Senate Economics Legislation Committee:
Inquiry into the Customs Amendment (Anti-Dumping) Bill 2011

Submission of the Department of Foreign Affairs and Trade:
Consistency of the Bill with Australia's WTO Obligations

A. Include trade union organisations as affected parties and interested parties (Amendments 1, 2 & 32)

Amendment 1 of the Bill amends the definition of "affected party" in subsection 269T(1) to allow certain trade unions to seek a review of measures under Division 5. Article 11.2 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("WTO Anti-Dumping Agreement")[1] allows "**any interested party**" to seek such a review (if certain conditions are met, including that it submits positive information substantiating the need for such a review).

2. Amendment 2 amends the definition of "interested party" in subsection 269T(1) to allow certain trade unions to access and submit information during an anti-dumping investigation. Article 6.1 of the WTO Anti-Dumping Agreement[2] provides that "**all interested parties** in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question".

3. The WTO issue that arises is whether trade unions as defined in the Bill are "**interested parties**" for the purposes of the WTO Anti-Dumping Agreement. Article 6.11 of the WTO Anti-Dumping Agreement[3] provides a list of persons/bodies that "shall" be treated as "interested parties" for the purposes of the WTO Anti-Dumping Agreement, but that list does not include trade unions. However, Article 6.11 also states that Members are not precluded "from allowing domestic … parties other than those mentioned … to be included as interested parties".[4] The equivalent provision in the WTO Agreement on Subsidies and Countervailing Measures was discussed by the WTO Appellate Body in *Japan – Countervailing Duties on Random Access Memories from Korea (Japan – DRAMS).* The Appellate Body stated that:

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

[1] Article 21.2 of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") in respect of countervailing duties.
[2] Article 12.1 of the SCM Agreement in respect of countervailing duties.
[3] Article 12.9 of the SCM Agreement in respect of countervailing duties.
[4] Article 12.9 of the SCM Agreement in respect of countervailing duties.

authority must be mindful of the burden that such designation may entail for other interested parties".[5]

4. Including trade unions as "interested parties" for the purposes of accessing and submitting information during an investigation and seeking a review of measures under Division 5 would not appear to conflict with Australia's WTO obligations,[6] provided that such trade unions have the requisite "interest" in the matter. Although the amendments do not seem to go to the issue of trade unions making applications for measures, there are certain WTO rules regarding the required level of industry support for such applications (see section G below).

5. Amendment 32 amends the Bill's definition of "interested party" in section 269ZX to allow certain trade unions to apply for a TMRO review of certain Ministerial decisions and to access and submit information during the review.

6. There do not appear to be any WTO rules that would prevent this amendment.

B. Insert a rebuttable presumption that dumping results in material injury (Amendments 3, 4 & 7)

7. To allow such a presumption would undermine the clear distinction between dumping (which on its own cannot be remedied) and dumping causing material injury (which can be remedied). Pursuant to GATT Article VI, the WTO Anti-Dumping Agreement and the SCM Agreement, measures can only be imposed if a **determination** has been made on each of three issues: dumping/subsidisation, injury and causation.

8. Article 3.5 of the WTO Anti-Dumping Agreement[7] states that:

> "**It must be demonstrated** that the **dumped imports are, through the effects of dumping ... causing injury** ... 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 information before the authorities**. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

[5] Paragraph 242, WT/DS336/AB/R.

[6] Note, in this regard, that footnote 14 of the WTO Anti-Dumping Agreement provides that "Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application" for an anti-dumping investigation (footnote 39 is the equivalent provision in the SCM Agreement).

[7] Article 15.5 of the SCM Agreement in respect of countervailing duties.

9. Article 3.1 of the WTO Anti-Dumping Agreement[8] states that:

> "A **determination** of 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**".

10. In *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body stated:

> "The thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination". The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, **that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible**.
>
> The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that **the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness**. In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be **investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation**. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process".[9]

11. Article 3.2 of the WTO Anti-Dumping Agreement[10] states, in part, that:

> " … With regard to the effect of the dumped imports on prices, **the investigating authorities shall consider** whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree".

[8] Article 15.1 of the SCM Agreement in respect of countervailing duties.
[9] Paragraph 192-193, WT/DS184/AB/R (footnotes omitted, emphasis added).
[10] Article 15.2 of the SCM Agreement in respect of countervailing duties.

12. Article 3.4 of the WTO Anti-Dumping Agreement[11] states that:

> "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 …".

