

RIO TINTO

Submission

to

**the Joint Study of the Administration of Australia's
Anti-dumping System**

THIS SUBMISSION

This submission is in response to a joint announcement on 23 February 2006 by the Minister for Industry, Tourism and Resources, The Hon. Ian Macfarlane and the Minister for Justice and Customs, Senator The Hon. Chris Ellison, of an administrative review of Australia's anti-dumping regime.

Rio Tinto has an interest in Australia's anti-dumping regime because Rio Tinto is a large purchaser of inputs used in mining and minerals processing. To remain price competitive in the international market for minerals and metals Rio Tinto's operations must be cost competitive at the global level. In order to be cost competitive some of Rio Tinto's inputs are purchased locally while other inputs are purchased in the international marketplace.

Over the past five years, Australia's anti-dumping regime has been applied to imported inputs used by Rio Tinto such as ammonium nitrate from Russia, iron and steel grinding mill liners from Canada and silicon from China. In each of these cases the resulting anti-dumping duties have raised Rio Tinto's costs, thereby reducing Rio Tinto's international competitiveness.

As a result of this direct experience with Australia's anti-dumping regime Rio Tinto offers the following views on the delivery and administration of Australia's anti-dumping laws. Rio Tinto's views are divided into two parts. The first part (paragraphs 1-12) are more general in nature. The second part (paragraphs 13-21) examines some of the "Issues for Consideration" identified in the joint study guidance document.

PART 1

1. Streamlining and simplifying regulation is good in principle.

An important part of government reform since the early 1990's has been to reduce the burden of unnecessary regulation and streamline the interface between government and the business community. Achieving this objective will improve the international competitiveness of Australian industry.

The Ministers for Industry, Tourism and Resources and for Justice and Customs have announced a joint study of the administrative process of the nation's antidumping laws to consider options to '*improve the delivery on anti-dumping outcomes in an efficient, transparent and equitable manner*'. That is, can the administrative processes that evaluate anti-dumping claims¹ be made more efficient and streamlined?

The review of regulations that unnecessarily increase costs and restrict competition are the fundamental tenants behind the National Competition Policy (NCP) framework orchestrated through the Council of Australian Governments (COAG). Such a framework is the accepted best-practice procedure for the review of government regulation. It should also be applied to the processes for administering the regulation in this case.

2. All anti-dumping legislation needs review now.

If best-practice were to be pursued for this study, as laid out by the principles of NCP, *all* relevant legislation should be considered in the evaluation of both benefits and costs on an economywide basis. That is, the benefits and costs of changing administration procedures of anti-dumping policy cannot be evaluated without a public benefit test of the underlying policy itself. This test would look at both the benefits to industries that receive that assistance and the costs to industries and households who use those goods. The Australian Government has restricted the terms of reference for this study to exclude the review of the government's anti-dumping policy and focus only on its administration.

3. This study.

In this context, the task confronted by this study is incomplete given a full review of the underlying legislation has not or is not likely to take place in the near future. Better administration of a bad policy still leaves bad policy. This is highlighted by speculating about the potential benefits and costs of reform of the current administration process.

¹ Australian Customs Service, 1995, Australia's Anti-Dumping and Countervailing Administration.

4. Faster access to assistance at lower cost.

The impetus for this study has come from the client base of the anti-dumping legislation - import competing manufacturing. *'The Australian Government considers it a basic right that local industry is provided with an accessible but robust anti-dumping regime, consistent with our international obligations'*². The key issues for those seeking protection through the anti-dumping system is that current procedures involve delays in getting immediate protection from imports and can involve costs in providing requisite evidence in submissions to the Customs investigation.

5. Provisional measures already in place.

The anti-dumping and countervailing investigation process already provides for interim assistance to industries that lodge claims against imports. From day 60 of the investigation, Customs may impose provisional measures in the form of securities - which are temporary additional duties pending the final decision by the Minister. These interim measures already provide significant protection. Since 2002, around 31 investigations into alleged dumping have been initiated, of which 16 received a preliminary affirmative determination with imposition of securities.

6. Administration of existing legislation is flawed.

The administrative process relies not only on procedural steps but also on quantitative measures. These are required to confirm that goods have been dumped and to calculate the appropriate penalty duties. The concepts underlying these measures are laid out in the *Customs Act 1901*, however the rigor of their estimation is clearly part of the administrative process.

