Inquiry into the Customs Amendment (Anti-Dumping) Bill 2011

Submission to the Senate Economics Legislation Committee

by

Keith Wilson
Senior International Trade Law Counsellor
Institute for International Trade
University of Adelaide

31 March 2011

Summary

In terms of anti-dumping policy and regulation, the Institute for International Trade (IIT) believes that Australia's long-term national interest, including its economic interest, is best served by a robust, competitively-focused, internationally compatible, and administratively effective and transparent regime. Amendments to Part XVB of the Customs Act 1901 should be measured against those yardsticks.

IIT considers that the imposition of rebuttable presumptions on the importer of goods, as proposed in the Bill, does not meet the robustness and competition components. There are also major questions regarding compatibility with WTO rules. Other aspects of the Bill, while potentially adding to the robustness of the regime, in terms of its breadth of application, consultation provisions and access to additional materials, may not necessarily improve administrative effectiveness, timeliness and business certainty (as opposed to effectiveness in implementing the Bill's policy changes) or transparency (regarding claims of confidentiality).

Overall, though periodic reviews of Part XVB of the Customs Act are necessary to ensure its ongoing relevance and effectiveness, IIT does not believe that provision for an independent review of the proposed amendments after 2 years of operation is

sufficient to protect the system from unwarranted or unintended consequences of the proposed changes in the interim.

Submission

This short submission considers aspects of the *Customs Amendment (Anti-Dumping) Bill 2011*. It concentrates on the major features of the Bill rather than the specific draft wording of each individual provision in Schedule 1. In particular, we comment on the proposals to shift the onus of proof to the importer, as well as the broadening of definitions of 'material injury' to include impacts on jobs and investment, and of 'interested/affected party' to encompass trade unions, expansion of consultation provisions and review processes/material, and confidentiality issues.

Underlying considerations

2. IIT notes that *Australia's Anti-dumping and Countervailing System* was the subject of a recent Productivity Commission Inquiry Report No. 48, released in 2010. The Australian Government is expected to respond in May 2011 to the Commission's recommendations, in the context of the 2011/12 Budget. It may be recalled that the terms of reference for the report required the Commission, '[i]n making recommendations on the appropriate future role for an anti-dumping system in the Government's overall policy framework …to:

(a) aim to improve the overall performance of the Australian economy, taking into account the interests of the industry, importers and consumers;
(b) consider the consistency of anti-dumping policy with the overall policy framework, in particular competition, trade and industry policies, and alternative means of achieving the Government's objectives;
(c) have regard to Australia's international rights and obligations, including recent developments in international trade law and the current World Trade Organization Doha Round; and
(d) suggest practical ways of reducing compliance and administration costs, increasing business certainty and simplifying access to, and the timeliness and effectiveness of, the system.'

3. IIT believes that this range of underlying considerations remains relevant to any decision to improve upon the current system.

Balance of interests under the current anti-dumping system

4. We do not intend to repeat or comment upon the range of findings and recommendations contained in the Commission's report. We acknowledge that views will differ regarding where the balance should be struck between the interests of in dustry (including downstream sectors), importers and consumers, but argue that many aspects of the 'political economy' argument remain valid. We believe the 'cost to the community' will risk becoming imbalanced by a step as significant as changing the onus of proof in the manner proposed.

5. The current system accepts the view that a relatively few Australian industries should be able to continue to challenge perceived 'unfair' trading practices, even at the

expense of the broader economy, including consumers, and that this may be part of the 'price' of achieving productive trade reforms in other areas, as well as possibly providing opportunities for more gradual reform within those industries. The cost-benefit balance is struck when there is injury to the complaining party. If there is no injury and the industry still receives protection under anti-dumping provisions, this may be regarded as an unwarranted 'free kick'.

Rebuttable presumption of material injury, and onus of proof issues generally

6. Despite a recent rise, Australia has seen a declining number and value and narrowing range of activities covered by dumping-related measures (but an increasing proportion of longer-term extended protective measures). Although the need for protection – based on injury – may be warranted in some cases, it is unwarranted to allow the small number of beneficiaries of these costs to the broader Australian community to insist that importers (and indirectly consumers, as well as other downstream industries standing to benefit from competitive conditions for inputs etc) should have to bear the burden of proving that there has been 'no material injury' as a result of dumping.

7. The proposed rebuttable presumption that dumping results in material injury has this unwarranted effect, as do requirements for the importer to discharge the 'onus of proving that imported goods have not been … dumped into Australia'(and noting that this is proposed in circumstances where accepted applications giving rise to the changed onus of proof would be based on no more than the previous 90 days of data).

8. This is not the way that the onus of proof works in cases in most other fields, regardless of whether the various parties are local and foreign, or exclusively local. The complaining party must generally show that there has been damage, and that damage has been caused by the behaviour of the other party, and not as a result of other, sometimes unrelated, factors.

