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ADFA Response to the Productivity Commission Draft Report on Australia's Anti-Dumping and Countervailing System

Executive Summary

The Australian Dried Fruits Association ("ADFA") has reviewed the Productivity Commission's Draft Report on Australia's Anti-Dumping and Countervailing System. The ADFA is concerned that the changes which the Productivity Commission ("the Commission") has labelled 'high priority' reforms to the Anti-Dumping System will severely restrict access to anti-dumping measures for Australian industry.

The proposal to introduce a public interest test which it is intended will be complimented by a range of guidelines and directives, will add a further impost to accessing anti-dumping measures in a timely manner. The Commission's recommendation to limit the continuation of measures to one three-year extension (followed by a prohibition on further re-application for measures for a two-year period) is unreasonable. This uniform approach will likely result in exporters the subject of measures building stock to target re-entry of the market upon the expiration of the eight year period. ADFA is opposed to the uniform limitations on the life of anti-dumping measures. Similarly, ADFA does not consider reviews of measures and duty assessment reviews can be abandoned – to do so would further weaken the effectiveness of Australia's Anti-Dumping System.

The ADFA is supportive of the Commission's position to not alter the roles and responsibilities of Customs and Border Protection, the Minister and the Trade Measures Review Officer ("TMRO"). ADFA supports enhancing the resourcing of the functions of Customs and Border Protection and the TMRO, along with extending the appeal provisions to include continuation decisions.

Finally, the ADFA welcomes the Commission's recommendation to establish a working group to examine the close processed agricultural goods provisions and report to the Minister. ADFA considers a number of products impacting its membership will be impacted by any proposed changes to the close processed agricultural goods provisions.

Community interest test

The Commission has proposed a "bounded" community interest test which is based on broad public interest tests in Canada and the European Union ("EU") to address what the Commission perceives as a current 'lack of consideration of wider impacts'. It is stated that the costs to the community (downstream interests, stakeholders, and the public) of imposing measures can be significant when contrasted with the benefit to the local industry.

In proposing a public interest test, the Commission has identified that in Canada of approximately 160 investigations since the process was introduced in 1984, only six investigations have involved a public interest inquiry. The Canadian process requires an interested party to request the Canadian International Trade Tribunal ("CITT") to conduct a public interest review. Of the six inquiries completed to date, four have resulted in the application of the lesser duty rule (the public interest test is based upon whether it is in the public interest to impose a lesser – or no – duty rule). Only one inquiry has occurred since guidance principles were introduced in 2000. Certain of the CITT guidance principles reflect some of the proposed "directives" identified by the Commission in Recommendation 6.1.

In the EU, the public interest test has resulted in the non-imposition of measures in approximately 10 per cent of cases. Under the EU analysis the impact of the measures will be limited to "one step up or down the production chain."

The Commission's recommendation for the inclusion of a public interest test does not propose that the lesser duty rule be applied when the broader community's interest is upheld. Rather, the Commission is proposing that measures not be applied. The Commission has gone beyond the guidance considerations identified by Canadian and EU authorities by also recommending that the following limitations also apply:

- The resulting price for the imported goods would still be significantly below competing local suppliers' costs to make and sell

This criterion is not an explicit guideline consideration under Canadian or EU directives. ADFA has concerns that this criterion combined with the full cost plus profit guideline imposes an efficiency test which significantly disadvantages Australian industry;

- The dumped or subsidised are not the primary cause of material injury

Applicants must demonstrate that dumping has caused material injury. The proposed introduction of this criterion will impede industries from seeking measures in a general economic downturn when those industries are more susceptible to the injurious effects of dumping and large scale producers/exporters are actively seeking our export markets with marginal cost pricing strategies. This proposal is a major departure from current practice and is viewed as a further restriction to accessing Australia's Anti-Dumping System.

- The local industry's share of the domestic market is less than 20 per cent

The Commission describes measures as "ineffectual" where the Australian industry holds less than 20 per cent market share. Despite the caveats about newly commissioned plants and yet to be utilised production facilities, the setting of a particular market share level upon which Australian industry cannot seek relief from the injurious effects of dumping is a denial of Australian industry's right to access an international trading instrument. The setting of a 'target' market share level is likely to encourage exporters to become predatory – this type of behaviour is not in the interests of Australian manufacturing.

- Exporters price covers costs plus a reasonable profit

Significant conjecture as to what constitutes full costs (the Commission has not referred to 'fully-absorbed cost-to-make-and-sell') and reasonable profits. Terminology is vague and will be challenged by exporters/importers in every instance.

The ADFA's considered view is that the Commission's proposed public interest test will significantly further restrict access to anti-dumping measures to industries where injurious dumping has been proven. The 'further restriction' description is appropriate of the present system as accessing anti-dumping measures is an extremely complex and time-consuming process. It is evident from the Commission's primary concerns that it assumes anti-dumping measures lessen competition – it does not perceive measures as a means of correcting a discriminatory trading practice.

The ADFA re-affirms its comments in its submission to the Commission of June 2010 – the Minister's current role involves an available discretion on whether the imposition of anti-dumping measures is in the broader Community's interests. As the ADFA does not subscribe to the Commission's views, it does not consider it necessary to address the accompanying proposal to extend the investigation timeframe to cater for the public interest assessment.