As proof of dumping requires evidence that prices are below normal, the estimation of 'normal values' is a key component of the investigation. Practically, the estimation of these values is very difficult, especially when there is no equivalent domestic price available or when export data to other destinations is patchy and irregular. If the exporting country is designated as either a non-market economy or an economy in transition the value of like goods sold in another (surrogate) country can be used. The time period over which normal values are calculated is also crucial. However, the legislation is silent on these particular choices - which are highly arbitrary and key in determining the final outcome of the dumping claim.

Proof of material injury from dumped goods is the other pillar of the process. The weakness of the current administrative process lies with the proof of causality between imports, or the threat of imports, and the negative impacts on local industry. The causal link is often tenuous and difficult to differentiate from changes in normal day-to-day business. Injury is usually assessed from evidence of lower prices and lost market share which is always privileged information and cannot be independently verified.

² Joint Press Release, 23 February 2006, Minister of Industry, Tourism and Resources and the Minister for Justice and Customs.

The bottom line is that Customs and proponents from industry have significant scope through the administration of the existing legislation to achieve favourable outcomes that translate into protection from import competition. So, what are the potential benefits and costs of changing the administration of the anti-dumping legislation?

7. Benefits of streamlining and lowering threshold tests.

Streamlining the administrative process reduces the elapsed time of the process. More importantly, this time constraint would further weaken the threshold proof of dumping and material injury to domestic injury.

The benefits from streamlined processes of anti-dumping procedures are the quicker imposition of anti-dumping duties for those firms facing competition from imports deemed to be dumped. This helps relieve competitive pressures and therefore is of significant benefit for those industries. While the duties are country-specific, the *threat* of additional action can act as a deterrent to stop potential imports from other countries. A practical benefit is that this assistance is long-term. Currently, the process from the original claim by industry to approval of duties by the Minister is 175 days. As noted, in most cases, interim duties (securities) are imposed 60 days after formal initiation of the investigation. Final duties remain in place for 5 years. After this period a continuation inquiry takes place with the potential of extension for another 5 years. Therefore, the benefits to import-competing industries are equivalent to long-term assistance provided by tariffs.

Another area of benefit to import-competing industries from streamlining is the reduction in compliance costs. The supporting evidence required by Customs in submissions detailing dumping and material injury would be less onerous and therefore less costly. Streamlining may also reduce the expenditure required for the anti-dumping section of Customs.

8. The potential costs are substantial.

While the benefits of making assistance more accessible to industry are easily identified, the corresponding costs are more difficult to identify especially if this study cannot consider impacts on other industries.

The real risks and costs associated with a streamlined administration process will fall into two categories:

- the risk of making an incorrect determination that is inconsistent with the legislation of the Australian Government and its international commitments under WTO; and
- the risk of imposing higher costs of goods, as a result of long-term anti-dumping duties, on users unnecessarily or faster than otherwise would be the case as the result of an incorrect or accelerated determination.

A shorter elapsed time for the investigation process would involve less rigour and fewer safeguards. These safeguards are in terms of the hurdles required for the proof of dumping and material injury. As noted many of the judgements that Customs routinely make are not prescribed by the legislation but are arbitrary in nature. A faster process could result in an incorrect decision being made more often - given that the process is already biased in favour of import-competing industries.

9. Due diligence is required.

Each investigation must be sure that the economic conditions that initiated the anti-dumping action will be sustained and are not one-off in nature and that the action is not to be used as an opportunistic instrument to benefit from prevailing market conditions. This judgement cannot be made in a compressed investigation process.

10. Penalty duties are long-term.

Given that penalty duties will be in place for a minimum of 5 years - the scope for damage to industries that use goods subject to penalty duties as an input is considerable. These duties and the threat of ongoing anti-dumping action discourage imports and raise the price of those products - a good outcome for the industry taking action. But someone must pay for this benefit. Industries that use the good as an input will suffer a fall in competitiveness especially if they compete in international markets.

11. This study should recommend no change to the investigation period.

Given the flaws in the anti-dumping legislation Customs should *at minimum* maintain the 155 days required to investigate, after the 20 days *prima facie* screening period, to ensure that due diligence is exercised. Also, the time required and rigor required to evaluate the key measures that test proof of dumping and the calculation of the applicable penalty duty should *at minimum* be left unchanged.

