Submission No 17

Inquiry into Australia's Relations with the Republic of Korea; and Developments on the Korean Peninsula

Organisation: **Australia-Korea Business Council**

Contact Person: **John Wotton**
Executive Director

Address: **PO Box 1008, Epping NSW 1710**

Submission to Joint Standing Committee on Foreign Affairs, Defence and Trade

Inquiry into Australia's Relationship with the Republic of Korea

Australia Korea Business Council

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AUSTRALIA-KOREA BUSINESS COUNCIL

PO Box 1008, Epping NSW 1710, Australia

Telephone: 61 2 9876 2433 Facsimile: 61 2 9876 2433

www.akbc.com.au

ABN: 17 346 891 501

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1 Terms of reference

The AKBC welcomes the opportunity to contribute to the Committee's inquiry into Australia's relationship with the Republic of Korea.

The Committee's terms of reference are to *"review political, strategic, economic (including trade and investment), social and cultural issues; and consider both the current situation and opportunities for the future"*.

2 Summary of this submission

Australia has a strong and generally positive trade relationship with Korea.

Dumping measures, which can be imposed by the Australian Government to increase the price of imports, can be a negative aspect of the relationship.

Korean exporters are affected by Australian dumping measures more significantly than exporters from any other country.

The AKBC calls for:

- robust decisions by the relevant authorities concerning the question of whether dumping has caused material injury to Australian industry, arrived at in a transparent and procedurally fair way; and
- initiation of the independent review of anti-dumping arrangements as recommended by the Productivity Commission, with a view to the application of the public interest test to decision-making in anti-dumping matters consistent with the National Competition Policy.

3 About the AKBC

The Australia-Korea Business Council (AKBC) was established in 1978 with the aim of improving business relations between Australia and Korea by fostering greater understanding of economic developments and business conditions in each country and promoting cooperation in trade and investment between the two countries.

Membership of AKBC is largely composed of the major Australian corporations involved in bilateral trade (up to 80 percent in total) with Korea, although recently the Council's constitution was revised to encourage participation by small and medium-sized Australian enterprises which undertake business in Korea.

Current membership includes leading resource companies (such as BHP Billiton, Woodside Energy, Rio Tinto); manufacturers (Coca Cola Amatil); companies providing financial and other services (Macquarie Bank, Freehills, PricewaterhouseCoopers); those involved in promoting Australian exports (Austrade, Meal & Livestock Australia); and some local subsidiaries of leading Korean companies (Hyundai Motor Company Australia).

A principal focus of the AKBC's activities is the annual Joint Meeting between AKBC and its counterpart, the Korea Australia Business Council (KABC), which is held alternately in Australia and Korea. Twenty six meetings have been held, most recently in Seoul in September 2004. AKBC also arranges conferences, roundtable discussions and meetings between Australian and Korean business representatives, all of which are aimed to enhance understanding of relevant current developments or issues facing business.

The Chairman of AKBC is Visiting Professor Bill Shields, Macquarie Graduate School of Management (previously Chief Economist and Executive Director of Macquarie Bank). The current Chairman of KABC is Ku-Taek Lee, Chairman and CEO of POSCO, which is Australia's largest single export customer.

4 Australia's trade and investment relations with Korea

4.1 Statistical snapshot

The attached fact sheet provides a snapshot of bilateral trade between Australia and Korea.

Korea is Australia's 4th largest export destination and also 4th largest overall trading partner, a fact that is not broadly recognised within Australia.

Australia is Korea's 15th principal export destination, while we rank 6th as a source of imports.

Australia largely supplies Korea with raw materials (including foodstuffs), although service exports are now also significant. Imports from Korea include telecommunications equipment, cars, chemicals/plastics, whitegoods and computers. The balance of trade is heavily in favour of Australia, with the bilateral surplus reaching $4.2 billion in 2004.

Clearly, Korea has been, and remains, an extremely important trading and business partner for Australia.

In recent years, Korea has also been a source of foreign investment into Australia, notably the investment by Korea Zinc in Sun Metal Corporation based in Townsville, Queensland, and more recently the development of mining area C in the Pilbara, Western Australia, which is a joint venture project with BHP Billiton.

4.2 Anti-dumping – a significant impediment in the trade relationship

Australia's anti-dumping system is a significant impediment in the trading relationship between the two countries.

Of the 28 products presently subject to dumping measures 10 include exports from Korea (either solely or as one of a number of other countries). There are more dumping measures imposed against Korean exports than there are against any other country.

Of the 11 anti-dumping investigations presently underway (original investigations, reviews and continuation inquiries), 7 include exports from Korea. There are more investigations currently underway in relation to Korean exports than there are in relation to any other country.

Dumping measures increase the price of exports, by imposing a duty on them. This leads to increased input costs for user industries, whether by reason of the continued purchase of higher priced inputs from the subject country, or by substitution of higher priced domestic inputs or inputs sourced from other countries. Consumers face increased costs as well, either directly in the case of finished goods, or indirectly in the case of productive inputs.

