
5 Refocussing the broad approach

Key points

- The highest priority for reform of Australia's anti-dumping system is to introduce consideration of the broader public interest.
- Taking account of overseas approaches, the Commission examined several options for achieving this. However, most would have significant drawbacks.
 - Though some of the concerns about a conventional public interest test are overstated, under such a test, it would be difficult to factor in a system preserving benefit from achieving a 'fairer' trading outcome in each and every situation.
 - By itself, an explicit requirement for the Minister to take account of the public interest would not guarantee appropriate consideration of such matters.
 - Increasing the stringency of the existing assessment criteria would not necessarily screen out those cases where the imposition of measures would have been most costly.
 - As a stand alone approach, separate public reporting on wider impacts would be a weak option for encouraging consideration of the public interest in the decision-making process.
- The Commission's preferred approach is to introduce a 'bounded' public interest test, that would draw on the provisions of similar tests in the European Union and Canada.
 - The test would be administered by Customs and apply to new investigations and to reviews to determine whether existing measures should be continued.
 - It would embody a presumption in favour of the imposition of measures where there has been injurious dumping or subsidisation.
 - But it would also detail a small number of specific circumstances where measures would not be in the public interest — for example, where they would be ineffectual in removing injury, or would impose large costs on downstream users relative to the benefits for the applicant industry.
 - Where, based on the advice from Customs, the Minister was satisfied that one (or more) of these circumstances applied, measures would not be imposed. And where the imposition of measures would not be contrary to the public interest, the current lesser duty provisions would apply as appropriate.
 - Customs would have to complete assessments against the test within 30 days, with provisional measures imposed in all cases where there was a finding of injurious dumping or subsidisation, prior to consideration of public interest matters.
 - The application of these new arrangements would be subject to various consultation and public reporting requirements.

5.1 Promoting the public interest should be the goal

Not surprisingly, there is a diversity of views on what should happen to Australia's anti-dumping system.

At one end of the spectrum are most of the recent users of the system who argue that it is an important, fundamentally sound and internationally endorsed part of Australia's trade policy framework. Thus, in synthesising the views of its member companies, the Trade Remedies Task Force (TRTF) said that it:

... 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 ...

- 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 ...
- ... 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 current system provides a mechanism to impose discipline on foreign exporters and overseas suppliers to dissuade the practice of dumping onto the Australian market. (sub. 26, p. 1)

According to this group of stakeholders, major changes to the focus of the current system are not required, though almost all argued for some modifications to its detailed requirements to give better effect to the intent of the system and to improve transparency and administrative efficiency.

At the other end of the spectrum, the Australian Steel Association — representing the interests of various users of steel products which have been burdened by measures on some of their inputs — questioned the case for retaining a system, and argued that if one is to continue, then key components of it should be overhauled:

Even if the system is to remain in some form, the substantive and procedural provisions should be constructed so that protectionist tendencies are minimised and the laws cannot be misapplied or used for abusive purposes. (sub. 28, para. 13)

And in between, are those who consider that there is a clear case for retaining an anti-dumping system of some description, but that the current arrangements require substantial modification to render them less costly for the community. For example, Dow Chemical submitted that:

... an unfortunate outcome of the anti-dumping system, as it is currently legislated and interpreted, is that it is open to misuse and may, to the extent it is abused, protect uncompetitive local industries and deny access of downstream industries to globally-sourced products and technologies at a competitive cost. Therefore we believe the system is in need of significant revision in order for it to deal effectively with a new era of international investment in production capacity particularly in the Asia-Pacific region. (sub. 3, p. 1)

Some further commentary on the efficacy of the current system from submissions to this inquiry and to the 2006 Joint Study is provided in box 5.1.

As discussed in the previous chapter, the Commission also sees the need for significant change to the current arrangements. Indeed, without significant change, the case for Australia to retain an anti-dumping regime would be much weaker.

The highest priority is to introduce consideration of the wider effects of imposing anti-dumping measures. In other words, the anti-dumping system should serve the broader public interest, rather than only consider the interests of particular firms or sectors, recognising that:

- the system preserving benefits of providing access to anti-dumping protection are a key part of this public interest calculus
- there are practical limits on how far consideration of wider impacts can and should reasonably extend.

Having had regard to approaches employed in some overseas countries, this chapter explores four broad options for taking account of wider impacts and the public interest, namely:

- augmenting the current assessment criteria with a public interest test (sections 5.2 and 5.5)
- explicitly requiring the Minister to take account of public interest matters (section 5.2)
- increasing the stringency of the current assessment criteria (section 5.3)
- separate, and self standing, public reporting on the likely wider impacts of imposing measures (section 5.4).

Some of the changes which the Commission is recommending to address more specific deficiencies in the current legislative requirements, and to further improve the transparency of the system (see chapters 6 and 7), would also help to promote the public interest, albeit less directly.

Box 5.1 **Where to on anti-dumping: stakeholder perspectives**

Those endorsing a continuation of the current approach

Competitive, world-class producers in Australia have nothing to fear from a level playing field in domestic and international markets. But even the largest, most competitive companies can be hurt seriously by dumped goods ... an effective antidumping system ... to deal with such potential situations is extremely important. (BlueScope Steel, sub. 19, p. 39)

In the absence of tariffs in an open market such as Australia's, access to remedies to address unfair trading practices is considered essential. As a signatory to the WTO Anti-Dumping [and Countervailing Agreements], Australia has elected to enact fair-trade provisions in its domestic legislation. Qenos fully endorses Australia's application of the provisions within the Customs Act and considers that access to the available remedies is essential to underpin investment in Australia by manufacturers. (Qenos, sub. 13, p. 1)

CSR Limited strongly supports the anti-dumping provisions and believes it is an important element in ensuring the health and growth opportunities for the Australian manufacturing industry. (CSR Limited, sub. 10, p. 1)

Rather than being a protectionist measure, tough anti-dumping rules are an entitlement under the WTO to protect open and fair trade ... The risk of passive anti-dumping regulation during the GFC has been identified by this submission in terms of lost output and benefits to the economy at a time when unemployment is rising and capacity utilisation is falling. (The Australian Workers' Union, sub. 32, p. 13)

The NFF is committed to ensuring Australia's anti-dumping system is WTO-consistent, and that industries with legitimate claims against dumped imports have the opportunity to seek remedy through the system. Australian farmers, for differing reasons, depend on a transparent, efficient and defensible anti-dumping system. (National Farmers' Federation, sub. 6, p. 3)

Australia's agricultural, fisheries and forestry industries are ... significantly exposed to the unfair policies and practices of other countries. Accordingly it has been important that [these] industries have had recourse to the full suite of retaliatory measures, authorised by WTO rules, where it can be established that significant harm is being caused as a direct result of external policies or practices. (Department of Agriculture, Fisheries and Forestry, sub. 34, p. 2)

Those arguing for significant change

[It is] not in the national interest of any trading country to 'protect or cocoon' non performing and non competitive industries ... Australia should not strengthen our existing anti-dumping and countervailing system ... and over time, should wind down these barriers to free trade, productivity and innovation. (W.W. Wedderburn, sub. DR38, pp. 1–2)

Australia's anti-dumping regime may provide assistance to certain producers, but the broader impact of anti-dumping actions should be recognised. There can be no presumption the benefits generated by anti-dumping action outweigh the costs associated with increased prices and reduced competition. (Food and Beverages Importers Association, 2006, p. 3)

Currently the system operates in such a manner that the interests of those directly affected by the allegedly dumped imports, that is, the Australian industry producing like goods, are taken into account to the exclusion of interests of other parties. (Rio Tinto, 2006, p. 7)

5.2 A public interest test

As discussed in previous chapters, advice from Customs to the Minister on whether to impose anti-dumping measures is based solely on whether there has been dumping or subsidisation that is, or threatens to be, injurious, with no regard to wider impacts on the economy. And though the legislation seemingly gives the Minister some scope to take account of other factors in responding to that advice (see chapter 2), the Commission has not been advised of any recommendations from Customs that have been amended by a Minister on the basis of wider impacts, or the public interest more generally.

The WTO Agreements do not preclude countries from including a public interest test in their specific requirements, with the European Union and some individual countries (for example, Canada and Brazil) having done so.

