

# FINDING THE BALANCE:

## A Public Interest Test in the Dumping and Countervailing Duties Act 1988

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## *List of Abbreviations*

AD	Anti-Dumping duty
CITT	Canadian International Trade Tribunal
EU	European Union
GATT	General Agreement on Tariffs and Trade
SCM	Subsidies and Countervailing Measures
SIMA	Special Import Measures Act
SIMR	Special Import Measures Regulations
WTO	World Trade Organisation

## *Introduction*

International trade in goods benefits consumers and domestic industries in New Zealand. Consumers have a wider variety of products they can buy for competitive prices. Domestic industries may be able to use imported products as inputs in their commercial activities, these will be referred to as ‘downstream industries’. Domestic manufacturing industries benefit by gaining access to international markets, increasing their exports and revenue, these will be referred to as ‘domestic industries’. Some domestic industries may be in competition with imported goods, if the domestically produced good is substitutable for the imported good.<sup>1</sup>

Under international trade rules there are three instances in which a country can take domestic action against imported products, collectively referred to as ‘trade remedies’. If the imports are dumped, which means they are sold at a lower price in the importing market than in the exporting market, the importing country can impose anti-dumping duties on the products. Countervailing duties can be imposed if an exporting foreign government has conferred a subsidy on the exporting industry and the subsidy is artificially lowering the price of the imported good. The duties aim to address the harm caused by dumped or subsidised imports to the importing countries’ domestic industries. Anti-dumping duties restore the price of the imported product to the exporting market value, and countervailing duties counteract the subsidised low price of the import. The third trade remedy is a safeguard measure, which involves restricting the quantity of imported goods if there is an unprecedented surge in the number of imports. In each case, the use of trade remedies requires injury to the domestic industry of the importing country.

This dissertation focuses on the circumstances in which it is appropriate for the New Zealand Government to impose anti-dumping and countervailing duties, and what factors should be considered before a duty is imposed. The specific focus is on the “public interest test”, which was recently implemented by the Trade (Dumping and Countervailing Duties) Amendment Act 2017,<sup>2</sup> which received Royal Assent on 29 May 2017. The public interest

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<sup>1</sup> For clarity, “like product” is the term used in international trade to describe products which share the same physical characteristics, function or end-use and are substitutable for each other. For the purposes of this dissertation, the extended debate on the definition of “like products” is not relevant.

<sup>2</sup> Referred to as the 2017 Amendment Act, or the 2017 amendment hereafter. Note that per Trade (Dumping and Countervailing Duties) Amendment Act 2017, s 5(1)(a), the name of the principal Act, the Dumping and Countervailing Duties Act 1988 has been changed to the Trade (Anti-dumping and Countervailing Duties)

test was proposed to enable the decision-making Minister to consider whether the imposition of the duty is in the wider national interest by considering factors such as increased costs for consumers, before the imposition of a duty.

The public interest test highlights the tension between the interests of consumers and downstream industries who benefit from cheaper imports, and the interests of domestic industries who compete with the imported products and suffer injury or the threat of injury due to the unfair trade practices of the foreign entity or their government. These competing interests have led to significant debate on the purpose of anti-dumping and countervailing duties and the way in which they should be imposed. This dissertation navigates through this debate in five parts:

Chapter I will outline the international rules governing the imposition of anti-dumping and countervailing duties and their relationship with domestic law.

Chapter II will analyse the historical and contemporary rationales and purposes for the duties. It will also test the legitimacy of a public interest test in solving the perceived shortcomings of trade remedies.

Chapter III will chart the history of New Zealand trade remedies policy, and the way in which the competing interests have been addressed in legislation. The second part of Chapter III explains the 2017 Amendment Act and the procedure and substance of the new public interest test.

Chapter IV will outline the approaches taken by the European Union and Canada, who employ a public interest test in their anti-dumping and countervailing investigations. It will also address the rejection of a proposed public interest test in Australia.

Chapter V will critically evaluate the New Zealand public interest test in light of the material covered in the previous four chapters. Past decisions from the European Union and Canada will be used as examples to evaluate the potential interpretation and application of the New Zealand test.

The overall objective of this dissertation is to evaluate the legitimacy of a public interest test in addressing the concern that anti-dumping and countervailing duties may be imposed

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Act 1988. All legislative section references will be to the Trade (Anti-dumping and Countervailing Duties) Act 1988.

in a protectionist manner and are not always in the interests of consumers and downstream industries. I aim to provide a persuasive argument that even though the public interest test is theoretically useful, drafting and implementing an effective public interest test is difficult, both at the multilateral international trade regime level and in domestic legislation. The difficulty stems from the absence of a compelling unified purpose between a public interest test and the imposition of anti-dumping and countervailing duties.



## ***Chapter I: The International Trade System***

At the international level, three agreements govern the imposition of anti-dumping and countervailing duties: The General Agreement on Tariffs and Trade (GATT), the Subsidies and Countervailing Measures Agreement (SCM Agreement), and the Agreement on Implementation of Article VI of the GATT (Anti-Dumping or AD Agreement). The Agreements provide the framework for domestic legislation and specify the mandatory criteria to determine the occurrence of dumping, subsidisation and causal injury. They do not impose any obligation on importing countries to impose anti-dumping or countervailing duties. Rather the:<sup>3</sup>

decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled... [is a decision] to be made by the authorities of the importing Member.

The primary objective of trade remedies is to provide relief to domestic industries, but there may also be other elements besides the domestic industries' interests that influence a decision on whether to apply duties.<sup>4</sup> In other words, the importing countries' domestic industries do not have an overarching *right* to a remedy against injury-causing imports. The procedural and substantive elements influencing the decision whether to impose a duty, and at what rate, are determined by the domestic laws of the importing country.

### ***A The General Agreement on Tariffs and Trade 1947 (GATT)***

The GATT has the objective of promoting and liberalising international trade by "developing the full use of the resources of the world and expanding the production and exchange of goods" by substantially reducing tariffs and by eliminating "discriminatory treatment in international commerce".<sup>5</sup> These objectives are furthered by the Article I ("most favoured nation treatment") and Article III ("national treatment") obligations.

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<sup>3</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (World Trade Organization [WTO]) 1868 U.N.T.S. 201 (signed 15 April 1994, entered into force 1 January 1995), Article 9.1 and Agreement on Subsidies and Countervailing Measures (World Trade Organization [WTO]) 1869 U.N.T.S. 14 (signed 15 April 1994, entered into force 1 January 1995), Article 19.2

<sup>4</sup> Paul I.A. Moen *Public Interest Issues in International and Domestic Anti-dumping Law: The WTO, European Communities and Canada* (Graduate Institute of International Studies, Geneva, 1993) at 40.

<sup>5</sup> General Agreement on Tariffs and Trade 55 UNTS 187 (signed 30 October 1947, entered into force 1 January 1948), the Preamble.

Article I requires that any trade advantage accorded to one Member be accorded to every other Member. Article III prohibits internal taxes and regulations from being applied to imported products which are in excess of those applied to like domestic products or which afford protection to domestic production. Domestic measures that protect domestic producers are contrary to the objective of non-discrimination embodied in these obligations. The imposition of anti-dumping and countervailing duties, pursuant to Articles VI and XVI, are exceptions to these obligations, as these are targeted actions against individual trading countries and have the purpose and effect of protecting domestic producers from injury caused by dumped or subsidised imports.<sup>6</sup>

The Kennedy Round of multilateral trade negotiations<sup>7</sup> resulted in the 1967 Agreement on the Implementation of Art VI of the GATT (the Anti-Dumping or AD Code), which outlined detailed criteria for the determination and implementation of anti-dumping measures. This Code was amended and replaced by the 1979 Code, concluded at the end of the Tokyo Round negotiations. The Tokyo Round negotiations also created the Tokyo Round Subsidies Code, which had similar rules for countervailing duties.

These Codes were not binding on all GATT members. Indeed, New Zealand did not accede to the Anti-Dumping Code for nearly twenty years, maintaining that its anti-dumping legislation was implemented in accordance with the:<sup>8</sup>

the spirit and the intention of [GATT] Article VI... [and that the] ... legislation as it stands is most suited to our needs and, in particular, provides the necessary facility to take remedial action expeditiously to protect infant industry.

As discussed in Chapter III, the reasons for not acceding to the Code and the implications of the eventual decision to accede, are significant for the development of New Zealand trade policy, especially in the context of tension between domestic industries, consumers, and downstream industries.

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<sup>6</sup> New Zealand Trade Consortium “Anti-dumping in New Zealand: A century of protection from ‘unfair’ trade?” (2005) Working Paper No. 39 at 5.

<sup>7</sup> Multilateral trade negotiations are negotiations which took place under the GATT, and now take place under the WTO. They result in significant changes to international trade rules. There have been eight rounds of negotiations and are the ninth, the Doha Round, which commenced in 2001 is yet to be completed.

<sup>8</sup> New Zealand Trade Consortium, above n 6, at 28. An infant industry is a newly established developing industry.

## 1 *The GATT Articles on Dumping and Subsidies*

Article VI of the GATT contains the general rules governing the application of anti-dumping and countervailing duties.<sup>9</sup> The linking of anti-dumping and countervailing duties in Art VI suggests that they are both concerned with the unfair pricing of imported goods. However, they are in fact concerned with different underlying problems. Subsidies are “policy instruments that may be used to achieve a variety of government objectives”,<sup>10</sup> whereas dumped goods are the result of prices set by private firms.<sup>11</sup> A product cannot be subject to both anti-dumping and countervailing duties at the same time.<sup>12</sup>

Dumping, the selling of products of one country into another at a price less than the normal value of the products, is not prohibited unless it causes or threatens material injury to a domestic industry of the importing country.<sup>13</sup> The price of an imported product is less than its normal value if the price “is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country”.<sup>14</sup> To offset the injury or prevent dumping, the importing country may levy an anti-dumping duty on the dumped product. The duty must not be greater in amount than the margin of dumping, which is the price difference between the normal value and the dumped price in the importing country.<sup>15</sup>

Subsidies are financial contributions from the government to an industry that can result in three possible scenarios. Country A could subsidise domestic production of a product which might disadvantage the export of that product by Country B into Country A. Alternatively, Country A could subsidise a product that is exported to Country C, disadvantaging the export of that product by Country B into Country C. In these scenarios, Country B cannot take any unilateral action against Country A, but might be able to file a

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<sup>9</sup> Michael J. Trebilcock, Robert Howse and Antonia Eliason *The Regulation of International Trade* (4<sup>th</sup> ed, Routledge, London, 2013) at 334.

<sup>10</sup> At 364

<sup>11</sup> At 365.

<sup>12</sup> GATT, Article VI:5.

<sup>13</sup> Article VI(1).

<sup>14</sup> Article VI(1)(a). In the absence of comparable domestic prices, dumping will be found to exist if the price is less than either “the highest comparable price for the like product for export to any third country in the ordinary course of trade”, Article VI(1)(B)(i), or “the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.” Article VI(1)(b)(ii).

<sup>15</sup> Article VI(2).

complaint under the World Trade Organisation's Dispute Settlement mechanism.<sup>16</sup> However, if Country A subsidises a product that is exported to Country B and causes damage to domestic producers in Country B, countervailing duties may be levied by Country B to remedy the injury to Country B's domestic producers.<sup>17</sup> The subsidy must cause or threaten material injury to the importing countries' domestic industry before a countervailing duty can be levied on the subsidised product.

## *2 The Uruguay Round (1986-1994)*

The Uruguay Round saw the creation of the World Trade Organisation (WTO).<sup>18</sup> The WTO is an international member-based organisation that provides a forum for the negotiation and administration of rules regulating international trade in goods and services, and a dispute settlement mechanism for its members.

During the Uruguay Round, the Anti-dumping and Subsidies Codes were replaced by the Subsidies and Countervailing Measures Agreement (SCM Agreement), and the the Agreement on Implementation of Article VI of the GATT (Anti-Dumping or AD Agreement). Unlike the Codes, these agreements bind all Member States.<sup>19</sup>

### ***B The Anti-Dumping Agreement***

Under the Agreement, a Member can only impose anti-dumping duties in accordance with Art VI of the GATT, requiring a determination of dumped imports, material injury to a domestic industry, and a causal link between the dumped imports and the injury.<sup>20</sup>

“Injury” is defined as “material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry”.<sup>21</sup> A determination of injury requires an objective examination of the volume and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact on domestic producers.<sup>22</sup>

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<sup>16</sup> Trebilcock, above n 9, at 364.

<sup>17</sup> GATT, Article VI:3

<sup>18</sup> Agreement Establishing the World Trade Organization (Marrakesh Agreement) 1867 U.N.T.S. 154 (signed 15 April 1994, entered into force 1 January 1995).

<sup>19</sup> Trebilcock, above n 9, at 367.

<sup>20</sup> AD Agreement, above n 3, Articles 1 and 2.1

<sup>21</sup> Article 3.