This study should also recommend to the Ministers that this study of administration of the anti-dumping legislation cannot be usefully completed without a full review of the objectives and the rationale of the underlying legislation itself. Such a review remains outstanding from the Australian Government's own NCP process.

12. National interest

The question of whether the public good is served by the imposition of dumping duties is a question which is considered to some extent by the anti-dumping regimes of other countries, such as the European Union, Canada, Brazil, Paraguay, Thailand and Malaysia. It is not considered in Australia. Rio Tinto is of the view that such consideration should be part of the administration of Australia's anti-dumping regime.

Discussion of the public interest in the Australian context generally takes the form of a “national interest” test, involving the question of whether the benefit of imposing dumping duties outweighs the detriment (cost) of imposing such duties. Put slightly differently, such a test would involve a consideration of economywide factors rather than simply those factors affecting the domestic industry making the anti-dumping application.

It was submitted in *Hyster Australia Pty Ltd v Anti-Dumping Authority* (1993) 112 ALR 582 that the Minister has a general discretion whether to impose dumping duties covering matters such as whether such action would be of utility or in the public interest. In that case the Federal Court did not deny such discretion. Rather, the Federal Court noted that there was nothing in the subject matter, scope and purpose of the legislation, which required the conclusion that the Minister is bound to take into account the national interest. Nor, on the other hand, was it incumbent upon the Minister to consider whether would be any “utility” in imposing dumping duties.

Accordingly, Rio Tinto believes that while, under the existing anti-dumping legislation, a national interest test is not expressly provided for, it also is not expressly excluded and may fall within the discretion of the Minister when deciding whether or not to publish a dumping duty notice. Rio Tinto believes that the introduction of such a test in the administration of Australia’s dumping regime need not require a change in the law, as it would merely formalise an existing opportunity to apply such a test.

Currently the system operates in such a manner that the interests of those directly affected by the allegedly dumped imports, that is, the Australian industry producing like goods, are taken into account to the exclusion of interests of other parties. The inclusion of a ‘national interest’ test would ensure that Australia’s anti-dumping regime takes into account and balances the interests of all parties that it affects.

While dumped imports may adversely affect local competitors, they may also benefit Australian consumers, as well as Australian industries that use the imports in their production processes. Taking into account the ‘national interest’ not only would be more in line with the economic theory of dumping but also more aligned to the interests of Australia’s exporters.

In the adoption of a ‘national interest’ test as part of the administration of Australia’s anti-dumping regime, consideration could be given to introducing some of the procedures used by the Canadian International Trade Tribunal in assessing the ‘public interest’ in dumping investigations in Canada.³ In Canada, there is provision for a request to be made for a ‘public interest’ inquiry. That is, such an inquiry does not take place automatically. Information to be included in such a request is set out at **Schedule A**. Australia might consider a similar approach pursuant to which interested parties might request that the ‘national interest’ be investigated and in such a request provide similar information to that set out in **Schedule A**.

³ See Canadian International Trade Tribunal Guideline on Public Interest Inquiries, which sets out the Tribunal’s general approach to public interest inquiries.

The Canadian International Trade Tribunal also has published guidelines on the conduct of ‘public interest’ inquiries that sets out factors to be considered by the Tribunal in a ‘public interest’ inquiry. They are extracted in **Schedule B**. Rio Tinto believes that similar factors should be considered as part of the application of a national interest test in Australia’s anti-dumping regime.

Rio Tinto, therefore, submits that a ‘national interest’ test similar to that which exists in Canada be included in the administration of Australia’s anti-dumping system.

PART 2

13. Dumping application threshold

Rio Tinto is firmly of the view that any claims in a dumping application need to be supported by appropriate and adequate evidence.

A recent decision of the Trade Measures Review Officer (**TMRO**) provided some guidance on the nature of evidence required. In his review of a decision by a delegate of the Chief Executive Officer of Customs (**CEO**) to reject an application for the imposition of dumping duties on certain hollow steel sections exported to Australia from the People’s Republic of China, the Republic of Korea, Malaysia and Thailand, the TMRO considered that:

“... extensive conclusive evidence is not required to establish reasonable grounds for the publication of a dumping duty notice, given the language of the legislation and the advice contained in Customs’ own publications and application form. Rather, evidence of a sufficient quantity to establish a prima facie case to enable the initiation of the investigation is required.”

