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Productivity Commission
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REVIEW OF AUSTRALIA'S ANTI-DUMPING AND COUNTERVAILING SYSTEM

The Trade Remedies Task Force (TRTF) welcomes this opportunity to contribute to the Productivity Commission's review of Australia's Anti-dumping and Countervailing System through this submission.

The TRTF, which has been operating for over a decade, is a grouping of around 50 Australian manufacturing companies and industry associations and is Chaired by Innes Willox, Director – International and Government Relations at the Australian Industry Group.

The Task Force's objective is to ensure that Australia has in place an effective system of policies and procedures to take action against imports which are causing injury to Australian industry. This injury could be caused by practices such as the dumping of products in the Australian market; overseas export subsidies; or a sudden increase in imports; which would trigger a safeguard action.

At this time of global economic turmoil, and with the continued stalling of the WTO Doha Round, it is critical that Australian industry can better access trade remedies through an effective anti-dumping system to counter the effect of illegal under-pricing through commercial or government practices.

The existence of a mechanism to address unfair trading practices is supported by measures envisaged and prescribed by the World Trade Organization (WTO) under its Agreements, including the Anti-Dumping Agreement ("the Agreement") and the Subsidies and Countervailing Measures Agreement.

Australia already has one of the most open markets in the world for industrial products. With such an open market, it is imperative that we have some device to ensure that products are not landed in Australia below the market price in their own country simply to capture market advantage here.

Thank you for this opportunity to comment.

Yours sincerely

Innes Willox
Chairman
Trade Remedies Task Force

TRTF SUBMISSION EXECUTIVE SUMMARY

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

The Task Force makes the following key points in this submission:

The Current System

- Australian industry has every right under international trade rules to employ mechanisms to counter predatory pricing.
- Accordingly, our current anti-dumping and countervailing system operates on a fundamental and internationally-accepted basis.
- The current system supports a stable business environment for industries affected by dumped imports, upon which material injury has been inflicted.
- However, the facts suggest that Australia is modest in the number of anti-dumping cases we pursue.
- The current system does not allow Australian companies to increase profits by create an uncompetitive trading environment.
- In fact, it contributes to Australian efforts to ensure that international trade remains fair through a process which has been designed to level a “playing field” which has been distorted by overseas suppliers
 - the actual cost impact of measures is minimal when considering the overall importation of goods into the market.
- The current system provides a mechanism to impose discipline on foreign exporters and overseas suppliers to dissuade the practice of dumping onto the Australian market.

Public Interest Test

- The additional costs, time delays and uncertainties of having a public interest test are not warranted.
- We note however, that those countries which do deal with issues of public interest have recognised that ultimately it is necessary to give priority to the finding that an industry has been materially injured by either dumped or subsidised goods.
- We also note that the few findings under the Canadian system have been about the application of the lesser duty rule (something that is considered in all cases in

Australia) and that the application by the European Commission of its “community interest” test has only occurred in a very few cases.

Moving forward

- The TRTF does not support any changes to Australian legislation and practices which would be inconsistent with the Anti-dumping Agreement (“the Agreement”).
- The TRTF supports the retention of the lesser duty rule and does not support the practice of zeroing.
- The TRTF considers that to go beyond what the Agreement provides would not only disturb the delicate balance expressed in the Agreement but would undermine the long term support that the Australian community has for the retention of the Agreement.
- The TRTF does not see either the anti-dumping or countervailing system as an instrument for removing a country’s competitive advantage, but certainly considers that competitive advantage should not be further and unfairly enhanced by the use of dumping and government subsidies which are inconsistent with the anti-dumping and subsidies and countervailing agreements.
- The TRTF welcomes consideration of how the system might become more effective and timely.
- The TRTF has been critical of many aspects of the system during the Joint Study Inquiry where it considers that substantial and encouraging progress was achieved administratively, in terms of process and procedures, including: recognition of the particular needs of SMEs; new guidelines; improved dumping manual; and the creation of an electronic public file system.
- The TRTF supports: the retention of a unitary dumping system; Customs to retain its present role; and that the Minister should remain as the ultimate decision maker.
- The TRTF considers that to remove either Customs or the Minister from the process is not justified on the grounds of efficiency or effectiveness.
- The impact of removing Australia’s anti-dumping system would be highly detrimental to Australia and its industry.
- Without an effective anti-dumping system, countries could freely dump product onto the Australian market
 - this would create an unpredictable and unfair market environment; insufficient returns would stifle continued investment or result in industries vacating the Australian market permanently.
- It is contrary to Australia’s long term interest to remove dumping remedies, especially as all Australia’s trading partners maintain anti-dumping systems

- this also applies in relation to the retention of a countervailing system where governments engage in trade distorting behaviour through the use of subsidies.

TRADE REMEDIES TASK FORCE SUBMISSION

Introduction

As the Issues Paper prepared by the Productivity Commission (“Issues Paper”) notes, Australia’s anti-dumping system is based on internationally agreed rules and procedures under the auspices of the World Trade Organization (WTO); nearly all other developed and many developing countries have an anti-dumping regime; and the objectives and broad concepts underpinning Australia’s system have widespread endorsement.

This increase of anti-dumping systems occurs against a background where members of the WTO are not obliged to actually have such a regime. The fact that it is so universally applied, endorses the need for such a system to be in place.

The Issues Paper notes that there have been periodic reviews of Australia’s anti-dumping system but that it was 20 years since the Gruen report conducted a “root and branch” examination of the system.

The Productivity Commission noted that dumping usage has declined from the very high rate of the 1980s where Australia’s percentage of measures was 30% of those measures in force globally to around 5% of such measures, which is acknowledged as more in keeping with Australia’s share of world trade. Although the present economic downturn may see this figure increase, such an increase is likely to be insignificant.

Recent figures would tend to show that Australia’s present use of anti-dumping measures indicate that such measures are not being used excessively or as some form of *de facto* protectionist measure.

The minimal level of dumping measures imposed and revenue collected demonstrates that our anti-dumping system cannot be seen as in any way an impediment to international trade with Australia.

Indeed, the imposition of measures should not be seen as being protectionist at all. Rather, its purpose is to restore fair international trade. The reason why the previous role of the Industries Assistance Commission, the forerunner of the Productivity Commission, was removed from the dumping process was because of the then Government’s recognition that dumping should not be seen as a protectionist measure.

Dumping is not directed at and cannot be used to deal with the competitive advantage that industries may have internationally. The fact that imports from many countries, most noticeably China, come in without any complaint or anti-dumping or subsidy measures being imposed demonstrates this fact.

Measures are only imposed where a company in addition to having a competitive advantage, seeks to enhance the international competitiveness of a product through the use of trade distorting dumping and/or subsidies.

Reasons for having a dumping system

As noted in the Issues Paper, one view is that if protectionism is defined as “barriers to imports which assist a local industry to maintain a level of activity which it could not

otherwise sustain” then anti-dumping actions could be considered protectionist. However, if we consider this matter in terms of the international trading system, in which the WTO sets the rules about what is and is not permissible, then the fact that anti-dumping actions are permitted would mean that it cannot be protectionist by definition.¹

There are two distinct but related reasons for having an anti-dumping system. The first is economic, and the second relates to international trade law.

Economic case

Economists will argue that lower priced imports benefit an economy – allowing consumption gains from lower prices, and the reallocation of resources into areas of comparative advantage. In other words, they increase the “gain from trade”. However, economists will also agree that there are two circumstances where you may not gain from trade; where there is predatory pricing; where you have intermittent dumping. The Issues Paper refers to both cases as reasonable justification, in principle, why an anti-dumping system is permissible.

Predatory Pricing

The argument of predation depends on the motivation of the exporter dumping the goods: predatory pricing is intended to drive the domestic industry out of business and then reap monopoly profits.

The criticism of this approach to anti-dumping by economists is that it assumes: that dumped imports come from one country, rather than several; that barriers prevent the dumped goods from re-entering the exporter’s domestic market; and that once prices went up, other foreign suppliers and local industry would not re-enter the market.

It should be noted at the outset that the wording of the Anti-dumping Agreement (the “Agreement”) itself, although directed at unfair trade, deliberately categorises behaviour in terms of consequence rather than intent. Therefore, dumping administrations do not necessarily focus on a need to establish predatory intent.

Secondly, an objective consideration of dumping margins does not necessarily prove intent even if the amount of margin is so high that you could reasonably suspect that there was an element of predation in the behaviour of the overseas supplier or foreign exporter. Dumping by relatively small margins may be equally harmful in terms of seriously affecting a company in certain situations, especially if price is the factor in determining sales of goods, or market share needs to be above a certain level to ensure the continued long term viability of an industry.

Gruen, in his report, said that there appears to be examples of predation but these have not been documented. The European Union experience of dumping and justification of responses places an emphasis on predatory behaviour.

¹ World Bank, Working Papers, Trade Policy WPS551 “Australia’s Anti-dumping Experience” by Gary Banks.

Intermittent dumping

The Productivity Commission noted that from time to time overseas suppliers may look to offload surplus stock at low prices in the Australian and other export markets. This behaviour is not necessarily predatory, as the main purpose is not to wipe out any domestic industry, but it can have the effect of requiring the domestic industry to scale back production. Should the intermittent dumping continue, it could lead to cessation of local production or impede the establishment of an otherwise viable industry.

The imposition of measures as noted in the Issues Paper may avoid adjustment costs and a source of volatility in the market place may be removed or reduced. Companies may sometimes treat their export sales as a means of surplus disposal. "It has been suggested that for a small economy like Australia's even a one off dump could wipe out an industry or a major section of it."²

The TRTF endorses these comments in particular, as the experience of industry is that this is the chief cause of dumping complaints in Australia.

Where the products are generic in nature, the costs of production are high, or the cost of shutting down a facility is prohibitive, companies will export goods at dumped prices. Any sales on an overseas market will at least defray costs and may even make a modest contribution to profit. Such sales in an overseas market like Australia, which by world standards is not large, can have serious short and long term effects on the profitability of local industry.

Businesses have their own rates of return on investment which must be met in order to justify the continuation of a business in Australia. Intermittent dumping, especially if it persists over several years, can seriously erode market share, profit and profitability. This can be to a point where the business will become less competitive due to insufficient returns to reinvest in the business. In some cases it will result in the Australian business permanently withdrawing from the market. Once such a decision is made, it is almost impossible to get the businesses back online even if the dumping ceases. This can result in a loss of jobs, technical skills and knowledge which will not be replaced.

There can be occasions where the Australian market is good in terms of pricing compared to other countries and the market in Australia may even be expanding. Many businesses go through a normal business cycle of up and down in pricing, costs and market share. It has been argued that any competitive firm should be able to weather times when goods are dumped on an intermittent basis onto the market.

However, many businesses rely on the "good times" to sustain them in the inevitable down periods, to ensure their long term viability. Intermittent dumping, which denies the profits that a local industry would have otherwise earned in the "good times", is detrimental to a long term viability of local businesses.

Not to impose measures in these circumstances would simply contribute, at the expense of domestic industry, to ensuring the long term viability of the overseas

² World Bank, Working Papers, Trade Policy WPS551 "Australia's Anti-dumping Experience" by Gary Banks.

companies through maintaining (if not increasing) their production capacity and any related efficiency gains and increased profits.

It may be the case that the duration of intermittent dumping is not known but there is no precondition under the Agreement (or by Australian industry) that requires that there is any precise assessment of the duration, or frequency, of dumping.

