Canberra
1/2 Brindabella Circuit
Brindabella Business Park
Canberra International Airport
ACT Australia 2609

Telephone +61 2 6163 1000
Facsimile +61 2 6162 0606
Email: info@moulislegal.com
www.moulislegal.com

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moulislegal

commercial+international

Mr J Hawkins
Committee Secretary
Senate Standing Committee on Economics
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email

Dear Secretary

Customs Amendment (Anti-Dumping) Bill 2011

This submission is offered in response to the invitation for submissions issued by the Committee for the purposes of its inquiry into the *Customs Amendment (Anti-Dumping) Bill* 2011 ("the Bill").

Contents

A Intention of this submission

Australia is a signatory to the *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* ("the Final Act").

Article XVI of the Final Act provides as follows:

> *Each Member shall ensure the conformity of its laws, regulations and administrative processes with its obligations as provided in the annexed Agreements.*

Amongst those annexed Agreements are the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("the Anti-Dumping Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement").

A WTO Member may bring a dispute concerning the compliance by a fellow WTO Member with its obligations under any of the WTO Agreements to the Dispute Settlement Body pursuant to the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("the DSU") which is Annex 2 to the Final Act.

Article 19 of the DSU provides as follows (in part):

> *Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.*

The intention of this submission is to consider various elements of the amendments to the *Customs Act* 1901 ("the Act") which are proposed by the Bill from the standpoint of their likely compliance or non-compliance with Australia's obligations under the Anti-Dumping Agreement and the SCM Agreement.

B About Moulis Legal

Moulis Legal is a law firm. We represent clients in international trade matters. The areas in which we are active include WTO disputes; free trade agreements; anti-dumping and countervailing investigations; customs compliance; and other aspects of cross-border commercial regulation. Our clients include Australian, foreign and multinational companies, and foreign governments.

In making this submission we are not acting under the instruction of any client or clients. Our interest is to assist the Committee by expressing views about the conformity of the Bill with Australia's international legal obligations under the WTO Agreements.

We seek to address the Committee from the position of legal policy, and not from any other policy position.

C Non-compliance – "as such" and "as applied" distinction

WTO jurisprudence has developed a distinction between non-compliance of a legislative instrument on "as such" basis, and non-compliance only on the basis of how a legislative instrument may be applied.

That part of a legislative instrument which *mandates action* which is inconsistent with a WTO obligation can be challenged "as such". In other words, the simple presence or existence of the law can be an actionable non-conformity under the DSU.

Legislation which *gives discretion* to an executive authority of a WTO Member to act in a range of ways, where one or some but not all of those ways might be inconsistent with a WTO obligation, cannot be challenged "as such". Instead, only the application of that legislative instrument by the executive, in a way which was non-conforming, would be actionable.

D Comments on the proposed amendments

In commenting on the conformity of the proposed amendments with the Anti-Dumping Agreement and the SCM Agreement, this submission groups the amendments into these nine categories:

- that trade unions should be listed in the Act as *"interested parties"* and as *"affected parties"* in dumping and countervailing investigations;
- that companies producing less than 25% of the volume of the goods to which an application for an investigation relates should have standing to lodge an application for that investigation and to have it initiated;
- that an application for an investigation require supporting data covering a period of no more than 90 days prior to the lodgement of the application;
- that a preliminary affirmative determination can be made at any time after the initiation of an investigation;
- that a rebuttable presumption of material injury caused by dumping arises if dumping is found to have occurred;
- that importers bear the onus of proving that goods are not dumped or subsidised;
- that information for an investigation or for a review that reasonably could not have been provided earlier is not precluded from being considered by the CEO of Customs ("the CEO") or the Trade Measures Review Officer ("the TMRO"), respectively;
- that the CEO and the TMRO actively consult with persons with expertise in the relevant and related Australian industries in making their decisions and recommendations; and
- that dumping and countervailing decisions, whether made by the Minister, the CEO or the TMRO, be susceptible to review by the Administrative Appeals Tribunal.