9. Moreover, even if there is injury or damage, the costs of anti-dumping measures benefiting a few may in some circumstances be disproportionate to the wider community impacts and costs. If injury is simply presumed without need for further proof by the complaining party, in some circumstances it may serve to artificially inflate the perceived costs to those few beneficiaries, relative to the wider impacts. This may in turn convert a free kick into a free ride, ultimately leading to the risks and anti-competitive consequences of long-term protection.

10. IIT believes that these aspects of the proposed amendments do not meet the robustness and competition components of the underlying considerations mentioned above.

11. Also important is the need for Australia's system to continue to be based on the rules and procedures it has agreed to as a member of the World Trade Organisation (WTO), including under the Agreement on the Implementation of Article VI of the GATT (the Anti-Dumping Agreement). Although there is flexibility regarding the manner of implementation of aspects of these rules (for example regarding duration of investigations, access to information, taking into account of wider interests etc) it is highly questionable that presumptions of injury and dumping and reversing the onus

of proof would satisfy the basic WTO principles and substantive rules regarding proof of injury (actual or threatened), and the required evidence of a causal link.

12. Not only does this potentially expose Australia to WTO's compulsory dispute resolution provisions in respect of compliance with its legal rights and obligations, but the broader implications for Australia's interests and negotiating position in concluding the current WTO Doha Round may also be considered important.

13. Provisions of the Anti-Dumping Agreement, highlighting a number of relevant passages in bold, are attached to this submission.

Other issues

14. While IIT has no specific comment on the merits or otherwise of broadening the scope of parties joining investigations or broadening the scope of analysis and impacts, including new or updated information potentially provided to decision-makers in anti-dumping actions, we make the following general comments, measured against the major underlying considerations mentioned in paragraph 2 of our submission, above. WTO rules also deal with 'interested parties' for the purposes of anti-dumping investigations, as well as a range of procedural issues including how confidential information should be treated.

15. We note that many of the provisions in the proposed amendments are designed to bolster the system, and may be regarded as adding to its robustness in terms of the range of information available to decision-makers, the scope of reviews, including to cover impacts on jobs etc, as well as appeal rights and so on. The question is how far should you go? There may be perceived potential savings for a few protected industries, but there are also likely to be increased costs of compliance for many parties in the process, particularly for importers, and broader economic and financial consequences for Australian consumers and other industries.

16. If Australian trade unions are to be treated as 'interested parties', are there other groups in Australian society who may also claim that they are affected by the impacts of anti-dumping measures? How many 'experts' could be consulted, whose information must be considered? What may be regarded as 'related Australian industries'? If new information can be considered in reviews, but only by a finding that 'reasonably' it could not have been provided previously, how will this affect business certainty in the decision-making process, or the time taken to resolve these issues satisfactorily? How broad are impacts on jobs, or investment?

17. The concerns regarding the expense of conducting anti-dumping investigations are valid. We query whether the proposed amendments will result in a more cost-effective process, though they would shift not only the legal burden, but also put an increased financial burden onto parties and affected sectors other than the industry seeking protection.

18. We raise these issues, not to disagree with having the most accurate information before decision-makers, but to query whether these proposals would be the most timely and cost-effective approach. Australian anti-dumping investigations are among the most time-efficient in the world. The system also caters for cases where slightly

longer periods and extensions may be justified. The combined effect of likely increases in anti-dumping investigations and applications as a result of the proposals, as well as the increased scope (impacts) and range of information potentially introduced at different stages, would be increased costs for all involved in considering greater amounts of material, accommodating additional parties, and dealing with new legal issues and uncertainties, together with increased administration costs and more frequently extended proceedings. Some of the perceived savings may prove illusory.

19. Lastly, we note the proposal that, in consideration of duty assessment applications, claims of confidentiality or adverse business or commercial effects would be determined by the person supplying the information. This may affect the transparency of the process. Currently, the decision-maker forms an opinion on adverse effect. The proposed amendments would require the CEO to give the applicant a summary of the information in a form that allows a reasonable understanding of the information without breaching confidentiality or adversely affecting business or commercial interests, though the effectiveness of summaries is open to question.

Attachment – Certain relevant Anti-Dumping Agreement provisions (emphasis added)

Article 3.1

A determination of injury for the purposes of Article VI of GATT 1994 **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.

Article 3.4

The **examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices** having a bearing on the state of the industry, including...[range of factors]...This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

Article 3.5

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. **The demonstration of a causal relationship** between the dumped imports and the injury to the domestic industry **shall be based on an examination of all relevant evidence before the authorities.** The authorities shall also examine any known factors other than the dumped imports which ... must not be attributed to the dumped imports….

Article 5.1

Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written **application by or on behalf of the domestic industry.**

Article 5.2

An application under paragraph 1 **shall include evidence of (a) dumping, (b) injury** within the meaning of Article VI of 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 considered sufficient** to meet the requirements of this paragraph. The application shall contain...

Article 6.11

'**Interested parties**" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.