What must be established for measures to be imposed is that an investigation finds dumping, which has caused material injury to the domestic industry concerned, and that the Minister is satisfied that the dumping and injury will continue.

Consideration of International Fair Trade

The role of anti-dumping measures was considered in a review undertaken by the European Union Green Paper in 2005 on “Europe’s Trade Defence Instruments in a Changing Global Economy”. That paper did not question the need for the retention of an anti-dumping system, as the European system was based on rules derived from the WTO agreements that establish such a system and accordingly, form a legitimate part of the international trading protocols.

The Green Paper also noted that as the WTO (and previously the GATT) sets the rules about what is and is not permissible, the fact that anti-dumping is permitted by the WTO would mean that it cannot be protectionist by definition.³

The Green Paper also stated that as there are no agreed international rules to deal with competition policy, an anti-dumping system remains the only method by which unfair trading practices and trade distorting practices can be dealt with at the international level.

The TRTF strongly supports the retention of an anti-dumping system in the absence of any form of international competition policy. Indeed Australian industry (like industries in other countries) has endorsed the removal of trade barriers, provided that anti-dumping systems remained to deal with unfair and uncompetitive trading practices.

The TRTF notes that the present Government’s policy, as stated before the last Federal election is, to retain an effective anti-dumping administration.

The European Union sought the views of others as part of the consultation process arising out of the Green Paper and asked:

“Question 1: What is the role of trade defence instruments in the modern global economy? Do trade defence instruments remain essential in order to ensure respect for international trade rules and protect European interests? Should the EC consider how these might be improved?”

The answer provided by the Shanghai WTO Affairs Consultation Centre puts the position well and would represent the overwhelming views of most countries.

³ World Bank, Working Papers, Trade Policy WPS551 “Australia’s Anti-dumping Experience” by Gary Banks

“The global economy has enhanced trade opportunities for various participants, and extended the benefit each participant gets from trade. The role of trade defence instruments is to ensure trade competition is regulated by the WTO rules. Trade defence instruments are necessary to ensure enforcement of world trade rules. The existence of trade defence instruments is to ensure the common benefit of all participants or a balance of benefits under trade rules, rather than any particular participant benefits. In appropriate utilization of trade defence instruments according to unilateral benefit and competition against the trade rules are not suitable. The EC needs to consider the improvement of utilisation of trade defence instruments, especially from the perspective of economic globalisation, to face fair competition from other countries and areas of benefit from international division of labour. It should not be considered protection of internal weak industries.”

The Government of the Netherlands also commented:

“The lack of international competition rules and the absence of supernational monitoring means, that for the time being, there is no alternative to trade defence instruments.”

A group of experts were appointed to also consider the issue of the use of Trade Instruments. Andre Sapir, Professor Economics, ECARES Universite Libre de Bruxelles noted:

"International economists recognise that practices regarded as unfair risk undermine a liberal trade regime such as WTO and therefore anti-dumping and other fair trade provisions have a legitimate role to play in the system and provide a safety value to maintain and deepen trade liberalisation."

He also went on to say that this depended on anti-dumping not being captured by protectionist interests.

One rationale that is mentioned is that dumping despite its difficulties is important as a means of interfacing between countries with different economies, as part of the system that has allowed the breaking down of barriers to international trade.

There are those who would argue that the “safety value” of anti-dumping is too high a price to pay for opening up world trade. In considering what is fair, the working paper on Australia's Anti-dumping Experience quoted the following support of anti-dumping systems from Professor Jagdish Bhagwati of Colombia University:

“An economist is right to claim that, if foreign governments subsidise their exports, this is simply marvellous for his own country, which gets the cheaper goods, thus should unilaterally maintain a policy of free trade. He must however, recognise that acceptance of this position will fuel demands from protection and imperil the possibility of maintaining the legitimacy of free trade. A free trade regime that does not rein in or seek to regulate artificial subversions will likely help trigger its own demise. An analogy that I use to illustrate this ‘systemic’ implication of the unilateralist position in conversing with Milton Freidman on his celebrated Free to choose television series is the perhaps apt: Would one be wise to receive stolen property simply because it is cheaper, or would one rather vote to prohibit such transactions because of their systemic consequences?”

This line of thought supports the cosmopolitan economists' position that the world order ought to reflect the essence of the principle of free trade for all – for example, permitting the appropriate use of countervailing duties and anti-dumping actions to maintain fair, competitive trade.”

The response to that quote, was that the theft analogy was inappropriate for dumping and the more apt question might be “Would one be wise to accept goods that have been given away?” Although a general comment, this position shows a failure to appreciate the need to have any form of international regulation of market behaviour.

The TRTF supports Bhagwati's succinct summary of the need to retain both an anti-dumping and countervailing duty system as a key component to the maintenance of the legitimacy of free trade, ensuring that trade is not subverted through the use of dumping and subsidies.

Questions posed by the Productivity Commission

Question 1: What effect does intermittent dumping have on local industry?

The TRTF considers that intermittent dumping is a real concern to Australian industry. Industries do go through up and down cycles and in any case the effect of lost market share, profit and profitability is considerable. This leads to industries considering whether or not to continue to invest so it can remain competitive, or to simply close down either part or all of its operations.

Other industries, while they may get some short term benefit from access to cheap dumped imports when they are available, will be disadvantaged if a local industry which can supply stock more readily and more quickly than imported goods is no longer operating in Australia.

Question 2: Is Australia's current anti-dumping system a significant deterrent to intermittent dumping, are there current cases that have specifically concerned such behaviour, and is the imposition of dumping duties for five years an appropriate way to deal with instances of intermittent dumping?

There seems to be an assumption that intermittent dumping is a one-off shipment of goods. This may be the case, but equally there can be shipments which may be occurring regularly over a certain period. It is not uncommon for shipments to have occurred in previous years prior to a dumping application being lodged, but not in such volume or price as to have caused material injury to an Australian industry.

The trigger for the lodging of an application is where the level of intermittent dumping gives rise to a sustained level of injury which results in material injury being suffered by an industry.

In determining any dumping case, a party has to nominate an investigation period, normally 12 months, and under both the Agreement and Australian law. Therefore it is only the “behaviour” in this period that Customs can assess.

This period also defines the actual data on domestic selling and export prices and costing information that can be required to be obtained from an exporter. Less than 12 months would normally be considered unrepresentative, and more than that imposes an

unreasonable burden on an exporter. To this extent, there is no difference whether the claim is based on intermittent dumping or not.

The other question is whether the shipment or shipments within this period have caused material injury to the industry and if this injury is likely to continue beyond the investigation period.

The adjudication of whether there is dumping or not depends on the findings made during the 12 month period. Measures can be applied if there is a finding of material injury caused by these dumped imports after discounting any other form of injury, and there is evidence of continuation of injury.

The implication in the question of whether five years is the most appropriate way to deal with intermittent dumping is that if dumping is intermittent then once the dumping ceases, so should the measures.

The TRTF is not aware of any other country that has proposed that measures to be imposed are for a term of less than five years. This timeframe is considered reasonable as it allows a company once injured from dumping to have sufficient time to recover from material injury. The exporter concerned which has dumped is not prevented from importing, only from selling goods at dumped prices.

Secondly, it is the case that those industries that do dump do so because they have excess capacity and a cost structure which encouraged them to seek to maintain cost efficiencies by dumping, rather than scaling back production or stopping dumping for a short period. Therefore it is highly likely that if there is a downturn in the home or world markets, they would look to Australia as a market to dumped product, simply to get sales.

Exporters have the option after 12 months, or sooner if the Minister agrees, to seek a review of the level of measures, or to seek termination of the measures. This provides a sufficient degree of flexibility to deal with a case where it can be shown that dumping has stopped or that it is not at the same level as before.

Finally, it must be remembered that the dumping measures only apply to the specific companies or countries covered, and would not affect any other exporters in the market.

Question 3: Are there other rationales for Australia's anti-dumping system? Is the current system well targeted instruments for the pursuing them?

As mentioned above, a major rationale of Australia's anti-dumping system is that there is no alternative, given that there is no international agreement on competition policy principles. The issue of competition policy is considered under a separate heading later in this submission.

In terms of targeting, the present dumping system is well targeted within the limits imposed by the Agreement and is considered a sufficient deterrent.

Consideration needs to be given to the question of country hopping, where once measures are imposed against imports from one country, a company will then produce goods from another country in which it has its factory and sell at dumped prices onto the Australian market. This necessitates a completely new investigation. The TRTF

recommends addressing practices which result in the circumvention of measures, including country hopping or through changes in the physical characteristics of a good, so it not considered a like good to which measures apply.

An exporter cannot be compelled to increase its prices by the amount of the dumping margin to ensure that the domestic industry is no longer being injured. There are procedures set out in the dumping manual that enable some redress. We note what are described by the European Commission as “anti-absorption” proceedings, which allows a quick review to ensure that the dumping measures are appropriately increased. This effectively forces an exporter to increase its prices or face significant losses should it fail to increase its selling price on the Australian market.

Consideration of a public interest test

The TRTF strongly opposes the introduction of a public interest test. The comments made by Gruen are still valid. The creation of a public interest test would politicise the dumping process, and would cause considerable delays in timely implementation of measures for an industry which is being materially injured.

It is notoriously difficult to define what is in the public interest, or to create a test which is acceptable to all parties. Few industries in Australia have advocated for a public interest test.

Previous submission supporting the introduction of a Public Interest Test – Rio Tinto

In a submission to the Productivity Commission Review on National Competition Policy Arrangements, Rio Tinto did not state whether it agree or disagreed with dumping but was critical of the fact that dumping does not consider the national interest, as it only focuses on the cost to industry and not benefit to consumers and economy as whole.

However, the reasons for Rio Tinto’s position are apparent when later in the submission it says, in effect, that when confronted with a high exchange rate which causes reduction in export sales, *“One way of maintaining export performance when the exchange rate is high is to offset the loss of export revenue by lowering the landed cost of input. One glaring barrier to this option is Australia’s policy on anti-dumping.”*

Rio Tinto complained that it had been affected by Customs duty of 34 to 116% import duty on ammonia nitrate, and by duty of 64 to 87% on iron and steel grinding mill liners from Canada. It refers to other products as well but the real focus is on these two cases.

It could be argued that the support for a national interest test is simply one of special pleading by a very large company who see that they have the right to moderate poor export performance due to a high exchange rate with an entitlement to access dumped product. Ammonia nitrate from Russia comes from a highly distorted source, and in the case of Canada the dumping margin was extremely high and very damaging to the relevant Australian industry.

There is no apparent consideration by Rio Tinto that these high dumping margins could have caused material injury to an Australian industry. From its point of view, this does not matter as the national interest is to ensure that unfavourable Australian exchange rates are compensated for by access to highly dumped inputs, irrespective of long term consequences to particular industries.

The extreme and company specific focus was somewhat moderated in Rio Tinto's submission to the Joint Study where it simply questioned whether the public good is served by the imposition of dumping duties and referred to other countries such as the European Union, Canada, Brazil, Paraguay, Thailand and Malaysia, and that consideration of the imposition of dumping duties should be a part of Australia's anti-dumping regime.

Rio Tinto suggested that the guidelines used by the Canadian International Trade Tribunal should be considered form the basis of a consideration of what is a national interest test in Australia. The Canadian system will be discussed below.

