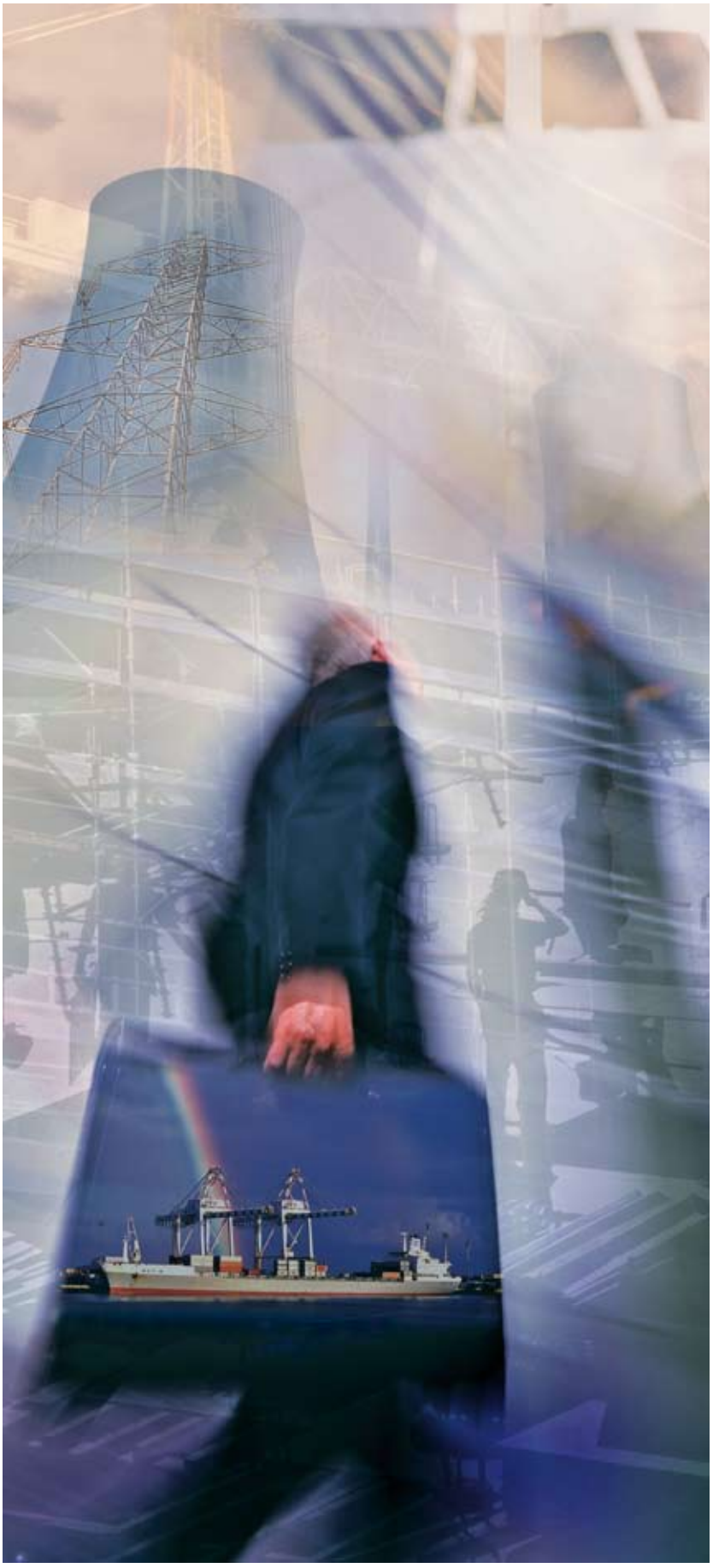

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A Note on the Need for Transparency in the Application of Anti-Dumping Duties

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Abstract: Anti-dumping administration is a is a complex task requiring the application of economic, legal and accounting principles in the evaluation of petitions by industry for anti-dumping measures to be taken against allegedly injurious dumped imports. In particular there are complex competition issues involved in a decision on the imposition of dumping duties. Competition in the domestic market should be the first issue investigated. This will reduce the possibility of finding a false positive of injurious dumping at the initiation stage, and any unnecessary inhibitory effect on trade. The accuracy of the authority's decisions can be enhanced by improving the transparency of the investigation process. This can be achieved by providing counsel for each party with access to the commercial in confidence information. It is then easier though a process of facilitated mediation for there to be a convergence on agreed issues needing resolution. This is likely to improve parties' acceptance of the administering authority's decisions based on sound economic principles from initiation to a final determination.