However, such tests are typically ‘bounded’ in that there is a presumption in favour of measures if dumping/subsidisation and material injury are found. For example:

- The EU’s community interest provision (box 5.2) specifies that while intervention must be based on an appreciation of all the various interests taken as a whole, ‘the need to eliminate the trade distorting effects of injurious dumping/subsidisation and to restore effective competition’ is to be given special consideration. Hence, once injurious dumping has been found, there must be ‘compelling reasons’ that lead to the ‘clear conclusion’ that measures would not be in the community interest. (EC 2006, pp. 2–3)
- Under the Canadian system (see box 5.3), assessment of the public interest does not occur automatically. Indeed, the relevant legislative guideline (CITT 2004) indicates that ‘normally an injury finding leads to the imposition of antidumping or countervailing duties’. But on request from an interested party, the Canadian International Trade Tribunal may conduct a public interest inquiry if it decides that there are reasonable grounds to believe that the imposition of duties, in full or part, may not be in the public interest.

Such requirements to consider the public interest have not had a major impact on the outcomes of anti-dumping investigations. For example, the Commission has been advised that application of the EU’s community interest test has led to the non-imposition of measures in about 10 per cent of cases where injurious dumping or subsidisation has been found — with decisions not to impose measures mainly based on industry viability and ‘inability to benefit from measures’ considerations. And in the nearly 160 investigations since the public interest inquiry process was introduced in Canada in 1984, there have been only six such inquiries, in turn leading to the imposition of lesser duties on four occasions. Moreover, only one of these duty reductions has occurred since guidance was provided in 2000 on factors to be considered in public interest inquiries (see box 5.3).

Box 5.2 The EU's community interest test

To help ensure that the imposition of anti-dumping and countervailing measures against imports from non-EU countries is in the community interest, Articles 21 and 31 of the relevant regulation specify, amongst other things, that:

- intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers
- all parties are to be given the opportunity to make their views known
- measures found to be appropriate on the basis of dumping and injury may not be applied if the relevant authorities can clearly conclude, on the basis of all the information submitted, that this would not be in the community interest
- interested parties may request a hearing from the assessment body, with requests to be granted if accompanied by appropriate community interest reasons.

However, these articles also specify that, in considering the community interest, special consideration is to be given to the 'need to eliminate the trade distorting effects of injurious dumping/subsidisation and to restore effective competition'.

In giving effect to these requirements, the analysis (which is carried out by the European Commission):

- is of an economic nature, with no regard given to political or broader policy considerations (for example, foreign and regional policies)
- takes into account the viability and future prospects of the applicant industry
- may have regard to any impact of measures on the degree of competition in the market, including the creation or strengthening of a dominant position for the applicant industry
- is not a cost-benefit analysis in the strict sense where the various interests are weighed against each other quantitatively, but rather involves the application of a proportionality test that considers whether the costs of imposing measures on other parties would be disproportionate to the benefits for the applicant industry. This would be the case where, for example, it was found that the industry:
 - was not viable, even with measures in place
 - would clearly not benefit from measures for other reasons — for instance, because there would be a shift in demand into substitute products
- focuses on the situation of entities that would be directly affected by measures, meaning that assessments will normally only go one step up or down the production chain. For products not commonly sold at the retail level, consumer interests are to be involved only if they can demonstrate an 'objective link' with that product.

Contrary to the perception of many participants in this inquiry, the test applies to *all* new investigations and to reviews to determine whether measures should be considered beyond their initial term. And where measures are found to be in the community interest, a lesser duty sufficient to remove the injury for the applicant industry may still be imposed.

Source: EC (2006).

Box 5.3 The Canadian public interest inquiry mechanism

Under Canada's bifurcated assessment process, the dumping/subsidisation component of that assessment is undertaken by the Canada Border Services Agency. In the event of a positive finding, the case is then referred to the Canadian International Trade Tribunal (CITT) which examines injury and causality matters, and which may also consider public interest matters.

Specifically, when commencing an injury inquiry, the CITT will indicate how it may consider public interest issues if it makes an injury finding. In response to a request from an interested party, it may initiate a public interest inquiry. Such inquiries are informed by submissions from interested parties and will usually involve a public hearing. (The Tribunal is also able to self-initiate a public interest inquiry, but has never done so.)

The CITT may, on the basis of these processes, determine that it would be in the public interest to impose a lesser (or no) anti-dumping or countervailing duty. And though the Tribunal is free in this context to take into account any relevant factor, some specific factors are listed in a schedule to the guideline as requiring consideration, including whether:

- goods of the same description are readily available from countries or overseas suppliers not encompassed by the action
- imposition of full duties would be likely to:
 - eliminate or substantially lessen competition in the domestic market for the goods concerned
 - cause significant damage to downstream industries, including by limiting their access to necessary inputs
 - significantly impair competitiveness by limiting access to technology
 - significantly restrict the choice or availability of goods at competitive prices for consumers, or otherwise cause them significant harm
- reducing or eliminating the duty is likely to cause significant damage to those supplying inputs (including primary commodities) to local producers of the goods concerned.

Notably, under the Canadian regime, a lesser duty cannot be imposed separately from any public interest test assessment (on the basis that it would be sufficient to remove injury for the applicant industry). That is, if the CITT determines that there are no public interest grounds for reducing the magnitude of a measure, then that measure must be set to equate to the full dumping margin (or the benefit of the countervailable subsidy).

Sources: CITT (2004); Special Import Measures Regulations [Canada](SOR/84-927).

But such modest impacts are not a reason to dismiss the public interest test approach. Indeed, under tests involving a presumption in favour of measures, it would be surprising if the observable impact was anything other than modest. Yet

as well as precluding the imposition of measures in circumstances that could be disproportionately costly for the community (or at least reducing that cost through the imposition of a lesser duty), even a presumptive test will ensure that wider impacts are not disregarded.

Participants' views

A few participants supported the addition of a public interest test to the Australian requirements, or at least consideration of the wider impacts of imposing measures. Representative of downstream users, the Australian Steel Association recommended that:

A national interest test based on objective economic criteria should be included. It should be evaluated throughout and be used to redirect appropriate cases to suitable and more general assistance mechanisms that look to sustainability. (sub. 28, para. 837)

The Law Council of Australia and the Law Institute of Victoria suggested that:

... consistent with the approach taken in some overseas jurisdictions ... consideration should be given to ensuring that 'national interest' is taken into account when making a decision as to whether any dumping-measure should be imposed. (sub. 29, p. 8)

(Others to voice support for considering wider impacts included: the Australian Competition and Consumer Commission (sub. 35, p. 29); the Department of Agriculture, Fisheries and Forestry (sub. 34, p. 6); and the Food and Beverage Importers Association (sub. DR46, p. 2).)

However, virtually all of the submissions from local companies that have sought anti-dumping measures, or from organisations or individuals representing those interests, were strongly opposed to the introduction of *any* form of public interest test. Such opposition was based on a variety of considerations:

- The public interest would be difficult to define or put boundaries around, leading to added uncertainty for those taking or defending anti-dumping actions.
... the inclusion of a non-defined 'public interest' requirement would create increased levels of uncertainty. Further subjectivity would arise, including:
 - Who would determine what is in the community's interests?
 - What is meant by 'in the community's interests'?
 - How would the public interest test be objectively measured, and over what period of time would such an assessment be made?
 - How does the decision-maker decide what benefits are more important in one industry sector versus the costs to another industry sector?

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- Were the stakeholders provided ample opportunity to input to the community interest issue? (Qenos, sub. 13, p. 9)
 - A test would likely give undue weight to the interests of downstream user industries and consumers at the expense of industries suffering injury from dumping or subsidisation.

How is the public interest to be assessed against the parochial interests of one consumer party or group? In many consumers eyes, pricing of products ranks importantly in any procurement or sourcing decision. But it is not the only important criterion. (Orica Australia, sub. 18, p. 13)

- It would be difficult to properly account for the longer-term costs of failing to address dumping.

The NFF believes that it is inappropriate to incorporate an emphasis on economy-wide impacts in relation to [the] anti-dumping system ... it can often be extremely difficult to foresee the longer term domestic price outcome of dumping. For example, if the injury incurred by the domestic industry from dumping leads to domestic participants leaving the industry, in the longer term this can lead to market power issues and increased domestic prices as competition dissipates. (National Farmers' Federation, sub. 6, p. 7)

- The need to consider the public interest would increase administrative and compliance costs and the time taken to finalise investigations.

The existing process is long relative to market place action. An additional process of determining public interest is likely to add more time and cost to what is now already a costly process. This is likely to make it even more difficult to bring cases forward and will deny Australian companies the rights to fair trade prescribed by the WTO and our own provisions ... The cost of establishing public interest machinery and running it would not appear justified based on the extent of anti-dumping actions undertaken in Australia and the formidable barriers to undertaking such a case. (CSR, sub. 10, p. 6)

- It would politicise decision-making.

