concerns the nature of the products in issue. Again as noted above, differences in quality were also an issue in a like goods analysis where in the steel sector, there are significant differences between structural and non-structural grades. The broader the administering authority's approach to determining like products, the more there will be some differences between the products being compared. It is then possible that the injury was caused by those differences and not by any price discrimination. (Moulis and Gay 2005:78) This also relates to issues of appropriate adjustments as discussed above. It appears that OneSteel is now seeking to offer a different price structure for structural and non-structural products, with the latter primarily being imported. To compare independent importers' prices with OneSteel's domestic production rather than its non-structural imports would be an unrealistic mechanism that can only increase the likelihood of technical dumping being found.

706. There are a number of policy issues that relate to the question of attribution. The first is the evidentiary basis for determining non dumped causes of injury. Typically, this would involve seeking evidence from other importers not subject to the anti-dumping application as to the pricing and market share of non dumped supplies. For example, if an anti-dumping action is brought against China but not Vietnam and Vietnamese exports set the price in the local market, then any injury is really being caused by the non dumped prices regardless of Chinese figures unless they significantly undercut Vietnamese prices as well.

707. Often an anti-dumping duty will be placed on goods from one country but not on the same goods imported and sold at a similar price from another country. This raises the question as to how injury can be found on the first set of goods but not on the second? This inconsistency was recognised in the US Court of Appeals for the Federal Circuit where the court overturned the United States International Trade Commission's positive injury finding. "Because domestic users of magnesium could have bought fairly traded Russian magnesium rather than dumped magnesium, the court found that imports of dumped magnesium did not injure the domestic industry, and therefore whatever difficulties the domestic industry faced were the result of market forces rather than unfair trade practices." Accordingly, the presence of similar goods imported from another country is a crucial factor which should be considered when determining injury or the amount of duty imposed. Particularly when without such a consideration it is possible for domestic producers to bring a dumping action against goods from one country while continuing to import similar goods which are not subject to dumping duties from another.

708. While Australia's customs officials will make such inquiries when asked to do so, it is typically the case that the persons with the relevant information will refuse to cooperate. Typically Australia's customs officials will not take any further steps to get that evidence and will conclude that they were not able to prove to a sufficient degree that there were non dumped causes of injury.

709. This is problematic for two main reasons. First it effectively shifts the burden of proof on to the importer end user interests to show that dumping was not causing injury. Instead ADA and the legislation put the onus on the applicant to show that this is the case and particularly requires non dumped causes to be considered in the analysis.

710. The second key flaw is that parliament has given the Australian bureaucracy express statutory powers to ask for this information. It would appear anecdotally that customs bureaucrats will never use this power, worrying that it would be offensive to innocent commercial interests to do so.

711. A bureaucrat given a statutory power should not make a blanket determination never to use it in relevant circumstances, otherwise they are unduly fettering their discretion contrary to parliament's intent. The Gruen Review recommended that "(a) substantial effort" should be made to allow for the influence of factors other than dumping in causing injury.

712. The Willett Review expressly referred to section 214B of the Customs Act and Customs' reluctance to use that power. It concluded that "where important information requested is not forthcoming it may be necessary to consider the use of the powers provided by this section." (Willett, 2006:57)

713. It would be very easy for a bureaucracy to approach this issue sensitively. Those with relevant information ought to be able to be made to understand that full information helps administrators come to decisions that optimise the efficiency of the Australian market. The only people who are unlikely to be sympathetic to this policy aim are those who would wish to use anti-dumping procedures to gain unjustifiable competitive advantages. There should be little reluctance in using statutory powers to promote assistance from such sources.

714. A key example of the problem was the *Galvanised Pipe* case. The then TMRO demanded that Customs reinvestigate because they had failed to consider imports from a country that was not subject to the investigation, to determine the extent to which this led to the injury claimed. The administering authority was apparently told by importers from that country that they were unwilling to provide information. The administering authority apparently did nothing further in the circumstances and reiterated its view on the merits.

715. The problem compounds itself because it first leads to an increased chance that a measure will be improperly imposed and secondly, prevents the best evidence being available to determine a realistic non-injurious price where some measure is justified.

716. In the review of measures pertaining to *Copper Tube from the Republic of Korea*, measures were revoked because it was found that non-dumped products were significantly below the price of dumped product. Hence it could not be concluded that injury would be linked to dumping. That perfectly valid logic applied on a review should be a foundation of all causation methodology.

717. Canadian practice appears at least marginally better than Australia. For example, in a 2004 decision regarding certain steel fuel tanks the Canadian International Trade Tribunal found that dumping was not the cause of injury when they explored a wide range of other factors. Changes to the Canadian dollar, the contraction of the Canadian market and the domestic producer's behaviour in the marketplace were found to be the actual cause of the injury suffered:

> "the Tribunal has concluded that most of the injury suffered by the domestic industry in the Canadian marketplace can be attributed to a single non-dumping factor, the significant contraction in the Canadian market in 2002. The remainder is mostly due to other non-dumping factors. The most important of these are SPI's virtual monopoly position as the sole domestic producer and the way in which SPI has conducted itself in the marketplace. In the Tribunal's opinion, these factors led some SPI customers and potential customers to seek an alternative source of supply."

718. The EU have taken into account whether competition from substitute products, competition from other domestic products or the fluctuations in the exchange rate have caused injury. (Van Bael and Bellis 2004:268)

719. In *Case C-358/89, Extramet Industrie v EC Council, 1992 ECR I-3813*. Extramet Industrie (Extramet) was the largest importer of calcium metal in the EU. As a consequence of a complaint on behalf of Péchiney Electrométallurgie SA ("Péchiney"), the sole producer of calcium metal in the EU, anti-dumping measures were imposed against imports of calcium from the PRC and the Soviet Union, the main sources of Extramets imports.

720. Extramet appealed the decision to impose the dumping measures, arguing that Péchiney only suffered injury because it had refused to supply calcium metal to Extramet. After Péchiney failed to supply calcium metal to Extramet, Extramet commenced legal proceedings against Péchiney for abuse of a dominant position. Extramet argued that anti-competitive practices should be considered in anti-dumping investigations. The court held that the Commission should have considered whether Péchiney contributed to or caused the injury suffered. Therefore, the anti-dumping measure was annulled.

721. One methodological mismatch arises from the fact that the Appellate Body has considered that it is not necessarily the case that the collective effects of causal factors other than dumping should be lumped together to determine causation of injury (*EC-Tube or Pipe Fittings*, para 191-2), although the Appellate Body considered this may occur in an appropriate case. If cumulation arises in relation to dumped imports but not in relation to the analysis of non-dumping factors, there is an imbalance. This flows from considering the causality requirement "in a proceduralist manner …". (Mavroidis, Messerlin and Wauters 2008:123) The Productivity Commission should ensure that such an analysis is undertaken under defensible economics methodology.

722. *Recommendation 32: The Productivity Commission should recommend that Customs use its powers to gain all relevant evidence including that pertaining to non-dumped causes of injury. The Productivity Commission should also develop recommendations as to a logical basis for attribution.*

NON-DUMPED CAUSES OF INJURY – RELATIONSHIP TO NIFOB

723. As noted above, there are two important aspects of the requirement to consider non dumped causes of injury. The first is to determine whether causation exists at all. The second is to allow for a proper reduction of the duty to a non injurious level where some duty is applicable.

724. Customs administrators should be required to attribute injury to the various causes so that a non injurious price can be limited to the injury caused by dumping alone.

725. This relates to the way Australia calculates a non injurious price. This is another of the most significant flaws in the Australian legislation and practice. A subsequent section deals with that issue discretely. This section merely identifies how this issue inter-relates with the non-attribution obligation.

726. The WTO agreement strongly recommends but does not mandate that a duty less than the full margin should be applied if such lesser duty would be adequate to remove the injury caused by the dumping. (Article 9.1)

727. The important question is the methodology employed to determine what that lesser figure should be. Here the most significant commercially realistic factor would be the presence of non dumped imports into the market. Where these are available at low prices and sufficient volumes, and where these take market share from the local industry and/or cause the local industry to adjust its prices, that is the best methodology of identifying a commercially realistic non injurious price.

728. Instead, Australia's customs officials primarily concentrate on a cost plus historical profit level for the domestic industry.

729. This method is devoid of commercial reality and effectively looks at the aspirations of the local industry as to profitability rather than what it can realistically expect as a result of competition from non dumped sources.

730. This is a crucial element if competition is to be maintained even in the face of a positive anti-dumping duty. To select non injurious prices based on aspirational profit levels that are not realistic in current market conditions would operate as a bar to exports from those sectors. A historical analysis of the behaviour of exporters after positive anti-dumping findings shows this to be the case.

731. The Gruen Review noted that NIFOBs are also likely to err on the high side. Furthermore, the lesser duty rule will not compensate for excessive dumping margins. (Banks, 1990)

PRELIMINARY AFFIRMATIVE DETERMINATIONS AND RESPONSES

732. The tenor of the WTO agreement is to call for administrators to notify interested parties of their tentative views to allow responses before final determinations are made. This is a sensible policy aim but is sometimes undermined by the wish to meet tight timeframes.

733. As noted above, the first determination is whether to accept an application. This submission has argued that interested parties should be made aware of the application and given an opportunity to respond so that the decision whether to proceed or not can be made after taking into account all relevant facts. While the evidentiary standard should not be as high as is required for provisional or final measures, a reasonable standard still needs to be met.

734. The next stage where such determinations are made is where provisional measures are sought.

735. Once again it is important that customs officers make their preliminary views known to interested parties and give them a final opportunity to respond before a decision is taken on the application of provisional measures.

Preliminary measures – timing

736. Provisional measures may only be taken after a preliminary affirmative determination of dumping and injury. Such measures shall only apply for a period as short as possible, not exceeding four months. The period may be extended in certain circumstances.

737. The Productivity Commission issues paper raises a question as to whether preliminary measures should be available at an earlier point of time. There are conflicting policy goals. On the one hand, an industry truly deserving protection under a defensible policy environment would wish to obtain it as soon as possible to alleviate any ongoing injury. On the other hand, such decision should only be taken when sufficient time and attention has been given to an analysis of the relevant data, including an opportunity for interested parties to present their arguments, so that customs officials can be reasonably confident in their conclusions.

738. The Willett Review concluded that "the practicalities of completing a preliminary finding which includes the gathering, verification and analysis of all relevant information would make it virtually impossible to complete the task effectively within 60 days." (Willett, 2006:80)

739. The very opportunity to apply provisional measures and the time limits provided in the Anti-Dumping Agreement afford a fair and reasonable balance between these conflicting values. Because of the long lead times in forward orders and transport times to Australia, and because of the need to show material injury, advancing the entitlement to preliminary measures for a few weeks would be much more damaging to the robust analysis in already tight timeframes than it would benefit legitimate interest of complaining industries.

Preliminary measures – nature

740. Preliminary measures are not final determinations. Their aim is to provide protection for local industry in cases where a positive final outcome seems warranted. Because there will then be a full investigation and final determination, it is always possible that no dumping duties will ultimately be imposed. Thus there is a need to ensure that any provisional measures are not unduly onerous on importers who are affected.

741. Great care should be taken in deciding whether to impose some form of security. Once securities are in place, local producers can then drop their prices and basically take market share at will.

742. The current approach can call for some kind of a bank guarantee or security instrument. Importers are charged significant commercial rates for such facilities and hence this constitutes a very significant cost of doing business. In many cases that cost cannot be passed on to customers given that forward orders have already been concluded. That also means that the preliminary measure does not even effectively protect the local industry because it does not ensure increased pricing. In other circumstances there is a need to gamble on whether the final decision will be in favour of anti-dumping duties or not.

743. It is important to try and find preliminary measures that provide no less protection to domestic industry but are applied in ways which minimise the cost to presumptively innocent importers, pending a final determination. at the very least, for companies whose credit worthiness should be presumed, their own guarantee ought to suffice.

STATEMENTS OF ESSENTIAL FACTS AND RESPONSES

744. As noted above in relation to acceptance of applications and preliminary affirmative determinations, there is an obligation on customs officials to notify interested parties of their views as to key facts and allow an appropriate time for responses.

745. It is desirable that there is a meaningful stage where parties can present arguments about the facts as found prior to decisions being made by the administering authority. Article 6.9 of ADA indicates that the authorities shall inform all interested parties of the essential facts under consideration in sufficient time for the parties to defend their interests. There are then further time periods to respond after the SEF, and a further period to report to the Minister.

746. Three issues here are whether appropriate and sufficient information is given, whether the timeframe is appropriate and whether the administering authority gives interested parties a meaningful opportunity to suggest alternative conclusions to those expressed or implied in the SEF.

747. There is a very significant difference between a statement that limits itself to the findings of essential fact, leaving it to later submissions to draw attention to the proper conclusions that can be made from them, and on the other hand a document that is effectively a draft of the ultimate decision or recommendation. The Australian approach tends towards the latter, which removes an important avenue for interested parties to properly present their arguments before preliminary conclusions are made. (Moulis and Gay 2005:80)

748. This makes it extremely difficult for interested parties to respond in a way which would give them any confidence that their views will be fully taken into account. If the bureaucrat has already made up his or her mind on key issues, that is unlikely to change.

749. Australia's practice should be amended to ensure that only findings of fact are presented at that stage and appropriate time allowed for responses by interested parties.