<sup>22</sup> Article 3.1. Per Article 3.2 – A significant increase in the volume, or a significant decrease in the price of the dumped good may indicate that the product is causing material injury.

When considering the impact on the domestic industry, all relevant economic factors affecting the state of the industry should be evaluated.<sup>23</sup> There must be a causal link between the dumped products and the injury to the domestic industry, which is not attributable to any other factor.<sup>24</sup>

The Agreement provides a “lesser duty rule”,<sup>25</sup> which means that “if the injury suffered is less than the dumping margin, then relief should only be granted to the extent that is necessary to remedy the harm”.<sup>26</sup>

### *C The Subsidies and Countervailing Measures Agreement*

The SCM Agreement places tighter constraints on the use of subsidies than the GATT. Its rules reflect a negotiated balance between Members that sought to limit the use of subsidies, and Members that sought to limit the imposition of countervailing duties.<sup>27</sup>

A subsidy is a “financial contribution by a government or any public body”,<sup>28</sup> which confers a benefit to the manufacturer.<sup>29</sup> A subsidy is subject to the provisions in the Agreement if it is limited to certain enterprises, and therefore “specific” under Art 2.<sup>30</sup>

A Member may bring multilateral or unilateral action against subsidies.<sup>31</sup> The unilateral response of imposing countervailing duties requires the Member to establish that there is a

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<sup>23</sup> Article 3.4. These include actual and potential decline in sales, profits, output, market share, productivity, factors affecting domestic prices, employment, wages, and the ability to raise capital or investments.

<sup>24</sup> Article 3.5.

<sup>25</sup> Article 9.1

<sup>26</sup> Moen, above n 4, at 42.

<sup>27</sup> *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea* (2005) WT/DS22/AB/R (Report of the Appellate Body)

<sup>28</sup> SCM Agreement, above n 3, Article 1.1(a)(1). Could be a direct transfer of funds, waiver of government revenue that is otherwise due, or the provision of goods or services, per Art 1.1(a)(1)(i)-(iii). Additionally, any indirect governmental financial contribution, if they would normally be vested in the government, would also be considered to be a subsidy, per Art 1.1(a)(1)(iv).

<sup>29</sup> Article 1.1(b).

<sup>30</sup> For example, a subsidy would be specific if it was only given to cotton farmers. A subsidy to farmers generally, may not be specific depending on the circumstances.

<sup>31</sup> For the multilateral response of a claim before the Dispute Settlement Body, subsidies are classed as either prohibited or actionable. Prohibited subsidies are export subsidies, which are given only to products manufactured for export or subsidies which are contingent on the use of domestic input products over imported goods (SCM Agreement, Part 2, Arts 3.1(a) and (b)). A Member does not have to prove injury to bring a claim before the Dispute Settlement Body for prohibited subsidies. An actionable subsidy is one

specific subsidy, the subsidised product is causing or threatening material injury to its domestic producers of a like product, and a causal link between the subsidy and the injury.<sup>32</sup> The provisions outlining the injury and causation are almost identical to the provisions in the AD Agreement, and also include the lesser duty rule.<sup>33</sup>

This chapter briefly outlined the international rules governing the imposition of anti-dumping and countervailing duties. The next chapter explores possible reasons why these duties are allowed in international trade.

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which causes injury to the domestic industry of another Member, nullification or impairment of benefits to other Members under the GATT 1994, or serious prejudice (defined in Art 6 SCM) to the interests of another Member.

<sup>32</sup> SCM Agreement, above n 3, Article 11.2

<sup>33</sup> Articles 15 and 19.

## *Chapter II: Purpose and Rationales*

Anti-dumping and countervailing duties are predicated on the view that subsidies and dumping are unfair trade practices because they distort comparative advantage and disrupt the 'level playing field' of international trade.<sup>34</sup> Trade remedies are perceived as government intervention on behalf of domestic industries suffering injury from artificially unfair competition from imports.<sup>35</sup> From the consumer and downstream industry perspective, anti-dumping and countervailing duties raise the prices of imports and decrease access to cheaper goods.

There has been significant academic discussion on the economic and political justifications for anti-dumping and countervailing duties. It must be noted that even if anti-dumping and countervailing duties can be justified from an economic perspective, the greater concern is that the rules allowing their imposition, while meant to correct trade distortions, are "being increasingly used in a manner that contravenes the fundamental principles of GATT, namely free trade and multilateralism".<sup>36</sup> According to commentators, trade remedies have a legitimate role to play in the international trade regime, "but not if they are... misused as protectionist instruments".<sup>37</sup>

This section outlines the rationales and criticisms of anti-dumping and countervailing duties. The purpose of the duties will determine the manner and circumstances in which they need to be applied and the different interests that should be taken into consideration.

### *A Dumping and Anti-Dumping Duties*

Dumping could take numerous forms, giving rise to different economic justifications for an anti-dumping duty. Jacob Viner was among the first academics to make a compelling case for anti-dumping laws.<sup>38</sup> Most of the forms of dumping described by Viner are price discrimination, which involves selling a product in two different national markets for different prices. This could happen because prices are determined by the differing elasticities of demand and competitiveness between the two markets. Exporters may be establishing themselves in a new market and price lower so they can gain more market

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<sup>34</sup> Trebilcock, above n 9, at 389.

<sup>35</sup> *Trade remedies in New Zealand: A discussion paper* (Ministry of Commerce, Discussion Paper, 1998) at 21.

<sup>36</sup> New Zealand Trade Consortium, above n 6, at 6.

<sup>37</sup> At 6.

<sup>38</sup> Jacob Viner *Dumping: A problem in international trade* (The University of Chicago Press, Chicago, 1923)

share. Another reason for price discrimination may simply be that exporters have surplus stocks that can be diverted to overseas markets for cheaper prices. Trebilcock and Howse comment that anti-dumping duties may not be justifiable against price discrimination because “dumping gives the export country the benefit of the price discriminator’s low-priced market without the social costs of its high-priced market”.<sup>39</sup>

Another form of dumping is international predatory pricing, which draws the most criticism. Predatory pricing involves an exporter pricing their products lower to drive out rivals in the importing market, gaining a monopoly and then increasing prices past their original level. It can also be argued that subsidies are governmental assistance enabling private firms in gaining monopoly of foreign markets through predatory pricing. Commentators generally agree that predatory pricing may provide an economic justification for anti-dumping and countervailing measures.<sup>40</sup>

However, predatory pricing is only possible when there are very few global suppliers of a product. An exporting firm would have to drive out domestic firms as well as other exporting firms in the importing market to gain monopoly. It is almost impossible for predatory pricing to be successful as barriers to establishing an international monopoly are significant, including the difficulty of preventing consumers from stock-piling goods during the low-pricing phase, high barriers of entry in the importing market and the requirement that the dumped product exhibit high inelastic demand, so consumers do not just switch to a substitute product.<sup>41</sup> Hindley concludes that the scope for economically justified anti-dumping measures makes a small proportion of the large number of dumping cases worldwide.<sup>42</sup> Governments around the world impose anti-dumping duties and predatory pricing is rarely identifiable or required to impose the duty.

Dumping may be sporadic if products are being dumped for a few months at a time, or long-term, if imported products are sold at lower prices for a sustained period. The harm in sporadic dumping is that during periods of dumping, domestic producers may be forced

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<sup>39</sup> New Zealand Trade Consortium, above n 6, at 12.

<sup>40</sup> Trebilcock, above n 9, at 352. See also, Jean-Marc Leclerc “Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries” (1999) 44 McGill LJ 111 and A O Sykes “Countervailing Duty Law: An Economic Perspective” (1989) Colum L Rev 199.

<sup>41</sup> Jean-Marc Leclerc “Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries” (1999) 44 McGill LJ 111 at 116.

<sup>42</sup> New Zealand Trade Consortium, above n 6, at 11. Referring to B Hindley “The economics of dumping and antidumping action: Is there a baby in the bathwater?” in P.K.M. Tharakan (ed) *Policy implications of antidumping measures* (Elsevier Science Publishers, Amsterdam, 1991) 25 at 31.



to exit the market temporarily or restrict production to fend off the lower-cost imports while they wait for the dumped product to leave the market. Consequently, the domestic producers' higher costs for re-entering the market may be passed on to the consumer once the dumped product exits the market. If consumer costs outweigh the benefits of sporadic dumping, anti-dumping duties may be justified on the basis that sporadic dumping hurts domestic consumers in the long run.<sup>43</sup> Viner points out that cheap imports are advantageous for the importing country, reiterating the economic theory that a nation's welfare is improved if imports are relatively cheaper than its exports.<sup>44</sup> The gains to the consumers offset the costs to the domestic producers of like goods. He goes on to say that this advantage exists "... unless the cheapness is so temporary that it results in greater injury to domestic industry than benefit to consumers".<sup>45</sup> Not only does this imply that the interests of consumers should be considered in imposing duties, it also suggests that sporadic situations of lower priced imports might justify the imposition of dumping or countervailing duties, more than situations of long-term dumping.

However, substantial injury from temporarily dumped products suggests that the domestic industry may be failing due to other factors, making anti-dumping duties unjustified as there is no causation.<sup>46</sup> Sporadic dumping may be an economically sound decision made by exporters to efficiently dealing with excess stock that would otherwise be praised if the exporter were a domestic producer.<sup>47</sup> Long-term dumping may either signify that the cheaper price of the good stems from a genuine advantage of the exporting firm, which does not justify the imposition of duties, or that the pricing is strategically predatory, which may justify the imposition of duties.

### ***B Subsidies and Countervailing Duties***

Countervailing duties are justified on the basis that subsidisation is an artificial advantage conferred by the government. While the SCM Agreement definition requires a specific subsidy, it is difficult to limit the theoretical scope of artificial advantages granted by a government which may distort international trade, unless the level of governmental regulation which would be a 'fair advantage' can be determined. Governmental investment into physical infrastructure, public education, research and development, healthcare and

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<sup>43</sup> Jean-Marc Leclerc, above n 41, at 117.

<sup>44</sup> Jacob Viner *A Memorandum on Dumping* (League of Nations, Geneva, 1926)..

<sup>45</sup> At 9.

<sup>46</sup> Ministry of Commerce, above n 35, at 22.

<sup>47</sup> Jean-Marc Leclerc, above n 41, at 117.

other domestic sectors may directly or indirectly affect the international economic activity of that country, shaping that country's comparative advantage.

Trade liberalisation is dependent on the notion that differing productive conditions in countries allow countries to produce certain types of good more efficiently than others, giving that country a comparative advantage in that good. Countries can then export the goods they are comparatively better at producing and import other goods. The difference in the productive conditions of countries enables global gains from trade, bolstering the argument for trade liberalisation under the GATT and the WTO. Therefore, it is arguable that subsidies are merely governmental policies contributing to the productivity of the country, supporting the global variation in comparative advantages and increasing the gains from trade, rather than being a trade distorting practice.<sup>48</sup>

### *C Political Rationales*

Given the limited economic justification for anti-dumping and countervailing duties, the better rationale is likely to be found in political competition.<sup>49</sup> The conclusion may simply be that trade remedies are more appropriate as a mechanism to reassure domestic industries who feel threatened by trade liberalisation, rather than as an economically justifiable course of action to remedy predatory behaviour.<sup>50</sup> Countries may “prefer to retain the provisions as a safety valve to relieve pressure from their domestic industries for broader protectionist measures”.<sup>51</sup>

Furthermore, the most frequent users of anti-dumping and countervailing actions generally support trade liberalisation. Mastel comments that “countries that practice protectionism do not need antidumping law; barriers that keep out all imports, by definition, also keep out dumped imports”.<sup>52</sup> It is only countries with open markets that find the need for assurances that imports are fairly traded or that there are remedies available in case of unfair trade, supporting domestic political consensus in favour of liberal trade policies.<sup>53</sup>

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<sup>48</sup> Trebilcock, above n 9, at 391.

<sup>49</sup> New Zealand Trade Consortium, above n 6, at 3.

<sup>50</sup> Ministry of Commerce, above n 35, at 24.

<sup>51</sup> New Zealand Trade Consortium, above n 6, at 6.

<sup>52</sup> Greg Mastel *Antidumping Laws and the US Economy* (Routledge, London, 1998) at 3

<sup>53</sup> At 4.

