TRADE REMEDIES IN NEW ZEALAND

A DISCUSSION PAPER

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EXECUTIVE SUMMARY

Trade remedies - anti-dumping and countervailing duties and safeguard action - are measures taken against imports which are injuring specific industries. Such actions, and the mechanisms through which they are considered and applied, should be consistent with the Government's objectives of encouraging economic growth through the operation of open and competitive markets. Such actions must also be consistent with New Zealand's international obligations as set out in the relevant WTO Agreements.

Recent global economic trends include the growing integration of the production of goods and delivery of services across borders, the increasing complementarity of trade and investment, the acceleration of technological change, the progressive integration of capital markets, and the growing role of human capital as a source of competitive advantage. This globalisation of economies has led to increased international specialisation and a high degree of interdependence between national economies which has seen the need for a policy framework which considers the effects of policies on markets and their participants, irrespective of the nationalities of the firms or products involved. One such framework is based on the contestability of markets, which provides a basis for considering policy coherence at the domestic and international level.

New Zealand is seen as a moderate user of trade remedy actions, having conducted seventy anti-dumping investigations, ten countervailing duty investigations, and four safeguard inquiries since 1982. A large proportion of these cases have not resulted in a trade remedy being applied. In more recent years, New Zealand's trade remedy activity has focused more on Asian countries, reflecting the increasing share of New Zealand's trade held by these countries, which is in turn indicative of the effect of Government policies to remove import licensing and reduce tariff protection, as well as of the shift in world production and trade patterns.

New Zealand's trade remedy legislation was reviewed comprehensively in 1986 in the context of major changes to industry assistance mechanisms, and more recently in 1994, when changes required by the new WTO Agreements were implemented. There remains a continuing debate about the ability of trade remedies to provide an effective and swift response to “unfair” or “disruptive” imports. Because current procedures do not require the consideration of the effectiveness of anti-dumping duties or other trade remedies in dealing with the impact of imports, or an analysis of the net national benefit of such actions, there is also the opposing view that use of trade remedies is protectionist, and inconsistent with the Government's policy of trade liberalisation and effective competition in local markets.

Anti-dumping is subject to strong criticism, particularly when it is contrasted with the objective of market contestability and the operation of competition laws. The economic analysis of trade remedies suggests that in each instance, the key questions are situational, and often come down to a balancing of interests to determine the net national benefit. Currently, New Zealand trade remedies policy does not provide for such balancing. A wider framework which takes account of these different interests is that used for the regulation of domestic competition. The use of a competition policy net national benefit approach essentially involves a consideration of whether low (or competitive) import prices are distorted (artificially low), or are the result of sustainable, competition-enhancing profit maximising behaviour. This leads to potential differences in approach according to the type of behaviour for which a trade remedy is sought. For example, safeguards, by definition, deal with instances where prices are not artificially low, while subsidies reflect government intervention, and could therefore be regarded as providing an “artificial” advantage.

Dumping, however, may or may not be distorted. To the extent that competitive prices reflect the operation of market forces, then the use of a net national benefit test and any associated remedy, provided it is WTO-consistent, would seem appropriate.

New Zealand's economic policy is focused on increasing national welfare. This is achieved only through the promotion of economic efficiency. Anti-dumping duties may be applied only if the dumping is causing material injury to domestic producers of like goods. This focus on producers may not be a good proxy for net national benefit since the adverse impact of dumping on producers might be outweighed by benefits to consumers and downstream producers. New Zealand's competition law has as its primary objective the promotion of economic efficiency, which tends to lead to appropriate prices at a level of output desired by society, provides incentives on management to innovate or otherwise produce output at lowest possible cost, and minimises the unproductive use of resources to secure or defend market power.

In addition to the consideration of the appropriate policy framework for trade remedy policy, the process by which trade remedies are analysed and applied is also an issue to be addressed. Such procedural issues include consideration of the processes which arise from the adoption from the policy framework adopted, and also issues which have arisen as a result of experience in the administration of the current legislation. Also, if the policy framework for trade remedies does require greater consideration of the impact on competition and consumers, then some reconsideration of the existing administrative arrangements might be appropriate. In particular, any process must be transparent, timely and cost effective in achieving the desired results. Similarly, the nature of the remedy provided needs to be considered within the same framework, and in particular whether border measures or some other form of adjustment assistance is more appropriate. This is especially relevant to safeguard action.

The Government's overall economic strategy aims to maximise national welfare. Carrying this through into trade remedy policy (as in competition policy), would require some modifications to the way in which the policy operates. Such modifications could include the identification of the cause of low prices or import surges, and the introduction of a public interest test where these do not result from foreign government actions.

The Government has agreed that trade remedies should be considered in the context of the net national benefit, and that the basis for such a consieration, as well as other matters relating to the administration of trade remedies, should be the subject of a review.

This paper is intended to provide a basis for developing a framework for the future operation of trade remedy policy, including a basis for New Zealand's active participation in the development of international rules in this area. Policy issues which are put forward for discussion include:

- How the application of trade remedies could take account of the interests of consumers or other producer considerations (net national benefit);

- The extent to which competition policy considerations should be incorporated into trade remedy analysis;

- The nature and extent of adjustment assistance where firms encounter problems coping with supply shocks of international origin;

- Whether a common framework and administrative structure can be developed to cover all forms of trade remedy action; and

- Any issues relating to the administration of New Zealand's anti-dumping legislation, such as process matters and injury determinations.

1. INTRODUCTION

Trade remedies are specific actions intended to deal with specific problems raised by imports. The application of trade remedies is governed by an international framework of rules, while domestically, trade remedies operate in parallel with the general regime of industry assistance provided by the tariff and the general objectives of economic policy in New Zealand.

Trade remedy legislation is administered by the Trade Remedies Group, a unit of the Business Policy and Programmes Division of the Ministry of Commerce. The purpose of the Division is "to promote and sustain the international competitiveness of New Zealand business". The objective of this Discussion Paper is to provide a basis for a discussion on how best trade remedies can help achieve that purpose. There are two broad areas of debate: first, the broader issue of the consistency of trade remedies with the general thrust of economic policy in New Zealand; and secondly, the process by which trade remedies are administered.

THE ECONOMIC FRAMEWORK

With a population of little more than 3.5 million, and exports of goods and services which comprise around 30 percent of GDP, international economic linkages are essential to New Zealand's prosperity.

In recent years a number of global economic trends have emerged. These include:

- Growing integration of goods production and services delivery across borders;
- Increasing complementarity of trade and investment;
- Accelerating technological change opening the way for new types of economic transactions across borders;
- Progressive integration of capital markets;
- Increased short-term physical mobility; and
- A growing role for human capital as a source of comparative advantage.

Together these trends are part of a process which has been termed "globalisation". The process of globalisation leads to increased international specialisation and a high degree of interdependence between national economies. The result is that the economic interests of individual countries have become more closely knitted together and the distinction between domestic policy and foreign economic policy has become less meaningful.

In such circumstances, the implementation of trade rules based on the assumption that trade involves an exchange of goods and services of distinct national origin is more difficult and its justification is less clear. There is a growing need for a policy framework which considers the effect of policies on markets and their participants *per se* rather on the nationality of either

firms or products. One such framework is based on the contestability of markets: an approach which focuses on the way in which changes to the rules governing international economic activity will affect international competition and the operation of international markets. Such a framework also provides a basis for considering policy coherence at the domestic and international level.

New Zealand's economic reform programme has largely been directed at the creation of more open and competitive product and factor markets in New Zealand, and many elements of this have involved increasing integration of these markets with regional and international markets. New Zealand has also been actively involved in international reform exercises under the WTO, OECD and APEC with the objective of ensuring that such exercises contribute to the improved functioning of international product and factor markets in which New Zealand agents participate.

In order to maximise its interests in the context of the globalisation process, New Zealand needs to seek to be able to influence the international reform agenda so that its own interests can be taken into account. Up to now New Zealand has been able to do this through being in the vanguard of the liberalisation process, and through the quality and credibility of its arguments.

THE NEED FOR REVIEW

Government policy is to encourage economic growth through the operation of open and competitive markets. Thus, a critical issue is the effect of "unfair" and "disruptive" trade and their remedies on market competition. It is also important to consider the extent to which both problem and solution distort the signals received by domestic firms regarding their competitiveness with foreign firms, in both domestic and export markets.

Current procedures do not require the consideration of the effectiveness of anti-dumping duties or other trade remedies in dealing with the impact of imports, or the net national benefit from such duties. Present law and practice provide for the imposition of border measures (usually duties), once it is established that there has been injury caused to domestic industries arising from the "unfair" or disruptive imports. There is no requirement to consider what effects such duties will have, either on the domestic industry or elsewhere, in terms of the national interest. In assessing net national welfare, the interests of consumers and downstream industries are important.

The application of anti-dumping duties has also resulted in claims by importers and retailers that the Government is reverting to "protectionist" policies, and has given rise to concerns that anti-dumping action could be inconsistent with other economic objectives, including trade liberalisation and encouraging effective competition in local markets.

To improve the performance of the New Zealand economy import licensing has been removed and a comprehensive tariff reduction programme implemented over the last decade. It has been argued by some though that local producers continue to be at risk from sudden surges in cheap imports, or from "unfairly" traded goods which are subsidised or dumped. International experience has been that when tariff and non-tariff barriers are lowered, industries have increased resort to trade remedies for relief from international competition perceived as unfair. Questions which arise include: are trade remedies effective in providing such protection; and are they consistent with the thrust of other government policies including trade liberalisation and competition policy?

New Zealand's trade remedy legislation was last reviewed comprehensively in 1986 in the context of major changes to industry assistance mechanisms, accession to the GATT Anti-Dumping Code and in response to the Government's concern about its ability to respond to complaints of dumping. The review resulted in significant changes to New Zealand's legislation. Since then, industry assistance reform has continued.

There is continuing debate by producers, importers and retailers about the effectiveness of trade remedies and the effects of trade remedy action. The 1991 Officials Report on the Post-1992 Tariff Review revealed considerable concern about imports of "cheap" products and whether trade remedy legislation provided an effective and swift response to dumped imports. In 1991 the Government directed officials to review the effectiveness of trade remedy legislation in the context of problems with import competition facing the apparel and footwear industries. The Post-1996 Tariff Review carried out in 1994 also identified a number of concerns about trade remedies.

The New Zealand trade remedy legislation was amended in 1994 to ensure consistency with the WTO Agreements negotiated in the Uruguay Round. The changes that took effect from 1 January 1995, and the experience gained since then in administering the legislation, provide a basis for an evaluation of the policies and processes adopted by the Trade Remedies Group including those areas where affected parties do not agree with the Group's approach.

This paper has been developed by officials from the Ministry of Commerce, the Ministry of Foreign Affairs and Trade and the Treasury, to contribute to informed debate on the issues. It may also be of relevance to the emerging international debate on the broader relationship between trade and economic policy. The paper looks at the rationale for trade remedy actions, and discusses the extent to which trade remedy policy reflects a consistent application of the Government's policy objectives, particularly in the context of competition policy. The paper addresses the question of the impact on consumers of actions taken to protect individual industries, and whether the benefits of the remedy in terms of the position of domestic producers, exceeds the cost to consumers. The process issues are also referred to. The order of discussion is:

- A description of how trade remedies operate in New Zealand (Chapter 2);
- A discussion of the rationale for dumping and for anti-dumping actions, including their consideration in a competition policy context (Chapter 3);
- A discussion of the policy and process issues arising in any consideration of trade remedies (Chapter 4);
- A conclusion summarising a possible approach to trade remedies policy and processes. (Chapter 5).

2. NEW ZEALAND'S TRADE REMEDY REGIME

This chapter outlines the history of trade remedies in New Zealand, and summarises the procedures involved in trade remedy actions. It deals separately with anti-dumping, countervailing duties, and safeguards.

ANTI-DUMPING LAW AND PRACTICE IN NEW ZEALAND

History

New Zealand was one of the first countries to adopt anti-dumping legislation. In 1905 domestic and British manufacturers of agricultural implements complained about the efforts of an American harvester trust to monopolise the New Zealand market by systematic price-cutting to New Zealand purchasers. As a result, the Agricultural Implement Manufacture, Importation and Sale Act was passed, which made provision for a special duty to be applied to the unfairly traded imports. This Act continued in effect until 1915.

The first full anti-dumping legislation appeared as section 11 of the Customs Amendment Act of 1921. This Act gave the Minister of Customs the power to impose anti-dumping duties, with only a limited requirement to carry out any sort of injury test.

This law remained in force until 1965, when the Customs Amendment Act 1965 broadened the scope of the "prejudice or injury" requirement. The Customs Amendment Act 1971 extended the number of circumstances under which duties could be applied.

In 1983 a review of the legislation was carried out. By this time, New Zealand was a signatory to the GATT Subsidies Code, but not to the GATT Anti-Dumping Code, and the revised law, which became Part VA of the Customs Act, was more closely aligned to the Codes.

The economic reforms initiated in New Zealand in 1984 saw the progressive removal of import licensing by 1992 and the phased reduction of tariffs. In 1986 the decision was made to join the GATT Anti-Dumping Code, and a full review of New Zealand's trade remedy legislation was carried out. The result was anti-dumping legislation which conformed fully with the Code.

In 1988 the responsibility for the administration of the legislation was transferred from the Customs Department to the newly-established Ministry of Commerce, and the legislation was enacted as the separate Dumping and Countervailing Duties Act 1988.

In 1990, anti-dumping action was removed from trans-Tasman trade, on the grounds that with the removal of restrictions on trade in goods, and with the application of competition law to relevant anti-competitive conduct, commerce between the two countries had taken on more of the characteristics of domestic trade, and anti-dumping measures would be inappropriate. Up to that point, most of the anti-dumping actions taken against Australia or New Zealand had been initiated by the other country.

In 1994, the Dumping and Countervailing Duties Act was further amended to take into account the WTO Agreement on Implementation of Article VI of GATT 1994 (the AD Agreement).

