

---

## 6 Supporting framework changes

### Key points

- Aside from the introduction of a bounded public interest test, the Commission has been circumspect in the changes that it is recommending to the current system framework.
- The Australian Government should convene a working group to examine whether the Close Processed Agricultural Goods provisions should be retained and, if so, what changes, if any, should be made to them.
- Australia's decision to recognise China as a market economy is an issue beyond the purview of this inquiry.
  - In any event, Customs can already employ alternative assessment methodologies to deal with any concerns in this area.
- Australia should not adopt the practice of zeroing in calculating normal values.
- Changes proposed as part of the new bounded public interest test would provide for somewhat earlier access to provisional measures in some investigations.
- Tightening and improving the continuation provisions is a high priority reform.
  - While the default term for measures should remain at five years, extensions should be limited to one three-year term.
  - Applications for new measures following the expiry of a three-year extension should be subject to the same requirements as the original application.
- The current review of measures and duty refund provisions should be abolished and replaced by a single new mechanism that would allow for timely and cost-effective adjustments to the magnitude of all measures on an annual basis.
  - Where this adjustment process leads to a zero duty rate, measures should still remain in place for the original term.
  - There should also be related changes to the basis for determining the duties payable on individual consignments of goods subject to measures that would see the correct amount of duty collected at the time of importation.
- As part of the annual adjustment of measures, Customs should pro-actively seek feedback on the impacts of measures. Such feedback should also be used, where appropriate, to provide for a more streamlined revocation process. Where it indicates that local production of a good subject to measures has ceased, and is unlikely to recommence in the period for which the measures would otherwise remain in place, the measures should be revoked.
- Australia's list of countervailable subsidies should be aligned with the WTO lists.

---

In chapter 5, the Commission recommended the introduction of a ‘bounded’ public interest test that would allow for consideration of wider impacts in anti-dumping investigations. This chapter considers what additional modifications to the existing system framework would be appropriate to complement this change to the focus of Australia’s anti-dumping system.

## **6.1 How much additional change is warranted?**

Reflecting the complexity of the anti-dumping system, participants suggested a large number of changes to the current assessment criteria and related requirements, as well as to the administrative arrangements for giving effect to those requirements. Many of these changes and the underlying issues have also been canvassed in the administrative reviews of the system over the last two decades.

However, in the Commission’s view, there are several reasons to, at this stage, limit the number of changes additional to the introduction of a bounded public interest test.

- Given the considerable judgement involved in applying the current assessment requirements, it is far from clear that there would be a material pay-off from many of the suggested refinements to the associated assessment methodologies and processes. That is, the changes in outcomes resulting from adding more layers of complexity to assessments may be small in relation to the variations in outcomes associated with the judgemental component of the process.
- In some areas, the WTO agreements potentially constrain the degree and nature of change that can be made to the current requirements.
- A large number of detailed changes to the assessment requirements would make it harder to simultaneously bed down the new public interest test and to discern its impacts at the time of the next review.

Thus the Commission is not proposing any changes to the ‘like goods’ test, the basis for determining (starting) normal values, or the injury or causality provisions. However, it is recommending a significant tightening of the provisions governing the continuation of measures and more regular adjustments to the magnitude of measures. And it has suggested a circuit breaker to deal with the vexed issue of the provisions relating to close processed agricultural goods. Moreover, the discussion on the various steps in the investigation process raises several issues that could usefully be revisited at the time of the next review (see draft recommendation 7.11).

---

## 6.2 Initiation requirements

Various factors affect who can access Australia's anti-dumping system and how easily. In addition to the key tests for dumping, injury and causality, which are discussed later, Customs screens applications using the like goods test, the standing requirements and, where relevant, the provisions allowing primary producers to be considered as part of an expanded domestic processing industry. The level of information required to mount a prima facie case can also affect access.

### Like goods test and industry standing requirements

Although submissions to the inquiry suggested a number of refinements to these provisions, there is nothing, in the Commission's view, to suggest that they are contributing to materially flawed decision-making.

The current like goods test is based on WTO requirements developed to ensure that the concept is not too permissive in terms of the ease of making a case for measures. And while some participants suggested that the test is inflexible, Customs can take into account a wide range of factors bearing upon 'likeness' and exercise judgement as to their relative importance in any particular situation.

There will, of course, be cases where Customs' judgement on 'likeness' is disputed (see, for example, PolyPacific and Townsend Chemicals (sub. 36, p. 3) and TMRO (2005, para. 51)).

But it is far from clear that it would be possible to avoid such debate through legislative change — even were change possible within the WTO framework. Here, as in most aspects of the assessment process, opinions will continue to differ irrespective of how the particular requirements are framed. Also, in cases where the issue of likeness is particularly complex, Customs can release an issues paper inviting commentary from interested parties and/or seek expert advice before any final decision is made. In the Commission's view, and that of many participants (see, for example, Bradken, sub. DR59, p. 1 and CSR, sub. DR47, p. 3), recourse to expert advice should be considered whenever likeness issues are likely to be contentious.

Similarly, where there is significant support within a local industry for an application for anti-dumping or countervailing measures, the standing requirements do not generally appear to be a barrier to moving to the initiation phase. Those requirements have been of concern to some primary producers — see for example, National Farmers' Federation (sub. 6, p. 5) and Australian Pork (sub. DR39, p. 5). However, the crux of their 'access' issue seemingly lies with the 'close processed

---

agricultural goods' provisions (discussed below). Moreover, to facilitate access by 'diffuse' industries, the current requirements already allow for the coordination of applications through trade organisations and other persons representing an industry.

It may, of course, be that changes in the standing rules will be required as a result of initiatives emerging from the Doha round. For example, one issue being discussed is whether an application for measures should only proceed when supported by a majority of the overall local industry (based on production values), as distinct from a majority of those expressing a view on the application (WTO 2008a, article 5.4). As the Australian Steel Association (sub. 28, para. 302) observed, currently, if 25 per cent of producers are enjoined in an application and the remaining 75 per cent are silent, the application can proceed. But absent any such amendments to the WTO agreements consequent on Doha, the need for unilateral changes of this nature does not seem strong.

### **Provisions for primary producers**

Like Canada and the USA, Australia has provisions that allow primary producers to join processors in applying for measures against dumped processed agricultural goods (see box 6.1). The intention is to extend anti-dumping protection to primary producers were they to experience injury as a result of dumping of the processed product rather than the raw commodity.

However, several participants — including the NFF (sub. 6, p. 5), the Australian Dried Fruits Association (sub. 14, pp. 4–5) and Australian Pork (sub. DR39, p. 1) — contended that the 'close processed agricultural goods' (CPAG) provisions are ineffective, insofar as primary producers cannot apply alone for measures against a dumped processed product because their raw product is not generally 'like' the processed item.

These participants went on to reiterate arguments put to the Joint Study that changes should be made to facilitate direct access to the anti-dumping system for producers of CPAGs without the need to rely on the cooperation of processors. In support, they contended that processors standing to benefit from the availability of cheaper imports may be unwilling to 'lead' the application process. And Australian Pork (sub. DR39, p. 2) further noted that the conditions for primary producers to enjoin in an application with a processor — for example, that the raw product must be devoted completely or substantially to the processed product — can similarly preclude cooperative action.

---

### Box 6.1 Close processed agricultural goods

Under the *Customs Act 1901*, 'like goods' can be 'close processed agricultural goods' if the Minister is satisfied that:

- (a) the raw agricultural goods are devoted substantially or completely to the processed agricultural goods; and
- (b) the processed agricultural goods are derived substantially or completely from the raw agricultural goods; and
- (c) either:
  - (i) there is a close relationship between the price of the processed agricultural goods and the price of the raw agricultural goods; or
  - (ii) a significant part of the production cost of the processed agricultural goods, whether or not there is a market in Australia for those goods, is, or would be, constituted by the cost to the producer of those goods of the raw agricultural goods. (s. 269T(4B))

These provisions, which were introduced in 1991, are intended to help address:

... the vulnerability of vertically integrated agricultural producers, who are generally price takers in their markets, with the prices they receive dependent on the prices their buyers are able to command for their processed products. Agricultural producers can, therefore, be materially injured as a result of the impact of dumping or subsidisation on the processors to whom they sell their produce. (Beddall 1991)

If locally produced goods are close processed agricultural goods, then the Australian industry can be expanded to include producers of the raw agricultural input. Further, if all of the criteria set out above are met, then that expanded industry should be considered when assessing material injury (ACBPS 2009a, p. 5).

For its part, the Commission observes that the consistency of Australia's CPAG provisions with WTO rules (and that of the similar provisions in Canada and the USA) has, at various times, been questioned.

