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# Recommendations

## The new public interest test

### RECOMMENDATION 5.1

*The imposition and continuation of anti-dumping and countervailing measures should be subject to a ‘bounded’ public interest test, embodying a presumption that measures will be imposed if there has been dumping or subsidisation that has caused, or threatens to cause, material injury, unless one (or more) of the following circumstances apply:*

- *the imposition of measures would preclude effective choice and competition in the Australian market for the like goods, and the resulting scope for the applicant supplier to exploit market power could not be addressed through application of the lesser duty rule*
- *the price of the imported goods concerned after the imposition of measures would still be significantly below competing local suppliers’ costs to make and sell*
- *un-dumped or non-subsidised like imported goods are readily available at a comparable price to the dumped or subsidised imported goods*
- *prior to the commencement of injurious dumping or subsidisation, the local industry’s share of the domestic market for the goods concerned was low, with that share likely to remain low even if measures were imposed*
- *the large majority of the overseas supplier’s output of the goods concerned is exported, with the goods imported into Australia being exported at a price which covers the supplier’s fully distributed costs and a reasonable profit margin (plus the value of any identifiable input subsidies).*

*The explanatory memoranda to the enabling legislation should elaborate on the intent and application of this list of circumstances, having regard to the commentary in the body of this report.*

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*Where, based on the advice from the Australian Customs and Border Protection Service (ACBPS), the Minister is satisfied that one (or more) of these circumstances apply, measures would not be imposed. And where none of these circumstances apply and the Minister has determined that measures should be imposed, then the magnitude of those measures should be set having regard to the existing lesser duty rule arrangements.*

*Assessments against the public interest test by the ACBPS should generally be completed within 30 days, and draw if necessary on advice from external parties such as the Australian Competition and Consumer Commission. Provisional measures should be imposed in all cases where a finding by the ACBPS that there has been injurious dumping or subsidisation provides the basis for moving to apply the test.*

*In giving effect to these requirements, the ACBPS should also:*

- clearly indicate the nature and breadth of the public interest test in its initial invitations to interested parties to comment on applications for measures*
- give interested parties the opportunity to comment on its assessments against the test through detailing those assessments in the Statement of Essential Facts*
- include a synthesis of that commentary from interested parties in its final report to the Minister.*

## **Supporting framework changes**

RECOMMENDATION 6.1

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

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

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

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RECOMMENDATION 6.2

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

RECOMMENDATION 6.3

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

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

RECOMMENDATION 6.4

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

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

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

RECOMMENDATION 6.5

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

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

RECOMMENDATION 6.6

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

RECOMMENDATION 6.7

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

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

RECOMMENDATION 6.8

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

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## Administration of the system

### RECOMMENDATION 7.1

*The Australian Customs and Border Protection Service, the Minister and the Trade Measures Review Officer should retain their broad administrative and decision-making roles within the anti-dumping system, with their specific responsibilities modified, as appropriate, to reflect the Commission's other recommendations.*

*These roles and responsibilities should be reconsidered at the time of the next review (see recommendation 7.11) in the light of experience with the new system.*

### RECOMMENDATION 7.2

*The following changes should be made to the current appeals arrangements for anti-dumping decisions.*

- *Decisions on whether or not to commence an investigation into the continuation of anti-dumping or countervailing measures beyond the initial five-year term — and any ensuing decisions by the Minister — should be appellable.*
- *Where the Trade Measures Review Officer (TMRO) finds in favour of an appeal against a decision made by the Minister, the Minister should make a final determination without returning the case to the Australian Customs and Border Protection Service (ACBPS) for reinvestigation, unless the TMRO explicitly recommends a reinvestigation. In the event of the latter:*
  - *the reinvestigation and report to the Minister should be conditioned and constrained by a directive from the TMRO on where the initial investigation was flawed*
  - *within the confines of that directive, there should be scope for the ACBPS to consider relevant new information.*

*Any such reinvestigations and ensuing decisions by the Minister should not be appellable.*

### RECOMMENDATION 7.3

*Provision should be made for the Australian Customs and Border Protection Service (ACBPS) to seek extensions of the investigation period at any time during an investigation. In addition to notification of extensions through the issue of an Australian Customs Dumping Notice, all correspondence relating to such requests should be made available on the public file.*