1. INTRODUCTION

Anti-dumping duties are applied to imported goods that are being dumped from their country of export and as a consequence cause injury to a domestic industry in the country of import. By dumping it is meant that the goods are priced for consumption in their country of export at a price higher than that for export.[1] The domestic legislation in the country of import is required to be consistent with the provisions of the WTO Anti-dumping Agreement. Anti-dumping provisions are applied by almost all significant trading WTO signatories.

The basic the anti-dumping provisions are contained in Article VI of GATT 1994 and have now been expanded upon in the Anti-Dumping and Subsidy Agreements.[2] However, the incidence of and the member states taking anti-dumping measures has changed, with the

[1] Jacob Viner (1923) one of the earlier contributors centred the debate about dumping around the concept of price discrimination between national markets.

[2] WTO Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994 http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm and the WTO Agreement on Subsidies and Countervailing Measures 1994 http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm .

more recent GATT/WTO members replacing their industry protective measures with anti-dumping measures.[3]

Anti-dumping measures are designed to protect the industry in the country of import from price discrimination resulting from the lack of effective competition in the country of export.[4] On the surface this appears a justifiable remedy particularly where the industry in the country of import produces in competitive market conditions. Anti-Dumping duties correct that imbalance, which is often referred to as the level playing field hypothesis. The question is whether the existing processes of investigation and decision making can provide such a result, and if not, are there alternatives? To examine an application of the anti-dumping process, the analysis will focus on outcomes relating to economic efficiency, horizontal equity and simplicity in application[5] by reference to a case study in the Australian economy.

2. THE CASE STUDY

The case study is a recently initiated case on a petition from the Australian industry alleging the injurious dumping and subsidisation of toilet paper exported from China and injurious dumping from Indonesia.[6] The reason for choosing this case is that it is against two important trading partners, one with a high volume of trade and the other with close proximity to Australia. The case is also complex in that it alleges injurious dumping and subsidisation in a concentrated domestic market.

Briefly, the industry in Australia is concentrated with two producers accounting for more than 80% of domestic sales, and the domestic purchasers are the two major super market chains having a similar market concentration. All producers import paper pulp in varying proportions which they use in the conversion to paper products, in this case toilet paper. The

[3] Spinanger, D. (2002). A Summary of Key Findings in Misuse of Anti-Dumping Measures and Non-Tariff Barriers: A threat to APEC and WTO Liberalization/Market Access Goals - A background paper for the ABAC APMC. Kiel, Kiel Institute for World Economics.

[4] Kindleburger (1968) in his classic text on international economics picks-up the Viner thesis, and refers to dumping as the charging of different prices in different markets. This reflects the general thesis that dumping is simply a form of international price discrimination. Kindleberger further maintains that it takes place where demand abroad is more elastic than demand at home, and results from monopolistic elements in the home market.

[5] The Hon Wayne Swann the Terms of Reference of the Treasury Inquiry into Australia's Future Tax System - These are shortened version of Objective 2 and similar to those in the *Asprey* Report.

[6] Australian Customs Dumping Notice No 2008/12 of 20arch 2008 Initiating an Investigation into alleged dumping and subsidisation from China and alleged dumping from Indonesia of certain toilet paper.

type of primary injury alleged by the industry is price suppression, that is, the inability to raise price to cover their increasing costs of production. This is said to have had the secondary effect of a reduction in business profitability and related performance indicators. From the evidence available at the initiation stage of the inquiry the veracity of these economic factors as indicators of injury is not clear.