- During the recent investigation into currants exported from Greece, the European Commission was unsuccessful in requesting Customs to clarify to what extent Australia's CPAG provisions comply with WTO rules (EC 2008, p. 1).
- The similar Canadian and US provisions have been the subject of cases before GATT/WTO dispute panels. For example, the WTO Appellate Body found the USA had acted inconsistently by including lamb growers as part of the US industry when taking safeguard action against lamb exported from Australia and New Zealand (WTO 2001, para. 197b).
- A GATT dispute panel was established (at the request of the European Union) to consider the imposition by Australia of countervailing duties on imports of glacé cherries from France and Italy on the grounds of an inconsistent definition of the

---

‘domestic industry’ (GATT 1992). However, the European Union later requested that proceedings be suspended and so a finding was not made (GATT 1993).

It is also unclear that, in practice, the provisions could be of benefit to primary producers.

- Although some have contended that injury to upstream producers has been a significant element in testing for injury (Ludwig 2006, p. 39), the Commission has received no evidence that the outcomes of any cases have been materially affected by a capacity to examine injury over a wider output base.
- As noted by the Senate (SSCIST 1991, para. 2.3), primary producers may well experience injury beyond any suffered by the processor — for example, if the processor is able to offset competition from dumped imports by paying a lower price for the raw product. But, in such cases, it is not clear why an (independent) processor would take the lead in applying for measures. As well as presumably sharing the costs of taking action, it would also expose its purchasing practices to external scrutiny.
- If measures are applied to a processed good, and if the processor has significant buying power, it may pass little of the price benefit back to primary producers.

Indeed, an alignment of the interests of the two parties and strong incentives for cooperative action would only be likely when primary producers have an equity interest in the processing entity — as occurs, for example, in producer cooperatives. The Commission notes that such cooperative arrangements are less common than when the CPAG provisions were enacted nearly two decades ago (see, for example, Lewis 2006). And, given the strictures of the like goods framework, it is hard to see how the provisions could be rendered more ‘useful’ for primary producers — were this judged to be desirable.

More broadly, the question arises as to why primary producers should be treated differently from other upstream producers which must rely exclusively on their customers to take action against any injurious dumping and/or subsidisation. In this regard, Gruen (1986, para. 5.9) pointed to a list of stakeholders who could mount no less valid claims for CPAG-style provisions.

In light of the above, in the Draft Report, the Commission proposed that, in consultation with interested parties, the Australian Government should convene a working group to examine the CPAG provisions and report to the Minister on whether and how the preceding concerns might be resolved.

Participants responding to the Draft Report were highly supportive of this approach, including the Law Council of Australia and the Law Institute of Victoria

---

(sub. DR56, table item 2); the Trade Remedies Task Force (TRTF, trans. p. 3); and Australian Pork (sub. DR39, p. 5).

However, in some cases, such support was couched in the context of a review process designed to render the provisions more useful for primary producers, rather than a more comprehensive assessment that included a consideration of the broader merits of the current approach.

The ADFA welcomes the Commission’s Draft Recommendation ... to convene a working group to examine the provisions relating to ‘close processed agricultural goods’ within the *Customs Act 1901*. The ADFA does not support abolishing the provisions: ADFA members and other raw agricultural growers and suppliers require access to the Anti-Dumping System as is available to all other producing industries in Australia. (Australian Dried Fruits Association, sub. DR52, p. 4)

Such commentary has reinforced the Commission’s view that a thorough review of these provisions is required. However, it emphasises that the review should be an open one, rather than focussed solely on examining whether it would be possible to make the provisions more useful for primary producers. For the reasons outlined above, a comprehensive review might conclude that the CPAG provisions should be abolished — a conclusion that should not be precluded by the terms of reference.

RECOMMENDATION 6.1

***The Australian Government should convene a working group to examine the close processed agricultural goods provisions and report to the Minister on:***

- ***whether the provisions have had a meaningful impact on the outcomes of any past cases***
- ***if not, whether there is any likelihood that they could, in future, have a meaningful impact and, if so, in what circumstances***
- ***whether and how it might be possible to make the provisions more practically effective, whilst still complying with WTO requirements, and what benefits and costs would ensue***
- ***what arguments would justify the retention of the provisions more generally***
- ***what changes, if any, should be made to the provisions in light of the above.***

***The working group should consult with interested parties and publish a draft report for comment.***

---

## Prima facie information requirements

Concerns about the amount of information required to have anti-dumping cases initiated are longstanding (see, for example, TRTF (2006, pp. 5–7) and Willett (1996, p. 32)). Specifically, there is a view that the requirements concerned go beyond that necessary to establish a prima facie case — a view that was also evident in this inquiry. Thus, OneSteel stated that:

Customs currently places an undue onus on the applicant to provide evidence beyond reasonable doubt regarding all assertions made in an application concerning exporters and the relevant overseas markets for the goods under consideration. (sub. 16, p. 13)

(Others to express a similar view included: the Australian Plantation Products & Paper Industry Council (A3P), sub. DR45, p. 6; the Australian Dried Fruits Association, sub. 14, p. 3; Bradken, sub. DR59, p. 3; CSR, sub. 10, p. 3; James Stevenson, sub. DR42, pp. 2, 8; and Qenos, sub. 13, p. 7.)

The costs of collecting and assembling the required information can be particularly onerous for small to medium sized enterprises (SMEs) (see, for example, PolyPacific and Townsend Chemicals, sub. DR51, p. 14). Further, SMEs often lack the resources to deal with the complexities of the anti-dumping system and are therefore likely to be even more reliant on external consultants than larger firms.

To address these concerns, and in response to recommendations from the Joint Study, Customs has made a number of changes to its operating practices — for example, the introduction of an SME liaison function within its Trade Measures Branch — and to its application forms and related guidance to applicants. In this regard, the TRTF (sub. 26, p. 32) said that the better guidance on assessment criteria and methodologies is an improvement over the previous system.

And more generally, BlueScope Steel said that:

A review of the Australian Customs Service ‘Application for Dumping and/or Countervailing Duties’ document does not suggest that Australian authorities are requiring information from Australian industries that goes beyond what is required under the WTO Agreement. (sub. 19, p. 46)

As signalled in the Draft Report, the Commission is not recommending any changes to the arrangements covering prima facie information requirements. In this regard, determining the stringency of the initiation requirements involves a trade-off between, on the one hand, not discouraging meritorious claims and, on the other, not attracting excessive numbers of questionable claims. Some might argue that the latter should not be a significant concern because non-meritorious cases will be ‘weeded out’ by the formal investigation process. But taking cases to the next stage entails some additional administrative and compliance costs. Moreover, the lower

---

the initiation bar, the lower will be the application cost for firms, leading to a possibly greater likelihood of strategic filing behaviour designed to ‘chill’ imports.

To sustain a case for an easier initiation hurdle, there would need to be evidence that significant numbers of cases that would have had a reasonable prospect of success are being discouraged. However, the fact that measures are ultimately imposed in only half of initiated cases (see chapter 3) suggests that the initiation hurdle is not especially onerous or otherwise detrimental to appropriate outcomes.

Given this, the Commission considers that any substantive easing of the initiation bar would need to be accompanied by some offsetting discipline to guard against what the Australian Steel Association (sub. 28, para. 334) described as ‘fishing expeditions’. One possibility would be to reduce the level of evidence required from an applicant to sustain a case for initiation in return for the lodgement of a bond that would be forfeited in the event measures were not applied. But this would impose a new cost on all unsuccessful applicants for measures, including on those willing and able to meet the current thresholds. And giving practical effect to a lower initiation hurdle — whether linked to a forfeitable bond arrangement or introduced on a self-standing basis — would itself be a highly judgemental process.

In light of the above, and given that there was no specific evidence submitted to rebut the same set of arguments made in the Draft Report, the Commission remains of the view that changes in this area are not warranted.

### **6.3 Normal value calculations**

Along with the so-called ‘ascertained’ export price, the normal value of the overseas good determines whether dumping has occurred and (unless the lesser duty rule is applied) the magnitude of any measure imposed. In line with the WTO Anti-Dumping Agreement, Customs considers a normal value to be the average price paid for like goods sold in the exporter’s home market. However, where a specified set of conditions is not met (see box 6.2), Customs uses a hierarchy of alternative methodologies for calculating a normal value.

In their submissions to the inquiry, users of the anti-dumping regime argued that aspects of the current arrangements for calculating normal values (and of the other ‘variable’ factors) have the effect of depressing dumping margins, thereby reducing the level of measures imposed. As elaborated below, they were particularly concerned about the implications of treating China as a market economy for the purposes of these calculations.

---

## Box 6.2 How are normal values calculated?

As noted in the text, in the first instance, Customs considers normal values to be the average price paid for like goods sold in the exporter's home market. However, for Customs to accept such sales as a suitable basis for calculating normal values, they should, among other things:

- be at arms length (that is, not be influenced by a commercial relationship between the buyer and the seller)
- occur in the ordinary course of trade (that is, reflect the total cost to make and sell the goods)
- not reflect artificially low input prices
- generally account for greater than five per cent of the total volume of like goods shipped by the exporter to Australia.