Australian industries which rely on Korean inputs become less competitive, both domestically and in export markets. Importers themselves suffer loss of business. There can be knock-on effects in terms of reduced employment, less tax revenue and reduced investment. Consumers face higher costs, leading to increased living costs and inflationary pressures.

Because of the significant impacts of dumping measures, any finding that dumped imports have caused material injury should be carefully considered. Injury to the industry concerned should indeed be "material". Information relating to that question should be able to be openly debated by interested parties.

Supporters of dumping measures argue that they benefit the Australian public by maintaining business prospects, employment, profitability and investment in the Australian industries which compete with the dumped imports. The AKBC does not necessarily disagree with this proposition.

However, a complete assessment of whether such measures are in the public interest should involve a wider economic analysis than one which focuses only on the financial position of the directly competing Australian firm or industry concerned.

The AKBC accepts that the anti-dumping system is a permissible instrument of trade policy, and that in circumstances where material injury is being caused to Australian industry dumping measures may be warranted.

However, the AKBC strongly believes that:

- a finding that material injury has been caused by dumped imports should be robust in substance, and should be arrived at in a transparent way; and
- an assessment of what is in the national interest, in an economic sense, should be a necessary aspect of the decision-making process.

5 Australian dumping law

For the Committee's benefit we now provide an explanation of the laws and procedures involved in anti-dumping matters.

5.1 Applicable laws

The principal Australian laws relating to anti-dumping measures are contained in the *Customs Act 1901* ("Customs Act") and the *Customs Tariff (Anti-Dumping) Act 1975* ("Dumping Duty Act").

The evolution of Australia's anti-dumping law is largely the result of Australia's obligations as a WTO Member. In keeping with the international development of anti-dumping law, and changing domestic policies, Australian legislation has

been revised numerous times. Following the Kennedy Round of multilateral trade negotiations, the Dumping Duty Act was legislated to give effect to the Australian Government's decision to become a signatory to the General Agreement on Tariffs and Trade Anti-Dumping Code. The Dumping Duty Act was later amended in 1981 to enable Australia to become a signatory to the revised GATT Anti-Dumping Code arising from the Tokyo Round of negotiations.

In 1988, during the Uruguay Round of negotiations, the Australian Government established the Anti-Dumping Authority as the primary agency for making recommendations to the Minister concerning anti-dumping and countervailing measures. Its task was to review preliminary findings by the Australian Customs Service ("Customs") and to make recommendations to the Minister for Justice and Customs ("Minister") as to the action the Minister should take.

Following the end of the Uruguay Round, the Australian Parliament passed a number of pieces of legislation to amend the customs legislation to give effect to some of the outcomes of the Uruguay Round, including those brought about by the WTO Agreement on Implementation of Article VI ("Anti-Dumping Agreement").

The Anti-Dumping Authority had been abolished soon before this. Customs became wholly responsible for conducting anti-dumping investigations and for making recommendations to the Minister.

In 2003, further legislative changes were made to the Customs Act, notably concerning anti-dumping investigations involving economies in transition. The latest development has been the inclusion of the People's Republic of China as a country which is entitled to equivalent treatment in anti-dumping matters to that accorded to other WTO members.

5.2 The basic concept

"Dumping" occurs where the "normal value" of a product exported from a country is more than the "export price" of that product. This difference is called the "dumping margin".

5.3 What is "normal value"

The "normal value" is the domestic selling price of the product in the exporter's home market. There are various rules which require adjustments to be made to the domestic selling price so that it is fairly comparable to the export price. For example, the domestic sale and the export sale might take place at different levels of trade; there might be some specification differences between the product when sold domestically as compared to the product that is exported; or there may be different costs impacting upon the domestic sale and the export sale. A simple example of the latter might be transport costs: domestic sales might include delivery to customers, but the export price will include delivery to the port. In such a case there would need to be an offsetting adjustment.

In cases where the domestic selling price is below cost, and the losses on domestic sales are not recovered within a reasonable period of time, the cost to make and sell the product in the exporter's home market will be used as the normal value instead of the domestic selling price. This is significant at times when the "world price" drops below cost. An exporter cannot argue that it is not dumping simply because its domestic and export prices are both equal to the world price.

5.4 What is "export price"

The export price is normally the FOB invoice price of the same product when destined for the importing country's market.

5.5 "Material injury" must be caused

If dumping is detected by the investigating authorities of an importing country, and if it is demonstrated that material injury has been caused or is threatened by that dumping to an industry in the importing country which produces the same product, the authorities of the importing country may impose a duty on the dumped imports to offset the margin of dumping.

In the absence of material injury, and a causal link between dumping and the injury, dumping duties cannot be imposed on imported products. Thus, the assessment of material injury and causation are important considerations.

The Customs Act sets out a non-exclusive list of factors for the Minister to consider in deciding whether material injury has been caused to the Australian industry. They are:

- the margin of dumping;
- the volume of the exports which have been dumped or might be dumped in the future; and
- the price difference between the Australian and the imported products in the Australian market, and its likely effect on the Australian industry in terms of production, future sales and stock levels, profit level, return on investment, cash flow, employment, market share, capital raising and investment.