Anti-dumping Actions

Since 1982, New Zealand has initiated 76 anti-dumping investigations, calculated on the basis of one country by one product. The following tables provide information on these investigations.

Anti-dumping Investigations by New Zealand 1982-98
Number of Investigations

June Years	Initiated	Terminated*	Duties/ Undertakings	Carried Over
1982	1	-	1	-
1983	-	-	-	-
1984	-	-	-	-
1985	2	1	-	1
1986	1	-	1	1
1987	9	6	3	1
1988	6	-	3	4
1989	6	3	6	1
1990	1	-	2	-
1991	6	-	-	6
1992	14	5	7	8
1993	4	2	10	-
1994	2	2	-	-
1995	9	3	1	5
1996	9	7	4	3
1997	1	1	3	0
1998 (to January)	5			5
Total	76	30	41	5

* "Terminated" means that the investigation did not proceed to a final determination, generally on the grounds that the investigation failed to establish either or both of dumping and injury.

The figures also indicate that over the period since 1982, around 40 percent of investigations were terminated without a remedy being provided. Of the 56 investigations initiated since the Ministry of Commerce took over administration of the legislation, 22 have been terminated. The reasons for these terminations include findings of no injury in fourteen cases, no dumping in five cases, negligible imports in two cases, and no like product in one case.

In the period up to 1990, investigations involving Australian goods dominated, with 10 of the 26 investigations initiated, and six of the ten anti-dumping duties imposed. Increased activity involving Asian countries in recent years reflects the increasing share of New Zealand's import trade held by these countries, which in turn is indicative of the removal of

import licensing and the lowering of tariff protection, as well as the shift in world production and trade patterns.

Anti-dumping Investigations by New Zealand 1982-98
Number of Investigations by Country, June years

Country	Initiated	Terminated	Duties/ Undertakings
Australia	10	4	6
Canada	1	1	-
China	7	2	3
EU	13	4	8
Hong Kong	2	2	-
India	1	1	-
Indonesia	7	4	2
Japan	3	3	-
Korea	8	3	5
Malaysia	2	-	2
Pakistan	1	1	-
Papua New Guinea	1	1	-
Philippines	2	1	1
Singapore	1	-	1
South Africa	2	-	2
Taiwan	5	1	4
Thailand	9	2	6
USA	1	-	1
Total	76	30	41

* Investigations in progress (January 1998): China - 2, EU (Greece) - 1, Thailand - 1, Indonesia - 1.

As at 31 December 1997, anti-dumping duties applied in 27 cases to:

Hog Bristle Paint Brushes from China.
Refined Sugar from Belgium, Denmark, Germany, Malaysia, the Netherlands and Thailand.
Plasterboard from Thailand (three products).
Lead Acid Batteries from Indonesia, Korea, Malaysia, Singapore and Taiwan.
Certain Non-Leather Women's Footwear from China.
Certain Men's Footwear from China, Indonesia and Thailand.
Automotive Oil Filters from the USA.
Sweetened Condensed Milk from Thailand.
Abrasive Discs and Wheels from Korea and Taiwan.
G-Clamps from the United Kingdom.
Canned peaches from South Africa
Canned apricots from South Africa

Anti-dumping Practice in New Zealand

The Dumping and Countervailing Duties Act 1988 (the Act) is administered by the Trade Remedies Group of the Ministry of Commerce. The powers and responsibilities of the Secretary of Commerce, as set out in the Act, have been delegated to the Manager of the Trade Remedies Group.

Applications

An anti-dumping investigation is based on an application lodged with the Trade Remedies Group. The application must include the information required by section 10(2) of the Act, which reflects the provisions of Article 5.2 of the AD Agreement. This information includes details of the New Zealand industry, information on imports of the allegedly dumped goods and the exporters and importers involved, price information on normal values and export prices, and the injurious effects of the allegedly dumped goods.

When an application is received by the Trade Remedies Group it is immediately checked to ensure it is a properly documented application. The industry is advised within 5 days of the Ministry's receipt of the application whether it does meet these requirements, and the government of the exporting country is notified.

The evidence in the application is checked to establish if there is sufficient evidence to justify initiation of an investigation, and also to determine the standing of the applicant. This requires that the Trade Remedies Group be satisfied that the application is made by or on behalf of the industry, and has the level of support required, as set out in section 10(3) of the Act, which reflects Article 5.4 of the AD Agreement. During this checking the applicant may be asked to clarify the information provided, and the Trade Remedies Group may also take into account other information available to it in order to check the accuracy and adequacy of the information provided.

If the Trade Remedies Group is satisfied that there is sufficient evidence to initiate an investigation, the decision is notified in the *New Zealand Gazette*, and to the applicant industry, as well as to the representative of the country of export and to known exporters and importers.

Investigations

The full investigation involves thorough checking of the evidence in the application document, and extensive gathering of industry and trade data to establish whether dumping is causing injury. The investigation of both dumping and injury is carried out by the Trade Remedies Group.

Investigations are carried out through **questionnaires** to exporters, importers and the domestic industry, supported by on-site **verification visits** to check the information provided. Verification Reports are provided to the parties visited, as required by Article 6.7 of the AD Agreement.

Information that is considered to be **confidential** will not be released to other parties, but otherwise the Trade Remedies Group places all information on a Public File, including non-confidential summaries of confidential information.

If information requested is not received or not received in a timely fashion or to the extent required, then the Trade Remedies Group can rely on the **facts available**, subject to the provisions of Article 6.8 and Annex II of the AD Agreement. Information considered unreliable can be disregarded.

The Minister of Commerce must make a **final determination** within 180 days of the initiation of an investigation. **Disclosure of the essential facts** and conclusions likely to form the basis for the final determination must be made within 150 days of initiation.

An investigation must be **terminated** where there is insufficient evidence of dumping or injury, or where the domestic industry has withdrawn its application, or the application no longer has the required degree of support from the domestic industry. Evidence of dumping is insufficient if the margin of dumping is less than 2 percent, or where the volume of imports of dumped goods is negligible, having regard to New Zealand's obligations under the AD Agreement.

Dumping

Dumping means the situation where the export price of goods imported into New Zealand is less than the normal value of the goods in the country of export.

The investigation of **dumping** requires the establishment of export prices and normal values, and the evaluation of any adjustments required to ensure a fair comparison between the two.

Normally, the Trade Remedies Group bases its investigation of dumping on actual imports over the most recent twelve month period for which information is available, and which can be related to information on injury to the industry. Actual data is used where it is made available.

Where possible, the dumping investigation is based on a **transaction-to-transaction** comparison of transactions made at the same time. Where there are large numbers of exporters, a **sampling** process is used, normally by using a list in descending order of exporters responsible for up to 60 percent of exports.

Export prices are calculated by adjusting transaction prices to the ex-factory equivalent to take account of costs, charges and expenses which are additional to those generally incurred on sales in the domestic market, and for any costs, charges and expenses resulting from the exportation of the goods or arising after their shipment from the country of export.

Where the export transaction was not at arm's length, a **constructed export price** may be established by taking the first arm's length transaction in New Zealand and deducting any duties or taxes, costs or charges arising after exportation, and an amount for profit.

Normal values are usually based on arm's length sales in the market of the exporting country by the exporter concerned. If the exporter does not sell on the domestic market then prices of other sellers are used. Where there are no relevant sales of the like goods on the domestic market, or where the situation in the relevant market is such that any sales are not suitable for use in determining normal values, then a constructed value or a third country price can be used.

Constructed values include the cost of production, plus reasonable amounts for administrative and selling costs and other charges, and an amount for profit, having regard to the rate of profit normally realised on sales of goods of the same general category in the domestic market of the country of export.

Prices to third countries have not normally been used by New Zealand because of the difficulties involved in determining whether or not such prices are also dumped, i.e. to do so effectively requires the construction of a value.

New Zealand has removed from its legislation specific provisions relating to establishing normal values in **non-market economies**. In the light of developments in recent years, it was considered that it would be difficult to meet the conditions referred to in the Interpretative Note 2 to paragraph 1 of Article VI of GATT 1994. Accordingly, the standard provisions of the Act are used on a case-by-case basis, taking into account the extent to which prices or factor costs might not be based on market considerations, and therefore might not be suitable for use in determining normal values. In some situations, information regarding prices or cost elements in surrogate countries might still be used where exports from a non-market economy are being investigated, but it is expected that such situations will be the exception rather than the rule.

In order to ensure that there is a **fair comparison** between export prices and normal values, they are compared at the same level of trade, normally at the ex-factory level, in respect of sales made at as nearly as possible the same time, with due allowances made as appropriate for any differences in terms and conditions of sales, levels of trade, taxation, quantities, and physical characteristics, and for any other differences that affect price comparability.

In considering differences in indirect expenses, such as some advertising costs, the Trade Remedies Group does not normally make adjustments, since it considers that such expenses are incurred irrespective of whether a particular sale or group of sales is made, and therefore any difference does not affect the price. Where adjustments can be made is in respect of promotional activities where it is clearly demonstrated that the costs involved were related to specific sales and affect the price of the transaction, since it could be considered that such costs are directly related to the price paid by the buyer, and were a factor of which the buyer was aware. Fixed expenses are generally not considered to bear a direct relationship to the sales under consideration. No adjustment for differences in profit is made.

The comparison between export prices and normal values on a transaction-to-transaction basis establishes the extent of dumping, and identifies the shipments which are dumped. The consideration of injury is consequently based on the volume and extent of dumping so determined. Non-dumped imports are not averaged with dumped imports.

Injury

Material injury must be caused by reason of the dumping of goods. Section 8 of the Act requires an examination of the volume of dumped goods, their effect on prices in the New Zealand market for like goods, and the consequent impact of the dumped goods on the relevant New Zealand industry.

The Act goes on to set out a number of factors and indices which the Trade Remedies Group shall have regard to, although noting that this is without limitation as to the matters the Trade Remedies Group may consider. These factors and indices include:

- The extent to which there has been or is likely to be a significant increase in the volume of dumped goods, either in absolute terms or relative to production or consumption;
- The extent to which the prices of dumped goods represent significant price undercutting in relation to prices in New Zealand;

- The extent to which the effect of the dumped goods is or is likely significantly to depress prices for like goods of New Zealand producers or significantly to prevent price increases for those goods that otherwise would have occurred;

- The economic impact of the dumped goods on the industry, including actual or potential decline in output, sales, market share, profits, productivity, return on investments, and utilisation of production capacity; the margin of dumping; factors affecting domestic prices; and actual and potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

In addition, the Trade Remedies Group must have regard to factors other than dumping which may be injuring the industry, since injury caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-dumped imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology, the export performance and productivity of the domestic industry, and the nature and extent of importations of the dumped goods by New Zealand producers.

An investigation could establish that there may be both volume and price effects, but an analysis of the consequent impact on the industry could lead to the conclusion that the industry is not suffering material injury, particularly if important indices of that impact, such as output, sales, and profits, are not showing any actual decline. A determination of whether or not there is material injury caused by dumping is based on consideration of all of the factors involved, including an evaluation of the industry's position but for the dumping, and an assessment of the extent to which the totality of the evidence leads to the conclusion that a domestic industry is being materially injured by the dumped goods. The existence of a decline in one or several of the injury factors or indices does not require a determination that material injury is being caused by the dumped imports, if the totality of the evidence does not support such a conclusion.

It is important to note that each investigation must be approached on the basis of the facts pertaining to that particular case. An approach which may be relevant in one case will not necessarily be appropriate in another case.

Consideration of **volume effects** is limited to imports found to be dumped, and is based on the extent to which dumped imports have increased, in both absolute and relative terms.

In considering **price undercutting**, the Ministry will normally seek to compare prices at the ex factory and importer's store levels, to ensure that differences in distribution costs and margins do not confuse the impact of dumping. Accordingly, the Ministry's position is generally to compare importers' prices, including relevant selling and administration costs, which involve similar cost elements to those in the New Zealand manufacturer's ex-factory price, but not including cost elements relating to the distribution of goods.

Price depression exists when the industry's prices are lower than the level of the previous period. **Price suppression** occurs when dumping prevents price increases that would otherwise take place. The Trade Remedies Group has generally based its assessment of price suppression on positive evidence, in particular the extent to which cost increases have not been recovered in prices. Cost increases not recovered in prices will be reflected in declines in gross profit expressed as a percentage of sales. Where cost savings have been made, the lack of any price increase will not normally be regarded as price suppression.

While the inability to recover costincreases is the main indicator of price suppression, the Trade Remedies Group will consider any other factors raised as positive evidence of price suppression.

The main injury factors for assessing **economic impact** include declines in output and sales, market share and profits, but the other factors identified in the Act and in the AD Agreement are also taken into account.

Injury is assessed on the basis of the impact of dumped goods on the domestic industry. The source of the dumped goods will not necessarily affect this impact. Accordingly, the injurious effect of dumped goods from a variety of suppliers in a variety of countries can be considered **cumulatively**. The Trade Remedies Group carries out this consideration in accordance with Article 3.3 of the AD Agreement, and on the basis of the injury effects identified above, i.e. volume and price effects and the consequent economic impact.

The Trade Remedies Group considers **threat of injury** on the basis set out in Article 3.7 of the AD Agreement, which requires consideration of factors such as the rate of increase of dumped goods, the capacity of the exporter to increase dumped exports, the prices of imports, and inventories of the product being investigated. The change in circumstances which would create a situation in which dumping would cause injury must be clearly foreseen and imminent.

Actions

If there is reasonable evidence of injury from dumping, **provisional measures** can be imposed by the Minister after 60 days from the date an investigation was started. Provisional measures will be applied only if they are necessary to prevent further injury from occurring during the remaining period of the investigation.

Anti-dumping duties may not exceed the margin of dumping, and are applied as *ad valorem* rates, specific amounts, or under a price mechanism which sets a price level below which anti-dumping duties are payable. New Zealand also operates a **lesser duty** rule, by which the Minister is required to have regard to the desirability of ensuring that the amount of anti-dumping duty is not greater than is necessary to remedy the material injury. Anti-dumping duties will normally be set for each exporter concerned, although in some cases the duty may be applicable to the supplying country as a whole.