Current criteria for determining and imposing a duty focuses solely on the impact on the domestic industry and ignores the interests of consumers and downstream industries. Given the absence of a persuasive justification for anti-dumping and countervailing duties as more than an occasional remedy or reassurance, there may be an opportunity to reform the rules so they align with the current trends in international trade. Considering the public interest could be one way of resolving the tension between protecting domestic industries and increasing the welfare of consumers and downstream industries.<sup>54</sup>

#### ***D The Public Interest***

Domestic industries competing with unfairly traded imports require protection, and can lobby their governments to obtain and retain the protection afforded to them. Conversely, consumers who bear the cost of protection tend to have their interests side-lined because of a lack of a unified voice.<sup>55</sup>

Trade liberalisation may contribute indirectly to the lack of pressure from consumers because the wider range of goods provide alternatives to the goods subject to anti-dumping or countervailing duties.<sup>56</sup> Another reason for differing lobbying pressure could be the variable concentration of effects. Benefits of trade remedies are concentrated on the domestic industries manufacturing the product in question. Because of this, domestic firms will have the incentive and realistic chance of lobbying for stronger protection. Conversely, the costs to consumers and downstream industries are widespread, generating little incentive or motivation to organise into a group and lobby for decreased trade remedies. To put it bluntly, “elected governments faced with the choice of appeasing indifferent consumers or belligerent producers have an obvious incentive to gratify the latter”.<sup>57</sup>

Furthermore, the interests of the domestic industries may broadly coincide with the national interest, particularly for smaller countries with a developing domestic industry.<sup>58</sup> For instance, the tension between protecting domestic industries and the consumer interest was not as apparent in New Zealand when it was considered that protection of manufacturers was within the public interest.<sup>59</sup> In the early 1900s, when domestic industries were still

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<sup>54</sup> Moen, above n4, at 26. See also J Miranda, R Torres and M Ruiz “The international use of anti-dumping: 1987-1997” (1998) 32(5) JWT 5.

<sup>55</sup> See NZ specific examples in Chapter III.

<sup>56</sup> New Zealand Trade Consortium, above n 6, at 67.

<sup>57</sup> At 11.

<sup>58</sup> New Zealand Trade Consortium, above n 6, at 58.

<sup>59</sup> At 67.

developing, protectionist sentiment was rife in New Zealand, in both public opinion and within infant industries.<sup>60</sup>

In the absence of a formal public interest test, the interests of domestic industries will prevail over the interests of consumers and downstream industries. This may be because of the lobbying strength of the domestic industries or due to the economic policy of a country focused on developing its industries. Illustrations for these situations can be found in the history and development of New Zealand trade remedies policy, discussed in the next section.

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<sup>60</sup> At 61.

### ***Chapter III: New Zealand Trade Remedies History and Legislation***

The tension between protecting the interests of domestic industries and consumers is apparent in the development of New Zealand trade policy and legislation. Examples of the Chapter II rationales can be seen by mapping the history the trade remedies regulations in New Zealand.

Notably, there have been provisions for the public interest in the legislation for long periods of time and there has also been significant discussion on balancing the competing interests.<sup>61</sup> A report from the Customs Department in 1957 noted that:<sup>62</sup>

...not the least of the problems associated with dumping is the need to balance the interests of the New Zealand industries affected against those of the consumers.

Many of the changes to the trade remedies regime has been influenced by pressure from domestic industries and protectionist concerns of the government, with a few exceptions, one of which is the 2017 public interest test.

#### ***A New Zealand Trade Remedies History***

During the early years of New Zealand trade policy, protectionist sentiment “permeated the whole community” and was advanced by both “public opinion on the one hand and the necessities of the struggling infant industries on the other”.<sup>63</sup>

This focus on domestic industries has not diminished significantly, primarily due to strong lobbying by manufacturers. The strongest demand for protection has come from the traditionally dominant industries in New Zealand, such as refined sugar and plasterboard and the industries who have benefitted from high levels of protection in the past, such as the textile, clothing and footwear industries.<sup>64</sup>

New Zealand became the second country to introduce anti-dumping legislation in the Agricultural Implement Manufacture, Importation and Sale Act 1905, which protected manufacturers of agricultural implements from dumping. Agricultural manufacturers and

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<sup>61</sup> Ministry of Commerce, above n 35, at 2.

<sup>62</sup> New Zealand Customs Department “Report of the Customs Department for the year ended 31 March 1957” [1957] I AJHR H25 at 15.

<sup>63</sup> New Zealand Trade Consortium, above n 6, at 61.

<sup>64</sup> At 61.

their employees petitioned the New Zealand government as they were concerned that an American manufacturer intended to undercut their prices, put domestic firms out of business and gain monopoly of the local market.<sup>65</sup> Richard Seddon, the Prime Minister at the time, made a strong economic argument for anti-dumping duties by implying that American exporter's pricing was predatory:<sup>66</sup>

[No one] would like to see our industries imperiled, or our farmers put in the hands of a foreign trust of foreign capitalists, who for the time being might give advantages [through low priced dumped goods], and ultimately when they had extreme power would crush the lifeblood out of the industry.

The Act was a compromise between the interests of farmers who did not want an increase in the cost of agricultural implements, and public sentiment against foreign competition that could drive out the New Zealand agricultural implement-manufacture industry.<sup>67</sup> The Act was never used to take action against imports, as it was thought that the legislation by its very existence may have prevented unfair competition.<sup>68</sup>

The first comprehensive anti-dumping and countervailing duty legislation was the Customs Amendment Act 1921, which had a public interest test for anti-dumping and countervailing duties. The Act allowed the Minister of Customs to decline to impose a duty if it was not required in the public interest.<sup>69</sup> This was an attempt to ensure that both consumers and domestic industries were protected. The public interest provision was removed from the legislation in 1966 without any significant debate or opposition,<sup>70</sup> and New Zealand trade remedies policy became entirely domestic producer-oriented as a result. Domestic manufacturers successfully opposed the re-introduction of a public interest test,<sup>71</sup> until the 2017 amendment.

The argument that anti-dumping and countervailing duties are justifiable as reassurances to the domestic industry is evident in New Zealand trade history, especially with the reduction of tariffs and other trade protections. Anti-dumping duties were justified even as

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<sup>65</sup> Viner, above n 38, at 204-206.

<sup>66</sup> (28 October 1905) 135 NZPD at 1216.

<sup>67</sup> Viner, above n 38, 205.

<sup>68</sup> New Zealand Trade Consortium, above n 6, at 22.

<sup>69</sup> Customs Amendment Act 1921, Section 11(8).

<sup>70</sup> Customs Act 1966.

<sup>71</sup> New Zealand Trade Consortium, above n 6, at 17.

late as the 1970s on the basis that infant industries needed protection.<sup>72</sup> A strong trade remedies policy was a way of assuring manufacturers that even with increasing trade liberalisation, they would have remedies available to them if they suffered injury from unfair international competition.<sup>73</sup> The initial economic justifications for anti-dumping provisions, argued by Prime Minister Seddon to be necessary to combat international predatory pricing, have since given way to political pressure from domestic manufacturers. As discussed previously, this is consistent with the literature on trade remedies.<sup>74</sup>

Another indication that the primary concern was the protection of domestic industries was the government's refusal to accede to the GATT Anti-Dumping Code because not doing so gave the government greater freedom and flexibility to act in the domestic industries' best interest. The argument was that the Code did not take into account the interests of a small country that had a limited number of producers.<sup>75</sup> There was also a concern that acceding to the Code would mean that anti-dumping duties would not be able to be imposed if there was injury to a sole New Zealand producer, as duties to prevent injury to a single firm were considered "protectionist in character" under the Code.<sup>76</sup> By 1983, New Zealand was a signatory to the GATT Subsidies Code, but not the Anti-Dumping Code. This perhaps indicates that the egregiousness of foreign governmental subsidies should take precedence over domestic interests.<sup>77</sup>

After acceding to the Anti-Dumping Code in 1986, the government called for a review of the trade remedies legislation, most likely due to pressure from New Zealand manufacturers who perceived it as a weakening in their protection.<sup>78</sup> The working group proposed significant changes to the legislation, striving to strike a balance between protectionism and liberalisation, concluding that neither extremes "provide an adequate basis for the restructuring of New Zealand's anti-dumping system".<sup>79</sup> The Minister of Customs, Hon. Margaret Shields recommended that "the legislation be modified to require the Minister of Customs to take into account the cost of a duty on the users of goods when setting a duty".<sup>80</sup>

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<sup>72</sup> At 59.

<sup>73</sup> At 59.

<sup>74</sup> At 66.

<sup>75</sup> At 62.

<sup>76</sup> At 28.

<sup>77</sup> Ministry of Commerce, above n 35, at 7.

<sup>78</sup> New Zealand Trade Consortium, above n 6, at 35

<sup>79</sup> At 36.

<sup>80</sup> At 37.

This proposal was initially made by the Minister of Agriculture and Fisheries because of concerns that anti-dumping and countervailing duties placed greater focus on domestic industries over the users of the goods. The Customs Department was of the view that the introduction of a public interest test would be opposed by the New Zealand Manufacturers' Federation as it would erode the protection against unfairly priced imports.<sup>81</sup> The public interest proposal was not implemented as a result.<sup>82</sup>

Administration of the trade remedies regime was transferred from the Customs Department to the Ministry of Commerce in 1998 and the Dumping and Countervailing Duties Act 1998 was enacted.<sup>83</sup>

In 1994, the Dumping and Countervailing Duties Act 1988 was amended to be consistent with the Uruguay Round Agreements.<sup>84</sup> During this discussion, a discussion paper on a "national interest test" was proposed, addressing whether the producer-oriented focus of New Zealand trade remedies should be widened to include consumers and downstream industries.<sup>85</sup> The discussion paper was published in 1998.<sup>86</sup> The Minister of Commerce, Hon. John Luxton, announced on 16 March 1998 that New Zealand's trade remedy policy would be reviewed and that the government had "agreed that trade remedy action against imported goods should take account of national interest criteria . . . and the review will consider when and how a public interest test should be applied".<sup>87</sup> A summary for the Cabinet Economic Committee noted that:<sup>88</sup>

... the current trade remedies regime assumes that removal of injury to New Zealand producers is in the national interest. There is no balancing of interest to ensure that the imposition of trade remedies does not outweigh benefits to consumers and downstream industries in the form of lower prices. The Minister proposes that trade remedies against unfair or disruptive trade be considered in the context of the net national benefit and that this be a major focus of the review.

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<sup>81</sup> At 37.

<sup>82</sup> At 38.

<sup>83</sup> Ministry of Commerce, above n 35, at 7.

<sup>84</sup> At 8 and 15. See also Dumping and Countervailing Duties Amendment Act 1994.

<sup>85</sup> New Zealand Trade Consortium, above n 6, at 46.

<sup>86</sup> At 46.

<sup>87</sup> J Luxton "Luxton announces trade remedy policy review" (media release, 16 March 1998).

<sup>88</sup> New Zealand Trade Consortium, above n 6, at 49.



The submissions on the discussion paper fell into two camps, those who wanted to maintain protection for manufacturers against unfair trade and those who believed that consumers should not be denied access to the cheapest goods.<sup>89</sup> The Ministry of Commerce concluded that:<sup>90</sup>

the case for a detailed net national benefit test has not been demonstrated as costs would likely outweigh benefits... [but there would] ... be benefit in including a provision which would require the Minister to take account of the public interest in determining whether or not to impose duties, and to have particular regard to the impact on competition”

This was perceived as a partial victory of domestic manufacturers, especially since the decision whether to implement such a provision was delayed until after the 1999 General Election.<sup>91</sup>

The newly elected Labour/Alliance coalition government and the Minister of Commerce, Hon Paul Swain, did not consider that the proposal for a public interest test in the trade remedies regime needed immediate attention. At the end of 2000, a discussion paper on a “public interest test” was drafted, which explained that “in a very few cases, special circumstances might be identified over and above this finding [of dumping causing material injury] that would necessitate a consideration of the public interest”. However, this discussion paper was never released and the question of a public interest test in the New Zealand trade remedies regime was not raised again,<sup>92</sup> until the 2017 amendments.

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<sup>89</sup> At 50.

<sup>90</sup> At 52.

<sup>91</sup> At 52.

<sup>92</sup> At 56.

## ***B New Zealand Trade Remedies Legislation***

The Dumping and Countervailing Duties Act 1988 outlines the dumping and subsidisation investigation process in New Zealand and is based on the WTO AD and SCM Agreements. Prior to the 2017 amendments, the Minister of Commerce did not have wide discretion to decline imposing dumping or countervailing duties if the investigation determined that they should be imposed.<sup>93</sup>

### *1 The Trade (Dumping and Countervailing Duties) Amendment Act 2017*

Under the new legislation, New Zealand producers can make an application to the chief executive of MBIE to start an investigation to determine the existence and effect of dumping or subsidisation of goods imported, or intended to be imported, into New Zealand.<sup>94</sup> The chief executive must initiate an investigation if he or she is satisfied that there is sufficient evidence in the application to justify investigating the alleged dumping or subsidisation.<sup>95</sup>

The first step in the investigation requires the chief executive to investigate the existence of alleged dumping or subsidisation and whether there has been material injury.<sup>96</sup> The findings of the investigation are reported to the Minister of Commerce, who makes the determination whether there has been dumping or subsidisation causing material injury.<sup>97</sup> If the Minister determines that there has been no dumping or subsidisation, the public interest test is not engaged and the investigation ends.<sup>98</sup> If the Minister decides that there has been dumping or subsidisation which is causing or threatening material injury to domestic producers, the Minister must determine the rate of the anti-dumping or

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<sup>93</sup> *Introducing a Bounded Public Interest Test into the New Zealand Anti-Dumping and Countervailing Duties Regime* (Ministry of Business, Innovation and Employment, Discussion Paper, June 2014) at 6.