Previous submission supporting the introduction of a Public Interest Test – National Farmers Federation

The National Farmers Federation (NFF) in its submission (made on behalf of its 80,000 farm businesses around Australia) specifically referred to dumping action in respect of farm chemicals, and fertilisers but did not ask for a public interest test because they considered them unsubstantiated and for tactical reasons. In other words, the NFF saw public interest tests being applied to get rid of what they saw as unmerited applications.

Previous submission supporting the introduction of a Public Interest Test – Coles Myer

In its submission to the Joint Study, Coles Myer stated that competitive market outcomes should be the focus of an investigation. It suggested that the Australian Competition and Consumer Commission (ACCC) should have a role in determining injury, but did not request a public interest test. Rather, Coles Myer asserted that the ACCC would achieve this outcome by applying a more economic analysis to the present injury criteria.

When reviewing the previous submissions to the Joint Study generally, it is apparent that there is a lack of widespread support for a public interest test. Further, that the request for a public interest test has arisen because of specific decisions in a few cases which offended one or two players.

Views on the Canadian system in submissions supporting the introduction of a Public Interest Test

We note that Rio Tinto did strongly support the creation of a Canadian system to deal with public interest. However, Rio Tinto failed to appreciate that under the Canadian system the public interest test is used to consider the issue of the application of the lesser duty rule, something that occurs routinely in Australia. Absent any ruling in favour of a public interest test, then the full margin of dumping is applied under Canadian anti-dumping law.

The current practice in Australia allows for the lesser duty to be applied ensuring that an amount less than the dumping margin can be imposed to remove injury to an Australian industry. To this extent the needs of consumers and downstream users are accommodated. To the extent that the full margin is applied, then it only done so on the basis that it is necessary to do so to protect an industry. The only reason then for the introduction of a public interest test in Australia, would be to not impose measures where an industry was found to have been materially injured.

Matters for the Productivity Commission to consider regarding a Public Interest Test

It would be inappropriate for the Productivity Commission to propose a public interest test as a matter of principle, without addressing what system it would recommend be put in place to address this question.

In particular, apart from the question of what would be the criteria, the other issue is when would the test be applied and what timeframe would be proposed to allow for an adequate consideration of this issue?

When examining the criteria used to determine the public interest test, focus should be given to the need to address the injurious impact of dumped, and/or subsidised imports on producers, and to ensure that effective competition is restored through the imposition of anti-dumping measures to counter unfair international trade practices. In other words, the criteria would need to be expressed in a manner that ensured that only in exceptional circumstances would the public test be used.

The alternative would be to draft a general set of criteria which meant that in every case a public test would be run and, if put in a form that required that pre-eminence be given in all cases to the interest of other parties, would therefore subvert the whole purpose of having an anti-dumping regime.

This outcome would be totally unacceptable to the TRTF and would be contrary to the Government's own commitment to retain an effective anti-dumping and countervailing regime.

There would need to be a procedure in place that would enable those parties claiming that it was not in the public interest to have measures in place based on public interest grounds to be subject to some form of initial assessment to avoid "gaming" by parties, who are simply lodging claims to draw out the process.

It would be inevitable that the timeframe for reporting to the Minister would need to be increased considerably to allow sufficient opportunity for parties to make submissions and for Customs (or another body) to consider the question of public interest. Given that the public interest test as applied in Canada and by the European Commission is only used in rare cases, the TRTF seriously questions the need for Australia to have such a system in place in every case with the consequent costs and time delays.

Examination of the practices of the European Union and Canada.

Although there are references to public interest tests in some countries, there are only two jurisdictions that formally deal with a public interest test and that have developed criteria to determine what is in the public interest, or in the case of the European Commission is called the Community Interest test.

The TRTF sets out its understanding of these systems, not because it supports either system but as a means of illustrating the practical issues that need to be considered and through this question, whether in the context of Australia, either system is needed.

The European Union - Community Interest test

Article 21 of EC Regulations states:

“Community interest

1. A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including
2. the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.
3. In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this Article, and they shall be entitled to respond to such information.
4. The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are submitted within the time limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.
5. The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties imposed. Such comments shall be received within one month of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.
6. The Commission shall examine the information which is properly submitted and the extent to which it is representative and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee. The balance of views expressed in the Committee shall be taken into account by the Commission in any proposal made pursuant to Article 9.
7. The parties which have acted in conformity with paragraph 2 may request the facts and considerations on which final decisions are likely to be taken to be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission or the Council.
8. Information shall only be taken into account where it is supported by actual evidence which substantiates its validity.”

Attached (at “A”) to this submission is a "Note to all members of the Anti-dumping Committee and to Delegates to the Council Working Party on Trade Questions Brussels 13 January 2006" Subject: Clarification paper 'The Community Interest test in anti-

dumping and anti-subsidy proceedings'. A summary of that paper which explains the main features of the administration of the Community interest test is set out below.

Summary of the Anti-dumping Committee to the Council Working Party Note

The main purpose of a community interest test is to decide whether there are particular reasons not to impose measures, despite the finding that the dumped or subsidised imports cause material injury to a Community industry.

Since the consideration of the test can lead to a conclusion that a case should be terminated, despite the existence of unfair dumping or subsidised trade, the standard to be applied must be high.

Community Interest analysis must identify compelling reasons which would lead to the clear conclusion that it would not be in the overall interest of the Community to apply measures. In other words, it must be found that the disadvantage for certain interested parties would be disproportionate to any advantages given to the Community industry by the measures.

The test carried out is an economic one with no regard to political considerations or broader policy issues e.g. foreign policy, labour standards and regional policy. It is not a cost benefit analysis in the strict sense, so while advantages and disadvantages are put in balance, they are not mathematically weighted against each other, because of the methodological difficulties in quantifying each factor with a reasonable margin of security within the time available.

Community interest particularly looks at the viability and future perspectives of Community Interest, with and without measures, and the likely impact of measures or their absence on other parties.

Assessment of impact is made in the light of the proportionality test, where measures will not bring benefit to an Industry, then the increased costs to consumers and end users, even if small, would be disproportionate.

However, if measures were likely to improve the situation for a Community interest test, then the increase in costs to other parties would be tolerated.

Nature and content of analysis

Once existence of injurious dumping has been established, there is a presumption for the need to apply measures unless compelling reasons lead to a clear conclusion that the measures would not be in the Community interest.

First consider the likely consequences of application or non-application of measures on Industry and other parties, which is a prospective assessment:

- although prospective, have regard to factual data, past experience and evidence and in the case of the Industry you have injury analysis information
- look to other interested parties to see if they can increase their prices to allow for increase in raw materials.

Secondly, balance the question of interests.

The EU acknowledges that there are few clear cut cases where negative impact of dumping measures is outweighed by Community Interest test. Cases where it would be disproportionate, is where an industry is no longer viable, so it would not benefit from the measures, or because substitute products would take over.

Analysis is at the micro level, only concerning the companies which are directly impacted by measures. That is, only one level up and down the chain of economic operators of the product concerned is examined.

Collection of information

European Commission proactively seeks information at outset of investigation from interested parties who are known to them. The time scale is set out in the questionnaire that it sent to interested parties.

Experience is that the levels of cooperation is poor and provide only unsubstantiated or unverifiable information or simply provide statements in favour or against imposition of measures.

Assessment of stakeholders

(a) Relevant interests of Community Industry

Where injurious dumping has been established it can be presumed that this is against the interests of the Community Industry.

(b) Viability test

- Is the Industry viable or has good prospects of becoming viable if measures are imposed?
- If Industry does not have the potential to recover and play a role in terms of market share, production capacity technology etc then anti-dumping measures will be considered disproportionate?

Likely effect of measures or absence

Is it considered whether the Industry can maintain price levels and increase its market share as a consequence of measures or can it increase its prices and maintain current market share, with price increases being passed on to consumers?

- Particular consideration is given to effect on employment.
- In general, the higher the expected benefit from imposition of measures, on increase in sales volume, market share, prices and profitability and saved or created employment, the higher the weight is given to these considerations when balancing possible negative effects.

If Industry would not or only marginally benefit from measures for example because market share of the dumped imports will be taken over entirely by non-dumped product but equally low priced imports then measures would not be justified.

Importers and Traders

The mere fact that measures will lead to cost increases is not sufficient justification for not imposing measures:

- Consider the importance of the product to importer, is it a minor or major part of its business, profit margins and possibility of passing on cost increases and alternative source of supplies?
- That Industry cannot supply entire demand is invalid as measures do not prevent imports; just ensure that they are supplied at non-injurious prices.
- Employment and value adding of importers normally less than for Industry and Industry might have highly qualified jobs and important know how that needs to be preserved.

Interest of users

Interest of downstream users depends if they predominately purchase from domestic industry, dumped sources or from third countries:

- Further the importance of the product under investigation for the final product manufactured by the user and the potential cost of measure are important considerations.
- Fear of cost increases is the main argument, especially if most purchases are from dumped sources.

However:

- The product under investigation is one of several input factors for user industry. It is normal that industry is larger with bigger turnover and employment than domestic industry, so straight out employment comparison is not appropriate and argument on costs would mean that measures would never be imposed.

In practice:

- Cost of product in relation to total cost of production (not just raw material or cost of manufacturing) is considered.
- Then determine likely cost increases.
- By looking at alternative source of supply, and then look at profitability or net impact on margins, and whether cost increases can be passed on, which requires consideration of competitive consideration of market.
- Strong competition may make it difficult to pass on cost increases.

Relevant interest of consumers

Consumer interest is heightened when the dumping involves consumer products:

- Consumers also base decisions on factors other than price.

EU consumer interests do not play a decisive role in Community interest test.

Assessment

Considers the danger of price increases which might result from the imposition of measures:

- In a very competitive market increases may not be passed on, but reduce profit.
- The fact that prices have increased is the ultimate purpose of anti-dumping measures.

Preserving consumer choice

Balance consideration of user choice caused by exporters withdrawing from market, compared to availability of other products, only have a real concern if measures will lead to a shortage of supply, then Community interest will prevail:

- Reduction in competition in the market, if you have a limited number of producers, with significant market share, then there is a danger of reduced competition by strengthening an oligolistic/monopolistic market structure.
- The fact that one player is in a dominant position of itself does not mean that its interests are not worth protecting against unfair competition, provided that it does not abuse its market position.
- Normally there is less risk if there are alternative sources of supply from third countries.
- Shortage of supply from imposition of measures not really an issue as product is still available from dumped sources and there are other sources.

Criticism of the EU test

Criticisms of the EU Community Interest Test include that it is used infrequently; that insufficient regard is given to the interest of consumers and end users; that no real regard is given to the cost benefit analysis of the imposition of measures; and that better economic modelling should be undertaken.

Obviously to those who do not believe in dumping at all, any other outcome other than the non-application of measures is never in of a public interest.

The reality is that to maintain an international system of fair trade, jurisdictions must honour the system by imposing measures, unless there are compelling reasons not to do so.

As the EU have correctly stated, there is only a limited amount of time to conduct an public interest test which imposes its own restrictions on how detailed such an inquiry ought to be.

The practical issue is that it relies on the parties who object to the imposition of measures to provide reasons and evidence that can be considered in making such a determination.

There are always going to be disagreements on whether or not a methodology can be employed to assist in the process of measuring if it is in the public interest to not impose measures.

Even the critics of the present EU scheme are not proposing that the whole issue of determining a cost benefit analysis can be based on an economic model, rather that such a model would assist in making the whole process more consistent with economic principles.