In cases involving exports from market economies, where these conditions are not met (or overseas suppliers have not cooperated in providing sales records), Customs uses a hierarchy of alternative methodologies, depending on the specific circumstances:

- other sellers' domestic sales (in the country of export)
- either a constructed price to make and sell the goods in the country of export, including an allowance for profit; or, the overseas supplier's sales to a third country
- an amount having regard to all relevant information with scope, in some circumstances, to construct prices based on the cost to make and sell in surrogate countries, including Australia.

For 'economies in transition' (or for non-market economies), the alternatives listed above are not hierarchical. Rather, the approach to estimating normal values is simply to draw on all relevant information.

Conversely, participants representing downstream industry interests contended that aspects of the calculation process often lead to normal values, dumping margins and dumping duties that are artificially high. (See, for example, Australian Steel Association, sub. 28, paras. 463–466.)

That said, there was broad agreement among participants that the methodologies for calculating the variable factors should give greater regard to established trading conventions and should not involve the use of 'zeroing' in determining normal values. In addition, as discussed in chapter 7, the black-box nature of the calculation process and the ensuing lack of clarity of its outcomes are also of a considerable concern to all parties.

For its part, the Commission acknowledges that many of the observations about the deficiencies in the methodologies used to calculate normal values (and the other

---

variable factors) have some intrinsic merit. So too do some of the suggested changes to overcome those deficiencies — at least when considered in isolation.

However, making a significant number of changes to the current methodologies, or to particular aspects of their application, could introduce considerable new uncertainty and complexity to the assessment process, and distract from more important systemic reforms.

Also, some of the proposed changes would have offsetting effects. Hence, it is not clear to the Commission how significant the collective impact on dumping margins would be, or even whether those margins would, as a result, generally be higher or lower. By way of illustration, any methodological initiatives designed to deliver more rigorous and economically ‘precise’ normal values would need to look at the basis for allocating costs in any constructed cost to make and sell calculation — including whether the costs of supplying particular markets should be determined using ‘fully distributed costs’ or ‘avoidable costs’. As discussed by the Commonwealth Competitive Neutrality Complaints Office (CCNCO 1998), the latter may have merit in some circumstances. Yet any application of the avoidable cost approach that reduced constructed normal values might well swamp the collective impact of the various changes sought by local industry interests.

In responding to the Draft Report, the Australian Steel Association (trans. p. 47) argued that the Commission should more precisely test the effects of some of these detailed changes. But, as the preceding avoidable cost example illustrates, the outcome of such testing would be highly sensitive to the particular suite of initiatives that were examined. More importantly, the Commission reiterates that the uncertainty and complexity that would attach to changes in the computational methodology — even if having some merits in the light of the sort of testing advocated by the Australian Steel Association — would be an unhelpful distraction to the more important reform options the Commission is proposing.

## **Exports from China**

Since April 2005, and as a precursor to free trade negotiations, Australia has recognised China as a market economy by permanently agreeing, among other things, not to seek recourse to section 15 of the *Protocol of Accession of the People’s Republic of China to the WTO* (DFAT 2005). Section 15 allows WTO members to treat China as a non-market economy for the purposes of applying anti-dumping duty laws until 2016 or until China establishes, under the national laws of an importing WTO member, that market conditions prevail in a particular industry or sector.

---

Thus, where Chinese goods are subject to an anti-dumping action in Australia, the normal value will, in the first instance, be calculated on the basis of prices in the Chinese domestic market. In contrast, the USA treats China as a non-market economy, while jurisdictions such as the European Union treat it as an economy in transition — allowing for more ready recourse to constructed normal values (see appendix C).

Local industry interests contended that the growth in China's exports to Australia, in the context of its treatment as a market economy, poses a significant challenge for the anti-dumping system (see box 6.3). Specifically, many argued that this treatment makes it difficult to take account of various forms of indirect support that are 'seemingly available' to Chinese producers — with the consequence being that, when actions are successful, normal values, dumping margins and the level of measures imposed are depressed. The ensuing perception of unfairness is compounded by the less favourable treatment of Chinese exports in some other jurisdictions. (See, for example, Cement Industry Federation, sub. 9, p. 6.)

**Box 6.3 Some participants' views on issues concerning China**

The outcome of the present arrangements requires Australian industry to compete with prevailing prices and costs for Chinese exporters which are understood to be artificially low. As a result, Australian industry — unlike its counterpart industry in the US, Canada and the EU — are disadvantaged and operating at unprofitable levels. (CSBP, sub. 15, p. 12)

Having business operating experience in China, Orica understands that local Chinese producers can gain access to incentives worth a considerable value, which may render prices for goods artificially low compared to a WTO rule based assessment. These incentives cover such factors as land grants, environmental allowances, relocation allowances, tax incentives, raw material input price concessions and export rebates ... Customs' lack of recognition of these local business practices needs to be addressed. (Orica, sub. 18, p. 14)

This Australian company [Steelforce] undertook significant expenditure to build a state of the art factory in China ... It engages in no domestic sales in China and hence cannot dump. Yet the dumping legislation as it currently stands requires a deemed normal value in such circumstances to raise a hypothetical differential to see if dumping is deemed to occur or not. This makes no policy sense. (Australian Steel Association, sub. 28, para. 48)

The Commission understands these concerns and also China's economy and policy settings. However, Australia is not alone in the status it affords China. According to media articles posted on the Chinese Government's website, 97 WTO members have recognised China as a market economy, including New Zealand, the Republic of Korea, Russia and South Africa (MOFCOM 2009a, 2009b).

---

And, in any event, Australia's decision to recognise China as a market economy has not stopped measures being applied to Chinese exports. Indeed, there are currently more measures in place on goods from China than on goods from any other country (see chapter 3). Further, over the last decade, the share of anti-dumping measures applying to goods originating from China has grown from less than 10 per cent to more than 30 per cent.

As outlined above, there are also generally applicable provisions in the current system to cater for circumstances where sales in an exporter's domestic market are not an appropriate basis for calculating normal values. In particular, Customs can employ an alternative calculation method where government involvement in a market artificially lowers input costs or output prices. Such an alternative was employed by Customs in relation to the recently released Preliminary Affirmative Determination for aluminium extrusions from China (ACBPS 2009b) and the ensuing imposition of provisional measures.

More broadly, Australia's decision to recognise China as a market economy would have had regard to a variety of trade policy matters and goals. Hence, it would not be appropriate in this inquiry to recommend changes to the decision on the basis of the preceding dumping-specific concerns, whatever their particular merits might be.

That said, there may well be scope for Customs to allay some of the concerns about the treatment of Chinese imports (and of market situations more generally) through some of the initiatives proposed in chapter 7, including:

- ensuring that it clearly documents whether and how it has taken into account any input subsidies and other government support in calculating normal values (see recommendation 7.8)
- engaging, where appropriate, experts to assist in such assessment (see section 7.3)
- giving due consideration to relevant findings in overseas anti-dumping and countervailing cases (see recommendation 7.6).

### **Due regard for established trading conventions**

A number of submissions contended that Customs' methodologies are sometimes at odds with widely observed, international, business practices:

In general, the administration of the current antidumping system is highly weighted towards a strictly accountant-driven process with little regard for business intentions or the usual conventions and mechanisms surrounding the conduct of any particular business under investigation. (Dow Chemical, sub. 3, p. 2)

---

... Customs needs to take greater heed to standard practices within an industry in determining normal values. Inconsistent determinations can have a material impact on calculated dumping margins creating the effect of ‘moving the goal posts’ for any applicant, potentially making a valid dumping claim, invalid. (OneSteel, sub. 16, pp. 5–6)

However, to a large extent, Customs’ hands are tied with respect to the broad methodologies used to determine normal values and dumping margins — with any significant departure from the WTO requirements likely to provide additional grounds for appeals. And seeking to amend the requirements to give effect to ‘normal business practice’ would also be problematic — especially as the sort of price discrimination that can lead to dumping actions is regarded in most other market contexts as normal practice (see appendix D).

Nonetheless, the flexibility and discretion provided to Customs in applying the current requirements presumably gives it some scope to employ common sense approaches that have regard to commercial realities. At the very least, as suggested by CSBP (sub. 15, p. 8), there should reasonably be an expectation that Customs will consult regularly with stakeholders to identify any potential issues of this nature.

### **‘Zeroing’**

Zeroing is the practice of inflating the average dumping margin by converting negative dumping margins on particular sales to zero (see box 6.4). The practice, which is employed by the USA, has been strongly debated at Doha.

#### **Box 6.4 What is zeroing?**

‘Zeroing’ is a methodology applied to the calculation of normal values in some jurisdictions — most notably the USA. To determine whether dumping exists and its magnitude, authorities normally compare a ‘weighted average normal value’ of the product with a ‘weighted average of prices of all comparable export transactions’. However, when zeroing applies, authorities disregard any exports where the export price is higher than the normal value; that is, they give them zero weighting.