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*This new arrangement, together with the adequacy of the general time limits for the various steps in the investigation process, should be assessed at the next review (see recommendation 7.11), having regard to experience in the intervening period under the new system.*

*Through its ‘Anti-Dumping and Countervailing Actions — Status Reports’, the ACBPS should provide an annual, consolidated, summary of the timeliness of each of its investigations in the preceding 12 month period.*

RECOMMENDATION 7.4

*Decisions by the Minister in response to advice from the Australian Customs and Border Protection Service, or from the Trade Measures Review Officer, should be subject to a 30-day time limit.*

RECOMMENDATION 7.5

*The Australian Government should ensure that the Australian Customs and Border Protection Service (ACBPS) and the Trade Measures Review Officer (TMRO) are adequately and appropriately resourced to enable them to effectively undertake their functions under the new system. The level of resourcing should take into account the opportunities for the ACBPS and the TMRO to engage outside expertise to enhance the quality and/or cost-effectiveness of aspects of their assessment tasks.*

RECOMMENDATION 7.6

*In providing advice to the Minister on whether anti-dumping measures should be imposed or continued, the Australian Customs and Border Protection Service should indicate in its investigation reports whether there have been any comparable recent cases in other countries; what the outcomes of those cases were; and what is the relevance, if any, of those outcomes to the investigation at hand.*

RECOMMENDATION 7.7

*Through its ‘Anti-Dumping and Countervailing Actions — Status Reports’, the Australian Customs and Border Protection Service should report annually on the number of applications for anti-dumping measures that do not proceed to initiation, and the products and countries that were the subject of those applications.*

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RECOMMENDATION 7.8

*Through its various reports and/or Australian Customs Dumping Notices, the Australian Customs and Border Protection Service (ACBPS) should be required to publish the maximum amount of information on the magnitude of individual anti-dumping and countervailing measures and the underlying variable factors that is consistent with maintaining appropriate protection for commercially sensitive information submitted by individual parties.*

- *Where the ACBPS determines that the firm-specific nature of the measures or the variable factors (or some other reason) militates against disclosing full details on those measures, it should reduce the amount of information published by the minimum necessary to provide the requisite protection for the commercially sensitive material concerned.*
- *At the very least, the ad valorem equivalents of measures should be publicly notified at the time of imposition and following annual adjustments under the new adjustment mechanism (see recommendation 6.5).*

*Customs should also report annually on the number of cases where the lesser duty rule has been applied.*

## **Other matters**

RECOMMENDATION 7.9

*The Australian Government should consult with the Australian Bureau of Statistics on the best way to ensure that import data are not suppressed on confidentiality grounds when the same or similar data can be publicly accessed through other sources.*

## **Implementation of the new requirements**

RECOMMENDATION 7.10

*All of the proposed reforms should take effect as soon as practically possible, except for the new public interest test (see recommendation 5.1) and the changes to the continuation provisions (see recommendation 6.4). These should take effect two years later.*

RECOMMENDATION 7.11

*There should be a broad and independent public review of the new anti-dumping system five years after the reform package is fully operative. Amongst other things, that review should examine:*

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- *the impacts on decision-making of the public interest test and whether that case history points to any gaps or deficiencies in the test and/or the accompanying legislative guidance, or to the need for supporting changes to other aspects of the legislative architecture*
  - *the need for changes to the system framework separate from the public interest test requirements*
  - *the efficiency and effectiveness of the Australian Customs and Border Protection Service, the Trade Measures Review Officer and the Minister in administering the anti-dumping system and giving effect to the new requirements, and whether any changes to their responsibilities are warranted in the light of that experience*
  - *whether the resourcing of the assessment and appeals process is adequate and appropriate, having regard to any proposed changes in decision-making responsibilities*
  - *what changes, if any, are required to the statutory timeframes for the conduct of investigations, or to the related provisions governing extensions to those timeframes*
  - *the effectiveness of the changes to the public reporting requirements in promoting more transparent decision-making and outcomes, while continuing to provide appropriate protection for commercially sensitive material submitted by the parties, and what more might be done in this regard*
  - *whether there have been changes to overseas anti-dumping regimes that could be relevant to the Australian system.*