... any determination not to impose antidumping duties on the grounds of 'national interest' would necessarily need to be taken at the political level because there would undoubtedly be important political ramifications arising out of such determinations. It is easy to imagine headlines in the national press highlighting the numbers of local jobs to be lost as a result of a determination not to act on injurious dumping ... Then there is the possibility that a Minister from one party making a determination primarily protecting firms in his or her party's constituencies would be seen to be playing politics with employees' livelihoods. (BlueScope Steel, sub. 19, pp. 48–49)

- Aspects of the current arrangements provide for implicit consideration of the public interest and make a formal test unnecessary.

Whilst the Australian Anti-Dumping System does not explicitly include [a public interest] provision, the discretion of the Minister to impose anti-dumping measures is at least an implicit provision which exists under the current system. The ADFA would also highlight that Australia applies the 'lesser duty rule' when considering the

imposition of anti-dumping measures ... The combined effects of the Minister's discretion and the operation of the lesser duty rule within Australia's Anti-Dumping System are considered by ADFA to be adequate measures that presently operate to cater for the 'public interest'. (Australian Dried Fruits Association, sub. 14, p. 6)

- It would be dangerous for Australia to unilaterally introduce a test ahead of any developments in this regard in Doha (see box 5.4).

The WTO Negotiating Group on Rules in the Doha Round has considered whether ... the Anti Dumping Code ... should be amended to insert a requirement that members take due account of representations made by domestic interested parties ... whose interests might be affected by the imposition of measures. The Chair of the Group describes the positions of the various members as being 'very far apart' and the participants being 'sharply divided' on the desirability of the proposal. Unless and until the WTO reaches consensus on this issue and amends Article 9 accordingly, it would be premature and dangerous for Australia to unilaterally adopt a public interest test. (OneSteel, sub. 16, p. 20)

Synthesising these concerns, the Trade Remedies Task Force contended that similar comments made in the Gruen Review (see below) remain valid and that:

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. (sub. 26, p. 11)

And BlueScope Steel concluded that:

Overall, there is nothing in the Australian experience or those of other countries that have introduced something akin to a 'national interest' test that would support an argument that the potential benefits of such an approach would outweigh the political and economic costs it would undoubtedly engender. (sub. 19, p. 51)

(Others to express opposition to a public interest test included: Australian Paper (sub. DR41, p. 2); Australian Pork (sub. DR39, p. 4); A3P (sub. DR45, p. 3); the Cement Industry Federation (sub. 9, p. 11); CSBP (sub. 15, pp. 9–10); Geofabrics Australasia (sub. 4, p. 3); James Stevenson (sub. DR42, p. 2); PACIA (sub. 31, pp. 11–12); PolyPacific and Townsend Chemicals (sub. 36, p. 6); Sulo (sub. 12, p. 7); and Windsor Farm Foods (sub. 37, p. 11).)

Previous reviews

The practicality and appropriateness of the public interest approach was also addressed in the Gruen Review (1986, s. 6.4). In keeping with the sentiments expressed by the large majority of participants to this inquiry, it concluded that 'introducing national interest provisions into every case from the outset would compound the difficulties of administration and legislation substantially'. In

particular, the review contended that it would be difficult to precisely define the national interest, yet without such definition the range of considerations that could be introduced to anti-dumping cases would be greatly increased.

Box 5.4 Doha discussions on a public interest test

The compilation of issues and proposals to amend the WTO Anti-dumping and Countervailing Agreements, circulated at the outset of the Doha Round, raised a number of public interest-type issues, including:

- the need to clarify the rules/disciplines pertaining to the treatment of the broader public interest in dumping matters
- consideration of putting more onus on assessment bodies to take substantive account of information relevant to the public interest and to consult with sectors other than applicant industries and the overseas suppliers of the goods concerned
- consideration of adding a public interest test to the requirements that must be met before anti-dumping measures can be imposed
- examination of the unintended effects of anti-dumping measures, with a view to giving greater emphasis in the agreements to the consequences of measures for broader economic, trade and competition policy goals.

In late 2007, the Chair of the Negotiating Group on Rules put forward a range of proposals to modify the agreements, including to make it explicit that assessment bodies have the right to take account of the views of domestic parties which would be adversely affected by the imposition of anti-dumping measures.

However, the current proposal, supported by Australia, is that decisions on whether or not to impose measures when the dumping and injury criteria have been met, or to apply a lesser duty rule, should be left to individual member countries. Moreover, the accompanying text from the Chair noted that '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'.

According to the Department of Foreign Affairs and Trade (sub. 22, p. 5), timing for the conclusion of the Doha negotiations remains 'uncertain'.

Sources: WTO (2003, 2008a, 2008b).

In a similar vein, in a recent report on Australia's relations with the Republic of Korea, a Joint Parliamentary Standing Committee commented that:

Due to the highly subjective nature of the term, 'national interest', the Committee believes that introducing any debate over 'national interest' would be creating fertile ground for opinion, legal arguments and appeals, which may effectively slow the anti-dumping review process. (JSCFADT 2006, p. 57)

The Commission's assessment

As indicated by the preceding commentary, the public interest test issue is contentious and far from straightforward. In particular, assessments of the efficacy of the approach must go beyond the superficial appeal of such a test as a means to promote the interests of the overall community, and look at its workability and likely impacts.

Even so, in the Commission's view, several of the concerns raised by participants have little merit.

- The argument that a public interest test would 'a priori' favour particular stakeholders is to misunderstand the concept of a public interest test. Though application of a test could of course lead to outcomes that would be more or less favourable for specific interests than those delivered by the current arrangements, a properly designed assessment process would involve a balancing of competing interests. In contrast, under the current assessment process, the interests of parties other than those who have suffered material injury from dumping or subsidisation are not even considered.
- The apparent discretion available to the Minister on whether to impose duties where there has been injurious dumping or subsidisation, together with the scope to apply the lesser duty rule, cannot reasonably be construed as a substitute for application of an explicit public interest test.
 - As noted earlier, the Commission has not been advised of any cases where the Minister has overturned recommendations from Customs (based on dumping/subsidisation and injury considerations) on public interest grounds.
 - Application of the lesser duty rule is linked solely to the circumstances of the industry seeking measures — specifically, where a duty smaller than the full dumping/subsidisation margin would be sufficient to remove injury. Thus although lessening the impost on users of the goods concerned, unlike the Canadian arrangements (see box 5.3), in applying the rule, there is no capacity to weigh the benefits for the applicant industry against the costs for other stakeholders.

The Commission notes that it would be possible to replace the current discretion available to the Minister with an explicit requirement for him/her to take account of wider impacts and the public interest. But without supporting guidance and the establishment of a process to enable the Minister to access information on these wider impacts, such a change would be unlikely to be sufficient to ensure that public interest matters were given appropriate consideration. And were there to be guidance detailing specific matters which the Minister should take into account, together with a supporting information gathering process, then the

arrangement would be little practically different from an explicit public interest test. This would also be the case were the grounds for applying the lesser duty rule broadened to take account of factors other than the circumstances of the applicant industry.

- The WTO agreements currently leave it up to member countries to decide whether to include a public interest test in their anti-dumping regimes. Though discussions at Doha are yet to be finalised, it seems highly unlikely that this ‘permissive’ approach will be fundamentally changed — especially as a number of jurisdictions have chosen to implement such tests. Accordingly, there would seemingly be little WTO-related risk were Australia to decide to introduce a test on the basis of unilateral considerations.

Also, the other concerns appear overstated.

- Though a public interest test would involve some additional uncertainty for stakeholders, this could be contained through appropriate guidance on the application of the test. Indeed, there is now much greater experience in Australia on the application of public interest tests than at the time of the Gruen review — including as part of the National Competition Policy legislation review program. And the anti-dumping-specific requirements in the European Union and Canada (boxes 5.2 and 5.3) provide more direct guidance on how such a test might be configured.

Moreover, the degree of uncertainty would most likely diminish over time as decision-making precedents were established. As the European Commission (2006, p. 20) has noted in relation to the EU’s test:

... over the years the Institutions have developed a clear practice, reflected in the [case history], which gives guidance on how the Community interest test is interpreted and applied.

In turn, guidance and decision-making precedents could constrain politicisation of the assessment process and, by discouraging non-meritorious public interest claims, help to limit additional administration and compliance costs.