Rio Tinto does not disagree with the views expressed by the TMRO. Nevertheless, in establishing a prima facie case, the application should contain sufficient evidence to substantiate the claims being made. In this regard Article 5.2 of the *WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* requires that an application for the imposition of dumping duties must:

“... include evidence of (a) dumping, (b) injury ... and (c) causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient ...”.

No doubt this requirement was made because of the significant economic consequences that even the initiation of a dumping investigation may have and to ensure that dumping investigations were undertaken only where there was evidence that dumping was occurring and, because of that, material injury to a domestic industry was being caused or threatened.

Rio Tinto submits that applications for the imposition of dumping duties must be properly and adequately documented and be accompanied by sufficient evidence substantiating the claims made in the application.

14. Determination of ‘like goods’

Rio Tinto is concerned that Customs has been determining ‘like goods’ too broadly with the effect that goods that are not ‘like goods’ to the allegedly dumped goods are being included in dumping applications and dumping investigations and, ultimately, become subject to anti-dumping measures.

The term ‘an Australian industry producing like goods’ is defined to mean that if, in relation to goods of a particular kind, there is a person or persons who produce like goods in Australia, then:

- there is an Australian industry in respect of those like goods; and
- the industry consists of that person or those persons.

The term ‘like goods’ is, in turn, defined to mean, in relation to the goods under consideration (i.e. the goods being exported to Australia and subject to the dumping application), goods identical in all respects to the goods under consideration or, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

If, for example, there is no one in Australia producing goods identical in all respects to the goods under consideration but it is possible that one or more persons in Australia producing goods having characteristics closely resembling those of the goods under consideration, then it would be necessary to identify the characteristics of both the locally produced goods and those under consideration (eg. physical, functional, technological, chemical, performance and other characteristics), compare those characteristics and determine whether the characteristics of the locally produced goods ‘closely resembled’ those of the goods under consideration.

While matters such as whether the locally produced goods are substitutable for the goods under consideration, whether they compete in the same market or are functionally equivalent may indicate that the locally produced goods have characteristics that closely resemble those of the goods under consideration, such matters are not determinative. For example, a milk bottle and a milk carton perform the same function, are substitutable and compete in the same market but their physical, technological, performance and a number of other characteristics do not closely resemble one another. Arguably, they are not ‘like goods’.

Rio Tinto considers that a more rigorous assessment, with a clear and consistent methodology be used in determining whether locally produced goods are ‘like’ the allegedly dumped imports. In this regard, where necessary, the advice of experts with detailed knowledge of the goods being investigated should be sought as part of the investigation, whether in the assessment of the dumping application or during the investigation.

Rio Tinto submits that the existing methodology for determining ‘like goods’ be reviewed and a clearer and more consistent methodology be adopted which complies with relevant statutory provisions and international legal obligations.

15. Material injury and causation analysis.

Rio Tinto believes that a more rigorous injury and causation analysis should be undertaken and documented. Both the WTO Anti-Dumping Agreement (ADA) and Australian law require that the material injury be caused by the dumping. It is not enough that the material injury coincide with the period of the dumping. As dumping is solely concerned with the price at which the dumped imports enter the domestic market, the issue that must be examined is whether the dumped imports are competing on price with locally produced goods.

Price undercutting, price suppression, price depression and loss of sales are often cited in dumping investigation reports as evidence of injury. These, however, are observable events taking place in a market but, of themselves, do not constitute injury. While they may lead to injury and are relevant considerations in the injury analysis, they nevertheless of themselves do not constitute injury.

Rather, price undercutting, price suppression, price depression and loss of sales volumes may lead to injury in the form of reduced revenues and, consequently, reduced profits. It is the reduced profits and revenues that constitute the injury that an industry may incur through the price and volume effects that imports at dumped imports may have.