750. It would also be desirable that a further opportunity for all interested parties to meet and discuss issues could be offered at that stage.

NON-INJURIOUS PRICES

751. As noted above, non-dumped causes are relevant both to a causation analysis and also as to the setting of non-injurious prices. After calculating the dumping margin, administrative authorities are entitled to apply a lesser duty if it would alleviate the injury. This is sometimes described as identifying the injury margin. In the Australian context it is described as the non-injurious price.

752. As noted above, in the context of causation and attribution, Australia, like the EU, takes a flawed and effectively protectionist approach to this step. It only seems to consider the differences between the imported product and the domestic industry's like product. Because it is trying to determine what the local industry would have been able to sell for in the absence of dumping, (that is identifying the local industry's unsuppressed selling price), it constructs a local price by looking at costs and adding a hypothetical profit building in a determination of a reasonable rate of return.

753. There is no policy justification for relying solely on local manufacturers' costs plus profit to determine a non-injurious price. The biggest problem with this is that it ignores completely whether such a return could be achievable in the conceivable market circumstances. (Didier 2001:45) In any industry with a robust market with adequate competition, there will be a range of suppliers both imported and domestic. If there are imports with a significant share of the market that are not dumped, they will set the standard of what could be achievable by the local industry even in the absence of dumping. It means that in some instances, imports found to be dumped and which are sold at prices higher than undumped imports, are faced with a further anti-dumping duty.

754. The calculation is particularly disconcerting when the local manufacturer itself imports like products. It makes no sense to ignore its own import prices in the market as setting non-injurious standards. It is poor in policy and also an inducement to anti-competitive strategic behaviour. To ignore these factors is to simply provide a protectionist bias towards local manufacturers. That would be so whether intended or not.

755. This approach cannot be justified on the basis that ADA and our legislation merely give a discretion to have a lower level of duty. Once a discretion is exercised, (which is invariably the case), it should be exercised on a fair and unbiased basis.

756. A failure to apply a reasonable methodology of determining such an amount is an undue restriction on that discretion which can only operate in a protectionist manner.

757. If administrators are truly trying to find the price the industry may achieve in the absence of dumped imports, it simply cannot ignore the price setting power of undumped imports.

758. The administering authorities should first consider what the exported price of the goods subject to the dumping duty would have to be to avoid there being dumping. It ought then to consider whether such sales would be likely and if so, on what likely quantities. The authorities would then consider all other sales in the relevant market either from non-dumped imports or from manufacturers who are not claiming protection or who have not demonstrated injury. Consideration might be given to the capacity of such suppliers to take up any available market share that would be lost by the dumped imports. That can be compared to the capacity of the local industry. An assessment can them be made as to the likely arm's length competitive and fair prices that will be set in the market. This can then lead to identification of a non-injurious price.

759. There should be no objection to administering authorities being moderately cautious in making these determinations to ensure that the local industry is not inadvertently harmed. That is quite different to simply ignoring these factors and pretending that the local industry could achieve profit levels that simply are not possible on evidence readily available to administering authorities.

760. Another advantage of this approach is that it overcomes the bias against importers through issues of confidentiality. If an unsuppressed selling price is only based on the local producers' figures, obviously those opposing the application will not be given access to this data and a meaningful opportunity to address the non-injurious price issue.

761. A related problem is the way the representative profit level is identified. PC should investigate what assumptions are made about adequate returns on capital or the need to generate future reserves. Once again any level identified should be realistic in the context of the current market circumstances. To simply use established profit levels from related industries or historical figures at an earlier stage is not an accurate reflection of what is likely to be the case in the absence of dumping at the time an anti-dumping duty would be applicable. Once again the most significant factor is the presence in the market and pricing of undumped imports.

762. In the EU, if an amount less that the dumping margin is sufficient to remove injury then the anti-dumping duty must be set at this amount (Art 7(2) and 9(4) of the Anti Dumping Regulations). A reasonable profit is added to the cost of production of the EC industry to determine this amount (Stevenson (2005) annex 1 p 26). According to the Court of First Instance, the "... profit margin .., must be limited to the profit margin which the community industry could reasonably count on under normal conditions of competition, in the absence of dumped imports" (Case T-210/95 *European Fertilizer Manufacturers' Association (EFMA) v Council of the European Union* [1999] ECR II-3291. Account is taken of the level of profitability in sales of other products of the same type produced by the community industry (*Ferro molybdenum* (China) 2002 OJ (L 35), 1) and the need for long term investments (*Hairbrushes* (China, Korea, Taiwan, Thailand) 2000 OJ (L 111) 4).

763. This is of crucial significance when as is commonly the case, an anti-dumping investigation involves input goods vital for other Australian manufacturing industries. Setting the final duty level in accordance with information about undumped imports helps ensure that there is adequate protection for the local industry at the same time as there being proper commercial protections for those industries utilising the inputs.

764. Another area where lesser duties should be applied is where dumping margins have been caused by currency fluctuations. If dumping has only technically arisen through short term and volatile currency movements, longer term projections might lead to a more realistic duty level.

765. *Recommendation 33: Non-injurious prices should be set by reference to realistic factors in the market under consideration. Non-dumped price setters should also set the non-injurious price.*

PROCEDURAL TIME LIMITS-GENERAL

766. The proper approach to time limits calls for a compromise between the conflicting values of expeditious support for domestic industries and sufficient time for all parties to do research and analysis and properly present their cases. A further issue where timeframes is concerned is to remember the trade-offs between speed and accuracy.

767. Article 5.10 ADA sets out time limits for the duration of investigations. Except in special circumstances they are to be concluded within one year. In any case investigations must be concluded within eighteen months of the date of initiation.

768. Current overall time limits in Australia are at the shorter end of the desirable spectrum and are particularly unfair to foreign exporters.

769. While short timeframes are typically called for by domestic industry, an important contrary argument is that time limits are always biased in favour of applicants. This is because there is no time limit on when an applicant can lodge an application. It can carefully research and analyse data, draft applications and submissions and even tactically seek to identify the most opportune timing so that favourable review periods are selected.

770. Once an application is lodged, very tight timeframes then apply. This already provides a major tactical advantage to the applicant. For that reason alone, more should be expected of them and policy-makers should be very wary of further calls by local producers to shorten the timeframes even further.

771. A real concern with this tactical imbalance as to timing of preparation of material is that after initiation at least, the applicants are merely expected to present information from their own records while importers need to get assistance and information from exporters in foreign countries.

772. This is exacerbated in situations where a very small number of corporations comprise the domestic industry and where there are a large number of foreign suppliers that are affected by the application. It is extremely difficult to even identify all relevant foreign suppliers, advise them of their rights and obligations under Australia's anti-dumping law, explain their practical obligations in completing questionnaires and providing adequate availability in site visits. This is particularly so when foreign suppliers do not speak English as a first language and do not utilise accounting systems that conform to Australian standards.

773. Organising consultants, coordinated actions and financial contributions to advisers adds to the difficulty. It has even been shown that positive injury findings are more likely the larger the number of importers, simply because there is a greater free rider problem and ensuing difficulty in having importers coordinate responses.

774. Where foreign exporters are concerned, as noted above, there is also the problem that they are not readily notified of the application. Australia's bureaucratic practice is to notify the consulate of an application. It then takes significant time for that advice to get back to the foreign government and have their bureaucratic officers seek out all affected parties. They then need to get advice as to the Australian system and begin the onerous task of responding to the elaborate exporter questionnaires.

775. A company that fails to respond to the questionnaire within the tight time frame is treated as uncooperative and is likely to have an adverse finding for that reason alone. That is particularly unfair in situations where small to medium foreign suppliers are not notified early enough and struggle to understand issues of language and the nuances of Australian accounting standards and customs administrative practices.

776. It is typically the case that an export manager in the foreign corporation handles dumping complaints and will often not have the accounting expertise to deal with the costing issues. There are also language barriers and the time needed to convince an exporter to become involved in the process. In many cultures, exporters feel that they have no right to question the views of Australian bureaucrats and hence are particularly reluctant to become involved.

777. There is then time for remitting questionnaires, having responses, visits to manufacturers, injury analysis and verification visits to importers. Timeframes are too tight for all of these important elements.

778. There are then site visits. Timing is also inadequate. There is a need for some time to reflect. There is then a further days for review before publication of a statement of essential facts.

779. It seems to be that extensions are commonly sought and granted. While extensions are commonly given, it does depend on the individual case officer although we do not believe that there is significant variance. Nevertheless, prevalent extensions corroborate the view that the time limits are unduly tight.

780. A particular problem with extensions is that these are invariably given at later stages and do not then allow further time for the key preliminary stages. (Moulis and Gay 2005:77) It would be better to have timeframes that are a fair balance between the need for prompt decision-making and the need for accuracy and due process, rather than have nominal time limits which are regularly extended. Rights of local producers can be protected once security measures are in place. The overall timeframe should still be sufficient to allow for careful and accurate determinations.

781. Another reason not to shorten time limits is to allow importers to consider alternative sources of supply that pose no threat of dumping while an investigation is proceeding. The aim of the system is not to destroy competition but instead to respond to injurious dumped prices. Removing dumping while maintaining competition would be the ideal outcome. Because most anti-dumping actions are taken against input goods where there are commonly unique Australian specifications and standards, these timeframes can be significant, particularly as Australia is not a large and highly valued market.

782. Some of the timing issues are particularly unfair when seen in the light of commercial realities. Applicants can bring application after application with no time bar. Yet if an anti-dumping duty is imposed, the Australian legislation puts a time bar on its review by those adversely affected. There is no justification for this mismatch.

783. It is also particularly important that ACBPS meet timely obligations to provide information on the public record. For example, in the recent unsuccessful HSS case, a site visit to a domestic manufacturer occurred in January 2009. Shortly after that, a decision was made to put on hold any site visits to Chinese suppliers. That at least implied that ACBPS was prepared to consider injury ahead of dumping on the basis that there might not be any injury and hence no need for expensive site visits. Yet a conclusion to that effect was only produced on the public record in late May 2009, some five months later. The disruptive impact of that delay was significant even though the outcome was welcome.

784. The Willett Review was concerned to speed up the process. Australia's system now asserts that decisions are made within 155 days, claiming to be one of the fastest in the world. Yet extensions are commonly given and the time taken is invariably longer, particularly when time is taken to consider the final ministerial sign-off on recommendations.

785. *Recommendation 34: The Productivity Commission should analyse the true time parameters used in most cases. From a policy point of view, the time frames imposed by the regulations should be consistent with what is realistically achievable in a commercial environment. That has to take into account the biases in favour of domestic interests and particular problems faced by foreign exporters of differing sizes, the need to engage in a greater number of site visits as more and more applications are taken by large exporter countries, accounting economic and legal complexities, the desirability of giving people appropriate opportunities to be heard and the desirability of giving people a meaningful opportunity to respond to findings of fact by the adjudicator.*

ADVICE TO MINISTER AND REPRESENTATIONS TO MINISTER

786. Under Australia's legislation a final decision is made by the relevant Minister. This is based on advice from the customs bureaucracy that has made the determination as to dumping, injury and a causal link.

787. While the WTO Anti-Dumping Agreement provides for overall time parameters, Australia's legislation puts no constraint on the Minister in making a final decision. That is undesirable and our legislation should require ministerial determinations within the timeframe identified under our international obligations.

788. A further time constraint is that 180 days after any PAD measure, the money needs to be claimed as duty or refunded. This imposes a practical constraint on the Minister.

789. What is also not clear is the Minister's obligation on receiving advice. In particular it is unclear whether the Minister has a right to: consider afresh the desirability or otherwise of applying a duty; consider whether he or she agrees with the logic of the Custom's report; consider whether there are any other relevant factors that might support a discretion not to apply a duty (e.g. a national interest criterion); consider whether the Minister is entitled to receive representations from interested parties before making a final determination and in the event that such representations are received; consider in what form this should occur and with what notification to other interested parties.

790. Section 269TG(1) of the Act provides the Minister with a discretion as to whether to declare that subject goods are dutiable.

791. Previously legal advisers to the then ACBPS suggested that the Minister had a discretion. In *Hyster Australia Pty Ltd and Others v The Anti-Dumping Authority and Others* (1993) FCA 36, Hill J Stated that:

> "However, I believe there is room for an argument that once the Minister had reached the appropriate state of satisfaction referred to, the publication of a notice is mandatory rather than discretionary; or, in other words, that the word 'may' is not used in the section in such a way as to confer a further discretion upon the Minister. However, it does not follow that if there is a discretion, the Minister exercising that discretion is obliged as a matter of law to take into account the economic effect on Australian industry caused by the imposition of dumping duties, as counsel for Hyster submitted."

792. If the Minister does have a discretion then a proper process should be identified for the Minister to consider whether to exercise it. That would include rights of representation, right to a hearing and relevant criteria.

793. If the Minister has no discretion, then either the decision could be taken by the Executive Branch or at the very least within strict time limits so that the matter does not sit on the Minister's desk for any undue length of time.

794. *Recommendation 35: The Australian regime should clarify all of the aspects of the Minister's involvement. There is an overlap between policy issues. If there is to be a national interest criterion and if the Minister is to be the one who makes the final determination, a discretion is obviously necessary. Conversely, the less the Minister has any discrete determination power the more there is a case for tight time frames or even reversion of the final decision to the original decision-maker.*

MINISTERIAL DIRECTIONS

795. Under Australia's legislation, the Minister is given the power to make direction to custom's bureaucrats in employing anti-dumping provisions.