13. Article 5.2 of the WTO Anti-Dumping Agreement requires that an application for anti-dumping measures must "**include evidence** of (a) dumping, (b) injury … 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**".[12]

14. In view of the above, these amendments would be inconsistent with Australia's WTO obligations.

C. Include the consideration of "the impact on jobs" (Amendment 5)

15. Amendment 5 proposes including an additional consideration for determining "material injury".

16. Article 3.1 of the WTO Anti-Dumping Agreement[13] states that:

> "A determination of 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".

17. Article 3.4 of the WTO Anti-Dumping Agreement[14] provides a list of factors that can be considered when examining "the impact of the dumped imports on the domestic industry concerned". This includes "actual and potential negative effects on … employment". Article 3.4 provides that the list "is not exhaustive".

18. Thus, adding the "impact on jobs" in the domestic industry concerned would not be inconsistent with Australia's WTO obligations.

[11] Article 15.4 of the SCM Agreement in respect of countervailing duties.
[12] Article 11.2 of the SCM Agreement in respect of countervailing duties states that the application "shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury …, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph".
[13] Article 15.1 of the SCM Agreement in respect of countervailing duties.
[14] Article 15.4 of the SCM Agreement in respect of countervailing duties.

D. Include the consideration of "any impact on capital investment" (Amendment 6)

19. Although "any impact on capital investment" is not one of the listed considerations in Article 3.4 of the WTO Anti-Dumping Agreement[15] that list is not exhaustive.[16] Adding it would not be inconsistent with Australia's WTO obligations.

E. Make the application form a legislative instrument (Amendments 8, 11 and 27)

20. This does not appear to raise any WTO issues.

F. Require supporting data relating to no more than the last 90 days (Amendments 8 and 11)

21. There are no specific provisions in the WTO Anti-Dumping Agreement or the SCM Agreement regarding the timeframe for "supporting data" for an application for measures.

22. However, Article 5.2 of the WTO Anti-Dumping Agreement[17] provides that the application must "**include evidence** of (a) dumping, (b) injury … 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". Article 5.3 of the WTO Anti-Dumping Agreement[18] provides that "the authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is **sufficient evidence to justify the initiation of an investigation**."

23. In this regard, it is worth noting that the WTO Anti-Dumping Committee has adopted a *Recommendation Concerning the Periods of Data Collection for Anti-dumping Investigations* which provides:

(a) that the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months;

(b) that this period should end as close to the date of initiation as is practicable;

(c) that the period of data collection for injury investigations should normally be at least three years; and

(d) that the period of data collection for injury investigations should include the entirety of the period of data collection for the dumping investigation.

[15] Article 15.4 of the SCM Agreement in respect of countervailing duties.
[16] Article 3.4 of the WTO Anti-Dumping Agreement and Article 15.4 of the SCM Agreement do, however, refer to "actual and potential decline in … return on investments" and "actual and potential negative effects on [the] ability to raise capital or investments".
[17] Article 11.2 of the SCM Agreement in respect of countervailing duties states that the application "shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury …, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph".
[18] Article 11.3 of the SCM Agreement in respect of countervailing duties.

24. Although this relates to data for the investigation (rather than the application), it provides an indication of the extent of evidence required to establish dumping and injury (and hence, indirectly, that required to "justify the initiation of an investigation").

25. Proceeding with investigations on the basis of data relating to no more than the last 90 days could be inconsistent with Australia's WTO obligations.

G. Providing standing to initiate investigations to persons producing less than 25 percent of the goods to which the application relates (Amendments 9 and 10)

26. Article 5.1 of the WTO Anti-Dumping Agreement[19] requires that anti-dumping investigations "shall be initiated upon a written application by or on behalf of the domestic industry".

27. Article 5.4 of the WTO Anti-Dumping Agreement[20] provides that this standard is met where "the application is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the domestic industry expressing support for or opposition to the application". Article 5.4 also provides that "no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry".

28. Amendments 9 and 10 appear to provide that the CEO would give public notice of his/her decision **not to reject an application for measures** together with an invitation for domestic producers to lodge supporting applications in the case where the domestic producers expressly supporting the application accounted for less than 25 per cent of total production of the like product produced by the domestic industry.

29. However, this public notice effectively initiates the investigation. Allowing the initiation of an investigation when support is lower than 25 per cent would be inconsistent with Australia's WTO obligations.

30. In addition, the new subsection 269TB(6)(b) appears to envisage that an application will be "taken to be supported by a sufficient part of the Australian industry if the CEO is satisfied that … the persons lodging … supporting applications together with the applicant account for not less than 25% of the total production or manufacture of like goods in Australia". However, this ignores the other limb of Article 5.4 of the WTO Anti-Dumping Agreement[21] – namely, that "the application is supported by those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the domestic industry expressing support for or opposition to the application".