<sup>94</sup> The Trade (Dumping and Countervailing Duties) Act 1988, s 10(1).

<sup>95</sup> Section 10A(1)(a).

<sup>96</sup> Section 10C.

<sup>97</sup> Section 10D

<sup>98</sup> Section 10D(3).

countervailing duty,<sup>99</sup> and direct the chief executive to start the second step, the public interest investigation.<sup>100</sup>

The chief executive must then investigate the second step, whether imposing the anti-dumping or countervailing duty determined by the Minister is in the public interest. There is a presumption that the imposition of the duty is in the public interest, unless the cost to downstream industries and consumers is likely to materially outweigh the benefit to the domestic industry of imposing the duty.<sup>101</sup> The eight factors the chief executive must examine are:<sup>102</sup>

- (a) the effect of the duty on the prices of the dumped or subsidised goods
- (b) the effect of the duty on the prices of like goods produced in New Zealand
- (c) the effect of the duty on the choice or availability of like goods
- (d) the effect of the duty on product and service quality
- (e) the effect of the duty on the financial performance of the domestic industry
- (f) the effect of the duty on employment levels
- (g) whether there is an alternative supply (domestically or internationally) of like goods available
- (h) any factor that the chief executive considers essential to ensure the existence of competition in the market

The findings of the public interest investigation are reported to the Minister, who must determine whether the imposition of the duty is in the public interest.<sup>103</sup> If it is in the public interest, the Minister must impose the duty at the rate previously determined.<sup>104</sup>

## *2 Responses to the Amendments*

Twenty-one submissions were received on the 2014 Discussion Paper from MBIE which proposed the public interest test. Smaller businesses and industries were concerned that their lack of unified voice would mean their interests would be side-lined in favour of

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<sup>99</sup> Section 10E. Per s 10E(2)(a) the duty is determined so that it is the lowest duty to remove the injury to the domestic producers, and cannot exceed the difference between the export price of the goods and their normal value for anti-dumping duties (s 10E(3)(a)) or the amount of subsidy on the goods for countervailing duties (s 10E(3)(b)).

<sup>100</sup> Section 10F.

<sup>101</sup> Section 10F(2).

<sup>102</sup> Section 10F(3).

<sup>103</sup> Section 10H.

<sup>104</sup> Section 10H(1).

consumers and downstream industries, which is the claim generally made on behalf of consumers, rather than against them.<sup>105</sup> Importers were generally in favour of the public interest test.<sup>106</sup> Manufacturers considered that the test diluted the effectiveness of the trade remedies and weakened their protection against unfair trade by foreign competitors.<sup>107</sup>

At the Select Committee stage, the Commerce Committee was unable to recommend whether the Bill should be passed. The Labour, Green and New Zealand First Party Committee members opposed the public interest test as they considered that it weakened the protections afforded to domestic industries suffering from unfair international competition.<sup>108</sup> One of their main concerns was that the proposed changes might force domestic producers to shift their production to Australia, where domestic producers are perceived to get more protection.<sup>109</sup> Other concerns were the perceived uncertainty of the test, and the lengthened investigation timeline that would have to be introduced to accommodate the test.<sup>110</sup> National Party members were in favour of the amendments, and considered that the public interest test enabled the wider effects of the duty to be assessed while still providing an effective trade remedies regime.<sup>111</sup> Regarding the substantive factors that are considered under the public interest test, the opposition members thought that the factors were too vague especially due to the lack of guidance on balancing the competing interests.<sup>112</sup> The members in favour of the test thought that the presumption in favour of imposing the duties is a high threshold and would achieve the appropriate balance between the competing interests.<sup>113</sup>

Despite the extended debate on the Bill, the Trade (Anti-dumping and Countervailing Duties) Amendment Act 2017, was given royal assent on 29 May 2017. The Act comes into force in November 2017.<sup>114</sup>

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<sup>105</sup> Submissions to MBIE 2014 Discussion Paper on the Development of a Bounded Public Interest Test”, retrieved from the Ministry of Business website <[www.mbie.govt.nz](http://www.mbie.govt.nz)> New Zealand Flower Growers’ Association.

<sup>106</sup> Importers Institute and Brooke Holdings Ltd submissions.

<sup>107</sup> Metals NZ, Heinz and First Union submissions.

<sup>108</sup> Trade (Anti-dumping and Countervailing Duties) Amendment Bill (143-2) (Select Committee Report) at 3.

<sup>109</sup> At 4

<sup>110</sup> At 5.

<sup>111</sup> At 3

<sup>112</sup> At 6

<sup>113</sup> At 7.

<sup>114</sup> Trade (Dumping and Countervailing Duties) Amendment Act 2017, s 2(2).

## *Chapter IV: Comparative Analysis*

The European Union (EU) and Canada are the only other WTO Member states with a comprehensive public interest test in their trade remedies legislation. In 2011, the Australian government rejected a proposal for the introduction of a public interest test, choosing to retain the wide discretion of the Minister to impose duties.

Before evaluating the New Zealand test against past EU and Canadian public interest investigations in Chapter V, it is useful to outline the salient aspects of the EU and Canadian anti-dumping and countervailing duties regime. The Australian proposal is also briefly outlined. The table below summarises the EU and Canadian approaches for clarity.

	<b>The European Union (EU)</b>	<b>Canada</b>
<b>Trade Remedies Legislation</b>	Regulation 2016/1036 for Anti-dumping duties  Regulation 2016/1037 for Countervailing duties	Special Import Measures Act 1985 (SIMA) and Special Import Measures Regulations (SIMR).
<b>Public Interest Test</b>	Mandatory in all new and review investigations.  Art 21 of Regulation 2016/1036 Art 31 of Regulation 2016/1037	Not mandatory in all investigations. Initiated on request or by the CITT.  Section 45(1) of SIMA
<b>Institution(s) responsible for administration of the legislation.</b>	All substantive elements, including the alleged dumping, injury, causation, public interest and final determination are determined by the European Commission.	Determination of dumping or subsidisation carried out by the Canadian Border Service Authority (CBSA).  Material injury, causation and public interest test is examined by the Canadian International Trade Tribunal (CITT).  Final determination made by the Minister of Finance.

## *A The European Union*

There are two Regulations establishing the substantive and procedural rules of a dumping or subsidy investigation, based on the WTO AD and SCM Agreements.<sup>115</sup> The European Commission determines whether there has been dumping or subsidisation, injury to domestic industry and causation, and then goes on to evaluate whether the determined duty is in the public interest, which is referred to as the “Union Interest”.<sup>116</sup>

The Commission can impose provisional duties for up to nine months if immediate intervention is in the Union interest and a provisional determination on the dumping or subsidisation and injury can be made.<sup>117</sup> Where it can be definitively established that there is dumping or subsidisation, injury and causation and the Union interest test is satisfied, a definitive anti-dumping duty can be imposed.<sup>118</sup> Like in New Zealand, the lesser duty rule applies in the EU.<sup>119</sup>

Like in New Zealand, the Union interest analysis must be carried out in both new investigations and reviews of existing duties.<sup>120</sup> Anti-dumping or countervailing duties will not be imposed if there are compelling Union interest reasons not to impose the duties, even if there are dumped or subsidised imports causing injury to Community industries.<sup>121</sup> The Union interest considers the interests of all EU Member States as a whole, rather than the national interests of individual Member States.<sup>122</sup> Similar to the presumption in the New Zealand test, the non-imposition of duties is an exception to the norm, and the negative impact on users, importers or consumers must be clearly disproportionate to any benefit to the domestic industry by the imposition of the duties.<sup>123</sup>

The domestic industry focus is further highlighted by Art 21(1) of the Anti-Dumping Regulation and Art 31(1) of the Subsidies Regulation specifying that “the need to eliminate

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<sup>115</sup> Regulation 2016/1036 on protection against dumped imports [2016] OJ L 176/21 and Regulation 2016/1037 on protection against subsidised imports [2016] OJ L 176/55

<sup>116</sup> Regulation 2016/1036, Art 21 and Regulation 2016/1037, Art 31.

<sup>117</sup> Regulation 2016/1036, Art 7 and Regulation 2016/1037, Art 12.

<sup>118</sup> Regulation 2016/1036, Art 9(4) and Regulation 2016/1037, Art 15(1).

<sup>119</sup> Regulation 2016/1036, Art 9(4) and Regulation 2016/1037, Art 15(1).

<sup>120</sup> Sinnaeve, Adinda “The ‘Community Interest Test’ in Anti-dumping Investigations: Time for Reform?” (2007) 2(4) GT&CJ 157 at 161.

<sup>121</sup> At 157.

<sup>122</sup> At 160.

<sup>123</sup> At 159.

the trade distorting effects of injurious dumping [or subsidisation] and to restore effective competition shall be given special consideration”.

## ***B Canada***

Two government agencies administer the Special Import Measures Act 1985 (SIMA)<sup>124</sup> and the Special Import Measures Regulations (SIMR),<sup>125</sup> the trade remedies legislation in Canada. The Canada Border Services Agency (CBSA) investigates whether there has been dumping or subsidisation of imports. If the CSBA concludes that there has been dumping or subsidisation, the investigation is passed on to the Canadian International Trade Tribunal (CITT), which determines the injury and causation, and carries out the public interest analysis. The CITT is an authorised court under the Canadian International Trade Tribunal Act.<sup>126</sup> The Tribunal has the authority to hear evidence from sworn witnesses and issue binding orders and decisions. The use of an authorised court is an interesting contrast to the Ministerial discretion under the New Zealand test.

Along with written submissions from interested parties, the Tribunal may hold an oral hearing to give parties and counsel the opportunity to cross-examine witnesses and to argue their position before the Tribunal. An oral hearing also provides the Tribunal the opportunity to test written submissions and documentary evidence.<sup>127</sup>

Section 45(1) of the SIMA allows the Canadian International Trade Tribunal (CITT) to consider whether the imposition of an anti-dumping or countervailing duty would be in the public interest. The SIMR outline the factors that can be considered when evaluating the public interest. The CITT can consider whether:<sup>128</sup>

- (a) like goods are readily available from other countries and exporters,
- (b) the duty is likely to eliminate or substantially lessen competition in the domestic market,
- (c) the duty has caused or is likely to cause significant damage to downstream industries,
- (d) the duty has significantly restricted the choice and availability of goods, or

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<sup>124</sup> Special Import Measures Act RSC 1985 c. S-15.

<sup>125</sup> Special Import Measures Regulations SOR 84-927.

<sup>126</sup> Canadian International Trade Tribunal Act RSC 1985 c. 47, s 17(1).

<sup>127</sup> Canadian International Trade Tribunal “Public Interest Inquiry Guidelines” (28 May 2014) at 7.

<sup>128</sup> Special Import Measures Regulations SOR 84-927, s 40.1(3). See also Special Import Measures Act RSC 1985 c. S-15, s 45(3).

(e) if the non-imposition or reduction of the duty is going to cause significant damage to domestic industries.

Unlike New Zealand and the EU, a public interest investigation is not required in each investigation. If the CITT finds that there has been injury, it may initiate a public interest investigation on request or ex officio if it believes that there are “reasonable grounds to consider that the imposition of an anti-dumping or countervailing duty, or the imposition of such a duty in the full amount... would not or might not be in the public interest”.<sup>129</sup>

At the end of the inquiry, the CITT issues a report of their decision. If it is determined that there is no need to reduce or eliminate the duty, the investigation ends there. If the tribunal recommends a reduction or elimination of the duty, a detailed report is sent to the Minister of Finance, who makes the final determination.<sup>130</sup>

Unlike the EU and New Zealand, Canada does not have the lesser duty rule. The determined duty is the full margin of dumping or amount of the subsidy. However, if a reduced duty would be sufficient to remedy the injury to the domestic industry and would also be in the public interest, the CITT may recommend a reduction in the duty. The reduced duty recommendation fulfils a similar role to the lesser duty rule in the EU and New Zealand.<sup>131</sup> However, unlike the lesser duty rule, there is no clear methodology to determine the reduction, it is entirely at the discretion of the CITT.<sup>132</sup> It is not apparent whether the reduction in the duties results in a duty that would be the comparable to the lesser duty if it was decided in the EU or New Zealand.

### *C Australia*

The Australian Customs and Border Protection Service (CBPS) has the primary responsibility for the administration of Australia’s anti-dumping and countervailing system, outlined in the Customs Act 1901 (Cth). CBPS carries out the dumping or subsidisation investigation and makes recommendations to the responsible Minister on the

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<sup>129</sup> Special Import Measures Act RSC 1985 c. S-15 s 45(1)

<sup>130</sup> CITT “Public Interest Inquiry Guidelines”, above n 129, at 1.

<sup>131</sup> Sinnaeve, above n 120, at 173.