It is to be noted that the primary test, of whether material injury has been or will be caused to the Australian industry producing the same goods, and the indicative factors for the Minister to consider, are all focussed exclusively on the industry concerned. Wider economic impacts are not mentioned.

5.6 Amount of dumping duty imposed

In Australia, dumping duties are assessed as the amount by which the normal value as determined during the investigation period exceeds the export price as determined during the same period. If it is decided that the Australian industry can compete without suffering material injury at a price lower than the normal value, the duty will be the amount by which this "non-injurious price" exceeds the export price. This ameliorates the harsh imposition of dumping measures to some extent; however it is still only focussed on the Australian industry producing the same products, and not on other industries, consumers or the economy as a whole.

6 Australian dumping decision-making procedures

6.1 Relevant agencies

Anti-dumping investigations are conducted by the Customs Trade Measures Branch. A simultaneous dumping and injury investigation is conducted.

The Minister makes final decisions, as an exercise of discretion, based on the recommendations contained in a report provided to the Minister at the end of the

investigation by Customs. The report sets out the facts and the way in which Customs proposes the law should be applied to those facts.

Certain Customs decisions as well as decisions by the Minister to accept Custom's recommendations are subject to a form of advisory review by the Trade Measures Review Officer ("TMRO"), as well as judicial review by the Federal Court.

6.2 Investigation steps and time limits

Australian anti-dumping investigation procedures are potentially the fastest in the world. Australia's procedures:

- call for a decision to initiate to be made by the CEO of Customs within 20 days of the lodgement of an application;
- permit a preliminary finding to be made after the absolute minimum Anti-Dumping Agreement time of 60 days following initiation;
- require a Statement of Essential Facts ("SEF") to be issued within 110 days of initiation; and
- mandate recommendations be given to the Minister by day 155 following initiation.

The Minister is at liberty to make his decision at any time after that.

6.3 Types of investigations

As well as an original investigation, which follows initiation of an application from Australian industry, Customs conducts:

- *review investigations* – these are investigations held on an ad hoc basis during the five year duration of dumping measures in order to adjust the variable factors (normal value, export price, and non-injurious price) for the goods concerned;
- *refund investigations* – these are investigations, able to be requested by importers every six months, in order to claim any refund of overpaid dumping duty (known as "interim dumping duty") and to arrive at a calculation of "final dumping duty";
- *accelerated reviews, or new exporter reviews* – these are investigations to determine the variable factors applicable to goods exported by new exporters from countries subject to dumping measures;
- *continuation reviews* – these are investigations which take place at the end of the five year period during which dumping measures remain in force, if requested by the Australian industry concerned, to determine whether the dumping measures should be continued for another five years.

7 Korean companies and anti-dumping – investigations and outcomes

Investigations concerning Korean companies since 2001 have involved the following products, companies and outcomes:

Year	Product	Company/ies	Outcome
2001	Copper tube	Nungwon Metal Industry Co	Dumping measures imposed
2002	Hot rolled structural sections	INI Steel Company	Dumping measures imposed
2002	Expandable polystyrene beads	BASF Korea Dongbu Hannong Chemical Company	Dumping measures continued
2003	Washing machines	LG Electronics Samsung Electronics Daewoo Electronics	Dumping measures imposed against all exporters except LG Electronics
2003	Linear low density polyethylene	Hanwha Corporation Samsung General Chemicals SK Corporation SK Global Hyundai Petrochemical	Dumping measures imposed against all exporters except Hyundai Petrochemical
2003	High density polyethylene	Samsung General Chemicals SK Corporation SK Global Daelim	Dumping measures imposed against all exporters except Daelim
2003	Copper tube	Nungwon Metal Industry Co	Variable factors reviewed
2003	Polystyrene resin	BASF Korea	Dumping measures discontinued
2004	Steel pipe	Hyundai Hysco SeAH Steel Co. Limited Daeyang P & T Husteel Co. Limited LG International Corporation	Dumping measures not imposed
2004	Hot rolled structural sections	INI Steel Company	Variable factors reviewed
2004	Hot rolled plate steel	Dongkuk Steel Mill Pohang Iron and Steel	Dumping measures imposed against all exporters except Dongkuk
2004	Washing machines	LG Electronics Samsung Electronics Daewoo Electronics	TMRO review
2004	Washing machines	LG Electronics Samsung Electronics Daewoo Electronics	Reinvestigation by Customs, and dumping measures maintained against Samsung Electronics and Daewoo Electronics and imposed against LG Electronics
2004	Copper tube	Nungwon Metal Industry Co	Variable factors reviewed
2004	Washing machines	LG Electronics Samsung Electronics	Variable factors reviewed