- While assessment of the likely longer-term impacts of imposing or not imposing measures would typically require greater judgement than analysis of the more immediate effects, much of the cost-based information required to support such assessments is already collected by Customs. The Commission further notes that there is already some assessment of longer-term outcomes under the current arrangements — for example, the consideration in continuation reviews of whether the termination of measures could lead to the recurrence of dumping.
- Though the need to examine a wider range of issues would lengthen assessment timeframes, such increases would be in the context of an assessment process that is one of the most rapid in the world (see appendix C). In addition, the extent to

which applicant industries would be disadvantaged would partly depend on whether public interest assessments were themselves time-bound, and whether other changes were made to ameliorate the impacts of a longer process. For example, were wider impacts only considered after injurious dumping/subsidisation had been found, and with provisional duties routinely imposed before this last stage of the assessment process began, then those seeking relief would not be disadvantaged by the longer overall assessment period.

In the Commission's view, a more compelling argument against a public interest test that embodied no presumption in favour of measures in the presence of injurious dumping or subsidisation, is that it would be difficult to factor in a system preserving benefit from achieving a 'fairer' trading outcome in each and every situation. Yet as the Trade Remedies Task Force (sub. 26, p. 13) observed, without the inclusion of such a benefit, the public interest test approach would seemingly subvert the key rationale for having an anti-dumping regime (see chapter 4).

A 'bounded' (presumptive) public interest test

As the Gruen Review noted, question marks over an 'unbounded' public interest test need not preclude the introduction of a more circumscribed test. The passage of time has rendered some of the particular models proposed by that review (1986, para. 6.4.8) less relevant. However, the EU and Canadian approaches, embodying a starting presumption in favour of measures if there has been injurious dumping or subsidisation, provide the basis for a more contemporary 'bounded' option.

In the Commission's view, such a 'bounded' public interest test would overcome the key high level deficiency in a completely neutral test. This type of test would not involve an attempt to calculate the 'system preserving' benefit that would arise from imposing a measure to address each particular instance of injurious dumping or subsidisation and then weighing that benefit against the probable direct efficiency cost of doing so. Rather, through the starting presumption in favour of measures whenever there had been injurious dumping or subsidisation, the implicit judgement would be that the system preserving benefit would generally exceed the efficiency costs. However, there would be scope to overturn that presumption where there were good reasons to believe that the wider costs would be excessive or otherwise unreasonable relative to the benefits for the applicant industry and its suppliers.

Of course, the approach is not without costs and implementation challenges.

- It would still involve some additional uncertainty, higher administrative and compliance costs, and longer investigation timeframes. Two particular issues are

how far the consideration of wider impacts should extend and what opportunities there should be for public input on those impacts.

- And there would need to be workable guidance to those administering the test on the circumstances that would warrant overturning the presumption in favour of measures where there had been injurious dumping or subsidisation.

However, such costs and challenges must be considered in the context of the benefits that the approach would bring in allowing for consideration of wider impacts, while still giving a heavy weighting to the notions that underpin the current assessment criteria. Moreover, as discussed above, these costs and challenges should not be overstated — especially given the guidance available from the EU and Canadian regimes and the potential to constrain the additional costs in various ways.

5.3 Increasing the stringency of the current criteria

An alternative to an explicit public interest test would be to increase the stringency of the existing assessment criteria with the goal of precluding the imposition of measures in those cases where the costs are likely to be high relative to the benefits for applicant industries. Specific criteria that could potentially be modified for this purpose would include the injury and causal link requirements and the *de minimis* thresholds for terminating applications.

However, in the Commission’s view, this would be an indirect and practically problematic way of seeking to promote the public interest.

- As currently configured, any relationship between the injury and causal link requirements and the wider costs associated with the imposition of anti-dumping measures is weak. Accordingly, the cases ‘screened out’ by, say, requiring a greater level of injury before measures could be imposed, or increasing the evidentiary burden for establishing causality, would not necessarily be those where measures would have been most costly.
- Raising the minimum import share thresholds that dictate when applications for measures are automatically terminated might be seen as having a somewhat stronger link to predatory, and therefore efficiency reducing, dumping. But the circumstances that would potentially allow an overseas supplier to employ dumping to create an enduring monopoly position in the market concerned (see chapter 4 and appendix D) are very narrow and are only partly related to the share of imports accounted for by that supplier. In any event, it is widely acknowledged that little or no dumping in Australia in recent years has been motivated by predatory intent. Hence, again, increasing these automatic

termination thresholds is unlikely to be an effective way of precluding more costly anti-dumping measures.

That said, some tightening of the current legislative requirements — especially in regard to the continuation of measures beyond their initial term (see chapter 6) — may be useful in supporting more explicit initiatives to take account of wider impacts and the public interest.

Finally, the Commission notes that rather than simply increasing the stringency of the assessment criteria as they are currently configured, it would be possible to embody considerations more directly targeting the public interest within those criteria. However, as discussed in section 5.5, this approach would also have drawbacks.

5.4 Public reporting of wider impacts

A ‘light-handed’ alternative to the regulatory approaches outlined above would be to use explicit, but separate, public reporting of wider impacts as a means to ‘discipline’ decision-making. As noted, Ministers have not previously exercised the discretion that is seemingly available to them to amend a recommendation from Customs on public interest grounds. But if information and analysis on wider impacts were to be included in the advice provided, and also available to the general public, the onus on the Minister to consider the public interest would arguably be somewhat greater.

More specifically, under this sort of approach, the formal assessment process would continue to look only at whether there had been dumping or subsidisation and ensuing material injury for the applicant industry. However, in parallel, Customs could be required to:

- seek input from interested parties on the wider impacts of imposing measures
- analyse and publicly report on these impacts.

Like a public interest test, this approach would add somewhat to the administrative and compliance costs of investigations and provide new grounds for lobbying the Minister. Indeed, these impacts might be more significant under a loosely defined analytical and reporting requirement than under a formal test, where the Commission envisages that the potential outcomes of public interest assessments would be constrained and shaped by explicit legislative guidance (see below).

More fundamentally, with no onus on the Minister to take account of its outcomes, separate public reporting is unlikely, by itself, to ensure that wider impacts are given appropriate consideration in the decision-making process.

This is not to deny the general value of public reporting in enhancing the quality of decision-making and promoting the accountability of decision-makers. To this end, the Commission is putting forward a number of proposals to increase public reporting by Customs (see chapter 7). However, as a stand-alone rather than a supporting mechanism, public reporting is likely to be a weak option for addressing the key deficiency in the current assessment process.

5.5 The Commission's preferred approach

For both efficiency and equity ('fairness') reasons, policy in this or any other area should be predicated on promoting the interests of the community as a whole.

As explained above, the current discretion for the Minister to take account of factors other than dumping/subsidisation and injury when deciding whether or not to impose measures, in combination with the lesser duty rule, is not sufficient to meet this imperative. Replacing this discretionary power with a specific requirement for the Minister to take account of the public interest would also be insufficient — unless accompanied by supporting guidance that would render the arrangement little different from an explicit public interest test. More generally, an 'unbounded' public interest test, more stringent versions of the current dumping and/or injury hurdles, or reliance on a self-standing public reporting regime, would all have significant draw-backs.

Accordingly, the Commission is recommending that Australia's anti-dumping system be augmented with a 'bounded' (presumptive) public interest test that would draw on the same sort of tests that apply in Canada and more particularly the European Union.

By having a starting presumption in favour of measures where there had been injurious dumping or subsidisation, the implicit judgement would be that the system preserving benefits of imposing measures would generally exceed the efficiency costs. However, there would be scope to overturn this presumption in a specific range of circumstances.

This new test would involve some additional uncertainty for stakeholders, and somewhat higher administrative and compliance costs. But the constrained nature of the test and the proposed accompanying application guidance would keep these impacts to a minimum. Indeed, there might well be less room for discretion than is the case for many aspects of the current assessment process.

The Draft Report proposal

In the Draft Report, the Commission proposed that the test should apply to new investigations and to reviews to consider whether existing measures should be continued beyond their initial five-year term. It further proposed that, in retaining responsibility for administering the anti-dumping system (see chapter 7), Customs would undertake the assessments against the new test and that, in retaining their current responsibilities within the system:

- the Minister would continue to decide whether or not to impose measures, having regard to these assessments by Customs
- the Trade Measures Review Officer would also be able to consider public interest matters where a decision was appealed on the basis that the test had been misapplied.

Matters to be considered in assessing the public interest

The Commission proposed that the test should:

- include general guidance on the stakeholder interests that could be considered in applying the test — including those of industries seeking measures and their upstream suppliers, importers, downstream industries and consumers (at least where final consumption goods were involved)
- provide for assessment of not only short-term outcomes, but also the likely longer-term effects of imposing (or not imposing) measures.

However, it further specified that to help ensure a focus on the main interests and more important effects, like the EU's community interest test (see box 5.2), assessments should generally stop at one step up or down the production chain.