Criticisms of the use of modelling are that:

1. Economic models only measure economic efficiencies, and cannot put a value on fair trade, nor do models put a value on producers' right to have measures imposed.
2. Economic modelling cannot measure the effect of doing nothing.
3. Economic models assume perfect competition, when this is in fact not the case and it is difficult to come up with a model that is based on non-perfect competition.
4. Economic modelling assumes perfect competition, or if not where does the information come from to make a determination not based on perfect competition.
5. Economic modelling has to develop a model of elasticity of demand which can, in the end, only be an approximation at best.
6. To have a model in the first place assumes a high degree of data which usually does not exist.

Canada

Under the Canadian system, the Canadian International Trade Tribunal ("Tribunal"), the body that determines injury, reports to the Minister of Finance under section 42 of the *Special Import Measures Act* (SIMA) on whether the imposition of anti-dumping duties in the full amount, should be maintained, reduced or eliminated.

The Canadian Parliament enacted this provision in the 1984 in response to concern by consumers that levying of dumping duty at the full margin led to higher costs for consumers and downstream users of a product and occasionally had adverse effects on competition in the Canadian market. In response to these concerns and, bearing in mind that imposing of duties at the full margin was only permissive under the

Agreement, the public interest test was introduced. However, the legislation did not define what was in the 'public interest'. It was left up to the Tribunal to decide this question. Over time the Tribunal has come up with a published list of factors which it uses to determine the question of public interest.

One key issue was how to interpret the question of public interest under SIMA with the provisions of the Canadian Competition Act when analysing what is "public interest". Those responsible for competition policy stated that the interests of consumers should be at least equal to the interests of producers. The Tribunal ruled:

*"In the Tribunal's view both the Competition Act and SIMA were enacted to promote and protect fair business practices in Canada in order to enhance Canadian economic welfare. These interests are achieved by, in part, by ensuring that Canadian industries are not harmed by unfairly traded imports. These interests are also achieved by promoting fair competition in the marketplace. Both the Competition Act and SIMA are important public policy tools that can be called upon to create favourable marketplace conditions by levelling the playing field, by removing obstacles and by encouraging fair competition."*⁴

As the matter was being considered under the provisions of SIMA, the Tribunal stated that to the extent of any inconsistency it must defer to the provisions of SIMA. Amendments introduced in SIMA in 2000, prescribed in para 40.1(3) (b) of the *Special Import Measures Regulations* covers factors that the Tribunal may consider in the public interest inquiries. It provides a list of factors that could be considered by the Tribunal in a public interest inquiry. It also clarifies that *"In their submissions and replies, parties should address all the factors that they consider relevant in assisting the Tribunal to arrive at its opinion."* Further that, the Tribunal will take into account any factors that it considers relevant. The list of factors is thus non-exhaustive in nature.

List of factors

In conducting a public interest inquiry, the Tribunal takes into account any factors that it considers relevant, including the following:

- 1 Whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply.
- 2 Whether imposition of the full duties has had or is likely to have the following effects -
 - (a) substantially lessen competition in the domestic market in respect of like goods;
 - (b) 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;
 - (c) significantly impair competitiveness by limiting access to:
 - (i) goods that are used as inputs in the production of other goods and in the provision of services, or

⁴ Public Interest Investigations - Certain Prepared Baby Food" PB-98-001

(ii) technology,

(d) significantly restrict the choice or availability of goods at competitive prices for consumers or otherwise cause them significant harm.

3 Whether a reduction or elimination of the anti-dumping or countervailing duty is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic production of like goods.

4 Any other factors that are relevant in the circumstances.

Under the Canadian scheme there is a preliminary step in which a party must make an application for consideration by the Tribunal of a public interest test, which determines if an interested party has provided a sufficient amount of evidence to justify the initiation of an investigation.

The TRTF would see this as vital step to ensure that there was no “gaming” by a party raising public interest test just to delay the imposition of measures.

The purpose of making reference to the EU and Canadian systems is to highlight that although parties, especially those who oppose dumping see a concept of “public interest” as being one that should be strongly supported, is to point out that there are a range of issues that need to be considered in developing such a scheme. It would be contrary to good public policy and to issues of procedural fairness to all parties, including domestic industry, exporter, consumer and end user interest, not to have an agreed criteria on how public interest is to be determined and how weight is given to the interests of producers and of other parties.

The weight given in the EU through the concept of proportionality and that of the Canadian test, is a simple recognition that there has been a finding that a domestic industry has been materially injured by dumped imports and there needs to be at the very least a strong and indeed compelling argument that measures should not be imposed in such cases because of the need to consider “public interest”.

A proposal that simply lists factors would be unsatisfactory because whoever makes the determination would need to come to some view on the relevance of interests of Industry and exporter. Not to address this issue would only lead to intense lobbying by all interested parties to put their own position on the relative weight or each of the criteria in the absence of any indication of what weight each factor is given in determining the respect interests of a producer, and downstream user and consumer.

Any criteria that is proposed must have as its basis a requirement that there must be compelling reasons not to impose measures because of wider issues of public interest. This is essential to maintain any degree of integrity for industry and to address unfair trade practices. Not to give weight to the needs of Industry which is found to be materially injured over the needs of other parties would lead to unacceptable outcomes for industry and would substantially undermine the whole rationale of an anti-dumping system. This would mean that the non-imposition of measures would be for the most part exceptional, and that this should not be seen as a criticism of the limited use of public interest.

DOHA round negotiations

There is no likelihood at this stage of the conclusion of the DOHA round or any indication that any of the proposals outlined in the latest version on the WTO Working Group Chairman's text on a proposed draft text of an agreement would be accepted. Indeed it seems clear that there will be no agreement for the inclusion of a public interest test in any final agreement, if one is concluded.

The present proposal⁵ is set out in amendments to Article 9.1 which states that:

9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition is permissive in the territory of all Members, and that the duty is less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

The Chairman's commentary on the proposed text was:

"Participants are sharply divided on the desirability of a procedure to take account of the representations of domestic interested parties when deciding whether to impose a duty. Some consider that such a procedure would impinge on Members' sovereignty and would be costly and time-consuming, while others support inclusion of such a procedure. Issues related to any such procedure include the extent to which any such procedures should apply in the context of Article 11 reviews, whether the ADA's requirement for a judicial review mechanism should apply to decisions pursuant to any such procedure, and the extent to which WTO dispute settlement should apply. On lesser duty, many delegations strongly support inclusion of a mandatory lesser duty rule. Other delegations oppose the inclusion of such a rule, with one delegation noting that it was not practically possible to calculate an injury margin. Among those supporting a mandatory lesser duty rule, there are varying views".

Although the failure to agree on any type of public interest test as part of the DOHA round is not determinative of what Australia ought to do, what is clear that there is no agreement on this question which would support the inclusion of a public interest test. Apart from the legitimate concern about national sovereignty when it comes to determining what is in the public interest, the comments made about the costly nature and time consuming nature of such a test are considered very valid reasons why it is inappropriate to have such a test.

How the current system might be improved

Modification within existing system architecture

⁵ Previous Chairman's text did have the option of having the right of domestic interested parties to be taken into account. However this test did not make it clear if it was only for the consideration of the application of a lesser duty rule or for non-application of measures. No criteria were specified, but any such finding would not be subject to WTO dispute resolution proceedings.

The issues paper states that the question of modification of the present assessment criteria should be seen in the context of not making the system either overly onerous or too lax and thereby unduly permissive of questionable or egregious claims for protection.

The TRTF does not agree with the categorisation of dumping as a protectionist measure and notes that the issues paper itself does not give any reason why dumping should be considered as protectionist.

However, if the anti-dumping provisions are used in a manner that are contrary to the agreement and then it may be said that the measures that have been put in place are unnecessary and therefore to that extent they offer protection that is not warranted as the effect is not to deal with restoring competitive conditions to the market place.

Several instances are given on specific issues which may be relevant in considering the question of possible modifications to the existing scheme, which have arisen out of previous reviews, notably the Joint Study.

These issues will be addressed first before considering the broader questions put forward in the paper.

Standing to lodge application

The current standing requirements in the Australian legislation are considered by the TRTF to be satisfactory. The domestic industry is defined as, “the domestic producers as a whole of the like product or those whose collective output of products considered as whole constitute a major proportion of the total domestic production of like goods”. However, under Article 4.1 (i) of the Agreement where producers are related to the exporters or importers or are themselves importers of the alleged dumped product, then the term ‘domestic producers’ may refer to the rest of the producers.

For the purpose of lodging an application then Article 5.3 of the Agreement an application can be made on behalf of a domestic industry if the support for those either supported by producers who collectively account for more than 50% of total production of those who support or oppose the application and that those industries which expressly support the application account for no less than 25% of total production of the like goods.⁶

The EU Green Paper on Europe’s Trade Defence Instruments in Changing the Global Economy (“the Green Paper”) suggested that this figure could be increased from 25% to at least 50%, so that the application is supported by the majority of the domestic industry. It has been stated that the main users of dumping can in fact easily meet this additional criteria, and that to increase the level means that the system will seem to have more credibility.

⁶ The latest draft text from the Chairman does not propose any changes to the current provisions concerning the percentages referred to in Article 5.3 of the agreement

The practical issue being addressed by the standing requirement is that many countries have large domestic industries with a large number of producers, making it impossible to get total support for an application. The standing requirement is a means of ensuring that the logistical difficulty in getting total agreement does not prevent an application being lodged. It must also be remembered that the determination of injury is measured against the total effect of the whole of the domestic industry.

A suggestion arising out of the Green paper is to have a requirement that for large industries where there are not many members that the requirement of 25% of total production be increased to 50% but that exceptions be made if an industry can be shown to be either fragmented, or where the applicants are SMEs.

In Australia some industries could meet the 50% criteria whilst others would have more difficulty. If such a proposal was to be considered then it would not impact on the ability for a major industry to lodge an application, so to this extent nothing changes in practice, but it would mean that to cover the situation of a fragmented industry and of SMEs that some form of definition in either case would have to be incorporated into the standing requirements. It would be difficult, if not impossible, to come up with a definition which was neither too arbitrary nor too generous, and would therefore unworkable. There would be little to no merit in amending the present standing requirements in the *Customs Act* as means of improving the system.

Two other additional concerns have been raised in the Green paper by some parties. The first is that under EU legislation, parties that are either related to importers or are importers can be excluded from being considered a domestic industry. The reason for this exclusion is that in either case a domestic producer, may decide that it is not in its interest to support an application because of the conflict of interest. Some have argued that this exclusion makes the domestic producers less representative of all interests. There is no exclusion of such parties under Australian anti-dumping legislation which includes related parties and domestic producers who import goods within the definition of a domestic industry.

Another particular concern raised by the Green paper is that some European Industries have overseas factories and that imposition of dumping duties of countries can impact on these industries to their detriment. This issue remains unresolved. What can be said in the context of Australian industry is that this issue has not been raised as a particular concern that needs to be addressed.

Like goods

The definition of like goods is one that, by today's standards, would be seen as somewhat old fashioned given its strong emphasis on the physical characteristic of goods, and less on other issues such as quality and other characteristics that may give a particular product more commercial distinctiveness than the definition of like goods on its face provides.⁷

⁷ The TRTF would, in particular, like to see a focus not just on test methodology when determining if goods are like goods, but that particular regard is given to the actual end use to which goods are in fact put, in determining what are "like goods".