796. The concept of a Ministerial Direction is a problematic one. Under principles of separation of powers it is for parliament to establish the legal regime and for the Minister to execute that regime. It is certainly the case from time-to-time that senior executives must form a view as to the meaning of statutory provisions and the most fair and efficient means of complying with their statutory mandate. In that context, guidance from the Minister to ensure consistency may be defensible. Nevertheless, it is too easy for a Ministerial Direction power to operate as a quasi legislative change.

797. The Ministerial Direction power under the legislation should only be used where there is clear evidence of a systemic concern, either a misinterpretation of the law or an inappropriate procedure adopted by Customs or sufficient inconsistency and uncertainty that requires clarification. It is for those advocating a change to explain the nature of the mischief that is sought to be addressed.

798. Ministerial Directions should rarely if ever be used to deal with findings of fact that an individual or industry is aggrieved with yet this is what effectively occurred.

799. The very nature of Ministerial Directions is fraught with difficulty. The Minister is not entitled to legislate. If the Minister is too prescriptive, as is the case with a recent domestic steel producer proposal as to injury, he or she is likely to be in violation of the law. If too general, the Minister is not giving meaningful directions. Whatever form of words he uses, to the extent that they vary from the primary legal documents, they allow interested parties to try and look for advantages through those differences. To the extent that the words are the same, there is little effectiveness in the direction.

800. A recent example in the steel sector is illustrative. It involved a Ministerial Direction as to injury and profit alluded to above. An inappropriately drawn Ministerial Direction on injury would constitute a fettering of the Minister's discretion in relation to the wide range of factors mentioned in section 269TAE of the Customs Act 1901 (as amended). Parliament intended Australia's legislation to be consistent with its international obligations. Interpretative presumptions utilised by the courts support this notion that provisions are to be interpreted consistent with international obligations. A per se rule in relation to one injury factor would mean that the Minister would not be turning his mind to the wide array of specified injury indicators in each case.

801. The Direction of 1991 made it clear that there can be material injury if imports impede a local industry's growth. The 1990 Direction warned that some factors alone will rarely give rise to material injury but acknowledges that this is possible in rare cases. Each case should be looked at on its merits in the context of the whole range of factors as required under Australia's international legal obligations. The first Ministerial Direction also arose as a result of a very public and open review process conducted by the Anti-Dumping Authority which led to a published Report No 4 of March 1989.

802. The Ministerial Direction of 1991 made it very clear that if the evidence shows that dumping slows the rate of an industry's growth in an expanding market, this can certainly give rise to material injury. Yet local producers continue to lobby for relaxed standards where they bring cases while operating under record profits.

803. The two Directions did not require amendment as they are consistent with international obligations and jurisprudence yet a separate lobbying exercise sought to do so. They also did not require any clarification as there was no ambiguity. They confirm that each case should be looked at on its merits in the context of the whole range of factors as required under Australia's international legal obligations.

NATIONAL INTEREST

804. One important modification called for in the submission is to have a national interest consideration before imposing any anti-dumping duty. The PC has identified the fact that the vast bulk of anti-dumping activity in this country are aimed at intermediary products which themselves are required by other significant branches of Australian manufacturing and primary industries. Thus the regime is not about Australian manufacturers simply responding to foreign imports, but instead is about how one significant branch of Australian industry can operate efficiently through being able to obtain inputs from the most efficient producers worldwide, while another branch of Australian industry seeks protection from price variations, whether real or deemed.

805. Because both branches of industry are vitally important to Australia and are both significant employers, the need for economic efficiency and balance in the regime is heightened. As noted in Section A, the commercial significance and employment levels in the sector using inputs, generally outweighs the significant employment levels in the producers of the inputs themselves.

806. The Gruen Review recommended against the addition of a nation interest clause. It considered that this would add to uncertainty, complexity and cost for interested parties and would expose the Minister and the bureaucracy to lobbying. (Gruen, 1986:36). While these are all relevant concerns, they depend in large part on the structure and processes of such a test. Furthermore, as with any cost-benefit policy analysis, they need to be set against the import and economic reasons why our government should only interfere with trade when it is in the national interest to do so.

807. The reform question in Australia is complicated by the as yet unresolved debate as to whether the Minister already has the power to take national interest criteria into account in deciding whether to exercise a discretion to apply a dumping duty after

a positive recommendation to do so. Even when adopting the Gruen Review recommendation against a national interest provision, the then government indicated that it believed that the Minister had such a power. (Banks, 1990).

808. In a submission to the Gruen Review, the then chairman of the Industries Assistance Commission proposed two models, the first with Customs called upon to make recommendations to the Minister including consideration of broader interests, with appeal rights to the IAC and alternatively requiring Customs to determine a prima facie case with reference to an independent authority for assessment.

809. Lindsay and Ikenson propose that a national interest test would call for establishment of disproportionate harm to downstream import-using interests. Relative welfare gains and losses could be assessed, perhaps based on numerical benchmarks. Alternatively, impacts on jobs in those sectors could be considered. (Lindsay and Ikenson, 2002:34)

810. Article 9.1 ADA indicates that "it is desirable that the imposition be permissive in the territory of all Members …". This indicates that there ought to be a discretion. While not expressly referring to a national interest criterion, this ought to be most significant.

811. Article 21.1 of EC Regulation 384/96 indicates that:

> "Measures … may not be applied where the authorities, on the basis of the information submitted, can clearly conclude that it is not in the Community interest to apply such measures."

812. In Canada, the Minister of Finance is entitled on recommendation of the Canadian International Trade Tribunal to not impose the full duty for public interest reasons. (Report of the Auditor General of Canada 2002:5)

813. Relevant factors have been incorporated in section 40.1(3) of the Special Import Measures Act Regulations.

> 40.1(3) For the purposes of subsection 45(3) of the Act, the following factors are prescribed:
>
> (a) whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply;
> (b) whether imposition of an anti-dumping or countervailing duty in the full amount
> (i) has eliminated or substantially lessened or is likely to eliminate or substantially lessen competition in the domestic market in respect of goods,
> (ii) has caused or is likely to cause significant damage to producers in Canada that use the goods as inputs in the production of other goods and in the provision of services,
> (iii) has significantly impaired or is likely to significantly impair competitiveness by
> (A) limiting access to goods that are used as inputs in the production of other goods and in the provision of services, or
> (B) limiting access to technology, or
> (iv) has significantly restricted or is likely to significantly restrict the choice or availability of goods at competitive prices for consumers or has otherwise caused or is otherwise likely to cause them significant harm;
> (c) whether non-imposition of an anti-dumping or countervailing duty or the non-imposition of such a duty in the full amount provided for in sections 3 to 6 of the Act is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic manufacture or production of like goods; and
> (d) any other factors that are relevant in the circumstances.

814. These regulations direct the bureaucrat's analysis and therefore reduce the risk of such decisions being made on purely political grounds. There are two particularly positive effects of the requirements in these regulations. The first is its focus on the presence of imported goods of the same description which are not subject to anti dumping duties (40.1(3)(a)) and the second is the focus on the effect of anti dumping decisions on competition (40.1(3)(b)).

815. Regulation 40.1(3)(b) enables the bureaucrat to consider the potential anti-competitive effects of imposing an anti dumping duty. Since this provision has been implemented, many anti dumping duties have been removed or reduced due to the

negative effects on market competition. In the case of *Certain Stainless Steel Round Wire* the Canadian International Trade Tribunal found that anti dumping duties on steel wire should be reduced from 181% to 35% as such a duty was not in the public interest. In particular, the Tribunal found that "the extra cost that the anti dumping duty adds for the US product is so high that the United States is not currently a viable alternative source. Thus, the imposition of the anti dumping duty in the full amount has significantly lessened competition by effectively removing the United States as a geographically close alternative source of wireline for Canadian users." A similar finding is seen in a case involving beer exported from the US where the Tribunal reduced the dumping duty significantly after a public interest inquiry. In this case the Tribunal concluded "that competition in the BC market and the consumer interest would be better served by reducing some of the anti-dumping duties from the full margin of dumping."

816. This test is further strengthened by requiring that the threshold decision on whether to initiate a public interest investigation is a form decision reviewable by the Federal Court.

817. In addition to the European Union and Canada, Brazil, Malaysia, Paraguay and Thailand now have public interest test provisions. The concept has also been included in China's recent legislative amendments. The Minister of Trade and Industry in Singapore considers whether an investigation itself is in the public interest. (Aggarwal, 2004b:8)

818. The PC issues paper raises questions both as to the policy and practicality of such a measure. From a policy perspective, if our laws ought to ultimately be in the national interest, it ought not to be controversial to advocate that in our international trade regime. Hence the key issue is whether there are practical impediments to the establishment of a fair and efficient national interest test. The PC Issues Paper suggests that there have been problems with such regimes as applied overseas.

819. It is true that they are not widely used. Aggarwal (2004b) identified 11 public interest inquiries in Canada between 1984 and 2000. In the same period 315 cases were initiated with final measures applied in 216. (Aggarwal, 2004b:4)

820. The ASA believes that a well structured system would work well and would certainly protect down-stream manufacturers who otherwise do not have a voice in anti-dumping proceedings.

821. In particular, there are a number of flaws with the EU model. Criticisms of the EU model include failure to receive appropriate notification of deadlines for submissions, requirements of unduly complex information and tight deadlines. (Davis 2009) The EC has also not approached the question from a rigorous economic perspective. "The community interest test is not a cost/benefit analysis in the strictest sense. While the various interests are put in the balance, they are not weighed against each other in a mathematical equation, not least because of the obvious methodological difficulties in quantifying each factors with a reasonable margin of security within the time available." (*Footwear with Uppers of Leather*, China, Vietnam, OJ L 98, 6 April 2006, p 3) Yet an economic analysis does occur in some instances. (Davis 2009) Most significantly it leaves this analysis until after positive findings have been made rather than engage in them concurrently. This puts too much political pressure on the Commission as its deliberations come at a time when the domestic industry knows that it will otherwise gain protection. Given the fact that political economy reminds us that those with most to gain from protection will be motivated to lobby, whereas those who lose out are often too dispersed and ignorant, a proper national interest test must give consumer interests sufficient time to become aware of the issues and make meaningful submissions.

822. As noted in the Productivity Commission issues paper, the bulk of anti-dumping actions in Australia are brought against intermediate goods. Those who directly lose out from anti-dumping applications are fabricators and manufacturers relying on such inputs. Even those why buy locally are adversely affected by dumping duties as this is likely to raise domestic prices as well. To have these disparate groups aware of these issues and available for comment requires appropriate education and lead time.

823. It is also suggested that the EU provisions have unduly restricted tests as to who are interested parties in making submissions on national interest criteria. (Aggarwal, 2004b: 9)

824. Canadian legislation involves a public inquiry and articulates relevant factors including availability of goods from other exporters, substantial lessening of competition, significant damage to producers that use the goods as inputs, significant

impairment of competitiveness, significant restrictions on the choice or availability of goods at competitive prices, significant harm otherwise caused to consumers and significant damage to domestic producers of inputs.

825. A proper national interest test would also consider the impact on Australian business decisions in terms of importing higher value added products to avoid dumping duties on input goods and foreign direct investment to move manufacturing facilities offshore.

826. An important but narrower aspect of a national interest test would be to consider the use of anti-dumping applications in anti-competitive ways. It would not be in the national interest to allow a domestic industry with market power to reduce competition and presumably raise prices as a result of anti-dumping applications. (Aggarwal, 2004b:13)

827. Another aspect of a national interest test might consider the impact of anti-dumping measures on development assistance that might be provided to our developing country trading partners. It would be perverse to help the establishment of domestic industries in those countries and then bring anti-dumping actions simply because the export country is operating at similar protectionist levels domestically as was commonly the case with Australian through much of the GATT history.

828. Another means of using the national interest criterion is as the basis of a partial reduction in otherwise applicable anti-dumping duty. Just as the legislation currently allows for less than a full dumping margin duty where that would obviate the injury,

829. the legislation should allow for a lesser amount where it would be in the national interest to do so.

830. Another possibility is to use the national interest test to segment certain product categories that might be found within a broader like product category within the anti-dumping investigation. Again, input goods that are particularly vital to Australia's manufacturing interest might be an example of such a response.

831. Should a national interest criterion be worthy of consideration, it should be borne in mind that there are a range of options available. If the concern is that it is too open-ended and provides too much by way of unguided discretion, there can be a more limited set of factors that could be considered. National interest could also be delegated or based on a report by ACCC or the Productivity Commission in some circumstances at least.(For two cases where the EC did apply community interest considerations see *Plastic and Textile Handbags from China* (OJ L208 of 2 August 1997) and *Laser Optical Reading Systems for Cars from Japan, Korea, Malaysia, China, Taiwan* (OJ L18/62 of 23 January 1999))

832. Another important issue with a national interest test is to consider what economic analysis would be appropriate to making the determination. It is recommended that as objective a formula and methodology as possible be proposed so that the determination is not seen as unduly political. Net welfare effects should be identified as accurately as possible.