Also, to reduce the degree of judgement involved in applying the test, the Commission proposed that there should be a list of six specific circumstances where *prima facie* the imposition of measures would not be in the public interest.

- One of these was directly efficiency-related — namely, where there was advice from the Australian Competition and Consumer Commission (ACCC) that the imposition of measures could eliminate or significantly reduce competition in the domestic market for the goods concerned.
- Three were where measures would not be effective in removing injury being experienced by the applicant industry, and hence where the ensuing costs for others in the community would be needlessly incurred:

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- The imposition of measures equivalent to the assessed dumping margin (or the benefit from a countervailable subsidy) would result in an import price still well below local suppliers' costs to make and sell.
 - 'Like goods' could be readily obtained from an un-dumped source at a comparable price, meaning that the imposition of measures would simply lead to substitution into un-dumped imports with little or no benefit for competing local suppliers.
 - Dumped or subsidised imports may be a contributing factor to the material injury being experienced by a local industry, but are not the major cause.

As outlined in box 5.5, neither the WTO requirements, nor the current Australian legislation, appear to preclude measures in these sorts of situations.

- Two were where the Commission judged that the imposition of measures would impose disproportionate costs on downstream users or unreasonably penalise the overseas supplier and/or importer of the goods concerned:
 - The applicant industry's share of the domestic market for the like goods is low, meaning that (unless there was newly commissioned and yet to be utilised capacity) the impost on users would be large relative to the benefits that the industry and its suppliers would receive. In this regard, the Commission noted that, under the EU's community interest test, an injury-based finding in favour of measures can similarly be overturned on this basis. To preserve the starting presumption in favour of measures, the Commission suggested that a minimum local market share threshold in the order of 20 per cent would be reasonable.
 - The dumped product is being exported at a price which covers the overseas supplier's costs and a reasonable profit margin (plus the value of any identifiable input subsidies), even if that price is below the normal value in the supplier's home market.

The Commission observed that, to cater for at least some of these situations, it would be possible to directly amend the current legislation. However, given the way in which the WTO agreements are structured, it concluded that the public interest test approach offers greater flexibility in giving effect to changes of this nature — as evidenced by the similar requirements in the EU and Canadian regimes. And it further noted that although the proposed list would not be exhaustive, there would have to be good reasons for introducing other considerations to overturn a finding in favour of measures based on the existence of injurious dumping or subsidisation.

Box 5.5 The potential for imposition of ineffectual measures

The WTO agreements and the Australian legislation contain provisions that are at least partly designed to limit the imposition of ineffectual measures. For example, when assessing injury, Customs must examine whether any factor other than the importation of dumped or subsidised goods is causing or threatening material injury, including the prices and volumes of like goods which are not dumped or subsidised (see chapter 2).

However, as only one of a number of factors which must be taken into account, ready access to comparably priced, un-dumped or non-subsidised imports from other sources might not be sufficient to rule out the imposition of measures. As noted in chapter 4, the Commission understands that measures imposed on coated paper from Finland and Japan in 1998 were largely ineffectual because of the availability of comparably priced, un-dumped, product from Korea and Indonesia.

More generally, in reflecting on their experiences in defending anti-dumping actions, Moulis and Gay (2005, p. 80) alleged that 'In most instances, when faced with this type of situation, Customs will not have due regard to the fact that other [un-dumped] imports are available at the same price'. And in an extensive commentary on the issue, the Australian Steel Association (sub. 28, paras. 706–722) pointed to inconsistencies in the way that Customs has addressed the issue in individual cases. The Association further claimed that the potential for ineffectual measures to be imposed is increased by Customs' failure to use its statutory powers to call for evidence from other importers of like goods — referring in this context to comments made by the TMRO in hearing an appeal in the galvanised pipe case (sub. DR57, para. 206). Notably, the EU community interest test makes specific reference to the situation where the applicant industry would not benefit from measures because of a shift in demand into substitute products (see box 5.2).

Also, in the recent appeals against decisions to impose measures on currants and toilet paper (see TMRO 2009a, 2009b), a particular point of contention was whether factors unrelated to the volume and price of imports had been a major cause of 'material injury'. Such debate again indicates the potential under the current arrangements for the application of measures that may not be particularly effective in removing injury, but which could still be costly for downstream users of the goods concerned.

Consequences of the public interest assessment

The Commission proposed that where, based on the assessments and advice from Customs, the Minister was satisfied that public interest considerations outweighed the benefits from removing injury for the applicant industry, measures would not be imposed (the EU approach). And it further proposed that where the case for measures based on a finding of injurious dumping or subsidisation was *not* overturned on public interest grounds, there should still be scope to apply the current lesser duty rule. Thus, when determining whether and what level of

measures should be imposed, the sequence of decision-making for the Minister (and the basis for the advice from Customs) would be as follows:

- Has there been dumping or subsidisation that is, or threatens to be, injurious?
- If so, are there public interest reasons for not imposing measures?
- If not, and measures are to be imposed, would a lesser duty be sufficient to remove the injury to the local supplier(s) of the goods concerned?

Time limits and provisional duties

The Commission argued that with most other aspects of the decision-making process being time-bound (see chapter 2), it would be anomalous if assessments against the public interest test were not similarly constrained. It concluded that a 30-day extension to the current investigation timeframe should usually be sufficient given that:

- specific guidance on when imposition of measures would not be in the public interest would simplify and constrain the purview of assessments
- the collection of relevant input from stakeholders could commence at the outset of the assessment process, with much of the information relevant to the public interest component also being necessary to examine issues of dumping and injury
- the constrained nature of the proposed test and the scope for stakeholder input via submissions would obviate any need for public hearings to consider public interest matters.

The Commission further noted that with the scope to apply provisional measures (see chapter 2) while public interest test assessments were conducted, there need not be any disadvantage from this extension to the investigation timeframe for those seeking relief from injurious dumping or subsidisation. To this end, it proposed that the release by Customs of a ‘preliminary affirmative determination’ indicating that there had been injurious dumping or subsidisation, and the imposition of provisional measures, should be mandatory prior to its assessment of whether there were public interest grounds for the Minister not ‘confirming’ those measures. (The specific implications for the operation of the provisional duty arrangements are considered further in chapter 6.)

Consultation and reporting requirements

To build and sustain confidence in the robustness of the new public interest test, and to facilitate appropriate stakeholder input, the Commission spelt out a range of accompanying consultation and reporting requirements for Customs, including that:

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- Its initial invitations to interested parties to comment on applications for measures should clearly indicate the nature, requirements and limits of the test.
 - Its public interest assessments should be included in an expanded ‘Statement of Essential Facts’ (SEF), with a synthesis of the commentary on those assessments provided in the final report to the Minister.

Participants’ responses

As for the initial input on a public interest test, responses to the Draft Report proposal were heavily polarised.

A few participants were strongly supportive of the general approach. For example, the Food and Beverage Importers Association (sub. DR46, p. 2) stated that the sort of bounded public interest test proposed in the Draft Report would be ‘a practical way of giving some recognition to the wider effect of anti-dumping measures’. And the Australian Steel Association (sub. DR57, para. 68) referred to Commission’s ‘laudable criteria [that] logically integrate with the key aspects of causation and lesser duty that an optimal system should promote’.

However, recent users of the anti-dumping system and their representatives both reiterated their general opposition to a public interest test, and expressed significant misgivings about the specific test put forward by the Commission.

Their key concern was that the proposed test would greatly reduce access to protection against dumping. For example, Qenos argued that the test would:

... extend well beyond the public interest tests applied in Canada and the European Union. The proposal accompanied by additional “guidance” and “directives” are means by which anti-dumping outcomes will be severely restricted ... (sub. DR48, p. 1)

In elaborating on this concern, the TRTF stated that:

Under the proposed test, where an industry does not account for more than 20% of the local market, it will be denied access to measures. By contrast, if an industry holds a significant proportion of the market, it would also be denied measures due to proposed “lessening of competition” provisions.

For any industry which overcomes either restriction, it must also be a globally efficient producer, as measures will also not be imposed if:

- the export price of the allegedly dumped goods recovers all costs and some contribution to profit; or
- the resulting non-dumped price (after imposition of measures) is significantly below the Australian industry’s cost-to-make-and-sell. (sub. DR44, p. 1)

It went on to contend (p. 2) that, in limiting access to measures, the proposed test would discourage future investment in large scale manufacturing.

Others to raise similar concerns — which are considered further below — included: the Australian Dried Fruits Association (sub. DR52, p. 2); Australian Paper (sub. DR41, p. 2); OneSteel (sub. DR49, pp. 4–5); Penrice Soda Products (sub. DR54, p. 1); and SCA Hygiene (sub. DR60, pp. 1–2).