Current WTO jurisprudence has allowed more recognition of issues to do with commercial considerations of products and this has flowed through to the present consideration of criteria in the dumping manual that Customs will have regard to in making such a determination. To go beyond the present criteria would start to raise issues of WTO consistency. There is no possibility of the definition of like goods being expanded as part of the DOHA negotiations.

The TRTF supports the policy of Customs, which were issues of like goods to arise which are not clear cut that they will issue a policy paper to enable all parties to put forward submissions before any final decision is made.

Time limit for calculating normal values and methodology used

The TRTF does not have concerns over the present timeframes used to establish a normal value and export price. The determination of such amounts over a 12 month period is considered satisfactory for judgements to be made about what is a normal value and export price. Where it is not possible to use a 12 month period, a lesser period may be used but it cannot be less than 6 months.

Given that the exporter has to provide detailed information on both domestic and export sales and costs, then any extension of this timeframe would impose too great an obligation and would be inconsistent with the Agreement.

Zeroing

Zeroing has not been a practice adopted in Australia and the WTO Appellate Body has ruled against it on several occasions as being inconsistent with the agreement⁸. The TRTF does not support the introduction of a zeroing methodology into Australia's anti-dumping legislation.

Current requirements pay sufficient heed to threatened rather than actual injury from dumping

The question of actual injury and threat of injury are two separate issues. The usual dumping case is based on dumping causing actual material injury to an Australian industry.

A case based on threat is different because there is no actual injury but the threat of injury from dumped goods is imminent. It is difficult to imagine that a case would be lodged based on allegation of actual injury and then also claim a threat of injury. However, in principle, the cases could be argued in the alternative in an application. This could arise where Customs makes a finding that the material injury alleged in the application is not established, but that there are grounds for a threat of material injury.

As the claim is for threat of injury, the requirement of the Agreement is that there must be "clearly foreseeable and imminent" injury and that a range of factors must be

⁸ There is no support by any party for the re introduction of zeroing in original investigations, only for other investigations and assessments. However it is clear that the strength of opposition to even this limited form of zeroing is such that it has no hope of ever being accepted. Any reference to the re introduction of some form of zeroing into the agreement has been deleted from the latest version of the Chairman text.

considered, such as significant increase in dumped imports; changes in the capacity of exporters; whether prices of imports will have a significant depressing or suppressing effects on domestic prices would likely lead to further demand for imports; and inventories of products being investigated and any other relevant factors.⁹

The TRTF would agree with the comments in the guidelines published by Customs in relation to the application, that the WTO jurisprudence that an applicant would need to establish a high degree of likelihood that the anticipated injury would materialise in the very near future.

The question is what information Customs would consider as supporting such a case. At present, this is simply a statement that any such case must be based on facts not conjecture.

The comments made on factors such as a recent decline in performance could indicate a return to normal situation, after an unusually favourable period, rather than being on the verge of a precipitous decline into injury would be seen demonstrating an attitude through the use of such language, that shows a reluctance to consider a case of threat in an unbiased or objective manner.

The TRTF considers that more emphasis should be given to consideration of the issue of threat of injury and more detailed guidelines developed to deal with this situation than presently exist. These guidelines should recognise that threat can be caused, not only by one circumstances but by a progression of circumstances which would cause injury to occur in the near future.¹⁰

Material Injury

The issue of determination of material injury tends to be contentious because the provisions of the Anti-dumping Agreement and consequently Section 269TAE of the *Customs Act* do not provide a definition of what is meant by material injury. Such a determination is made by having regard to a range of factors, none which are determinative.

Both the Agreement and Section 269TAE of the *Customs Act* require factors other than the importation of dumped goods to determine whether or not the actual cause of the injury to an industry is due to factors other than the dumped imports. A dumping administration is not required to carry out some form of mathematical exercise to separate out the effect of injury from non-dumped sources from dumped imports, but nevertheless a dumping administration, in the case of Australia is required to separate out and distinguish injury from non-dumped sources before determining if the dumped imports caused material injury.

The former Anti-dumping Authority, in report Number 4 on Material Injury, stated that the term material injury meant that the injury had not to be “immaterial, insignificant or insubstantial.” In other words, what they proposed was a minimum threshold test.

⁹ See Article 3.7 of the Agreement

¹⁰ See Panel in United States - Software Lumber from Canada par 7.119

The Ministerial Directions, which set out what Customs must give regard to in coming to a determination on material injury, have picked up this wording but also made it clear that there can be no finding of material injury based on the effects of normal ebb and flow of business.

There has been criticism from both exporters and Australian industry based on Customs' finding on material injury, given that there is, in fact, a large amount of discretion given to a dumping administration to make such a determination. Customs, in response to some concerns stated under Recommendation 17 that:

"That Customs examine means of improving its analysis and reporting of material injury and causal link taking into account the approaches of other jurisdictions."

The TRTF understands that Customs has been in contact with other administrations but is not aware of any particular change in its description or analysis of either material injury or causation.

One issue that does arise is whether Customs is necessarily equipped to carry the task of determining whether or not a domestic industry is materially injured. There have been suggestions that bodies such as the ACCC and even the Productivity Commission would be better placed to undertake this task.

The TRTF, although not completely uncritical of Customs' role in carrying out injury analysis, still considers that this role should continue to be performed by Customs.

At present, the application form requires considerable information to be provided up front on injury. Some administrations would only require this level of detail once a case was initiated. The TRTF accepts that given the present timetable for carrying out a dumping investigation, this level of information is necessary. Customs officers are then able to carry out visits to the domestic industry usually within the first 40 days of an investigation and be in a position to have detailed knowledge of the injury claims at a fairly early stage in the investigation.

The Federal Court has from time to time considered the question of determining the question of material injury and causal link and the case law on these questions was summarised in the most recent Federal Court case of Schaefer Waste Technology Sdn Bhd v Chief Executive Officer, Australian Customs Service [2006] FCA 1644 (29 November 2006) where the Court stated:

"46. The subject matter of the enquiry which the CEO/Minister must make under s 269TAE(1), read with s 269TG(1), is material injury to an Australian industry that is causally connected to, "by reason of" or "because of", dumping; see ICI Australia Operations Pty Ltd v Fraser (1992) 34 FCR 564 at 571."

"147. The test for causation of material injury was said by Lockhart J in Swan Portland Cement Ltd v Minister for Small Business and Customs (1991) 28 FCR 135 at 144 to be "essentially a practical exercise". His Honour said that its purpose is to achieve the objective of determining whether, viewed as a whole; the relevant Australian industry is suffering material injury from the dumping."

"148. This test was applied by the Full Court in Fraser and by other Full Courts in Enichem Anic Srl v Anti-Dumping Authority (1992) 39 FCR 458 at 470 and Minister for

Small Business, Construction and Customs v La Doria di Diodata Ferraiolli SPA (1994) 33 ALD 35 at 48. It has also been applied by single judges; see Mullins Wheels Pty Ltd v Minister for Customs and Consumer Affairs (1999) 166 ALR 449 at [18], [21]; N.V. Beaulieu Real v Minister for Justice and Customs ("N.V. Beaulieu Real") [2002] FCA 467 at [50]; affirmed on appeal [2002] FCAFC 339."

The TRTF supports this interpretation of the test for causal link and of material injury as one that is essentially a practical exercise.

The TRTF does not consider that the determination of material injury is something that either the ACCC or the Productivity Commission could perform better than Customs. For reasons referred to later in this submission, the TRTF does not believe there would be any perceived benefit by introducing a bifurcated system, which would require an industry to incur additional expense in having to work with two separate bodies.

A concern of the TRTF is that insufficient attention is given to return on investment and internal rates of return as an injury factor. This issue was raised by TRTF members who also pointed out that it was also a matter that Willet commented on in his report.

The view of Customs appears to be that as the question of return on investment is one which is dependent on the assessment of the company itself, it should in effect be disregarded or given little weight. To the contrary, it is an issue of vital importance and some industries; in particular, internal rates of return, where it produces a range of products. It may well decide not to continue with production of that product, if its returns when compared to other are simply inadequate.

The response stated in the Joint Study was:

"Customs considers changes in return on investment in its injury determinations. Internal rate of return is a concept better suited to project evaluation than injury determination".

The TRTF certainly does not consider the question of internal rate of return to be something that is best suited to project evaluation.

The TRTF is also concerned that proper account should be given to profit foregone when making a finding of material injury. This issue was raised by the TRTF as part of the Joint Study and was treated as separate from that study.

What was being sought was to deal with a situation that did arise where a market is expanding and that as a result the domestic industry is seeing its volume, market share, profit and profitability go up to levels which may either in whole or in part be higher than were achieved in the past. However, circumstances can come about, where dumped goods are still being sold into this market effectively denying the domestic producers greater sales and as a consequence more profit and greater profitability.

The TRTF does not consider that there is anything in either the Agreement or under Section 269TAE of the *Customs Act* (which sets out what are factors to be considered to determine material injury) that would preclude consideration of profits foregone. At present the Ministerial Direction governing the determination of what is considered to be material injury is unclear on whether profit foregone is considered to be an injury factor.

However, Customs has consistently rejected any consideration of profits foregone in determining whether or not an industry has been materially injured. The practice has been to focus on what an industry historical profit has been and as these profits will be achieved in an expanding market, to disregard any loss of additional profits.

The logic of the position is hard to justify given that:

1. Where the market is expanding and the benefit of that expansion is simply captured by dumped imports that can dump with impunity if the existing profit levels are seen by Customs as in historical terms to be acceptable.
2. That historical profit returns may not be adequate to ensure the long term viability and competitiveness of an industry and justify investment in new technology and increased capacity.

This profit foregone argument does not stand alone as being determinative of injury. A domestic industry would have to demonstrate that it has the production capacity to meet the increased demand, and that the present profit levels are inadequate.

The debate around this question is best illustrated by the following paper put out as part of the DOHA round by the Friends of Anti-dumping which comprise those countries whose primary interest is exporter focussed. The members of the Friends of Anti-dumping includes Brazil, Chile, Columbia, Costa Rica, Hong Kong, China, Israel, Japan, Republic of Korea, Norway, Singapore, Switzerland, Taiwan and Thailand (the "FANS").

The WTO Trade Negotiating Document TN/RL/GEN/38, headed "Second Submission of the Proposals on the Determination of Injury" (Attached at "B") seeks to put restrictions on how to define material injury, by seeking to define it as something that is an important and measurable deterioration in the operating performance of a domestic industry based on an overall assessment of all relevant economic factors and indices having a bearing on the state of the domestic industry.

On page 4 of the FANS submission under the heading "Deterioration" it makes the statement that the operating performance of a company must be worse off during the period of the dumping investigation when compared to previous years. On this basis they say that where a domestic industry might be injured but where protection of anti-dumping measures is not warranted, including when performance of the domestic industry has been chronically poor but stable over the period of the injury investigation.

The concern that the exporters have is that a poorly performing industry should not get the benefit of dumping protection if its poor performance is no worse during the investigation period than before. In that sense it is "stable: so dumping has not made its position worse."

However the interesting point is that the FANS do concede in footnote 4 that a profit level that is poor but stable can nevertheless be considered to give rise to injury when regard is had to all other injury factors. Where the state of the domestic industry is good but would be better absent dumped imports. This gets to the heart of the dispute between the TFTR and Customs that arose out of the Joint Study.