		Daewoo Electronics	
2004	Hot rolled plate steel	Dongkuk Steel Mill Pohang Iron and Steel	TMRO review
2004	Linear low density polyethylene	Hanwha Corporation Samsung General Chemicals SK Corporation SK Global	Variable factors presently under review
2004	High density polyethylene	Samsung General Chemicals SK Corporation SK Global Daelim	Variable factors presently under review
2004	Polyvinyl chloride homopolymer resin	Hanwha Chemical Corporation LG Chemical Limited	Dumping measures continued
2004	Greyback cartonboard	Daehan Pulp Hansol Paper Co.	Provisional measures imposed, investigation continuing
2005	Hollow steel sections	Not published	Dumping measures not imposed
2005	Hot rolled plate steel	Dongkuk Steel Mill Pohang Iron and Steel	Reinvestigation by Customs, and dumping measures maintained
2005	Domestic refrigerators	LG Electronics Samsung Electronics Daewoo Electronics	Investigation continuing
2005	Linear low density polyethylene	Lotte Daesan Petrochemical	Accelerated review (new exporter) continuing
2005	Polyvinyl chloride homopolymer resin	Hanwha Chemical Corporation, LG Chemical Limited, Hyundai Petrochemical Co Ltd	Review continuing

The Committee will note that the list of companies involved includes many of Korea's major and internationally well-known companies. Steel, chemicals and petrochemicals are the prime targets of complaints from industries within Australia that compete with Korean imports. More lately, we have seen consumer goods become the subject of such complaints (washing machines and refrigerators).

The relatively large number of Korean exporters involved in such cases is a matter of concern. On one view, this is reflective of the active and extensive business relations between Korean companies and Australian businesses and consumers. But the experience of Korean exporters with Australian anti-dumping appears highly disproportionate to that of other trading partners. Australia benefits greatly from Korea as a customer for Australian products, and as a source of competitively priced inputs and finished goods.

8 AKBC's first proposition - material injury findings should be robust and transparent

8.1 Overview

Fair, independent and demonstrably correct decision-making in anti-dumping matters is central to the integrity of the system and to the confidence of those who are affected by it. The AKBC feels that the questions of material injury, and the causal link between dumping and such material injury, are not adequately tested in Australian investigations. Sometimes, the rationale of findings made by Customs is not apparent. Interested parties can suffer because of poor information processes, and the lack of a forum in which to present their views.

Matters of process are a strong focus of the WTO Anti-Dumping Agreement. Other countries have faced the same issues, and developed ways to address them. In the United States, for example, the International Trade Commission conducts material injury and causation inquiries in a public court-like setting. The members of the ITC, called Commissioners, have tenure and are appointed on the basis of their relevant industry and economic experience.

The AKBC notes that the Anti-Dumping Authority, which was abolished in 1999, had some measure of independence from Customs and was seen by many as having a useful review function. The Authority considered preliminary findings made by Customs, and then made recommendations to the Minister.

The AKBC wishes to highlight certain aspects of Australia's current anti-dumping system which detract from impartiality and fairness, and which suggest that decision-making is not as transparent and robust as it ideally should be.

8.2 Sectoral assistance is suggestive of bias

The initiation of an anti-dumping investigation is the first occasion on which a subjective material injury finding must be made by Customs. Initiation is not automatic: the CEO must decide that there are reasonable grounds for an investigation.

An area of ongoing concern for foreign exporters and local importers is the willingness of Customs to assist domestic industry. Despite Customs' role as an investigator and decision maker, Customs' assistance to domestic industry has, in certain instances, flowed into the area of advocacy. This can affect the perceived impartiality of investigations and of any final recommendations.

The fact that Customs in effect assists in the preparation of cases on which the Minister is to make a decision, based on Customs' recommendations, allows perceptions of bias to be held, and may lead to actual bias. If interested parties do not have confidence in the investigative process, the quality of co-operation, argumentation and decision making inevitably suffers.

Example: Customs seeks to promote the services it provides to domestic industry. In its September 2003 *Manifest* publication, Customs highlighted its administrative efforts to assist Australian producers in initiating trade remedy procedures noting, in respect of the steel industry, the benefits of co-operation. Co-operative efforts provided to domestic producers included the development of an *"early warning system"* to alert the domestic industry as to possible dumping and the creation of a *"dedicated team of senior and experienced trade measures staff"* to visit and advise elements of domestic industry contemplating an anti-

dumping application. Assistance provided included *"assisting industry to ensure that their information gathering activities were appropriately focused to obtain relevant information"* and *"assisting industry to present their application in a format which best presents their arguments"*.

8.3 Short time limits

The periods for investigations mentioned in 6.2 above place severe strain on investigators and can compromise the adequacy and integrity of decision-making from the point of view of all concerned. Customs may request extensions of time. However, an extension of time does not necessarily redress any evidence gathering or analytical problems which may have arisen during the earlier stages of the investigation, because frequently it is just not possible to "go backwards".

The relatively short time limits can prevent a proper engagement between interested parties and investigators on critical issues. This is exacerbated by the fact that non-confidential summaries of information under consideration by Customs, which need to be provided by the submitting parties, frequently do not find their way on to the public file, which is open for inspection by interested parties, until it is too late for others to obtain copies and comment on them.

Example: This year, there have been 4 new original investigations initiated by Customs. There have been extensions of time granted in two investigations. Last year there were also 4 new original investigations. There were extensions of time granted in 3 investigations. This underlines the proposition that the statutory time limits are rushed. This is unfair to all concerned, including Customs, and indicates that decisions may not be as well considered as they should be.