Opponents of zeroing say it is a ‘biased and partial method for calculating the margin of dumping and inflates anti-dumping duties’ (WTO 2008a, p. A-10). They have sought to codify WTO dispute settlement findings outlawing zeroing in most circumstances. Conversely, the USA has argued that zeroing is a legitimate practice and should be expressly permitted under the Anti-Dumping Agreement (DFAT, sub. 22, para. 5.3).

However, Australia should not adopt the practice even if it is subsequently sanctioned at Doha. The Commission can see no reason to bias the calculation of the normal value in this way.

---

In fact, under Australia's arrangements (where dumping and material injury are simultaneously considered), the practice would seemingly have a more prejudicial effect on outcomes than in the USA (where zeroing is applied after a case has been initiated and injurious dumping or subsidisation found). That is, under the Australian arrangements, unless the *de minimis* provisions applied, zeroing could make a finding of dumping almost axiomatic. Significantly, there was no support from industry participants for Australia to follow the US approach (see, for example, Australian Steel Association (sub. DR57, para. 98); the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 3); and the TRTF (sub. 26, p. 25)). The Department of Foreign Affairs and Trade (sub. 22, para. 5.3) also opposes its introduction.

RECOMMENDATION 6.2

*Australia should not adopt the practice of zeroing when calculating normal values.*

## 6.4 Material injury and causality

As outlined in chapter 2, anti-dumping measures cannot be imposed unless a local producer has suffered (or is threatened with) material injury from dumped or subsidised imports. Although not defined in the Act, the Dumping Manual defines 'material injury' as:

... injury which is not immaterial, insubstantial or insignificant, and is greater than that likely to occur in the normal ebb and flow of business. (ACBPS 2009a, p. 11)

The three main injury indicators examined by Customs in this component of the assessment process are:

- the relative prices of the imported and locally manufactured like goods
- sales volumes, including changes in domestic market shares
- profit levels and profits relative to turnover.

Although Customs may examine a range of other injury factors (including changes in employment levels, capital investments, return on investments, cash flows, productivity, inventories, rates of growth, and research and development), a 1990 Ministerial Direction indicates that a 'material' diminution of profits is a key requirement for proving material injury (ACBPS 2009a, p. 11).

In addition, for measures to be imposed, there must also be a direct or discernable causal link between the material injury and the dumping/subsidisation. In assessing

---

causality, Customs may consider the influence of a wide variety of potential causal factors other than dumping, including:

- the availability and price of un-dumped and non-subsidised imported like goods
- any relevant changes in consumption patterns
- whether capacity constraints have hindered the ability of local producers to maintain their share of a growing market.

Submissions to the inquiry were divided on the evidentiary standards for demonstrating injury and the basis for assessing causality.

- On the one hand, recent users of the anti-dumping system argued that the current requirements are too demanding. For example, the TRTF (sub. 26, p. 29), among others, claimed that Customs gives insufficient account to ‘profits forgone’ when assessing material injury, focussing instead on an industry’s historical profits which are more amenable to verification. James Stevenson (sub. DR42, p. 12) went further, arguing that harm must necessarily follow if goods are being dumped, meaning that there should be no need to determine ‘material’ harm at all.
- However, some others contended that the current requirements are not sufficiently rigorous. For example, the Law Council of Australia and the Law Institute of Victoria (sub. 29, p. 12) stressed that a finding of injury should only occur where there is evidence of reduced revenues and profits. Likewise, the Australian Steel Association (sub. 28, paras. 683–686) indicated that Customs seemingly relies too heavily on two-dimensional correlations which do not prove causation.

On this latter point, at least, the TRTF (sub. 26, p. 38) agreed that some more detailed analysis may be useful in cases where the linkage between dumping and injury is less clear. And whatever their particular views on evidentiary standards, participants from all sides voiced concerns about the lack of transparency accompanying Customs’ assessment processes (see box 6.5).

In the Draft Report, the Commission did not make any explicit recommendations regarding the assessment of injury and causality, observing that this is yet another aspect of the anti-dumping system where judgement is paramount. Accordingly, it argued that, at best, legislation (and changes to it) can shape and somewhat constrain the degree of judgement required — and that even here there is a trade-off with giving Customs sufficient flexibility to tailor assessments to the particular circumstances at hand.

Further, while recognising that, in principle, the loss of potential profits as a result of dumping is no less relevant than the loss of actual profits, the Commission

---

observed that there are significant practical constraints on taking the former into account in injury assessments. Most obviously, it would involve a considerably higher degree of speculation than an assessment of what has actually happened to profits, meaning that any shift in this direction would require the exercise of even greater judgement by Customs and potentially provide new grounds for appeal.

**Box 6.5 Injury and causality assessments: transparency concerns**

Though views on evidentiary standards and the basis for assessing causality differed markedly, most participants considered that there is insufficient transparency in Customs' assessments of injury and causality and the findings that emerge from those assessments.

Putting the perspective of applicant industries, the Cement Industry Federation (sub. 9, p. 7) said that it would 'encourage a more open approach to the methodology' while BlueScope Steel argued that:

Providing greater transparency in relation to the criteria used in assessing whether material injury has occurred or is threatened, and the extent to which threatened injury is taken into account in practice, would be helpful. It would be particularly helpful to clarify how damage caused by intermittent dumping would be assessed. (sub. 19, p. 45)

Commenting on the issue from the perspective of overseas suppliers, Casselle Commercial Services said that:

Suppliers are particularly aggrieved by a system that imposes specific sanctions against them for allegedly causing material injury in a foreign market while denying them the opportunity to properly test whether that injury was correctly attributable to their exports. (sub. 2, p. 6)

And as a user of products that have been subject to anti-dumping measures, in a submission to the Joint Study, Rio Tinto (2006, pp. 4–5) argued that:

The causal link is often tenuous and difficult to differentiate from changes in normal day-to-day business. Injury is usually assessed from evidence of lower prices and lost market share which is always privileged information and cannot be independently verified. The bottom line is that Customs and proponents from industry have significant scope through the administration of the existing legislation to achieve favourable outcomes that translate into protection from import competition.

Given this, the Commission concluded that a preferable approach for achieving better injury/causality assessment would be to increase the accountability of those involved in the assessment and decision-making process through better public reporting on the outcomes of investigations and the basis for findings and recommendations (see chapter 7).

Responses to the Draft Report were generally supportive of moves to enhance the transparency with which Customs reports on the injury and causality dimensions of investigations. For example, A3P (sub. DR45, p. 5) maintained that improvements

---

in this area would ease potential misunderstandings among applicants. And OneSteel (sub. DR49, p. 2), which had initially sought a more definitive recognition of profits forgone as a potential causal factor in injury assessments, subsequently supported the Commission's draft recommendation to refrain from further refinements in this area.

However, others, though not disputing the need for greater transparency in decision-making, reiterated some of their initial concerns in this area. In particular, the Australian Steel Association (sub. DR57, para. 198) maintained that causality should be objectively tested (using quantitative techniques) to isolate the effect of any dumping and/or subsidisation from other factors that may be negatively impacting on the domestic industry under consideration.

For its part, the Commission remains unconvinced that further refinements to the injury and causality provisions are warranted at this juncture, and especially any mandatory requirement for Customs to quantitatively test for causality.

There may, of course, be circumstances where quantitative testing might shed some light on causality issues. But the current requirements do not preclude such testing where it would clearly add value. The scope for, and usefulness of, such testing might be matters which Customs could give further consideration to — especially were there to be a greater willingness to contract out aspects of the assessment task (see chapter 7).

Even so, any such quantitative testing would not obviate the need for judgement. Indeed, various statistical and data limitations would often make more formalised quantitative testing highly problematic, not least, the likely very small magnitude of the impacts involved, as well as the assumptions and commercial sensitivities that typically contribute to the current 'black box' perceptions.

## **6.5 Provisional measures**

There was relatively little comment in submissions on many aspects of the form of measures applied under the Australian system — including, the heavy reliance on duties rather than undertakings, the calibration of duties in specific rate rather than ad valorem terms and the stringency of the requirements governing retrospective measures, which have not been applied in Australia for more than two decades. However, there was considerable commentary on the application (or non-application) of provisional measures. There was also some input on the duty refund system (see section 6.7).

---

From day 60 of an investigation, Customs is able to impose provisional measures to prevent further injury (or threat thereof) to the applicant industry for the remainder of the investigation process and until the Minister makes a decision on whether or not to ‘confirm’ those measures. The imposition of provisional measures is contingent on Customs making a preliminary affirmative determination (PAD) that there are sufficient grounds for doing so. Such measures may include guarantees, bonds, cash deposits or combinations thereof. In practice, however, they typically take the form of unsecured undertakings that bind an importer to pay any duties consequent on the Minister’s final decision on imports in the intervening period.

