The Senate

Legal and Constitutional Legislation Committee

Customs Legislation Amendment Bill (No. 2) 2002

April 2003

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ABBREVIATIONS

Accession Protocol	Accession of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organization, WT/L/432, 23 November 2001
ACS	Australian Customs Service
CEO	Chief Executive Officer
EU	European Union
GATT	General Agreement on Tariffs and Trade
LIV/LC	Law Institute of Victoria/Law Council of Australia
MITF	Manufacturing Industry Task Force
PRC	People's Republic of China
WTO	World Trade Organization

CHAPTER 1

INTRODUCTION

1.1 On 5 March 2003, the Senate referred the Customs Legislation Amendment Bill (No. 2) 2002 to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 20 March 2003. On 19 March, the Senate agreed to extend the reporting date to 25 March. On 25 March, the Committee tabled an interim report, noting that it had conducted a public hearing and received submissions and seeking an extension until 4 April 2003.

Key aspects of the Bill

1.2 The Bill:

- introduces new provisions for determining the normal value of goods in countries with an economy in transition (that is, countries moving towards a market economy) (Schedule 1);
- amends the anti-dumping provisions of the *Customs Act 1901*, particularly to ensure that the Act is consistent with the World Trade Organization (WTO) Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) (Schedule 1);
- exempts air security officers from the passenger movement charge (Schedule 2); and
- makes minor and technical amendments to international trade modernisation elements of customs legislation (Schedule 3).

The report of the Senate Selection of Bills Committee

1.3 The Senate Selection of Bills Committee drew the Committee's attention to the issue of whether the proposals in Part 1 of Schedule 1 of the Bill (concerning economies in transition) are incompatible with Australia's obligations to China under the WTO's system of international agreements, and if so, possible remedial options.

Conduct of the inquiry

1.4 The Committee advertised the inquiry in *The Australian* newspaper on 12 March 2003 and invited submissions by 14 March 2003.

1.5 The Committee received seven submissions (including two supplementary submissions) and these are listed at Appendix 1 with details of additional information received. Submissions were placed on the Committee's website for ease of access by the public.

1.6 The Committee held a public hearing in Canberra on 19 March 2003. A list of witnesses who appeared at the hearing is at Appendix 2.

Scope of the report

1.7 Chapter 2 outlines the main provisions of the Bill.

1.8 Chapter 3 considers the evidence presented to the Committee and includes the Committee's conclusions and recommendations.

1.9 Relevant EU legislation and an exposure draft of the regulations designed to accompany the Bill are reproduced in Appendices 3 and 4 respectively.

Acknowledgements

1.10 The Committee thanks those organisations and individuals who made submissions and gave evidence at public hearings.

Note on references

1.11 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the transcript of evidence are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

CHAPTER 2

OUTLINE OF THE BILL

2.1 This chapter outlines the main provisions of the Bill. It discusses:

- economies in transition (Schedule 1);
- the removal of the passenger movement charge for air security officers (Schedule 2); and
- technical amendments following 'trade modernisation' amendments in 2002 (Schedule 3).

Schedule 1 - Economies in transition

2.2 The proposed amendments to the *Customs Act 1901* contained in Schedule 1 are made in the overall context of the anti-dumping provisions of the Act.

2.3 Briefly, the term 'dumping' refers to the practice of selling imported goods at a price less than that in the country of origin in order to gain a competitive advantage over local manufacturers. While this practice may benefit consumers and manufacturers who use the imported goods in their production processes, it may also be injurious to local producers of like goods who are unable to match the prices. Local producers may lose market share, become unprofitable and in some cases, be forced to cease local operations.

2.4 To provide a measure of protection against unfair competition, the Customs Act allows local producers to apply for 'dumping' duty to be collected by the Australian Customs Service (ACS) in respect of the dumped imports; or 'countervailing' duty, where the producers of the goods receive a subsidy. These measures are permitted under the WTO rules.

2.5 The ACS has responsibility for investigating whether imported goods are dumped or subsidised, using processes and evidentiary requirements set down under WTO rules; and also whether any material injury results to local producers. The ACS may only apply anti-dumping duty if the examination demonstrates both dumping and material injury. The process is necessarily rigorous to prevent local producers from using dumping allegations as an anti-competitive trade barrier.

2.6 A significant part of this process is for the ACS to establish a 'normal value' for the goods in question, that is, the true price of the goods sold in the country of origin, or if produced for an export market only, a surrogate third country.

2.7 In some cases, forms of price control and influence in exporting countries are relatively transparent. For example, in centrally planned economies, the Government may determine the prices of goods, regardless of the cost of production. This contrasts with open economies, where prices are determined by market forces. In some

countries, however, the situation is far more difficult to establish. This is particularly the case for 'economies in transition', the subject of this legislation.

2.8 Proposed subsection 269T(5C) sets out when a country is to be taken to have an 'economy in transition'. This issue is relevant to determining how the normal value of goods is to be calculated.

2.9 A country has an economy in transition at a particular time if:

- before that time, the government of the country had a monopoly, or a substantial monopoly, of the country's trade and determined, or substantially influenced, the domestic price of goods in that country; and
- at the time, this situation no longer exists.

2.10 The Explanatory Memorandum states that countries with economies in transition are 'those countries which previously had centrally-planned economies and which are moving towards market-based economies in which the price of goods is basically determined by supply and demand'.

The current provisions: 'price control'

2.11 The existing provisions of the Act set out circumstances in which a 'price control situation' can be found to exist. They deal with the circumstances where the normal value of goods in the country of export is distorted because of the role of government in the economy.

2.12 Generally, the normal value of any goods exported to Australia is the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export (subsection 269TAC(1)). In certain circumstances, this general rule does not apply. One of these circumstances is where there is government control or substantial control of the domestic selling price of goods. The current test which is applied is that the domestic selling price of those like goods is controlled, or substantially controlled, by a government (at whatever level) of that country.[1] If this situation is found to exist, the normal value is the amount determined by the Minister having regard to all relevant information.

2.13 The Explanatory Memorandum states that:

> It is unclear whether the current test of price control covers indirect government interference. The amendments recognise that something less than actual control may still result in significant distortion in the calculation of normal value.

2.14 Consequently, the Bill replaces the test of price control with a test of 'price influence'.

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1 Section 269TAC(5E).

The proposed provisions – 'price influence'

2.15 Proposed section 269TAC(5D) states that the normal value of goods is the amount determined by the Minister having regard to 'all relevant information'. The Minister may make such a determination if satisfied that the country of export has an economy in transition and one of four situations applies.

2.16 These four situations are:

- the exporter of the exported goods sells like goods in the country of export and the domestic selling price of those like goods is **significantly affected by a government at any level** of that country; or
- while the exporter of the exported goods does not sell like goods in the country of export, others do, and the domestic selling price of such goods is **significantly affected by a government at any level** of that country; or
- the exporter does not answer questions in a questionnaire sent to the exporter by the CEO within the time allowed; or
- the answers given by the exporter in the questionnaire do not enable the Minister to determine whether the domestic selling price of the goods has been significantly affected by government.