8.4 Lack of meaningful information

A key difficulty in advising and assisting companies in the context of an Australian anti-dumping investigation is the lack of specific and detailed information as to the critical matters being considered by Customs. There is no avenue available for lawyers or other advisers to access the full record of the materials under consideration. This affects the representatives of domestic industry and of foreign exporters, as well as others, equally.

Confidential information may be disclosed to lawyers in the course of judicial review before the Federal Court. However, there is no method by which the parties' advisers can review this information in the course of the initial investigation. This lack of transparency not only limits the ability of advisers to engage Customs fully in respect of the relevant issues, but also can create legitimacy problems in respect of the outcomes and the system. Decisions are thought to be made "behind closed doors", on the basis of information which has not been subjected to external scrutiny.

It is not the case that advisers and interested parties are provided no information, but rather that the gaps in information can be significant. Under the Customs Act, Customs is required to maintain a public record of the investigation. This includes copies of applications, submissions and correspondence. Further, Customs is required to allow inspection of that public record. Where confidentiality is claimed Customs generally requests that a non-confidential version of information be produced for the public record which *"contains sufficient detail to allow a reasonable understanding of the substance of the information"*.

Customs' anti-dumping manual suggests that a relatively restrictive approach should be taken when providing information that is in fact confidential. For

example, Customs notes, in respect of costs and prices, that *"the practice of simply deleting this information does not meet the requirement of enabling the other party to having a reasonable understanding of the information provided*".

In practice however, parties who request anti-dumping actions do not always heed these directions. Non-confidential information can be meagre, or difficult to interpret. In respect of issues such as the actual calculation of margins, confidentiality requirements mean one must simply assume that Customs has done its sums correctly. In circumstances where Customs disagrees with a claim of confidentiality and yet the claimant still refuses to allow the information on to the public record or provide an adequate summary of the information, Customs can and will consider that information where it is demonstrated to be *"correct"*. This does not cure the scepticism of other interested parties.

8.5 Undumped imports in injury analysis

The causal link analysis required in dumping investigations, whereby dumping must be shown to have been responsible for material injury to the domestic industry, is of critical importance. One important element in such an analysis is the presence of undumped imports in the market, which are nonetheless as lowly priced as the dumped imports. In most instances, when faced with this type of situation, Customs will not have due regard to the fact that other imports are available at the same price. A similar approach is sometimes adopted in denying the arguments of exporters that, in the event duties are imposed, a non-injurious price should be established at the level of the lowest undumped import price (an application of the *"lesser duty rule"*), rather than at a much higher normal value.

Foreign exporters can easily perceive an unfairness in these situations, especially if the result of the investigation will be to exclude them from a market for an extended period of time whilst others continue to compete at (what in effect was found to be) *"dumped"* price levels. This concern can be intensified where the domestic industry has been importing from the undumped source, or is in some way related to that supplier.

These instances can raise complex subjective issues. AKBC acknowledges that it is difficult to predict future commercial behaviour. However, greater robustness might be called for in circumstances where there clearly will be a discriminatory effect against only some exporters, and there is little expectation of a remedial effect for the domestic industry concerned.

Example: An instance of this type of problem was the Minister's finding in the original (2003) investigation concerning washing machines from Korea. The major Korean exporter, with the largest market share, was found not to be dumping. The two smaller exporters were found to have been dumping. Dumping measures were imposed against the two smaller exporters. The proposition that the smaller exporters had themselves caused material injury, and the likelihood of dumping measures imposed against them but not against the major exporter having any remedial effect on the Australian industry, was questioned by the TMRO in its (2004) review of the decision as follows:

> *"Daewoo argued that the volume of its (allegedly) dumped exports of washing machines to Australia represented less than 3 per cent of the Australian market and could not have caused injury (and did not pose a threat of injury) in a highly competitive market where prevailing prices are dictated by competition between the major suppliers, F&P, Electrolux and LG.*

The Review Officer, on the basis of the available information, agrees with this argument. The Review Officer is also of the opinion that, on the basis of the available data, the Australian industry producing washing machines has not suffered material injury.

Accordingly, the Review Officer recommends that the Minister direct the CEO to reinvestigate Customs' findings in relation to whether or not dumping has caused material injury."

8.6 No or minimal ability to contest interpretation of the facts

Under the Customs Act, Customs must, within 110 days of initiating an anti-dumping application, issue a Statement of Essential Facts ("SEF"). Specifically the legislation states that a *"statement of facts on which the CEO proposes to base a recommendation to the Minister"* be placed on the public record. Interested parties are permitted to make submissions in respect of the SEF within 20 days of its issuance. These submissions are to be taken into consideration prior to any recommendation to the Minister concerning the imposition of dumping duties.