In practice, Customs has typically waited two to three weeks after it has completed its exporter verification reports and released a Statement of Essential Facts (SEF) before making PADs. Hence, over the past decade, provisional measures have, on average, been applied around day 140 of an investigation, and as late as day 210 (that is, 230 days after application), with the earliest application at day 80 still being later than permitted by the legislation. And in the recent toilet paper case, provisional measures were not imposed, even though Customs ultimately recommended to the Minister that anti-dumping duties should be implemented.

Notwithstanding that Customs’ practice meets the WTO requirements, many submissions to the inquiry contended that Customs adopts an unduly cautious approach to making a PAD and that provisional measures could be, and should be, applied earlier (see, for example, CSBP, sub. 15, p. 12 and TRTF, sub. 26, pp. 38–42).

This issue is a longstanding one, having been raised during the Senate Inquiry (SSCIST 1991), the Willett Review (1996) and, more recently, the Joint Study (2006).

- Understandably, those affected by dumping and/or subsidisation will want the earliest possible relief. Where the requirements for provisional measures are satisfied, they should be applied.
- Equally, it is important that a desire to provide early relief does not come at the expense of investigative rigour. Indeed, the generally late stage of the investigation process when measures are imposed could, at least partly, reflect the complexity of cases. In this regard, the general consensus is that case complexity has been increasing.

Given the latter, the Commission does not see a case for initiatives to make it any easier to obtain provisional measures or to fast-track their imposition as suggested by Sulo (sub. DR58, p. 2) — even if a practical legislative way to do so could be found. Similarly, it does not see grounds for imposing provisional measures consequent solely on the Minister extending an investigation’s timeframe, as

---

suggested by the Australian Dried Fruits Association (sub. 52, p. 4) in response to the Draft Report proposal to increase the scope for Customs to seek extensions of time (see section 7.2). In other words, the Commission believes that Customs should apply provisional measures no earlier than it can establish a sound case that there has been injurious dumping or subsidisation.

But nor should it delay imposing provisional measures once such a case has been established. Hence, it is desirable that the provisional measures arrangements are such that assessments against the proposed public interest test do not lead to delays in relief for applicant industries where injurious dumping or subsidisation has been established — especially as the test is only intended to preclude measures in a small minority of cases.

The Commission is therefore recommending that under the new public interest test, the release of a PAD finding that there has been injurious dumping or subsidisation, and the imposition of provisional measures, should be necessary precursors to the assessment of whether there are any public interest grounds for not ‘confirming’ those measures.<sup>1</sup>

Further, to fit in with the proposed assessment sequence, the Commission is recommending that unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation. Given that PADs are sometimes released a little time after the SEF (currently due by day 110 unless there has been an extension), this change would bring forward the imposition of provisional measures in some cases.

This approach was strongly endorsed by BlueScope Steel (sub. DR55, p. 4) and the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 4) in their responses to the Draft Report.

#### RECOMMENDATION 6.3

***In conjunction with the introduction of the new public interest test (see recommendation 5.1), the arrangements governing the imposition of provisional measures should be modified as follows:***

---

<sup>1</sup> For the most part, this might not require any specific changes to the current provisional measures regime. That is, Customs will normally impose provisional measures where it is satisfied that there are dumping/injury grounds for doing so. But, as noted above, in the recent toilet paper case where Customs ultimately recommended anti-dumping duties, it did not impose provisional measures. In this case at least, a public interest test assessment would have added to the delay in relief for the applicant industry (presuming, of course, that the case for measures would not have been overturned on public interest grounds).

- 
- *If the requirements for imposing provisional measures are met, then prior to the commencement of any assessments against the public interest test, the Australian Customs and Border Protection Service should, without exception, be required to release a Preliminary Affirmative Determination (PAD) and impose provisional measures.*
  - *Unless an extension of time has been granted, the release of a PAD should occur no later than day 110 in an investigation.*

## **6.6 Duration of measures and continuation arrangements**

Under Australia's anti-dumping system, measures are typically imposed for five years (the WTO maximum). The default term was increased from three years in 1991 following a Senate Committee report on means to facilitate access to anti-dumping protection (SSCIST 1991). Few measures have been revoked before term. Also, in keeping with the WTO agreements, measures can be extended for further periods of five years if a continuation review finds there is a case for doing so.

But while providing for extensions, the WTO agreements also specify that measures should remain in force only as long as is necessary to counter injurious dumping or subsidisation. An important issue for this inquiry is, therefore, whether the Australian requirements and the way they have been applied are consistent with the high-level WTO objective and with the goal of promoting the public interest more generally.

Participants expressed a diverse range of views about the duration of measures and continuation arrangements. Most recent users of the anti-dumping system contended that: five years is appropriate for both initial terms and continuations; and that there should be no pre-specified limits on continuations — that is, applications should be assessed on their merits. (See, for example, the Australian Dried Fruits Association, subs. 14, p. 5 and DR52, p. 3; BlueScope Steel, sub. DR55, p. 17; CSR, sub. 10, p. 5; PolyPacific and Townsend Chemicals, sub. DR51, p. 7; SCA Hygiene, sub. DR60, p. 2; and the TRTF, subs. 26, p. 35 and DR44, p. 5.) In contrast, users of goods that have been subject to measures contended that three-year terms should be adequate protection in the first instance and that the requirements for extensions should be more demanding (Australian Steel Association, sub. 28, para. 883 and Dow Chemical, sub. 3, p. 13).

In considering the efficacy of these aspects of the current arrangements, the Commission has been cognisant of the costs that firms incur in applying for measures. Too short a period of protection where a case for measures is established would unreasonably discourage meritorious applications — an equally inappropriate

---

outcome to overly lengthy protection. Given this, it considers that the current five-year default term for the initial imposition of measures is not unreasonable.

However, notwithstanding their consistency with the WTO agreements, the Commission considers that the appropriateness of the current continuation requirements that determine the total duration of Australia's anti-dumping measures is highly questionable.

- As noted in chapter 3, an increasing proportion of measures have been extended on one or more occasions. The longer that measures remain in force, the more they become protective devices that undesirably shield recipient industries from the need to adjust to underlying structural pressures. At the extreme end of the spectrum, the measures which have been in place on PVC exports from Japan and the USA for nearly 20 years, and on brandy from France for almost as long, cannot reasonably be construed as anything other than long-term industry protection.
- The current requirements governing the continuation of measures are necessarily less demanding and of a different ilk to those for initial investigations. This is because, with measures already in place, it is not possible to directly test for injury and causality. Thus continuation reviews are forward looking with Customs required to make a judgement about whether dumping is likely to recur upon expiration of measures. But this means that measures could, in theory, be extended in perpetuity without ever testing whether the injury or causality considerations that underpinned their initial imposition were still valid.
- Some continuation decisions also appear to have been highly speculative in nature. For example, one of the considerations in the recent decision to continue measures applying to linear low density polyethylene exports from Korea and Thailand was that impending capacity increases in the Middle East were 'supportive' of the possibility that exports from Korea and Thailand might be dumped in the future (ACS 2008, pp. 8–9). Yet as continuation decisions are not currently appellable to the TMRO, the merits of such speculation cannot be separately scrutinised.

The Commission further notes that:

- The continuation requirements for anti-dumping measures are less demanding than those for the WTO safeguard provisions. Initially, safeguard measures can only be applied for a maximum of four years, with the total duration of a measure (that is, the sum of the provisional, initial and extension periods) restricted to eight years. Moreover, reapplication of an expired safeguard measure that applied for longer than 180 days is prohibited for at least two years.

- 
- The desirability of tightening the WTO requirements governing the continuation of anti-dumping measures has been canvassed at Doha (see appendix C).

But even if the Doha discussions do not lead to any changes to these aspects of the WTO Agreements, the other considerations set out above suggest that Australia's continuation requirements should be tightened. Indeed, in the Commission's view, aside from the introduction of a bounded public interest test, this is one of the highest priority changes to the current system.

### **Draft Report approach**

In the light of the above, in the Draft Report, the Commission proposed that while the current five-year default period of initial protection should be retained, extensions should be limited to one three-year term. It observed that this would still provide for up to eight years protection without the need to resubmit a new case for measures.

And to ensure that there is some sort of distinction between anti-dumping measures and longer-term tariff protection, the Commission further proposed that there should be a two-year freeze on new applications for measures at the end of this eight-year period (or if measures are not continued, beyond the initial five-year term).

Finally, to mesh with a separate proposal to replace the current 'review of measures' arrangements with a more timely and cost-effective adjustment mechanism (see next section), it proposed that continuation reviews should automatically recalibrate the variable factors. (Though there is currently provision for such recalibration, it happens relatively infrequently.)

### **Responses to the Draft Report proposals**

Reflecting their general position on the duration of measures (see above), users of the system strongly supported the Commission's proposal to maintain the current five-year default term for anti-dumping and countervailing measures. And there was no overt opposition from downstream industry interests.

However, respondents were (unsurprisingly) divided over the proposed limitation on extensions to a single three-year term, followed by a freeze on reapplications.