At the same time, some of those opposed to the proposed test also argued that its constrained nature might prevent consideration of factors relevant to the public interest. For example, BlueScope Steel (sub. DR55, p. 8) contended that the circumstances listed in the Draft Report when measures would prima facie not be in the public interest focussed unduly on income transfers, and that a more comprehensive basis for assessing the public interest was required. Similarly, the CFMEU (sub. DR50, pp. 2–3) said that the test should not be limited to examination of effects one step up or down the production chain and should encompass social and environmental impacts (‘the triple bottom line’).

And while supporting the general thrust of the proposed test, the Australian Steel Association (sub. DR57, para. 41) likewise expressed concern about any limitation of assessments to one step up or down the production chain. It also suggested that additional criteria could be added to the test (para. 37), and noted the importance of Customs integrating consideration of the public interest into its existing investigation processes and timeframes (paras. 13–15). As discussed below, comments on specific aspects of the proposed test were also received from the ACCC (sub. DR62, pp. 6–9) and Customs (sub. DR61, pp. 1–2).

The Commission’s assessment

Notwithstanding the preceding concerns, the Commission remains of the view that:

- The anti-dumping system should serve the interests of the community as a whole.
- The best way of balancing the interests of those materially injured by dumping or subsidisation and those who bear the cost of anti-dumping measures is through the sort of presumptive public interest test proposed in the Draft Report.
- Decisions on whether there are public interest grounds for overturning the presumption in favour of measures where there has been injurious dumping or subsidisation should be made by the Minister, based on advice from Customs (and where relevant the TMRO) — though as outlined in chapter 7, the Commission is recommending that administrative roles and responsibilities be re-examined at the next review.

Also, it notes that some specific aspects of the Draft Report proposal were relatively uncontroversial — for example, those relating to the application of provisional measures prior to the commencement by Customs of public interest assessments and to public reporting on those assessments. Accordingly, the discussion that follows focuses on addressing those concerns and critiques of the draft proposal that bear upon the detailed configuration of a presumptive test.

How open-ended should the test be?

In determining how broadly the assessment of public interest issues should extend, three key considerations are:

- the need to retain a presumption in favour of measures where there has been injurious dumping or subsidisation
- the correlation between the comprehensiveness of assessments and the time, cost and uncertainty involved for stakeholders
- the likely lesser implications for community well-being of impacts outside of the market for the goods subject to an anti-dumping measure.

In the Commission’s judgement, these considerations militate against a more open-ended test than the one proposed in the Draft Report. It further notes that:

- The anti-dumping and countervailing system in general, and the public interest test in particular, would be a poorly targeted instrument for pursuing wider goals, such as promoting environmental or social outcomes.
- Some of the other matters specified in the EU or Canadian requirements would rarely, if ever, be of any practical significance. For example, the Canadian requirements make reference to the possibility that the imposition of measures could deny access to new technology. Yet given the specificity of the like goods test, it is hard to see how this could be so.

Indeed, having reflected further on these issues in the light of the feedback from stakeholders, the Commission now considers that some additional constraints on the breadth of the new test would be desirable.

- As outlined below, its final recommendation omits one of the circumstances for not imposing measures included in the Draft Report proposal, and involves some modifications to others, with the intent of providing greater surety that the test will only influence outcomes in a small minority of cases. This would in turn help to ensure that the broader benefits from providing access to an anti-dumping safety valve are not unduly diminished.

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- In addition, it is now recommending that the list of circumstances that would cause the Minister not to impose measures on public interest grounds should be exhaustive. As well as reducing uncertainty for stakeholders, in practical terms, this would serve to define the nature and breadth of matters encompassed by the test. Thus, there would no longer be a need to:
 - explicitly constrain the consideration of impacts to one step up or down the production chain
 - provide specific guidance on the range of stakeholder interests that may be relevant in applying the test, or to make explicit provision for consideration of longer-term as well as more immediate impacts.

As discussed below, recasting the public interest test as a definitive list of considerations would also help to address concerns about its subjectivity and the degree of interpretation involved. And with a more constrained test drawing heavily on matters that Customs must already examine as part of its dumping and injury assessments, any concerns about the adequacy of a 30-day timeframe for assessments against the test should be similarly diminished.

Finally, were experience with the new test to indicate that its scope was too narrow or too broad, this could be addressed at the time of the next review (see recommendation 7.11). However, consistent with the intention of the test and the related cost, timeliness and uncertainty issues, the Commission's expectation is that any augmentation would most likely involve adding to a still exhaustive list of circumstances when measures would not be in the public interest, rather than providing a general discretion to those applying the test to consider any other 'relevant' factors.

How tightly should the test requirements be specified?

Several participants contended that the concepts and terminology in the Draft Report proposal were subjective and/or ambiguous. For example, BlueScope Steel stated:

There is still considerable ambiguity and subjectivity associated with the simplified prima facie public interest tests being proposed by the Commission. BlueScope is concerned that an unintended interpretation of these tests may further impact on the future viability of Australian industry. (sub. DR55, p. 10)

The Commission readily acknowledges that application of the new test would involve the exercise of judgement related to the particular circumstances of each case. But this is also a feature of the existing legislative architecture.

More generally, it would be extremely difficult to draft legislation to prescriptively cater for every individual circumstance that might arise in applying even the sort of highly constrained public interest test that the Commission is recommending. In its view, a preferable approach, and one which is commonly used in other regulatory contexts, is to specify the legislative requirements in principles-based terms and supplement those requirements with more detailed application guidance for Customs, the Minister and the TMRO. Indeed, with such application guidance and the now exhaustive list of circumstances when measures would not be in the public interest, the Commission reiterates that assessments and decisions against the proposed new test might well entail less judgement and discretion than is required for many aspects of the current requirements.

That said, the Commission has reformulated some of the specific requirements to help ensure that they can be operationalised in a way that reflects their underlying intent.

How extensively should the test be integrated with injury/causality assessments?

In responding to the Draft Report, the Australian Steel Association (sub. DR57, para. 14) reiterated its concern that if public interest test assessments are divorced from injury and causality assessments, then there could be both ‘illogical inconsistencies’ in conclusions and wasted investigative effort. And Customs (sub. DR61, p. 2) went further, suggesting that those components of the test relating to causality might instead be explicitly considered at the time of the causality assessment — with this achieved through either specific mention in the administrative guidelines, a Ministerial Directive, or a change to the legislation.

As noted earlier, the Commission has formulated the requirements of its proposed test to, as far as possible, build on the existing requirements. Therefore, some linkages between the current and new investigative tasks should be neither surprising nor a cause for concern. Indeed, there are similar linkages between individual components of the current assessment task — for example, a de minimis dumping margin is taken to mean that there cannot have been material injury leading to the termination of an investigation (see chapter 2).

However, the Commission considers that a formal separation of the public interest phase of the assessment task, including in regard to matters impinging on causality, is appropriate for several reasons.

- The starting presumption in favour of measures where there has been injurious dumping or subsidisation means that the public interest test can be characterised as an ‘after-the-event’ mechanism to screen out a relatively small proportion of outlier cases where measures would clearly be inimical to the public interest.

Integrating some of the components of the test within the existing assessment task would make it difficult to evaluate its effectiveness in performing this screening function.

- As alluded to above, modifying the existing assessment process to try to encapsulate the concepts in the proposed test could be problematic — especially for those components that are not reflected in the WTO agreements and thus not considered at all under the existing arrangements.
- And even if such changes could be made without raising WTO concerns, there would be some risk that the causality-related components of the proposed test would simply be treated as one of several matters to be taken into account, rather than being definitive in precluding the imposition of measures.

In any event, the Commission considers that the risk of wasted investigation effort, or inconsistency between Customs' examination of injury and causation and its causality-related assessments against the test, would be small. Give the linkages between the two, Customs would obviously be mindful of the test requirements in its earlier consideration of injury and causality matters (and also in determining information requirements at the outset of an investigation). And were any inconsistencies to arise, they could then be tested through the appeals process.

Reformulations to the specific requirements of the test

As well as the shift from a non-exhaustive to an exhaustive list of circumstances when measures would not be in the public interest, some modifications to the particular inclusions and requirements of the list put forward in the Draft Report are warranted. Consistent with the thrust of the discussion in the preceding sections, the intent of these modifications is to avoid requirements that would:

- be open to varying interpretations, or would otherwise be practically difficult for Customs to apply in advising the Minister on whether measures should be imposed.
- preclude measures in too many cases, and thereby undermine the system preserving benefits afforded by the current arrangements.