2.17 The Explanatory Memorandum states that the first and second situations deal with a case in which 'it is not appropriate that normal value be the price paid for the goods'. It then states that the third and fourth situations recognise that the Minister's ability to ascertain the normal value of goods is dependent on the information provided by the exporter of those goods:

> If information is not provided by the exporter or insufficient information is provided, the Minister is not in a position to be able to accurately calculate the normal value of goods exported to Australia and therefore cannot determine whether or not dumping has occurred.

2.18 If the exporter does not provide the information requested, the Minister will determine the normal value of the goods, having regard to all relevant information. In other words, 'the presumption, in the absence of the necessary information, will be that the domestic selling price has been significantly affected by government.'

Proof of dumping

2.19 Proposed subsection 269TC(8) imposes new requirements on the CEO of the Australian Customs Service when considering dumping duty applications where he or she is satisfied that the nominated exporters are from a country with an economy in transition.

2.20 Where a person makes a dumping duty application,[2] the CEO must make an initial assessment of the application to determine whether a prima facie case has been

2 Under section 269TB.

established. If not satisfied that there are reasonable grounds for the imposition of dumping duty, the CEO must reject the application.

2.21 Where the CEO is satisfied that the exporters are from a country with an economy in transition and he or she has decided not to reject the application, the CEO must, as soon as practicable:

- give each nominated exporter a questionnaire about whether the conditions in paragraph 269TAC(5D)(a) or (b) exist - that is, whether the domestic selling price of the goods is significantly affected by government interference;
- inform each exporter that they have a specified period of not less than 30 days to provide answers to the questionnaire; and
- inform each exporter that the investigation of the application for a dumping duty notice will be conducted on the basis that subsection 269TAC(5D) applies to the normal value - that is, that normal value will be determined by the Minister having regard to all relevant information if:

  (i) the exporter does not answer the questions in the questionnaire within the time specified; or

  (ii) the exporter does not provide sufficient information in their response to enable the CEO to determine whether the domestic price of like goods is significantly affected by government interference.[3]

2.22 The Explanatory Memorandum states that the proposed amendment:

> … will effectively put the obligation on an exporter from an economy in transition to show that the domestic selling price of goods is not significantly affected by government in order to have the general rule of price paid or payable for like goods sold in the ordinary course of trade apply. If, in the answers to the questionnaire, the exporter can show that the domestic selling price of like goods is not significantly affected by government then the general method for determining normal value would apply. If not, then the normal value would instead be determined having regard to all the relevant information.

2.23 Item 8 of the Bill provides that the amendments apply only to applications for dumping duty made or lodged after the commencement of these provisions and things done as a result of such an application.

The cumulative effect of exports to Australia

2.24 Proposed new subsection 269TAE(2C), according to the Explanatory Memorandum:

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3 That is, the conditions specified in paragraph 269TAC(5D)(a) or (b).

> … clarifies the basis on which the Minister may consider the cumulative effect of exportations of goods to Australia from different countries of export. The amendments ensure that the provision is consistent with Article 3.3 of the WTO Agreement on the Implementation of Article VI of GATT.

2.25 Section 269TAE sets out the factors the Minister may consider in determining whether material injury to an Australian industry has been caused or is being caused, or is threatened or would or might have been caused. The current subsection 269TAE(2C) provides that in considering the effect of the exportation of like goods to Australia by different exporters from the same or different countries, the Minister should consider the cumulative effect of those exportations only if satisfied it is appropriate to do so, having regard to:

- the conditions of competition between those goods; and
- the conditions of competition between those goods and like goods that are domestically produced.

2.26 While this provision can apply in relation to export of goods to Australia by different exporters from the same country, the Explanatory Memorandum notes that Article 3.3 of the GATT only provides for cumulation where the goods are exported from more than one country.

2.27 Proposed subsection 269TAE(2C) which will replace the existing provision provides that the Minister should only consider the cumulative effect of exports from different countries if satisfied that:

- each of those exportations is subject of a dumping investigation; and
- all the investigations resulted from applications lodged on the same day or, if the applications were lodged on different days, the investigation periods significantly overlap;
- the dumping margin for the exporter of each exportation is at least 2% of the export price or weighed average of export prices used to establish that dumping margin;
- for each application, the volume of goods exported to Australia is not taken to be negligible; and
- it is appropriate to consider the cumulative effect of those exportations having regard to:
  - the conditions of competition between those goods; and
  - the conditions of competition between those goods and like goods that are domestically produced.

2.28 The Explanatory Memorandum states that ‘Consistent with Australia’s WTO obligations, it will no longer be possible to cumulate exportations from the one country.’

Lodging of applications

2.29 Section 269V provides that an importer of goods on which interim duty has been paid may apply for an assessment of the liability of those goods to duty. Subsection 269V(2) provides that an application may be 'made', while subsection 269W(2) sets out how an application may be 'lodged'. Subsequent subsections then refer to applications 'made' or 'lodged'.

2.30 The Explanatory Memorandum notes that the Federal Court has found a distinction between when an application for duty assessment was 'made' and when it was 'lodged'.[4] The proposed amendment removes this distinction by using only the term 'lodged'.

Content of applications

2.31 Proposed subsection 269W(1A) sets out in more detail what applications must contain and permits supporting evidence to be provided by a third party. It provides that the application must contain:

- sufficient evidence to establish that the applicant's opinion of the relevant amounts is correct; or
- evidence to establish that the applicant's opinion of the relevant amounts is correct and a commitment that another party will give the CEO (within a minimum of 30 days of lodgement) further evidence, so that the CEO will have sufficient evidence to establish that the applicant's opinion is correct.

2.32 The Explanatory Memorandum notes:

> These amendments recognise that there may be circumstances in which an applicant (who is an importer) may not have access to the necessary information to establish the amounts of normal value or countervailable subsidy as the information would usually be held by the overseas exporter who may not be willing to provide it to the importer (for commercial reasons). This amendment will allow the exporter to provide that information directly to the CEO.

2.33 The Explanatory Memorandum further notes that while the CEO may request the supply of relevant information from any person,[5] 'the applicant should be required to supply all the information to establish the correctness of the applicant's opinions or arrange for this to be supplied by a third party'. The CEO may reject an application that does not meet these requirements.

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4 *Amcor Packaging Australia Pty Limited t/as Amcor Food Cans Australia v. Chief Executive Officer of Customs* [2002] FCA 1346.

5 Subsection 269X(2).

Providing information to the applicant

2.34 Proposed subsection 269X(3A) sets out how the CEO is to treat information provided by an exporter. Subsection 269X(3) requires that, where the CEO proposes to take into account information that was not provided by the applicant, the CEO must give the applicant a copy of the information (unless it is commercially sensitive information) and provide the applicant with an opportunity to make further submissions.

2.35 Proposed subsection 269X(3A) provides that the CEO must not give the applicant information that the exporter of goods covered by the application has given to the CEO that is relevant to working out the normal value of the goods, the countervailable subsidy relating to the goods, or the export price of the goods, unless the exporter indicates to the CEO that he or she is willing for the information to be given to the applicant.

2.36 The Explanatory Memorandum notes:

> This requirement for express consent of the exporter applies whether or not the information was provided as a result of a request from the CEO for information under subsection 269X(2) or was provided as a result of a commitment in the application that the exporter would provide the information.