Such an approach to “material injury” is taken in New Zealand. In 1998 the New Zealand Ministry of Commerce published a discussion paper on “Trade Remedies in New Zealand”. It interpreted the New Zealand Dumping and Countervailing Duties Act 1988 and the WTO Agreements as “requiring a finding that injury is caused by the dumping or subsidisation of goods, not simply by the imported goods irrespective of the existence of extent of dumping or subsidisation. The existence of increases in import volumes, price undercutting, or declines in market share for example, are not considered to be injury per se, but when all of the available evidence is considered a conclusion as to whether or not injury can be attributed to dumping or subsidisation can be reached”.

In addition, there does not appear to be any detailed assessment of the impact of the dumped goods on domestic selling prices. While imports may be at dumped prices and while the domestic producers may have reduced their prices, there should be an analysis of the amount by which the dumped imports undercut the prices of the locally produced goods, whether the extent of that price undercutting is attributable only to the margin by which the imports are being dumped and the extent by which domestic producers have lowered their prices in response to the dumped prices or to other factors as well. In other words, the analysis should link the extent of the dumping to the price undercutting to the price depression and/or suppression and/or loss of sales volumes and then to the injury being incurred by the domestic industry, that is, the amount of the reduced revenues and profits.

For example, if the imports in question are being exported at dumped prices with a dumping margin of 10% but they are undercutting the prices of the locally produced goods by 20%, then the imports would still undercut the locally produced imports by 10% even if exported at undumped prices. In such circumstances there would need to be a detailed analysis establishing that the dumped imports were causing injury greater than the injury that would be caused if those goods were imported at undumped prices. Similarly, if goods were being imported at dumped prices but did not undercut the prices of the locally produced goods, then a detailed analysis would need to be undertaken to determine why the higher priced dumped imports were being purchased in preference to the cheaper locally produced products. Only pursuant to such an analysis could it be established that the dumped imports were causing injury to the domestic industry.

Rio Tinto's experience with the case of ammonium nitrate (AN) from Russia illustrates the deficiencies in the administrative process for determining material injury and its causation. In this case in 2000 price changes in the Australian market were driven by supply/demand imbalance caused by the start-up of a new local supplier. The timing of this macro supply/demand adjustment coincided with the entry of a small quantity of imported product from Russia. Rio Tinto believes that Customs did not satisfactorily investigate the correlation between these two events.

The Russian AN case also revealed deficiencies in the use of loss of market share as a measure of injury. Customs' recently released Statement of Essential Facts on Russian AN concluded that the Australian industry had lost market share, yet did not explain this was due to a lack of capacity. It is impossible not to lose market share when there are capacity constraints in a rapidly growing market. This is an example of a lack of detailed probing analysis and demonstrates a poor understanding of the relevant market.

In undertaking such analyses, consideration should be given to obtaining the assistance of economic analysts within Federal Government agencies, such as the Productivity Commission and the ACCC to assist in the material injury and causation analysis.

Rio Tinto submits that a more rigorous analysis of material injury and causation be adopted in dumping investigations that clearly links the entry of dumped imports into the Australian market with the injury, that is, reduced revenues and profits, incurred by the domestic industry.

16. Role of the Dumping Liaison Unit.

Rio Tinto is concerned that there would seem to be a conflict of interest in the Dumping Liaison Unit assisting applicants with their dumping applications. In such circumstances, it would be one part of the Trade Measures Branch assisting in the preparation of a dumping application, while another part of the Trade Measures Branch would assess the completed dumping application. If any part of the Trade Measures Branch is involved in the preparation of dumping applications, it could and probably would be perceived to have an interest in the assessment of the application and, ultimately, in the outcome of any dumping investigation that ensued.

Rio Tinto does not believe that an agency of the Federal Government should be involved in providing assistance to applicants in the preparation of dumping applications. For such assistance to be given, raises questions as to the impartiality of the assessment of dumping applications and the outcome of any ensuing dumping investigation. Further, providing such assistance would not seem to be the appropriate role for government.

Rather, the assistance provided by the Federal Government is through the assessment of applications and, where appropriate, the conduct of dumping investigations and the imposition of dumping duties.

Rio Tinto submits that the Federal Government should not assist potential applicants in the preparation of dumping applications for the reasons given above.

17. Reviews of antidumping measures.

Article 11.1 ADA provides that an “*anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury*”. Any review of anti-dumping measures, therefore, must be of the measure itself because only through such a review is it possible to determine whether the measure is necessary to counteract dumping causing material injury.