Undertakings may be entered into by which the exporter agrees to so conduct future export trade to New Zealand to avoid causing or threatening material injury. If an undertaking is accepted, the investigation of the extent of injury may be completed, while amendments to undertakings because of altered circumstances can be accepted.

In certain circumstances, as set out in Article 10 of the AD Agreement, **retrospective measures** can be applied.

There is provision in the New Zealand legislation for **third country dumping** actions to be taken, subject to the conditions set out in Article 14 of the AD Agreement.

Where an anti-dumping duty on a product is in place, that duty can be applied to all imports of the goods in question from the country or countries investigated. Where there may be efforts to **circumvent** the purpose of the duty through changes in the product or in the supplying country, the anti-dumping duties may be applied only if the product remains

a like product to the original product and if there is no change of origin of the supplying country. In all other cases a new investigation would be required.

Reviews and Reassessments

Anti-dumping duties cease to be payable after five years from the date of the final determination, unless the goods are subject to a review.

A **review** may be initiated on the initiative of the Trade Remedies Group or on request from an interested party. In accordance with Article 11.2 of the AD Agreement, the purpose of a review is to determine whether the injury would be likely to recur if the duty were removed or varied.

A **reassessment** of the duty may be carried out on the initiative of the Trade Remedies Group or on request, or following the completion of a review, and the Minister may determine a new rate or amount of duty. Where a reassessment results in a lower duty being imposed a refund can be made. A reassessment permits the adjustment of duties in order to ensure that they do not exceed the margin of dumping, and also permits separate duties to be established for new exporters or exporters not investigated.

Parties to an investigation can seek **judicial review** of decisions made by the Minister and by the Trade Remedies Group, through application to the High Court.

COUNTERVAILING DUTY LAW AND PRACTICE IN NEW ZEALAND

History

New Zealand's countervailing duty law has generally followed the same track as anti-dumping law, and the Dumping and Countervailing Duties Act 1988 and its predecessors applied to subsidised goods. There are some differences, for example, countervailing duty action can still be taken on trans-Tasman trade. It is also noteworthy that New Zealand joined the GATT Subsidies Code several years before joining the Anti-Dumping Code, reflecting its concerns over subsidisation *per se* rather than with the response of countervailing duties.

In 1994, the Dumping and Countervailing Duties Act was further amended to take into account the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

Countervailing Duty Actions

New Zealand has conducted few countervailing duty investigations, as shown by the table below. This reflects international experience, since apart from the United States few other countries have any significant number of countervailing duties in force. During the period 1982-1998 six actions have been taken, one involving acceptance of an undertaking.

Countervailing Duty Investigations by New Zealand 1982-98
Number of Investigations

June Years	Initiated	Terminated	Duties/ Undertakings	Carried Over

1982	-	-	-	-
1983	-	-	-	-
1984	-	-	-	-
1985	1	1	-	-
1986	-	-	-	-
1987	1	1	-	-
1988	4	-	1	3
1989	-	3	-	-
1990	-	-	-	-
1991	1	-	1	-
1992	-	-	-	-
1993	-	-	-	-
1994	-	-	-	-
1995	1	-	-	1
1996	2	1	-	2
1997	2	1	3	-
1998 (January)	1	-	1	-
Total	13	7	6	-

The goods involved in investigations have been limited to transport equipment and foodstuffs. In two cases involving tugs and catamarans, the action related to the purchase of a piece of capital equipment.

The table below shows that Australia and EU countries have been the main targets of investigations.

Countervailing Duty Investigations by New Zealand, 1982-98

	Initiated	Terminated	Duties/ Undertakings	Carried Over
Australia	4	2	2	-
Canada	1	1	-	-
EU	5	3	2	-
South Africa	2	-	2	-
Thailand	1	1	-	-
Total	13	7	6	-

As at 31 December 1997, countervailing duties applied to canned spaghetti from Italy, canned peaches from the EU, while there is an undertaking on alloy wheels from Australia.

Countervailing Duty Practice in New Zealand

The provisions of the Dumping and Countervailing Duties Act relating to processes and injury apply equally to dumping and subsidy investigations, with some additional

notification and consultation requirements in subsidy cases, as required by Article 13 of the WTO SCM Agreement.

Definitions

The 1994 amendments to the Act introduced a number of new or revised definitions relating to subsidies. These included definitions of "**foreign government**", which includes sub-national authorities as well as bodies exercising authority for an association of foreign countries; and "**specific subsidy**", which reflects the definition found in Article 2 of the SCM Agreement.

Subsidies

The determination of whether there is a subsidy and the **amount of the subsidy** is made on the basis of the SCM Agreement and section 7 of the Act. Information is required on the existence, amount and nature of the subsidy. This information permits the Ministry to identify the subsidy programme concerned, to determine if there is a **financial contribution by a government**, and to gauge the extent to which it **provides a benefit** to the exported product.

In investigating subsidies, information is sought from the government concerned as well as from exporters.

Actions

Countervailing duties may not exceed the amount of subsidy on the goods, and as in the case of dumping a **lesser duty** rule applies, the Minister is required to have regard to the desirability of ensuring that the amount of countervailing duty is not greater than is necessary to remedy the material injury.

In applying a countervailing duty, the Minister must ensure that the products concerned are not subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation (Article VI:4 of GATT 1994). The New Zealand Court of Appeal has interpreted this to mean that no anti-dumping duty can be applied to deal with a situation of export subsidisation, which means that the price differentiation impact of an export subsidy must not be attributed to dumping when considering injury in a dumping case, and vice versa.

The SCM Agreement sets out the conditions under which certain subsidies are **non-actionable**. In addition to non-specific subsidies, certain subsidies relating to regional development, research and development and adaptation to environmental regulations, are non-actionable when the conditions laid down in the SCM Agreement are met. The Act does not reiterate these conditions, but section 14(3) provides that no countervailing duty may be imposed if to do so would be inconsistent with New Zealand's obligations as a party to the WTO Agreement. This provision would also apply in cases where certain agricultural subsidies are non-actionable under the WTO Agreement on Agriculture.

Provisions for **termination** are similar to those for anti-dumping, but with the addition of the requirement in section 11(1)(c) that there should be termination where the imposition of a countervailing duty would be inconsistent with New Zealand's obligations as a party to the WTO Agreement, and the requirements of section 11(2)(c) relating to negligible imports. This covers the situation where termination is required under the Agreement if the amount

of subsidy is less than one percent of the value of the goods, or less than two percent for goods from developing countries, or less than three percent for goods from least-developed countries.

SAFEGUARD LAW AND PRACTICE IN NEW ZEALAND

History

Prior to the passage of the Temporary Safeguard Authorities Act in 1987, safeguard action was taken under the Industries Development Commission Act 1961, and more specifically, by the Emergency Protection Authority (EPA), established under that Act.

If a domestic industry considered that it was suffering damage from an increase in imports it could put a case for the restriction or other restraint on imports to the EPA. If the EPA decided that emergency action was appropriate, there was an automatic reference to the Industries Development Commission (IDC), which would then make recommendations on appropriate longer term industry assistance measures.

In light of the completion of industry-specific development plans, the removal of import licensing and the reduction of normal tariff levels, which largely removed the role of the IDC, it was not considered necessary to maintain it. The Temporary Safeguard Authorities established under the Temporary Safeguard Authorities Act were intended in many respects to operate in much the same way as the EPA, but with additional definitions of industry, like goods, and injury, which were closely aligned with the GATT Anti-Dumping Code. In addition, if the Minister decided to take action as a result of TSA recommendations, this decision would be final and would not be referred to the IDC after 12 months.

Following the negotiation of an Agreement on Safeguards (SG Agreement) in the Uruguay Round, it became necessary to amend the Temporary Safeguard Authorities Act to reflect the obligations of the new Agreement. In particular, it was necessary to reflect the SG Agreement requirements for “serious injury” and to permit safeguard action on behalf of industries producing “like or directly competitive goods”. Also, the Act was amended to ensure that the SG Agreement requirements regarding the duration and conditions of any safeguard action were met.

It should be noted that, unlike anti-dumping and countervailing duties which are imposed on individual exporters or countries, safeguard action can normally be taken only on an MFN basis, and deals with the consequences of increased imports, not their cause.

Safeguard Actions

Since the passage of the Temporary Safeguard Authorities Act in 1987, only four applications for such action have been referred to a TSA. Two other applications, one for safeguard action under SPARTECA, were declined or withdrawn. The inquiries undertaken by a TSA have included footwear, in 1989, when the TSA recommended a range of actions but the Minister’s decision was that the issues should be dealt with in the context of the general review of industry assistance for the footwear industry; men’s and boys’ underpants, in 1992, when the Authority’s recommendation for a temporary duty was accepted; and used tyres, in 1993 and abrasive discs in 1995, when the Authority’s recommendations that no action be taken were also accepted.

Safeguard Practice in New Zealand

The Temporary Safeguard Authorities Act 1987 (TSA Act) provides for the appointment of Temporary Safeguard Authorities to inquire into references made to an Authority by the Minister of Commerce.

The Minister may request an Authority to undertake an **inquiry** in relation to the importation of goods when it appears to the Minister that the importation of goods has caused or may cause serious injury to an industry. An Authority is required to **report** on whether the industry has suffered or is likely to suffer serious injury as a result of the importation of the goods, and if so, whether urgent action is necessary to protect the industry and the nature of the protection considered appropriate. The request to the Authority, and any statement of Government policy transmitted to the Authority, are required to be published in the *New Zealand Gazette.*

The TSA Act defines **serious injury** as "... significant overall impairment to the economic viability of a domestic industry". An **industry** is defined in terms of New Zealand producers of **like or directly competitive goods**, with "directly competitive goods" being "... goods that, as a matter of fact and commercial common sense, are substitutable for imported goods".

In carrying out its inquiry, an Authority is required to call for submissions from interested parties. Provisions regarding the confidentiality of information are similar to those in the Dumping and Countervailing Duties Act. An Authority has 30 working days in which to report to the Minister.

In determining whether an industry is being injured, an Authority is required to evaluate the rate and amount of **increase in imports** in terms of both volume and value, in absolute and relative terms; the **economic impact** of the increased importation including actual or potential declines in output, sales, market share, profits, productivity, employment and utilisation of production capacity; **factors other than imports** which may be injuring the industry; and the nature and extent of imports by New Zealand producers.

An Authority may report to the Minister that **urgent action** is required only if it is satisfied that the imports are causing or threatening serious injury; that serious injury is not attributable to other causes; and that it is not practicable for the industry to reduce the injury by other adjustment measures.

An Authority may recommend **safeguard measures** if such measures are compatible with New Zealand's obligations as a party to the WTO Agreement, including the imposition or variation of any duty, the restriction of imports, or any other action considered appropriate. The reference to WTO obligations is intended to cover the SG Agreement's provisions relating to the duration and conditions for safeguard action, including general application, degressivity and limitations on repeat action.

Following receipt of a recommendation from an Authority, it is up to the Minister of Commerce to determine what action, if any, shall be taken, i.e. an Authority's recommendations are not binding. Where the Minister does decide to take action, then it is implemented through the appropriate instrument, which in the case of a change in the rate or amount of a duty, will be through an Order in Council under section 9 of the Tariff Act 1988. Thus, a safeguard measure is currently not a temporary supplementary measure, unlike anti-dumping or countervailing duties, but is a change in the substantive level of

protection. This would appear to be inconsistent with the view that a safeguard measure is a temporary and emergency action.

3. ANTI-DUMPING

There are two broad schools of thought relating to trade remedies such as anti-dumping. One is that such laws are aimed at intervening on behalf of efficient domestic manufacturers facing competition from imports that are artificially underpriced, usually as a result of "foreign subsidies or other subterfuges".[1] The contrasting view is that anti-dumping laws are inherently protectionist in both their procedural and substantive effect.

Anti-dumping is subject to strong criticism, particularly when it is contrasted with the objective of market contestability and the operation of competition laws.

> Anti-dumping laws are one of the most egregious exceptions in international trade law to this [*national treatment*] principle, in that they clearly subject foreign producers to much more burdensome pricing constraints than those to which domestic producers are subjected under domestic laws, including competition laws. ... While reforms of countervailing and safeguards regimes are not directly amenable to competition law solutions, the most widely invoked trade remedy - dumping - is.[2]

> [M]aking antidumping more sensitive to competition concerns is something that is in the interest of any administering country. The problem is one of political economy, in that the power of the lobbies supporting a narrow injury-to-industry focus outweighs that of those who bear the burden of this.[3]

> [Anti-dumping] is fundamentally flawed from an economic perspective and cannot be fixed by a tinkering with the methodological arcana of investigations.[4]

> The traditional economic rationale for anti-dumping measures has been the threat of international predation. A pragmatic analysis of the situation led to a somewhat different assessment. With the great increase in transnational commerce, domestic economic policies, laws, and business practices have gained an important extra-territorial impact. In the absence of any international agreement as to which domestic policies and business practices constitute restrictions of trade, anti-dumping laws have evolved as strategic tools to counteract the effects of domestic structural differences and other non-tariff barriers between commercial partners. While anti-dumping actions may, indeed, protect statehood, in practice, anti-dumping laws effectively stop the entry of many otherwise reasonably priced imports from exporters incapable of predation.[5]

Nevertheless, the reasons for maintaining anti-dumping have been put forward, and it remains a fact that an increasing number of countries are introducing and using anti-dumping laws. This chapter provides an analysis of dumping and discusses some of the arguments

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1 Nivola (1993), p.30.

2 Trebilcock (1996)

3 Hoekman and Mavroidis (1996)

4 Hoekman and Kostecki (1995)

5 Marceau (1994), p. 1.

which have been advanced in favour of anti-dumping. It then considers anti-dumping in a competition policy context.