Rejecting or terminating applications

2.37 Proposed subsection 269YA(2) provides that the CEO must reject an application if satisfied that it does not contain everything it must contain under subsection 269W(1) or (1A). The CEO must make this decision within 20 days of lodgement.

2.38 Proposed subsection 269YA(3) provides that the CEO must reject an application if:

- the application contains a commitment that another person will provide the CEO with further evidence to establish that the applicant's claims about the amounts that are the normal value and export price (or the amounts of countervailable subsidy and export price) are correct; and
- within 20 days of the time allowed, the CEO is satisfied that he or she has not received sufficient evidence to establish the correctness of the applicant's claims.

2.39 Proposed subsection 269YA(4) provides that the CEO may terminate the examination of an application if satisfied that he or she does not have enough information to be able to ascertain provisionally each variable factor relevant to the determining the duty. The Explanatory Memorandum states:

> The power to terminate an examination is required to ensure that the CEO is not forced to provisionally ascertain each variable factor if he or she does not have sufficient information to be able to do so. Under the existing provisions, once an application has been lodged, the CEO is required to

provisionally ascertain the variable factors and provisionally calculate the duty payable whether or not he or she actually has sufficient information to do so properly.

2.40 Proposed subsection 269YA(5) sets out the effect of a rejection or termination and the CEO's obligations in those circumstances. The CEO must notify the applicant in writing of the rejection or termination, the reasons for the decision and the applicant's right to apply for a review of the decision by the Review Officer.[6]

Review of the CEO's decision

2.41 The CEO's decision to reject an application for duty assessment or to terminate an examination of it will be subject to review by the Review Officer, as set out in proposed section 269ZZN. Proposed section 269ZZUA sets out the responsibilities of the Review Officer in relation to such reviews.

Accelerated reviews

2.42 Division 6 of Part XVB currently provides for accelerated review of dumping duty notices or countervailing duty notices on application of certain exporters of goods covered by the notice. The Bill replaces references to 'residual exporter' in subsection 269ZE(1) with references to 'new exporter', so as to ensure consistency with Article 9.5 of the WTO Agreement which limits the right to apply for accelerated review to new exporters only.

Schedule 2 - Air security officers

2.43 Section 5 of the *Passenger Movement Charge Act 1978* provides for the imposition of a passenger movement charge on people departing Australia for another country, while exempting certain persons.

2.44 Proposed paragraph 5(m) exempts protective service officers who are on an aircraft for the purpose of enhancing the security of aircraft. The term 'protective service officer' has the same meaning as in the *Australian Protective Service Act 1987* (that is, the Director of the Australian Protective Service or a person occupying a position in the Australian Protective Service).

Schedule 3 - Technical amendments re trade modernisation

2.45 On 1 July 2002, certain provisions of the *Customs Legislation Amendment and Repeal (International Trade Modernisation) Act 2001* commenced. In particular, the existing auditing provisions in the Customs Act were replaced by provisions that allow Customs officers to exercise monitoring powers, and an infringement notice scheme for specified offences in the Customs Act was introduced.

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6 (paragraph 269YA(5)(a).

2.46 According to the Explanatory Memorandum, Schedule 3 makes minor amendments to the Customs Act as a consequence of the commencement of the monitoring powers and infringement notice scheme. They include:

- amending section 4 of the Customs Act to define 'monitoring powers' for the purposes of the whole Act;
- amending section 203, which allows a judicial officer to issue a warrant to seize goods in certain circumstances, to provide that he or she may have regard to whether action may be taken by way of infringement notice;
- amending section 71H so that infringement notices can be served on a person in respect of a statement made in an entry, even if the entry is subsequently withdrawn; and
- amending subsection 119B(2) so that infringement notices can be served in respect of an export entry, submanifest or outward manifest, even if it has been withdrawn.

CHAPTER 3

ISSUES

3.1 This Bill has general application to all economies in transition, including that of the People's Republic of China (PRC). However, the PRC is, as far as the Committee is aware, the only 'economy in transition' that is also a full member of the WTO. Accordingly, it follows that the PRC stands to be most affected by the provisions in the Bill. Further, several of the Bill's provisions are inextricably linked with the *Protocol on the Accession of the People's Republic of China* (the Accession Protocol) which sets out the terms and conditions for the PRC's entry to the WTO in December 2001.

3.2 Several submissions received by the Committee focussed on a range of possible incompatibilities between the Bill and Australia's WTO obligations. Most discussion centered around three key issues, which this chapter examines:

- the 'significantly affected' test;
- procedural and evidentiary requirements associated with the provision of information in anti-dumping investigations; and
- the adequacy of consultation processes associated with the Bill.

3.3 Submissions and evidence also raised a number of other issues that the Committtee notes for the purposes of this report, but which it does not discuss in detail. These include:

- whether a sunset clause would be appropriate in the Bill;
- the apparent indefinite operation of the 'economies in transition' provisions;
- compatability of disclosure provisions in the bill with WTO requirements, in particular Article 6.2 of the Implementation agreement;
- powers of the CEO of the ACS to reject or terminate an application for interim duties; and
- whether the legislation represents a fundamental shift in Australia's trade model, implementing a new form of trade barrier.

The 'significantly affected' test

3.4 Proposed new paragraphs 269TAC(5D)(a) and (b) are to apply when the Minister must decide, in an anti-dumping investigation, whether to accept the price of goods in the country of origin as the 'normal value', or whether to use a different method. The subsections apply a test of whether the exporter's selling price is 'significantly affected by a government at any level of the exporting country'.

3.5 Article 15 (a) of the Accession Protocol recognises that different sectors of the PRC's economy are at different stages of progress towards full market economy conditions and in some circumstances, it may not be possible or appropriate to use Chinese domestic prices and costs as a basis for determining normal value in an anti-dumping investigation. The Protocol therefore permits the importing country to use an alternative methodology for establishing this value.

3.6 However, the Protocol's test of whether Chinese prices will be used to determine 'normal value' is whether 'market economy conditions prevail'. Several witnesses and submissions highlighted the differences between the language in the Bill and that in the protocol.

3.7 Mr Daniel Moulis, a lawyer with experience in representing foreign exporters, maintained that the proposed 'significantly affected' test goes beyond a consideration of market economy conditions:

> The Bill's use of a *"significantly affected"* test would permit consideration to be moved away from Chinese prices or costs where there were lesser impacts on that price by a government than those envisaged under the Article 15 test.
>
> …
>
> The *"significantly affected"* test is quite different to the Article 15 test, both conceptually and in terms of its width. On one view it is not a test at all, because its meaning is not clear, or at least relatively unclear in comparison to the Article 15 test.[1]

3.8 Mr Moulis noted that there are many ways in which governments can significantly affect prices, and that in his view the Australian Government does this through its own policies, for example, competition policy and consumer protection legislation, both of which affect prices. [2]

3.9 The Government of the PRC also objected to the use of the terminology 'significantly affected':

> However, 'significantly affected' is an ambiguous term which may increase the discretion of the Australian Minister for Justice and Customs. When the normal value of the goods is determined, it is more likely to use the price of the third country, which is unfair to the investigated party and increases more possibilities of abusing the antidumping measures. In comparison, the test of "price control" is evidently more compatible with the stipulation of

1 *Submission* 4, pp. 4-5

2 Transcript of Evidence, p. 3.

> Article VI of GATT (the Anti-Dumping Agreement of WTO) and is more helpful to resolve the antidumping issues fairly and properly.[3]

3.10 The Independent Paper Group also objected to the terminology used in the Bill:

> It is our view that the replacement of the term 'price control' with 'price influence' does not provide greater clarity and certainly in respect to the treatment of economies in transition, in this case, China.[4]

3.11 However, these views were not supported by the Manufacturing Industry Task Force on Anti-Dumping (MITF) or by the responsible Government agencies.