The FANS state that there are some circumstances where the domestic industry is performing well or even growing but some argue that the domestic industry would be

even in a better situation if it were not for the dumped imports and that the domestic industry is injured in that sense. The paper then goes on to state:

“We recognize that some authorities use a so-called “but for” analysis, which makes an assessment of whether the domestic industry could have gained more profit, sold greater volumes, operated at higher capacity or realized other better outcomes if it had not been for dumped imports to determine whether there is a causal relationship between dumped imports and injury to the domestic industry. However, whether the same analysis is also relevant in determining whether material injury exists is another question.

Given that the domestic industry’s operating performance is strong, one must question whether there is a real need for a “protection” by the imposition of AD measures. It is not impossible that, where there are different trends in different Article 3.4 factors, authorities could find “deterioration” of the state of the domestic industry, even if one or more factors relating to the state of the domestic industry show an increasing trend. However, if an overall assessment of all the factors falls short of showing “deterioration” and simply shows that the domestic industry would have been better off absent dumped imports, we doubt that the domestic industry is in need of protection by the imposition of AD measures.

Furthermore, if the existence of material injury is determined solely based on a “but for” analysis, an injury investigation will result in an affirmative injury determination in almost all cases, since an analysis would almost always show that the domestic industry would be better off if it did not have to face competition from dumped imports. Thus, an application of a “but for” analysis in the determination of the existence of material injury would in effect render the injury requirement of the AD Agreement meaningless.”

In Footnote 6, the FANS state:

“The FANs are not insisting that an industry can never be injured if, for example, the industry has increased its profit level over time. As mentioned in Case 1, authorities have the discretion to give to the different factors of Article 3.4 the weight that the authorities deem appropriate in the given circumstances. For example, it could happen that, even if the industry’s profit level is growing, an objective analysis shows that the current profit level is still not sufficient to ensure the industry’s viability in the market competition, taking into consideration the necessity for further investments such as developing improved models in a fast-growing market. Such a situation may bring about decline in the industry’s ability to raise capital or make further investment. By also taking into consideration other factors, such as a drop in market share, a careful overall assessment of all these factors could then lead to the conclusion that the state of the domestic industry is deteriorating”.

The FANS do acknowledge in the footnote (which appears as Footnote 6 in the original document) that authorities have the discretion to give different factors different weight in Article 3.4 which sets out the material injury indicators. One example is when the profit rate of an industry is such that the current profit level is still not sufficient to ensure the industry’s viability when regard is had to the need for further investment such as developing improved models in a fast growing market. As noted, such a situation may bring about a decline in the ability of an industry to raise capital or make further investment.

Although this paper is not addressing the question of profits foregone in an expanding market, what it does illustrate is the fact that regard can be had to the level of profit in determining whether or not they are adequate to ensure the industries long term viability. As they acknowledge the fact that profits are increasing does not mean that they are necessarily adequate.

The position taken by Customs has been simply to state that if your current level of profit is no worse following dumping of goods onto the market, then in effect you have not suffered any injury, even though you have lost profits due to the impact of dumped imports.

Previous consultations between the TRTF and Customs resulted in a proposed draft Ministerial Direction that acknowledgement of a loss of market share in such circumstances, but without reference to potential loss of profit. The logical consequence of an acknowledgement of loss of market share would be loss of profit and profitability, but consistent with its previous approach no inclusion was made to deal with loss of profit.

The TRTF considers that the Ministerial Direction should be updated to include a reference to loss of profit as an indicator of material injury.

Australia's list of actionable subsidies under the countervailing provisions should be more closely aligned with the WTO

The subsidies agreement is not written in a clear manner and would be more helpful if the concepts used in that agreement were used in the subsidies agreement and this would include using the list of actionable subsidies found in the subsidies agreement.

Information burden on those seeking protection against dumped or subsidised goods is appropriate.

Issue of lodging an application

One of the major issues of concern to the TRTF has been that of the information burden on parties in having to initiate a dumping application. The information requirements in the dumping application are very comprehensive, especially on injury. The TRTF does not have a difficulty with the detailed requirements set out in the application form. It considers that given the relatively short timeframe under Australia's anti-dumping system that the information required to be supplied in the application form is reasonable.

The major issue has been by which standard Customs evaluated the information in the application form, and for consistency in decision making in initiating a case and in particular, that the criteria and methodologies used to evaluate an application be published.

The TRTF would draw the Productivity Commission's attention to its submission to the Joint Study on this question. The TRTF was not seeking to lower the standard by which an application ought to be considered or that the information requirements ought to be less than presently set out in the application form. The TRTF also requested that special consideration in terms of assistance ought to be provided to SMEs.

The key consideration of the submission was to overcome the perception that Customs was not simply seeking to apply the appropriate evidential standard as required to initiate a case, which was a prima facie standard but was requiring actual verification of information, something that was only required after initiation of the case. The outcome of the Joint Study was that for draft applications, pre-lodgement guidelines were published and once an application had been lodged that they would be evaluated according to 'Guidelines for the examination of a formally lodged application' These guidelines set out the evidential standard to be applied, the formal process for rejecting an application and how Customs would go about evaluating an application.

The outcome is considered by the TRTF to be a major improvement over the previous system of initiation and rejection of applications. There is more certainty surrounding the question of how an application will be evaluated and, if rejected, that the reasons for such a rejection are easier to understand and accept. Australian industries do not lodge frivolous claims. The nature of the information requirements set out in the application form are such that a considerable amount of time effort and expense needs to go into preparing an application. Depending on the complexity of a case this information gathering may take between three to six months. The legal obligation imposed under the Agreement and as reflected in the *Customs Act* is that the information in an application cannot be speculative. The applicant's CEO must be satisfied that the evidence supplied is adequate and accurate and that it supports the application being made and is sufficient to justify the initiation of an investigation.

There was an appreciation by Customs that it is to everyone's advantage for it to document its internal practices and procedures as means of promoting greater certainty and consistency in decision making.

Confidentiality of information

One issue of particular concern is that of obtaining information from official Australian Bureau of Statistics ("ABS") statistics on the question of import statistics of goods by applicants. The Joint Study considered the request but was advised that legislation under which the ABS operated meant that this information could not be provided to other parties.

The TRTF would like the Productivity Commission to explore and make recommendations on what possible solutions might exist to overcome this difficulty.

One of the particular difficulties on the anti-dumping system is that for understandable reasons, a lot of critical information has to be kept confidential. Article 6.5 of the Agreement provides that confidential information submitted during the investigation by an interested party must be kept confidential by an anti-dumping authority. Confidential information includes both information which is confidential by its very nature, and also information which is submitted by a party on a confidential basis. A non-confidential version of submissions must be provided and placed on a public file.

The TRTF made submissions on the question of confidentiality in respect of the Joint Study, in particular that non-confidential summaries be provided in a timely manner; that the non-confidential summaries provide more information; and that the public file system be available electronically to interested parties.

The TRTF welcomes the creation of an electronic public file system as a notable outcome of the Joint Study Review. The requirement that parties must provide a general description of the information which has been blanked out as confidential in a document which appears on the public file is also helpful in assisting parties understand the nature of a claim of confidentiality. The placement of a non-confidential version in a timely manner still remains an issue of concern.

One issue that does get raised, is that of the possible introduction of the Administrative Protective Order system, by which confidential information can be supplied to the legal representatives of parties and in turn provided to accounting firms under strict conditions which would enable the information on costs in particular to be checked out for accuracy and completeness. Under Australia's legal system this information can only be provided to an interested parties once legal proceedings are undertaken and then only to legal counsel and accountants upon legal undertakings being given that this information will not be disclosed to that interested party.

There is no doubt that, in principle, the disclosure of this information would be of considerable advantage to an applicant and for that matter to an exporter in respect of a domestic industry's claims during the investigation. This would enable a party to feel reassured that the verification process has been comprehensive and thorough. This would enable greater acceptance of outcomes and remove the feeling that the verification process has not been good enough when the outcome is not consistent with the perceived commercial realities of a party.

The particular difficulty, as expressed by the Joint Study, is the need for confidentiality to be maintained in any system that discloses information to a party's legal representative or expert, but not to the actual party concerned must have a very high degree of integrity and significant penalties for breach. This achieved in the US system under their Administrative Protection System by ensuring that the information is supplied to legal representatives, who can provide it to accounting experts, but are still liable for any unauthorised disclosures. The concern is that if a similar scheme was introduced then, in effect, the system would require lawyers to become actively involved and this would considerably increase costs. Any advantage to a domestic industry would be outweighed by the additional costs that would be incurred compared to the present scheme which is based on using consultants. In the recent EC review of its trade defence instruments, the view of the European industry is that the US Administrative Protective Order system is just too expensive and therefore is not supported.

However, the TRTF would be interested in any views that the Productivity Commission may have on a system which would allow the release on of confidential information subject to strict sanctions to representatives of parties that would not incur the high costs of legal representatives.¹¹

Basis for calculating a non-injurious price is sufficiently rigorous

¹¹ The paper "Preliminary ideas on a protective order system in the EUTDI investigations" by Cliff Stevenson discusses options that could be considered if an APO system was to be introduced in the EU. The paper suggests that for reasons of cost, access should not be restricted to lawyers and could include other professionals, and methods to sanction breaches become a significant issue, with no easy answers. One such as having to pay a bond would be too restrictive as the bond would have to be high and therefore would exclude small firms. Reference is made to the Australian system which although more restrictive is safer as the risk of violation is lower.

Customs has published a document where it has set out its policy on how it will establish Unsuppressed Selling Price (USP) and a Non-injurious price.

Reference is made in passing to the question of the use of price underselling but only in the context of using the USP in an analysis of price underselling, as an adjunct to an analysis of price undercutting, price depression and price suppression. The policy document is neither clear nor helpful on the question of price underselling.

Price underselling is used in the EC to determine the level of measures to be applied under the lesser duty rule. In cases where it has been found that there is price depression, then if you used that figure as the starting point to determine an unsuppressed selling price then you end up with an incorrect level of measures. To overcome this you determine a target price¹², which is the price that the goods should have sold for if not for the effect of dumping.

The policy direction has been in force since 2004. Although Customs has stated that the use of price underselling has not been common thus far, Customs intends to establish procedures but none have been established to date.

The TRTF considers that procedures for establishing an Unsuppressed Selling Price and Non-injurious price need to be amended to incorporate formal acknowledgment of the use of price underselling where there is evidence of price depression. This use of price underselling does not over compensate an industry but its non-recognition means that in certain circumstances the application of the lesser duty rule will not be sufficient to prevent continuing material injury to an Australian industry.

In those circumstances where a constructed price is used, then the amount of profit to be determined should reflect the level of profit, needed to meet the level of return, or internal hurdle rate, needed by an industry to ensure that the domestic industry remains economically viable in the longer term. Customs essentially ignores these arguments and relies on historical profit levels which in certain cases are insufficient to ensure that an industry can remain competitive by allowing continuing investment in research and development new equipment.

There should be more emphasis on pursuing price undertakings as an alternative to the imposition of measures

The TRTF considers that the question of whether or not a price undertaking should be used is one that can only be determined on a case by case basis. The key issue is the level of cooperation experienced by Customs during the course of the investigation of the exporter, the past conduct of the exporter, the level of dumping found, the ease of compliance of the actual measures and injury to an industry if the exporter breached the undertaking.

If the level of cooperation is low, the amount of dumping margin high and any possible breach would cause significant industry, and then a price undertaking would not be appropriate. In cases where the reverse is true then it may be considered.

¹² The target price is calculated based on cost of production of the goods, plus reasonable profit margin that would have been achieved in a market unaffected by dumped imports.