833. Added to such rigorous analysis there should be an opportunity for alternative support to a domestic industry that would otherwise be entitled to a duty but for an adverse national interest test finding. A careful analysis of net welfare effects would assist in that regard. It would commonly be the case that some direct assistance would be far more efficient in support of the domestic industry than an anti-dumping duty with its adverse effects on Australian manufacturing and exporting generally. This would also bring the adjustment needs of the relevant industry within the context of Australia's general industry policy.

834. A national interest test should also consider the domestic industries sustainability strategy and, if applicable, its restructuring proposals. The more the industry has a viable and sustainable future, the more legitimate it might be to expend the time and effort on anti-dumping and anti investigations.

835. Another possibility is to allow the national interest test to be considered at the time of determining whether to accept an application. Whether that would be desirable or not would depend on the evidentiary standard applied and what other avenues for support for domestic industry might be available were there to be a clear national interest concern from the outset. It is recommended that the Productivity Commission recommend that government prioritises the need for strategic assistance with a view to maintaining a viable manufacturing base in Australia rather than relying on anti-dumping actions to the extent that has been the case in recent years in Australia.

836. In that event the case for addressing national interest as early as possible is strengthened. Where evidentiary standard issues are concerned, it might well be the case that when an application is so obviously not in the national interest, the investigating body can then stream the application into the more direct adjustment assistance regulatory stream.

837. *Recommendation 36: A national interest test based on objective economic criteria should be included. It should be evaluated throughout and be used to redirect appropriate cases to suitable and more general assistance mechanisms that look to sustainability.*

APPLICABLE MEASURES

838. If anti-dumping measures are justified it would be appropriate that they meet the legitimate concerns of the domestic industry without being unduly disruptive on the general economy.

839. The EU Green Paper raised the possibility that duties might phase in over time or in proportion to import volumes to give the market time to adapt.

840. It is recommended that the Productivity Commission explores such options. In many cases a significant anti-dumping duty would cause insolvencies and massive disruption to employment and manufacturing industries.

841. Anti-dumping duties should also take into account in transit transactions where goods have been ordered. It would be unfair to apply anti-price discrimination duties to such circumstances. In transit provisions commonly apply in Australia's customs legislation.

842. A further issue relates to the time period over which the measures are applicable. A previous version of Australian legislation had a three year sunset review.

843. The longer the period of application, the more likely that circumstances would have changed in a way which might cease to justify the measures. (Banks, 1990)

844. Further problems with extended time periods is that they can either be irrelevant or unduly protectionist. They will be irrelevant where inflation makes the floor price easy to meet. They will be inefficient if efficiencies and technological advances have improved the costs of foreign goods. (Banks, 1990)

845. The Productivity Commission has questioned whether a ten year rule as currently proposed in the Doha Round should replace an extension system. That should be rejected. Five years is itself too long under modern product cycles. A ten year rule would be fundamentally protectionist. A five year system with proper biases against extension is preferable to a ten year blanket.

846. *Recommendation 37: While the WTO Anti-Dumping Agreement and domestic legislation allow for five year duties, there is nothing in the law that will prevent Australia applying duties for a lesser period. Given the modern product cycle in most industries, a five year time period is excessively long. A three year period would be more than adequate to ensure protection of local industries without undue influence on competition.*

REVIEW – TMRO

847. Any complex system such as an anti-dumping regime should have appropriate internal and external review mechanisms.

848. Article 13 ADA requires administrative review procedures to be independent of the administering authority. Currently the legislation provides for certain matters to be reviewed by a Trade Measures Review Officer, a statutory officer employed within the Attorney General's Department.

849. That position is currently held by a person of the highest integrity and intellectual quality but there are some problems with the statutory mandate. At present it is unduly limited.

850. Where administrative review is concerned, there is too much ambiguity in the provisions relating to the TMRO's rights and obligations. In some instances the TMRO's powers are merely advisory. In other situations it appears that a decision of the TMRO has automatic effect. The TMRO has no investigative power.

851. It is also not clear just what written and oral submissions interested parties can make to the TMRO and what rights, if any, they have to review and respond to submissions of other interested parties.

852. Another problem with the recommendatory powers is that the Minister who makes the ultimate decision may call on the customs bureaucracy to advise him. That provides for a conflict given that the TMRO has reviewed the behaviour of that very bureaucracy. (Moulis and Gray 2005:82)

853. There is a particular problem as to the implications of a finding by the TMRO that a reinvestigation should occur. In a number of recent cases, Customs has simply disagreed with the TMRO's observations and reiterated its views to the Minister. Regardless of whose views may be right or wrong in an individual case, it is important that the procedure make clear who has the final say on such a matter. Either the TMRO should be given the power to make substitute findings or Customs' powers should be carefully delineated.

854. The recent *HSS* case displays one example at least where a previous holder of the office of TMRO seems to have misunderstood the standard of review. After four applications were rejected by ACBPS, the TMRO overturned the decision, arguing that ACBPS was wrongly demanding information to a standard that would only be appropriate in the investigation itself. In our view that is not what ACBPS had done. ACBPS had simply repeatedly called for information from the applicant, that was within their own corporate information. When the applicants were not even able to provide sufficient details of their own business information, the application was naturally rejected.

855. Where standard of review is concerned, there is uncertainty as to whether the TMRO is exercising a merits style review or is or should be adopting a more deferential style as is the case with judicial review. At the very least, the more the TMRO is expected to undertake a merits style review, the more resources that ought to be appropriated for such purposes.

856. Review by the TMRO also raises the problem of secrecy. Importers do not get to make input to the TMRO review of a rejection. Until an application is accepted, there is no public notification of it. There seems no justification for keeping importers and exporters in the dark, thus preventing them from bringing relevant information to ACBPS or the TMRO. As indicated above, it further exacerbates the tactical disadvantages to them in terms of timing.

857. The TMRO should also be able to call for termination. If a particular process is sufficiently flawed it will be wholly undermined in due course where a Federal Court challenge is made. The Federal Court will call for the bureaucracy to begin again. It makes no sense to give the TMRO any lesser power. The earlier the stage that a flawed process is identified, the better for all concerned that it begins again.

EXTERNAL REVIEW – AAT AND FEDERAL COURT

858. Anti-dumping decisions are highly complex matters combining complex accounting questions, economic causation elements and statutory interpretation in the context of Australia's international legal obligations. Numerous discretionary decisions must be made along the way which also raises general questions of administrative law and review.

859. It makes sense to have speedy and efficient review mechanisms in an adjudicatory forum. That should either occur within the AAT or within a specialty court or AAT division.

860. Where court review is concerned, judges must balance the competing policy aims of allowing valid complaints about behaviour to be made and not unduly restricting the ability of administrators to process the large volume of import and export transactions.

861. *Recommendation 38: There needs to be an expedited process for prompt court review as mandated by Article 13 ADA.*

862. Some time ago the Administrative Review Council considered the question as to whether merits review of anti-dumping decisions should be allowed before the Commonwealth Administrative Appeals Tribunal. The ARC recommended in favour of that. Rights of court review are limited to questions of law and will generally only lead to a reconsideration of a matter by the administrative officers. There can be debate about what are appropriate questions of law. The recommendations were not adopted at that time.

863. It has been suggested that the specialty courts in the US have fostered more critical analysis of claims. (Horlick and Vermulst 2005:70)

864. *Recommendation 39: Consideration might be given to the establishment of a specialty court or specialty division within the Federal Court with more determinative powers.*

865. There also seems to be a mismatch between the standard set by Australia's Federal Court on review and on the other hand the standard set by the WTO jurisprudence. Because the ADA provides much more in the way of specific guidelines on procedure, it will be easier to bring a successful complaint before the WTO. Under a judicial review standard, if the Code contains vague principles, any acceptable methodology would suffice. If instead the treaty provides very clear prescription, a bureaucrat that fails to follow that prescription would be subject to a successful challenge.

DUTY ASSESSMENT

866. Once an anti-dumping duty is imposed there is a need to consider how to collect the duty from individual importers. The overriding policy aim is to correctly assess the amount of duty payable with the least transaction costs for all concerned.

867. A key problem arises because the investigation period would have looked at average export prices and average normal values to try and find a standard margin of dumping around which to frame the duty. Yet it can naturally be expected that export prices will change from time-to-time. Thus while the investigation may have found historical dumping, in due course the exporter may raise its prices to avoid this occurrence.

868. There is thus a need to consider on a transaction by transaction basis whether any anti-dumping duty is in fact payable. From the importers' perspective the fairest approach is to consider each transaction and impose the duty taking into account the difference between the actual export price and the historically determined normal value.

869. Australia has moved to a different system which seeks to minimise the transaction cost from the bureaucrats perspective but comes at a significant cashflow cost to the importers concerned. Duties are collected based on the historically found dumping margin regardless of the instant export price. Importers are then invited to seek a duty assessment every six months, effectively asking for refunds where export prices were in fact higher.

870. Thus the Australian legislation has copied the European assessment process where very broad amounts are collected based on historical export prices, ignoring the reality of actual shipments, following which importers can seek refunds if they have paid too much. It is probably not even justifiable from the perspective of costs savings by the administering authorities but is doubly problematical if it operates in a protectionist way.

871. Such a system is in fact unduly protectionist. There would not be significant administrative expense to the bureaucracy to look at actual export prices as per invoices and calculate anti-dumping duties accordingly. In those cases where the documentation was insufficient to justify a lower amount, they could continue to charge the historical amount, at least provisionally.

872. Australia's bureaucratic practice has raised a more serious problem. Customs officials in fact reconsider both export prices and normal values as part of the duty assessment process. Australia's authorities consider that parties seeking refunds must provide full information about normal values and export prices. If they are unable to do all of this, the administration rejects the refund. That should not be acceptable. The new regime is for the administrative convenience and cash-flow benefits for government and its agencies. This should lead to the conclusion that the onus can by all means be on the person seeking refunds to establish why a variation is needed, but the facts as found in the original duty decision should be presumed to still be applicable in the absence of convincing evidence to the contrary. Thus if an applicant shows that the export prices were higher than predicted and says nothing whatever about normal values, a refund should be obtained.

873. This concern is exacerbated by the fact that the Australian provisions have very strict time limits. If Customs reject an application for refunds on the basis of inadequate facts and the time for refunds expires, the importer's rights are lost. Yet if export prices were truly higher, they have paid dumping duty that was never properly applicable under the principles of the legislation. They have paid an estimate based on a rough assumption that export prices would never change, an assumption that no-one would expect to be true. It would simply be the tail wagging the dog if a refund process for the pure administrative convenience of bureaucracy adversely affected importers in this way. The very transaction costs of the importing and assessment process are already inefficient and anti-competitive.

874. Even if sufficient information is provided, Australian officials engage in a full normal value exercise even when this is not called for by the refund applicant. Effectively they engage in a complete dumping analysis every six months. Because of the many discretionary elements in normal value calculations and the constant threat that actual figures will not be accepted for a range of reasons, it is too often the case that there is a risk that no refunds will be provided simply because customs bureaucrats feel that they are not sufficiently satisfied that there are not adverse normal value changes. This goes wholly against the policy aim of providing a benefit to the bureaucrat in having a retrospective system.

875. The current process which automatically revisits the normal value question, effectively constitutes an overlap with the general review function allowing anti-dumping duties to be reassessed on a regular basis. Most importantly it adds significant transaction costs, great uncertainty and will often lead to dumping duties significantly higher than actual export prices would demand.

876. A further perverse aspect of considering normal value afresh every six months on assessment is that even if the normal value is found to be lower than originally determined, it is not reset. Thus it operates as a temporary review only.

877. Such an approach is not mandated by the WTO Anti-Dumping Agreement or Australia's legalisation.

878. *Recommendation 40: The assessment system should ensure that applicants have no less rights as to procedure and evidence than they had under the initial determination. Duty assessment should also not be a mechanism to re-evaluate normal value on a regular basis, absent a request to do so in the assessment application.*

REVIEW

879. Article 11.2 ADA allows for interim review based on positive information substantiating the need for a review. If the anti-dumping duty is no longer warranted it must be removed. This is within the framework of Article 11.1 which indicates that an anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.

880. Article 11.2 allows authorities to conduct a review on their own initiative. If the authorities are monitoring imports in part to assist local industry to bring applications, it should also be monitoring for the other side of the coin to see when an interim review would be desirable.

881. Where an interim review is called for by interested parties, it is suboptimal that the Australian legislation has imposed a blanket 12 month time limit when Article 11.2 of ADA simply says that a reasonable period of time must have elapsed since

the imposition of the definitive anti-dumping duty. There certainly need to be some limits to stop perpetual calls for review but a period as long as 12 months will simply be unfair in many industries. This will be particularly so when a product has a short technological lifespan. The recent financial crisis also called for reevaluation of existing measures.

EXTENSION APPLICATIONS AND SUNSET PROVISIONS

882. It is clear from the WTO Anti-Dumping Agreement that anti-dumping duty should not apply for more than a five year period unless there is a good reason for an extension.

883. That analysis should also occur within the context of an appropriate evidentiary standard. Because the strong policy aim of the WTO Anti-Dumping Agreement is to bring duties to an end after five years there should be a strong presumption in favour of their removal and a high evidentiary burden on those seeking to hypothesise material injury caused by future dumping if the duty is removed.