3.12 The MITF, a group representing the interests of Australian industry, strongly supported the Bill and argued that it brought Australia into line with the approach adopted by other WTO members in respect of economies in transition. The Task Force Chairman told the Committee that the 'price control' test (as described in the PRC submission) had proven to be unworkable:

> Previous legislation in 1999… was ineffective, as the requirement to establish price control was very narrowly interpreted and did not allow for a proper examination of foreign government influence in the sector exporting. It is our understanding—and it always was and still is—that it is government policy to take into account a broader range of factors impacting on prices and costs where economies in transition countries are involved in anti-dumping cases. Additionally, in the old legislation there was no onus of proof on exporters to provide evidence of free market conditions, and, in the absence of such evidence, the minister was obliged to extend free market treatment, as the onus was on the minister to satisfy himself.[5]

3.13 The Task Force Chairman argued that considerable damage had been done to Australian industries because of inappropriate acceptance of Chinese prices resulting from the Minister's obligation, in the absence of evidence to the contrary, to accept that free market conditions existed. He provided the Committee with a table showing the outcomes of a number of antidumping cases involving goods imported from the PRC. He claimed that in the majority of these cases, the Australian industry had successfully demonstrated material injury, but lost the anti-dumping cases: 'No dumping was found because … Chinese prices and costs were accepted'.[6]

3.14 For its part, the ACS maintained that the proposed test was consistent with WTO rules. The National Manager, Trade Measures Branch, advised that the WTO agreement does provide for alternative means of establishing normal values in certain

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3 *Submission 5*, Mr Liu Zouzhang, Minister Counsellor (Economic and Commercial), Embassy of the People's Republic of China, p. 2.

4 *Submission 3*, p. 2.

5 Transcript of Evidence, p. 7.

6 Transcript of Evidence, p. 8.

circumstances, and that these provisions have application generally, not just in respect of economies in transition:

> Our view was that the WTO agreement provides for alternative means of establishing normal values in certain circumstances. That is something that is not just applicable to economies in transition but in any case that we investigate. If the domestic selling price cannot be relied on as a reasonable basis on which to proceed then there is a series of options that can be adopted and we do that as a matter of normal practice. In the case of economies in transition, of which China is just one of a number…We have specific provisions that describe circumstances in which we can move away from the domestic selling price.[7]

3.15 The ACS representative described the range of strategies followed when anti-dumping investigations encounter difficulties establishing 'normal value':

> …it is always our intention to try to find a value that most closely reflects what is going on in the economy that we are investigating. So we will first turn to options such as looking at other sales within the market—cost, make and sale. We call that a constructed normal value. Finally, if no other option is available then we will consider going to a third country and finding a normal value based on prices, usually in that country.

3.16 The ACS representative discounted the significance attached by other witnesses and submissions to the differences in terminology between the Accession Protocol and the Bill:

> In that sense, what we are doing is consistent with the practice that we adopt in any other case, except that here Australia has defined the kinds of considerations that will lead it to decide that a normal value based on the domestic selling price in that particular economy is not appropriate. [8]

3.17 The ACS responded further to the question of differences between the test in the Bill and the WTO test, that is, the terms of the Accession Protocol, in written responses provided to the Committee on 21 March. In that response the ACS reaffirmed that it does not agree that there is any incompatibility, explaining that:

> The underlying thrust of the economies in transition provisions is to recognise those situations in which a Government has effectively distorted the market (for a particular producer's goods) by significantly affecting prices. These circumstances are considered to be likely to exist, to some extent, when a government has in the past conducted a centrally-planned economy and is now recognised as being in transition to a free market economy.[9]

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7 Transcript of Evidence, pp. 17-18.

8 Transcript of Evidence, p. 18.

9 ACS Written responses to Questions on Notice, 21 March 2003, p. 4.

3.18 The ACS also discounted Mr Moulis' suggestion that government influence in a free market economy can be equated to that in an economy in transition (para 3.8):

> This is fundamentally different from the situation of a free market economy where the government may play some role. The reference to 'significantly affected' is to overcome the possibility that any government action could be interpreted as creating a situation of price influence. The fact that government behaviour may affect prices in some way is not, of itself, sufficient – the impact must be significant.[10]

3.19 The Committee had sought confirmation about the approach adopted by other WTO members in respect of economies in transition, and in particular, the European Union (the EU). While acknowledging that the EU legislation incorporates language that is in keeping with that in the Accession Protocol, (ie: market conditions prevail), the ACS maintained that EU criteria to determine whether there is '*price influence*' are the same as those to be used to determine whether '*market conditions prevail'*.

3.20 The ACS advised the Committee that the EU criteria formed the basis for the ministerial guidelines issued to the ACS in December 2000 and June 2001 and 'also form the basis of the new Customs Regulations to be made under the auspices of the Bill'. Both a copy of the EU legislation and an exposure draft of the regulations were provided to the Committee and are attached at Appendices 3 and 4.

3.21 The Committee accepts that the criteria to determine whether there is '*price influence*' are essentially the same as those to be used to determine whether '*market conditions prevail'*.

3.22 The Committee accepts that the criteria to determine whether there is 'price influence' are similar in most respects to those to be used to determine whether 'market conditions prevail. For example, both the EU legislation and the exposure draft of the regulations list matters such as whether decisions regarding prices, costs and inputs sales and investment are made in response to market signals and without significant interference by a government of an exporting country. Both also refer to accounting standards, require bankruptcy and property laws and also require that the production costs and financial systems of firms are not subject to significant distortions carried over from the former non-market economy system. It must be acknowledged that there is some extra detail in the draft regulations. However, it is difficult to see how any assessment of whether an economy is operating under market conditions would be different under either set of criteria.

WTO procedural and evidentiary requirements

3.23 The Bill requires exporters in an 'economy in transition' to provide information to an ACS anti-dumping investigation that demonstrates that the domestic

10 ACS Written responses to Questions on Notice, 21 March 2003, p. 4.

selling price of goods is not significantly affected by government. If exporters do not answer questions within the time allowed, or if the answers given by the exporter do not provide sufficient information, the presumption will be that the domestic price has been significantly affected by Government.[11]

3.24 Several submissions received by the Committee viewed these provisions as not in accordance with WTO requirements. Some disagree with the requirement to provide information and see it as 'commercially unrealistic'[12]. However, the issue appears to be not so much the provision of information, which is consistent with Article 15 of the Accession Protocol,[13] but rather the procedures under which it is sought. Specifically, the matters of concern are the timeframes within which exporters are obliged to respond to questionnaires; and the availability of ACS assistance in providing the information.