DUMPING

Dumping has been recognised as an economic issue for some time. An early and useful example of detailed analysis is provided by Viner[6]. He sought to understand the origins and impacts of dumping by considering the motive of the dumping firm, the duration of the dumping, and the ability of the domestic industry to adjust to the dumped goods. All of the forms of dumping described by Viner are generally forms of price discrimination.[7] Assuming that the Government of the importing country cannot control the competitiveness in the originating market, or the degree of isolation of the two markets, all it can do in response to dumping is to apply border measures. These influence upwards the price at which the imports cross the border into the local market. The question is, should the Government do this?

Viner points out that "To the importing country cheapness of imports is an advantage". This is the standard economic conclusion that a nation's welfare improves when the price of its imports falls relative to that of its exports. The gains to consumers offset the costs to producers of similar goods. This would suggest that the Government should not act against international supply shocks if they stem from cheap imports. However, Viner goes on to say that this advantage occurs "... unless the cheapness is so temporary that it results in greater injury to domestic industry than benefit to consumers". Viner sees this as likely, and thus as the prime justification for acting against dumping[8]. Viner's proposition implies that the interests of consumers should be taken into account in considering action against dumping, but they should be balanced with the interests of producers.

Why, if the cheapness of imports is only temporary, does it result in such injury to local producers? Substantial injury from temporary dumping suggests that the domestic industry may have problems arising from other sources (in which case acting against dumping may be unjustified). Viner insisted that there should be a "presumption, if not absolute proof that the foreign competition really is abnormal... [and that] an industry's claims to special protection against abnormal foreign competition should be discounted to the extent that it already enjoys protection".

If dumping is causing injury because it is not temporary, it may well be that the cheapness of the imports stems from a genuine competitive advantage (in which case it is "normal trade"),

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[6] Viner (1926)

[7] Technically, all require that the market of origin and the destination market be isolated from one another sufficiently to prevent re-export and thus price equalisation. They also require that the market of origin has a lower price elasticity of demand than the destination market (which implies that the former is not perfectly competitive).

[8] Note that Viner also believed that, "It is not a matter of importance, however, whether dumping in general or any particular species of dumping should be classified with unfair competition or not. What is important with respect to dumping is its economic effect, which is not greatly dependent upon what happens to be its motive."

or that it is part of a predatory strategy. In Viner's framework, only predatory pricing[9] would give rise to Government intervention under competition policy if it was domestic in origin.

A more recent categorisation of dumping has been developed by Willig[10], based on the intent of the exporter, its market power, and the structure of the importing market. Willig considers both predatory dumping and strategic dumping to be detrimental so as to justify a response. Strategic dumping is used to describe injurious exports through an overall strategy of the exporting nation combining pricing of exports and restraints which close the exporting country's market. The success of such a strategy depends on this market being of a significant size relative to scale economies to provide a significant cost advantage over rivals.

It must be recognised, however, that the scope for strategic dumping is limited to certain countries or groups of countries, and to certain industries, and is unlikely to be of concern to New Zealand. Similarly, the actual incidence of predatory dumping in international trade is likely to be very small, just as successful prosecution of predatory pricing in domestic jurisdictions is not high. On this basis, therefore, there would appear to be few, if any, economic grounds for taking anti-dumping action, but there remain some doubts as to whether the theoretical position applies in all cases:

> The basic theoretical criticism of anti-dumping holds that, unless dumping has its origins in an anti-competitive practice and/or market structure in the exporting market, it is welfare enhancing, or at worst, welfare neutral, and should be unremedied. ... The fundamental question that arises when the two modes of analysis [*anti-dumping and competition*] are compared, and when it is argued that one is intrinsically superior or inferior to the other, is that of resource allocation. In particular, can it be definitively demonstrated that price discrimination (other than in the narrow case of predation) always is preferable from a resource allocation point of view to the imposition of an anti-dumping duty?. Put another way, does imposing an anti-dumping duty (other than in the case of predation) always misallocate resources, thereby harming economic welfare? ... In particular, in a small, open economy where the domestic price is equivalent to the world price, if dumped imports reduce prices in the importing market below world price, it can be argued that the dumping may cause a misallocation of resources. Under these circumstances, the imposition of anti-dumping duties, if set at the correct level, would be welfare maximizing.[11]

The assumption of the theoretical arguments against anti-dumping is that the imposition of duties will raise the price to consumers in the importing market by the amount of the anti-dumping duty. However, this may not always be the case, and while there is not a lot of research available on the actual impact of anti-dumping duties, one study[12] indicates that prices did not increase as a result of the imposition of anti-dumping duties. One of the possible reasons for this is that the imposition of anti-dumping duty on only part of total imports does not render the entire market non-contestable, which would be required if the

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9 Viner's "market development pricing" might be indistinguishable, in the medium term, from predatory pricing under certain market conditions, in which case it would also be actionable domestically.

10 Willig (1992). There is more discussion of Willig's categorisation later in this Chapter.

11 Morgan (1996).

12 Cullen (1995).

full amount of anti-dumping duty was to be reflected in price increases.[13] Another issue, identified by Miranda[14] is "whether one can conclude that the low prices that result from dumping invariably represent a market outcome. And this is assuming that every market outcome is socially desirable".

ARGUMENTS FOR ANTI-DUMPING

The conclusion by economists is that in the absence of predatory pricing, there is generally no justification for taking anti-dumping action. Clearly, given the widespread use of anti-dumping, this view is not shared by governments around the world. In any event, as suggested above, predation is rarely the reason for anti-dumping action being taken.

> Notwithstanding the fact that it is difficult to identify domestic predation and even more difficult to try to capture international predation, the main point is that anti-dumping laws have nothing to do with predation. Tests used to identify foreign dumping do not follow economists' argument that the main purpose of anti-dumping laws should be to deter international price discrimination and predation. Anti-dumping laws have taken from economics only the potential reference to threats of predation and, unfortunately, the use of the term "dumping" for business practices which often have nothing to do with economic dumping.[15]

This part of this chapter sets out and comments on the arguments frequently advanced in support of the anti-dumping regimes operated by the major trading countries. The applicability of a competition policy approach is discussed later in the chapter.

The question of "fairness" goes to the heart of much of the justification of anti-dumping. Arguments made in support of anti-dumping laws include the following:

- Dumping distorts comparative advantage;
- Dumping is only made possible by market isolation of the exporting country;
- Anti-dumping action ensures the maintenance of "fair" competition;
- Consumers are also producers, and it is in their long term interests to secure the viability of production in the importing country;
- The existence of anti-dumping laws against "unfairly traded" imports supports the maintenance of free trade regimes.

In addition, rationales relating to distributive justice and communitarian values have been identified as justifying anti-dumping action.[16]

Comparative Advantage

The argument regarding comparative advantage is that the dumping of goods creates an artificial rather than a true comparative advantage, since the lower export price does not

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[13] Morgan (1996).

[14] Miranda (1996)

[15] Marceau (1994), p. 26.

[16] Trebilcock (1996), pp 76-77.

result from cost-efficiency. The result is the distortion of the market signals to producers in the importing country, because the prices suggest that adequate returns will not be achieved for the dumped product. The consequence is that countries with a real comparative advantage will lose the capacity and capability to produce such products.

> Left unchecked, the "false signals" which occur in cases of price discrimination or sales below cost can have a "snowball" effect on other producers' decisions, creating a veritable avalanche of inefficiency in the market. If selling below cost is allowed to continue, other competitors (and potential competitors) will make business decisions based on this initial false market signal. They will fail to enter a product market, fail to expand capacity, fail to improve productivity, and fail to use all other resources efficiently, based on the other company's ability to price below cost. There can be, and often are, multiple levels of economic inefficiency caused by these false signals. And although competitive pricing (and efficient resource allocation) may return at a later date, this only occurs after substantial loss in total economic growth, as companies in the competing industry and other affected downstream businesses disinvest and then reinvest more efficiently.[17]

There are however a number of problems with this argument. First, it may be that the lower export price does result from cost-efficiency (dumping may result from price discrimination with both export and domestic prices well above cost of production). Secondly, if dumping is long term, it is *true* that adequate returns cannot be achieved, i.e. it is not a distorted suggestion. More generally, it should be noted that the theory of comparative advantage does not argue in terms of true or fair competition, but in terms of aggregate welfare. It suggests that dumping may result in reduced welfare, but that the burden will generally be borne by the exporting not the importing country.

Nevertheless, there remains the argument indicated above by Morgan, that where prices in an import market have been reduced below world prices, and where purchasers in that market are price takers, the prevailing price signals in the market will be distorted so as to stimulate overproduction of the exportable goods and underproduction of importable goods. Anti-dumping duties would restore relative pricing to prevailing world market conditions, restoring efficient resource allocation. One difficulty with this argument is that it is by no means clear that it is appropriate to talk of "world prices" outside a limited range of commodities.

Market Isolation

The argument is that dumping is caused by the isolation of the exporting country's market through high protective barriers or lack of competition in the market of the exporting country. This permits high prices to be charged in that market, which cross-subsidise low prices in the market of the importing country.

While high protective walls or the existence of monopolies might explain why dumping can occur, neither Article VI of the GATT nor the AD Agreement specify market isolation as a basis for permitting the imposition of anti-dumping duties. If it was provided for, it could be expected that the situation in the exporting country would be a principal target of the investigating authorities, in that they would seek to determine the extent of protection or the extent of competition in the exporting country. It could also be observed that if this claim was seriously presented, then there would be no justification for anti-dumping measures to be taken against countries such as Hong Kong and Singapore, which operate free trade regimes.

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[17] Stewart (1996)

While it has been argued that the existence of anti-dumping regimes can act as a continuing pressure on protectionist countries to address their own measures at the border, and the state of competition within their borders, there is no economic argument for responding to protective barriers in another country by erecting barriers to imports from that country.

However, to the extent that market isolation indicates the existence of a distorting element which could explain price discrimination, it could be taken as a useful indicator of a situation where dumping may need to be addressed. Put another way, the absence of market isolation could indicate a situation where there would be no justification for anti-dumping measures.

The Maintenance of Fair Competition

It is sometimes argued that anti-dumping protects free and fair competition. In this context, protecting free competition should lead to similar outcomes as competition law.

The concept of fair competition is related to the idea that competition is enhanced by dumping only if it is non-injurious and results in an extra supplier being added to the market. Thus, dumping is harmful if it undermines the productive capability of the domestic industry.

This view is illustrated by a European Community decision on magnesium oxide from China[18]:

> In assessing the Community interest, two basic elements have to be taken into account. The first is that to prevent distortions of competition arising from unfair commercial practices and thus to re-establish open and fair competition on the Community market is the purpose of anti-dumping measures and is fundamentally in the general Community interest . . .
>
> In addition, in general, while there might be a short term price advantage to end users if no duty is imposed, to refrain from establishing fair competition on the Community market would, in the longer term, lead to less competition and higher prices.

There are difficulties associated with the fairness rationale for anti-dumping actions. It is commonly used, yet it is often unclear what the author means by “fair” or whether the objective is to be fair to producers or consumers. The magnesium oxide case, for example, refers to fairness both in terms of processes and outcomes.

The first argument is that unfair commercial practices distort competition. In this context, “unfair commercial practices” could have more than one meaning. It could, for example, refer to the practices of an overseas firm that is able to dump because it is protected from competition in its domestic market. The rationale for anti-dumping action using this definition of unfair commercial practices is no different from the “market isolation” rationale discussed above.

Alternatively, “unfair commercial practices” might refer to the business conduct of overseas exporters in a more general sense. If, for example, it means anti-competitive practices, then some form of government intervention can be justified, but competition policy approaches would be more appropriate.

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[18] Council Regulation (EEC) No 1473/93 of 14 June 1993, *Official Journal of the European Communities* No L 145/4 17 June 1993, pp 207-212.

Secondly, it could be argued that unfair competition leads to less competition and higher prices. In other words, there will be more competition and lower prices if there are more suppliers in a market. This argument has merit if:

- The demise of the domestic industry would lead to the market being monopolised; or
- The local industry is internationally uncompetitive but, given a little time to adjust, could become competitive.

If, however, the domestic industry can survive only because it receives protection from imports then prices are likely to be less competitive. Consumers and the economy would be better off by allowing market forces to prevail, even if that led to a reduction in the number of suppliers. In any event, in most jurisdictions the imposition of anti-dumping duties is based on injury to competitors not injury to competition, and in the absence of an appropriately elaborated public interest clause, it is unlikely that this situation will change (it being noted that the EC does have a Community interest clause which presumably can take account of the need to maintain competition).

Consumers are also producers

The claim is sometimes made that the focus of anti-dumping on primary line injury is appropriate because consumers are also producers, and in that role may require protection against other dumped imports.[19] This argument has no more merit than the contrary contention that the producer interest should be ignored because producers are also consumers. In reality, producer interest is a poor proxy for consumer interest. Primary line producers frequently suffer injury from dumping whereas consumers should in most cases benefit from dumping.

The interests of consumers in maintaining domestic production can best be addressed through an analysis of the net national benefit, and must also take account of the economic objectives and policies pursued by the government. Issues relating to a net national benefit test are addressed later in this paper, but it could be noted that research in the US[20] has estimated that in 1991 the net economy-wide welfare gains arising from the removal of outstanding anti-dumping and countervailing duty orders was US$1.59 billion, equivalent to 0.03 percent of US GDP.

Distributive Justice and Communitarian Values

Under this argument, the distributive impacts of low-priced imports may outweigh the gains in consumer welfare, particularly through the impact on low-skilled, low-paid workers. In relation to communitarian values, low-priced imports may have a negative impact on the welfare of industry-dependent communities, particularly through their effects on social and related networks and infrastructure on which such communities depend.

However, as Trebilcock points out[21], current anti-dumping regimes do not appear to focus significantly on these concerns, but in any event, to the extent that distributive justice and

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[19] See, for example, de Clercq, "Fair practice, not protectionism", *Financial Times*, 21 November 1988.