Damage to competition

In the Commission's view, measures should not be applied where they would enable a local supplier to exercise significant market power. Were this to be the outcome, then there would be adverse impacts not only for the supplier's customers, but for resource use more generally. Notably, both the EU and Canadian public interest test arrangements provide scope for decision makers to consider such impacts on competition (see boxes 5.2 and 5.3). In fact, the proposed wording of the

requirement in the Draft Report to preclude measures where this ‘could eliminate or significantly reduce competition in the domestic market for the goods concerned’, was based on the wording in the Canadian test.

Importantly, the proposed provision was not intended to automatically deny access to anti-dumping measures whenever a local supplier has a substantial share of the market, or when measures might cause market prices to rise significantly. Indeed, given that the intent of an anti-dumping measure is to boost the local supplier’s competitiveness by raising the price of competing imports, there would be a logical inconsistency in a provision which, in the absence of any market power concerns, precluded such an outcome.

Rather, the Commission’s objective was to focus attention on circumstances where the imposition of measures could remove or significantly reduce the ability for importers of the like goods concerned to compete in the Australian market and leave users with little choice but to purchase from the applicant supplier. As discussed below, the Commission’s expectation is that the potential for such an outcome would only very rarely arise.

Moreover, the provision was not intended to involve the sort of lengthy and broad-ranging assessments of possible competition impacts that are required for various matters dealt with under the TPA. Evidently, such assessments would be incompatible with a timely, cost-effective and presumptive public interest test. And the purpose of the proposed consultation between Customs and the ACCC was simply to ensure that where any competition concerns could not be quickly dismissed (see below), the subsequent assessments by Customs against the provision were well informed.

However, several respondents to the Draft Report expressed concerns that such a provision could frequently lead to the non-imposition of measures — see, for example, A3P (sub. DR45, p. 3) and the TRTF (sub. DR44, p. 1). These concerns have highlighted both the need to reformulate the provision to ensure that the focus is on the potential for measures to create a situation where a local supplier could end up with unchecked market power, and for some clear application guidance.

In regard to the latter, the commentary from the ACCC on the potential for any anti-competitive effect from the application of measures is germane. While noting that the effect will depend on the particular circumstances, it said that:

... as a general guide, it is likely to be most significant when the affected imports play a considerable role in influencing the pricing and supply decisions of domestic firms — for example, where domestic markets are already highly concentrated, barriers to entry are significant and there are few (but significant) alternative import sources. (sub. DR62, p. 6)

In the Commission's view, the operational implication is that where there are readily accessible alternative import sources for the goods concerned, this provision should immediately be determined not to be relevant. This should also be the case even where there are no readily accessible alternative import sources, but there is more than one local supplier. For virtually all of the products subject to measures in Australia in recent years, either one or both of these situations would have applied.

In any cases where there were not readily accessible alternative supply sources of like goods, or very close substitutes for them, it would then be appropriate for Customs to consult with the ACCC on the potential implications of measures for the degree of competition in the market concerned. However, in contrast to the early stage consultation suggested in the Draft Report, this would most appropriately occur at the point of the investigation when the dumping margin was evident — the smaller that margin, the less likely it would be that any ensuing measures would deliver significant market power to the applicant supplier. And even where the ACCC advised that the imposition of measures could have this effect, Customs would need to give consideration as to whether an appropriate application of the lesser duty rule could largely remove any scope for monopoly pricing by that supplier.

In light of the likely minimal impact of the provision and the potential to counter any market power afforded by measures via the lesser duty rule, the Commission considered whether it was in fact necessary to retain a competition-related provision within the public interest test. But even where any scope for monopoly pricing was constrained by the lesser duty rule, it is possible that more subtle mechanisms for exploiting market power might be employed to the detriment of customers (for example, less favourable trading terms, longer delivery times and reduced after sales service). Accordingly, in circumstances where it cannot be quickly established that a market would remain sufficiently competitive with measures in place, it would be prudent to retain the scope for Customs and the Minister to be able to consider competition issues that might militate against the application of measures. That said, the Commission reiterates its view that only very rarely would such circumstances arise.

Resulting import prices remain injurious

Again, the Commission considers that a provision which precludes measures where the resulting (duty-inclusive) price for the imported goods concerned would still be significantly below competing local suppliers' costs to make and sell, is fundamentally sound. As it argued in the Draft Report, there is little point in imposing ineffectual measures that will nonetheless burden downstream user industries.

The Commission recognises that, worded in these general terms, the provision could be open to variable interpretation.

Thus it gave consideration to some explicit tightening of the wording — in particular, to embody the sentiment that even with measures in place the local industry would not be profitable. But based on the proportion of recent cases where the lesser duty rule has not been applied, this more demanding formulation could rule out measures in a significant number of cases.

Also, a formulation of this sort could see profitability assessed at a specific, and likely low, point in the demand cycle when dumping may be more prevalent. As the TRTF observed (sub. DR44, p. 3):

The proposal that there be no measures if the export price plus dumping margin is below the Australian industry's cost-to-make-and-sell does not take into account that all sectors of the economy cycle up and down. In the ordinary ebb and flow cycle, a business may endure periods of loss in anticipation of the return to the profitable part of that cycle. This is particularly relevant in industries involving large capital outlays. To suggest that an industry would be denied a measure at the low part of the cycle is unreasonable. Protection of fair market prices is particularly important at this stage.

This sort of time-specific interpretation was not what the Commission had in mind. Rather, the objective is to prevent measures being imposed in cases where, over the full demand cycle, it would be highly unlikely that those measures would restore the applicant industry's profitability to reasonable levels.

Given the longer timeframe involved, and the challenges of predicting future movements in market conditions, this more 'applicant friendly' interpretation could sometimes entail significant judgement. But there would be an obvious incentive for (and onus on) the applicant industry to provide evidence on how measures would impact on its profitability over time. In this regard, and though not being definitive in a prospective sense, historical data is likely to provide some guidance on the future prospects of the industry with and without measures. More specifically, the size of any gap between the duty-inclusive import price and the applicant industry's cost to make and sell at the time of the application, relative to the magnitude of past fluctuations in market prices, could be one pertinent consideration.

For the reasons outlined above, the preceding matters would be best encapsulated in the application guidance, rather than in the legislative wording of this component of the test. Nonetheless, the Commission has slightly modified its recommended wording to help clarify the underlying intent.

Access to comparably priced, un-dumped, like goods

In reflecting on the responses to the Draft Report, the Commission gave further consideration to the need for a provision specifying that measures should not be imposed in cases where un-dumped or non-subsidised 'like' imported goods are

readily available at a comparable price to the dumped or subsidised goods. Amongst other things:

- In determining whether dumping or subsidisation has been the cause of material injury to an industry, Customs is already required to consider other sources of injury, including the availability of un-dumped like goods.
- While the availability of comparably priced, un-dumped, imports means that measures are likely to be ineffectual in remediating injury for the applicant industry, it also means that those measures will have few direct costs for downstream user industries.

Nonetheless, the Commission remains of the view that there is value in retaining this ‘final check’ on the imposition of ineffectual measures, particularly given the concerns about Customs’ current assessments of causality (see box 5.5). Also, as noted earlier, even if ineffectual, measures still entail administrative and compliance costs for the various parties. And retaining this check would provide some additional insurance if the more problematic ‘primary source of injury’ provision were to be removed (see below).

At a more detailed level, the Commission does not see any need for wording changes to address the concern raised by the TRTF (sub. DR44, pp. 3–4) that this component of the test could unreasonably prevent local suppliers of premium products seeking protection against dumping. Specifically, the TRTF saw potential for a cheaper and inferior imported product to be interpreted as comparable to the premium product — thereby ruling out measures against a dumped premium product. However, under the interpretations of likeness provided for in both Australia’s legislation and the WTO agreements, it is hard to see how this sort of outcome could arise.

A potentially more significant issue is how comparable like goods are to be determined as un-dumped or non-subsidised. But this issue must already be addressed in assessments under the current causality provisions and thus does not, in the Commission’s view, require explicit treatment in either the legislative wording of the new test or the accompanying application guidance. Indeed, omitting the reference to ‘un-dumped or non-subsidised’ — by, for example, shifting to a formulation that referred to comparably priced like goods ‘not encompassed by the action’ — would remove an important signal that this component of the test is designed to prevent the imposition of ineffectual measures, not to sanction ‘country hopping’ and the like.

Primary cause of injury

Provision to preclude measures when dumping (or subsidisation) is not the primary cause of injury was intended to obviate the sort of debate that has arisen in some

recent cases about the materiality of the injury resulting from dumping relative to that caused by other factors (see box 5.5). As noted earlier, Customs must already consider non-dumping related causes of injury. However, the Commission was seeking to provide a clear legislative signal that dumping (or subsidisation) must be an important contributor to the injury suffered by the applicant industry.