3.25 Particularly relevant to these arguments is Article 6 of the Implementation Agreement, which concerns evidence for anti-dumping investigations. Article 6.1 states that all interested parties in an anti-dumping investigation shall be given ample opportunity to present in writing all the evidence which they consider relevant. Exporters or foreign producers receiving questionnaires are to be given at least 30 days to reply.[14] Due consideration is to be given to any request for an extension of the 30 day period, and extensions are to be granted where practicable if cause is shown[15]. Parties are to be given a 'full opportunity for defence of their interests' throughout the investigation[16], and authorities are to provide timely opportunities for parties to see all relevant information that is not confidential (as defined in the Agreement).

3.26 The submission of the Embassy of the PRC saw the provisions as excessively harsh and running counter to WTO obligations:

> Furthermore, according to the Amendment, if the exporters fail to answer questionnaires within the period decided by Australian Customs, the Australian Customs Service will ignore the information they provide. The harsh practice of shifting the burden of proof from importers to exporters and making no provisions on request of extension for the time period obviously runs counter to the requirements of Article 6.2 and paragraph 6 of Annex II of the WTO's Anti-Dumping Agreement, which will injure the legitimate rights and interests of the exporters.

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11 Explanatory Memorandum, p. 7.

12 See for example *Submission 3*, Independent Paper Group, p. 3.

13 Article 15(a)(i) refers to situations where the producers under investigation can clearly show that market economy conditions prevail in the industry.

14 Art. 6.1.1

15 Art. 6.1.1

16 Art. 6.2

3.27 Similarly, the Law Institute of Victoria/Law Council of Australia (LIV/LC) joint submission also expressed concern at the apparent harsh manner in which it believed the requirements on exporters would operate:

> Although the amendments may provide administrative expediency for the Australian Customs Service, they are unduly harsh on economies in transition such as the PRC, where domestic producers who export to Australia may have little understanding or interest in questionnaires from the Australian Customs Service.[17]

3.28 The LIV/LC argued that the requirements in the new subsections requiring exporters to provide information to the ACS were not in accordance with the GATT anti-dumping provisions (the Implementation Agreement), in that there was no provision for exporters to seek additional time to complete questionnaires, or to seek assistance to do so.

3.29 The LIV/LC representative, Mr Andrew Hudson, elaborated:

> If you have unsophisticated exporters in China and they get a questionnaire from Customs, they might have little interest or capacity to respond to such a questionnaire. They would not necessarily understand the circumstances. To then effectively draw that reverse onus and say that, if they do not complete it or do not complete it to the satisfaction of Customs, it will be deemed to be an economy in transition - and those provisions will be picked up and we will be back to the minister making the determination of normal value - is in my view unfair, impractical and unrealistic, taking into account Chinese requirements.[18]

3.30 Mr Daniel Moulis also saw the provisions as incompatible with the WTO:

> Annex II, paragraph 6 of the anti-dumping agreement makes it clear that the policy under the agreement is that, if information is not accepted, firstly the investigating authority should say to the interested party that it is insufficient and inform them what they do not like about it in order to give that party an opportunity to come back. I think I have highlighted in my submission that, as an example in the European Union system, there is clearly this interchange.[19]

3.31 The LIV/LC provided the Committee with a set of proposed amendments to the Bill's requirements for exporters to answer questionnaires that it considered would bring it more in line with WTO Implementation Agreement requirements. The amendments proposed were as follows:

> (a) Amend the questionnaire provision in a manner consistent to Article 6.1.1 of the Implementation Agreement and other provisions of Section

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17 *Submission 2*, p. 3.

18 Transcript of Evidence, pp. 13-14.

19 Transcript of Evidence, p. 5.

> 269TC to specifically oblige the ACS to inform an exporter that they are entitled to an extension of time to respond to the questionnaire and the grounds on which an extension may be available.
>
> (b) Questionnaires are to be provided to "producers" and "exporters" in the manner contemplated by Article 15(a) of the Protocol (to the extent that they are different).
>
> (c) Include a provision by which an exporter is advised that they may seek assistance from Customs in completion of the questionnaire and the grounds on which assistance may be available in a manner consistent with Article 6.13 of the Implementation Agreement and US provisions.[20]

3.32 The ACS however did not agree with Mr Moulis or Mr Hudson and did not see the amendments in the Bill as preventing the granting of an extension of time or assistance. The ACS stated that this is current practice, where an exporter is making a genuine effort to complete questionnaire information within a reasonable timeframe.[21]

3.33 An ACS representative emphasized that Customs goes to considerable lengths to assist all parties involved in investigations, including exporters:

> We liaise intensively with all parties, including exporters and foreign governments, in an effort to cajole, encourage and support. We do anything except fill in a form for people. That goes to the question of how far our assistance might extend, but we do a lot of explaining of what is needed and we offer up questions that, if answered, meet our needs. There is no uncertainty about what is required.[22]

3.34 However, in providing extensions of time and assistance, the ACS also has to be mindful of the statutory requirement to complete investigations:

> The investigation is a very serious matter and once it has begun it needs to be completed within a statutory time frame of 155 days, which is about the fastest in the world. We have to strike a balance, then, between completing the investigation, observing the rights of parties to submit information and effectively drawing the line at certain points, underpinned with a lot of liaison.[23]

3.35 The possibility that some exporters might not see co-operation with an investigation as being in their interests is also a factor in imposing deadlines and consequences for the non-provision of information. The ACS representative explained that non co-operation or partial co-operation could have the potential to skew or prevent an investigation:

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20 *Submission 2*, pp. 14-15.

21 ACS Written responses to Questions on Notice, 21 March 2003, p. 2.

22 Transcript of Evidence, p. 18.

23 Transcript of Evidence, p. 18.

> If a company were to refuse to cooperate or were to cooperate in a selective manner, all the facts available to Customs might then become ones that were self-serving or, worse, we might be left in a position where there was no real substantive information, barring the information that we might be able to get from the government of that country. That really does not create a good, solid basis for a positive decision that price control does exist.[24]

3.36 ACS also disagreed with assertions made about the need of 'unsophisticated' exporters for assistance. The ACS representative advised the Committee that in reality, most firms have access to sophisticated legal advice and are well aware of the requirements:

> The companies that do not are, in my opinion, atypical—in other words, the unsophisticated, small company in China. Most of the companies that attract interest in dumping regimes tend to be large and sophisticated, with access to lawyers and accountants—lawyers within China and sometimes from Hong Kong. … they have access to quite sophisticated information in a regime that is well understood, with a process that is well understood.[25]

3.37 The Committee accepts the assurances provided by the ACS that the provisions of the Bill are not intended to deny exporters access to justified extensions of time or to assistance when required. It is clear that the ACS does not operate in such a way that would lessen the protections intended under the WTO agreement.