Downstream users, as represented by the Food & Beverage Importers Association and the Australian Steel Association, were strongly supportive of such amendments, with the former arguing that:

---

After eight years of assistance through the dumping system, any further calls for assistance should be treated as a request for longer term industry assistance. (sub. DR46, p. 2)

and the latter going further, contending that a freeze should also apply to unsuccessful applications (ASA, sub. DR57, para. 278).

In contrast, many users of the system strongly opposed the proposed changes. Typical of this viewpoint was CSR, which argued that:

... the two year freeze on applications is completely unacceptable. There is a long history in certain segments whereby as soon as measures are removed, dumping recommences ... Furthermore it can take 12 months to prove the new case, leaving applicants to tough it out for another 3 years. (sub. DR47, p. 4)

In elaborating on the above, several participants said that the Commission's proposal would provide a two-year window for unfettered dumping. For example, BlueScope Steel contended that:

The notion of providing an importer, or group of importers, who have previously been proven to be causing injury to Australian industry with dumped product, a period of time during which they can re-offend and dump without fear of retribution is highly unusual. What is being proposed is analogous to releasing an offender from jail, and giving them permission to re-offend with impunity during a defined period. (sub. DR55, p. 12)

Some also noted that in placing limits on the extension of measures, the Commission was going further than the sort of changes in this area that have been canvassed at Doha. (See, for example, Penrice Soda Products (sub. DR54, p. 3).) And, in regard to the implications for countervailing actions, A3P (among others) noted that:

... subsidies and support in exporting countries that directly lead to dumping activities do not just disappear or cease delivering an unfair competitive advantage after an arbitrary term. (sub. DR45, p. 3)

(Others expressing opposition to the proposed time limit on measures and reapplication freeze included: the Australian Dried Fruits Association (sub. DR52, p. 3); OneSteel (sub. DR49, p. 2); Qenos (sub. DR48, p. 3); Sulo (sub. DR58, p. 2); and the TRTF (sub. DR44, pp. 4–5).)

## **The Commission's assessment**

The Commission recognises that the proposals in the Draft Report would represent a significant change to the current continuation arrangements, especially against the backdrop of an increasing proportion of measures being extended. It also recognises

---

that, for this component of the system at least, it would mean Australia's requirements would become more stringent than those in other countries.

However, neither of these outcomes constitute a reason for retaining the current provisions. In the Commission's view, none of the commentary from local industry interests has detracted from the broad rationale for the tightening proposed in the Draft Report — namely that the increasing proportion of measures which are being extended is further blurring the boundary between anti-dumping measures and long-term industry protection. And it reiterates that the regime proposed in the Draft Report, though stringent in an anti-dumping context, would be no more stringent than the WTO safeguard provisions (see above).

Nonetheless, the input from participants and its own further analysis has caused the Commission to reconsider the merits of a freeze on reapplications following the expiry of a measure.

In principle, as the Commission acknowledged in the Draft Report, there is a case for permitting immediate reapplications where countervailable subsidies are involved — these subsidies do not disappear simply because a measure has reached the end of its term. The same is also true of non-countervailable input subsidies that may be relevant in some dumping cases.

To cater for these situations in particular, the Commission looked at the possibility of an arrangement that would allow the Minister to waive the reapplication freeze in 'exceptional' circumstances and the scope for greater use of retrospective measures.

- But without very strong constraints on a waiver arrangement, there would be a considerable risk that waivers would become the norm. Also, the granting of a waiver could unreasonably condition the outcome of the subsequent investigation process.
- And retrospective measures could only offer a small offset to the continuation of injurious subsidisation (or the resumption of injurious dumping) during a two-year freeze period. This is because, in keeping with the strictures in the WTO agreements, Customs can only apply retrospective duties to goods imported in the 90 days prior to the imposition of provisional measures.

Further, as several participants pointed out, given the time taken to consider an application and undertake an investigation, a two-year reapplication freeze would involve closer to a three-year interregnum before measures could be reapplied.

In fact, this latter observation calls into question the need for a reapplication freeze to provide an opportunity to again test injury and causality issues. That is, following the expiry of a measure — which would, under the Commission's recommendations,

---

occur no later than eight years after commencement — evidence of injurious dumping or subsidisation over a subsequent 12-month period would normally be required to support a new application for measures. And with a further six months or more required to undertake an investigation, it would be close to two years before measures could be reapplied.

Accordingly, while the Commission is still recommending there only be scope for one three-year extension of a measure beyond the initial five-year term, it will no longer be recommending a freeze on reapplication following the expiry of a measure.

Nor will it be recommending any moratorium on reapplications following one (or several) unsuccessful applications for measures. The Australian Steel Association (sub. DR57, para. 278) argued that such a moratorium could reduce the incentives for strategic filing behaviour, as well as offering some administrative cost savings. But as discussed in chapter 4, the Commission is not convinced that, within the Australian system at least, the incentives for strategic filing are particularly strong. And its recommendation (7.7) for enhanced annual reporting by Customs on applications for measures that do not proceed to initiation, could reduce these incentives further. More generally, a moratorium of this nature could exclude some potentially meritorious cases that, because of the system's complexity, are often refined through a series of iterating applications before all the requirements are met.

#### RECOMMENDATION 6.4

***There should be no change to the current five-year default term for anti-dumping and countervailing measures.***

***However, extensions of anti-dumping and countervailing measures, following a continuation review, should be limited to one three-year term. And an application for new measures following the expiry of a three-year extension should be subject to the same requirements as the original application (including assessment against the public interest test as detailed in recommendation 5.1).***

***Continuation reviews should, in all cases, comprehensively examine and recalculate the relevant variable factors.***

## **6.7 Maintaining the currency of measures**

For the sorts of products that feature prominently in Australia's anti-dumping system, market conditions and hence prices can change rapidly. Thus, as explained in chapter 4, if not regularly adjusted, anti-dumping measures can, in some cases,

---

quickly become either ineffective in remediating injurious dumping or subsidisation, or unreasonably punitive.

Once a measure has been in place for at least 12 months, at the request of an affected party or at the direction of the Minister, Customs can review the ‘variable factors’ setting the level of that measure. Though injury and causality matters are not usually considered (unless revocation is specifically sought), this ‘review of measures’ process requires Customs to examine the variable factors (normal value, export price, benefit of the subsidy and non-injurious price) as if it were a new investigation.

However, such reviews occur infrequently. Over the past decade, Customs has, on average, reviewed only three measures each year — less than 10 per cent of the average number of measures in place over this period. Moreover, some 40 per cent of these reviews have been at the direction of the Minister (rather than directly requested by either a local supplier, importer or overseas supplier). Although related matters arising in other investigations have often prompted the Minister’s involvement, a further consideration has been the significant periods of time that have sometimes elapsed (up to five years) since previous updates.

Customs also re-examines all of the variable factors when considering requests from importers for duty refunds. However, any changes made to the variable factors as part of this ‘administrative review’ process do not carry forward to subsequent consignments of the goods concerned. And, as well as being dependent on requests by importers, the extent to which this process re-examines the variable factors is partly contingent on the amount of duty involved (see box 6.6).

Evidently then, the current adjustment mechanisms do not constitute an efficient or effective way of ensuring that anti-dumping measures retain their currency in changing market circumstances. Accordingly, a more timely and cost-effective, though still rigorous, adjustment mechanism is required to regularly update all measures in place.

In the Draft Report, the Commission proposed updating the variable factors (and, in turn, the magnitude of each measure) through an auditable self-assessment process, or some other cost effective mechanism determined at the time measures were imposed. It further suggested that this self-assessment process could involve:

- exporters submitting estimates of their contemporary normal values and export prices to Customs as a basis for adjusting the relevant duty (or floor price specified in an undertaking)

- 
- where the lesser duty rule had been applied on a constructed basis, the local industry lodging a simple pro-forma indicating how its relevant costs had changed in the preceding 12-month period.

#### **Box 6.6 Duty refunds and collection arrangements**

An importer can apply for a duty refund assessment where it considers that the duty it has paid on a consignment of goods subject to an anti-dumping measure exceeds the actual dumping margin. This situation may arise, for example, where the actual export price exceeds the normal value or non-injurious price that was determined when the measures were first imposed or last adjusted following a review of measures. Some duty would also be (prima facie) refundable where the export price is below the normal value or non-injurious price, but is above the ascertained export price.

Applications for duty refunds can only be lodged at six-monthly intervals and any refunds do not include a component for interest foregone. Customs requires importers to provide various information in support of their claims, including on the export price and normal value which the importer contends were applicable to each consignment and the information used by the importer to establish those amounts (ACS 2000, p. 15).

As part of these reviews, Customs re-examines all of the variable factors (including subsidy rates), though any changes do not carry forward to subsequent consignments and the extent of re-examination is dependent on the amount of duty involved.