1 That trade unions should be listed in the Act as interested parties and as affected parties in dumping and countervailing investigations

Items 1 and 2 of the Bill seek to amend the definition of *"affected party"* and of *"interested party"* in Section 269T(1) of the Act, and the definition of "interested party" in Section 269ZX of the Act, to include:

> *a trade union organisation some of whose members are directly concerned with the production or manufacture of like goods*

Under the Act, an interested party has a right of access to the public record maintained for the relevant investigation by the CEO, and to the public record maintained for a review by the TMRO. An interested party must be invited by the CEO to lodge submissions in relation to an investigation, and by the TMRO to lodge submissions in relation to a review of a Ministerial decision. An interested party has the right to initiate a review by the TMRO of a Ministerial decision.

An affected party has the right to seek a review by the CEO of an existing anti-dumping or countervailing measure under the Act.

Under the Anti-Dumping Agreement, interested parties also have participative rights in an investigation, and may also initiate a review of an existing measure.

The question which therefore arises is whether a trade union is, or is entitled to be, an interested party under the Anti-Dumping and SCM Agreements.

Article 6.11 of the Anti-Dumping Agreement sets out a list of entities that *"shall"* be included in the definition of an interested party *"[f]or the purposes of this Agreement"*. This list does not include trade unions.

The Article also provides that:

> *This list does not preclude Members from allowing a domestic or foreign party other then those mentioned above to be included as an interested party.*[1]

In *Japan - Countervailing Duties on Dynamic Random Access Memories from Korea*[2] (*"Japan – DRAMS"*) the Appellate Body held that an investigative authority has the power to designate entities as interested parties for the purposes of the SCM Agreement. This indicates that Members have a discretion to determine who may be an interested party for the purposes of an investigation.

That ruling by the Appellate Body was in the context of the gathering of information by an investigating authority for the purposes of undertaking its investigation. The Appellate Body said:

> *We do not suggest that investigating authorities enjoy an unfettered discretion in designating entities as interested parties regardless of the relevance of such*

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1 This is mirrored in Article 12.9 of the SCM Agreement.

2 WT/DS336/AB/R, 28 November 2007

> *entities to the conduct of an objective investigation. As we have observed, the term "interested party" by definition suggests that the party must have some "interest" related to the investigation. Although that interest may be in the outcome of the investigation, a consideration of the interest should also take account of the perspective of the investigating authority. An investigating authority needs to have some discretion to include as interested parties entities that are relevant for carrying out an objective investigation and for obtaining information or evidence relevant to the investigation at hand. Nonetheless, in designating entities as interested parties, an investigating authority must be mindful of the burden that such designation may entail for other interested parties*. (footnotes omitted)

Accordingly, there must be at least some doubt concerning the concept of including a trade union as an interested party in activities other than information gathering by the investigating authority concerned, and the participation of that party in the information-gathering.

In our view these amendments proposed by the Bill are in conformity with the relevant WTO Agreements in so far as they would permit trade unions to make submissions and to be requested by the CEO to provide information in an investigation. In light of the comments made by the Appellate Body on this point in *Japan – DRAMs*, it is not clear whether they would be found to be in conformity in so far as they would permit trade unions to initiate a review of an existing anti-dumping measure by the CEO.[3]

2 That companies producing less than 25% of the volume of the goods to which an application for an investigation relates should have standing to lodge an application for that investigation and to have it initiated

Items 9, 10 and 11 of the Bill seek to alter the operation of Sections 269TB and 269TC of the Act. The effect of these Items is that, where an application is made on behalf of persons who produce less then 25% of the total production or manufacture of like goods in Australia, the CEO, as part of the public notification of his decision not to reject the application, must state that other persons who produce or manufacture the like goods in Australia may lodge supporting applications with the CEO.

Where supporting applications have been received by the CEO from persons who, together with the applicant, account for not less then 25% of the total production and manufacture of like goods in Australia, the application will be taken to be adequately supported. As such, the application would not fail the requirement that it be *"supported by a sufficient part of the Australian industry"* under Section 269TB(4)(e) of the Act. This would be a new "pathway" to initiation of an investigation.