Consultation

3.38 This Bill was introduced into the House of Representative at the end of the 2002 Parliamentary Session, on 12 December. It passed the House that same day and was subsequently introduced into the Senate on 3 March 2003. Its late and apparently unexpected introduction and rapid progression through the legislative process has apparently surprised a number of affected organisations and gave rise to a number of complaints about a lack of consultation, most notably by representatives of the PRC:

> What worries us is that the Australian government, without consulting public opinions, submitted to its Parliament the bill for amending the antidumping provisions of the 1901 Customs Law at the end of last year. The bill involves antidumping investigations on the exports of economies in transition including China. However, no Chinese parties were consulted and none of them were given the opportunities to fully express their views. Obviously, this is inconsistent with the transparency principle of the WTO.[26]

3.39 In late February 2003, the PRC Minister of Foreign Trade and Economic Cooperation also wrote in similar terms to the Australian Minister for Justice and

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24 Transcript of Evidence, p. 20.

25 Transcript of Evidence, p. 18.

26 *Submission 5*, p. 2.

Customs; and to the Minister for Trade. These letters are attached to the Submission of the Embassy of the PRC.[27]

3.40 The Committee sought information from several sources about the consultation process. In response to questions from the Committee about whether his group had been consulted, Mr McAllen of the Manufacturing Industry Task Force on anti-dumping admitted that the legislation had 'surprised' him, but that there had been on-going consultation with the Government about the issue:

> The taskforce has an ongoing dialogue with the minister and this is one of the problems that we have regularly been putting to the minister. It was with some warmth that we saw the legislation in the parliament in the middle of December. To some extent we were being consulted all along the line and our view was known that the existing way was not the right way.[28]

3.41 In response to a similar question, Mr Hudson advised the Committee that as far as he was aware, no consultations had taken place with the Law Council or the Law Institute of Victoria committees.[29]

3.42 The Committee questioned ACS representatives about the nature of the consultation process, and in particular whether the Government of the PRC had been included in this process.

3.43 An ACS representative confirmed that there had not been any exposure of the bill prior to its introduction into the House of Representatives. However, the representative advised the Committee that the principles incorporated in the Bill had been public for some time:

> The underlying content of the bill and the regulations, which are almost ready for release, has been published in the form of ministerial guidelines that form part of the guidance to Customs about how we are to conduct investigations relating to economies in transition, and that has been the case for a couple of years now.

3.44 The ACS also subsequently advised the Committee that the Australian and Chinese Governments had been exchanging views on this matter since May 2001:

> The Chinese Government wrote to the Minister for Justice and Customs in July 2001, following a meeting in May 2001 with the Minister's office and Customs officials about the December 2000 price control guidelines. The Chinese Government raised concerns about the use of criteria that seemed to be broader than the expression 'price control' would allow, and objected to

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27 *Submission 5.*

28 Transcript of Evidence, p. 10.

29 Transcript of Evidence, p. 14.

an onus that the guidelines purported to place on exporters to materially and substantially respond to Customs' questions.[30]

3.45 The ACS emphasized that 'These are the same issues as are being addressed in the Customs Legislation Amendment Bill (No.2) 2002 and associated regulations'[31]. The ACS provided copies of the correspondence to the Committee.

3.46 The Minister for Justice and Customs, Senator the Hon. Chris Ellison, wrote to the Committee on 24 March, confirming that the Chinese Government '…has been aware of the thrust of those [price control] guidelines for the last two years and has taken the opportunity to make a written submission to me on the issues.' The Minister also noted that his office had met with representatives of the Embassy of the PRC and with Freehills lawyers on at least one occasion to discuss these matters.

3.47 The Committee considers that consultations about the principles within the Bill appear to have been adequate, in the sense that the thrust of the Government's policy was made clear to the party most affected, the PRC.

Conclusion

3.48 The Committee considers that the provisions of the Bill are compatible with Australia's obligations to China under the WTO's system of international agreements.

Recommendation

The Committee recommends that the Bill be passed.

Senator Marise Payne

Chair

30 ACS Written responses to Questions on Notice, 21 March 2003, p. 1.

31 ACS Written responses to Questions on Notice, 21 March 2003, p. 1.

DISSENTING REPORT

LABOR SENATORS

Introduction

1.1 Labor Senators consider that there are a number of unresolved issues in this Bill and remain unconvinced that the legislation in its current form is compatible with Australia's WTO obligations to the PRC. They are also of the view that unless amended, the legislation is likely to be subject to WTO challenge, thereby damaging Australia's trade relations with China while defeating the purpose of the Bill.

The 'significantly affected' test

1.2 Proposed new subsections 269TAC(5D)(a) and (b) apply a test of whether the exporter's selling price is 'significantly affected by a government at any level of the exporting country'. This test is applied when the Minister is deciding whether 'normal value' should be the selling price in the country of origin, or whether a different method should be used for determining normal value.

1.3 However, Bill's inclusion of the phrase 'significantly affected' has proved contentious, a number of witnesses and submissions arguing that the test should be whether 'market economy conditions prevail', which is the language used in the Accession protocol and in EU regulations[1].

1.4 At issue is whether the Bill's use of the term 'significantly affected' imposes a more stringent test on firms exporting from an economy in transition than would 'market economy conditions prevail'.

1.5 As noted in the majority report, Mr Daniel Moulis, a lawyer with experience in representing foreign exporters and who has also served as a WTO panelist, has submitted that the term 'significantly affected' is ambiguous and that even if market economy conditions did prevail, it would still be possible, given the breadth and ambiguity of the words used in the Bill, to find that a government *"significantly affected"* the price concerned.[2]

1.6 The different language used is also of significant concern to the PRC, as described in paragraph 3.9 of the majority report.

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1 Attached at Appendix 3 – see Clause 7(b).

2 *Submission 4*, p. 4.

1.7 The Australian Customs Service argues that the two phrases have the same effect, as the EU criteria to determine whether there is '*price influence*' are the same as those to be used to determine whether '*market conditions prevail'*.[3]

1.8 Labor Senators agree with the majority view, which is that the criteria to determine whether there is 'price influence' are similar in most respects to those to be used to determine whether 'market conditions prevail', although it should be noted that the draft regulations do go to a greater level of detail than the EU legislation. However that is beside the point, as the ACS is arguing that the criteria are the same. If that position is accepted, then this only highlights a logical inconsistency in the ACS arguement.

1.9 Labor Senators' understanding of the difficulty with the current legislation is that there is no obligation on exporters to provide information and no presumption, in the absence of the necessary information, that the domestic selling price has been significantly affected by government. The Bill addresses these issues. If it is accepted that the Bill adequately addresses these particular problems; and that as the ACS asserts, EU criteria to determine whether there is '*price influence*' are the same as those to be used to determine whether '*market conditions prevail'*, then there does not seem to be any reason why the Bill should not mirror the terms used in the EU legislation in this regard.

Recommendation

Labor Senators recommend that that the Bill be amended, removing the 'significantly affected' test and substituting a test of whether 'market economy conditions prevail', in line with the language used in the Accession Protocol and EU legislation.

