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## C Anti-dumping in a global context

### Key points

- The WTO is the primary global body regulating trade-related matters.
  - The *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures* are the key agreements relevant to this report.
  - These agreements set the substantive rules on when action can be taken against dumping and subsidisation, as well as the procedural rules member countries must follow if they have an anti-dumping system.
- However, flexibility in the way the agreements can be implemented by member countries gives rise to some substantial differences between anti-dumping systems. For example:
  - The time taken for dumping investigations varies, with Australia having one of the quickest investigation processes in the world.
  - Parties' lack of access to confidential information under the Australian system is in line with similar restrictions in New Zealand, India and the European Union. In contrast, the USA and Canada allow access to confidential information by way of 'administrative protective orders'.
  - Australia's treatment of China as a market economy when calculating normal values is more 'permissive' than under the US, EU and Indian systems.
  - Unlike the European Union and Canada, Australia's system provides no explicit scope to take account of wider interests in determining whether to impose measures.

The World Trade Organization (WTO) is the primary global body regulating trade-related matters between member countries. As discussed in chapter 2, member countries are not obliged to have an anti-dumping and/or countervailing system; but having chosen to do so, their systems must conform to the relevant global agreements.

Section C.1 of this appendix summarises the content of the two WTO agreements that govern anti-dumping and countervailing measures globally. Section C.2 details how some of the key features of the agreements are treated by other developed and developing nations, while section C.3 examines the current Doha round of WTO negotiations as they relate to the anti-dumping and countervailing agreements.

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## C.1 The WTO agreements

Two WTO global agreements govern the implementation of anti-dumping and countervailing systems in member countries:

- the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, also known as the Anti-Dumping Agreement
- the *Agreement on Subsidies and Countervailing Measures*, also known as the Countervailing Measures Agreement.

It is important to note that, in the context of global trade, the WTO does not prohibit the practice of dumping per se; rather the agreements discipline members' use of trade measures against the injurious effects of dumped (or subsidised) imports. This is because the WTO governs the trade actions of member countries rather than dictating the pricing practices of private firms.

### The Anti-Dumping Agreement

The Anti-Dumping Agreement comprises 18 articles and two annexes, and has two primary goals; namely, to establish the rules that must be met in order for alleged dumping to be substantiated, and the procedures that authorities must follow to investigate allegations of dumping and to impose measures.

However, the agreement is largely principles-based, and member countries have considerable flexibility in interpreting certain aspects of the agreement and its implementation. As result, there are some significant differences in anti-dumping systems across the world.

In effect, the agreement comprises a 'minimum standard' for domestic anti-dumping systems, and in certain areas, countries are able to impose more demanding requirements on local industries seeking the imposition of measures.

#### *Substantive rules*

Articles one to four of the agreement outline the substantive rules concerning dumping. The basic principle of the agreement is that member countries may not impose remedial trade measures against imports unless it is shown that those imports are dumped, and that they have caused (or threatened to cause) material injury to a domestic industry producing like goods. The agreement deals with these concepts in turn.

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A key requirement is that an investigating authority should determine dumping on the basis of the definitions in the agreement. A good is considered to be dumped if it is exported to another country at below its normal value. The agreement outlines the methodologies to be used to calculate the normal value of the dumped good, particularly in circumstances where the price of the good in the supplier's home market is not a 'commercial' one, or information about its price is not readily available.

The agreement guides investigating authorities as to what constitutes injury to a local industry, as well as how to determine a threat of injury. It also requires that there be evidence of a causal link, and suggests factors other than dumping that might be causing injury to the local industry.

### *Procedural rules*

Articles 5 to 15 of the agreement deal with the procedural requirements for anti-dumping investigations. Member countries are bound to follow certain procedures, thus somewhat limiting their freedom to tailor a system that best suits their particular circumstances.

The rules outlined in the agreement deal with the initiation of cases and their subsequent investigation, including the evidence thresholds required before measures can be imposed. It specifies who 'interested parties' are for the purposes of joining an investigation, and deals with the treatment of confidential information (including the requirement that parties provide non-confidential summaries of any confidential information submitted).

The agreement also provides for the imposition of provisional measures while an investigation continues, and the imposition and collection of final dumping duties (and the retrospective imposition of measures). And it specifies a role for undertakings, as well as the maximum duration of any measures imposed.