Extension of Measures

The Commission has suggested that anti-dumping measures should attract a limited operating timeframe. To achieve this it is proposed that extensions to the initial five year impost be limited to one only extension of three years. Measures would therefore have a maximum life of eight years. Furthermore, following the eight year period, the industry would be denied accessing measures (of any type) for a further two year period.

The ADFA respectfully disagrees with this proposal. The limitation on the life of measures will likely result in exporters awaiting the expiry of the measures to re-commence dumped exports via previously established distribution channels. The present continuation investigation process takes full account of the exporter's activities including export pricing to third countries. The proposed limitations will disadvantage Australian industry and encourage dumping to re-commence following the expiry date of the measures.

Continuation investigations involve an examination of all relevant factors which indicate the likelihood that dumping and material injury will re-commence in the absence of measures. It would be short-sighted to impose a uniform restriction on the life of measures when such an impost is not required. The Commission's proposal reflects more on the dissatisfaction with Customs and Border Protection's continuation investigation process than the limited circumstances when measures are extended beyond the initial five year imposition period.

Reviews

The Commission has proposed that the current review of measures process which adjusts the variable factors be abolished. It is argued that reviews are "costly and cumbersome" and that some 40 per cent of reviews have been at the direction of the Minister. In respect of this latter category the major reason for the Minister's involvement is in part due to the extension of time of the original investigation, extending the period between the end of the investigation period and the date the Minister imposes anti-dumping measures.

The ADFA questions whether anti-dumping measures can be viewed in the same manner as the self-assessment process for taxation. Anti-dumping measures are based upon commercially sensitive selling price and cost information (of exporter, importer, and local industry) requiring the involvement of Customs and Border Protection to establish each of the applicable variable factors. Self-assessment (by the importer) would require both the exporter (normal value information) and the local industry (unsuppressed selling price information) to disclose confidential information to the importer. The ADFA considers its members would be reluctant to disclose commercially sensitive price and/or cost information to a competitor.

The ADFA considers that Customs and Border Protection is well positioned to manage review inquiries. As a review of variable factors investigation does not re-visit material injury, the process should not involve a complete 155-day timeframe (the same as for an original inquiry). A much reduced timeframe is considered appropriate.

Administrative reviews

The Commission has similarly proposed that administrative reviews be abolished. The ADFA holds major reservations with this proposal. The administrative review process is a further verification process that the exporter (to which anti-dumping measures apply) has not exported at a dumped or injurious price. To establish this fact, Customs and Border Protection will examine contemporary normal value information during an administrative review.

The proposed 'adjustments' to interim duties payable at time of importation is likely to result in the underpayment of interim duties. The present process minimises underpayments of interim duty. The ADFA is opposed to a change which abolishes administrative reviews and moves to a notional self-assessment process.

The Commission's proposal highlights a further instance of how the effectiveness of the current Anti-Dumping System is to be gradually eroded.

Administrative changes to the system

The recent Joint Study (2006) recommended a number of changes designed to improve the administration of Australia's Anti-Dumping System. Some of these changes, such as the introduction of the electronic public file system have improved access and transparency to the decision-making process in a timely manner.

The ADFA is supportive of a number of the proposed changes to the administration of the system. These include:

- The inclusion of decisions relating to the continuation of measures, reviews of the amount of interim duty, acceptance of price undertakings, and variations in variable factors;

- Ensuring Customs and Border Protection and the TMRO are adequately resourced;

- Requiring Customs and Border Protection to comment on divergences from overseas investigation outcomes;

- Requiring Customs and Border Protection to seek feedback on the impact of measures on interested parties; and

- Recommending to the Australian Law Reform Commission that changes to the legislation governing the release of information suppressed by the Australian Bureau of Statistics where such information is available from an alternate source (i.e. published export information) for the purposes and use in anti-dumping applications.

The ADFA is concerned by Draft Recommendation 8.3 where the Commission has proposed that requests for extensions to the timeframe of an investigation should be available "at any time during an investigation". The ADFA is aware from recent experience that there appears to be an absence of overriding scrutiny with timeframe extensions. In some cases, extensions of time of up to 120 days have been granted – in the absence of provisional measures. The ADFA requests the Commission to re-examine this issue and to recommend that where extensions of time are granted that provisional measures are imposed (certainly no later than Day 110 of the investigation timeframe).

The ADFA does not support Draft Recommendation No. 8.7 which will require Customs and Border Protection to annually publish the number of applications that did not proceed to initiation, including the description of the goods the subject of the application. The publication of this information is likely to result in the release of commercially sensitive information and could jeopardise the local industry's supply position.

Close processed agricultural products

The ADFA welcomes the Commission's Draft Recommendation 7.1 to convene a working group to examine the provisions relating to 'close processed agricultural goods' within the *Customs Act 1901*. The ADFA does not support abolishing the provisions: ADFA members and other raw agricultural growers and suppliers require access to the Anti-Dumping System as is available to all other producing industries in Australia.

ADFA was recently involved in an investigation on processed currants from Greece where dried currant growers were considered part of the Australian industry for material injury purposes. The ADFA welcomes the opportunity to participate in a proposed working group to examine the issue of 'close processed agricultural goods'.