Within its anti-dumping manual Customs refers to the SEF as forming the *"basis of the CEO's recommendation to the minister on whether there are sufficient grounds to publish a dumping or countervailing duty notice"*. This suggests that the SEF is not a decision document in itself. Rather it is to be principally a statement of gathered facts which will form the basis of conclusions. However, in Australian practice the SEF contains not only facts but also Customs' conclusions in respect of those facts. In other words, the decisions arrived at by Customs in relation to material injury and causal link findings are also made public at that time.

It is often not until the issuance of the SEF that one is given a complete picture of the facts and/or arguments advanced in favour or against the imposition of anti-dumping measures. While there is some benefit in knowing, prior to the ultimate decision, Customs' initial impressions of the validity of presented facts and arguments, experience suggests that Customs treats the SEF not as an interim document on which comments are to be received and fully considered prior to reaching any conclusions, but rather as the principal decision document itself.

Example: The AKBC is not aware of any case in which Customs has retreated from the substantive overall conclusions made in an SEF.

8.7 Ineffective appeal rights

The AKBC feels that the Australian anti-dumping regime lacks an effective review process. Reviews of anti-dumping measures in Australia are undertaken by: the Trade Measures Review Officer ("TMRO"), who has no investigative power and can only recommend reconsideration by Customs; and by the Federal Court of Australia, whose jurisdiction is limited to review on the basis of legal error.

The TMRO is located within the Attorney General's Department and is appointed by the Minister for Justice and Customs. It considers itself to be *"an independent administrative appeal mechanism with no investigative function."* However, the TMRO's position as an officer within the Minister's own Department, and the structure of the review system, allows there to be misgivings about its independence and effectiveness.

Even assuming operational independence, the TMRO is hampered by the limited scope of its review function and the fact that the Minister, who ultimately decides whether or not to impose anti-dumping duties, is not required to heed its recommendations. Under the Customs Act, the TMRO can review certain decisions made by the Minister concerning the imposition of anti-dumping measures. It does this on a desk audit basis. There are no hearings, and the only contribution permitted to be made by an interested party is to make its views known in submissions (which must be provided within a short time frame).

The TMRO can also review decisions of the Chief Executive Officer of Customs (**"**CEO**"**) including the decision to reject an application for taking anti-dumping action and the decision to terminate an anti-dumping investigation where the dumping margins, volumes or injury is found to be negligible.

The outcome of a TMRO review is either a recommendation that the decision under review be affirmed or that the Minister ask Customs to undertake further investigation of the matter and then resubmit a recommendation to the Minister.

In deciding whether to accept a recommendation for reinvestigation, the Minister is likely to consult with his advisers. However, Customs is the Minister's adviser on anti-dumping issues, which can give rise to the perception that Customs' officers might not consider objectively a TMRO recommendation for a reinvestigation, since to advise the Minister to accept such a recommendation will be tantamount to admitting their own error or, at the least, to admit that there is an alternative view.

Under the *Administrative Decisions (Judicial Review) Act 1977*, the Federal Court has jurisdiction to review an administrative decision which includes decisions made by Customs and the Minister in respect of anti-dumping proceedings. Pursuant to the legislation the Federal Court will only consider questions of law in the course of such a review. This concept has been narrowly interpreted at least in the context of matters dealing with anti-dumping and the operations of Customs more generally.

This combination of jurisdictional limitation, and a perception that the Federal Court is reluctant to consider anti-dumping issues in detail because of the technical complexity of the area, is reflected in the limited number of applications for judicial review in respect of anti-dumping cases brought before the Court. With the exception of 2001/2002 where there were six applications for judicial review brought before the Federal Court, since 1999/2000 there have been only a very small number of proceedings brought each year.

9 AKBC's second proposition - the national interest should be considered in anti-dumping

9.1 Overview

WTO members are at liberty to implement and/or apply the internationally agreed rules relating to anti-dumping contained in the Anti-Dumping Agreement in accordance with their domestic law. Dumping is not unlawful in any way. It cannot be considered or treated as an "offence" of any kind. In fact, for reasons of industry and economic policy, some countries do not maintain anti-dumping systems. Significantly, some countries consider "national interest" factors (such as the wider benefits to their economy of low priced inputs) before deciding whether or not to impose dumping duties.

In Australia, no "national interest" considerations are taken into account by either Customs (in making its recommendations to the Minister) or by the Minister (in making his or her decisions), apart from the national interest of protecting a specific industry from the injurious effects of dumped imports. Although the power to impose dumping measures is expressed in permissive terms in the legislation (by the use of the words "the Minister *may*" in describing that power), it has never been considered by any Minister that he or she might not impose dumping measures if the statutory grounds (ie dumping, material injury and a causal link) were present.

9.2 Recommendation by Productivity Commission

In its Report No 33 of 28 February 2005, the Productivity Commission presented its considerations and findings in its Review of National Competition Policy Reforms.