Customs should make available the terms and conditions of the price undertaking to industry so it can make any comments. Any form of price undertaking must have comprehensive requirement about the shipments of goods subject to measures, including advanced notice of any shipments to Australia and allow supply of all relevant documentation to Customs in Australia for examination and to agree to all requests by Customs for supply and if necessary inspection of documents both within Australia and overseas. Compliance of all terms must be strict and breach of conditions would lead to immediate imposition of measures.

The current five year norm for anti-dumping measures should be changed, and whether related revocation and sunset provisions should be amended.

The TRTF supports the retention of the existing mandated timeframe of five years for both anti-dumping measures and sunset reviews. The existing timeframes allow an industry sufficient time to recover from the past effect of dumped imports and injury.

The implication of the question seems to be that intermittent dumping may be a one off occurrence, but this is not necessarily the case, nor is the fact that if the conditions are right again that an exporter will not dump goods onto the Australian market within the five year period.

At present, dumping duties are required by Article 11.1 of the Agreement to remain in force for as long and to the extent necessary to counteract dumping which is causing injury. Article 11.2 allows for measures to be either reviewed, to increase or decrease the level of duty or to have the measures terminated. The present system therefore allows sufficiently flexibility to deal with all circumstances. The last version of the WTO Working Group Chairman's text did not propose any changes to the five year period for imposition of measures.

In respect of the question of sunset reviews there have been proposals to have the reviewed measures either last for three years and for measures only to be renewed once and after that a new application would need to be made, or no renewal at all. One view was that there should be some evidence of the development of the industry since the measures were imposed.

In the review of the EC trade defence instruments there were similar proposals as outlined above and in addition that present injury test be replaced by a likelihood of threat test.

What can be said is that there is no agreement at all on what should be done in relation to sunset reviews.

In Australia, there is a requirement that an industry must apply for the continuation of measures once the original term of five years has expired. If an industry believes that it is no longer subject to dumped imports, and by this time there is evidence on whether dumping is continuing and the industry has recovered, then it not unusual for no application to be made and for the measures to lapse.

If a domestic industry believes that dumping is continuing or will recommence if measures lapse then they should have the right to seek continuation of those measures to ensure that they do not suffer further injury. If suitable grounds exist for measures to continue then they should be allowed to continue.

In principle, there is an argument that measures should only be allowed to be in place for 10 years in total and if needed a new application should be made. The difficulty is to legislate so that this is a rule that applies in all cases as it is possible that in some cases, especially if there are generic products and a history of dumping over many years, that dumping will simply recommence, especially if a new application has been made. It is difficult to draft legislation that would deal with exceptional circumstances. The outcomes of the Joint Study were to provide much greater clarity in respect of the legal standards to be applied to an application and detailed guidelines on how an application would be considered by Customs. When it comes to a continuation inquiry the application form is brief, there are no guidelines to speak of, and the dumping manual description of a continuation inquiry process is likewise very brief, yet applications for continuation of measures remains as significant issue and major work load for Customs.

The TRTF would recommend that a better and clearer application form, guidelines and guidance in the dumping manual be developed to assist in overcoming the uncertainty of the continuation inquiry investigation process and differences in outcomes of investigations.

There should be a freeze on reapplication following an unsuccessful application for anti-dumping measures, whether there should be some form of sanction for frivolous applications

This issue arose out of one case in one country several years ago and there have not been examples of this as a continuing issue that have affected international trade and this has never been an issue in Australia.

Again, in theory, if an application is rejected then there should be a period of time before an application is re lodged, where what is being relied upon are the same facts or only minor variations of these facts. The reality is that if an application was rejected and then was resubmitted on the same substantial grounds then Customs would be able to have regard to the information from the previous application and its findings and reject the new application as not having reasonable basis for imposing measures.

Improving administration of the existing system

The position of the TRTF is that the current system should be retained within Customs and that there is no need to introduce a formal bifurcated system.

The Agreement sets out the concepts and procedures to be followed in making a determination whether or not to impose dumping measures. How each country is to implement the measures is something for each country to decide.

There are two systems that countries use, one is a unitary system in which one body determines both dumping and injury, the other is where these functions are performed by two separate bodies. The other possibility is where you have two bodies, one which makes a determination under the Preliminary Affirmative stage, and then the matter is handed over to another body which then makes the final determination on dumping and injury.

Previously, Australia had the two stage process body with Customs making determinations up until the Preliminary Affirmative stage and then the Anti-dumping

Authority making the final determinations. Under this system Customs initiated the case, visited Australian industry, sent the exporter questionnaire, conducted overseas visits, made determinations on normal value, export price and dumping margin, as well as preliminary findings on material injury and causal link.

The role of the Anti-dumping Authority was to review the finding of Customs and to make final determinations. It did not conduct overseas investigations. One of its roles was to advise the Government on material injury and it did provide a report to Government on this question as one of its first tasks. The reality is that although a review function is useful, the conclusion of Willet was that the additional time taken added little real value. To have tighter timeframes was considered the best way to achieve this was to have Customs do the whole process thoroughly but once, with an ultimate right of internal review to a Trade Measure Review Officer. The government of the day accepted this proposal. The same argument that applied under Willet still applies today.

The other option is to have two separate bodies – one dedicated to dumping and one dedicated to injury. This means that you would not be bound by a sequential system but could have both bodies look at dumping and injury at the same time, making the whole process more efficient. It could be also said that this would allow different skills to be recognised and the higher degree of specialisation would be beneficial to all parties.

There is no necessarily right or wrong answer to this question. Major users like Canada and the US use a bifurcated system where there is a separate body considering dumping and another consider injury, whereas the EC simply has one body which considers both.

The EC previously had administrative separation within its authority with one group dealing with dumping and the other with injury, but this formal distinction is no longer in place.¹³

The key issue is that of resources and amount of work and cost of each system. At present the current work load is not high and although it will almost certainly increase in response to the current economic climate, there will not be significantly large numbers of new cases. It would therefore seem less efficient to have two separate bodies in different agencies. The number of people would be relatively small and the type of work is so specialised that it is difficult for those doing that job to be absorbed into an agency during quiet periods. There are also issues of job training and career development and consequent impact on staff morale. Over time good people leave to pursue other career options. There is also the advantage of providing those working in a dumping administration the option of working on both dumping and injury side of an investigation as this provides them with broader work experience.

¹³ In the report prepared on behalf of the EC, by Mayer, Brown, Roweand Maw LLP dated December 2005, on Evaluation of EC Trade Defence Instruments, the question of going from the present EC unitary approach to bifurcated system was discussed. The comment in the report at page 34 was “Moreover, if the EC was to introduce a bifurcated system, such as exists in the US, it has to be appreciated that this comes at a certain financial cost. This is in both terms of the agencies themselves with regard to offices, staffing, etc: and in terms of interested parties have to deal with two agencies rather than one. The “experiment” of the past- into which dumping and injury investigations were split into separate directorates within DG Trade- was generally considered by survey respondents to be a disaster. EC interested parties appreciate an integrated, consistent approach to the whole investigation”.

It would seem that if there was going to be a formal separation of functions between injury and dumping that it would be best done administratively rather than having two separate organisations. It would also be considered that the legal, accounting and investigative skills required are transferable between consideration of dumping investigation and injury analysis.

Overall, the TRTF believes that the current system is basically sound. One area for improvement may be the formal recognition within an Investigation team of those resources that are required to conduct both a dumping investigation and injury analysis to ensure that there are sufficient resources to do both tasks. There should be one person, at Customs Manager level appointed to be specifically in charge of the injury side of an investigation to ensure that in complex dumping investigation, especially out of China, that all the resources do not go to that part of the investigation at the expense of the injury side and that the proper consideration of injury does not occur too late in the investigation.

It is not considered that economic modelling *per se* will add anything to a proper analysis of injury. Although used in the US, such an approach is not used in either the EC or Canadian administrations. The reality is that if a case is clear cut either way, then modelling is not going to add anything to the decision making process. In cases where the question of injury may be less clear, modelling may be useful after having regard to the prescribed injury factors; a value judgement is going to have to be made whether or not economic modelling is used.

One of the key considerations is to have sufficient resources so that a proper analysis of injury factors and causal link can be effectively carried out and that there is sufficient time to do these tasks. A failure to devote sufficient resources would not only mean that a less than thorough job would be done, but there would be inevitable delays, leading to requests for extension of time during the course of an investigation.

It may be worthwhile considering having the investigation period extended by an additional 30 days, rather than having constant extensions of time.

The TRTF considers that the role of the Minister ought to be retained and does not see that removing the Minister from the process would necessarily improve the system.

One criticism is that due to the workload that a Minister has, it can be difficult for a Minister to make a quick decision upon receiving a report, or that a Minister will be subject to political lobbying once the report goes to the Minister, which raises issues of procedural fairness.

The TRTF considers that the Minister should make a timely decision once a final report is received from Customs. In principle, it agrees that a statutory time limit could be imposed and that this should be sufficient to enable a decision to be made within three months of receipt of a report. This period should take account of any time a Minister is out of Canberra or has other pressing business. Of course this is a maximum period, and the Minister is always in a position to make an earlier determination.

The reality is, that once a report is made and given to the Minister, it is rare that a Minister will go against a finding. To allow a Minister to be in a position to form his or her own evaluation, is nevertheless, seen as worthwhile exercise of discretion in

appropriate circumstances. This does imply that the Minister would be open to receive submissions over and above those which would be received during an investigation. In effect, no new evidence can be introduced to overrule verified information, but submissions could be made as to the weight of evidence or to raise legal issues that have been ignored or inadequately considered during the investigation. Having a statutory imposed deadline on the Minister would ensure that there were time limits on receiving and considering such submissions.

The Minister would have to be conscious, as indeed they are, of the need to maintain procedural fairness by making all parties aware of any submission that they receive and this could be achieved by ensuring that any submissions are made to, and considered by, the Minister are given to other interested parties.

To the extent that the Productivity Commission would like to consider other options for a decision maker then one option is to have a statutory officer position within Customs whose role would be similar to that of the Minister in receiving and considering a report from the Trade Measures Branch. Another alternative is to have a tribunal comprising of several different persons, who could be convened to determine a case. This would raise the option of having a more formal hearing process and having direct representations to this body by interested parties and would have the possibility of having evidence re-examined and for it to consider matters such as public interest.

Against this, is the fact that such a body would add considerably to the timeframe of the investigation process¹⁴ and make the process inherently more expensive for the majority of cases. Parties would, in effect, have to spend additional resources on making representations for fear of not doing so would potentially disadvantage them.

Preliminary Affirmative Determinations

A concern that was raised during the Joint Study by the TRTF was the linking of the making of a Preliminary Affirmative Determination with the publication of a Statement of Essential Facts. These are two separate stages in the investigation process. The making of a preliminary affirmative determination enables security to be imposed on dumped imports, which will alleviate the material injury being suffered by an industry whilst the investigation is completed.

The following is the extract from the Final Report of the Joint Study as it conveniently summarises the different views on this topic and where the matter presently rests:

“5.2.5 Preliminary affirmative determinations and securities

Customs was unjustifiably cautious in its approach to imposing provisional measures and that a PAD should be made as early as possible. Orica pointed out that ‘the WTO Anti-Dumping Code enables provisional measures to be imposed from Day 60 of an investigation’, while there had been ‘limited instances where a PAD was published prior to the SEF (due at Day 110).

¹⁴ One option would be to abolish the Trade Measurer Review Officer position given that its role could in fact be performed by the Tribunal. This would save time by having a further review.

