
E The competition law alternative

Key points

- A possible alternative to a dedicated anti-dumping regime is to deal with dumping matters through competition law.
 - The approach already applies to trade between Australia and New Zealand (though either country can still take countervailing action), and within some other free trade areas and customs unions overseas.
- The approach has some in-principle attractions.
 - It would limit the imposition of anti-dumping measures to circumstances where dumping was most likely to be directly detrimental to efficiency.
 - Bringing dumping matters within the remit of the Trade Practices Act could increase the scope to take account of inter-relationships with some other competition issues.
- But notwithstanding its use in a trans-Tasman context, the feasibility of using competition law as a general substitute for Australia's anti-dumping system is highly questionable.
 - It would require the cooperation of other countries, which could not be guaranteed.
 - It would also require better developed competition institutions in some of Australia's major trading partners.
 - As a court-based approach, it would be much more time consuming and costly.
 - The punitive nature of the remedies provided for under competition law would be problematic, especially in countervailing cases.
 - It is unclear that there could be adequate recognition of the 'system preserving' arguments for taking action against injurious dumping or subsidisation.

An important element of rigorous policy analysis is assessment of the relative merits of different ways of pursuing particular policy goals. Thus paragraph 4(b) of the Terms of Reference asks the Commission to consider potential alternatives to a dedicated anti-dumping regime.

A possible alternative approach put forward in this context is to deal with dumping under s. 46 of the Trade Practices Act (TPA). Amongst other things, that section prohibits firms with substantial market share from supplying goods or services at

below cost for a sustained period, for the purposes of eliminating or substantially damaging a competitor (see box 2.5). This approach is already employed under the Closer Economic Relations (CER) Agreement with New Zealand in respect to trans-Tasman trade, though the parties are still able to take countervailing action (see box E.1). Trade within the European Union and between Canada and Chile under the Canada-Chile Free Trade Agreement (CCFTA) is similarly exempt from the application of anti-dumping measures that apply to third countries, and instead is subject to applicable competition law. However, like the CER Agreement, the CCFTA allows Canada or Chile to take countervailing action against subsidised imports from the other.

E.1 Some in-principle attractions

Prima facie, across-the-board reliance on the misuse of market power provisions in the TPA to deal with injurious dumping would have some attractions. In particular, it would limit the imposition of measures to circumstances where dumping was most likely to be directly detrimental to efficiency. More specifically, measures could only be imposed where:

- the overseas supplier had significant market power as a result of having a substantial share of the market in question — in contrast to the current anti-dumping provisions where action can be taken when the volume of dumped imports is as little as 3 per cent of total imports of like goods (see box 2.2)
- dumping was found to be motivated by predatory intent (that is, a purpose test) — in contrast to the current arrangements where action can be taken whatever the motivation for dumping, provided a local industry producing like goods suffers, or is threatened with, material injury.

Also, bringing dumping matters within the remit of the TPA could increase the scope to take account of inter-relationships with some other competition issues. In discussing this matter in the context of mergers policy, the Australian Competition and Consumer Commission (ACCC) said that:

... in Australia, an important element of the competitive environment in many markets is competition from imported products. In certain circumstances, however, the existing anti-dumping regime may give rise to outcomes which are inconsistent with the TPA's focus on promoting and protecting a competitive environment for the benefit of consumers. (sub. 35, p. 29)

The current arrangements do not of course preclude consideration of such inter-relationships. Thus the ACCC (sub. 35, p. 26) said that it will 'where appropriate' liaise with Customs. And in three merger cases over the last decade, approval by the

ACCC has been subject to the merged entity offering an undertaking not to take anti-dumping action for a specified period, or agreeing to compensate importers for expenses or losses arising from unsuccessful applications for measures (sub. 26, pp. 27–28).

Box E.1 Dealing with dumping under the CER Agreement

Prior to 1990, anti-dumping measures could be, and were, imposed by Australia and New Zealand on goods sourced from each other. For example, in the eight-year period until 1990, 10 of the 26 dumping cases initiated in New Zealand, and 6 of the 10 dumping duties imposed, involved Australian goods (New Zealand Ministry of Commerce 1998, p. 8). And of the 23 dumping and countervailing measures in place in Australia at 30 June 1989, one (frozen peas) was against imports from New Zealand (ACS 1989).

However, under the CER Agreement, anti-dumping (but not countervailing) measures against goods which meet the ‘rules of origin’ are prohibited. Instead, the agreement specifies that any misuse of market power in relation to trans-Tasman trade is to be dealt with through each country’s competition laws.

In terms of the legislation this involved:

- inserting a new provision in s. 46 of the TPA, and a mirror provision in New Zealand’s Commerce Act, covering misuse of market power in trans-Tasman markets
- amending various other pieces of legislation in both countries to address matters relating to the collection of evidence, judicial procedures and the enforcement of each other’s judgements.