884. Nevertheless, studies around the world show that most duties are in fact extended, in some cases for decades. Between 1993 and 2002 the Canadian International Trade Tribunal extended the original finding in 29 out of 51 decisions. (Auditor General of Canada 2002:7). The US Department of Commerce only removed anti-dumping duties in 2 of the 314 cases it reviewed under the sunset clause between 1998 and 2000 (Mankiw and Swagel, 2005). Lindsay and Ikenson reviewing US experience between July 1998 and August 2002 found that the Department of Commerce made affirmative sunset determinations in 259 out of 263 cases while the ITC voted affirmatively in 72% of cases. (Lindsay and Ikenson, 2002:35) The continuation of anti-dumping duties after the sunset review has also been noted in an UNCTAD study. (Neufeld, 2001).

885. Some administrations effectively operate a reverse burden of proof. For example, the US authorities are only likely to conclude that a duty should not be extended if dumping has ceased and imports still rose after the duty was imposed. (Sykes, 2005:33)

886. Some authorities are alleged to renew measures almost indefinitely under the very loosely defined expiry and extension provisions. (Didier (2001:51), speaking of the EU experience and referring to the *Ball Bearings* cases) One author concludes after an extensive series of studies that "once duties are imposed they tend to perpetuate themselves and ultimately drive imports out of a protected market." (de Lima-Campos 2005:239)

887. The most likely reason for this is the simplistic causation analysis at the extension application stage. As is the case with threat of injury applications, extension applications call for analysis of a hypothetical. If the basic procedures for assessing an initial application are flawed and biased in favour of domestic interests, that is likely to be exacerbated when a purely speculative exercise is undertaken on an extension application. (Lindsay and Ikenson, 2002:35) Given that there is a current duty that was set at a level to remove injury, the application calls for a decision as to the likelihood of material injury in the event that the duty was removed.

888. Another difficulty with regular reviews is where exporters raise their prices to avoid an adverse duty assessment. There is then a predictive exercise as occurs on extension applications as to what is likely to occur if the duty were to be removed as the pricing decision has in fact removed the historical injury. Inappropriately simplistic logic suggests that if there was an injury without a duty in the first place and a duty removed that injury, then removing the duty might naturally see the injury reoccur.

889. Such an approach, whether express or implicit, is erroneous as it does not consider the current circumstances. An extension application needs to consider the likely export prices absent a duty, the relevant normal values in the ensuing period, the extent to which those prices lead to a dumping margin, the impact of any dumped imports on the domestic industry and the presence and impact of any other injury causing factors besides the potential dumping.

890. From a policy perspective, there is no reason why it should be easier to establish such a threat at an extension stage than at an earlier stage. The only acceptable difference is that a history of confirmed injurious dumping is certainly a relevant piece of evidence that may be taken into account on an extension review. If this approach were taken, the outcomes would be very

different, particularly if WTO jurisprudence was influential such as that established in the *Lamb* case, with its requirement of a high degree of likelihood based on probative evidence.

891. In *Korea v USA – Anti-Dumping Duty on DRAMs of 1B or Above from Korea* WTO Doc WT/DS99/R, adopted 19 March 1999, the Panel held that the agency was not entitled to presume the likely recurrence of injurious dumping. There must instead be "demonstrability on the basis of the evidence adduced …" (para 6.50).

892. It has also been suggested that some extraneous factors are at times taken into account. Moulis and Gay suggest that in one case, improvements in the domestic industry's position were presumed to be as a result of the anti-dumping measures. In another case it was suggested that a Chinese anti-dumping investigation against Japanese exports could lead to the Japanese exporters looking for alternative markets including Australia. (Moulis and Gray 2005:81)

893. In a recent case of concern to ASA members, an exporter had not sold any goods to Australia since the time anti-dumping measures were imposed on *Galvanised Pipe from Thailand.* The measure was nevertheless extended on the basis of certain constructed values. Normal values were determined at the time of extension and compared to the normal values as originally found in the initial investigation. The administering authority then presumed that any hypothetical export prices would have moved by the same percentage. This is simply an error of law in the absence of any evidence of a corporate intent to maintain a consistent ratio between export prices and normal values, which was demonstrably not the case on the data obtained from the supplier under review.

894. Some effort needs to be made to avoid these problems. The EU Green Paper questions whether instead of the extension test being a "likelihood of recurrence of injurious dumping", a higher threshold might be a "clearly foreseeable and imminent threat of injury." Without such an imminent threat there seems no reason why the dumping duty should not be removed with the right for a new application to be brought in due course. This would bring the extension criterion into line with that applicable to threat of injury as per Articles 3.7 and 3.8 ADA.

895. What is more difficult from a policy perspective is to decide how the *de minimus* principle should apply on an expiry review. On the one hand, if exports have ceased, a measure can still be extended if the likelihood is properly established. On the other hand, if the extension process is to be consistent with the spirit of the balance of ADA, attention must be given to how likely future exports would be and if there is a likelihood that they would be at *de minimus* levels, then that should be excluded from the calculations.

SUBSIDIES

896. As noted at the outset, this submission concentrates primarily on anti-dumping because that is the area of greatest practical significance. However, a number of observations may usefully be made about the potential application of Australia's countervailing regime.

897. Issues of injury and causation are identical to the anti-dumping regime and need not be repeated.

898. Where subsidies are concerned, there will often be similar complications in computation as arise in calculation of normal values. This is particularly so when a subsidy is not a certain amount per unit of production but is instead based on special tax provisions, favourable loans or equity infusions or low cost goods and services all needing amortization.

899. The Agreement on Subsidies and Countervailing Measures calls for an analysis of the benefit to the recipient and not the cost to the provider. Thus there will be a need to consider how more favourable a government loan guarantee might be than a bank guarantee that the foreign supplier might otherwise obtain. It is particularly difficult to try and make such assessments in relation to foreign companies.

900. It will also be particularly difficult to consider how to make such assessments in developing countries or emerging market economies that do not have fully operating market benchmarks. (Sykes, 2005:52)

901. Other problems arise if the subsidy is to an industry as a whole and is applicable to a range of products.

902. The Productivity Commission has also asked whether the information burdens imposed on local producers seeking relief from dumping are excessive especially where subsidies from overseas governments are involved. This again mixes two issues, anti-dumping activity and countervailing activity. Foreign subsidies should be dealt with under countervailing provisions. Where this occurs, there is still a need to ensure that a reasonable attempt has been made by the applicant to provide all the relevant information. While it may be hard for a domestic applicant to find details of a foreign subsidy, the application is premised on the basis that they believe that the foreign subsidy is occurring. Whatever reasonably led them to that belief needs to be placed before the Customs administration so that they can form the view as to whether to initiate an investigation.

903. Subsidies must be notified through the WTO. In many countries, freedom of information and other public access mechanisms allow one to find the nature of such subsidies. In all such cases, the applicant should provide clear details.

904. In countries where there is a suspicion that subsidies are hidden, that may be a problem but there is still a need to at least provide enough evidence to allow a Customs administrator to form the same view that prima facie an injurious subsidy is in place. If the applicant meets an appropriate evidentiary standard at the initiation stage, the administration will then ask the foreign government to answer a range of questions. If the responses are inadequate, inferences on facts available will be made. Hence there is no suggestion that there is an inappropriate information burden even in this complex area.

GENERAL REFORM OPTIONS

905. Anti-dumping laws cannot be justified on either economic or fairness grounds. As such there is no need for their maintenance. Any arguments in favour of maintenance of the anti-dumping system should show how the policy is in the public interest. (Hindley 2007:340) This allows the determination as to the validity of the policy and whether bureaucratic and ministerial actions are consistent with the policy objectives. (Hindley 2007:340)

906. In the prevailing political climate of western democracies, direct lobbying for protection is unlikely to be successful. Calls for anti-dumping action, which rely on the rhetoric of fairness (Banks 1993:199) are more likely to be popular. To customs authorities, dumping is an unfair trade practice. To economics professors and departments of trade, dumping is merely marginal cost pricing, a natural mechanism by which efficiencies in production can be increased. Alternatively, dumping can be simply a corollary of protection in the home market leading to excessively high normal values.

907. Any potential harm from dumping, particularly predatory dumping, can be left to domestic competition laws. Australia has successfully taken this initiative with New Zealand under ANZCERTA. Nothing in the trade experience between these two countries shows that there are any problems in relying on this avenue.

908. The only potential concern is whether domestic competition laws would have sufficient extra- territorial reach both theoretically and practically to deal with such behaviour. This was not seen as a problem in the Australian New Zealand bilateral arrangements, although statutory amendments were made to ensure that express coverage was permitted. Because the concern would be with pricing in Australia, it would be easily within domestic legislative focus to attack predatory prices offered to Australian consumers.

909. The Productivity Commission has questioned whether addressing dumping concerns through competition laws might need to wait until all of Australia's major trading partners have well developed competition institutions. That should not be the case. Just as unilateral trade liberalisation is in Australia's best interests regardless of the behaviour of our overseas trading partners, so too is optimal competition and trade regulatory provisions. If there is no defensible logic behind anti-dumping regimes, they should not be maintained. Similarly, if we can develop a competition law that adequately addresses anti-competitive behaviour by foreign entities, we should do so regardless of whether other countries engage in the same thing.

910. Another approach is to concentrate on safeguards or general industry assistance to consider the viability of Australian industry. The reality is that the Australian manufacturing sector needs to consider how to sustain itself in the face of competition from lower cost sources of supply, rather than how to protect against technical dumping.

911. If anti-dumping laws are to be maintained, Didier has suggested that complaining industries might be required to present a restructuring plan where protective measures are taken. (Didier 2001:46) This would be particularly valuable where the injury is primarily caused by factors other than dumping. While a dumping duty is still technically available in such circumstances, the real problem is the general weakness of the industry.

912. If the systems are to be maintained, it is important to ensure that they do not operate in a protectionist manner. Numerous economic studies have shown that such regimes become a form of contingent protection.

913. As noted at the outset, the key changes in this regard would be to:

i) exclude applications that would benefit manufacturers who also import the goods under consideration;
ii) ensure that the determination of *like goods* limits attention to goods that truly compete and not allow broadly described applications to improperly encompass an unduly wide range of goods;
iii) provide for a moratorium as to further applications for a reasonable period of time after an unsuccessful one and damages obligations from inappropriate applications to dissuade domestic industry from abusive use of the regime;
iv) call for reasonable utilisation of investigative powers by Customs administrators to properly find and analyse factors other than dumping that might cause injury found from time-to-time;
v) provide for appropriate expertise in Customs administration to accurately demonstrate whether injury is caused by dumping and what degree is caused by other factors;
vi) as a corollary of a proper allocation of causative factors, ensure that where a dumping duty is applicable, calculation of a non injurious price is based on a realistic assessment of injurious dumping and current market conditions and is not based on a manufacturers aspirations;
vii) provide for the application of a national interest criterion at all stages to ensure that dumping applications on behalf of a particular industry, are not to the overall disadvantage of the Australian economy.

914. A complete list of ASA recommendations is as follows:

Recommendation 1: The Productivity Commission should undertake a net welfare analysis, particularly in relation to job implications either economy wide or using the steel sector as a case study.

Recommendation 2: The Productivity Commission should undertake a net welfare analysis of anti-dumping activity in Australia.

Recommendation 3: The Productivity Commission is asked to give particular consideration to the anti-competitive aspects of the current system, particularly in those domestic industries that display monopolistic or oligopolistic tendencies. A range of policy responses should be considered varying from those internal to the anti-dumping system to transference to ACCC jurisdiction.

Recommendation 4: Australia's existing anti-dumping regimes should be repealed and replaced with similar anti-competitive measures as apply in ANZCERTA.

Recommendation 5: There are a range of policy response that ought to be considered where claims are made my manufacturers who also import:

(a) *Excluding the manufacturers from the benefit of the regime.*
(b) *Forcing applications to deal with their own import sources if they wish to persist.*
(c) *Utilising their own imports as a key factor in identifying injury and causation.*
(d) *Using their own import values as an automatic non-injurious price to allow others to meet their import pricing strategy regardless of source.*

(e) *Ensuring that the ACCC is brought in from the outset to advise on the potential anti-competitive aspects of strategic anti-dumping applications of this nature. That could either be by a direction within Customs legislation or via an extension of general ACCC powers.*

Recommendation 6: To remove doubt, Australia's legislation should mandate that applicants advise whether they have imported like goods or have any desire to do so. This would be in conjunction with the range of options in terms of policy responses to such applicants.

Recommendation 7: If the anti-dumping system is to be maintained, it would make sense that the evidentiary standard at the application stage requires a belief that the application has a likely chance of success based on the evidence provided.

Recommendation 8: More information should be provided and verified at the initiation stage as to all factors, to ensure that only viable applications go forward.

Recommendation 9: The Productivity Commission is asked to recommend that known interested parties should be advised in confidence as soon as an application is received.

Recommendation 10: The Australian procedure should comply with ADA and foreign governments be notified of an application as soon as possible.

Recommendation 11: Interested parties should be entitled to provide information that may clearly show the inadequacies of the application prior to the initiation decision being taken.

Recommendation 12: It should only be in cases where the application would be highly unlikely to be in the national interest that rejection should then occur. From a policy perspective such a power would be more palatable to domestic industries where it also came with a right to refer the industry to other assistance mechanisms at that stage. PC should consider this.

Recommendation 13: A combination of moratoria and damages undertakings is needed to counter the demonstrable incentives in favour of abusive cases and the harm they clearly cause.