Stakeholders considered that any delay in making a PAD results in continued injury to applicants and provided little disincentive to prevent further dumping during an investigation.

The TRTF maintained that achieving the level of satisfaction to make a PAD did not have to rely on verified information, and that an insistence on verification 'would result in not preliminary nor provisional, but final findings being made at this stage of the investigation'.

Several submissions contended that Customs is unduly cautious in determining whether a PAD is justified and sets unnecessarily high evidentiary standards.

Evaluation

Under the WTO Anti-Dumping Agreement and Australia's anti-dumping legislation, provisional measures (securities) cannot be applied sooner than 60 days from the initiation of an investigation. A PAD must be made before provisional measures are applied. In accordance with s.269TD of the Customs Act 1901, a PAD may only be made if Customs is satisfied that there appears to be sufficient grounds for the publication of a dumping duty notice. Before securities are taken, Customs must also be satisfied that it is necessary to do so to prevent injury while the investigation continues.

The standard of evidence required to make a PAD and take securities is higher than that required to initiate an investigation, but is less than that required to apply measures.

There is no requirement that information be verified through on-the-spot investigations prior to making a PAD. However, a PAD does need to be supported by cogent and reliable information about dumping, injury and causality. At around 'day 60' of an investigation the available evidence will usually include the application by an Australian industry and submissions received in response to the initiation of the investigation. Submissions are often made by opposing interests such as importers, exporters and other interested parties. Submissions made by interested parties, including applicants, frequently reveal conflicting evidence about the allegation of injurious dumping. In almost all cases the submissions propose different evidence about how imported and domestically produced goods compete in the Australian market.

A recent exception was the investigation of the alleged dumping of grinding mill liners where Customs made a PAD and imposed provisional measures at around 'day 85'. In that investigation, exporter questionnaire responses showed high levels of dumping and Customs' analysis showed that the link to material injury was strong. As outlined above, in most cases the existence of dumping, material injury and causal link are not as evident at this stage of the investigation.

Customs is already in a position to ensure that, where appropriate, a PAD is issued. As noted in the mill liners case, the verification of exporter data is not invariably required before making a PAD. A related issue is the form the PAD should take. Neither the WTO Anti-Dumping Agreement nor Australia's legislation prescribes this. The requirements for a PAD are less stringent than those for a statement of essential facts (SEF), which is an evidentiary requirement under Article 6.9 of the WTO Anti-Dumping Agreement. The SEF is a public document which informs interested parties of the

essential facts forming the basis for the decision to impose final measures and allowing parties to comment on those facts.

Customs' approach has been to document in some detail the delegate's reasons for being satisfied that circumstances exist to justify the issue of a PAD. This takes significant time and often means that the PAD coincides with publishing the SEF. Customs will develop a PAD in some abbreviated form which meets the legal requirements. This might accelerate the making of PADs.

The WTO Committee on Anti-Dumping Practices has also considered what should be included in a PAD. Although the draft recommendation has not been adopted by the Committee, it gives some guidance on the practices and thinking of WTO members on evidentiary standards and form of PADs.

Australian anti-dumping law, and Customs' administration of anti-dumping investigations, appear consistent with those proposals. Customs will continue to issue a PAD as soon as possible during investigations and where necessary it will apply provisional measures to prevent material injury to the Australian industry occurring while the investigation continues.

Customs will also continue to ensure that it meets the minimum requirements of the law and the WTO agreements.

Recommendation 18: That Customs continue to issue PADs as soon as possible after day 60 when appropriate circumstances exist and develop a format for the PAD which may assist in reducing preparation time."

Comment

There has been no evidence that Customs has as a matter of practice, adopted the approach it referred to above. Customs has not developed, to the knowledge of TRTF, a new format for making a Preliminary Affirmative Determination.

Customs stated that it will issue a PAD as soon as possible after day 60 in appropriate circumstances. The TRTF would consider that appropriate circumstances would *inter alia* be where:

- The applicants comprise either the entire Australian industry or a significant majority of that industry and Customs had verified the information provided by the company on material injury.
- There are no obvious other factors which could have contributed to the industry or it is reasonably clear that the domestic industry would nevertheless be still suffering material injury from dumped imports.
- That the exporter or exporters failed to cooperate and provide a response or an adequate response to the exporter questionnaire.
- Where the exporter questionnaire received by Customs showed in all the circumstances, significant dumping margins taking the condition of the Australian industry into account.

In terms of a time to make such a finding, the TRTF would say that it should be as close as possible to day 60 as circumstances allow but in any event should be made no later than day 85 of the investigation, unless the case is complex.¹⁵

Role of Trade Measure Review Officer

At present the role of the Trade Measure Review Officer (TMRO) is only part of a review process. The primary review process is at present the Federal Court which can consider a review of a decision of the Minister under the *AD (JR) Act*. This review is not a merit review, as the Government policy to date has been that it is inappropriate to have a merit review of a decision of a Minister because the Minister is entitled to have regard to matters including government policy in reaching a decision. However, the need to have the record “checked” so to speak was recognised, providing that it was not a full scale review. At present the TMRO is prevented from receiving new evidence, his task is to review the files and to make recommendations which can either be accepted or rejected.

One reason for the present approach is that it was meant to provide a low cost option for having the facts reviewed. It was not meant to create a second tier review where new facts and therefore findings could be made. To do so would in some sense re-create a second review body when this was considered post Willet review to be unnecessary. Secondly, to allow new evidence to be introduced would simply allow “gaming” to take place where information could be withheld during the actual investigation, only to be presented at the review stage.

Any consideration of extending the function to include more than the present role would have resource implications for the present role which is performed by one officer. Additional resources would need to be provided and different set of skills needed for the role of the Trade Measure Review Officer.

The position of the TRTF is that the present role of that officer is sufficient and there is no need for change.

Previous Labor Party proposals

In a paper *A Fair Go for Australian Industry*, released in December 2006 (see Attachment “C”), there was an extensive discussion on proposals for new arrangements to be put in place for determining both a dumping application, for conducting a dumping investigation and in having some of the functions taken from Customs to be given to the ACCC. Finally there was a proposal to remove the Minister as the decision maker. Attached (at “D”) is response that the TRTF gave to that submission.

¹⁵The TRTF notes that Dow Chemicals has advocated a two stage process as a means of encouraging an earlier application of a preliminary affirmative determination, than currently exists. The TRTF believes that the focus on the correct evidential standard by Customs to make such a determination, which is after all a preliminary, not final determination, would assist in this process. The TRTF would welcome any proposals by the Productivity Commission on the question of appropriate and timely determination of a preliminary affirmative determination leading to imposition of securities to protect an industry from the ongoing injury being suffered whilst an investigation takes place.

One of the major proposals in that paper was that dumping investigations be removed from Customs and be given to the ACCC. The TRTF strongly opposes the transfer of the anti-dumping administration function from Customs to any other agency.

The premise of the paper is that as Customs now Customs and Border Security is now focussed on border security type issues that its resources are best placed dealing with those issues and not on anti-dumping and that the ACCC with its focus on competition policy issues and in conducting commercial investigations, is best placed to deal with these issues and to consolidate dumping investigations with ACCC functions would be consistent with government policy.

The TRTF would repeat its criticisms of the proposals that it made in its paper. One of the chief criticisms is that the paper simply put up one alternative which is to transfer dumping functions to the ACCC, no other models were discussed. The role of conducting a dumping investigation is not addressed; rather the focus of an investigation is only injury. The TRTF notes that the Productivity Commission can have regard to a range of options and not confine itself the way that the discussion paper did.

One model which was never mentioned is that of Canada where the dumping authority is in fact performed by their Border Agency. The logic of having a dumping function located within a Customs body is considerable but not addressed in the paper.

The TRTF does not consider that the skill set of officers within the Trade Measures Branch is less than that of the ACCC. Indeed in carrying out an actual dumping investigation, in particular overseas inquires, it would be superior. The TRTF has stated in this submission, that in terms of injury analysis there can be several approaches, including separating out within Customs the role of conducting a dumping investigation from that of injury.

The TRTF would support the adequate resourcing of the Trade Remedies Branch in relation to providing adequate and skilled officers to do both dumping investigation and injury analysis. For the reasons already given, it considers that it is more practical for this function to be administrative rather than having separate organisations.

One option already mentioned in the previous response was to create a separate body within Customs that could report to the Minister which would assist in clarifying the role of an anti-dumping and countervailing administration from that of general Customs administration, yet retain the advantages of the role of such an administration would have in accessing the Customs data base.

Further Customs is seen as being political neutral. An alignment with an Industry portfolio is seen by exporters as suggesting that the purpose of the dumping administration is to side with domestic industry. To place the dumping administration within the ACCC is to see dumping only in terms of competition policy which is only concerned about the interest of consumers at the expense of unfair trade competition experienced by domestic industry.

The relationship of dumping and competition policy is addressed below in this submission.

Competition Policy

At a broad level, it could be stated that both competition policy and dumping laws address the question of behaviour that is simply unfair, one that is domestic and one that is international. Indeed Gruen in his report drew this analogy. Where such behaviour is observed then it is appropriate for a government to deal with such behaviour be it domestic or international.

However there is a critical difference, between competition and dumping law. Competition law is designed to protect the interests of the consumer and anti-dumping law to protect the industry and those who work in the industry. One possible option is to have dumping addressed under the anti-competitive conduct provisions of the *Trade Practices Act*, as this would focus on predation and thus remove discrimination between behaviour between local and overseas suppliers.

The immediate difficulty is that of enforcement, the domestic competition laws do not have extra territorial force. As the paper correctly noted, to go down this path, would not meet the fairness objectives which underline the anti-dumping policy objectives including:

- How judgements against overseas suppliers might be enforced.
- How penalties under the TPA would be reconciled with the provisions under the Agreement.
- How the current provisions of the TPA could be employed to offset the impacts of subsidies provided by overseas governments.

The TRTF considers that the practical difficulties are insurmountable and could not be seriously entertained.

Even where politically it was possible to replace dumping law with competition law, which occurred under the CER agreement between Australian and New Zealand it is worth noting that for whatever reason, these provisions have never been used.

It is also noteworthy that even when Australia enters into Free Trade Agreements with countries there is no suggestion that competition laws replace dumping laws. Competition laws can only be a substitute were two countries share strong political, cultural and economic ties but more importantly similar legal systems so that it is possible to have similar competition laws, and legal systems that allow cross vesting of powers. This was possible in the case of New Zealand, but not with other major trading partners. As noted above the outcome even in this case is that this system has never been used.

Subsidies

The focus of the Issues Paper is on anti-dumping as this tends to be more controversial and also because subsidy cases are not particularly common. It is also the case that both prohibited subsidies and actionable subsidies would be universally recognised as being trade distortive and therefore from a policy perspective one that is easier to justify in imposing measures against.

The TRTF would note that given that there seems to be acceptance of the need for having a subsidy administration, which any proposal made in respect of dumping, would

be against the background that any procedural changes would impact on subsidy administration.

One issue that is relevant is that of public interest and of continuation inquires and length of measures. The public interest test referred to in this submission only concern anti-dumping, there does not seem to be a requirement not to impose measures, where market forces have been distorted by subsidies. Likewise measures to counter the injurious effects of subsidised imports should remain in place for as long as a subsidy remains in force. There should be no basis for applying a shorter period of five years as has been suggested for dumped imports or to have any restriction imposed on the length of time on the continuation of measures.