These Items would not be in conformity with Article 5.4 of the Anti-Dumping Agreement

[3] In relation to the ability of a trade union to initiate a review of a Ministerial decision, there is a divergence between the Anti-Dumping Agreement and the SCM Agreement. Article 13 of the former does not seek to confine the parties who may request an administrative review procedure (unless an implied confinement emanates from the concept of "review"). Article 23 of the SCM Agreement states that review procedures *"shall provide all interested parties who participated in the administrative proceeding and are directly and individually affected by the administrative actions with access to review"*.

and Article 11.4 of the SCM Agreement to the extent that they were to allow the initiation of an investigation where an application has not been made *"by or on behalf of the domestic industry"* as required by those Articles.

There is a two part test under the relevant Agreements for determining whether an application has been made by or on behalf of the relevant domestic industry, and whether an investigation can be initiated by an investigating authority.

First (we will call this "the first test"), the application must be:

> *…supported by those domestic producers whose collective output constitutes more than 50% cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application.*

Second ("the second test"):

> *…no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced by the domestic industry.*

Presently under the Act an application must be supported by a *"sufficient part of the Australian industry"*. Section 269TB(6)(a) and (b) explain that an application will be considered to have been supported by a sufficient part of the Australian industry when both parts of the two part test under the relevant Agreements are met. In other words, the existing pathway to initiation mirrors the requirements under the relevant Agreements.

The amended Section 269TB(6) will replicate the existing pathway to initiation under the Act. It will refer to both the first and second tests in the case of an application which itself identifies that both tests have been met. However the Bill opens a new pathway to initiation, stating that in the case of an application which does not identify support from persons who produce not less than 25% of the relevant goods, supporting applications may be made by persons whose production could raise that percentage to above 25%. In the case of this new pathway, the express requirement for the CEO to be satisfied that the first test has been met is not mentioned.

It is true to say that if *opposing* applications do not come forward in a percentage that is more than the percentage of *supporting* applications, the first test will be met. The failure to expressly mention that test would not itself lead to a non-conformity with the Agreements. Nonetheless it would be incongruous for the first test to be mentioned in the pathway to initiation which is presently provided for under the Act, and which would continue to be provided for if the Bill were to become law, but not in the new pathway suggested by the Bill.

Furthermore, if the first test was demonstrably not satisfied in the case of the new pathway, there is nothing in the Bill which would require the application to be rejected.

As a separate point, we note that the Articles in the relevant Agreements clearly state that an investigation shall not be initiated where domestic producers who expressly support the application account for less then 25% of the total production of the domestic industry.

Section 269TB(4)(e) of the Act requires that an application made under Section 269TB(1) must be supported by a sufficient part of the Australian industry. Under Section 269TC, where the CEO is not satisfied that the application conforms with Section 269TB, he must reject it. There is no requirement to publish a public notice where an application is rejected.

The Bill envisages a scenario in which an application made without the support of a sufficient part of the Australian industry will not be rejected. Under the Bill an "invitation" for supporting applications to come forward, in an attempt to meet the 25% threshold of support, is to be issued in the notice that is published under Section 269TC(4) when the CEO has decided not to reject the application. We believe that such a notice effectively initiates an investigation. At that point in time the CEO would not be satisfied that the application was supported by producers responsible for the production of not less than 25% of the relevant goods, meaning that a breach of either of Articles 5.4 or 11.4 will arise.

We do not think that the failure to expressly mention the first test in the case of the new pathway would be an "as such" non-conformity with the relevant Agreements. Any initiation in contravention of the first test would clearly be a non-conformity "as applied". A legislative provision which allowed the initiation of an investigation where not less than 25% support was demonstrated would be an "as such" non-conformity.

3 That an application for an investigation require supporting data covering a period of no more than 90 days prior to the lodgement of the application

Item 8 of the Bill seeks to amend the Act so that an application for a dumping duty notice or a countervailing duty notice need not require supporting data relating to more than the last 90 days.

There is nothing within the Anti-Dumping or the SCM Agreements that prescribes a minimum time limit for data contained in an application. Therefore the proposed amendment to the Act might not be WTO-illegal in itself. However, Article 5.2 of the Anti-Dumping Agreement requires that an application include:

> *…evidence of (a) a dumping, (b) injury within the meaning of Article VI of the GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be sufficient to meet the requirements of this paragraph.*

Similarly, Article 11.2 of the SCM Agreement requires that an application shall:

> *…include sufficient evidence of the existence of (a) a subsidy, and, if possible, its amount (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this agreement and (c) a causal link between the subsidized imports and the alleged injury.*

In both instances the CEO must review the accuracy and the adequacy of the evidence provided in the application. Under the Act the CEO must reject the application if not

satisfied that there appear to be reasonable grounds to initiate an investigation.