<sup>132</sup> At 173.



outcome, and gives effect to the Minister's final decision on whether to impose the duties.<sup>133</sup>

In 2009, the Australian Productivity Commission proposed that a public interest test should be included in the trade remedies regime,<sup>134</sup> but this recommendation was rejected by the government.<sup>135</sup>

The proposed public interest test was modelled on the Canadian and EU approaches, and would apply to all new investigations and reviews. There would be a starting presumption in favour of imposing the measures if injurious dumping or subsidisation were established, unless one of the exhaustive list of suggested circumstances applied to the investigation:<sup>136</sup>

- (a) The duty would not be imposed if it would remove or significantly reduce importer activity in the market and reduce competition. The reduction in importer activity because of the duty might give the complaining Australian industry substantial market power.
- (b) The duty would not be imposed if the measures would not be effective in removing the injury, either because the price of the imported good subject to the duty would remain significantly below the domestic supply price or because non-dumped or unsubsidised like goods are available from other countries at a comparable price to the dumped or subsidised imports.
- (c) Finally, the presumption would be displaced if the imposition of measures would result in disproportionate costs to downstream industries. This could be the case because the complainant industry has a small market share and therefore the impact on users would be larger than the benefits to the industry.

It was acknowledged that there might be other circumstances in which non-imposition of a duty would be in the public interest, but the recommendation was purposefully limited to a small number of circumstances so the uncertainty in the application of the public interest test would be minimised.<sup>137</sup> The Commission recommended that the list of circumstances displacing the presumption in favour of imposing the duties should be revisited at a later

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<sup>133</sup> *Australia's Anti-dumping and Countervailing System: Productivity Commission Inquiry Report* (Australian Productivity Commission, No. 48, 18 December 2009) at 9.

<sup>134</sup> At 55.

<sup>135</sup> *Streamlining Australia's anti-dumping system: An effective anti-dumping and countervailing system for Australia* (Australian Customs and Border Protection Service, June 2011).

<sup>136</sup> Productivity Commission, above n 133, at 72.

<sup>137</sup> At 73.

stage, when there had been enough actual case history.<sup>138</sup> This public interest test is more limited than the flexible eight factors in the New Zealand test.

The government rejected the proposal because it was considered to be a costly and disproportionate response to the small number of anti-dumping and countervailing investigations initiated in Australia.<sup>139</sup> It was considered that the purpose of trade remedies to provide redress to domestic industries injured by dumping or subsidisation would be undermined by considerations of the public interest, which would lead to non-imposition of duties even if there has been dumping or subsidisation causing injury.

The Minister's unfettered discretion not to impose the measures was deemed adequate in allowing the Minister to take account of public interest matters when necessary. The only change implemented to the regime in response to the public interest proposal was to assist in the exercise of this discretion. The CBPS report to the Minister is required to include an assessment of the expected effect of a measure on the Australian market, including the effects on downstream industries, prices and market shares.<sup>140</sup>

The Australian Minister's wide discretion is quite unlike the New Zealand regime, with or without the public interest test. The New Zealand public interest test is most like the EU approach in that it is a mandatory requirement, and more like the Canadian approach in the factors that are prescribed.

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<sup>138</sup> At xx, Box 4.

<sup>139</sup> Australian Customs and Border Protection Service, above n 135, at 26.

<sup>140</sup> At 26.

## *Chapter V: Evaluation and Discussion*

The amendments will come into force in November 2017. As such, it may be some time before a dumping or subsidisation complaint is made and a full public interest investigation is carried out in New Zealand. This section will compare and evaluate the procedural and substantive aspects of the New Zealand public interest test against the EU and Canadian public interest tests. The EU and Canadian approaches provide useful illustrations of different dumping and subsidisation scenarios and how the competing interests can be balanced against each other. The aim of this section is not to provide unsubstantiated speculations or to imply that Canadian and EU determinations will influence the decisions of the New Zealand Minister, but to evaluate the likely interpretation and application of the New Zealand test by incorporating the lessons that can be learnt from the EU and Canadian experience.

The Ministerial discretion under the new test is markedly different to the previous New Zealand approach, which required the imposition of the duty if injurious dumping and subsidisation could be established, without any meaningful discretionary power to consider non-imposition.<sup>141</sup> The factors that must be considered in the public interest investigation are limited to eight considerations which cover a broad range of evidence and interest, like the EU or Canadian approaches.<sup>142</sup> Although a flexible approach is desirable when considering the different markets in New Zealand, there may be some value in having discrete categories like the Australian proposal, especially if there is reason to believe that a multifactorial approach could lead to uncertainty and biased application. Indeed, there are significant concerns about the factors that are outlined and how they might operate in practice. These concerns can be divided into two categories: substantive and procedural. These are discussed in turn below.

### *A Substantive Aspects*

There are eight factors that the chief executive of MBIE must investigate and the Minister must consider when determining whether the duty is in the public interest.<sup>143</sup> These factors can be broadly divided into two categories: the consumer or downstream industry interest, and the domestic producer industry interest. The “existence of competition in the market”

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<sup>141</sup> MBIE Discussion Paper, above n 93, at 6.

<sup>142</sup> Trade (Dumping and Countervailing Duties) Act 1988, s 10F(3).

<sup>143</sup> Section 10F(3).

factor potentially affects consumer and producer interests in different ways and will be examined in relation to both. This distinction is shown in the table below.

Consumer or Downstream Industry	Domestic Producer Industry
<ul style="list-style-type: none"> <li>• the effect of the duty on the prices of the dumped or subsidised goods<sup>144</sup></li> <li>• the effect of the duty on the prices of like goods produced in New Zealand<sup>145</sup></li> <li>• the effect of the duty on the choice or availability of like goods<sup>146</sup></li> <li>• whether there is an alternative supply (domestically or internationally) of like goods available<sup>147</sup></li> <li>• the effect of the duty on product and service quality<sup>148</sup></li> <li>• any factor that the chief executive considers essential to ensure the existence of competition in the market.<sup>149</sup></li> </ul>	<ul style="list-style-type: none"> <li>• the effect of the duty on the financial performance of the domestic industry<sup>150</sup></li> <li>• the effect of the duty on employment levels<sup>151</sup></li> <li>• any factor that the chief executive considers essential to ensure the existence of competition in the market.<sup>152</sup></li> </ul>

This distinction between the effects on consumer or downstream industries and domestic industries is useful in evaluating the potential outcomes of the balancing test, but may be artificial in practice due to the possible overlap between the interests. For example, if the duty is not imposed, any negative effects on the domestic producer industry might impact the consumer interest in the long-term through decreasing choice and availability of the good, thereby nullifying the initial benefit to the consumer because of the non-imposition of the duty.

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<sup>144</sup> Section 10F(3)(a).

<sup>145</sup> Section 10F(3)(b).

<sup>146</sup> Section 10F(3)(c).

<sup>147</sup> Section 10F(3)(g).

<sup>148</sup> Section 10F(3)(d).

<sup>149</sup> Section 10F(3)(h).

<sup>150</sup> Section 10F(3)(e).

<sup>151</sup> Section 10F(3)(f).

<sup>152</sup> Section 10F(3)(h).

## *1 Non-economic policy considerations*

The previous New Zealand investigations evaluated only the economic effects of the dumping or subsidisation on the domestic industry. It may be appropriate for the public interest investigation to include non-economic policy considerations, such as public health, environment, national development policy or foreign relations considerations, because those considerations affect the social welfare of the wider population.

In the past, the EU Commission has considered international trade relations to be relevant considerations in the Union interest test. One example is the *Hydraulic Excavators from Japan* investigation, in which the trading relationship between the EU and Japan was a factor in determining that it was not in the Union interest to allow price undertakings instead of duties so the duties were imposed.<sup>153</sup> However, recent EU Commission investigations have explicitly refused to consider non-economic factors as they conflict with the technical examination of the economic effect of the measures:<sup>154</sup>

the [Union] interest analysis is an economic analysis focusing on the economic impact of... anti-dumping measures on operators in the [Union]. It is not a tool by which anti-dumping investigations can be instrumentalised for general political considerations relating to foreign policy, development policy etc.

In Canada, the CITT has periodically used non-economic policies to justify the outcomes of public interest investigations. A significant reduction of the duty on baby food was recommended due to concerns over child health and welfare and to mitigate the consequences of higher costs of baby food for low-income families.<sup>155</sup> Another example is the *Iodinated Contrast Media* investigation which concerned a dye used in diagnostic X-rays of soft tissue or organs. The CITT found that the increase in price as a result of the duty would not be in the public interest as it:<sup>156</sup>

would lead to a significant reduction in the number of procedures or a shift toward greater use of [a domestic alternative which led to greater adverse health effects, which] would reduce the quality of healthcare for patients.

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<sup>153</sup> *Hydraulic Excavators from Japan*, 1985, OJ L 176/1 at [22]. Price undertakings are essentially agreements with the unfairly trading exporter to a set a certain price, in lieu of imposing the duty.

<sup>154</sup> Sinnaeve, above n 120, at 161.

<sup>155</sup> *Certain Prepared Baby Food* (30 November 1998) PB-98-001

<sup>156</sup> *Certain Iodinated Contrast Media* (30 August 2000) PB-2000-001 at [3(a)]

The expected price increase would reduce radiologist choice and increase the burden on hospital budgets, which is contrary to the best interests of the patients.

The consideration of non-economic factors is likely to be influenced by the procedural aspects of the public interest investigation, which are different for each country. In the EU, the interested parties are limited to the businesses and organisations that have an economic interest in the product under investigation.<sup>157</sup> Therefore parties with non-economic interests, like environmental or development concerns, would not be considered interested parties and their views will not be taken into consideration.<sup>158</sup> Whereas in Canada, submissions have been made by the government of the exporting country, environmental organisations, hospitals, Members of Parliament, employees, unions and welfare organisations. The availability of non-economic evidence has enabled the Tribunal to fully evaluate non-economic policy factors in its reasoning.<sup>159</sup>

The scope of the New Zealand test to consider non-economic policies is unclear. There is no definition of an “interested party” in the New Zealand legislation, although parties that would be significantly affected by the imposition of the duty must be given reasonable opportunity to make their views known.<sup>160</sup> This could mean that parties with non-economic interests could provide their views on the matter, but only if they are aware of the investigation and would be significantly affected by the imposition of the duty, which is likely to be determined on a case-by-case basis.

The factor which considers the effect of the duty on the quality of the product,<sup>161</sup> could lead to an outcome like *Iodinated Contrast Media*, where the quality of the products affected

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<sup>157</sup> Regulation 2016/1036 Art 21(2) and Regulation 2016/1037 Art 31(2). See also Sinnaeve, above n 120, at 158.

<sup>158</sup> Sinnaeve, above n 120, at 158.

<sup>159</sup> Special Import Measures Act (RSC 1985 c. S-15), s 45(6) permits "a person interested in an inquiry" to make representations before the CITT on the public interest. Special Import Measures Regulations (SOR 84-927), s 41 states that an interested party is anyone who is connected to the production, purchase, sale, export or import of any goods that are the subject of an investigation or domestically produced like goods, or is required by the legislature to make submissions on the public interest test, or is an advocacy group for consumers in Canada. See also Sinnaeve, above n 120, at 173.

<sup>160</sup> Trade (Dumping and Countervailing Duties) Act 1988 s 10G. Note that according to the s 3(1) definition of “notified parties”, the parties that need to be notified of the outcomes and procedures in the investigation are just three groups, economically connected to the investigation, the exporting countries’ government, the exporters and importers known to have an interest in the goods and the applicants themselves.

<sup>161</sup> Section 10F(3)(d).

the provision of healthcare. Another hypothetical example to illustrate this point could be dumped or subsidised construction materials, such as steel. If dumped steel is of higher quality than domestically produced steel, would it be justifiable to impose a duty if it might result in an increase in the price of the import, leading to a decrease in its use in the construction of residential houses and buildings? The policy considerations in this scenario are not just the economic impact of the duty being imposed, but the quality and safety of New Zealand homes and buildings. It is economically justifiable to say that an increase in the price of the imported good might be disadvantageous to consumers and downstream industries because it raises their costs, but it is also in the public interest to have safe and well-constructed buildings.

The issue of non-economic policy considerations raises fundamental questions about the purpose of the public interest test. Is the public interest test supposed to determine whether the duty is solely in the economic interest of the consumers or downstream industries, or is it concerned with the overall welfare of the importing country? This question is not easy to resolve as the economic impacts on consumers and downstream industries often dictate social welfare. If it is going to be more expensive for builders to use higher-quality imported steel or for hospitals to provide a certain medical procedure, the overall housing, infrastructure and healthcare objectives of the importing country could be undermined, resulting in a net negative public interest outcome.