WTO procedural and evidentiary requirements

1.10 The Bill requires exporters in an 'economy in transition' to provide information to an ACS anti-dumping investigation that demonstrates that the domestic selling price of goods is not significantly affected by government. If exporters do not answer questions within the time allowed, or if the answers given by the exporter do not provide sufficient information, the presumption will be that the domestic price has been significantly affected by Government.[4]

1.11 This issue is well canvassed in the majority report, at paragraphs 3.25 – 3.29. In the majority's report, the Committee accepts the assurances provided by the ACS that the provisions of the Bill are not intended to deny exporters access to justified extensions of time or to assistance when required.

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3 See ACS Written responses to Questions on Notice, 21 March 2003, p. 4.

4 Explanatory Memorandum, p. 7.

1.12 While this may be the case, Labor Senators nonetheless consider that the lack of specific provisions guaranteeing extensions of time to submit information, as well as ACS assistance, leave the Bill open to potential adverse interpretation and possible challenge.

1.13 Labor Senators believe that amendments similar to those proposed by the Law Institute of Victoria and the Law Council (LIV/LC) would improve the Bill (see paragraph 3.31). Further, amendments may go some way towards reassuring the Government of the PRC, a valued trading partner, that it is not the Australian Government's intention to disadvantage Chinese exporters.

Recommendation

Labor Senators recommend that the Senate amend the Bill as follows:

> **(a) Amend the proposed subsection 269TAC(5D) of the Bill in a manner consistent with Article 6.1.1 of the Implementation Agreement and other provisions of Section 269TC to specifically oblige the ACS to inform an exporter that they are entitled to an extension of time to respond to the questionnaire and the grounds on which an extension may be available.**
>
> **(b) Require questionnaires to be provided to 'producers' and 'exporters' in the manner contemplated by Article 15(a) of the Protocol (to the extent that they are different).**
>
> **(c) Include a provision by which an exporter is advised that they may seek assistance from Customs in completing the questionnaire and the grounds on which assistance may be available, in a manner consistent with Article 6.13 of the Implementation Agreement.**

1.14 Time limits should apply to extensions of time and the provision of assistance to ensure that these amendments do not cause the statutory limit for conducting an anti-dumping investigation, 155 days, to be exceeded.

Consultation process

1.15 Labor Senators cannot agree with the majority's conclusion that the Government's consultation process on this Bill was adequate. While some consultations appear to have occurred between the Government and the PRC about the principles behind the Bill, it does not appear that the PRC and other affected parties, including local manufacturers who rely on components sourced from the PRC, were consulted about the Government's intention to legislate on this matter. For example, in a letter to the Minister for Justice and Customs, which was subsequently provided to the Committee, the National Farmers' Federation warned of its 'serious concerns' about the 'lack of consultation in drafting the amendment and the potential negative ramifications of the Bill in its current form on Australia's international trading reputation'.

Regulatory Impact Statement

1.16 During the public hearing, the Committee asked an ACS representative whether the Bill required a regulatory impact statement (RIS), and was advised that the Bill was 'subject to this process'.

1.17 In a subsequent written response, the ACS confirmed that had been subject to the process, but that the Office of Regulation Review (ORR) had advised that no RIS was required in respect of anti-dumping provisions.

1.18 Given that a number of Australian industry groups such as the Australian Paper Group and the National Farmers Federation have been sufficiently concerned to either make representations to this committee or direct to the Government, Labor Senators were somewhat surprised at the approach taken by the ORR.

1.19 The Committee sought information about the reasons for the decision not to prepare an RIS. In a letter sent to the Committee, the ACS advised that the ORR, having considered the nature and extent of the amendments:

> …had decided to exempt the…Bill from the requirement of a RIS on the basis that the proposed changes to the anti-dumping arrangements are of a minor and machinery nature.

1.20 In further correspondence to the Committee, the ACS noted:

> Customs approached the ORR in February 2002, before drafting of the Bill began. ORR was provided with an outline of the "price influence" provisions … and this was supplemented by discussions between ORR and Customs …
>
> In light of the Committee's enquiries about this point, Customs has been concerned to ensure that it has not failed to meet its obligation to address issues requiring an RIS. Customs has consulted further with ORR over the price influence provisions … and was advised by ORR on 31 March 2003 that ORR's previous advice to Customs remains unchanged.

1.21 Labor Senators are concerned to ensure that proposed legislation is rigorously assessed to determine whether an RIS is required. It is vital to maintain the integrity of the ORR's assessment scheme, and the ORR should never be perceived as relying on an agency's description of its draft legislation as minor or machinery in nature.

The Accession Protocol – is it binding?

1.22 As part of its consideration of the Bill, the Committee explored whether the Bill should include a sunset clause. This issue was raised in the joint submission of the LIV/LC which observed that once a country had been classified as an 'economy in transition', that classification appeared to have indefinite application. The LIV/LC argued that this would have potential adverse consequences for the PRC as normal

value would be left to be determined by the Minister rather than information in the exporting country.[5]

1.23 Committee members asked ACS and Department of Foreign Affairs and Trade representatives how long this classification would have effect.

1.24 ACS representatives responded that the Accession Protocol specifies a period of fifteen years. However, ACS and Department of Foreign Affairs and Trade appear to believe that this is not binding on Australia:

> China's protocol of accession contains an acknowledgment that a methodology may be used by other WTO members, and it makes it clear that that may be applied for at least the 15-year period. What it asserts is that it should not be applied after 15 years. That is my reading of the effect of that instrument—that protocol of accession. But, as I said, my understanding is that the protocol of accession is binding on China as an acceding party, but it is not a binding instrument on Australia as another WTO member.[6]

1.25 As noted by Mr Moulis in his submission, Article 1.2 of the Accession Protocol declares the Protocol to be 'an integral part of the WTO Agreement'. Labor Senators were therefore surprised that the Department of Foreign Affairs and Trade sees the Protocol as non-binding.

1.26 While acknowledging that it is difficult to test whether the Accession Protocol is not binding on Australia, Labor Senators consider that it would be unfortunate if that view was used to justify legislation that is inconsistent with it. Such action would give rise to perceptions that Australia is no longer committed to WTO principles, a policy which has produced great benefits for the Australian economy over the last two decades.

1.27 Labor Senators support bona fide anti-dumping legislation, but are concerned that this Bill goes beyond bona fide anti-dumping legislation to set up new, artificial trade barriers against China. The lack of consultation with the Government of the PRC only reinforces these concerns. Labor Senators consider this legislation in its present form has the potential to damage trade relations with the PRC - a most valued customer for Australian exports.

Senator the Hon. Nick Bolkus — Deputy Chair

Senator Joseph Ludwig

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5 *Submission 2*, p. 8.