Australia’s anti-dumping legislation reflects this. It requires that a review be a review of the anti-dumping measure, that is, of the publication of a dumping duty notice, as opposed to a review of only the dumping duty notice itself or its contents. Publication of a dumping duty notice is possible only where it is established that the goods in question are being imported and, because of that, material injury is being caused or threatened to a domestic industry. It is this, of all the elements necessary for the publication of a dumping notice that must be reviewed.

Accordingly, any review must be of the measure itself and not simply the variable factors, to which reviews have been erroneously limited to.

Rio Tinto is concerned with the level of analysis of material injury and causation in dumping reviews. For example, the recent review of anti-dumping measures on ammonium nitrate from the Russian Federation has as its purpose, consistent with Article 11.2 of the WTO Anti-Dumping Agreement, reviewing whether and to what extent the anti-dumping measures are necessary to continue to offset the injurious effects of dumping.

It was found that half of the Russian ammonium nitrate exported to Australia during the period under review had been exported at prices less than a revised non-injurious price. Further, ammonium nitrate had been exported from a number of other countries at export prices less than those of the Russian ammonium nitrate, as well as the revised non-injurious price, and whose total volumes significantly exceeded the volume of ammonium nitrate from Russia. While significant volumes of ammonium nitrate entered the Australian market at export prices less than the revised non-injurious price, Customs found that the Australian industry had not incurred any material injury during the period under review.

If exports are entering a market at significant volumes below a non-injurious price, that is, the minimum price necessary to remove or prevent injury to the domestic industry, but those exports are not causing injury to the domestic industry, clearly a detailed analysis is required to determine why the domestic industry is not incurring any injury in such circumstances. No such analysis was undertaken in the review of the measures on Russian ammonium nitrate. This is a major concern.

Rio Tinto submits that the manner in which reviews of anti-dumping measures are conducted need to be reviewed and brought into compliance with Division 5 of Part XVB of the *Customs Act 1901* and Article 11 of the ADA.

18. Transparency and the public file.

Article 6.1.2 of the ADA and the equivalent Australian law provides that “*evidence presented... by one party shall be made available promptly to other interested parties*”. Confidential information is an obvious exception to this requirement. However, Rio Tinto believes that the spirit of this Article requires only a limited use of confidential information. Indeed this was confirmed by the WTO Panel in *Guatemala – Cement II* in which it was affirmed that ‘*good cause*’ must be shown by a party claiming that information is confidential (Article 6.5 of the ADA).

Article 6.5.1 of the ADA provides that “*authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence*”. No time period is stipulated in the ADA or in Australia’s anti-dumping legislation for the provision of these summaries. In the interests of procedural fairness Rio Tinto is of the view that the summary should be provided at the same time that confidentiality is claimed and that Customs should not rely on the confidential information until such summary is provided to the other parties.

When provided, the non-confidential summaries should contain sufficient information to ensure transparency of the investigation process.

Timeliness with preparing visit reports by Customs’ and placing those reports on the public file has also been a problem in Rio Tinto’s experience.

Rio Tinto submits that interested parties should be required to provide summaries of confidential information and that they be provided at the same time the confidential information is provided.

19. Training and quality assurance.

Customs should implement an effective training program to ensure that its officers administer the anti-dumping regime in a way which complies with Australian law and reflects the commercial environment in which that law is applied. The training program should draw on internal expertise as well as external advice, including from the business community, as well as lawyers and accountants with relevant expertise and experience. One component of this program could be a compulsory secondment of officers to businesses, so that investigation officers could gain increased understanding and experience in how businesses operate. This 'real-life experience' would assist officers in their analysis of how markets operate and how products compete with one another in such markets.

Customs should implement a quality assurance program to ensure that dumping investigations comply with and give effect to relevant statutory provisions, as well as comply with the ADA and WTO jurisprudence. From time to time that program should be reviewed by an external consultant with relevant expertise and experience.

Rio Tinto submits that the existing internal training program for officers involved in dumping investigations be reviewed with a view to involving external consultants from time to time, the possibility of secondments and implementation of a quality assurance program that, from time to time, involves an external consultant reviewing existing practices and policies for compliance with legislative requirements. Customs should also consider commercial business experience as a selection criterion in recruitment of investigating officers.