The concern is not necessarily that non-economic policy considerations will distort the focus of the investigation away from strict economic analysis, but that the public interest factors are merely masquerading as objective determinants of the economic effects of duties, yet still allow for non-economic considerations to be imported into the analysis. Based on the examples given, there is value in evaluating the non-economic impacts of the duties, but those considerations should be outlined in the legislation. Without comprehensive legislative guidance, there is a risk that non-economic justifications might be used in an uncertain and inconsistent manner. This is a significant issue when foreign policy and trade relationships are concerned, as they may indirectly influence the decision-maker when carrying out the public interest investigation. As evidenced in the historical analysis of the regulation of anti-dumping and countervailing duties, the protectionist tendencies of the regulations depend on the political and social context, which could lead to substantially different conclusions on non-economic policy factors, depending on the political affiliation of the Minister.

Furthermore, if interested parties are not aware of the boundaries of the test, they may make submissions and arguments on non-economic factors, even if they are not necessary or useful to the investigation. Even after the explicit declarations from the EU Commission that the Union interest test only considers economic effects, it was argued in *Polyester Staple Fibres* that since domestic producers made polyester staple fibres from recycled materials, requiring less energy consumption and generation of carbon emissions compared to the dumped products, the “replacement of Community production by dumped imports... would increase carbon emissions and set back the EU climate change objectives”.<sup>162</sup> This argument was rejected and the Commission stated again that the public interest investigation focused on the economic effect of the measures.

The New Zealand public interest test would have benefitted from explicit guidance on admissibility of non-economic factors. From a theoretical perspective, the proposed economic rationales for anti-dumping and countervailing duties do not offer much guidance on the nature of the public interest test. There needs to be some agreement on the purpose of the public interest test and how overall national welfare objectives fit into that analysis.

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<sup>162</sup> *Polyester Staple Fibres* Council Regulation (EC) No 893/2008 (10 September 2008) at [80].



## 2 *Consumer and Downstream Industry interest*

Consumers and downstream industries will likely be affected by the changes in the price, choice, and availability of the product subject to the duty or a like product.<sup>163</sup> The amendments define consumers as New Zealand consumers of the dumped or subsidised goods, like goods, or other goods that have the dumped or subsidised goods as an input in their production.<sup>164</sup> Downstream industries are New Zealand industries that use the dumped or subsidised goods or like goods, as an input in the production of other goods.<sup>165</sup>

### *a. Effect of the duty on the price of a good subject to the duty or a like good produced in New Zealand:*

There may be an increase in the price of the good subject to the duty, which would increase costs to consumers and downstream industries. However, it is unclear how the duty would impact the price of a “like good produced in New Zealand” and why that should be a factor to consider by itself. The discussion papers from MBIE do not mention this factor explicitly, it only exists in the final legislation. The duty is unlikely to directly affect the price of a domestically produced like good. It is possible that the imposition of the duty and any subsequent increase in the price of the imported good could affect supply and demand in the long-term, leading to a change in the price of the domestically produced like good. This is likely to be speculative analysis that is difficult to carry out without any evidence, which is often the case in new investigations. It may be possible to examine the effects of the duty on the price of the domestically produced like product in a review investigation, as the duty would have been in place for some period, and the question would be whether it should continue to be imposed.

It should be noted that while the general criticism of anti-dumping and countervailing duties is that they prevent consumers from accessing cheap goods and increase the cost to the consumer, this is not always the case.<sup>166</sup> Importers may decide to reduce their profit

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<sup>163</sup> Trade (Dumping and Countervailing Duties) Amendment Act 2017, ss 10F(3)(a)-(c)

<sup>164</sup> Section 10F(4).

<sup>165</sup> Section 10F(4).

<sup>166</sup> See Cullen, Bruce “The impact of the Introduction of Anti-Dumping duties on Industry and Consumers in New Zealand: The Case of Lead Acid Batteries” (1995) GSBGM Project Report Series 10, Victoria University of Wellington. Cullen examined the effects of an anti-dumping duty on lead acid battery imports into New Zealand. The investigation had found that dumped imports from Indonesia, Korea, Malaysia, Singapore and Taiwan had caused material injury to NZ manufacturers. Cullen found that the duty did not lead to an increase in the price of batteries.

margins, absorbing increased prices rather than passing it down to the consumer. It is important to note that the duty restores the price to what it should have been in the absence of the dumping or subsidisation, rather than raising it to the prices of like products in the market. Thus, the price of the dumped or subsidised import might still be less than domestically produced like goods or other imported goods.

The implications of price changes on consumers might be difficult to ascertain as consumers are a heterogeneous group and their purchasing decisions cannot always be rationalised in commercial terms, especially for retail items. Consumers may choose brand loyalty over cheaper substitute goods. In the *Handbags* investigation in the EU,<sup>167</sup> it was found that the duty would increase the consumer price of leather handbags up to nine per cent. Nevertheless, it was decided that the price increase would not substantially affect long-term demand and the impact on consumers would be insignificant since leather handbags are an occasional fashionable purchase and thus “consumers did not have a clear perception of the appropriate price”.<sup>168</sup>

Any increase in the price of the goods because of a duty might result in an increase in the production costs of the downstream industries. This would impact the ability of the downstream industry to compete in domestic and export markets. In the EU, the investigation first defines the share of product subject to the investigation in the downstream industries’ production cost and the likely effect of the duty on the production cost. New Zealand might take the same approach, but it may be difficult to reach a conclusion as the impact of the duty may depend on other factors, such as the competition in the market, availability of other sources of supply and the degree of the downstream industry’s dependence on the domestic industry for supply of the product under investigation.<sup>169</sup>

In EU cases where the Commission has been in support of imposing the duty, the Commission has often found that the effect of the duty was negligible. Either the cost of the product concerned made up a relatively small portion of the total production cost, or the cost increase could be absorbed by the profit margins of the downstream industries, without significant effect on overall profitability.<sup>170</sup>

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<sup>167</sup> *Handbags* Council Regulation (EC) No. 1567/97 (1 August 1997) Definitive Anti-dumping duty.

<sup>168</sup> Sinnaeve, above n 120, at 168

<sup>169</sup> At 166.

<sup>170</sup> At 167.

*b. Effect of the duty on the choice and availability of like goods:*

Two of the eight factors are essentially the same consideration. Sections 10F(3)(c) and 10F(3)(g) require that “the effect of the duty on the choice or availability of like goods” and the existence of “an alternative supply (domestically or internationally) of like goods” should be considered. There is very little difference between the two factors in terms of their outcome. It is not apparent why they are two separate provisions, or what the distinction is. If there is no other supply of like goods under s 10F(3)(g), then the duty would reduce choice and availability in the market under s 10F(3)(c). Conversely, if there is an alternative supply, the choice and availability might still be retained or not substantially affected.

If a duty is not imposed, the short-term benefits to consumers of low-priced imports may disappear if the domestic industry is driven out of the market, reducing competition in the market and choice of the product in the long-term.<sup>171</sup> This reasoning is largely based on the orthodox perception of dumping as predatory pricing, leading to the exporter obtaining a monopoly over the importing market by driving out other competitors.

However, a similar reduction in choice of goods may still occur if the duty is imposed. The long-term effect of a duty might be that importers stop importing the good subject to the duty as it is too expensive, reducing the choice of goods in the market. In either situation of the domestic producer or the exporter leaving, there are unlikely to be significant reductions in consumer choice if there are other sources of supply of like goods in the importing market.

This factor is likely to lead to different outcomes depending on the goods concerned. If it is a highly specialised product, there may be a limited number of producers globally, therefore the choice and availability of the good would decrease if the duty is imposed. However, if there are various sources of supply, substantial choice and availability might be retained in the market.

Importers will play a significant role in determining the choice and availability of the goods. The weight of the negative consequences to importers will depend on the importance of the product subject to the duties in the business activity of the importer and the possibility of passing on the cost increases to purchasers. Importers generally deal with a range of products so the duties may have a limited impact on them; they can mitigate any

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<sup>171</sup> At 169.

negative consequences of the duty by switching to other products and new sources of supply.<sup>172</sup> In the EU *Handbags* investigation, the market for synthetic handbags was predominantly supplied by imports rather than domestic production, indicating that the impact of the duty on importers would be disproportionate to any benefits to the domestic industry.<sup>173</sup>

The availability of imported like products not subject to a duty raises questions about the purpose of anti-dumping and countervailing duties. Non-dumped or unsubsidised lower priced imports may pose a similar threat to domestic producers as dumped or subsidised imports. Furthermore, the existence of other cheaper imports might contribute to the injury to the domestic industry, making the causation analysis between the dumped or subsidised good and the injury to the domestic industry difficult.<sup>174</sup>

*c. Competition in the market:*<sup>175</sup>

The wording of this factor is expansive, allowing the chief executive to investigate “any factor that the chief executive considers essential to ensure the existence of competition in the market”.<sup>176</sup> It is not apparent what those factors might be and how they might be balanced against each other. The possible conclusions are even more indeterminate as the competition in the market will vary between products and producers.

The effect on competition is explicitly mentioned as a criterion for public interest in Canada.<sup>177</sup> In *Stainless Steel Wire*, the CITT concluded that the duty would significantly lessen competition in the market.<sup>178</sup> The product under investigation, belting wire, was used by auto assembling and food industries in assembling lines. Both industries needed quick and reliable supplies of belting wire. The CITT found that delivery of the product from other countries takes considerably more time than delivery from the United States. The

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<sup>172</sup> At 165.

<sup>173</sup> At 164.

<sup>174</sup> This occurred in the EU in *Laser Optical Reading Systems* Commission Decision (21 December 1998), where it was decided that imports from third countries contributed to the “precarious situation of the Community industry... [therefore]... should be considered as breaking the causal link between the dumping and the injury found.” At [14].

<sup>175</sup> Trade (Dumping and Countervailing Duties) Act 1988, s 10F(3)(h).

<sup>176</sup> Section 10F(3)(h).

<sup>177</sup> Special Import Measures Regulations (SOR 84-927), s 40.1(3)(b)(i)

<sup>178</sup> *Certain Stainless Steel Round Wire* (1 April 2005) PB-2004-002

CITT concluded that under such circumstances “the loss of even one country as a source of supply is significant” for downstream industries.<sup>179</sup>

In most EU cases, the Commission has taken the view that the reduction of competition is unlikely to happen because of the availability of alternative sources of supply.<sup>180</sup> However in one case, *Ring Binder Mechanisms II*, there were only a few producers of ring binder mechanisms worldwide, mostly under Chinese control. If the domestic industry was driven out of the market by dumped goods, the EU market would be dependent entirely on imports from China. Chinese producers would have an incentive to raise prices and affect downstream industries, thus competition concerns were in favour of imposing the duties.<sup>181</sup>

These examples illustrate how flexible and unpredictable the competition consideration can be from the consumer and downstream industry perspective.

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<sup>179</sup> At [98]

<sup>180</sup> In *Potassium Chloride* Council Regulation (EC) No 1050/2006 (11 July 2006) the Commission decided to change the form of the duty, because it had led to the elimination of a significant source of supply and reduced competition in the market.

<sup>181</sup> Sinnaeve, above n 120, at 171. *Ring Binder Mechanisms II* Council Regulation (EC) No. 2074/2004 (29 November 2004) Definitive Anti-dumping duty.

### 3 *Domestic Producer Industry interest*

The two factors from the New Zealand public interest test which directly concern the complaining domestic industry are the effect of the duty on the financial performance of the domestic industry,<sup>182</sup> and employment levels.<sup>183</sup>

The interests of the industries supplying the domestic producer industries with goods and services, generally referred to as upstream industries, are not directly considered in the New Zealand public interest test. Any positive impact of duties on domestic industries is likely to have a positive effect on their upstream industries. Likewise, a worsening of the conditions of domestic industries might also adversely affect upstream industries, which could have significant consequences on the financial performance and employment levels of the upstream industry. The EU Commission considered the interests of the upstream industry in the *PTFE* investigation.<sup>184</sup> Most raw material suppliers depended on the domestic industry and derived 75 per cent of their sales from them. Any reduction in the domestic industry's purchases would significantly affect the situation of the upstream industry. Without the imposition of measures, the domestic industry would likely relocate to other countries, forcing the upstream industry to look for clients outside the EU. This would mean that they would compete with other suppliers of raw materials and face additional export costs, reducing their profits. The imposition of measures was thus in the interest of the upstream industry.<sup>185</sup>

There could be investigations in New Zealand where the upstream industries will be affected by the outcome. The exclusion of upstream industries was not discussed in detail throughout the process, so it is not clear why the interests were limited to the domestic producer industry, consumers and downstream industries.<sup>186</sup> It may be that considering the domestic producer industry interest is enough to establish the harm that could be caused if the duties are not imposed.

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<sup>182</sup> Trade (Dumping and Countervailing Duties) Act 1988, s 10F(3)(e).

<sup>183</sup> Section 10F(3)(f).

<sup>184</sup> *PTFE* Commission Regulation (EC) No. 862/2005 (7 June 2005) Provisional Anti-dumping duty. *PTFE* Council Regulation (EC) No. 1987/2005 Definitive Anti-dumping duty.

<sup>185</sup> Sinnaeve, above n 120, at 166.