3. ECONOMIC CONSTRAINTS

There is a basic supposition in the rules relating to the initiation of an anti-dumping inquiry that, if through the investigation process there is a finding of dumping and related injury to the domestic industry in the importing country, this is a sufficient ground to impose an anti-dumping duty on the dumped imports. This assumption would appear to be reasonable where the only factor leading to a non-Paretian optima is price discrimination in the country of export of the dumped goods. However, this is unlikely trading circumstance in an international trade environment, which is littered with a variety of subsidies and government induced distortions, non arms-length trading within multinational organisations, as well as non-competitive market conditions in the countries of import and export. It is only necessary to have one of these distortions, other than the dumping to make reaching the Paretian optima through the imposition of anti-dumping duties a tenuous outcome. For example, a difficulty in the application of anti-dumping duties arises when the affected industry in the importing country also operates in a non-competitive environment. This circumstance is recognised both in the Anti-dumping Agreement and in the implementing Australian legislation and needs to be taken into account in any anti-dumping finding.[7]

James and Edwards (2008) in discussing the application of Paretian optima in the development of taxation policy, suggest that where there are a number of non-competitive market conditions, the removal of only one of the non-competitive elements is inconsistent with the reaching a Paretian optima and invokes the general theory of second best. That is, in these circumstances the Lipsey and Lancaster (1956) general theory of second best holds such that it:

[7] Article 3.4 of the Anti-Dumping Agreement provides 'The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including ...**factors affecting domestic prices**;...' which is implemented in Australian municipal law as s. 269TAE (2A)(d) Customs Act 1901 which says to the effect that restrictive trade practices of, and competition between, foreign and Australian producers of like goods must not be attributed to the injurious dumping.

> ‘is not true that a situation in which more, but not all, of the optimum conditions are fulfilled is necessarily, or even likely to be, superior to a situation in which fewer are fulfilled’.

With respect the above James and Edwards (2008) go on to say that:

> ‘Indeed the general theory of second best holds that if one of the Paretian optima cannot be achieved then a second best optimum can be reached by departing from all the other optimum conditions. Furthermore, nothing can be said in general about the direction or the magnitude of the secondary deviations from optimum conditions made necessary by the inability to achieve the original optimum condition.’

In many anti-dumping claims the industry has a dominant position in the domestic market of import and/or there are domestic distributor(s) that may have a dominant market position. In such cases a Paretian optima is unlikely to be achieved by simply taking remedial action against the dumped goods. It is therefore necessary to complete a thorough competitive market analysis before contemplating anti-dumping action.

To illustrate, the Australian market composition is shown in the following table, which was constructed from the information in the applicant industry’s submission in support of the initiation of their dumping case. This data must be treated with some caution as to its accuracy as it was derived from the public non-confidential file, however, it represents a general picture of the Australian market for relevant periods:

Source	**Market Sales A$m**		**Market Share**	
	2005	**2007**	**2005**	**2007**
KCA + SCAHA	500	541	78%	74%
OTHER	123	158	19%	22%
DUMPED	17	29	3%	4%
TOTAL	640	728	100%	100%

In the toilet paper case there are two dominant Australian producers, Kimberly-Clark (KCA) and SCA Hygiene (SCAHA), and dominant purchasers, Coles and Woolworths, with one of the purchasers importing the allegedly dumped toilet paper from China. In these circumstances it is unlikely that the Australian industry is a price taker. It is more likely that the industry behaves in a non-competitive manner with some countervailing pressure on prices being exerted by the dominant buyers. The likely influence of the Australian industry on the domestic competition was not addressed in the initiation report by Customs, as were whether the imposition of dumping duties would be Paretian optimal in this case. This is a major oversight, as the process of a dumping investigation is disruptive of normal trade and of considerable public and private expense. The effects of structural and behavioural competitive positions on the economic impact of any alleged dumping are required to be investigated as part of the inquiry process.

From the information in the Australian industry's application there is an implied assertion that the industry has lost market share which is evident from the table above. However, it is also said that the Australian industry imports toilet paper from New Zealand, where one of the producers has an associated corporation producing for domestic New Zealand consumption and export. The same party also imported toilet paper from China as there was a fire at its Australian plant during the period before the lodgement of the dumping petition by the Australian industry. The effect of import sourcing by the Australian industry was not explored in the initiation report, other than to say that the price of the other imports was not a dumped price, leaving imports by parties other than the Australian industry being the only injurious dumped imports.

Well do we have non-armslength pricing between associates, which may be contributing to the injury alleged by the Australian industry? Did the acquiring of an equity stake in the Chinese exporter by one of the parties multinational associates after the importation of the alleged non-dumped Chinese exports offset the non-dumped price paid? When account is taken of the allegedly non-dumped imports by the Australian industry the market share of the Australian industry has not decreased as alleged. When you consider the proportion of allegedly dumped and subsidised imports as a proportion of the Australian market, this has only moved from 3% to 4% over two years. Such an incursion into the Australian market is hardly significant.