The legal risk in relation to the proposed amendment is that if an applicant only provides supporting data relating to a previous 90 day period, that data will be adjudged not to be sufficient to satisfy the CEO that he should not reject the application.

We wish to point out that our comments relate to the information required for the purposes of initiation, and not to the appropriate time periods for which information would need to be gathered and analysed by an investigating authority for the purposes of arriving at provisional or final decisions to impose measures.[4]

4 That a preliminary affirmative determination can be made at any time after the initiation of an investigation

Item 13 of the Bill seeks to remove the current prohibition under the Act on the imposition of provisional measures at a time earlier than 60 days after initiation of an investigation. Provided the CEO is satisfied that there are sufficient grounds for the publication of a notice, the Item would allow the CEO to impose a provisional measure immediately after the investigation is initiated.

Both the Anti-Dumping Agreement and the SCM Agreement provide that provisional measures cannot be applied sooner then 60 days from the date of the initiation of an investigation.[5]

In our view the proposed amendment, if it became law, would not constitute an "as such" non-conformity. Clearly, however, if a provisional measure were to be imposed sooner than 60 days after initiation, that measure would itself be non-conforming.

5 That a rebuttable presumption of material injury caused by dumping arises if dumping is found to have occurred

Item 3 of the Bill proposes to amend the operation of Section 269TACB of the Act, so that where the Minister has determined that goods exported to Australia have been dumped, there is a rebuttable presumption that the dumping has caused material injury to the Australian industry.

Apart from the WTO concerns we express below, the proposed amendment seems to be illogical and unfair in a legal context. Australian industry clearly is not going to be inclined to argue that no material injury is caused, which means that in practice it would be up to other interested parties to prevail in their arguments that the Australian industry had not suffered material injury. However those parties will not have access to information about the Australian industry's financial performance: that information will be in the records of the Australian industry, who would benefit from the application of the presumption and therefore would not be inclined to provide the information required to establish that they

[4] We might mention that the approved form for applications of this nature could be amended to achieve the intention of this aspect of the amendments. The need for a legislative amendment is not evident.

[5] Article 7.2 of the Anti-Dumping Agreement and Article 17.2 of the SCM Agreement.

have (or have not) been injured.

Presumptions such as this have no place in the legislation of WTO Members, given the terms and the tenor of the relevant Agreements. Article 3 of the Anti-Dumping Agreement provides that a determination of material injury shall be:

> *…based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.*[6]

A mere presumption that material injury exists cannot be a determination of the type required by the relevant Agreements. A finding based on such a presumption would not be a finding based on positive evidence. The relevant Agreements specifically list the factors which must be considered in arriving at a finding that dumping or subsidisation has caused material injury. An investigating authority must find that there is a causal link between the dumping of the products and the injury suffered by the industry. The determination of such a link is to be based on all evidence available to the investigating authority.[7]

We feel that the introduction of the rebuttable presumption proposed by the Bill would be fundamentally at odds with Australia's WTO obligations. Such a provision would have the prospect of being an "as such" non-conformity, because of the way in which it would be seen to inevitably taint the rigour of any investigation undertaken by the Australian investigating authorities.

6 That importers bear the onus of proving that goods are not dumped or subsidised

Item 12 of the Bill seeks to amend Section 269TC of the Act, such that once an investigation has been initiated the importer of the goods the subject of the application bears the onus of proving that the imported goods have not been dumped or subsidised.

Importers do not have the information which is required to establish normal values, export prices, or to prove or disprove that subsidisation has occurred, or to establish the levels of any such subsidisation.[8]

This amendment would seem to offend against the general scheme of the Anti-Dumping Agreement and the SCM Agreement in several ways.

First, under the relevant Agreements, all interested parties are invited to make submissions to the investigating authority after the initiation of an investigation.[9] Article 6.8 and Annex II of the Anti-Dumping Agreement set out the rules and procedures by which an investigating authority may complete an investigation and arrive at a

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[6] This is mirrored in Article 15.1 of the SCM Agreement.