In the Commission's view, for measures to be in the public interest, the latter is an important general principle. Quite simply, if dumping or subsidisation is only a minor contributor to injury, then measures are again likely to be ineffectual.

But, as a legislative requirement, it could be practically difficult to apply — a concern raised by a number of participants, including Customs (sub. DR61, p. 2). In particular, the multitude of factors that can cause injury to an industry mean that the assessment task could be very complex, placing analytical demands on Customs that could be difficult to accommodate within the proposed 30-day assessment timeframe, and creating new grounds for disputation and appeals.

Further, given the other provisions in the test, a specific requirement of this nature is to a considerable extent, as characterised by CSR (sub. DR47, p. 3), a 'test upon a test', and therefore probably unnecessary. That is, if the price of the dumped or subsidised imports after the imposition of measures is likely to remain well below the local price, and/or if other un-dumped or non-subsidised like imported goods are available at comparable prices, then dumping/subsidisation is unlikely to be a major cause of injury.

Hence, the Commission will not be retaining a 'primary cause of injury' provision in its recommended test.

Low industry market share

Several participants contended that precluding anti-dumping measures where the applicant industry accounts for less than 20 per cent of the Australian market for the like goods would be unfair to smaller scale local manufacturers — see, for example, Australian Paper (sub. DR41, p. 2). And some, such as the Australian Dried Fruits Association (sub. DR52, p. 2), went on to suggest that the proposed provision could encourage predatory dumping by overseas firms so as to reduce the applicant industry's market share below this threshold.

However, the Commission remains of the view that it is unreasonable (as well as inefficient) to impose measures in cases where the cost of doing so is many times larger than the benefit derived by the recipient industry. And while it is possible that setting a local market share threshold below which measures would not be imposed could, in particular instances, encourage more aggressive price competition, with

that threshold set at 20 per cent, it seems unlikely that this would be a common scenario. For the types of products that have typically been subject to measures, the local industry's market share has usually been well in excess of 20 per cent.

The market share of an industry can, of course, change significantly over time, including as a result of recently installed capacity coming into service. Also, the imposition of measures might, itself, significantly boost market share. Hence, on further consideration, the Commission will now be recommending a more general formulation, focussing on the underlying intent — namely, that the large majority of user industries (and consumers) should not be burdened with the cost of measures when the applicant industry's market share was low prior to the commencement of dumping or subsidisation, and is likely to remain low even with measures in place. This would give Customs greater scope to take account of the particular circumstances surrounding an application, rather than being tied to 'a one size fits all' requirement.

Nonetheless, the Commission continues to see merit in using a minimum market share of 20 per cent, prior to when dumping or subsidisation commenced, as an initial threshold when applying this component of the test. This indicative share should be included in the application guidance accompanying the new test. That guidance should also make it clear that there is scope to take account of newly installed capacity in the local industry that is not yet operating at planned output levels, and of any facilities under construction.

Profitable sales by export-oriented overseas suppliers

In proposing that measures should not be imposed when the imported goods were exported at price which covered the overseas supplier's costs and a reasonable profit margin (plus the value of any identifiable input subsidies), the Commission's intention was to address the particular circumstances of production facilities established to cater primarily for export markets.

The core anti-dumping concepts were developed at a time when the dominant production model in most industries involved domestic supply, with residual output directed to export markets. However, globalisation has seen a shift in some capital intensive industries towards establishing very large plants designed to service global or regional markets. In such cases, sales in the country in which the plant is located may comprise a very small proportion of total output, making those sales largely irrelevant to the commercial fortunes of the operator. Even within the confines of the anti-dumping framework, invoking measures on profitable exports based on a price differential between a very small domestic market and a very much larger (aggregate) export market seems highly problematic.

But, as several participants noted, as formulated in the Draft Report, this component of the test could also prevent the imposition of measures where a significant part of an overseas supplier's output was sold in the domestic market. That is, as long as any residual dumped exports were profitable (as determined by Customs), measures would be precluded. Though not unreasonable in isolation, to generally deny access to measures in these circumstances would undermine the core intent of the anti-dumping regime and the system preserving benefits that it can generate.

Even so, the Commission remains of the view that there should be explicit recognition in the public interest test for the particular circumstances of export plants. Hence, it has augmented this component of the test to require not only that the goods are imported into Australia at a price which covers the overseas supplier's fully-distributed costs and a reasonable profit margin (plus the value of any identifiable subsidies), but also that the large majority of the output of the plant concerned is exported. The Commission suggests that the application guidance specify that a 90 per cent or more export share — meaning that no more than 10 per cent of such a plant's output is sold in the home market — should be the indicative trigger for applying this component of the test.

Other matters

Some respondents to the Draft Report (for example, Qenos, sub. DR48, p. 2) reiterated concerns about the increase in investigation timeframes consequent upon the introduction of the public interest test and questioned whether the task could be completed within the 30 days proposed by the Commission.

But in the Commission's view, provided that Customs is adequately resourced (see section 7.3) to undertake this and the other new tasks proposed elsewhere in the report, 30 days should be sufficient. As noted earlier, the Commission has deliberately configured the public interest test to align closely with Customs' current assessment tasks and the information it collects — with the changes proposed in response to the feedback on the Draft Report further reducing the need for separate new assessment effort.

Further, and irrespective of the time taken to complete the public interest test assessment in any particular investigation, the proposed application of provisional measures prior to such assessment (see section 6.5) would remove any disadvantage for the applicant industry.

There was also some reiteration of concerns that introducing public interest considerations would open up new grounds for lobbying the Minister and, more particularly, encourage overseas suppliers and importers to test the new

requirements at both the investigation phase and through the appeals process. (See, for example, Penrice Soda Products, sub. DR54, p. 2.)

However, soundly-based testing of the proposed new arrangements is precisely what is intended and required — including to establish precedents that would serve to minimise the uncertainty inevitably attaching to any new arrangement of this nature. Also, the changes that the Commission has made to tighten its proposed test in response to the feedback on the Draft Report would reduce the incentives and opportunities for more speculative testing of the requirements, or for lobbying of the Minister.

The likely impact of the public interest test

The proposed new public interest test is designed to preclude measures that would be excessively or unreasonably costly relative to the benefits provided to the applicant industries concerned. However, its precise impacts in this regard will of course depend on the nature of the cases that come forward (and on whether any applications for measures are deterred). Hence, in developing and refining the test requirements, the Commission's primary point of reference has necessarily been on how those requirements might have affected past cases.

With this past case history in mind, the changes that the Commission has made to the requirements proposed in the Draft Report are explicitly intended to give greater weight to the system preserving benefits of providing access to anti-dumping protection. As in the EU and Canadian systems, the Commission's expectation is that the presumption in favour of measures would only be overturned on public interest grounds in a small minority of cases. Whether the balance that in fact emerges is appropriate in promoting the interests of the community as a whole is a matter that should be assessed as part of the next review of the system (see recommendation 7.11).

RECOMMENDATION 5.1

The imposition and continuation of anti-dumping and countervailing measures should be subject to a 'bounded' public interest test, embodying a presumption that measures will be imposed if there has been dumping or subsidisation that has caused, or threatens to cause, material injury, unless one (or more) of the following circumstances apply:

- *the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule*

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- *the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers' costs to make and sell*
 - *un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods*
 - *prior to the commencement of injurious dumping or subsidisation, the local industry's share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed*
 - *the large majority of the overseas supplier's output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier's fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies).*

The explanatory memoranda to the enabling legislation should elaborate on the intent and application of this list of circumstances, having regard to the commentary in the body of this report.

Where, based on the advice from the Australian Customs and Border Protection Service (ACBPS), the Minister is satisfied that one (or more) of these circumstances apply, measures would not be imposed. And where none of these circumstances apply and the Minister has determined that measures should be imposed, then the magnitude of those measures should be set having regard to the existing lesser duty rule arrangements.

Assessments against the public interest test by the ACBPS should generally be completed within 30 days, and draw if necessary on advice from external parties such as the Australian Competition and Consumer Commission. Provisional measures should be imposed in all cases where a finding by the ACBPS that there has been injurious dumping or subsidisation provides the basis for moving to apply the test.

In giving effect to these requirements, the ACBPS should also:

- *clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures*
- *give interested parties the opportunity to comment on its assessments against the test through detailing those assessments in the Statement of Essential Facts*
- *include a synthesis of that commentary from interested parties in its final report to the Minister.*