[19] Article 11.1 of the SCM Agreement in respect of countervailing duties.
[20] Article 11.4 of the SCM Agreement in respect of countervailing duties.
[21] Article 11.4 of the SCM Agreement in respect of countervailing duties.

31. If it is intended that the public notice would only signal the existence of a partial application, and call for other Australian industry members to support the application, this would appear to be inconsistent with Article 5.5 of the WTO Anti-Dumping Agreement.[22] That article provides that: "The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation". This provision limits the ability of Customs and Border Protection to seek additional support for an application.

32. In view of the above, these amendments would be inconsistent with Australia's WTO obligations.

H. If the CEO decides not to reject an application, the onus is on the importer to prove the goods have not been dumped/subsidised. Any material lack of cooperation would lead to a rebuttable presumption of dumping/subsidisation (Amendment 12)

33. Article 2.1 of the WTO Anti-Dumping Agreement provides that "a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Article 2.2 of the WTO Anti-Dumping Agreement then provides a mechanism for determining the margin of dumping "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison". Article 2.4 of the WTO Anti-Dumping Agreement requires that a "fair comparison … be made between the export price and the normal value" and that the "comparison be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time".[23]

34. In addition, Article 6.6 of the WTO Anti-Dumping Agreement[24] provides that "the authorities shall during the course of the investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based". Article 6.9 of the WTO Anti-Dumping Agreement[25] requires that the authorities, "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision to apply definitive measures". Article 6.10 of the WTO Anti-Dumping Agreement requires that the authorities, "as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".

[22] Article 11.5 of the SCM Agreement in respect of countervailing duties.
[23] The SCM Agreement similarly has detailed provisions dealing with determining the existence and level of subsidisation.
[24] Article 12.5 of the SCM Agreement in respect of countervailing duties.
[25] Article 12.8 of the SCM Agreement in respect of countervailing duties.

35. As Australia's investigating authorities, Customs and Border Protection has to make a determination of dumping and/or subsidisation (and the extent of that dumping and/or subsidisation) following an investigation undertaken by it to determine certain facts, upon which the dumping margin (or level of subsidisation) is based. Australia cannot impose an onus on the importer to prove the goods have not been dumped/subsidised.

36. Therefore, these amendments would be inconsistent with Australia's WTO obligations.

37. Regarding "material lack of cooperation", it is worth noting that Article 6.8 of the WTO Anti-Dumping Agreement[26] provides, in part, that:

> "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available".

38. Annex 2 to the WTO Anti-Dumping Agreement sets out certain rules for the use of such information in the context of anti-dumping investigations.

I. Allow the making of a preliminary affirmative determination as early as the date of initiation of an investigation (Amendment 13)

39. Article 7.1(i) of the WTO Anti-Dumping Agreement[27] provides that provisional measures can only be applied if "an investigation has been initiated …, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments". Article 7.1(ii) of the WTO Anti-Dumping Agreement[28] provides that provisional measures can only be applied if "a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry". Article 7.1(iii) of the WTO Anti-Dumping Agreement[29] provides that provisional measures can only be applied if "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation". Article 7.3 of the WTO Anti-Dumping Agreement[30] provides that provisional measures cannot be applied "sooner than 60 days from the date of initiation of the investigation".

40. Thus, a preliminary affirmative determination can only be made after Customs and Border Protection has considered the information and comments (that are received after a public notice is given of the initiation of an investigation) and come to an initial position that there has been dumping/subsidisation and consequent injury to a domestic industry. It could not be in a position to make a preliminary affirmative determination on the date of initiation of an investigation. To do so would be inconsistent with Australia's WTO obligations.

41. The explanatory memorandum also states that this provision "means that securities can be collected from the importer of the alleged goods as soon as an investigation has been

[26] Article 12.7 of the SCM Agreement in respect of countervailing duties.
[27] Article 17.1(a) of the SCM Agreement in respect of countervailing duties.
[28] Article 17.1(b) of the SCM Agreement in respect of countervailing duties.
[29] Article 17.1(c) of the SCM Agreement in respect of countervailing duties.
[30] Article 17.3 of the SCM Agreement in respect of countervailing duties.

initiated". Such "securities" would be a "provisional measure" for the purposes of the WTO Anti-Dumping Agreement and the SCM Agreement. Collecting them as soon as an investigation has begun would thus be inconsistent with Australia's WTO obligations.