Although only a few importers apply for duty refunds (around six each year since 2004), where refunds have been sought, the vast bulk (around 90 per cent) of the duty collected has been returned. And not surprisingly, those importers seeking refunds tend to be those with large initial duty liabilities. Hence, over a third of total duties collected have been refunded in recent years (see chapter 3).

The other notable feature of the duty refund arrangements is the asymmetric method for determining the amount of duty payable when the goods are entered into Australia.

- Where the actual export price is lower than the ascertained export price, the duty established by the prevailing normal value or non-injurious price, plus an additional variable duty, is immediately paid by the importer.
- But when the export price is higher, the 'excess' duty (based on the existing variable factors) is not immediately refunded. Rather, the importer must formally seek a refund via the administrative review process outlined above.

This asymmetry can thereby give rise to outcomes for importers that many might regard as inequitable.

However, the Commission also recognised that the self-assessment process might not always be the best and most cost-effective approach. For example, it suggested that in some situations, it might be possible and preferable to use international price indexes, an option raised by Dow Chemicals (sub. 3, p. 7) and previously applied by Customs

---

to a price undertaking (ACS 2001, p. 37). Consequently, it sought further input from participants on how the proposed adjustment mechanism might be best configured.

Additionally, the Commission proposed changes to the basis for collecting dumping and countervailing duties on individual consignments of goods subject to measures. In essence, the proposal involved collecting the ‘correct’ amount of duty at the time of importation, with adjustments down as well as up to reflect movements in export prices subsequent to the imposition of measures. With this new collection arrangement in place, the Commission argued that a duty refund system would no longer be required and thus proposed that the administrative review provisions be terminated.

## Responses to the Draft Report

Most respondents to the Draft Report supported the ‘in principle’ case for regular, cost-effective, adjustments to the magnitude of measures. Typical was BlueScope Steel (sub. DR55, p. 18) which stated that:

In principle BlueScope supports annual reviews of normal values, non-injurious prices and applicable dumping duties, or the floor price in undertakings to ensure that anti-dumping measures remain effective in remediating injurious dumping/subsidisation.

Others supportive or accepting of the broad approach included: A3P (sub. DR45, p. 4); Australian Paper (sub. DR41, p. 4); CSR (sub. DR47; p. 4); Law Council of Australia and Law Institute of Victoria (sub. DR56, table item 6); Penrice Soda Products (sub. DR54, p. 3); Sulo (sub. DR58, p. 2); and the TRTF (trans. p. 15).

However, several industry participants expressed strong reservations about a self-assessment approach for adjusting the variable factors, suggesting that it would be no substitute for decision-making based on properly verified information and be open to abuse. For example:

The proposals to have self assessment determine adjustments flies in the face of the commitment by parties to obtaining the best outcome in the first determination. It would not be unexpected to find that parties are unwilling to cooperate with spot audits and that it is not possible to prosecute overseas parties. This provision is wide open to abuse ... annual adjustments should be limited to where there is open transparent data which is of sound integrity. (CSR, sub. DR47, pp. 4–5)

The recommendation on self-assessment fails to recognise that if an overseas supplier is continuing to dump in Australia, it would have little incentive to admit that. There must be checks and balances to ensure that there is an incentive to provide accurate information during review of measures. (TRTF, sub. DR44, p. 4)

Others to raise this issue included: OneSteel (sub. DR49, p. 6); PolyPacific and Townsend Chemicals (sub. DR51, p. 8) and Qenos (sub. DR48, p. 3). And Qenos

---

further argued that all interested parties should be afforded the opportunity to participate in any adjustment to measures to ensure that Customs is able to comprehensively determine new variable factors.

Finally, several local industry interests also opposed the proposed changes to the duty collection system, with the Australian Dried Fruits Association (sub. DR52, p. 3) claiming that it would, in effect, lead to duty evasion. However, the proposal was supported by the Australian Steel Association (sub. DR57, para. 281).

## **The Commission's assessment**

### *Adjustments to the magnitude of measures*

The Commission remains of the view that there is a clear need for a new mechanism that would allow for more timely and cost-effective adjustments to the magnitude of *all* measures on an annual basis. Notwithstanding the concerns of some participants about the form of mechanism that should be adopted, regular adjustments are important to ensure the currency of measures and thereby minimise the risk that they may become either ineffective in removing injury or unreasonably punitive.

The current provisions do not meet these requirements. One set is very cumbersome and costly — involving what amounts to a new investigation, including exporter verification visits — and is only infrequently used. The other can only be triggered by an importer seeking a refund of overpaid duties, meaning that again reviews will not necessarily occur in every case where market conditions have changed significantly. It is also a retrospective review and does not adjust measures prospectively.

However, on further consideration, the Commission accepts that there would be some drawbacks in too heavy a reliance on self-assessment, especially if the cooperation of some of the parties were difficult to secure. Also, depending on precisely how the arrangement operated, there could be tension with the principle of verifiable information that underlies the WTO Agreements.

Thus the Commission is of the view that a preferable approach would be to employ a streamlined and generalised version of the sort of risk management approach currently used by Customs for adjusting the variable factors on a one-off basis under the duty refund process. Specifically:

- Customs would collect the data necessary to recalculate the variable factors via annual returns from overseas suppliers and, where the lesser duty has been applied, from the local supplier(s). Assembling such data should not be overly onerous for firms, particularly if they knew in advance that it would be required.

- 
- Customs would employ the sort of ‘risk managed’ verification of these data that it applies to the current duty refund provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on the use of desk audits of information provided by the relevant parties, reference to international price indexes, or other relevant price benchmarks. The Commission’s expectation is that this sort of approach would often obviate the need for costly and time consuming onsite verification. It further notes that application of the current adjustment provisions already involves trade-offs between precision and investigative cost. As such, the Commission’s recommended approach would be an extension of, not a fundamental change to, the current risk-management framework.
  - As a working objective, Customs should aim to complete the annual verification and updating process for each measure within 30 days. This would be considerably shorter than the time taken for most of the adjustments under the current arrangements.

Some form of sanction — or recourse to an alternative basis for making the adjustments — would be required when particular parties subject to measures do not provide the necessary information, or provide misleading information. In regard to the latter, the Commission has been advised that there is some uncertainty about the extent to which the existing penalty provisions might apply to the proposed adjustment process. Accordingly, were it judged necessary to facilitate greater reliance on desk audits, Customs could be granted additional powers to apply penalties for false reporting specific to this process. (Any such penalties would presumably need to make the importer liable for false reporting by its overseas supplier, and might also need to be of a somewhat different ilk where a local supplier had falsely reported on matters relating to the magnitude of a lesser duty.)

The adjustment process outlined above could, in some cases, lead to measures being set at a zero level (as can currently occur through the ‘review of measures’ arrangements). But to allow for the possibility that circumstances might, in future, see a return to a positive duty outcome, the Commission considers that measures should remain in place for the original duration. It also notes that there would seemingly be no problem in applying the proposed adjustment process to undertakings — a concern raised by Australian Paper (sub. DR41, p. 3). Though undertakings effectively involve a commitment by the overseas supplier not to export at below a particular price level, there is no reason why provision could not be made in an undertaking to annually adjust that price level.

Finally, the Commission considers that the outcomes of the adjustment process should be determined and notified by the CEO of Customs without the involvement of the Minister. This would be consistent with the streamlined nature of the new

---

adjustment mechanism — which is intended to be a timely and cost-effective, though still soundly based, means for ensuring that measures retain their currency, and not a more fundamental reassessment of whether those measures are appropriate. For the same reason, allowing appeals against the outcomes of the process would not be appropriate. In this context, the Commission notes that decisions made under the current review of measures arrangements are likewise non-appellable. (The Minister would, however, continue to make the final decision on the outcomes of continuation reviews (see above) which would, in future, automatically recalibrate the variable factors.)

RECOMMENDATION 6.5

***The current ‘review of measures’ and ‘administrative review’ provisions should be abolished and replaced by a single new mechanism to adjust the magnitude of all anti-dumping and countervailing measures on an annual basis. The resulting adjustments, which should be determined and notified by the CEO of the Australian Customs and Border Protection Service (ACBPS), should not be appellable.***

- ***The new mechanism should employ the sort of risk-management approach applied by the ACBPS when assessing requests for duty refunds under the current administrative review provisions, but with greater reliance — wherever possible without significantly reducing investigative rigour — on desk-audits of information provided by the relevant parties, international price indexes, or other relevant price benchmarks.***
- ***Where this adjustment process leads to a zero duty rate, measures should still remain in place for the original term.***
- ***If considered necessary to facilitate greater reliance on desk audits, the ACBPS should be granted additional powers to apply appropriate penalties for false reporting.***

***The basis for collecting duties***

In keeping with the approach outlined in the Draft Report, the Commission is recommending a concurrent change to the basis for collecting dumping and countervailing duties. Notwithstanding the contentions of some local industry interests, it sees no reason why the current asymmetric collection approach is necessary to maintain the integrity of the system.