Recommendation 14: Assistance to interested parties should be provided by a completely separate entity and should occur in a way which does not presume a positive finding. Instead, the relevant bureaucracy should simply help explain anti-dumping laws and processes to potential applicants and indicate the kind of evidence and analysis that would optimise the application. Equal treatment should be given to responding interests.

Recommendation 15: The highest priority should be to rigorously test claims for confidentiality and ensure that non-confidential summaries go as far as possible to present meaningful data.

Recommendation 16: It is recommended that the public record as defined in the statute should truly be open to the public.

Recommendation 17: The PC should recommend that accounting and economic decisions be made by persons with appropriate expertise. It should then consider the relative advantages and disadvantages of bifurcated versus unitary approaches.

Recommendation 18: Regular use should be made of the entitlement to meetings. The PC is asked to recommend guidelines as to how such meetings should occur.

Recommendation 19: The Australian legislation should be clarified to ensure consistency in determining what are "like goods". The policy aim is to limit the analysis to truly competitive goods and minimise the chance that broad ranging applications will be brought.

Recommendation 20: Where "like goods" analysis is concerned, either there needs to be proper competition based product differentiation, or an appropriate adjustment when considering whether dumping exists, or more importantly a true understanding that there cannot be injury between non-competitive and differential products.

Recommendation 21: Australia's sales at a loss laws, procedures and administrative behaviour should be brought into line with WTO obligations and sound commercial practice that only seeks to exclude sales that could not reasonably be seen to be in the ordinary course of trade.

Recommendation 22: If a surrogate country test is to be used for normal value, there should be an express and objective test to identify an analogue country operating under similar economic conditions both generally and in the industry concerned.

Recommendation 23: WTO evidentiary standards should be applied in a balanced and reasonable way, particularly where exporter questionnaires and site visits are concerned.

Recommendation 24: Australia's legislation should be broadened to ensure that adjustments should be made on all reasonable grounds. Regulations and procedures should ensure that these need not be based on unduly restrictive evidentiary standards. Estimates commensurate with the commercial realities of the true situation should be made where on balance they are demonstrated. The administrator's own investigatory obligations need to be reinforced.

Recommendation 25: The Productivity Commission should consider the most appropriate policy means to ensure that anti-dumping laws are not automatically triggered by unavoidable currency movements that in no way could be described as price discrimination.

Recommendation 26: Australia's legislation and practice should strictly adhere to WTO obligations as to residual margins for exporters not investigated. Presumptions of innocence should remain. Co-operative exporters who are ignored for expediency reasons, should never receive a deemed dumping margin simply because of the cost structures of others who were investigated. No-one should face an anti-dumping duty who is not actually found to have been dumping.

Recommendation 27: Exporters should not be branded unco-operative simply because they have tried but failed to meet the time and evidentiary standards in questionnaires. Even those who could be validly seen as unco-operative should not end up with a dumping margin higher than WTO mandated averages although fair and reasonable adverse inferences should be permitted in appropriate cases. Australia's international obligations do not mandate punitive and arbitrary figures in such circumstances.

Recommendation 28: Australia should not adopt an illegal and economically unjustified proposal to allow zeroing. Even if permitted through WTO negotiations, unless mandated, it should not be followed as it is bad policy.

Recommendation 29: In considering de minimus standards, it would be appropriate to look at values and volumes as well as percentages to ensure that it is only entities with significant potential impact that are caught up in the process.

Recommendation 30: The Productivity Commission should attempt a more economically oriented definition of "material" in the context of the required degree of injury.

Recommendation 31: The Productivity Commission should develop an appropriate economics based causation test and consider the best adjudicatory system within which it should be employed.

Recommendation 32: The Productivity Commission should recommend that Customs use its powers to gain all relevant evidence including that pertaining to non-dumped causes of injury. The Productivity Commission should also develop recommendations as to a logical basis for attribution.

Recommendation 33: Non-injurious prices should be set by reference to realistic factors in the market under consideration. Non-dumped price setters should also set the non-injurious price.

Recommendation 34: The Productivity Commission should analyse the true time parameters used in most cases. From a policy point of view, the time frames imposed by the regulations should be consistent with what is realistically achievable in a commercial environment. That has to take into account the biases in favour of domestic interests and particular problems faced by foreign exporters of differing sizes, the need to engage in a greater number of site visits as more and more applications are taken by large exporter countries, accounting economic and legal complexities, the desirability of giving people appropriate opportunities to be heard and the desirability of giving people a meaningful opportunity to respond to findings of fact by the adjudicator.

Recommendation 35: The Australian regime should clarify all of the aspects of the Minister's involvement. There is an overlap between policy issues. If there is to be a national interest criterion and if the Minister is to be the one who makes the final determination, a discretion is obviously necessary. Conversely, the less the Minister has any discrete determination power the more there is a case for tight time frames or even reversion of the final decision to the original decision-maker.

Recommendation 36: A national interest test based on objective economic criteria should be included. It should be evaluated throughout and be used to redirect appropriate cases to suitable and more general assistance mechanisms that look to sustainability.

Recommendation 37: While the WTO Anti-Dumping Agreement and domestic legislation allow for five year duties, there is nothing in the law that will prevent Australia applying duties for a lesser period. Given the modern product cycle in most industries, a five year time period is excessively long. A three year period would be more than adequate to ensure protection of local industries without undue influence on competition.

Recommendation 38: There needs to be an expedited process for prompt court review as mandated by Article 13 ADA.

Recommendation 39: Consideration might be given to the establishment of a specialty court or specialty division within the Federal Court with more determinative powers.

Recommendation 40: The assessment system should ensure that applicants have no less rights as to procedure and evidence than they had under the initial determination. Duty assessment should also not be a mechanism to re-evaluate normal value on a regular basis, absent a request to do so in the assessment application.

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Australian Steel Association Inc
A0020339V ABN 24 762 435 928

APPENDIX 'A'

ASA Response to 'Industry' Application on *HSS Anti-Dumping and Countervailing – March 2009

Australian Customs References:-
- Trade Measures Report No. 144
- ACDN Nos. 2008/45 and 46

* Imports of HSS from China and Malaysia. Investigation commenced 18/12/2008

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ASA Inc Submission to Productivity Commission

COMPARISON BETWEEN ANTI-DUMPING APPLICATION AND ASX DOCUMENTS

This memo seeks to outline some of the key differences between assertions in the anti-dumping application and in the company's recent ASX documentation.

PART 1 – THE ANTI-DUMPING APPLICATION

The application makes the following comments as to revenue, volume, profit and injury:

Revenue

The Application states:

Index of Revenue variations (model, type, grade of goods)

PUB
FIL

Australian Industry revenue for pipe and tube has declined in 2007/08 commensurate with reductions in sales volumes and a reduction in margins (price over costs). The nine percentage point decline from 2006/07 to 2007/08 is considered a material retardation of the Australian industry's turnover.

Period	2004/05	2005/06	2006/07	2007/08	2008/09
Index	100	101.07	105.9	96.9	133.7

Notes:

1. Profit data sourced from Appendix A6.1 data supplied by applicants.

Production and volume

The Application states:

Page 21

Index of production variations (metric tonnes)

PUBLIC
FILE 45

Consolidated industry production data for pipe and tube indicates that the Australian industry has maintained relatively steady production rates since 2004/05, there being a reduction in 2005/06, followed by an increase in production rates in 2006/07, then a reduction to be at similar levels of 2004/05. 2008/09 data is for a quarter only and is not considered representative of the full year.

Period	2004/05	2005/06	2006/07	2007/08	2008/09
Index	100	94.86	102.47	98.9	102.3

Notes:

1. Production rates based upon Appendix A6.1 data supplied by applicants.

ASA Inc Submission to Productivity Commission

Profit

The Application states:

Page 22

Index of Profitability variations (model, type, grade of goods)

Period	2004/05	2005/06	2006/07	2007/08	2008/09
Index	100	70.27	80.60	-107.50	139.2

Notes:

1. Profit data sourced from Appendix A6.1 data supplied by applicants and is percentage based on profit over sales revenue.

The Australian industry's profit variation is based upon total profit (as distinct from profit per tonne). Customs' determined in Trade Measures Report No. 116 that the Australian industry experienced a reduction in profit and profitability following the 2004/05 year. The following profit and profitability variations indicate that there was a slight improvement during 2006/07 however, this was followed by a dramatic decline in 2007/08.

PUBLIC FILE

The Australian industry's profit and profitability in 2007/08 is substantially below those levels of 2005/06 – a year in which Customs had determined that the Australian industry had experienced material injury. Please note: this reduction in profitability is evident after the costs associated with the OneSteel-Smorgon merger which occurred in the September quarter of 2007 are excluded.

Period	2004/05	2005/06	2006/07	2007/08	2008/09
Index	100	75.09	87.83	-77.06	186.1

Notes:

1. Profit data sourced from Appendix A6.1 data supplied by applicants.

Injury

The Application states:

The growth in imported market share has predominantly been driven by price – a price that the Australian manufacturers argue are in some cases below that of the price sold and/or below the cost of raw materials plus value-add margin in the country of origin.

The Application states:

Page 13

"… Industry contends that the imported product forces industry to either: compete head on at a price point that results in significant reduction of margins to (a) unacceptable levels to cover the cost of capital, or (b) zero or negative margins – either outcome warrants cessation of supply to the target market on sound commercial judgment; or choose not to pursue such low margin business and forgo volume as a consequence; or

choose not to pursue such low margin business and forgo volume as a consequence. Logically, the resultant lower volume across fixed cost base results in the unit cost of remaining production to increase – thereby impacting viability of the wider product range."

Causes of injury - dumped imports

The Application states:

> ***The material injury experienced in 2005/06 has been further compopunded in the 2007/08 year (there was a slight improvement in 2006/07). As indicated, sales volumes and market share have continued to decline by an additional six and eight percentage points, respectively. The industry's cost-to-make-and-sell ("CTM&S") has increased in each of 2006/07 and 2007/08, however, selling prices in 2007/08 have declined by 5 percentage points after remaining relatively stable in 2006/07, and have been levels below 2005/06. The price depression experienced in 2007/08 has resulted in a substantial erosion of the industry's margin, contributing to significant reductions in industry profit and profitability***

The Application states:

> ***The extent of the material injury experienced in 2007/08 seriously jeopardises the future viability of pipe and tube manufacture in Australia. Industry profit and profitability is at critical levels. The Australian industry had anticipated a return to fair trading conditions following the imposition of interim duties following the 2006 application. This expectation has not eventuated, with further erosion of profit and profitability in 2007/08.***

The Application states:

> ***The Australian industry's ability to pass on full cost increases is hampered by the impact of increasing imports (at dumped and subsidised prices) and the industry's declining sales volumes and erosion of market share. The industry has experienced market share declines consistently since 2001/02 when it held 84 per cent of the Australian market, to recent levels of approximately 64 per cent – over the intervening periods injurious imports have increased from 16 per cent to 36 percent market share, making it extremely difficult for the local industry to pass on full cost increases.***

The Application states:

> ***Page 26***
>
> ***The Australian industry's profit and porofitability are at the lowest levels experienced in seven years. Customs indicated in Trade Measures Report No. 116 that the Australian industry had suffered "material" injury through lost profits and profitability in 2005/06. Industry profit in 2005/06 was approximately 70 per cent of that achieved in the previous year. In 2007/08 Australian industry profit has been further reduced.***

The Application states:

> ***In the applicants' opinion, there has not been any other discernible factor or factors that could have contributed to the industry's reduced performance, other than the competitive impacts of injurious imports.***

The Application states:

Page 13

Some sources of imported pipe & tube products cannot demonstrate the same level of traceability to appropriate standards of feedstock and counter this with lower sell prices to distributors and resellers. Distributors and resellers in turn use the purchase price of this imported pipe & tube product to motivate the domestic producers to sell at a lower cost. Alternatively, these imported products are sold into the end-use market place and the domestic manufacturers are forced to either reduce selling price to maintain market volumes via other distribution sources or forego the volume as the target selling price marginalizes the overall business transaction.

PART 2 - ASX MATERIAL

The above extracts are to be contrasted with material presented to shareholders and the ASX. Much of the following would have been known to OneSteel executives at the time of approval of the final anti-dumping application, given the likely utilization of monthly accounts and reporting.

ASX Release 17 February 2009 from OneSteel notes an increase of 256% on the $64 million statutory net profit after tax for the six months ended 31 December 2007. Operating net profit after tax for the six months to 31 December 2008 was stated to be $215 million, an increase of 131% from the six months ended 31 December 2007. Operating earnings before interest and tax (EBIT) was $401 million, an increase of 99% on the previous corresponding period. In the ASX Release Mr Plummer estimates that the company's full year net operating profit after tax will be between $325 million to $375 million.

Where revenue is concerned, the OneSteel Segment Overview noted that manufacturing increased 41% "as a result of higher prices, partly offset by a decrease in sales volume … The decrease in sales volume was due to significantly weaker demand in November and December due to the impact of weaker global financial and economic conditions and led to reduced production towards the end of the half to bring inventory levels and production in line with the softer demand." Thus the company was able to rationalise production and yet significantly increase revenue through better pricing. Where sales revenue is concerned, the OneSteel Company Overview notes that higher prices and volumes in the manufacturing and distribution businesses also contributed to the uplift, as well as the inclusion of Smorgon Steel.