Further, the agreement requires investigating authorities to maintain a public record of all files in a dumping investigation, and that member countries provide for judicial reviews of cases.

### *Dispute resolution*

WTO member countries can challenge another country's implementation of the agreement through the WTO Dispute Settlement Body. In addition, there is a WTO Committee which regularly reviews individual member countries' anti-dumping systems.

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## **The Subsidies and Countervailing Measures Agreement**

The Subsidies and Countervailing Measures Agreement deals with similar issues to the Anti-Dumping Agreement, but given the different nature of subsidisation, there are some variations. For example, the concepts of normal values and ascertained export prices are not relevant in countervailing cases.

The agreement defines a subsidy, and then further delineates between ‘prohibited’ subsidies and ‘actionable’ and ‘non-actionable’ subsidies. It also specifies consultation requirements between the investigating authority and the country alleged to have provided a countervailable subsidy.

However, most of the procedural rules for countervailing cases are substantially the same as for anti-dumping cases, including in regard to applications, investigations, injury, evidence, definition of a domestic industry, and imposition of provisional and final measures.

### **C.2 Anti-dumping and countervailing systems in other countries**

Given the principles-based nature of the WTO agreements, there are various differences across countries in the configuration of anti-dumping systems. Some of the more important areas in which requirements and procedures vary include:

- the number of agencies involved in administering the system
- the time taken to complete investigations and the sequence of the investigative tasks
- the breadth and nature of appeals processes
- the treatment of non-market economies and economies in transition
- whether there is provision to consider the broader public interest.

Table C.1 provides a summary of the arrangements in Australia, New Zealand, the USA, Canada, the European Union and India.

#### *System administration*

There are differences in the number of agencies involved in administering anti-dumping systems. Australia, New Zealand, India and the European Union use one agency. However, in Canada, the Canada Border Services Agency investigates dumping, while injury is determined by the Canadian International Trade Tribunal.

**Table C.1 A comparison of anti-dumping and countervailing systems**

	<i>Australia</i>	<i>New Zealand</i>	<i>USA</i>	<i>Canada</i>	<i>European Union</i>	<i>India</i>
<i>Bifurcated administration</i>	No	No	Yes	Yes	No	No
<i>Investigating authority: Dumping and subsidisation</i>	Australian Customs and Border Protection Service	Ministry of Economic Development	United States Department of Commerce	Canada Border Services Agency	European Commission	Ministry of Commerce
<i>Investigating authority: injury and causal link</i>	Australian Customs and Border Protection Service	Ministry of Economic Development	United States International Trade Commission	Canadian International Trade Tribunal	European Commission	Ministry of Commerce
<i>Target investigation timeframe (days)</i>	155	180	280	210	365	365
<i>Treatment of China</i>	Market economy	Market economy	Non-market economy	Starting presumption of market economy	Economy in transition	Economy in transition
<i>Public interest test</i>	No	No	No	Yes	Yes	No
<i>Decision maker on imposition of measures</i>	Minister	Minister	United States International Trade Commission	Canadian International Trade Tribunal	Council of Ministers	Ministry of Finance
<i>Merit and judicial reviews</i>	Merit (TMRO) Judicial review	Judicial review	Judicial review	Judicial review	Judicial review	Judicial review
<i>Lesser duty</i>	Yes	Yes	No	Yes (as part of the public interest test)	Yes	Yes

Sources: Australian Customs and Border Protection Service (sub. 33, p. 7); India Ministry of Commerce (2009); New Zealand Ministry of Economic Development (2009).

Similarly, the US Department of Commerce investigates allegations of dumping, while its International Trade Commission makes determinations about injury.

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The scheduled time from initiation to the imposition of measures also varies. With a target timeframe of around 5 months, Australia operates one of the most rapid systems in the world. In comparison, the scheduled timeframes are around 6 months in New Zealand, 7 months in Canada, 9 months in the USA, and 12 months in the European Union and India. However, systems typically provide for extensions, so that in India, for example, the investigation process can extend to 18 months. While these differences in time frames reflect various factors, a contributor to longer time frames in the European Union is the requirement to consider ‘community interests’ in all cases.

Another significant difference between systems relates to the handling of confidential information provided by interested parties during the course of an investigation.