Specifically, it is recommending that the duties payable on individual consignments of goods subject to measures be based on the actual export price relative to the export price at which no duty would be payable given the prevailing variable factors. In practical terms, this would mean that duty would only be collected when

---

the actual export price was below the ‘price floor’ established by the applicable normal value or non-injurious price.<sup>2</sup>

This change would also allow for the abolition of the duty refund system. In the Commission’s view, there would be much less reason to retain a refund system within a regime where the magnitudes of all measures were adjusted on an annual basis to retain their currency, and where duty payments at the time of importation were based on these more contemporary levels.

The Commission notes the contention of Sulo (sub. DR58, p. 2) that, where the lesser duty rule has been applied, the sort of duty collection approach outlined above would not be possible. The Commission interprets this to be a concern about the potential for revelation of confidential information rather than a technical issue. That is, armed with single consignment-based information on the adjusted duty payable together with information from the overseas supplier on the relevant normal value, it might be possible for the importer to calculate the non-injurious price which may, in turn, have been based on the local supplier’s cost to make and sell.

But as discussed in the next chapter in regard to improved public reporting on the magnitudes of anti-dumping measures and the underlying basis for them, where the variable factors are based on aggregated information from several parties, these sorts of confidentiality concerns will be greatly diminished. And even where there are constraints on the amount of detail that can be overtly published because the variable factors are based on the circumstances of individual firms, it will be hard to prevent overseas suppliers and importers combining the information provided to them individually, to deduce this detail. Accordingly, the Commission does not consider that confidentiality concerns should preclude the introduction of the proposed new duty collection arrangements.

RECOMMENDATION 6.6

***The basis for collecting dumping and countervailing duties should be modified. Specifically, for goods subject to a dumping duty, or to a countervailing duty involving the lesser duty rule, the duty collected at the time of importation should be based on the actual export price relative to the export price at which no duty would be payable on the basis of the prevailing, annually adjusted, variable factors. Concurrent with this change, provision for importers to seek refunds of overpaid duties should be abolished.***

---

<sup>2</sup> Where a countervailing duty is based on the full benefit of the subsidy provided by the overseas government, rather than on the non-injurious price, the measure will not, of course, establish a price ‘floor’. Instead, the duty will simply be an add-on to the export price of the good concerned.

---

### *Revocation matters*

While the main component of the current review of measures provisions would be rendered redundant by the recommended new annual adjustment process, those provisions also address some separate revocation matters. Thus there is provision for affected parties to apply for a revocation review where it is shown that, were the measure not in force, there would be no grounds for its introduction. (There have been two such revocations since 1998.)

However, if there were better monitoring by Customs of the impacts of measures (see box 6.7), then a more streamlined revocation process linked to that monitoring, and integrated with the annual adjustment of measures, would be possible.

Specifically, Customs should seek feedback on the impact of measures as part of the proposed new process for adjusting them. In the event that it received information indicating that local production of a good subject to measures had ceased, and was unlikely to recommence in the period for which the measures would otherwise remain in place, then it would recommend to the Minister that the measure concerned be revoked.

And were it judged necessary to maintain a self-standing revocation review process for WTO or other reasons, then at the very least, there should be an interlinkage with the new annual adjustment process and the related feedback provided to Customs on the effectiveness of measures. That is, if the circumstances outlined in the previous paragraph applied, Customs should then be able to initiate an (expedited) revocation review for consideration by the Minister.

#### RECOMMENDATION 6.7

***The Australian Customs and Border Protection Service (ACBPS) should, as part of the annual adjustment of measures (see recommendation 6.5), seek feedback from the various parties on the impacts of those measures over the preceding 12 months — including on market prices — and investigate further if appropriate.***

***Where such feedback indicates that local production of a good subject to measures has ceased, and is unlikely to recommence in the period for which the measures would otherwise remain in place, the CEO of the ACBPS should advise the Minister to revoke the measures. This process should replace the current revocation arrangements.***

---

### Box 6.7 Monitoring by Customs

Following the imposition of measures, Customs is required to ensure that correct amounts of duty are paid and/or that the conditions in undertakings are adhered to. However, it does not disclose details of these monitoring activities. Nor do its monitoring activities normally extend to examining the impact of measures on the prices of the imported goods when sold in the domestic market.

To help address concerns about the lack of monitoring of the effectiveness of measures — including in regard to duty absorption by importers, circumvention through rebates and ‘country hopping’ — the Joint Study (2006) recommended that Customs should:

- assess the need for a formal compliance monitoring exercise, encompassing circumvention of measures, within 12 months of the imposition of measures (recommendation 19)
- explore existing review mechanisms available to it which may address duty absorption concerns (recommendation 20).

Nonetheless, concerns about the ineffective nature of current monitoring endeavours were again evident in this inquiry, with a number of participants suggesting that Customs should give much greater attention to what is happening to input costs in downstream markets. For example, OneSteel proposed that:

In addition to the duty collection function, Customs should also be involved in monitoring the effect of the interim duties imposed on market selling prices for the [goods under consideration] — to ensure that the duties imposed have the desired effect of enabling the industry’s prices to recover to non-injurious levels. (sub. 16, p. 18)

In the Draft Report, the Commission proposed that, as part of the annual adjustment of measures, Customs should actively seek feedback from local suppliers on the impacts of measures and, on the basis of this feedback, determine whether further action is required. This approach was endorsed by a number of respondents to the Draft Report, including: A3P (sub. DR45, p. 4); the Law Council of Australia and the Law Institute of Victoria (sub. DR56, table item 15); PolyPacific and Townsend Chemicals (sub. DR51, p. 12); Qenos (sub. DR48, p. 5); and Sulo (sub. DR58, p. 3). As discussed in the text, the Commission is now recommending that this feedback also be used to underpin a more streamlined revocation process.

## 6.8 Countervailing issues

Australia’s anti-dumping system does not differentiate, in broad terms, between dumping and countervailing in regard to the information required to mount a case for measures. Nor does it differentiate in terms of the burdens of proof applying in relation to matters such as material injury and causality.

Nonetheless, it is clearly harder to mount countervailing cases. As noted in chapter 2, only one of the current measures in place is a countervailing measure. And while

---

there have recently been a handful of countervailing cases initiated — for example, toilet paper from China and currants from Greece — all have been withdrawn prior to the investigation being finalised.<sup>3</sup> Some particular difficulties referred to by participants in this context included those resulting from the need to:

- identify the nature of an actionable subsidy and how an overseas supplier directly benefits from it
- determine its likely effects on trade
- establish a causal link between the subsidy and any material injury incurred.

Other countervailing-specific concerns raised by participants included:

- the European Union's recent change to the basis for most of its agricultural subsidies which has rendered them non-countervailable (Australian Dried Fruits Association, sub. 14, p. 5)
- Australia's narrower list of actionable subsidies relative to the list permitted by the WTO (see chapter 2).

Especially given that the 'fairness' case for taking action to offset subsidies provided by other governments is arguably stronger than for action against dumping, the concerns about the difficulty of mounting countervailing cases are understandable.

However, it is unclear how this difficulty could be addressed in a fundamental way without reducing the rigour of the assessment process. For example, even were there to be a shift in the information burden from those seeking measures to Customs, many of the information-related difficulties of satisfying the requirements for measures would remain. And given broader 'relationship' issues with other governments, any reduction in the rigour of the process would be problematic. Not surprisingly, therefore, concerns about the difficulties of bringing countervailing actions have been evident in many countries, with such measures being generally minor in number relative to anti-dumping measures (see chapter 3).

Similarly, it is hard to see how actions by countries to recalibrate their subsidies so as to quarantine them from countervailing action could be addressed independently of WTO reform processes. Moreover, the recent recalibrations by the European Union are hardly unique, with many countries taking care to ensure that their subsidies conform with WTO requirements.

---

<sup>3</sup> The Commission notes that the current investigation of the alleged dumping and subsidisation of certain aluminium extrusions exported from China is ongoing, with Customs due to report to the Minister by 15 April 2010.

---

Nonetheless, the Commission is recommending two initiatives directed at improving the arrangements governing Australia’s countervailing system.

- Where countervailing cases are initiated, there may be greater scope for Customs to take account of relevant overseas investigations (see recommendation 7.6.), thereby reducing the evidentiary burdens on applicant industries.
- Australia’s list of actionable subsidies should be aligned and kept aligned with the wider WTO lists. While change in this area — which was canvassed by DFAT (sub. 22, paras. 3.14–3.16), and supported by many other participants (see, for example, Department of Agriculture and Food Western Australia, sub. DR43, p. 2; OneSteel, sub. DR49, p. 7) — would most likely have only a minor impact on the scope for Australian industries to bring countervailing actions, it would have a more general benefit by addressing a perceived unfairness in the current system.

RECOMMENDATION 6.8

***Australia’s list of actionable subsidies should be aligned and kept aligned with the lists in the latest relevant WTO agreements.***