<sup>186</sup> Quotes from Hansard

(a) *The effect of the duty on the financial performance of the domestic industry:*

There are two ways the financial performance of the domestic industry could be relevant in an investigation. If the dumping or subsidisation is causing significant injury, the imposition of the duties is necessary to ensure the future financial performance of the industry. Secondly, if the anti-dumping and countervailing duties are supposed to mitigate the adverse effects of dumped or subsidised goods on domestic industries, the domestic industry should be viable enough to derive meaningful benefits from the measures.

The EU Commission has generally decided that the domestic industry is viable and competitive enough to benefit from the measures, or that the imposition of duties is crucial for the domestic industry to remain financially viable and restore its competitiveness in the market. In the countervailing duties investigation *DRAMS*,<sup>187</sup> the domestic industry was held to be viable under normal market conditions. The industry had deteriorated sharply due to subsidised low-priced imports from Korea, affecting its ability to remain profitable and competitive. Without countervailing measures, the industry would likely disappear, resulting in significant unemployment. Entry costs in the market were high and re-entry by existing and new producers would be unlikely, therefore the measures were found to be in the Union interest.<sup>188</sup>

Conversely, some EU investigations have concluded that the current conditions of the domestic industry do not allow the industry to benefit from the imposed duties. The domestic industry may not benefit from the measures if the market share of the dumped good would be taken over by a non-dumped or unsubsidised but equally low-priced import from a third country, so the measures would not be justified. In *Laser Optical Reading Systems*,<sup>189</sup> the domestic industry was still in a nascent phase, reaching a market share of 1.4 per cent in the investigation period. The future viability of the domestic industry was unclear and advantages to the domestic industry were likely to be minimal. It was decided that the imposition of measures was not in the public interest.<sup>190</sup>

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<sup>187</sup> *Dynamic Random Access Memories (DRAMS)* Commission Regulation (EC) No. 708/2003 (23 April 2003) Provisional Countervailing duty. *Dynamic Random Access Memories (DRAMS)* Council Regulation (EC) No. 1480/2003 (11 August 2003) Definitive Countervailing duty.

<sup>188</sup> Sinnaeve, above n 120, at 164.

<sup>189</sup> *Laser Optical Reading Systems (LORS)* Commission Decision (21 December 1998) Termination.

<sup>190</sup> Sinnaeve, above n 120, at 162

In the EU *Handbags* investigation, it was found that the domestic industry would not benefit from the anti-dumping measures on synthetic handbags as they would be sourced from other countries not subject to the duty. The benefits of the measure would go to the exporters in the third country, through increased market access, rather than the domestic industry. However, the leather handbags industry was found to be viable and with a significant market share, therefore the measures were in the Union interest.<sup>191</sup>

Injury caused by dumped or subsidised goods, and the potential subsequent shut down of domestic industry can have devastating consequences for communities relying on the manufacturing factory for regional economic growth and employment. The Canadian anti-dumping or countervailing inquiry requires a finding of “material injury to a domestic industry”, where domestic industry means:<sup>192</sup>

domestic producers as a whole of the like goods or those domestic producers whose collective production of like goods constitutes a major proportion of the total domestic production of like goods.

Thus, the Canadian inquiry does not focus on the harm to individual communities, but rather to Canada as a whole. The only way a single community built around a domestic production plant would get protection is if the production plant is entirely responsible or constitutes a major proportion of the domestic production.<sup>193</sup> The New Zealand investigation requires that:<sup>194</sup>

the collective output of producers who support the application must constitute 25% or more of the total New Zealand production of like goods produced for the domestic market and more than 50% of the production of like goods produced for domestic consumption by NZ producers who have expressed support for or opposition to the application

This applies to the situation if there are three groups of New Zealand producers:

- (i) Producers who have expressed support for the application
- (ii) Producers who have expressed opposition for the application
- (iii) Producers who are neutral and have not expressed either support or opposition for the application

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<sup>191</sup> At 164

<sup>192</sup> Special Import Measures Act (RSC 1985 c. S-15), s 2(1).

<sup>193</sup> Jean-Marc Leclerc, above n 41, at 120.

<sup>194</sup> Trade (Dumping and Countervailing Duties) Act 1988, s 10A(1)(b).



The percentage requirement effectively excludes the output of the producers who are neutral to the application, thereby reducing the proportion which must belong to the producers injured by the alleged unfair trade who support the application. This means that there is potential for a single community to obtain protection, as long as the production from that community constitutes over 25% of the total production and 50% of the production excluding the neutral producers. Employment could be a helpful factor here. If the non-imposition of the duty is going to result in the closure of one plant, the number of employees affected would be significant.

*(b) The effect of the duty on employment levels:*

There are many examples from the EU where employment levels were a significant concern. In *Sacks and Bags*, 3,300 jobs in the domestic industry were at risk if the measures were not imposed. The total EU production involved 12,000 jobs. In *Ironing Boards*, it was concluded that the negative impact on employment would be in one geographical area of the EC, as several producers were located in that one region. In *Frozen Strawberries*, many of the producers were located in rural Poland and had substantial importance for employment in the local population.<sup>195</sup> All three investigations resulted in the imposition of duties, definitive duties for *Sacks and Bags*, and provisional duties for the other two.

*(c) Competition in the market:*

The imposition of anti-dumping or countervailing duties could reduce effective competition if the imports are driven out of the market and the domestic industry only consists of a limited number of producers with a significant market share. The EU Commission has decided that the sole fact that a domestic industry has a dominant market position would not mean that the industry's interest in being protected from unfair trade is less important:<sup>196</sup>

The maintenance of a dominant position is as such not against the [public] interest, as long as no abuse is made of such a dominant position.

While measures which incentivise uncompetitive behaviour from the domestic industry are not in the public interest, past breaches of competition law will not necessarily deprive the domestic industry from its right to obtain relief against dumping practice. This is especially

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<sup>195</sup> Sinnaeve, above n 120, at 164. *Frozen Strawberries* Commission Regulation (EC) No. 1551/2006 (17 October 2006) Provisional Anti-dumping duty.

<sup>196</sup> At 170.

so if the previous anti-competitive behaviour was not related to the product concerned in the dumping investigation.<sup>197</sup>

In the rejected Australian proposal, one of the specific circumstances in which the duty would not be imposed was if it would remove or significantly reduce importer activity in the market. The decrease in importer activity would give the Australian industry substantial market power, which was not preferable.<sup>198</sup> This proposed circumstance is a contrast to the EU approach outlined above. Either approach could be taken in New Zealand, either enabling the domestic industry to obtain a dominant market position by imposing the duty, or leading to the non-imposition of the duty if there is a risk that the domestic industry would obtain a dominant market position.

#### ***4 Conclusion on the Eight Factors***

The eight factors can be used flexibly to justify conclusions that benefit either the domestic industry, or consumers and downstream industries. The factors are not hierarchical and there is no clear guidance on how they should be weighed against each other. While this flexibility might be desirable when considering the broad range of circumstances that might arise in an investigation, it does create a risk that the factors will be unevenly balanced and used to justify a partisan outcome.

This is somewhat evident in the EU experience. The cost increase of the dumped or subsidised good is a part of the proportionality test in the EU. The higher the expected benefits for the domestic industry, the higher the weight of these considerations when balanced against possible negative effects on other parties.<sup>199</sup> When measures are not likely to benefit the domestic industry, even a small cost increase for users would be disproportionate. If the measures are going to significantly benefit the domestic industry, a certain level of cost increases will be considered “tolerable” for the users. The level above which costs become intolerable is dependent on a range of factors, including:<sup>200</sup>

...the level of competition on the market, the current level of profitability compared to that of the Community industry, the availability of other sources of supply, the employment involved, etc. Therefore, a fixed threshold above which any increase in costs would be disproportionate cannot be set.

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<sup>197</sup> At 172.

<sup>198</sup> Productivity Commission, above n 133, at 72.

<sup>199</sup> Sinnaeve, above n 120, at 164.

<sup>200</sup> At 167.

The EU Commission generally believes that the impact on prices is insignificant, and that the “maintenance of a viable Union industry is in the consumer’s best interest”,<sup>201</sup> because “it is in the long term interest of consumers to maintain a variety of sources of supply and competition”.<sup>202</sup> In some cases, the Commission has found that the duties would increase the cost to consumers significantly, but the long-term advantages of improving alternative supplies would mitigate the short-term increases in price. In *Ironing Boards*, the Commission offered no evidence for the conclusion that the choice of available products might decrease, but still concluded that:<sup>203</sup>

... any financial impact of anti-dumping measures on the consumers of ironing boards would most likely be negligible. On the other hand, should the anti-dumping measures not be imposed, the Community production would most likely disappear and the choice of product types available to the consumers may decrease.

The non-imposition of duties due to the interests of downstream industries is rare in both the EU and Canada, more weight is generally given to the interests of the complainant industry. In *Gum Rosin*,<sup>204</sup> the EU Commission decided that the measures would result in substantial cost increases for many industries, which provided jobs for a lot of employees. This finding alone was not convincing for not imposing the duty, it was supported by findings that the duty would not be effective in removing injury to domestic industry. Commentators noted that this case shows a general tendency that “interests of users are rarely decisive on their own... only when it is doubtful whether the [Union] industry will benefit from measures, the negative impact on users becomes important”.<sup>205</sup>

The lack of guidance in the New Zealand legislation on the balancing process could allow any factor to be the decisive one, at the discretion of the Minister. In a significant number of overseas investigations, the decisive factors have predominantly been the ones favouring the domestic industry and the imposition of the duty. It is essential that the public interest test operate in an objective manner, to ensure that the outcome is in the wider public interest, and not just in the interest of one party.

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<sup>201</sup> Marc Wellhausen “The Community Interest Test in Antidumping Proceedings of the European Union” (2001) 16(4) Am U Int'l L Rev 1027 at 1075.

<sup>202</sup> *Plain Paper Photocopiers from Japan* (1995) O.J. L 244.1.

<sup>203</sup> *Ironing Boards Commission Regulation* (EC) No. 1620/2006 (30 October 2006) Provisional Anti-dumping duty.

<sup>204</sup> *Gum Rosin* (China, Taiwan) Commission Decision (EC) (10 January 1994)

<sup>205</sup> Sinnaeve, above n 120, at 168

Perhaps the discussion points to the conclusion that there cannot be a comprehensive public interest test that strikes the right level of flexibility and guidance in terms of the factors that should be considered. To determine the factors that should be considered, the purpose of the public interest test must be determined. If it is purely a question of the economic welfare of the parties, then there is very little need to consider the choice, availability and quality of the goods. However, the public interest is informed by a range of social and economic policies, which must be considered if the true purpose of the public interest test is to achieve a balanced conclusion on whether the imposition of the duty maximises the overall welfare of the country.

### ***B Procedural Aspects***

Overall, there are few significant concerns with the procedure of the public interest investigation. The public interest investigation adds 90 days to the timeline, and the entire process takes 270 days, or nine months to complete. This is less than the EU investigation, which takes 15 months, but slightly more than the seven months for the Canadian investigation. While this extension in the timeframe was criticised by the opposing members at the Select Committee stage,<sup>206</sup> it is unlikely to be a significant obstacle to the parties in the investigation, due to the possible benefits of implementing a public interest investigation.

The status of the CITT as an authorised court deserves brief mention. It may be desirable for a tribunal or a court to carry out the public interest investigation, rather than leaving it at the discretion of a Minister. There is little room to pursue this proposal as New Zealand does not currently have a suitable tribunal or body to hear such claims. There are allowances for interested parties to make oral submissions in the investigation process, this may be an adequate alternative.<sup>207</sup>

It is appropriate for the public interest to be considered in each anti-dumping and countervailing duty investigation in New Zealand, because this will lead to increased consistency and reliability in the decisions on the imposition of duties. Nevertheless, two procedural concerns are outlined below.

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<sup>206</sup> Select Committee Report, above n 108, at 5.

<sup>207</sup> Trade (Dumping and Countervailing Duties) Act, s 10C(3).

## *1 Presumption in favour of applying the duty*

There is a presumption that the imposition of the duty is in the public interest, unless the cost to downstream industries and consumers is likely to materially outweigh the benefit to the domestic industry of imposing the duty.<sup>208</sup> The 2017 New Zealand amendment also introduces a purpose section into the Act, which adds to this unequal balance between the various interests, stating that:<sup>209</sup>

Anti-dumping and countervailing duties are intended to prevent material injury or the threat of material injury to an industry, or the establishment of an industry being materially retarded, due to dumped or subsidised goods being imported into New Zealand.

The focus is still on the benefits anti-dumping and countervailing duties can provide to the domestic industry. The EU and Canadian public interest clauses are similar, both require proof that the imposition of the duty is not in the public interest.<sup>210</sup>

This means that the decision to not apply a duty due to the public interest might only occur in exceptional circumstances, once the public interest test is fully satisfied. As discussed under the substantive factors section above, there is a risk that the eight factors may be unequally weighed, allowing for a biased determination of the public interest. This presumption and the implied high threshold of a negative public interest outcome might mean that the trade remedies regime may be used in protectionist ways; an outcome which the public interest test is supposed to prevent.