These issues concerning the nature of market competition must be resolved before starting the whole international apparatus of involving other countries and other national

manufacturers in protracted anti-dumping investigations. It is well known that the initiation of an anti-dumping complaint deters trade.[8] This is not the purpose of the application of anti-dumping policy, rather it is trying to ensure that there is a level playing field and in its simplest terms a situation which results in an efficient economic outcome for the country of import. It is important that the issues relating to the competitiveness of the domestic environment be explored, so that false positives can be avoided in initiating inquiries.

4. INFORMATION UNCERTAINTIES

To add further to the confusion, there are serious information constraints on the parties to any anti-dumping action. Although each party can undertake market intelligence to ascertain the economic position of the other parties, some jurisdictions, including Australia, do not allow the other parties access to the details of the evidence upon which the cases of the applicant(s) or the defendant(s) are based. The parties to the inquiry become totally reliant on the administering authority in its evaluation of the commercially confidential business information relevant to their case. That is, there can be no meaningful defence of a case possible at the inquiry stage, other than at the verification by the administering authority of the parties own evidence.

This restriction on access by the parties to confidential information of the other parties, with only the administering authority having access to such information for its decision on whether to impose a dumping duty, is argued by some, as an efficient way to deal with dumping matters.[9] Unfortunately that is not likely to be the case. The information required to be analysed is complex and is open to professional interpretation and debate. There is often no one answer to the evaluation of the information presented by the parties in support of their case. The information needs to be exposed to technical experts for the parties who can advise on a professional basis and resolve issues through dialogue with the other parties. There is, also a need to capture this expert professional expertise in the inquiry process to ensure that the complexities have been fully explored before a decision is made by the administering authority. To ignore this opportunity just adds to the uncertainty on the impact of the decisions of the administering authorities.

There have been a number of studies into the effects of procedural fairness on the level of compliance by parties to administrative decisions. Research by Hartner, Rechberger,

[8] Finger, M. (1993)
[9] Willett, L (1996)

Kirchler and Schabmann (2008), for example, on procedural fairness and tax compliance finds that:

> 'When people are treated in a procedurally fair manner by the tax authority and procedurally fair decision rules are employed, motivational postures of deference increase whereas motivational postures of defiance decrease.'

That is, the level of trust can be enhanced by adjusting the regulatory efforts of government agencies to accord with the behavioural needs of taxpayers, so as to encourage taxpayers to meet their fair share of taxes. This is usually a more effective pathway than the stereotypical investigate, find and enforce strategy.

The change in the attitude of tribunals and courts to facilitative mediated approaches in legal administration is consistent with the need to apply what are perceived as more procedurally fair processes leading to shared outcomes. This approach is becoming the standard procedure in commercial, family, and employment disputes. By the parties sharing their concerns and identifying the issues on which there is agreement, they can identify those issues where there is a need for further discussion and negotiation. Before the issues can be properly identified there needs to be frank and full exchange in an environment which respects the confidential nature of the issues the subject of the dispute. The success rate of resolving disputes through facilitative mediation is quite high, and the work of Laurence Boulle (2005) and other academic writers in this area can be referred to for a further discussion on this approach.

The purpose of raising the use of facilitative mediation as a tool to engage the parties, is that to be able to get the parties to identify the issues they need to be informed of the underlying information on which they are based. In the Australian anti-dumping inquiry context many of the critical issues are not identified by the parties, as they do not have access to the underlying confidential information on which they are based. There is no secure environment for such information exchange. Of course such exchanges need to be managed so that competitors are not able to use the confidential information to their personal advantage.

The effect of such nondisclosure of this information has meant that there is no effective scrutiny of such information, whether provided by the complainants, other domestic industry producers, exporters or importers. You end up with what is effectively a closed inquiry. The facts behind the case only become visible to the parties' lawyers when an administrative appeal has been lodged in the Federal Court of Australia allowing an opportunity for discovery of documents relating to a decision. This is patently an absurd situation for the

parties to be in. By having the first level of independent scrutiny at the level of a Federal Court hearing, makes the process of independent scrutiny by the parties a very expensive exercise. This inhibits the independent examination of the decisions making process, and therefore anti-dumping petitions become a fertile area for the deliberate inhibition of trade.