20. Appeals to the Trade Measures Review Officer.

Rio Tinto is aware that in a number of reinvestigation findings following a successful appeal to the Trade Measures Review Officer (TMRO), Customs has disagreed with the conclusions reached by the TMRO and, in effect, overturned the conclusions reached by the TMRO. This, Rio Tinto believes, undermines the review process.

If the TMRO concludes that one or more of Customs' findings were flawed and the Minister agrees with TMRO that those findings were flawed, then Customs should proceed in a reinvestigation on the basis that those findings were flawed and reassess its recommendations to the Minister on that basis.

Rio Tinto submits that reinvestigations conducted by Customs should proceed on the basis that the findings found by the TMRO were flawed are flawed for the reasons given by the Minister and agreed to by the Minister.

21. Conclusions

Having regard to the foregoing, Customs should adopt the following:

- a. formal procedures that allows relevant data to be sought and obtained so that the Minister has enough information to apply a national interest test before implementing anti-dumping measures;

- b. applications for the imposition of dumping duties be properly and adequately documented and be supported by sufficient evidence before dumping investigations are initiated;
- c. no Federal Government department or agency assist potential applicants in the preparation of dumping applications;
- d. an analysis of 'like goods' which accords with the definition of 'like goods' in Part XVB of the *Customs Act 1901* and in the ADA;
- e. a more detailed analysis of 'material injury' and causation, including the involvement of specialists in other government agencies;
- f. the conduct of reviews in accordance with legislative requirements and the ADA;
- g. increased transparency with respect to the operation of the public file; and
- h. improved training of personnel involved in the conduct of dumping investigations.

Schedule A

APPENDIX 1

INFORMATION TO BE INCLUDED IN A REQUEST FOR THE COMMENCEMENT OF A PUBLIC INTEREST INQUIRY

A request to the Tribunal to commence a public interest inquiry shall:⁴

- 1 include (when applicable) the name, address for service, telephone number, fax number and electronic mail address of the requester and of the requester's counsel, and be signed by the requester or the requester's counsel;
- 2 include a statement of the public interest affected by the imposition of the antidumping or countervailing duty, indicating the degree to which it is affected;
- 3 include sufficient information as to whether the imposition of the antidumping or countervailing duty would not or might not be in the public interest;
- 4 address all relevant factors, including, where applicable:
 - (a) the availability of goods of the same description from countries or exporters to which the order or finding does not apply,
 - (b) the effect that the imposition of the antidumping or countervailing duty has had or is likely to have on:
 - (i) competition in the domestic market,
 - (ii) producers in Canada that use the goods as inputs to produce other goods or services,
 - (iii) competition by limiting access to:
 - goods that are used as inputs in the production of other goods and services, or
 - technology,
 - (iv) the choice or availability of goods at competitive prices for consumers, and
 - (c) the effect that a reduction or elimination of the antidumping or countervailing duty is likely to have on domestic producers of inputs, including primary commodities, used in the production of like goods; and
- 5 include any other information that is relevant in the circumstances.

⁴ See subsection 40.1(2) of the *Special Import Measures Regulations* for the official wording of these regulatory provisions.

Schedule B

APPENDIX 2

FACTORS TO BE CONSIDERED BY THE TRIBUNAL IN A PUBLIC INTEREST INQUIRY

In conducting a public interest inquiry, the Tribunal takes into account any factors that it considers relevant, including the following:⁵

- 1 whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply;
- 2 whether imposition of the full duties has had or is likely to have the following effects:
 - (a) substantially lessen competition in the domestic market in respect of like goods,
 - (b) cause significant damage to producers in Canada that use the goods as inputs in the production of other goods and in the provision of services,
 - (c) significantly impair competitiveness by limiting access to:
 - (i) goods that are used as inputs in the production of other goods and in the provision of services, or
 - (ii) technology,
 - (d) significantly restrict the choice or availability of goods at competitive prices for consumers or otherwise cause them significant harm;
- 3 whether a reduction or elimination of the antidumping or countervailing duty is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic production of like goods; and
- 4 any other factors that are relevant in the circumstances.

⁵ See subsection 40.1(3) of the *Special Import Measures Regulations* for the official wording of these regulatory provisions.