The Productivity Commission made the following apposite comments in relation to anti-dumping and the national interest:

- *"Anti-dumping arrangements have always been a contentious issue… such arrangements are employed both to promote 'fair' trade and to guard against predatory pricing behaviour that may be inimical to longer term efficiency in affected industries. However, as a barrier to imports, anti-dumping measures, including the resulting countervailing duties, may also serve to restrict competition and, through higher prices, penalise consumers and user industries."*
- *"Many participants supported the call for a review, including the Australian Industry Group…; the Australian Chamber of Commerce and Industry…; the Minerals Council of Australia…; Western Graingrowers…; and the Independent Paper Group…"*
- *"More specifically, the ACCC… suggested that there should be provision for it to make submissions to anti-dumping investigations in circumstances where mergers had been approved having regard to the extent of import competition. However, the Australian Customs Service… indicated that under present legislation there is already scope for such submissions to be made."*

In its Recommendation 9.3, the Commission insisted that there be a National Competition policy review of anti-dumping arrangements as soon as practicable. The Commission noted that there was an important interface between trade and competition policy.

The Commission's view is consistent with the macro-economic approach that it has taken towards evaluating the costs and benefits of anti-dumping action by the Australian investigating authorities. The Commission promotes open competition, and in previous *Trade and Assistance Reviews* has been critical of the subsidy effects of government intervention, including the costs to the economy of the imposition of dumping duties.

For example, in its Trade & Assistance Review publication (2002-2003), the Commission states:

> *"Assistance thus takes many forms. It extends beyond direct government subsidies targeted to particular firms or particular industries, and includes tariffs, quotas, anti-dumping duties and regulatory restrictions on imported goods and services, as well as tax concessions and subsidies for domestic producers. Assistance also arises from the provision of*

underpriced services by government agencies and from government procurement policies.

Although assistance generally benefits the firms or industries that receive it, it comes at a cost to other sectors of the economy. For example, direct business subsidies increase returns to recipient firms and industries, but to fund subsidies governments must increase taxes and charges, cut back on other spending, or borrow additional funds. Similarly, while tariffs provide some price relief to domestic producers, they result in higher costs to local businesses (for their inputs) and higher prices for consumers, who then have less money to spend on other goods and services."

9.3 Need for recognition of competition law principles and the national interest

Such an approach also has wide support in the business and professional economic community in Australia, as well as acceptance internationally.

AKBC member Rio Tinto made the following comments to the Productivity Commission as part of a submission to the Commission's Review of National Competition Policy Arrangements:

"When all direct and ripple effects are properly measured, if the benefits exceed the costs, low-cost imports are in Australia's national interest. The problem is, anti-dumping legislation does not consider what is in the national interest. The anti-dumping legislation considers only the costs. It does not consider the benefits to consumers, other manufacturers, or exporters using imported inputs or the economy as a whole. Anti-dumping reviews are biased, by law, to examine the interests of just one stakeholder – the local manufacturer. Consumers and national interest do not get considered in the review process and the competitive effects of imposing dumping duties are not considered."

The National Farmer's Federation expressed its position on anti-dumping in its submission to that same Review as follows:

"There is also an important need for examination of anti-dumping rules to ensure that they align with Australia's strong commitment to trade liberalisation. While NFF does not support the removal of anti-dumping rules, we are concerned that the rules may impose higher input costs on Australian farmers – particularly for farm chemicals. The Customs Legislation Amendment Bill (No. 2) 2002, which threatened to classify China as a non-market economy, highlighted these concerns.

Essentially, NFF is concerned that anti-dumping rules are being treated as Government-approved restrictions on trade. This is against the general philosophy of NCP.

And in an opinion piece published in the *Australian Financial Review* by Allan Fels and Fred Brenchley, they have also promoted the view that wider economic interests should be taken into account when it is being decided whether dumping measures should be imposed against imports:

"A more effective solution [to the anti-dumping debate] would be to move dumping actions out of customs to the Australian Competition and Consumer Commission, requiring it to examine the public interest before levelling any new duties on low/cost imports.

> *The ACCC is required to consider public benefits when authorising any anti-repetitive activity, and either it or the National Competition Council could do the same for anti-dumping.*
>
> *There is a natural interface between trade and competition. Trade is really a branch of competition law. Trade barriers are just a sign of competition policy gone wrong."*

Concern about the implications of dumping protection in the context of the "national interest" are not unique to Australia. Other countries have faced the same issues, and developed ways to address them.

In the European Community, "Community interest" must be taken into account by the Commission and the Council before a decision is made to impose dumping measures on particular imports. Thus, Article 21.1 of the Basic Regulation provides as follows:

> *"A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures."*

This provision permits wider interests to be considered, whilst at the same time indicating that the elimination of the trade distorting effects of injurious dumping has some primacy.

10 Suggestions for debate and reform

In the interests of promoting a full and frank debate about the impacts of Australia's anti-dumping system on the Australian economy and on our trade relationships with exporters in countries such as Korea, ***the AKBC suggests that the Committee should endorse Recommendation 9.3 of the Productivity Commission's Review of National Competition Policy Reforms (Report N0. 33, 28 February 2005) for an independent review of anti-dumping arrangements.***

The initiation of such a review could then allow the following matters to be considered in an open forum:

- a reasonable extension of anti-dumping investigation time limits;
- strengthening the confidence of interested parties in the integrity of the system by ensuring the independence and experience of persons in the position of making final decisions, or at least introducing an administrative appeal system which has these attributes as well as the power to override previously made decisions if they are wrong;
- establishing Customs as a purely investigatory body which is required to evaluate and assess the facts in each case;

- establishing a new decision making body, whether within the ACCC or the Productivity Commission, or as an entirely new body, which is empowered to hear the views of interested parties concerning material injury issues in an open setting;
- introducing a "national interest" criteria, whether as an overriding criteria or as a factor to be balanced in making final decisions concerning anti-dumping matters.