J. Enable the taking of securities where TMRO finds reasonable grounds to warrant the reinvestigation of a decision not to publish a notice or is considering an application for a review of a negative prima facie determination or a termination decision (Amendments 36 and 46)

42. Article 7.1 of the WTO Anti-Dumping Agreement[31] provides that provisional measures can only be applied if:

- "an investigation has been initiated …, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments";

- "a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry"; and

- "the authorities concerned judge such measures necessary to prevent injury being caused during the investigation".

43. It appears as if these amendments would allow for the taking of securities without meeting all of these requirements. This would be inconsistent with Australia's WTO obligations. It is also likely that Customs and Border Protection would be unable to satisfy the requirements of Article 12.2.1 of the WTO Anti-Dumping Agreement[32] in respect of such provisional measures.[33]

[31] Article 17.1 of the SCM Agreement in respect of countervailing duties.
[32] Article 22.4 of the SCM Agreement in respect of countervailing duties.
[33] Article 12.2.1 of the WTO Anti-Dumping Agreement requires that a public notice of the imposition of provisional measures must detail, among other things, "the margins of dumping and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value" and "considerations relevant to the injury determination as set out in Article 3". Article 22.4 of the SCM Agreement requires that a public notice of the imposition of provisional measures must detail, among other things, "the amount of the subsidy established and the basis on which the existence of a subsidy has been determined" and "considerations relevant to the injury determination as set out in Article 15".

K. Allow Customs to consider any potential impacts on the relevant Australian industry and related Australian industries, including employment (including the multiplier effect), capital investment and market operation (Amendments 14 and 15)

44. Amendment 14 requires the CEO to have regard to certain potential impacts in deciding whether to make a preliminary affirmative determination.

45. Amendment 15 requires the CEO to have regard to certain potential impacts in formulating the statement of essential facts.

46. Footnote 9 to the WTO Anti-Dumping Agreement[34] provides that "injury" means "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry". Article 4.1 of the WTO Anti-Dumping Agreement[35] then provides that "domestic industry" "shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products".

47. To the extent that the amendments require consideration of impacts on a "related Australian industry" that does not come within the WTO definition of "domestic industry", this would be inconsistent with Australia's WTO obligations.[36]

48. In relation to looking at "potential impacts", we would note that Article 3.4 of the WTO Anti-Dumping Agreement[37] states that an "examination of the dumped imports on the domestic industry concerned shall include an evaluation of …actual and **potential** negative effects on … employment, ability to raise capital or investments".

49. If "potential impacts" is intended as a reference to the "threat of material injury", we would note that Article 3.7 of the WTO Anti-Dumping Agreement[38] states that:

> "A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent … the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur."

50. It is not clear what is meant by "market operation". We are therefore unable to form a view on the WTO consistency of its inclusion.

[34] Footnote 45 to the SCM Agreement in respect of countervailing duties.
[35] Article 16.1 of the SCM Agreement in respect of countervailing duties.
[36] We note that, in addition to the reference to "related Australian industries" in the amendment itself, the explanatory memorandum to the Bill provides that the "multiplier effect" also referred to in that amendment occurs "where a decrease in employment in one sector triggers further unemployment in related sectors". Similar WTO concerns as set out above arise if those "related sectors" did not come within the WTO definition of "domestic industry".
[37] Article 15.4 of the SCM Agreement in respect of countervailing duties.
[38] Article 15.7 of the SCM Agreement in respect of countervailing duties.

L. Allow new or updated information to be submitted (Amendments 11, 16-18, 25, 26, 29, 30, 31, 33, 34, 37-40, 42-45)

51. It appears from these amendments that new or updated information could be provided to Customs and Border Protection or the TMRO up until the point the relevant decision is made and that the relevant decision maker would need to have regard to that information.

52. This could raise WTO due process and timeline concerns under the WTO Anti-Dumping Agreement and SCM Agreement, particularly with respect to new and updated information provided late in the course of an investigation, during a TMRO review or during a Customs reinvestigation.

53. Article 6.2 of the WTO Anti-Dumping Agreement provides, in part, that:

> "Throughout the anti-dumping investigation all interested parties shall have a **full opportunity for the defence of their interests**".[39]

54. Article 6.4 of the WTO Anti-Dumping Agreement[40] provides that:

> "The authorities shall whenever practicable provide **timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases**, that is not confidential as defined in paragraph 5, and **that is used by the authorities in an anti-dumping investigation**, and to **prepare presentations on the basis of this information**".

55. Article 6.6 of the WTO Anti-Dumping Agreement[41] provides that:

> " … the **authorities shall** during the course of an investigation **satisfy themselves as to the accuracy of the information supplied by interested parties** upon which their findings are based".