- In Australia, New Zealand, the European Union and India, confidential information provided to the investigating authority cannot be disclosed to the opposing parties in the case. Those parties must rely on public summaries of such information when responding to claims.
- In contrast, in the USA and Canada, confidential information can be provided to the legal counsel of an opposing party where that information is covered by an ‘administrative protective order’ (APO). On the one hand, APOs can enhance natural justice in dumping cases and potentially deliver more rigorous outcomes, because parties have full knowledge of (and can respond to) the specific allegations being made about them. However, the involvement of legal counsel increases the costs to parties involved in cases. APOs are considered in more detail in chapter 7 of the report.

### *The appeal process*

Article 13 of the Anti-Dumping Agreement requires, as a minimum, that each member country have some form of judicial review of anti-dumping measures and procedures, independent of the investigating authority. The nature of this review body is not prescribed and may take the form of a court, tribunal or other body. Moreover, Article 13 does not limit a member country’s ability to complement judicial review provisions with other administrative review mechanisms.

As discussed in chapter 2, Australia provides for merits reviews by the Trade Measures Review Officer, and for further appeals on points of law to the Federal Court.

In New Zealand, decisions of the Trade Remedies Group (within the Ministry of Economic Development) and the Minister can be appealed to the High Court. In the USA, interested parties may appeal to the Court of International Trade. Canada provides for appeals on both matters of fact and law to its Federal Court of Appeals, while India allows appeals to the Customs, Excise and Gold (Control) Appellate Tribunal. In the European Union, appeals by interested parties may be brought before the European Court of First Instance.

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### *Non-market economies and economies in transition*

In determining normal values for the purposes of assessing dumping, the WTO agreements allow countries to consider the ‘market situation’ in the exporting country; that is, whether a country has a predominantly market economy, or whether there is substantial government involvement that artificially lowers the normal value of the goods. Article 15 of the Anti-Dumping Agreement further allows member countries to treat developing economies differently when calculating normal values and export prices.

One key point of difference between the Australian anti-dumping system and that of many other countries is the granting of ‘market-economy status’ to China. This means that in dumping cases involving exports from China, in the first instance, Australia considers the Chinese domestic price to be the normal value of the goods concerned. That said, via other non-country specific provisions, Australia can adopt alternative methodologies for constructing normal values when the domestic price of the allegedly dumped good is determined to be artificially low (for example, because of significant government intervention in the economy concerned).

In contrast, the USA treats China as a non-market economy. And the European Union and India adopt an intermediate position, based on Article 15 of the WTO’s *Protocol on the Accession of the People’s Republic of China*; in the first instance, treating China as a ‘country in transition’ to being based on market principles. This allows for the use of alternative methodologies for constructing normal values (such as prices in a surrogate third country) (Ikenson, 2005). However, if the importer can show that market economy conditions prevail in the Chinese industry concerned, then the Chinese domestic price may form the basis of the normal value for the purpose of determining whether there has been dumping. And in Canada, the approach is even closer to that in Australia. Specifically, the Canada Border Services Agency begins investigations with a presumption that the non-market alternative methodologies do not apply, unless there is evidence to suggest the overseas industry under investigation operates in a non-market fashion.

### *Public interest tests*

A significant difference in anti-dumping systems is whether they embody a ‘public interest test’ that allows for wider impacts to be taken into account in determining whether measures should be imposed. As discussed in the body of the report, Australia does not have such a test. Nor do New Zealand, the USA and India.

In contrast, under the EU system, a ‘community interest test’ applies to all investigations (see box 5.2). And in Canada, there is scope to impose a lesser duty (which may be zero) if public interest considerations so dictate (see box 5.3).

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### *Use of undertakings*

As noted, the WTO agreements do not prohibit the practice of dumping per se, and indicate that any measures imposed should be remedial rather than punitive. Accordingly, provision is made in the agreements for an investigating authority (or decision-maker) to accept an undertaking from an exporter to price future exports above the non-injurious level.

However, undertakings comprise only a small share of total measures in most jurisdictions. For example, the WTO reported that between October 2007 and October 2008, of the 28 new measures imposed in the USA only 1 was an undertaking, and that all of the 11 new measures imposed in the European Union involved duties. Similarly, as discussed in chapter 3, only 3 of the 27 measures currently in place in Australia involve undertakings, and in all of those cases, duties also apply to some exporters.