[20] USITC (1995)

[21] Trebilcock (1996), pp 76-77

communitarian values are of concern, it is not clear that allegedly unfair trade practices, such as the price differentiation required for dumping, have anything to do with such impacts. Rather, the concern may be with the provision of appropriate adjustment assistance, with the international trade implications being addressed through safeguard action.

Political Considerations

The other argument for maintaining an anti-dumping policy is that of political expediency, Bhagwati's prudential argument[22], which has some validity. However, it might be more appropriate to apply such an argument to temporary safeguard measures as a generic response to concerns about import competition, rather than to rely on a distinction between "fair" and "unfair" trade.

A COMPETITION APPROACH TO ANTI-DUMPING

The economic analysis of trade remedies suggests that in each instance, the key questions are situational and often come down to a balancing of interests to determine the net national benefit. Currently, New Zealand trade remedies recognise the former aspect, but neglect the latter. A wider framework which would take account of these different interests is that used for the regulation of domestic competition.

This discussion does not seek to address issues relating to an international approach to competition policy, or the question of the replacement of anti-dumping laws by competition law. The model provided by Australia and New Zealand, i.e. full free trade in goods and harmonisation of competition laws, or the EU, which goes even further in terms of economic integration, suggests that the removal of anti-dumping from the lexicon of international trade rules and its replacement by an internationally agreed approach to competition policy is not likely to be imminent.

This section discusses anti-dumping policy in the context of competition policy in New Zealand. It considers:

- The objectives of the two policies;
- A competition policy taxonomy for dumping; and
- The applicability of the elements of competition law analysis to dumping investigations.

It should be noted that use of a competition policy "net national benefit" approach essentially involves a consideration of whether low (or competitive) import prices are distorted (artificially low) or the result of sustainable, competition-enhancing profit maximising behaviour. Such consideration will differ, however, depending on whether the case at issue is one of dumping, subsidisation or safeguards.

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[22] Bhagwati (1988):

"The institutional procedures for ensuring "fair trade" through operation of CVD and AD mechanisms under a free–trade regime have a rationale in the *cosmopolitan* theory of free trade. The optimal allocation of world activity requires that no country artificially distort its comparative advantage by substantial subsidies to specific commercial activities or by permitting firms to indulge in disruptive dumping designed to destroy cheaper producers and then stick it to consumers with higher prices by more expensive suppliers. I also believe that there is a *prudential* argument for maintaining such "fair trade" processes as a complement to a free trade regime: if governments willingly ignore such artificial aids to foreign suppliers, it will certainly produce a backlash and imperil the free–trade regime itself."

The following discussion concentrates on dumping, since safeguards, by definition, deal with instances where prices are not artificially low in the sense outlined above. Competitive prices should reflect market forces and use of a "net national benefit" test and any associated remedy, provided it is WTO-consistent, would therefore seem appropriate. In dumping, prices, while being low in the sense of technically being "dumped", reflect market realities and are not "artificially low" in the sense of resulting from government intervention. Examples of artificially low prices resulting from government intervention include "market isolation" dumping[23], where dumping occurs from behind protective tariff barriers, and "mercantilist" dumping where governments promote exports with direct or indirect subsidies.

While subsidised goods may, in certain circumstances, have similar economic impacts to those of dumped products, their price stems from government action through the provision of some form of "bounty". In this connection, Viner observed, "To the importing country bounties are objectionable.....because the cheapness which results from them is not the consequence of any basic superiority in productive effectiveness, and may at any moment cease to prevail".[24] More recently, Bhagwati has noted that "optimal allocation of world activity requires that no country artificially distort its comparative advantage by substantial subsidies to specific commercial activities..."[25].

In both cases of "market isolation" and "mercantilist" dumping, trade which takes place at artificially low prices distorts resource allocation both globally and in individual importing and exporting countries. Such behaviour is potentially predatory in nature. It is also dependent on political decision and is consequently of uncertain duration. As is evident in New Zealand's domestic experience, this political uncertainty is likely to give rise to additional adjustment costs beyond those associated with normal market uncertainty. Similar issues arise with respect to subsidies other than direct export subsidies where resulting prices, while perhaps not meeting the price discrimination definition of dumping, are nevertheless artificially below those which would otherwise prevail in the market.

Safeguards, by definition, deal with instances where prices are more likely to reflect the operation of market forces and are not artificially low. Subsidies result in prices which are artificially low due to government intervention. Trade at artificially low prices distorts resource allocation, which, as explained in the preceding paragraphs, does not appear to be in the public interest. Internationally, New Zealand has maintained a strong position of opposition to subsidies. Certainly, in the case of export subsidies, which are prohibited by the SCM Agreement, New Zealand would not want to appear to be condoning their use. In addressing the impact of subsidies, therefore, a net national benefit test would not appear to be appropriate. Indeed, a strong stance taken against subsidies may reduce the likelihood of future subsidies being imposed. The following discussion, therefore, concentrates on

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[23] As discussed earlier, the existence of high protective walls is one explanation of how dumping can occur. This does not mean that use of anti-dumping measures against countries with free trade regimes invalidates the "market isolation" rationale for anti-dumping. Such use may reflect existence of other circumstances such as predatory pricing behaviour or it may reflect abuse of the anti-dumping remedy by the country imposing the measure.

[24] Viner (1926)

[25] Bhagwati (1988)

dumping, where *a priori* the situation is not clear, and careful consideration must be given to any approach which attempts to analyse and address the effects of dumping.

Objectives

The GATT 1994 and the WTO AD Agreement provide that anti-dumping duties may be applied only if the dumping is causing material injury to domestic producers of like goods. Thus it can be stated that the trigger for invoking dumping law is the primary-line damage[26] to domestic producers. It should be noted that dumping deals with trade in *goods* only.

The actual economic impact of specific anti-dumping laws depends on two factors. First, as the WTO does not *require* anti-dumping duties to be imposed simply because there is injury to domestic producers, there is scope for WTO Members to take the effects of dumping on other segments of the economy into consideration before deciding on remedies. Some countries require the effect of dumping on consumers to be considered, to some greater or lesser degree. But New Zealand[27] currently does not apply any test other than the "injury" test. The analysis under the Dumping and Countervailing Duties Act 1988 is limited to the primary-line injury.

Secondly, New Zealand law, like many others, does not precisely define "material injury". Accordingly, the extent to which anti-dumping law is protectionist in each jurisdiction is strongly influenced by the implementation practice.

New Zealand's economic policy is focused on increasing national welfare. This is achieved through the promotion of economic efficiency. The analysis in the previous chapter of the various trade remedies was based on this objective. However, the focus on primary-line injury may not be a good proxy for net national benefit since the adverse effects of dumping on primary-line producers can be outweighed by benefits to downstream producers and consumers.

New Zealand competition law has as its primary objective[28] the promotion of economic efficiency as this tends to lead to:

- Appropriate prices and, therefore, a level of output which is desired by society;
- Incentives on management to innovate or to otherwise produce output at the lowest possible cost; and
- Minimise the unproductive use of resources to secure or defend market power.

Included in this objective are both goods and services. Price and non-price effects are covered.

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[26] Injury caused to producers of goods like those imported, as opposed to producers of other goods, or consumers.

[27] Along with the great majority of other countries with dumping laws.

[28] Some countries have other objectives for their competition laws. Of these, the objective of consumer welfare maximization is the most common. There can be a conflict between the total efficiency and consumer welfare objectives if an anti-competitive merger or practice has outweighing productive efficiency gains, but in general, these two objectives are consistent.

In addition, competition laws in some countries have secondary social or political objectives, such as promoting the interests of large manufacturers, small businesses, the unemployed, or the residents of a particular region. Such objectives often result in conflict with efficiency and consumer welfare.

In the past there were inconsistencies in the treatment of secondary objectives in New Zealand. However, in the last few years, decisions by the courts and the Commerce Commission have indicated that the economic effects of structures and conduct are the primary focus of the Commerce Act 1986. Secondary objectives, although not excluded from consideration, are unlikely to be sufficiently important to affect the outcome of most decisions. Thus, competition law in New Zealand is generally consistent with the objective of promoting the economically efficient use of resources.

In general, anti-dumping law is more narrowly focused than competition law. Anti-dumping law considers the price based effects of dumping of goods on one sector of the economy (primary-line producers), whereas competition law considers the effects of anti-competitive structures and conduct, including non-price effects, on all participants in the relevant markets (primary-line producers, intermediate producers, end users and consumers). The objectives of the two laws in New Zealand at present, are not always consistent.

Competition Policy Analysis

To consider the wider economic effects of dumping the authorities would have to consider the factors affecting supply and demand for the goods concerned. This would be akin to the analysis undertaken under competition law. As outlined above, Willig, a competition analyst, has considered dumping policy under such an approach and has modified and extended Viner’s classification of dumping and analysed each class in terms of competition policy.

Willig’s conclusions on the effects of dumping on importing countries are that dumping, essentially by definition, injures producers and benefits consumers; that long run, short run, intermittent and sporadic forms of price discrimination dumping can all be forms of profit-maximizing behaviour; that none of the forms of below-cost dumping are anti-competitive (predatory dumping is not included in this category); and that none of the forms of sporadic and long run dumping are anti-competitive. Willig concludes, however, that the forms of short run or intermittent dumping that are or can be anti-competitive are predatory dumping, limit price dumping, and isolated episodes of reciprocal dumping as punishments for apparent infringement of cartel discipline. Predatory dumping, with the danger that domestic and other alternative producers will irreversibly exit the market, leaving it in the monopolistic control of the predator, is decidedly harmful to the importing economy, bearing in mind that there are issues relating to practical problems in dealing with situations beyond the border.

Viner and Willig agree that sporadic and long term dumping are not harmful to the importing country. There is a significant difference between their views on short run dumping. Writing in the 1920's Viner considered short run dumping to be so common that substantial import volumes at dumped prices should create a presumption of material injury. However, the changes to the global economy render Viner's presumption no longer valid. The three forms of short run dumping (as listed above) identified by Willig as being harmful to importing countries are all relatively uncommon. Thus, in the bulk of cases, dumping is likely to be beneficial to the importing country.

Willig's analysis shows that an approach based on the framework of competition law provides a natural way to consider the broad economic effects of dumping as it incorporates the impact

on all groups, not just on primary line producers. To consider the applicability of the methods of competition policy requires an outline of the relevant principles and practices of competition policy that would apply to dumping.

The Commerce Act, which is typical of modern competition laws, prohibits a range of types of anti-competitive behaviour. For this analysis two are important:

- The prohibition on dominant firm behaviour (sections 36 and 36A), of which price discrimination can at times be an example. Price discrimination cannot, of itself, create market power. It can only be anti-competitive when practised by a firm with sufficient market power to harm the competitive process without the need to collude with other firms - a dominant firm.

- The prohibition on agreements that substantially lessen competition[29] (section 27) has no equivalent under dumping law. However, public interest suggests considering extending the coverage to control agreements between two or more overseas firms that harm New Zealand's interests.

The main elements of analysis under section 36[30] are the definition of the market, whether a firm has a dominant position in that market, whether the conduct is exclusionary, and the firm's purpose.

Market definition and market power analysis are part of the same process. Market definition is an instrumental concept designed to clarify the sources and potential effects of a firm's market power. Whether different goods or services are in the same product market depends on the extent to which consumers regard them as substitutes. If they are close substitutes then the prices of each will provide a significant restraint on the other and it is appropriate to define them as being in the same market. The same principle applies to the other elements of market definition (geography, function and time).

Market definition is not part of the analytical process under anti-dumping law, which concentrates on the production of "like goods". Defining markets in accordance with economic realities (substitutability), can however, provide a framework for considering the wider effects of dumping

In all markets that are not perfectly competitive, each firm has some level of market power. The prohibition on the use of a dominant position is aimed at those firms that sell products that have no close substitutes and can profitably raise prices above competitive levels. Accordingly, "dominance" is a measure of market power which requires the courts to draw a line somewhere between trivial and serious economic effects.

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[29] This includes actions such as price fixing, output limitation and customer allocation agreements.

[30] Section 36(1):

No person who has a dominant position in a market shall use that position for the purpose of—

(a) Restricting the entry of any person into that or any other market; or

(b) Preventing or deterring any person from engaging in competitive conduct in that or any other market; or

(c) Eliminating any person from that or any other market.

The "material injury" test in dumping also draws a line between the trivial and the serious, but only in relation to the effect on the primary-line industry's performance (as measured by indicators such as sales, output, market share, profits and employment). Market definition/market power analysis provides an appropriate way of measuring the wider effects, including those on consumers and downstream producers.

Overall, the simpler tests involved in the dumping analysis are likely to be triggered in more situations than would result under the comprehensive balancing assessment required to invoke the provisions of competition law.

Section 36(1) focuses on the reasons why the non-dominant firm is unable to compete. The target of the prohibition is dominant firms which prevent or limit competitive conduct by rivals or potential rivals in the same or a contiguous market by using their high market power. Dominant firms which can weaken rivals or deter entry simply by being more efficient, are not caught by subsections (a)-(c).

Reasons for injury may be considered to some extent in a dumping investigation, but consideration of whether these are exclusionary is not part of the systematic analysis. From the national perspective, the reasons why a dominant firm's conduct causes injury to another firm will always be relevant. Thus a dumping policy which considered total welfare, would allow intervention only if the dominant firm's conduct was exclusionary.

The inclusion of purpose is useful because it can be difficult to judge whether the conduct identified in subsections (a)-(c) of section 36(1) is anti-competitive or normal competitive behaviour. The "purpose" test considers whether there is a causal link between the market power and the impugned conduct. But objective evidence of intent is rarely available. Consequently, the courts have looked at conduct and inferred purpose on the logical proposition that a firm intends the consequences of its actions.[31]

Under section 36, the dominant firm trades in a New Zealand market. The "purpose" test works satisfactorily because the evidence about a firm's purpose is available in New Zealand and the necessary legal processes are available to gain the evidence. There would, however, be some practical difficulties in a dumping case as the alleged dumper can be an overseas firm not trading directly in New Zealand. Evidence gathering powers may turn out in practice to be inadequate to gain the necessary proof of purpose.[32]
Nevertheless, information on the overseas firm's purpose(s) may be ascertainable in individual cases. Under an anti-dumping law that included the interests of consumers, users and intermediate producers, it would be appropriate for the regulators to seek and consider evidence on the *purpose* to the extent that it is available.