## *2 Determination of the duty*

Per the amended investigation process, the Minister determines the rate of the duty and then instructs MBIE to carry out a public interest investigation.<sup>211</sup> The public interest investigation is restricted to the determined rate and cannot be modified, even though another rate may be more suitable under the public interest factors. As outlined earlier, the

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<sup>208</sup> Section 10F(2).

<sup>209</sup> Section 1A.

<sup>210</sup> See Special Import Measures Act (RSC 1985 c. S-15), s 45(1). Regulation 2016/1036 on protection against dumped imports [2016] OJ L 176/21 Art 21 and Regulation 2016/1037 on protection against subsidised imports [2016] OJ L 176/55 Art 31.

<sup>211</sup> Trade (Dumping and Countervailing Duties) Act, s 10D(2)

lesser duty rule applies in New Zealand,<sup>212</sup> so the duty that is determined should be the lowest rate to remedy the injury to domestic industries.

Like New Zealand, the EU public interest investigation may only result in a complete elimination of the anti-dumping duty. In Canada, the CITT may recommend a complete elimination or reduction of a duty, if a lesser duty is in the public interest. There was a proposal to introduce similar flexibility to the EU system, but there were concerns that modifying the duty due to public interest would be unclear and more indeterminate, compared to the standard calculations of the duty, and that it would not be possible to quantify the balancing factors in the public interest test.<sup>213</sup>

These concerns are likely to apply in New Zealand as well. As such, allowing the discretion to modify the duty per the public interest may not be appropriate. However, it must be noted that the EU Commission carries out the entire investigation by itself, including the duty determination and public interest test. The lesser duty rule and the public interest investigation can therefore be considered simultaneously for a consistent conclusion. This is completely different to the procedural steps in the New Zealand approach, which involve the chief executive of MBIE and the Minister. Thus, the nature of the investigation does not allow for the lesser duty rule and the public interest factors to work in tandem.<sup>214</sup>

This may not have any meaningful impact on the outcome, as according to the lesser duty rule, the determined duty is the smallest full duty that will remedy the injury caused to the domestic industry. However, it is arguable that the outcome of the public interest test should not be constrained to the imposition of the full duty or no duty at all. There may be a level of duty that is smaller than the ‘lesser duty’ which is in the wider public interest and partially remedies the injury to the domestic industry. This would result in the best outcome for both domestic industries, consumers and downstream industries.

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<sup>212</sup> Ministry of Commerce, above n 35, at 17.

<sup>213</sup> Sinnaeve, above n 120, at 177.

<sup>214</sup> Trade (Dumping and Countervailing Duties) Act, ss 10-10H.

## *Conclusion*

Anti-dumping and countervailing duties fulfil a significant political function, on a domestic and international level, even if there are limitations to the economic rationales. The absence of compelling economic reasons in all cases where duties are imposed does require a critical evaluation of the true purpose of the trade remedies. Past investigations, especially in New Zealand, seem to imply that even if there are few economic *reasons* for the duties, the investigations should still be carried out on economic terms. This was because the domestic industries' interests were the only considerations and their welfare depends on their ability to compete with fairly traded goods, rather than any other factor.

The public interest test is supposed to mitigate underlying biases in the investigation, but the factors that should be considered because they affect public welfare, such as non-economic policies, are at odds with the traditionally economic analysis. The true purpose of the public interest test, which is to allow the decision-maker to look at the overall effect of the duty, is unlikely to be fulfilled by simply looking at the economic impact of the duties on consumers and downstream industries. There is little that can be done to reconcile that difference without legislative guidance, which is not provided in the 2017 amendment.

This dissertation has highlighted the pressing concern that the eight public interest factors introduced by the 2017 Amendment uneasily straddle the economic-non-economic boundary. Without any guidance on the purpose of the public interest test, the qualitative factors, such as the quality, choice and availability of the goods, cannot be evaluated consistently with the quantitative economic impacts on price and employment. The overlap between economic factors such as price of healthcare, and non-economic factors, such as quality of healthcare, further complicate this analysis.

The drafting of the public interest test leaves more questions than answers. Domestic industries requiring protection against unfairly traded goods face significant uncertainty about the outcome of an investigation. Consumers and downstream industries have the reassurance that their interests will be considered, but it is not clear how decisive those considerations will be in the outcome of the investigation. Each of the factors can be used to reach different answers in an investigation, either for or against the imposition of the duty. Out of the eight factors, two are essentially considering the same information, three are vague in their wording and only four are completely justifiable, as shown in the table below.

Justifiable	Concern the same thing	Vague and difficult to apply
<ul style="list-style-type: none"> <li>• The effect of the duty on the prices of the dumped or subsidised goods<sup>215</sup></li> <li>• The effect of the duty on the financial performance of the domestic industry<sup>216</sup></li> <li>• The effect of the duty on employment levels<sup>217</sup></li> <li>• The effect of the duty on the choice or availability of like goods<sup>218</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Whether there is an alternative supply (domestically or internationally) of like goods available<sup>219</sup></li> </ul> <p>(essentially repeating the choice and availability)</p>	<ul style="list-style-type: none"> <li>• The effect of the duty on the prices of like goods produced in New Zealand<sup>220</sup></li> <li>• The effect of the duty on product and service quality<sup>221</sup></li> <li>• Any factor that the chief executive considers essential to ensure the existence of competition in the market.<sup>222</sup></li> </ul>

Trade remedies investigations should consider the impacts of the duties on all affected parties as the outcome of the investigation can have significant ramifications for net national welfare. The public interest test is supposed to mitigate protectionist tendencies in the trade remedies regime by addressing the interests of consumers and downstream industries, but it is debatable whether the specific wording of the test is enough to address this underlying concern. The true impact of the test will only be apparent after it is utilised in an investigation.

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<sup>215</sup> Trade (Dumping and Countervailing Duties) Act 1988, s 10F(3)(a).

<sup>216</sup> Section 10F(3)(e).

<sup>217</sup> Section 10F(3)(f).

<sup>218</sup> Section 10F(3)(c).

<sup>219</sup> Section 10F(3)(g).

<sup>220</sup> Section 10F(3)(b).

<sup>221</sup> Section 10F(3)(d).

<sup>222</sup> Section 10F(3)(h).



## *Bibliography*

### ***Anti-dumping and Countervailing Duty Investigations***

#### Canada

*Certain Prepared Baby Food* (30 November 1998) PB-98-001.

*Certain Iodinated Contrast Media* (30 August 2000) PB-2000-001.

*Certain Stainless Steel Round Wire* (1 April 2005) PB-2004-002.

#### European Union

*Dynamic Random Access Memories (DRAMs)* Commission Regulation (EC) No. 708/2003 (23 April 2003) Provisional Countervailing duty and Council Regulation (EC) No. 1480/2003 (11 August 2003) Definitive Countervailing duty.

*Frozen Strawberries* Commission Regulation (EC) No. 1551/2006 (17 October 2006) Provisional Anti-dumping duty.

*Gum Rosin China* Commission Decision (EC) (10 January 1994).

*Handbags* Council Regulation (EC) No. 1567/97 (1 August 1997) Definitive Anti-dumping duty.

*Hydraulic Excavators from Japan* (1985) OJ L 176/1.

*Ironing Boards* Commission Regulation (EC) No. 1620/2006 (30 October 2006) Provisional Anti-dumping duty.

*Laser Optical Reading Systems (LORS)* Commission Decision (21 December 1998) Termination.

*Plain Paper Photocopiers from Japan* (1995) O.J. L 244.1.

*Polyester Staple Fibres* Council Regulation (EC) No 893/2008 (10 September 2008).

*Potassium Chloride* Council Regulation (EC) No 1050/2006 (11 July 2006).

*PTFE* Commission Regulation (EC) No. 862/2005 (7 June 2005) Provisional Anti-dumping duty and Council Regulation (EC) No. 1987/2005 Definitive Anti-dumping duty.

*Ring Binder Mechanisms II* Council Regulation (EC) No. 2074/2004 (29 November 2004) Definitive Anti-dumping duty.

### ***Legislation***

#### New Zealand

Agricultural Implement Manufacture, Importation and Sale Act 1905.

Customs Amendment Act 1921.

Customs Act 1966.

Dumping and Countervailing Duties Act 1988.

Dumping and Countervailing Duties Amendment Act 1990.

Dumping and Countervailing Duties Amendment Act 1994.

The Trade (Dumping and Countervailing Duties) Amendment Act 2017.

#### Australia

Customs Act 1901 (Cth).

#### Canada

Canadian International Trade Tribunal Act (RSC 1985 c. 47).

Special Import Measures Act (RSC 1985 c. S-15).

Special Import Measures Regulations (SOR 84-927).

### European Union

Regulation 2016/1036 on protection against dumped imports [2016] OJ L 176/21.

Regulation 2016/1037 on protection against subsidised imports [2016] OJ L 176/55.

### ***Treaties***

Agreement Establishing the World Trade Organization (Marrakesh Agreement) 1867 U.N.T.S. 154 (signed 15 April 1994, entered into force 1 January 1995).

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (World Trade Organization [WTO]) 1868 U.N.T.S. 201 (signed 15 April 1994, entered into force 1 January 1995).

Agreement on Subsidies and Countervailing Measures (World Trade Organization [WTO]) 1869 U.N.T.S. 14 (signed 15 April 1994, entered into force 1 January 1995).

General Agreement on Tariffs and Trade 55 UNTS 187 (signed 30 October 1947, entered into force 1 January 1948).

General Agreement on Tariffs and Trade 1994 (World Trade Organization [WTO]) 1867 UNTS 190 (signed 15 April 1994, entered into force 1 January 1995).

### ***WTO Disputes***

*United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea* (2005) WT/DS22/AB/R (Report of the Appellate Body).

### ***Books and chapters in books***

Greg Mastel *Antidumping Laws and the US Economy* (Routledge, London, 1998).

Paul I.A. Moen *Public Interest Issues in International and Domestic Anti-dumping Law: The WTO, European Communities and Canada* (Graduate Institute of International Studies, Geneva, 1993).

P.K.M. Tharakan (ed) *Policy implications of antidumping measures* (Elsevier Science Publishers, Amsterdam, 1991).

Michael J. Trebilcock, Robert Howse and Antonia Eliason *The Regulation of International Trade* (4<sup>th</sup> ed, Routledge, London, 2013).

Jacob Viner *Dumping: A problem in international trade* (The University of Chicago Press, Chicago, 1923).

Jacob Viner *A Memorandum on Dumping* (League of Nations, Geneva, 1926).

### ***Journal articles***

Jean-Marc Leclerc “Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries” (1999) 44 McGill LJ 111.

J Miranda, R Torres and M Ruiz “The international use of anti-dumping: 1987-1997” (1998) 32(5) JWT 5.

Adinda Sinnaeve “The ‘Community Interest Test’ in Anti-dumping Investigations: Time for Reform?” (2007) 2(4) in GT&CJ 157.

A O Sykes "Countervailing Duty Law: An Economic Perspective" (1989) Colum L Rev 199.

Marc Wellhausen “The Community Interest Test in Antidumping Proceedings of the European Union” (2001) 16(4) Am U Int'l L Rev 1027.

### ***Parliamentary and Government materials***

#### New Zealand

Historical Hansard (28 October 1905) 135 NZPD.

J Luxton “Luxton announces trade remedy policy review” (media release, 16 March 1998).

*Trade remedies in New Zealand: A discussion paper* (Ministry of Commerce, Discussion Paper, 1998).

*Introducing a Bounded Public Interest Test into the New Zealand Anti-Dumping and Countervailing Duties Regime* (Ministry of Business, Innovation and Employment, Discussion Paper, June 2014).

Submissions to MBIE 2014 Discussion Paper on the Development of a Bounded Public Interest Test”, retrieved from the Ministry of Business website <[www.mbie.govt.nz](http://www.mbie.govt.nz)>.

New Zealand Customs Department “Report of the Customs Department for the year ended 31 March 1957” [1957] I AJHR H25.

Trade (Anti-dumping and Countervailing Duties) Amendment Bill (143-2) (Select Committee Report).

### Australia

*Streamlining Australia’s anti-dumping system: An effective anti-dumping and countervailing system for Australia* (Australian Customs and Border Protection Service, June 2011).

*Australia’s Anti-dumping and Countervailing System: Productivity Commission Inquiry Report* (Australian Productivity Commission, No. 48, 18 December 2009).

### ***Other Resources.***

Canadian International Trade Tribunal “Public Interest Inquiry Guidelines” (28 May 2014).

Cullen, Bruce (1995) “The impact of the Introduction of Anti-Dumping duties on Industry and Consumers in New Zealand: The Case of Lead Acid Batteries”, GSBGM Project Report Series 10, Victoria University of Wellington.

New Zealand Trade Consortium “Anti-dumping in New Zealand: A century of protection from ‘unfair’ trade?” (2005) Working Paper No. 39.