### *Balance between anti-dumping and countervailing cases*

As noted in chapter 3, measures against dumping predominate in most countries, including Australia. For example, between 1999 and 2008, only 95 new countervailing measures were imposed globally, compared to nearly 1700 anti-dumping measures (see table 3.3).

A number of factors appear to explain this, including:

- less awareness among local industries about the countervailing system
- the greater difficulty of demonstrating that a subsidy is the cause of material injury to a local industry
- the scope for countries to design subsidy support to render it ‘non-actionable’.

## **C.3 Doha negotiations**

As the primary organisation overseeing multilateral trade negotiations and rules enforcement, the WTO evolves by member countries updating the agreements through negotiation ‘rounds’. The current Doha negotiating round began in November 2001, when member countries agreed, amongst other things, to clarify and improve the disciplines imposed by the *Anti-Dumping Agreement* and the *Subsidies and Countervailing Measures Agreement*.

Although the Doha round has not yet concluded, some 150 member countries have submitted suggested changes to the two agreements and, in December 2008, the Chairman of the Negotiating Committee circulated an updated draft of the anti-

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dumping and countervailing agreements, reflecting the state of negotiations at that time (WTO, 2008b). However, the draft acknowledges that there are significant differences of opinion amongst member countries.

### **Key issues for negotiation in the Doha round**

WTO members have recognised that there would be potential benefits from improving the clarity and precision of anti-dumping and countervailing processes and concepts. They have also expressed a desire for incremental change, rather than wholesale reform.

#### *Public interest tests and lesser duty rules*

The current anti-dumping and countervailing agreements are silent on the scope and means for member countries to take account of wider impacts in anti-dumping cases.

Not surprisingly, there has been significant disagreement amongst member countries about the possible provision for a public interest test in the agreements. Some, including Australia, have argued that the decision on whether to employ a public interest test should be left to individual countries, while others have contended that such a test should be a mandatory component of the system.

A similar divergence of views has been evident in relation to lesser duty arrangements. Some countries consider that a mandatory lesser duty rule would be in the spirit of the agreements (in that it would help to ensure that measures are remedial only and not punitive), while others question the ability to calculate an ‘injury margin’ in every circumstance.

#### *Causation of injury*

Those parts of the agreements relating to injury indicate potential factors other than the dumped imports that may be causing injury, including the volume and price of un-dumped imports, as well as changes in domestic demand, technology, and the export performance and productivity of the domestic industry.

Member countries have discussed, but have so far failed to agree on, whether it should be mandatory for the investigating authority to distinguish the effects of dumped imports from other factors, and whether there should be a requirement to undertake quantitative analysis of causation.

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### *Material retardation to the establishment of an industry*

As a general principle, for an anti-dumping or countervailing case to proceed to initiation, there must be production of like goods by the domestic industry. And, in most cases where measures are imposed, it will be on the basis of actual dumping or subsidisation.

However, the agreements also allow for the imposition of measures where:

- the possibility of dumped or subsidised imports threatens material injury to a domestic industry
- dumped or subsidised imports retard the establishment of a domestic industry; that is, where no local production currently exists.

That said, there is uncertainty around the application of these provisions, with participants at Doha having discussed, for example, whether the latter should only apply if there is no local production of the like goods concerned. (As far as the Commission is aware, this provision has not been used to support the imposition of anti-dumping measures in Australia.)

### *Sunset provisions*

There has also been considerable debate at Doha about the sunset provisions for measures imposed. While some countries are in favour of measures automatically terminating after five years without consideration of a possible extension, others argue that dumping terms should be determined on a case-by-case basis, and that automatic termination is inappropriate if the initial circumstances allowing for measures remain.

And there has been debate about proposed changes to the rules on the initiation of sunset reviews (including whether the investigating authority can unilaterally review measures prior to their expiry), the evidence thresholds to be met before measures can continue, and the timeframes for undertaking reviews.

Currently, some countries (including Australia) commence a sunset review prior to the expiry of a measure, whereas others wait until measures have been in place for the full five-year term.

### *Countervailing measures*

Possibly reflecting the greater acceptance by member countries of the underlying rationale for countervailing measures, there have been relatively few changes proposed to the countervailing-specific provisions at Doha.