6 Transcript of evidence, p. 20.

APPENDIX 1

SUBMISSIONS RECEIVED

Submission No.	Submitter
1	Manufacturing Industry Task Force on Anti-Dumping
1A	Industry Task Force on Anti-Dumping
2	Law Institute of Victoria and Law Council of Australia (Customs & International Transactions Committee)
3	Independent Paper Group
4	Mr Daniel Moulis, Freehills
4A	Mr Daniel Moulis, Freehills
5	Embassy of the People's Republic of China

Additional information

Copy of correspondence dated 28 February 2003 from the National Farmers Federation to Senator the Hon Chris Ellison, Minister for Justice and Customs, provided by the National Farmers Federation

Correspondence dated 21 March 2003 from the Manufacturing Industry Task Force on Anti-dumping to Committee

Correspondence dated 21 March 2003 from ACS to Committee – Answers to questions on notice

Correspondence dated 24 March 2003 from ACS to Committee, concerning US assistance to Chinese exporters

Correspondence dated 24 March 2003 from Minister for Justice and Customs to Committee

Correspondence dated 28 March 2003 from ACS to Committee, concerning Regulation Impact Statements

Exposure draft of Customs Regulations provided to the Committee by ACS

Correspondence dated 31 March 2003 from the Department of Foreign Affairs and Trade to Committee, concerning the Implementation Agreement and the Accession Protocol

Correspondence dated 2 April 2003 from ACS to Committee, concerning Regulation Impact Statements

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Wednesday, 19 March 2003

Private capacity
Mr Daniel Moulis, partner, Freehills

Manufacturing Industry Taskforce on anti-dumping
Mr Bruce McAllen (Chairman)
Mr John O'Connor (Deputy Chairman)

Law Institute of Victoria/ Customs and International Transactions Committee of the Law Council of Australia (joint submission)
Mr Andrew Hudson (by teleconference)

Australian Customs Service
Ms Sue Pitman, National Manager Trade Measures
Mr Michael Mulgrew, Director Policy, Trade Measures

Department of Foreign Affairs and Trade
Mr Dominic Trindade, Assistant Secretary, WTO Trade Law Branch
Ms Elizabeth Young, Director, WTO Subsidies and Trade Remedies Section, WTO Trade Law Branch

APPENDIX 3

EUROPEAN UNION REGULATIONS

Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community

Article 2 - Determination of dumping

A. NORMAL VALUE

1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product the normal value may be established on the basis of prices of other sellers or producers.

Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

2. Sales of the like product intended for domestic consumption, shall normally be used to determine normal value if such sales volume constitute 5% or more of the sales volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

4. Sales of the like product in the domestic market of the exporting country, or export sales to a third country. at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if it is determined that such sales are made within an extended period of

time in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

The extended period of time shall normally be one year but shall in no case be less than six months and sales below per unit cost shall be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20% of sales being used to determine normal value.

5. Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilized. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. Unless already reflected in the cost allocations under this subparagraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.

Where the costs for part of the period for cost recovery are affected by the use of new production facilities requiring substantial additional investment and by low capacity utilization rates, which are the result of start-up operations which take place within or during part of the investigation period, the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in the second subparagraph of paragraph 4. The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery. For this adjustment to costs applicable during the investigation period, information relating to a start-up phase which extends beyond that period shall be taken into account where it is submitted prior to verification visits and within three months of the initiation of the investigation.

6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined, on the basis of:

(a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;

(c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

7 (a) In the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.

(b) In anti-dumping investigations concerning imports from the Russian Federation, the People's Republic of China, the Ukraine, Vietnam and Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

> decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

exchange rate conversions are carded out at the market rate.

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.

B. EXPORT PRICE

8. The export price shall be the price actually paid or payable for the product when sold from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

In these cases, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made so as to establish a reliable export price, at the Community frontier level.

The items for which adjustment shall be made include those normally borne by an importer but paid by any party, either in or outside the Community, which appears to be associated or to have a compensatory arrangement with the importer or exporter, including: usual. transport, insurance, handling, loading and ancillary costs; customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods; and a reasonable margin for selling, general and administrative costs and profit.

C. COMPARISON

10. A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated to affect prices and, therefore, price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

APPENDIX 4

EXPOSURE DRAFT OF CUSTOMS AMENDMENT REGULATIONS 2003

1 Name of Regulations

These Regulations are the *Customs Amendment Regulations 2003(No.*).

2 Commencement

These Regulations commence on the commencement of Part 1 of Schedule 1 to the *Customs Legislation Amendment Act (No. 2) 2002.*

3 Amendment of *Customs Regulations 1926*

Schedule 1 amends the *Customs Regulations 1926.*

Schedule 1 Amendment

(regulation *3)*

[1] After regulation 182

insert

183 Matters to which the Minister must have regard

(subsection 269TAC (5E) of the Act)

(1) In this regulation:

entity, in relation to goods, means each of:

(a) the exporter of the exported goods mentioned in

subsection 269TAC (5D) of the Act; and

(b) if the exporter of the goods is not the producer of the

goods, but the goods are produced in the country of export –

the producer of the goods.

government, of a country, means any level of government of

the country.

(2) For subsection 269TAC (5E) of the Act, the following matters are prescribed:

(a) whether the entity makes decisions about prices, costs, inputs, sales and investments:

(i) in response to market signals; and

(ii) without significant interference by a government of the country of export;

(b) whether the entity keeps accounting records in accordance with generally accepted accounting standards in the country of export;

(c) whether the generally accepted accounting standards in the country of export are in line with international accounting standards developed by the International Accounting Standards Board;

Note International accounting standards developed by the International Accounting Standards Board can be found on the International Accounting Standards Board website at http://www.iasc.org.uk/cmt/0001.asp

(d) whether the accounting records mentioned in paragraph (b) are independently audited;

(e) whether the entity's production costs or financial situation are significantly affected by the influence that a government of the country of export had on the domestic price of goods in the country before the country's economy was an economy in transition;

(f) whether the country of export has laws relating to bankruptcy and property;

(g) whether the entity is subject to the bankruptcy and property laws mentioned in paragraph (f);

(h) whether the entity is part of a market or sector in which prices are influenced by the presence, in the market or sector, of an enterprise owned by a government of the country of export;

(i) whether utilities are supplied to the entity under contracts that reflect commercial terms and prices that are generally available throughout the economy of the country of export,

(j) if the land on which the entity's facilities are built is owned by a government of the country of export- whether the conditions of rent are comparable to those in a market economy;

(k) whether the entity has the right to hire and dismiss employees and to fix the salaries of employees.

(3) In assessing whether there is significant interference for subparagraph (2)(a)(ii), the Minister must have regard to the following:

(a) whether a genuinely private company or party holds the majority shareholding in the entity;

(b) if officials of a government of the country of export hold positions on the board of the entity- whether these officials are a minority of the members of the board;

(c) if officials of a government of the country of export hold significant management positions within the entity -

whether these officials are a minority of the persons holding significant management positions;

(d) whether the entity's ability to carry on business activities in the country of export is affected by:

(i) a restriction on selling in the domestic market; or

(ii) the potential for the right to do business being withdrawn other than under contractual terms; or

(iii) if the entity is a joint-venture in which one of the parties is a foreign person, or is carried on in the form of such a joint-venture- the ability of the foreign person to export profits and repatriate capital invested;

(e) whether the entity's significant production inputs (including raw materials, labour, energy and technology) are supplied

(i) by enterprises that are owned or controlled by a government of the country of export; and

(ii) at prices that do not substantially reflect conditions found in a market economy.

Notes

1. These Regulations amend Statutory Rules ^year^ No. , as amended by ^year^ No. .

2. Notified in the ***Commonwealth of Australia Gazette*** on 2003.