Since the introduction of the new arrangements, there have been no dumping cases in regard to goods traded across the Tasman. Moreover, though the CER Agreement allows for countervailing action consistent with WTO rules, if a countervailing matter arises, both countries are required to have regard to the objectives of the agreement. Again, there have been no cases since the agreement was enacted.

Even so, promoting such integrated decision-making would seemingly be easier if dumping matters were addressed under the same piece of legislation as other competition matters and administered by the same body. In this regard, the Australian Steel Association (sub. 28, para. 306) — one of only two participants to endorse the use of competition law as a generalised alternative to dedicated anti-dumping provisions — commented that ‘Australia’s regulatory framework should not allow a policy hiatus between competition and anti-dumping objectives’.

E.2 Significant practical problems

However, and notwithstanding its use in a trans-Tasman context, the feasibility of relying on competition law as a generalised substitute for Australia's anti-dumping system is highly questionable — a view shared by the ACCC and many other inquiry participants (see box E.2).

- It would require the cooperation of other countries which, based on the retention of the scope to take both anti-dumping and countervailing action in Australia's other preferential trade agreements, could not be guaranteed.
- It would also require better developed competition institutions and legal instruments for enforcing judgements on any dumping-related misuse of market power than exist in some of Australia's major trading partners.
- And, as a court-based approach, it would be much more time consuming and costly, with the ACCC (sub. 35, p. 13) observing that s. 46 cases can take 'a matter of years' to finalise.

Also, the penalties prescribed in the TPA for breaches of the s. 46 provisions are generally retrospective and may significantly exceed the damage caused by the contravention. Conversely, measures provided for under the WTO Anti-dumping and Countervailing Agreements are generally prospective and set to remediate damage to the local supplier, rather than to punish the transgressor.

- A harsher penalty regime that punished and deterred genuinely predatory dumping might well be desirable.
- But taking punitive action against a supplier benefitting from a countervailable subsidy provided by a foreign government would be especially problematic, as exemplified by the retention of the generally applicable countervailing provisions under the CER Agreement and the CCFTA.

More generally, it is unclear whether the competition law approach, with its focus on enhancing and preserving market competition, could adequately recognise the 'system preserving' arguments for taking action against injurious dumping or subsidisation (see chapter 4).

Thus, the Commission concludes that it would not be appropriate to use competition law as a generalised alternative to the current dedicated anti-dumping system.

Box E.2 Participants' views on the competition law alternative

Differences in underlying focus and philosophy

PACIA ... believes that a proposal to address dumping through competition policy is fundamentally flawed. While in broad terms both dumping policy and competition policy are compatible, the focus of each is different. The former is about industry activity and practice within global markets whereas the latter is focused on domestic competition where the consumer benefit is central. As such, PACIA would see the two approaches sitting side by side. (PACIA, sub. 31, p. 12)

OneSteel would submit that institutions and laws designed for domestic issues are very unlikely to be a constructive source of solution for international issues. Thus, the Trade Practices Act and the ACCC — whilst having a proven track record in successfully addressing domestic issues — are not a suitable foundation for improvements on international issues because they have not been created for that purpose. (OneSteel, sub. 16, p. 22)

While anti-dumping and competition policy share a common focus on unfair competition, CSBP would be strongly opposed to any move from Customs and Border Protection to the ACCC on the basis of fundamental philosophical differences that such a change in administration would bring ... The ACCC is on the public record as promoting reductions in tariffs and removal of the anti-dumping system altogether in order to [prevent anti-competitive conduct and safeguard the interests of consumers]. (sub. 13, pp. 10–11)

Practical difficulties

Australia could not begin to make competition policy work in the context of trade with another country that had no competition policy or which was unwilling to take action against anticompetitive actors domiciled in its country. Discussions at the WTO have shown that only about half of the Organization's members even have a competition policy and far fewer have competition policy laws and institutions that approach the quality of competition policy in Australia. (BlueScope Steel, sub. 19, p. 54)

The TRTF considers that the practical difficulties are insurmountable and could not be seriously entertained ... Competition laws can only be a substitute were two countries share strong political, cultural and economic ties but more importantly similar legal systems so that it is possible to have similar competition laws, and legal systems that allow cross vesting of powers. This was possible in the case of New Zealand, but not with other major trading partners. (Trade Remedies Task Force, sub. 26, p. 44)

The ACCC is of the view that the effectiveness of the CER Agreement and resulting legislative amendments to bring trans-Tasman dumping activity within the ambit of competition policy rests largely on the high degree of convergence in the legal systems, competition law and enforcement regimes, and business practices operating in Australia and New Zealand.

... there are some key practical implications which need to be considered when determining whether dumping could be [generally] addressed under the anti-competitive conduct provisions of the TPA. These include:

- the time required for investigations and court processes
- approach to transparency of investigations
- potential jurisdictional hurdles and
- whether applicable remedies are appropriate. (ACCC, sub. 35, pp. 11, 29)