[7] Article 3.5 of the Anti-Dumping Agreement, and Article 12.5 of the SCM Agreement.

[8] It is true that information available from importers is relevant to part of the determination of export price (in terms of the profitability of their sales in Australia) - Section 269TAA(2) of the Act refers.

[9] Article 6.1 of the Anti-Dumping Agreement, and Article 12.1 of the SCM Agreement.

determination where an interested party declines to provide information.

Secondly, Article 6.6 of the Anti-Dumping Agreement requires that an investigating authority satisfy itself of the accuracy of the information supplied by interested parties and upon which their findings are to be based. The proposed amendments suggest that the CEO could be passive in his or her approach to the investigation, or need only make inquiries of interested parties (importers) even if those parties do not have the information that the investigating authority needs to support its decision.

Thirdly, Article 6.10 of the Anti-Dumping Agreement requires an investigating authority to determine an individual margin of dumping for each known *exporter* (from the exporting country) or producer of the product under investigation. The CEO would fail in his or her investigative obligation, and would deny exporters and producers their WTO rights, if the CEO were to place on onus on *importers* to prove that dumping or subsidisation had not occurred.

We think that legislatively mandating that an importer has an onus to disprove dumping or subsidisation would constitute an "as such" non-conformity in the context of the positive evidence requirements of the relevant Agreements and of the rights of exporters as interested parties under those Agreements.

7 That information for an investigation or for a review that reasonably could not have been provided earlier is not precluded from being considered by the CEO or the TMRO, respectively

Items 16 and 17 of the Bill seek to allow the CEO to consider any new or updated information that *"reasonably could not have been provided earlier"* in his consideration of the matters under investigation and when making recommendations to the Minister.

On the face of it these proposed amendments to the Act would not conflict with Australia's WTO obligations.

Investigating authorities do need to be mindful of the requirement under Article 6.2 of the Anti-Dumping Agreement that interested parties must have a full opportunity for the defence of their interests throughout an anti-dumping investigation.[10] This is considered to be a fundamental due process provision.[11]

The prospect that interested parties might not be given adequate opportunity to defend their interests in the case of late-submitted information is higher than in the case of information submitted at an earlier stage of the investigation.

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10 This is mirrored in Article 12.1 of the SCM Agreement.

11 *Guatemala – Definitive Anti-dumping Measures on Grey Portland Cement from Mexico* WT/DS156/R, 24 October 2000.

8 That the CEO and the TMRO actively consult with persons with expertise in the relevant and related Australian industries in making their decisions and recommendations

Various Items of the Bill impose a mandatory requirement on the CEO and the TMRO to consult with *"persons with expertise in the relevant Australian industry and related Australian industries"* and to *"have regard to any information and analysis provided by those persons as a consequence of those consultations*" in arriving at determinations under the Act.

There is nothing inherent to these proposed amendments that conflicts with Australia's WTO obligations. In having regard to such information the CEO and the TMRO must nonetheless continue to arrive at their determinations based on positive evidence and in accordance with the due process requirements of the relevant Agreements.

9 That dumping and countervailing decisions, whether made by the Minister, the CEO or the TMRO, be susceptible to review by the Administrative Appeals Tribunal

Item 47 of the Bill seeks to allow appeal from a decision of the Minister, CEO or TMRO to the Administrative Appeals Tribunal.

Article 13 of the Anti-Dumping Agreement provides that judicial, arbitral or administrative tribunals or procedures shall be maintained for the prompt review of administrative actions relating to final determinations and reviews of determinations. According to the Article, such tribunals must be independent of the authorities responsible for the determination or review in question.[12]

Without considering the logistics and mechanics of providing the AAT with an appeals jurisdiction in this area, we express the view that the amendment would result in a review architecture which would be more compliant with Australia's WTO obligations than the current one. As a review procedure for the purposes of the relevant Articles, the TMRO in our opinion cannot be seen to be independent of the authorities responsible for the determinations that the TMRO is called upon to review.

Yours sincerely

Daniel Moulis
Principal

[12] This is mirrored in Article 23 of the SCM Agreement.