The higher pricing is not simply reflected by higher costs as there was also significant increase in profit. EBIT for the manufacturing segment increased 248% for the first half "due to the restoration of margins resulting mainly from higher prices, which had lagged increases in input costs in the prior period." EBIT increased 221% for the half "mainly as a result of higher prices and improved margins." The sales margin in distribution improved from 3.7% to 8.8%. Increases in sales margin in the manufacturing segment rose from 4.4% to 10.8% "due mainly to recovery of margins."

Distribution revenue increased 36% "principally due to a strong start in the first half with higher prices and margins. A lower Australian dollar and tight credit availability improved our competitive position against imports particularly in the second quarter, partly offsetting weakening domestic demand." This shows that the company is not complaining to shareholders about import competition or dumping. The notes to the distribution accounts state that "pipe and tube was impacted by reduced demand as the channel de-stocked late in the second half." It indicates that the outlook for the distribution arm is an anticipation of "continued weakness in demand over the short term." Once again, decreased domestic demand is the key to any injury, not imports.

The financial overview of the six months to 31 December 2008 as reported in OneSteel's Review of Operations document notes sales revenue up 28%, earnings before interest, tax, depreciation and amortisation up 73%, statutory earnings before interest, tax, depreciation and amortisation up 93%, earnings before interest and tax up 99%, statutory earnings before interest and tax up 141%, net operating profit after tax and minorities up 131%, statutory net profit after tax and minorities up 256%, earnings per share up 128%, return on funds employed up from 10.4% to 14.2% and return on equity up from 7.8% to 12.7%.

OneSteel's ASX Release 17 February 2009 makes clear that decreased production was a conscious decision by the company in the light of reduction in domestic demand. Mr Plummer was quoted as saying "we have taken substantial steps early to wind back production and bring inventory in line with demand." Most importantly, he did not see this as a bad thing but rather that "these steps and other 'back to basics' initiatives are expected to have flow on benefits for the company's cash, working capital and debt positions in the second half." The statement notes that the company had advised in late January that it was extending adjustment to operating levels, particularly steel-making production to bring operating and inventory levels in line with demand as early as possible in the half. It noted that adjustments were made at all major facilities. The Review of Operations document notes that "production slowed towards to (sic) end of half to match demand and adjust inventory levels."

Most crucially the OneSteel Company Overview states "production was running at or near record levels to meet very strong demand for the majority of the first half but was slowed late in the half to address the impact of weaker global economic and financial conditions on domestic demand." It noted customers began cancelling or deferring orders. This is the expressed reason for lower production, not losses to imports.

As to production, the OneSteel Segment Overview notes domestic steel despatches from the distribution segment increased 2% for the first half compared to the same half in the prior year.

The Segment Overview notes that inventory has increased 31% "due to softer sales volumes as the market responded to the impact of the global economic and financial crisis."

The OneSteel Presentation makes the crucial concession that:

- "Early in the half, OneSteel was operating at full capacity in almost all facilities.
- In November and December OneSteel introduced significant production cutbacks in almost all facilities.
- Production was significantly reduced late half to bring inventory and operating levels in line with demand.
- Responding quickly and strongly to deterioration in global and domestic conditions – flow on benefits expected to cash, working capital and debt in second half."

The Distribution-Key Points in the segment of OneSteel's results Presentation p 19 states "demand weak late in half due to impact of weaker global conditions

- Customer de-stocking
- Reduced activity in mining sector
- Access to credit issues in construction sector."

Once again no mention is made of imports or dumping.

PART 3 - QUESTIONS AND COMMENTS

The following questions seem pertinent in the light of a comparison of the above extracts:

a) In relation to the section extracted above from the AD Application on causes of injury, the first gap in this assertion is that it does not mention imports by the applicants themselves. It then seeks to suggest that the key to pricing is "traceability to appropriate standards of feedstock …". This is frankly a bizarre assertion. It implies that all consumers want similar appropriate standards but if they are not provided with an evidentiary traceability they will pay a lower price. A consumer either wants the standard or not. If they believe that the standard is not there, perhaps because of the lack of traceability of evidence, why would they be buying that at all? Do consumers want their steel buildings to fall down or their machinery to

breakdown and are just happy to pay a lower price? The above extract then seeks to suggest that this lower selling price, because of lack of traceability, forces domestic producers to sell at a lower cost. How can this be logically consistent? If the domestic producer can provide traceability and the imported product cannot, and if consumers are prepared to pay a premium for traceability, why aren't they prepared to pay the local producer's premium?

b) The above extract goes on to say in the alternative that because the untraceable products are sold into the end use market at lower prices, then manufacturers are forced to reduce selling price to maintain market volumes via other distribution sources and forgo volume as target selling price marginalizes overall business attractiveness. Once again, how is it internally logically consistent to say that non-traceability forces lower prices but that those who can show traceability must reduce selling price in any event?

c) Where direct or indirect imports by the applicants are concerned, why do their own imports not have the same price impact on their domestic production? What grades do they import and why? What pricing applies to their imports and in what distribution chains?

d) How does the allegation that the applicants have chosen to "forgo the volume" fit against their historical capacity levels? What kind of volumes did they have in the products that they describe as those without "traceability"?

e) What about improved results during the investigation period including 31 December 2008 half, as noted in ASX material and not included in the AD Application?

f) What information was provided to Mr O'Connor prior to his submission of the Application as to the more recent results and the likely interim profit figure? If information was not provided, why was it not sought and provided? If it was provided, how is that consistent with the tenor of the Application?

g) If dumped imports are damaging the company's business, why was this not alleged in the presentation made to OneSteel's AGM on 17 November 2008? That should be compared with the reference to the New Zealand distribution figures, OneSteel Presentation segment results p 21 where a comment was made that New Zealand distribution needed to maximise trading opportunities "to minimise the full impact of imported, lower-priced stock."

h) Given the natural problems post merger, why wouldn't the improvements in 2005/06 and 2008/09 be much more indicative of the local industry's trend returns than the unusual post merger situation? What explanations do the applicants give for the improved profitability in 2006/07 and 2008/09? What is their reason for the dramatic decline in 2007/08?

i) How are the allegations of lost revenue in Mr O'Connor's Application consistent with Mr Smedley's report to the AGM that sales revenue for the 12 months to 20 June 2008 grew by 73 per cent? How is it consistent with his assertion that it was also caused by "a very solid performance across all segments". How is it consistent with his view that operating earnings were up 85 per cent? How is it consistent with his assertion that the sales margin was 8.2 per cent compared with 7.9 per cent in the previous financial year? How is it consistent with his assertion that operating net profit increased 59 per cent? How is it consistent with his assertion that statutory net profit was up 18 per cent "reflecting the contribution of the acquired Smorgon steel businesses and associated restructuring costs".

As ASA Submission 8/1/09 noted, the UBS Report September 2007 noted that OneSteel initially targeted $70 million in synergies from acquiring the Smorgon operations. That analysis assumes some anticipated market share loss post the merger and rationalisation of production facilities. If the restructuring led to lower volumes but increased net profit, how is this demonstrable material injury? What degree of market share loss was utilised by OneSteel in calculating the net synergy target of $70 million? To what extent is the market share loss in volume terms that underlines this anti-dumping application different from its commercial estimates when deciding on the merger? As noted in the ASA Submission, UBS reported that a conservative assumption would have been in the order of a 4 to *5 per cent market share loss.(-* para 118 also refers to 5 per cent market share loss.) The UBS analysis indicates that the merger itself will lead to loss of market share on the basis that "customers uncomfortable with only one domestic supplier will seek to dual source, switching tonnes away from OneSteel to importers …" (ASA Submission 8/1/09 Appendix B-p 12).

j) Where revenues are concerned, how is it consistent with his assertion that operating cashflow was $350.8 million up from $276.5 million the previous year?

k) The Application notes reductions in sales volumes. Why does the Application concentrate on share and not capacity? If total demand increases when capacity remains static, percentage share will go down but there is no real injury. You cannot sell what you cannot or will not make. As ASA Submission 8/1/09 noted, the MD and CEO of OneSteel in his presentation to the AGM referred to "demand management". Demand management is presumably about pro rata allocations when OneSteel ATM's production facility cannot meet its demand.

l) What do the more recent trends show about sales volumes? The Application notes a 9 percentage point decline from 2006/07 to 2007/08. It asserts that this is considered a material retardation. Given the very high figures noted for 2008/09, why do the applicants consider that during the relevant period of investigation there is material retardation? How is this possible under conditions of demand management? A company that has to put its traditional customers on rations because it cannot meet total demand, should surely have to provide some realistic commercial explanation as to why it could nevertheless argue that its volumes are being hurt by dumped imports. Mr Plummer has noted significantly increased domestic sales and also noted demand management.

m) In considering the large increase in total profits and profitability in the September quarter of 2008-09, ACS sought information from the applicants and was advised that this can be attributed to:

   (i) Effects of the rationalisation

   (ii) A new pricing system that does not reflect all data including rebates thus overstating revenue and profit and manufacturing costs not reflecting the full value of HRC price increases (p 14).

   Does OneSteel senior management agree with this assertion by Mr O'Connor in behalf of the company? If the rationalisation of the industry led to increased profitability, does this not undermine concerns about decreased volumes? If a new pricing system does not properly account for rebates and temporarily overstates revenue and profit, what is the logic behind such a system? Is it consistent with the system of reporting to shareholders and the ASX? If not, why is it different?

n) If Mr Plummer advised the AGM that domestic sales increased significantly, how is this consistent with Mr O'Connor's contrary assertions that sales have been lost to imports? Is it the case that Mr O'Connor was unaware of Mr Plummer's views and vice versa? If each or either was aware of the views of the other, what motivated them to make contrary assertions? Was any discrepancy inadvertent or intentional? In either case, why doesn't the discrepancy undermine the minimal standards required of an appropriate application?

o) Why did sourcing offshore occur to supplement supply "to meet demand?" Does this not indicate that OneSteel ATM was not able to meet demand from its own production capability?

p) How are the assertions of reduced margins and unacceptable levels of return on capital and/or zero or negative margins consistent with the recent interim report indicating over a 250% increase in profit for this division of OneSteel and the favourable comments in the Hills Report?

q) AD Application Question A-5.6 calls for a copy of distributor or agency agreements/contracts. The application notes that there are no "formal distribution agreements" and that the arrangements "remain unaltered to those that existed in the previous investigation of 2006". How can the arrangements remain unaltered if BlueScope now has acquired Smorgon's distribution business and Smorgon no longer exists? Is OneSteel suggesting that its relationship to the old Smorgon distribution network that it now sells to via BlueScope is the same as its relationship when Smorgon was still in existence, and competing vigorously with it, when it presumably it could not sell much or anything to it?

r) It is particularly important to identify the past and/or present role of Irini and the relationship between OneSteel and BlueScope.

(1) What is the commercial basis of Irini's business with OneSteel?

(2) Does it obtain better prices than other distributors? If so, why? What is the nature of the product that it is allowed to distribute? What is its source? What must it do in return for any privileged status?

(3) Is it directed as to its selling prices? If so, would this constitute illegal resale price maintenance? If so, how should this impact upon the Customs investigation? On what basis does Irini make profit? Is its profit dependent on what it can sell or is it asked to track Alpine prices? If the latter, what level of profit if any is it guaranteed? If there is any ordained price undercutting, to what extent would OneSteel and Irini and Mr Bragge be in breach of anti-predatory pricing norms under Australia's trade practices legislation?

(4) Does BlueScope acquire product from OneSteel for its distribution chain at favoured prices, equal prices or worse prices than does Irini? In the latter event, what is BlueScope's attitude to this? If BlueScope is unconcerned, can this be explained by OneSteel's obligations to purchase hot rolled coil from it? To what extent is their mutual arrangement one that shows that imports can never compete with that part of the market, e.g. because BlueScope must buy and distribute a certain amount of OneSteel product in return for OneSteel guaranteeing to buy a certain amount of hot rolled coil from BlueScope? How does BlueScope price its hot rolled coil sales to OneSteel and Orrcon?

APPENDIX 'B'

Outline of Steel Product Anti-Dumping Cases from Year 2000

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Australian Steel Association Inc
A0020339V ABN 24 762 435 928

ASA SUBMISSION TO P.C. INQUIRY
APPENDIX 'B'
10 YEAR HISTORY OF ANTI-DUMPING CASES

Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
27/4/99	TMR No 11	OneSteel (nee TOA)	Circ Galv Pipes - 4 Grades - separate Normal Values	Thailand Other Imports ex Korea etc. were "ignored"	Saha Thai	3% - 15%	20% - 33%

Comments:
Cash Securities Imposed Sept 1999

- **Measures continued beyond 17/2/2005 (OneSteel)**
- •• This in spite of "no exports" ex Thailand
- •• Customs methodology for Measures based on "Phantom" exports – considered "wrong"
- •• Measures were also increased and Normal Values extended from 4 to 12
- •• **OneSteel has requested Measures to continue beyond 17/2/2010** – current Investigation - ACDN 2009/14.