Dumping Prices and Predatory Prices

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[31] See, for example, *Union Shipping NZ Ltd v Port Nelson Ltd* [1990] 2 NZLR 662; 3 NZBLC 101,618 at 101,648 where the High Court accepted an inference of purpose where "protestations of inner thoughts . . . [did] not reconcile with objective likelihoods".

[32] This problem was recognised in the context of the adoption of trans-Tasman abuse of dominance laws in 1990. Amendments were made to the competition and evidence statutes in both countries to ensure that normal evidence gathering powers would be available to New Zealand litigants for evidence located in Australia and vice versa.

Dumping pricing is selling goods with an export price less than their normal value in the country of origin. As the earlier analysis has shown, there are a variety of reasons why a firm may engage in such behaviour. Dumping analysis does not probe these. It focuses on establishing simple facts: evidence of (material) injury and of dumping pricing.

Generally, the normal value is taken as the price at which the goods are sold in arm's-length transactions in the ordinary course of trade in the country of origin. If this price cannot be established, then normal values are based on prices of exports to third countries or constructed values, including manufacturing cost, selling and administration costs and profits.

International predatory dumping harms domestic producers because efficient producers are forced from the market. Consumers receive short term gains, but lose in the long term as the dumping predator recoups the earlier foregone profits through subsequent monopoly pricing.

The pricing rules under anti-dumping law are objective tests that are capable of reducing the area for case-by-case dispute. However, the problem with the anti-dumping pricing rules, from a total welfare perspective, is their arbitrary nature. The existence of international price discrimination in itself is of no economic significance to either the exporting or the importing country. What does matter for the importing country is whether the prices harm the economy taken as a whole.

Predatory pricing is the use of short-run price cutting in an effort to exclude rivals on a basis other than efficiency, in order to gain market power[33]. In other words, predatory pricing is price cutting that is inconsistent with short-run profit maximization, and which benefits the predator in the long run by forcing other firms to cease operations and by deterring competitive entry.[34] The intention of the predator is to drive all other firms from the market so that it can subsequently extract monopoly profits. It does this by selling large quantities at below an accepted measure of cost. It is, therefore, a high cost/high risk strategy that is open only to firms with a considerably deeper pocket than the intended prey, and operating in markets with high barriers to entry.

Predatory pricing is undesirable because it does not produce an economically efficient outcome and thus has the drawbacks already identified. Establishing whether predatory pricing has occurred and tracing its consequences are complex tasks. Once such an investigation is carried through, though, the results are directly indicative of the economic consequences of the action.
Widening New Zealand dumping law to include consideration of the effects of dumping on persons other than the primary-line producers, could draw on the those tools that are available for analysing predatory pricing to the extent that it is practicable to do so (for instance, subject to the availability of information).

Non-price Predation

Section 36 is not limited to pricing matters. It also covers non-price conduct. Non-price predation is generally accepted to be considerably more common than price predation on domestic markets, because it is a lower risk strategy and does not necessarily involve large

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[33] OECD (1989), p.81.

[34] Nicolaides (1992) p.5.

foregone profits and uncertain outcomes. Similar effects are likely to prevail internationally. Therefore a total welfare approach to trade remedies would include non-price effects in the analysis.

Examples of non-price predation include disruption of distribution patterns and misuse of government processes[35]. Distribution patterns can be disturbed and higher costs forced on to a rival, for example through exclusive dealing contracts or expulsion from co-operative business groups. The misuse of government processes includes legal processes, through courts or other government agencies, undertaken without regard to the merit of the claim being advanced, in order to harm a business rival. Certain types of anti-dumping investigations may fall into this category.

Agreements That Substantially Lessen Competition

The underlying reason for prohibitions on agreements that substantially lessen competition and use of a dominant position is the same. The concern under section 27 of the Commerce Act is that firms will, through their collective behaviour, be able to emulate the socially undesirable conduct of a dominant firm.

It is similarly possible that there may be concerted dumping by overseas firms. Thus, a comprehensive approach to trade remedies would include consideration of whether dumping firms are using collective market power in a manner that is harmful to New Zealand.

Remedies

Under anti-dumping law the object of the remedy is to remove the cause of the injury. The primary remedy is anti-dumping duties. The maximum amount of duty that can be applied under the Dumping and Countervailing Duties Act 1988 is the margin of the dumping, which is the difference between the export price and the normal value. However, the Minister is required to give consideration to the desirability of applying the amount of duty necessary to prevent injury if that amount is less than the margin of dumping.

The anti-dumping duty can be expressed as an *ad valorem* percentage of the value of a import value, or a specific duty, or as a threshold price based either on the normal value or the value needed to remove the injury.

As an alternative to duties, the Act also makes provision for exporters to give undertakings, for example by increasing prices, in order to remove the injurious effect of the dumping, and so allow the investigation to be terminated.

There are two broad objectives to remedies under competition law. One is to correct the anti-competitive conduct and the other is to deter further transgressions.[36]

To correct anti-competitive behaviour, the Commerce Act provides for remedies including:

- The unenforceability of provisions of contracts and covenants that contravene sections 27-29 of the Commerce Act;

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[35] Bork (1978), pp 148-155.

[36] Moral culpability is not an issue, so retribution and rehabilitation are irrelevant.

- Relief by injunction; and
- Other orders the High Court considers appropriate (including orders for restitution and compensation, in certain circumstances).

In order to deter future transgressions, the Commerce Act:

- Allows the Commerce Commission to apply for pecuniary penalties[37]; and
- Allows private parties to apply for damages (i.e. a compensation element).

An issue that arises is whether these types of penalties and remedies could be applied under anti-dumping laws. This would require a fundamental shift in the nature and scope of anti-dumping remedies from border measures which may or may not be targeted at individual exporters, to measures applied behind the border. Whether the change could be implemented in a practical sense would depend on the existence of a framework for international co-operation between governments and enforcement agencies.

The key international co-operation issue in other areas of law is that the internationalisation of markets means that relevant information and evidence is increasingly being found both inside and outside each regulator's national borders. Co-operation is needed, but this requires more than just the desire to cooperage with foreign regulators. It also requires each regulator to have the legal authority to provide requested assistance.

Such frameworks exist for the international investigation and enforcement in some areas of law such as taxation and securities through a multiplicity of bilateral co-operation treaties and memoranda of understanding. Such a framework is starting to develop in the area of competition law for dealing with price fixing and other hard core cartels, but it is a long way from being complete.

Such frameworks require a shared acceptance that the conduct in question is unacceptable and that international co-operation will mean that every country is better off, even if this is not the situation in every individual case. This situation exists in relation to securities, taxation and some other areas of criminal law and is also increasingly accepted among countries with modern competition laws.

This commonality of view does not exist for anti-dumping. There is a division of views on the merits of anti-dumping law with some countries treating the reform of the international anti-dumping framework as a priority, and others being totally committed to retaining anti-dumping laws as a protective mechanism, even in the context of free trade agreements. The arbitrary nature of anti-dumping findings in some jurisdictions also militates against bilateral co-operation agreements.

To conclude, the foreseeable prospects for voluntary co-operation by way of treaties and memoranda of understanding in the context of anti-dumping laws are poor. This tends to suggest that a move to remedies which require international co-operation, such as those

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[37] In other jurisdictions, notably the United States, there is a strong view that effective deterrence against the most serious antitrust offences can be achieved only by personal criminal fines and jail sentences.

commonly found in competition laws, is impractical. Rather, border remedies are likely to continue to be the norm for anti-dumping.

Conclusions

The main conclusions that can be drawn from the analysis in this Chapter are:

- Competition law has a broader scope than anti-dumping law for three reasons. First, it considers the interests of all producers and consumers, not just primary-line producers. Secondly it covers non-price behaviour as well as pure pricing behaviour. Thirdly, it deals not just with goods but also with services.

- The analysis of dumping in terms of a competition framework shows that dumping is likely to be economically beneficial to the importing country in most cases.

- Competition law involves a complex analysis to determine undesirable instances of predatory pricing.

- The "normal value" and "material injury" tests of dumping law are much easier to meet than the tests of price predation under competition laws. It is likely that there are many instances of dumping, where anti-dumping duties have been imposed, which would not be caught as predatory under competition law.

- The trade remedies law questions are easier to answer but the competition law questions have a stronger underlying economic rationale.

- Anti-dumping remedies are simpler than those available under competition law, but many of the latter are likely to be unenforceable internationally and thus have no relevance to anti-dumping law.

- The analytical approach of competition law could be applied in dumping situations. It would allow consideration of wider impacts and thus a more complete indication of economic welfare.

4. POLICY AND PROCESS ISSUES

It is the purpose of this chapter to identify issues relating to both policy and process which could usefully be the subject of public debate.

POLICY ISSUES

Policy issues which arise from the discussion in the previous chapter include the extent to which competition policy considerations should be incorporated into trade remedy analysis, and in particular whether the application of trade remedies should take account of net national benefit considerations.

In addition, a number of areas can be identified where competition policy concepts differ from those used in anti-dumping, and where consideration could be given to the extent to which such concepts might be introduced into anti-dumping. These include the use of economically-based product market definitions when considering "like products" and "industry"; and accepting competition-based defences, such as meeting competition, when considering causality.

A further issue is the extent to which some actions currently taken under the Dumping and Countervailing Duties Act in New Zealand, might more appropriately be dealt with as safeguard action, and if so, what kind of changes might be necessary to safeguard laws and procedures.

Net National Benefit

Currently a trade remedy investigation considers price and volume effects and looks at "injury" to domestic producers. However, an assessment of net national benefits would explicitly consider the positive effects of cheaper goods on domestic consumers and downstream industries. This section looks at some of the issues involved in such an assessment.

For the reasons outlined in the previous chapter, it would not be appropriate to consider this kind of approach in cases involving subsidies by foreign governments, or where dumping is made possible through high trade barriers or other distortionary situations in the country of export. This would reflect a policy conclusion that trade at artificially low prices distorts resource allocation in a manner which is not in the public interest.

In cases where dumping does not fall into either of the "market isolation" or "mercantilist" categories, a comparison of the two situations, with and without the dumping shows the static effects. These are that when the price of a good falls (as is generally the case for dumped goods) consumers' welfare will increase because this lower price implies an increase in their real purchasing power. Part of this benefit will be at the expense of the profits of domestic producers (because it will be associated with a fall in consumption of domestic production, and a fall in the price of that which continues to be consumed). But this loss to domestic producers is a transfer to consumers. Assuming the welfare of consumers and producers is

valued equally, this transfer does not alter net national welfare. In addition, part of the gain to consumers will not generally be offset by another loss. It will be a gain to the country as a whole, coming from access to lower priced goods, and the movement of displaced resources to other areas[38].

As this analysis does not include all relevant factors it is possible, in theory, that the gains to consumers will not represent a net gain to the country as a whole. Anti-competitive pricing, or substantial adjustment costs could invalidate this conclusion. Also, it is by no means clear that the imposition of anti-dumping duties will, in fact, lead to an increase in price to the extent of the remedy. To the extent that it does not, then the consumer benefits are consequently reduced.

Significant technical resources would be required for an accurate quantification of the gains to consumers and the costs to producers from marginal changes to production. For example, assessing the consumption and production effects accurately requires an estimate of the responsiveness (elasticity) of these activities to price. Calculating such values may be difficult.

The costs of adjustment in the domestic industry affected by dumped or subsidised goods have often been cited. Viner suggests that:

> The possible losses to domestic producers from an influx of temporary cheap foreign goods are obvious: disorganisation, and even collapse, of the domestic industry may result, with serious losses of invested capital and serious unemployment of labour.[39]

However, the frequency with which adjustment problems are referred to belies the difficulties in identifying and quantifying them.

In theory, the judgements of whether to intervene in response to adjustment costs associated with dumping or subsidisation should involve:

- The identification of any economic adjustment costs (as opposed to transfers) that local industry (capital and labour) will incur as result of the cheap imports;
- The quantification of these costs;
- The calculation of the extent to which various possible forms of intervention by the Government will reduce the costs of adjustment;
- The calculation of the costs of these interventions (in terms of the opportunity and distortionary cost of the resources required);
- A comparison of the benefits of the intervention (from the third step above) with the cost of intervention (from the fourth step above), and a decision to intervene if the benefit outweighs the cost.

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[38] Technically, too, it is also possible that if the sector has low levels of effective protection relative to other sectors of the economy, a tariff may counterbalance this and raise national welfare. However, government policy is generally to remove distortions (say, remove other tariffs) rather than introduce compensating distortions (introduce an additional tariff).

[39] Viner (1926)

In practice there are a number of difficulties with this approach, which make it inoperative in this "ideal" form.

A major issue in assessing the adjustment costs associated with dumping is the difficulty distinguishing them from those caused by an underlying lack of competitiveness, or from shocks from other sources. If dumping is causing material injury it is likely that other problems are also present.

Adjustment costs are dependent on the path of adjustment, which will generally be uncertain. This is most obvious for labour, where the likelihood of any individual being re-employed is difficult to predict. It is also true for capital equipment where the alternative uses are not always known, but still may exist. Given that the adjustment path is uncertain, the value of the intervention is also likely to be surrounded in considerable uncertainty.

It is difficult to accurately predict and quantify the success of intervention aimed at mitigating adjustment costs. However, there are guidelines which suggest:

- The most effective interventions (mitigation at least cost) will be those which most directly address the fundamental concern, and thus

- Adjustment problems should be addressed on the basis of their nature (what sort of problem it is), not on the basis of their cause.