56. Article 6.9 of the WTO Anti-Dumping Agreement[42] provides that:

> "The authorities shall, before a final determination is made, **inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures**. Such disclosure should take place in **sufficient time for the parties to defend their interests**".

[39] Article 12.2 of the SCM Agreement in respect of countervailing duties provides that "Any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to … interested parties participating in the investigation, due account having been given to the need to protect confidential information".
[40] Article 12.3 of the SCM Agreement in respect of countervailing duties.
[41] Article 12.5 of the SCM Agreement in respect of countervailing duties.
[42] Article 12.8 of the SCM Agreement in respect of countervailing duties.

57. Article 11.4 of the WTO Anti-Dumping Agreement provides that the provisions of Article 6 regarding evidence and procedure apply equally to any review carried out under Article 11. Thus, the evidentiary and procedural requirements of an investigation also apply during a review of measures, a revocation review or a continuation review.[43]

58. Allowing for the submission of new or updated information late in the process of an investigation or review (particularly after the immediate period following the issue of the statement of essential facts) risks violating Australia's WTO obligations, primarily because it would not provide others with the opportunity to defend their interests.

59. The provision of new or updated information to the TMRO (and to Customs and Border Protection if it reinvestigates the relevant finding having regard to new or updated information) could also raise WTO concerns.

60. In addition, Article 5.10 of the WTO Anti-Dumping Agreement[44] provides that:

> "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation".

61. Trading partners would likely argue that if the TMRO (during a review) and/or Customs and Border Protection (during a subsequent reinvestigation) considered new or updated information then they should be seen as still conducting the initial investigation. They would likely argue that the entire process (i.e. the original investigation, the TMRO review and Customs and Border Protection's subsequent reinvestigation) should all be completed within the WTO timeframe. Given the time this process takes, and the additional time that would be added by considering new or updated information, it is quite possible that the time taken for the investigation would exceed the 12-18 months set down by WTO rules.

M. Require consultation with persons with expertise (Amendments 11, 14, 15, 16-18, 24-26, 28, 29-31, 33, 35, 38, 41-45)

62. These amendments need to be considered in the light of the considerations set out in Section L above.

[43] Article 21.4 of the SCM Agreement in respect of countervailing duties similarly provides that the provisions of Article 12 regarding evidence and procedure apply equally to any review carried out under Article 21.
[44] Article 11.11 of the SCM Agreement in respect of countervailing duties.

N. AAT Appeals (Amendment 47)

63. Article 5.10 of the WTO Anti-Dumping Agreement[45] provides that:

> "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation".

64. Depending on the decision being reviewed, trading partners may argue that the time taken for the AAT review should be included within the WTO timeframe. It is quite possible that the time taken for the investigation (including the time for AAT review, particularly if this follows TMRO review) would exceed the 12-18 months set down by WTO rules.

O. Non-disclosure of certain information (Amendments 19-22)

65. Each of these amendments suggests that it is the "value", "amount" and "price" that must not be published "in any … way" (i.e. it is the normal value, export price, amount of the countervailable subsidy and non-injurious price that cannot be published).

66. However, the explanatory memorandum suggests what must not be published "in any … way" is the information provided that assisted the Minister to ascertain the "value", "amount" and "price".

67. In respect of confidentiality, Article 6.4 of the WTO Anti-Dumping Agreement[46] provides that:

> "The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information".

68. Article 6.5 of the WTO Anti-Dumping Agreement[47] provides, in part, that:

> "Any information which is by its nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it".

[45] Article 11.11 of the SCM Agreement in respect of countervailing duties.
[46] Article 12.3 of the SCM Agreement in respect of countervailing duties.
[47] Article 12.4 of the SCM Agreement in respect of countervailing duties.

69. However, Article 6.5 of the WTO Anti-Dumping Agreement[48] also requires that interested parties provide non-confidential summaries of the confidential information that contain "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence". In the "exceptional circumstances" where "such parties … indicate that such information is not susceptible of summary", the parties must provide "a statement of the reasons why summarization is not possible".[49]

70. It is thus only in "exceptional circumstances" that the obligation to publish information "in any … way" can be avoided. By instituting a blanket prohibition on publication "in any … way", these amendments would be inconsistent with Australia's WTO obligations.

P. Treatment of confidential information during a duty assessment (Amendment 23)

71. This amendment does not appear to raise any WTO issues.

[48] Article 12.4 of the SCM Agreement in respect of countervailing duties.
[49] Article 6.5.1 of the WTO Anti-Dumping Agreement (Article 12.4.1 of the SCM Agreement in respect of countervailing duties).