Background – Original Investigation

- Original Investigation period was 1/7/97 – 31/3/99
- •• 7 Quarters = 21 months (I.P.)
- Customs "found" that, for Saha, I.P., the weighted average dumping margin was a **negative** (-4.8%)
- •• This should have resulted in "termination" of Saha Investigation in September 1999
- •• Basis being Article 2.4.2 of WTO and s 269 TACB (2)(a)
- Customs basis was short term currency fluctuations being contrary to Article 2.4.1 of WTO and s 269 TAF
- Saha also offered P.U.T., but Customs "declined"

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Comments (continued)

- Customs also stated that importers of same Pipe ex Korea, etc. did not offer any information
- Like Goods argument also rejected
- Also argument on "single market" logic, and level of trade rejected. Saha sold domestic by the piece; not by volume Tonnes on export orders.

Subsequent Appeals, etc.

March 2000	-	Saha and importer appeal to TMRO
July 2000	-	TMRO recommends "Re-Investigation"
November 2000	-	Minister affirms original decision
April 2001	-	Importer appeals to Federal Court
December 2001	-	Minister agrees to consent orders
September 2002	-	TMRO makes recommendation to Minister
February 2003	-	Minister directs Re-Investigation
May 2003	-	Minister revokes original decision on Saha
	-	Importer receives ex-gratia refund of "cash securities" paid Sept 1999 – Feb 2000
	-	Saha and Importer resume business
July 2003	-	OneSteel apply to Federal Court – "Overturn May 2003 decision"
	-	Saha and importer not party to action
January 2004	-	Minister re-instates original decision of February 2000
	-	Saha ceases exports – IDD imposed
	-	Customs review original 'causation' link to Material Injury – OneSteel Appeal
	-	Outcome – as per original finding
May 2004	-	OneSteel request continuation of Measures
August 2004	-	Customs initiate continuation inquiry – ACDN No. 2004/22
November 2004	-	Measures Report beyond 2005 – TMR No. 84 to continue
	-	Measures were to expire 17/2/2005
January 2005	-	OneSteel obtain Review of Measures – "to increase" N.V.s

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Comments (continued)		
February 2005	-	Minister continues Measures for 5 years – ACDN No. 2005/10 – now to expire 17/2/2010
April 2005	-	By way of a comparison the US Commerce Department established a weighted average dumping margin of 2.26% for Saha Thai exports to the US for the 12 month period ended 28 Feb 2005
	-	The previous Administrative Review by the US on Saha Thai had a de minimis margin of 0.17%
July 2005	-	Customs Report – Review of Measures – TMR No. 96
September 2005	-	Increased Measures – 12 Normal Values even though **no exports since January 2004**
	-	TMR No. 96
April 2008	-	Importer applies for Review of Measures
	-	TMR No. 139
	-	Saha had no exports since 2004
October 2008	-	Customs apply common sense, objective treatment, direct contrast to TMR No. 96 (Sept 2005)
	-	New single NV in lieu of previous 12 of TMR No. 96
	-	Year 2008 experienced unprecedented high steel costs
	-	Some exports start – few hundred – but HRC prices kill the business
Currency	-	New NV in US$ currency (0.87)
	-	A$ crashes from >0.90 to 0.64, making A$ price uncompetitive
	-	Saha Exports not price competitive with other country exports: • China • India • Vietnam • Taiwan
June 2009	-	OneSteel apply for Measures to continue beyond Feb 2010 (10 years)
	-	Ref. ACDN No. 2009/14

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Other Factors

- OneSteel/ATM is sole Australian producer (Brisbane Mill)
- They produce c. 22,000 T.P.A.
- The market is c. 120,000 T.P.A.
- Imports are mainly ex China
- OneSteel/ATM 'only' produce higher specification Galv Pipes to satisfy Australian Structural Grade AS1163
- OneSteel only produce 3 of the 4 sub-Grades being, "light', 'medium' and 'heavy'.
- "All" imports are of a lower, **non structural** specification AS1074 (BS1387 is the universal Standard)
- Most imports are "extra light", "light" sub-Grades
- OneSteel do not produce "extra light" and import from Vietnam

Other Imports

- In years 2005, 2006 and *2008, OneSteel initiated Investigations on dumping and *subsidy) on HSS imports from China, Malaysia, Korea, Thailand, Taiwan
- HSS is the general category of small diameter ERW Pipes and Tubes and which the Galv. Pipe is a subset of that Group
  •• HSS = Hollow Structural (Steel) Sections
- Saha's Galv. Pipe has been excluded from all of those Investigations which for all practical purposes have resulted in Galv Pipe Imports "exploding" from a base of around 40,000 T.P.A. in 97/98 to more than 100,000 T.P.A.
- OneSteel's/ATM Vietnam source has been excluded from its Dumping Applications.
- The 2008 HSS case has recently been terminated by Customs

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Case 1 (page 5 of 5)

Targeting – Strategic Action

- The original 1999 action is believed to have been "motivated" by the volume importer of Galv. Pipe from Thailand
- Nothing in that regard has changed. OneSteel continue to lodge against "importers" supplying their market competitors
- "You can import a Toyota or Holden "Ute" from Thailand duty free but you cannot import a piece of Galv. Pipe to make a farm Gate or stock yard panel."

Conclusion

- Up until April 2008 Customs had, wrongly, presumed Saha would always export at "dumped" prices and Saha has, through OneSteel's access to the Anti-Dumping System, been, in our view, discriminated against for 10 years

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Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
30/3/2000	ACDN No. 2000/17	BHP – Pre-BlueScope	Tinplate	Taiwan	Importer only	Securities imposed 23/8/2000 I.D.D. imposed 10/1/2001 TMR #26	**Note:** •Tinplate is used in food and beverage packaging •Consumer demand

Comments:

- Instructive – changes in consumer demand
- Measures were not continued beyond 10/1/2006
- Company now BlueScope and since ceased production
- Even with Dumping Duty, applicant lost $50 Mill
- Relevance – "Fresh Food People" and "Aluminium"

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30/11/2001	ACDN No. 2001/67	OneSteel	Hot Rolled Structurals, "Beams" "Channels", "Columns", Whyalla Product	Thailand Korea Sth Africa	Thailand – S	Initial 3.5% Subsequent "de minimis"	Korea – 18.2% Sth Africa – 42.6%

Comments:

- Only exporters to Australia were the 3 countries
- Each country had only one Mill producing GUC

April 2002: Customs imposed cash securities – ACDN 2002/18

- Thailand – 3.5%
- Korea – 18.2%
- Sth Africa – 42.6%

June 2002: Minister imposes I.D.D. – ACDN 2002/32 (5/7/02)
Basis as per cash securities

July 2002: Same day (5/7/02) Minister directs Customs to review the 3.5% Measures on Thailand as a consequence of lobbying Minister by OneSteel

April 2003: Minister accepts TMRO recommendation of a re-investigation – ACDN 2003/17

May 2003: Review of Thailand Measures results in "de minimis" – ACDN 2003/21

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Case 3 (page 2of 2)

Comments continued:

June 2003: Affirmation of Customs original decision – ACDN 2003/31

March 2004: Review of Measures on Korean Mill – INI – ACDN 2003/31

December 2004: Review outcome – No I.D.D. - ACDN NO. 2005/01 – Duty Assessment and Refund to importer

- Measures expired on 5 July 2007
- OneSteel had to import GUC from the Thailand Mill, Syam Yamato (shortfall)-year 2004.
- The Dumping Action initially stopped imports from Korea and killed imports ex Sth African Mill
- Effectively, all OneSteel achieved was a duopoly on supply – OneSteel and the importer of Thailand GUC
- Minister refused to accept Price Undertakings at time of prelim findings– why?

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Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
20/8/2003	ACDN No. 2003/38	BHP – Pre BlueScope	Plate	Japan Korea China Indonesia	Japan (JFE) Korea (Dung Kuk) China (none) Indon (2 Mills)	2.5% Nil N/A P.U.T.	19-21.9% 10.6% 24.9% 18.3%

Comments:

February 2004: Cash securities imposed – ACDN 2004/06
April 2004: I.D.D. imposed
- Korean Mill, Dong Kuk, had Investigation terminated
- Appeal to TMRO

December 2004: Minister affirms original decision

Notes:

(1) Australian market during I.P. was only 240k
(2) In 2008, BlueScope, (nee BHP) had record output
(3) BlueScope had customers on "allocation" - 2008
(4) No request for continuation of Measures
(5) Measures expired 1/4/2009

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Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
5/8/2004	ACDN No. 2004/09	OneSteel	Line Pipe	Korea only	Exporter & Importer	Terminated 11/8/2004	Terminated 11/8/2004

Comments:

- OneSteel had Pipe Line project in Australia
- Large diameter ERW Pipe
- Could not supply total project requirement
- Needed to import "shortfall" ex Korea
- Project Manager "decided" if need for imports, it should import shortfall requirement, not Onesteel.
- OneSteel not happy, lodge Dumping Application.
- Customs found that any injury attributable to dumping was negligible
- Abuse of process?

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Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
23/12/2004	ACDN No. 2005/02	OneSteel	HSS ERW Pipes & Tubes <165mm Diam	Malaysia Thailand Korea China	Exporter Exporter Exporter N/A	Terminated Terminated Terminated Terminated 5/4/2005	All terminated "Injury was negligible" ACDN 2005/21

Comments:

- Case terminated
- Question- abuse of process?
- Thailand HDGP excluded

Background

- Customs originally rejected the OneSteel application – "no injury" in pre screening process.(Record profits)
- TMRO upheld OneSteel appeal – applications only need to establish a prima facie case, and not substantiate claims.
- Customs then initiated Investigation as a result of TMRO decision
- Customs applied common sense approach and examined the Material Injury claims before establishing if any imports were "dumped"
- Customs terminate – "no injury"
- OneSteel appeal to TMRO – Customs should/need to determine if any dumping in a "positive" sense
- ASA apply to Federal Court
- Consent orders signed – **Case terminated**

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Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
8/6/2006	ACDN No. 2006/25	OneSteel	HSS - Same as previous case	Malaysia Thailand Korea China Taiwan	Exporter Exporter Exporter P.U.T.s	Terminated Terminated Terminated Terminated	Most were terminated Selection Factor on China P.U.T. for Steelforce And Foshan ex China

Comments:

- OneSteel re-make of previous case
- Most of the case was terminated
- Cash securities imposed on "residual" Chinese 24/11/06-selection process, most exporters "exempt" from IDD.
- Steelforce the real victim – "fell between the cracks"
- P.U.T. offered December 2006
- Minister accepts P.U.T. May 2007-Ministerial "inertia".
- Most Investigations terminated 8/12/2006 – ACDN 2006/62
- What was motivation? Strategic targeting ? or gunshot approach?
- Residual China Mills, including Steelforce, got 14.6% I.D.D. fixed A$ amounts varied according to sub-set of HSS
- Thailand HDGP "excluded"

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Date	Customs Ref	Applicant	Goods	Country	ASA-Howard Represent.	Measures Outcome	Other Exporters
18/12/2006	ACDN No. 2008/45	OneSteel	HSS - Same as two previous cases	Malaysia China Note: China included Countervailing claims	Exporter Exporter	Terminated Most Terminated (5 Mills)	Terminated Steelforce and residual Mills subject to Review of Measures - Pending

Comments:

- This case complicated by applicants' claims on Subsidy by GOC and review of measures on Steelforce.
- Applicants tried to *"Piggy back" subsidy allegation on China (*Canadian case)

May 2009: Investigation on Malaysia terminated – ACDN No. 2009/11
June 2009: Investigation on most China Mills terminated – ACDN No. 2009/18
June 2009: SEF pending-July 2009
Steelforce and Foshan Mills / exporters subject to PUT's from previous case.
Outcome of "Reviews" pending, but expect,(based on logic), revocation.

Time Lines

19/11/2008: OneSteel lodge Application (applicant with support of Orrcon)
5/12/2008: Applicant provides more information at request of Customs.
18/12/2008 Customs accept application

ASA Inc Submission to Productivity Commission

Comments:

Time Lines

19/11/2008:	- OneSteel lodge Application (applicant)-supported by Orrcon.
05/12/2008:	- Applicants provide more information
18/12/2008	- Customs accept application
	- Investigation period is 1/1/2008 to 31/12/2008
	- Applicants only provided “info” on their activities, etc. for nine months to Sept 2008
	- Exporter, Importers have to supply “full year” data
19/01/2009:	- Customs visit applicants – Newcastle’s OneSteel, Brisbane’s ATM, Orrcon.
27/01/2009:	- Customs visit Malaysia – Exporter Visit
18/03/2009:	- Customs visit BlueScope Distribution
	- Orrcon and BlueScope are significant importers of the G.U.C.-Customs defer visits to China.
May 2009:	- Visit Reports to applicants – January 2009 – placed on Public File
	- Revealed that Customs had reservations on applicants’ Material Injury Claims
	- Provides Explanation as to why exporter visits to China (except for Steelforce) postponed

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Comments continued:
May 2009: - Malaysia Investigation terminated
June 2009: - "Other Mills" China – terminated, except for review cases-Steelforce and Foshan.

Summary of Filings on Public Record

- Applicants Consultant (O'Connor) lodged 16 documents totaling 794 pages, mainly documents of mass distraction and "recycled" documents from other cases
- Government of China lodged 3 documents totaling 2,723 pages
- ASA lodged 9 documents totaling 165 pages

Confidential versions of applicants documents would have exceeded the 794 pages

Issue

- Applicants and their Consultant seemingly delayed the Customs Visit Reports (Public File Copy) being available from January to May.
- Exporters and importers had to incur transaction costs that may not have been necessary
- This epitomizes OneSteel's strategic use of the anti-dumping system.

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