For example, there may be a potential unemployment problem when a firm goes out of business. This may be due to employees lacking skills, lacking information about alternative forms of employment, or lacking means to shift to take up alternatives. The most effective interventions in this instance will be those which encourage appropriate training, transfer of information on job opportunities, or relocation. Wage subsidies would be a less effective intervention, production subsidies less effective again, and finally, tariffs would be the least effective. It is clear from this that successful intervention requires accurate diagnosis of the underlying problems.

Assessing the costs of intervention is extremely difficult to do accurately. Two components are included in these costs. The first is the value of the activity in which the resources would have been used had the intervention not required them (this is the "opportunity cost": the resources must be taken from someone doing something). This value is foregone. In addition, there are costs associated with raising revenue. These include the administrative costs of collection and any changes in behaviour that occur as a result (a reduction in work as a result of income tax, or reduction in consumption as a result of a sales tax).

If the intervention is one funded from tax revenue, then the relevant costs are those relating to taxation. If for some reason it was decided to impose a tariff, the costs to consumers and downstream producers would have to be considered, as this is the group which would be paying for the intervention.

If dumping is short term, i.e. if it is clear that the cheap imports are temporary, it is not clear why the firm should be forced out of business, with the attendant adjustment problems. If the lack of profitability is likely to be short term, markets would be expected to be prepared to supply necessary bridging capital. It should be noted that it is *not* the temporary distortion of competitive advantage that is *per se* a problem with dumping. Rather, it is the possibility that the dumping will force costly adjustments that are unwarranted in the medium term, and it is reasonable to assume that capital markets will generally not force such unwarranted

adjustments. Thus, the burden of proof should rest with those arguing the contrary in any particular situation.

If capital markets are making incorrect judgements, and are not prepared to provide bridging capital to fundamentally competitive firms, the question then arises as to what, if anything, the Government can usefully do to improve the situation. Successful Government intervention would require that it hold information about the particular firms' prospects superior to that held by the providers of capital. This is unlikely.

For all these difficulties, a practical assessment process for adjustment costs could involve the following steps:

- Identification of the adjustment problems that are likely to arise from the dumping, both in the short and the medium term;

- Quantification of the costs associated with these problems as far as is feasible;

- Identification of the type of assistance that is most appropriate to deal with the problem identified;

- An assessment of the likely benefits of the remedial measures (this could draw on the experience of the benefits from existing measures);

- An approximate valuation of the cost of the remedial measures (this could draw from costings of existing measures);

- A decision based on a comparison of costs and benefits.

Considerations relating to how and when the public interest should be taken into account are also relevant:

> For a public interest clause to be effective, it is important that it allows potentially negatively affected parties to defend their interests by giving them not only the opportunity to present their arguments to investigators, but also the legal standing to do so. They should have access to the information presented by the import-competing industry seeking protection in making their case. Public-interest clauses should come into play at the same time that injury to producers and the causal link between dumping and such injury is established.[40]

Since safeguard action does not *per se* involve artificially low prices, it could be appropriate to use a net national benefit test to determine whether safeguard action should be taken and in what form.

Other Competition Issues

The international replacement of anti-dumping laws by a competition policy approach is not considered a viable option in the foreseeable future. However, there are other competition policy elements which could be considered for inclusion in trade remedy actions.

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[40] Hoekman and Mavroidis (1996), p.46.

The use of a competition policy definition of markets to include, essentially, substitutable products (as is the case for safeguard actions), could have the effect of broadening the scope of the goods (and the industry) under investigation and so reduce the likelihood of an affirmative determination. Such an approach might also be able to take greater account of the impact on upstream producers, e.g. tomato growers producing for canned tomatoes, grape growers producing for wine-makers, who are excluded from consideration under the current law and international rules. However, it must also be recognised that the narrowness of the like goods definition may also serve as a limitation on the inappropriately broad coverage of anti-dumping duties. For similar reasons, the extension of "industry" to include suppliers or downstream customers could also expand the scope for anti-dumping and countervailing actions beyond that currently envisaged by the WTO Agreements.

The defence that dumped goods are meeting the competition can be taken into account by the New Zealand authorities in their assessment of whether the dumping of imports is causing injury to domestic producers. In this assessment, the impact of volume increases as well as price effects is considered in the context of the impact of those effects on a range of factors and indices. However, price relativities are often not simple, and must take into account product variations as well as differences in consumer perceptions, distribution policies and other relevant factors.

Essentially, the issue is one of causality. For anti-dumping remedies to be applied, material injury must be attributable to dumping or subsidising. The dumping or subsidisation need not be the major or only cause of injury, but it must be material of itself.

Another issue relates to the identification of pricing behaviour which, while not predatory in the strict sense of the term, has elements of anti-competitive behaviour. Thus, as identified at the beginning of this chapter, certain actions such as export subsidies or high protective barriers or other distortionary situations such as lack of competition or domestic subsidies, all of which have some degree of government involvement, would be subject to anti-dumping or countervailing remedies. Dumping activities which do not come within this description could be considered in terms of their impact on competition in the importing market, i.e. involving a net national benefit test, or could be similarly evaluated in a safeguard context. In essence, this approach would introduce into trade remedy analyses a requirement to give greater attention to the market situation in both the exporting and importing countries, and to take fuller account of the competitive situation in each market.

One method of implementing increased elements of a competition approach that has been suggested is:

> ... to obtain agreement that allegations of dumping are first investigated by the anti-trust authorities of the exporter's home country. These would determine whether the exporting firm or industry engages in anti-competitive practices or benefits from government-created or supported entry barriers. The bench-mark used in such investigations would be the exporting firm's home country competition laws. The importing country's competition authorities would be invited to participate in the investigation, and would be provided with all relevant data collected and used. If anti-competitive behaviour is found to exist, a remedy would be applied that would benefit the foreign import-competing industry. If the importing country's competition authorities disagree with the conclusion of the investigation by the competition offices, it would have the option of invoking WTO-dispute settlement mechanisms or initiating an anti-dumping investigation. However, a necessary condition for the latter would be that the importing country's competition authorities have concluded that significant barriers to entry exist in the exporter's home market. If not, anti-dumping would be prohibited. Countries would always be free to bring a so-called non-violation complaint,

> alleging that government measures (in this case lax enforcement of competition policies) nullified or impaired legitimate expectations regarding market-access conditions. In this case, multilateral mechanisms are left to determine the facts of the matter.[41]

This approach would require an appropriate degree of confidence in the competition policies of other countries and a level of acceptance of the processes used. It is unlikely that a sufficient degree of confidence or acceptance has been reached with regard to sufficient of the countries involved in trade remedy actions to permit the successful adoption of such an approach, although with increasing familiarity and convergence of competition policies, it may provide some guidance to the future. In this context, the work in APEC on competition policy issues is very relevant.

Safeguard Action

Reference has been made to the difference between safeguard action and anti-dumping and countervailing duty actions, and to the extent to which safeguard action could formally involve a greater degree of consideration of the net national benefit. The mechanisms by which this could be achieved are primarily process issues which are considered in the next section.

PROCESS ISSUES

Process issues include consideration of the processes which arise from the policy issues discussed above, and also issues which have arisen as a result of experience in the administration of the current legislation.

The Review of post-1996 tariffs, carried out in 1994, included in its terms of reference the note that submissions would be accepted from interested parties on the operation and policy of temporary safeguards, and the relationship between tariff policy and policies on anti-dumping and countervailing, taking into account the changes implied by the GATT Uruguay Round.

Concern was expressed in a number of submissions about the prevalence of allegedly dumped goods entering the New Zealand market, and whether current legislation and administrative practices permitted a sufficiently quick and robust response. Major themes of these submissions included proposals for threshold duties to replace anti-dumping action, and concerns about the cost and difficulties of actions. Additionally many of the submissions concluded that the current legislation had many negative aspects and was unworkable for the following reasons:

- Time taken to conduct an investigation is lengthy and any outcome is too late, since the domestic industry by that stage is suffering significant material injury;
- The cost involved in preparing an application and the ongoing investigation costs to the domestic industry are high;
- Difficulties of gathering of historical data for evidence of injury through dumping;

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41 Hoekman and Kostecki (1995), p. 257ff.

- Concerns that with the size of the New Zealand market, companies involved in an investigation could not remain anonymous, and may suffer retaliation from customers;

- Because of the size of the New Zealand economy that once any action under the legislation had been implemented it was often too late for any form of recovery;

- Difficulties in obtaining information in relation to overseas prices.

A smaller number of submissions suggested that steps taken to reduce tariffs should not be thwarted by trade remedies. Access to such remedies should be made more restrictive and integrated with general competition policy. Other submissions considered that the trade remedy legislation has been shown to be effective and well administered, and noted that trade remedies are preferable to tariff protection because they are more suited to targeting specific industries than is the current tariff regime.

The Review noted, with regard to proposals for threshold duties to replace anti-dumping duties, that such duties would be incompatible with Article VI of the GATT 1994 and the AD Agreement, since the proposals would, in effect, seek to impose anti-dumping duties without first having gone through the investigative process required to establish whether goods are dumped, and whether or not the dumping is causing injury. The review also noted that the concerns expressed by the textile, apparel and footwear sectors appeared to relate more to low-cost imports than to dumping.

On the cost and difficulty of bringing anti-dumping actions, the Review noted that the revised AD Agreement now specified the information required for an application to be considered (now reiterated in the New Zealand legislation), and pointed out that this need only be information that is reasonably available to applicants. The costs involved in preparing an application relate to the time taken and the resource used, while a decision to use consultants for this purpose is a commercial judgement for the firm or the industry to make. The Review also acknowledged the problems caused by customer retaliation against firms or industries making applications, but suggested that self-initiation by authorities was not necessarily the answer, since any such action would still need to rely on co-operation from the industry.

In 1995, concerns were raised with the Ministry of Commerce by the Manufacturing Advisory Group (MAG) about the time taken by the Ministry to consider applications for trade remedy action, and the approach taken by the Trade Remedies Group to the consideration of injury. The Trade Remedies Group agreed to adopt time limits of 5 days for consideration of whether an application is properly documented, and 25 days for the subsequent consideration of whether an investigation should be initiated. No such time limits were suggested for subsidy applications because of the need to consult with the government of the exporting country before initiation. The Trade Remedies Group also prepared a paper on injury, which is largely reproduced below.
Concerns have also been raised about the form of anti-dumping duty, and the ability for duties to be circumvented. Additional process issues relate to administrative issues, including the choice between a public inquiry or an administrative investigation approach.

Injury

The Trade Remedies Group's approach to injury is summarised in Chapter 2. The main concerns expressed about this approach have been in relation to its failure to take into account the situation which would exist in the absence of the dumped goods in assessing injury.

The Trade Remedies Group interprets the Dumping and Countervailing Duties Act 1988 and the WTO Agreements as requiring a finding that injury is caused by the dumping or subsidisation of goods, not simply by the imported goods irrespective of the existence or extent of dumping or subsidisation. The existence of increases in import volumes, price undercutting, or declines in market share for example, are not considered to be injury *per se*, but when all of the available evidence is considered a conclusion as to whether or not injury can be attributed to dumping or subsidisation can be reached.

The Trade Remedies Group follows the generally accepted interpretation of similar provisions in the WTO Agreements, that in order for material injury to be determined there must be either or both of volume effects and price effects, and that those effects must lead to an impact on the industry in terms of the factors and indices set out in section 8 of the Act. Also, the injury caused by factors other than dumping or subsidisation must not be attributed to dumped or subsidised imports.

Thus, an investigation could establish that there may be both volume and price effects, but an analysis of the consequent impact on the industry could lead to the conclusion that the industry is not suffering material injury, particularly if important indices of that impact, such as output, sales, and profits, are not showing any actual decline. A determination of whether or not there is material injury caused by dumping or subsidisation is based on consideration of all of the factors involved, and an assessment of the extent to which the totality of the evidence leads to the conclusion that a domestic industry is being materially injured by the dumped or subsidised goods. The existence of a decline in one or several of the injury factors or indices does not require a determination that material injury is being caused by the dumping or subsidisation of imports, if the totality of the evidence does not support such a conclusion.

The matters which the Secretary is required to have regard to in considering the economic impact of dumping or subsidisation include actual and potential declines in a range of factors and indices. This covers the situation where there is an actual decline, or where a decline is potential and thus threatening injury. In the case of threat, the requirements of the WTO Agreements regarding a determination of threat of injury must be observed. While neither the Act nor the Agreements exclude consideration of other factors, where the examination of the evidence does not establish an actual or potential decline in the listed factors and indices, any other evidence suggesting that material injury is being caused to an industry by the dumping of goods would need to be particularly persuasive, and not inconsistent with matters that might be assessed. However, the Trade Remedies Group does not rule out that such a situation might exist, and is always prepared to consider positive evidence which might justify a determination that dumping is causing material injury.

The WTO Agreements require that a determination of injury be based on positive evidence. In situations where an industry is not facing actual or potential declines in key indicators of its economic situation, but is arguing that it would have made higher profits if the dumped or subsidised goods were not in the marketplace (the "but for ..." approach), it could be difficult to provide positive evidence to establish that this constituted material injury caused by dumping or subsidisation. In this context, causality is of key importance. Injury caused by factors other than dumping or subsidisation must not be attributed to the dumping or subsidisation of goods, nor can injury caused by other factors be regarded as weakening the industry so that it is more vulnerable to dumping or subsidisation, and thus permit a finding that material injury is caused by dumping. In the absence of evidence of injury from any of the factors specified in the Act relating to economic impact, and without other persuasive positive evidence that dumping is causing injury, the Trade Remedies Group would be

unnecessarily exposing itself to challenge if it were to rely on the factor of profits not reaching a particular expected level, when this did not amount to an actual or potential decline.

It is important to note that each investigation must be approached on the basis of the facts pertaining to that particular case. An approach which may be relevant in one case will not necessarily be appropriate in another case.

The position taken by New Zealand is very similar to that of other administrations.