Sound administrative processes allow for review of decisions at the earliest possible time so as to avoid the perpetuation of the errors during an inquiry. To avoid such an unfair situation arising, the evidence should at least be made available to the counsel for the parties under strict confidentiality provisions. Such a process is used in anti-dumping administration in the United States.[10] To leave disclosure until what is effectively a legal appeal stage to the second highest court in Australia, is counter to what is happening in the tribunal and court process generally.

5. EQUITY IN OUTCOMES

In discussing the issue of a fair and reasonable process, it is not intended that issues between the parties can be settled by mutual consent, as the application of dumping duties is an act of tax assessment within a competition framework, which squarely falls within the responsibility of government.[11] Many of the matters as discussed above are concerned with competition and market dominance. Not only is there a strong likelihood of a distortion to competition within the country of import by imposing an anti-dumping measure, but there is also likely to be tax incidence effects and revenue implications arising from the application of the measures. These aspects are an essential part of the economic evaluation in a dumping inquiry. But they can only be taken after the informed input of the parties to the inquiry.

To illustrate this point consider some simple cases where a dumping duty is imposed. The first is the benchmark case, the obvious position of only the exporter being in breach of the competition condition, which dumping duties were ostensibly designed to remedy. In this case the consumer loses from the duty imposition, as export prices are raised so as to avoid the duty and hence maintains the domestic price at its pre-dumping level. The domestic producer regains producer surplus and the exporter if able to still compete in the market of the importing country also gains a share of the producer surplus. The result is essentially the

[10]US Provisions - APO procedures are contained in 19 CFR 351.304, 305, and 306. The procedures for imposing sanctions for violation of a protective order are contained in 19 CFR 35

[11] Under the *Customs Act* 1901 and the *Trade Practices Act* 1974

restoration of the initial market conditions with no winners or losers on the initial position before the injurious dumping took place.

The second is where there is a monopolistic domestic industry in the country of import and a monopolistic exporter in the country of export. Where only the one domestic economy allows imports, then leaving the situation alone is likely to produce a better outcome for the importing country as there is now a countervailing pressure on the domestic monopoly to reduce prices and increase available production.

The third is the same as the second with the additional of a non-competitive purchaser (distributor) in the country of import. In this situation the non-competitive purchaser can extract a rent equivalent to the difference between the domestic monopoly price and the import price from the monopolistic exporter.

In both these situations by imposing a dumping duty or undertaking relating to the export price, where such duties are only payable when the export price falls below the nominal price (normal value), the whole of the benefit of the price differential between the domestic and the exporter's market price can end up accruing to the domestic producer. However, this depends on the level of duty imposed. If the duty level is still sufficient to allow access to the domestic market by the monopolistic exporter, then it is the exporter who retains a producer surplus equal to the position before the imposition of the duty.

The above analysis is simplistic and is obviously conditioned by the relative elasticity of demand and supply of the goods in question. However, the toilet paper case clearly has characteristics that make it similar to the third illustrative case. There are no monopolies as such, but the Australian market is extremely concentrated with two dominant producers and two distributors. Therefore the consideration of competition issues at the initiation stage is essential, as to do otherwise may disrupt trade unnecessarily and divert both public and private resources contributing to the inflationary effects on the domestic economy.

In summary, where there is a petition for imposing dumping duties on allegedly dumped injurious imports, and there is reasonable evidence to suggest non-competitive behaviour in the domestic market of the country of import, the initiation of an anti-dumping inquiry is likely to lead to an unsatisfactory economic outcome.

6. WHAT CAN BE DONE TO IMPROVE ANTI-DUMPING OUTCOMES

Firstly, on receipt of an anti-dumping petition insist on an examination of the alleged injury to the domestic industry producing like goods, in the context of the competitive market

structure and behaviour of the stakeholders affected, and before the initiation of any inquiry into the dumping or subsidisation of the goods.

Secondly, that the examination be completed by an expert panel, with the assistance of counsel for the affected stakeholders (under a confidentiality undertaking), and report suggesting the way forward for dealing with any economic impact arising from the petition.

Thirdly, on notification of the affected parties, that the recommendations be implemented.

Fourthly, if there are no economic injury grounds the anti-dumping petition be dismissed.

Fifthly, if there are adverse economic effects of the allegedly dumped imports on the domestic industry, the petitioner is entitled to have an investigation of prima facie dumping and/or subsidisation completed.

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