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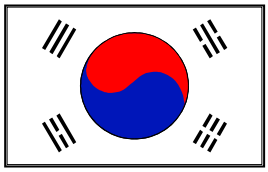
Australia Korea Business Council
27 May 2005



REPUBLIC OF KOREA

Fact Sheet

General information:

Fact sheets are updated biannually; May and September 2005

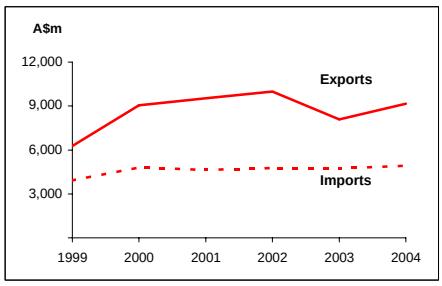
Capital: Seoul
Surface area: 99 thousand sq km
Official language: Korean
Population: 48.2 million (2004)
Exchange rate: A$1 = 796.8142 Won (Feb 2005)

Head of State and Head of Government:
H.E. Roh Moo-Hyun

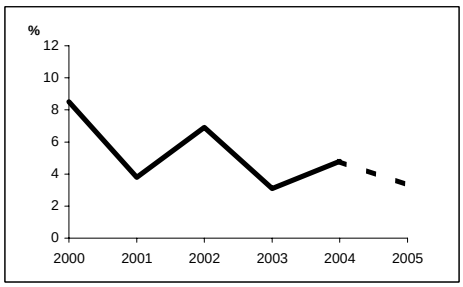
Recent economic indicators:

	2000	2001	2002	2003	2004(a)	*2005(b)*
GDP (US$bn):	511.8	482.6	547.0	605.0	665.6	*771.3*
GDP per capita (US$):	10,889	10,193	11,482	12,624	13,803	*15,909*
Real GDP growth (% change YOY):	8.5	3.8	6.9	3.1	4.8	*3.3*
Current account balance (US$m):	12,250	8,032	5,394	12,321	27,749	16,719
Current account balance (% GDP):	2.4	1.7	1.0	2.0	4.2	*2.2*
Goods & services exports (% GDP):	40.9	37.8	35.2	38.1	45.6	*45.7*
Inflation (% change YOY):	2.3	4.1	2.8	3.5	3.6	*2.5*
Unemployment rate (%):	4.1	3.8	3.1	3.4	3.6	*3.3*

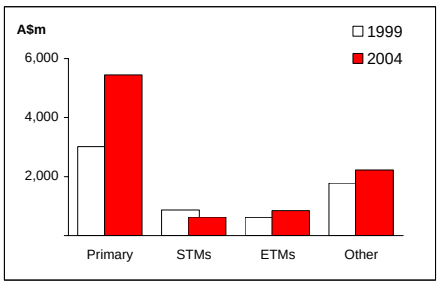
Australia's trade with Korea



Real GDP growth



Australia's exports to Korea



Australia's trade relationship with Korea:

Major Australian exports, 2004 (A$m):		**Major Australian imports, 2004 (A$m):**	
Coal	1,770	Telecommunications equipment	973
Crude petroleum	1,119	Passenger motor vehicles	657
Iron ore	765	Televisions	334
Non-monetary gold	599	Computers	228
Bovine meat	484	Household type equipment	204

Australian merchandise trade with Korea, 2004:		***Total share:***	***Rank:***	***Growth (yoy):***
Exports to Korea (A$m):	9,150	7.8%	4th	13.2%
Imports from Korea (A$m):	4,928	3.5%	9th	4.1%
Total trade (exports + imports) (A$m):	14,078	5.4%	4th	9.8%
Merchandise trade surplus with Korea (A$m):	4,222			

Australia's trade in services with Korea, 2004:		***Total share:***
Exports of services to Korea (A$m):	879	2.6%
Imports of services from Korea (A$m):	319	0.9%
Services trade surplus with Korea (A$m):	560	

Korea's global merchandise trade relationships:

Korea's principal export destinations, 2004:			**Korea's principal import sources, 2004:**		
1	China	19.6%	1	Japan	20.6%
2	United States	16.9%	2	China	13.2%
3	Japan	8.5%	3	United States	12.8%
4	Hong Kong	7.1%	4	Saudi Arabia	5.3%
5	Taiwan	3.9%	5	Germany	3.8%
15	*Australia*	*1.3%*	*6*	*Australia*	*3.3%*

Compiled by the Market Information and Analysis Section, DFAT, using the latest data from the ABS, the IMF and various international sources.

(a) all recent data subject to revision; (b) EIU forecast.