Remedies

The level of duty cannot exceed the margin of dumping or the amount of subsidy. Duties are applied on an *ad valorem* basis, as a specific rate, or on the basis of a reference price which relates to the normal value or to a non-injurious level. In New Zealand anti-dumping cases since 1988, duties based on the margin of dumping have been imposed in 23 cases, and lesser duties in 4 cases (three of them involving plasterboard from Thailand).

In most cases where the margin of dumping was applied, the price differential in favour of the imported goods was significantly higher than the margin of dumping, suggesting that there were other causes of injury. Nevertheless, the objective of the trade remedy legislation is to remove the injurious impact of dumping or subsidisation, irrespective of whether other causes of injury are more significant.

Lesser Duties

The Trade Remedies Group's approach to the application of the lesser duty rule is defined by Section 14(5) of the Act, which provides:

> In exercising the discretion under subsection(4) of this section, the Minister shall have regard to the desirability of ensuring that the amount of anti-dumping or countervailing duty in respect of those goods is not greater than is necessary to prevent the material injury or a recurrence of the material injury or to remove the threat of material injury to an industry or the material retardation to the establishment of an industry, as the case may require.

The purpose of a lesser duty, and hence a non-injurious price, is to determine whether a duty less than the margin of dumping is sufficient to remove the material injury or prevent the recurrence of material injury caused by the dumping. This requires an assessment of the extent of injury attributable to the dumping. In this context, it should be noted that the Trade Remedies Group considers that injury is material if it is more than immaterial and if the industry is worse off, i.e. if, as a result of the dumping and the volume and price effects attributable to the dumping, there are adverse economic consequences for the industry, in terms of an actual and potential decline, or other adverse effects, in the injury factors and indices identified in Article 3 of the AD Agreement.

In determining whether or not the lesser duty rule should be applied, the first step is to ascertain the situation which would apply in the absence of the dumping of the goods and the injury attributable to the dumping.

The main impact of dumping is indicated through price effects and the consequent impact on sales and profits. Accordingly, initial indications of the extent of injury attributable to dumping can be established through (a) the margin of price undercutting, or (b) the level at which the industry's prices are non-injurious.

If the margin of price undercutting exceeds the level of undercutting that would be present if the goods were not dumped, then this provides *prima facie* evidence that a lesser duty would not be appropriate. However, if the margin of price undercutting is less than the margin of dumping, then further consideration must be given to the application of the lesser duty rule.

The second approach is to establish a non-injurious price, being the price that would apply in the absence of the injurious dumping. Ideally, such a price should be based on market considerations, such as the prices which prevailed before dumping affected the market.

Where such an approach may not be appropriate then alternative approaches could be used, such as constructing a price on the basis of current costs and pre-dumping profit rates, or the current profit rates obtained by industries producing goods in the same general category.

The level of profitability is generally used as a normative indicator of injury, since that is considered the most useful indicator of the health of an industry, and is the factor which combines the economic impact of price and volume effects of the dumped or subsidised imports, and the industry's reaction to them.

Having established the non-injurious market price, the equivalent dutiable value for the goods is established. This will normally involve deducting from the non-injurious market price those cost elements between the dutiable value (usually FOB) and the market level. The relevant market level is taken as the first point of competition in the New Zealand market, i.e. ex-factory for domestic producers, and ex-importer's store for imported goods, which is similar to that normally used for the price undercutting comparison. The cost elements in the formula to calculate the dutiable value will normally include freight costs, importation costs and fees, including transport from wharf to importer's store, normal duty, any other costs associated with importation but not with distribution, and a margin for the importer.

The approach used does not seek to make judgements about what different businesses regard as an appropriate level of profit or any price or profit entitlement beyond the factually determined price or profit level achieved before the impact of dumping, or on another reasonable and appropriate basis.
Where prices or profit levels applying before the dumping occurred are used, they will normally be appropriate only when the pre-dumping situation is fairly recent. In the case of a review, or where there has been a significant period of time between the pre-dumping situation and the time of the investigation or review, an alternative approach may be required to determine the appropriate level of a non-injurious price.

The approach used by the Trade Remedies Group reflects that taken by the ADA in Australia. In discussing the level of profit to be used in determining an "unsuppressed selling price", the ADA has noted, "In assessing this margin of profit the ADA will look to the market for guidance; that is, the margin will usually be determined on the basis of the profits, if any, that were being achieved before the market was affected by dumped imports."[42]

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[42] *Evaporated Milk from Canada*, ADA Report No. 6, June 1989. It should be noted that this case involves an investigation rather than a review. The full quote is as follows:

New Zealand has applied the lesser duty rule in only four cases, three of which involved closely related products from the same country. This reflects the fact that in most cases the economic position of the industry will be only partly ameliorated by the removal of the dumping.

Circumvention

International debate on the circumvention of anti-dumping duties has centred on the assembly of parts, minor alterations to goods, and to changes in the countries supplying the goods. In New Zealand, to the extent that actions are considered to be a problem, they can be, and have been, dealt with by carrying out new investigations. This position is based on the principle that anti-dumping duties can be applied only in cases where an investigation has established that particular goods from a particular market are being dumped and causing material injury to domestic producers of like goods. Such duties cannot be applied to different goods, since a different industry could be involved, or to different markets.

In New Zealand, concerns have been expressed about the ability of exporters and importers to evade duty, and particularly in cases where the Trade Remedies Group establishes duties on the basis of a reference price. It is argued that this approach means that importers can create fictitious values for duty, and use the difference between the actual and fictitious prices to subsidise prices in the New Zealand market.

In fact, section 3(2) of the Act sets out the basis for determining whether or not transactions are at arm's length, which covers the scenario outlined above, and if they are not, then export prices can be constructed on the basis of the first arm's length sale in New Zealand.

It should be noted that the objective of an anti-dumping duty is to remove the injurious impact of dumping on the New Zealand industry. The objective is not to collect anti-dumping duty. If exporters increase their prices to a non-dumped level, or if other parties order their business affairs so that they obtain the benefit of any difference between the non-injurious or non-dumped price level and the price charged by the producer in the exporting country, then provided the non-injurious or non-dumped price level in New Zealand is maintained, and provided there is no hidden reimbursement or compensation to buyers in New Zealand, the Trade Remedies Group does not consider that there is any circumvention.

ADMINISTRATIVE ISSUES

If trade remedy responses to supply shocks caused by imports are to take greater account of the impact on competition and consumers in the provision of effective and appropriate remedies, then some reconsideration of the existing administrative arrangements might be appropriate. In particular, any process must be transparent, timely and cost effective in achieving the desired results. Further discussion should address the merits of the options available, from the introduction of a full-blown public and all-encompassing inquiry process, to the bringing together to a greater or lesser degree of existing processes and programmes, including the scope for a greater degree of co-ordination of adjustment assistance.

The unsuppressed selling price (USP) may be determined on the basis of a satisfactory return on funds invested or may be arrived at by examining the Australian industry's cost to make and sell, and then adding the margin of profit that should be achieved by the industry in a market not affected by dumping. In assessing this margin of profit the ADA will look to the market for guidance; that is, the margin will usually be determined on the basis of profits, if any, that were achieved before the market was affected by the dumped imports.

This section briefly outlines administrative issues which arise from the preceding discussion in this Paper.

Public Inquiry or Administrative Process?

Currently, dumping and subsidy investigations are carried out administratively by the Trade Remedies Group of the Ministry of Commerce. Temporary safeguard investigations are carried out by a Temporary Safeguard Authority, serviced by the Trade Remedies Group, and can contain some aspects of a public inquiry process.

Issues to be considered in deciding between a public inquiry and an administrative investigation include the capacity of the process:

- To be transparent;
- To allow free access and give objective treatment to all groups;
- To respond rapidly;
- To be cost effective.

A public inquiry process is likely to be more transparent and freely accessible, while an administrative process is likely be faster and less costly[43].

An approach adopted in some administrations is a full-blown public inquiry process. This is used in the US (the International Trade Commission) and Canada (the Canadian International Trade Tribunal). Such bodies hold public hearings to which all parties have access and for which legal representation is usual. In addition to the cost of the process to public funds, there are additional costs for participants. However, provided such a body has a sufficient quantum of work to justify its fixed costs, enhanced transparency and improved access are benefits to set against the increased costs.

Currently all final decisions on the application of trade remedies are made at Ministerial level. This seems appropriate in the case of an administrative process. The question arises, however, whether a public inquiry process could take final decisions without reference to an executive authority, such as a Minister. Decisions by such an executive authority might not be regarded as being sufficiently transparent, accessible and accountable. An argument against the inquiry process making final decisions would be the Government's need to ensure that the public inquiry process made decisions consistent with other aspects of Government policy.

Relationships and Co-ordination

Any new or amended process for conducting trade remedy investigations could involve activities which have some similarity to those currently conducted by other groups, namely the Commerce Commission in its investigations of anti-competitive practices, and those groups currently administering business and labour market assistance. This raises the question of how to ensure that the expertise of these groups in these areas is utilised, how to ensure consistency of approach, and how to avoid duplication of processes. Care would need to be taken to ensure consistency with the WTO Agreements to ensure that no actions were taken which were inconsistent with those rules.

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[43] See Laird and Sampson (1987)

More specifically, consideration would need to be given to whether some stages of the investigation and assessment process should be undertaken by groups other than the trade remedies administrators, although it is noteworthy that most of the current expertise and experience in these areas is contained within the Ministry of Commerce, and that the Trade Remedies Group is currently adopting processes which utilise these resources.

The development of such a process would also need to take into account the broad range of adjustment assistance programmes, and the need for co-ordination between these programmes.

Safeguard Action

The current Temporary Safeguard Authority (TSA) approach has some of the advantages of a public inquiry process, and would be sufficient to meet most of the requirements of the SG Agreement. However, it currently goes only half way. A TSA advises only on whether imports are causing injury and recommends a remedy without carrying out any detailed consideration of the impact of the remedy on parties other than the immediately affected industry. It is a Ministerial decision whether to implement the remedy. Indeed, Cabinet processes are involved where the action requires an amendment to the standard protection (a change in tariff).

This raises further questions as to whether a temporary safeguard measure should be clearly separated from normal border protection instruments, for example by applying a supplementary and temporary special duty similar to an anti-dumping duty, and whether the temporary safeguard process should contain within it the mechanism for applying remedies, such as the mechanism provided in the anti-dumping legislation.

To the extent that the determination of whether injury is caused by imports is based on a factual analysis, there would appear to be no reason why it needs to be done by a separate authority, instead of by the same investigative body which carries out a similar investigation and analysis process with similar criteria in relation to dumping and subsidy investigations. Another aspect of this question is whether injury to an industry should remain the focus of a safeguard investigation, or whether it should extend to consideration of the net national benefit involved.

Any consideration of how a trade remedy process could apply or link with processes, including existing programmes, for providing assistance to firms or workers, would need to take account of the Government's overall industry assistance policy.

Legislative Framework

The appropriate legislative framework is dependent both on the finality of the decision of the investigative process, and on its relationship to other groups' activities. Issues to consider include the desirability of a single trade remedy process, and the mechanism to be used for the application of any safeguard measures; whether to utilise existing mechanisms or to establish specific trade remedy solutions.

5. QUESTIONS FOR DISCUSSION

Trade remedies are specific actions intended to deal with specific problems raised by imports. In particular, the present trade remedies approach is compared with that of competition policy, where the objective is economic efficiency and maximisation of economic welfare.

The Government's overall economic strategy aims to maximise national welfare. Carrying this through into trade remedy policy (as in competition policy), would require some modifications to the way the policy operates.

The Government has agreed that the interests of parties other than producers of like goods, including consumers and other producers, should also be considered in the decision as to whether the Government should provide trade remedies (but not necessarily where dumping or subsidisation arises from government action in the exporting country).

Further changes could include:

- Taking anti-dumping or countervailing duty action only against anti-competitive (predatory) dumping, identified in a similar way to the process employed under competition policy, or where price discrimination results from government actions in the exporting country;

- Providing for safeguard action (adjustment assistance) where firms encounter problems coping with supply shocks of international origin, on the basis of criteria consistent with those used to administer assistance to firms encountering adjustment problems due to domestic causes.

- Recognising that since there is a substantial overlap between the three arms of trade remedies legislation, both in terms of their effects on the economy and in the nature of the investigation process for dealing with them, the three forms of remedy can be dealt with within a common framework and administrative structure.

Below is an outline of the stages of a process which could be used for all trade remedy investigations. It incorporates aspects of the current regimes, and makes additions arising out of the analysis in previous chapters. It is intended to aid consistency of treatment and avoid duplication of resources.

There are four basic components to the investigation process in response to claims of dumping, subsidies, or unexpected surges of cheap imports. These are:

- Identification and investigation of the grounds for action (are imports dumped, subsidised, or increasing suddenly), in accordance with the international rules governing such investigations, and the extent to which foreign government actions contribute to the grounds for action;

- Consideration as to whether the imports are causing relevant injury, ("material" injury in the case of dumped or subsidised goods, and "serious" injury in the case of sudden increases);

- Consideration of the effects on the process of competition (which implicitly includes the effects on consumers);

- Consideration of the appropriateness of a remedy (including a recognition of the interests of consumers and tax-payers), and the nature and application of any remedy recommended.

Instances of "market isolation" dumping where dumping occurs from behind protective trade barriers, and "mercantilist" dumping where governments affect exports with direct or indirect subsidies or other interventions, would be deemed not to be in the public interest. In such cases application of the latter two components of the framework would be unnecessary, and the usual process for the imposition of anti-dumping or countervailing duties would be followed.

Related and additional issues which need to be addressed in the context of any revised approach to trade remedies, include:

- Issues arising from the administration of trade remedies, and

- The interpretation and implementation of the legislation applied by the Trade Remedies Group of the Ministry of Commerce.

These conclusions, and the preceding discussion in this Paper, are intended to provide a basis for developing a framework for the future operation of trade remedy policy, including a basis for New Zealand's active participation in the development of international rules in this area.

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