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**Working Paper**

## Anti-dumping in New Zealand: A century of protection from "unfair" trade?

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# **Anti-dumping in New Zealand**

**A century of protection from “unfair”  
trade?**

**NZ Trade Consortium working paper**

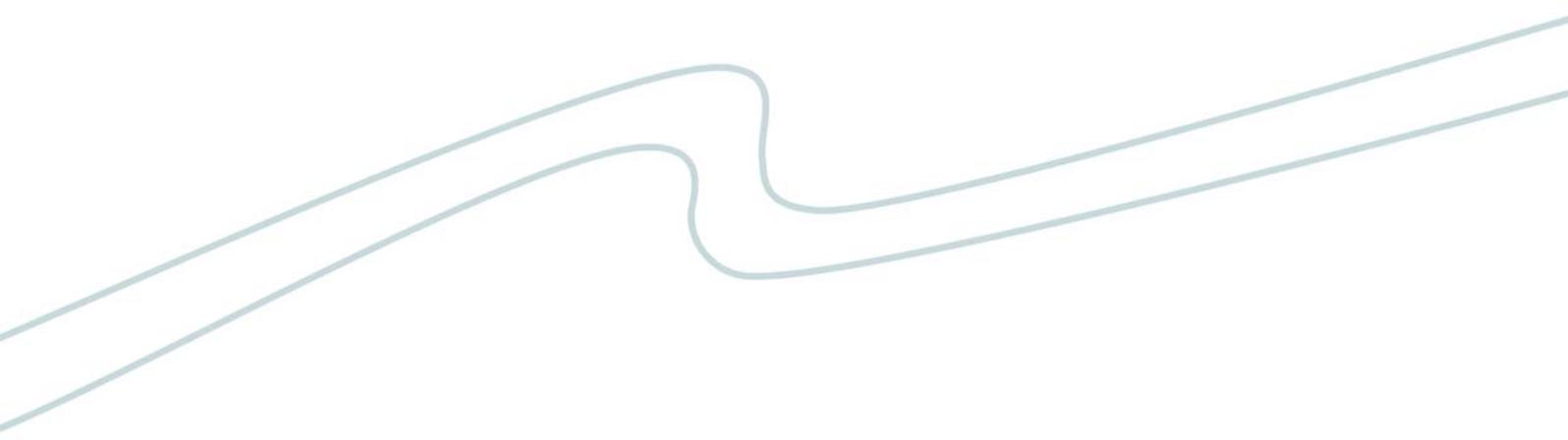
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**in association with the**

**New Zealand Institute of Economic Research (Inc)**





## **Preface**

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## **Authorship**

This report has been prepared by Martin Garcia and Astrid Baker. The findings, interpretations and conclusions in this research report are the authors' own and do not represent the views of the authors' employers. The research report is based on publicly available documentation and does not imply nor represent any personal criticism by the authors of government policy or practice, nor of any actor in the anti-dumping arena.

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## Abstract

Political pressures and concerns about “unfair” trade provide the main rationale for retaining broad anti-dumping provisions in most countries. Almost one hundred years ago, New Zealand was the second country in the world to introduce anti-dumping legislation. Since then New Zealand’s anti-dumping policy and legislation have changed significantly in response to both internal and external pressures. The key issues over the years have remained essentially the same. To what extent should domestic producers be protected from the effects of dumping? To what extent should the interests of other groups, such as consumers and downstream industries, be taken into account? There is a natural tension between the first issue - protection of the private interests of producers - and the second - the public or national interest. The issues of protectionism and the public interest are at the centre of the debate about anti-dumping. The political factors influencing anti-dumping policy are this study’s main focus. The study examines the history of anti-dumping policy in New Zealand, how and why it has been justified and what has shaped it.

The study shows that the anti-dumping debate involves the concentrated and organised interests of import-competing industries and their employees, who benefit directly from the protection provided by anti-dumping duties, and other interest groups who bear the more or less widespread costs of anti-dumping action, such as consumers and downstream industries. Manufacturing industries have been able to place significant pressure on governments to retain strong anti-dumping provisions, particularly as other general forms of protection have been removed or reduced and New Zealand has entered into bilateral free trade agreements. Despite this pressure, governments and officials have remained intent on ensuring that anti-dumping does not replace general protection and anti-dumping on trans-Tasman trade was removed in the interests of competition. Recent proposals that competition and wider interests should be considered before taking anti-dumping action have met strong resistance from manufacturers, with pressure from importers, consumers and downstream industries remaining either limited or absent.

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# 1. Introduction

## 1.1 Dumping and anti-dumping

Dumping is a term used to describe either price discrimination between different national markets or sales into another national market at less than cost. It is described by many as “unfair” trade (Jackson, 1997, p.274). The classic definition of dumping refers to international price discrimination, which involves sales of goods for export to a country at prices that are lower than the selling prices for like goods in the exporting country’s domestic market (Viner, 1926, p.3). Dumping can also refer to export sales at below costs (Marceau, 1994, p.11).

Article VI of the General Agreement on Tariffs and Trade (GATT)<sup>1</sup> condemns dumping “if it causes or threatens material injury to an established industry of a contracting party or materially retards the establishment of a domestic industry” (GATT Secretariat, 1994c, p.493). The World Trade Organisation (WTO) allows importing countries to take action against anti-dumping to protect a domestic industry from material injury. Anti-dumping action is a trade “remedy” which involves the levying of additional duties on imported goods as they enter a country with the intention of removing the injury that dumping is causing or threatens to cause to a domestic industry (Ministry of Economic Development, 3 February 2000, p.3).

A recent New Zealand case, for example, involved claims by the New Zealand whiteware manufacturer, Fisher & Paykel Ltd, in 2000 that Korean exporters were selling refrigerators and washing machines to New Zealand at dumped prices that were damaging the New Zealand industry. After two separate investigations, the Ministry of Economic Development (June 2001)

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<sup>1</sup> Article VI, paragraph 1, of the GATT states that:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another

- (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
- (b) in the absence of such domestic price, is less than either
  - (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
  - (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

concluded that the Korean whiteware was indeed being dumped and had caused material injury to the New Zealand industry. The Minister of Commerce took anti-dumping action by setting threshold reference values representing the values at which the goods were either not being dumped or were no longer causing injury to Fisher & Paykel. Importers of refrigerators or washing machines who imported goods below these values paid the difference in anti-dumping duties. In announcing the duties Minister Paul Swain stated that "New Zealand is an open competitive economy and our manufacturers are happy to compete on an equal footing with international suppliers. However we will not stand for unfair practices that put New Zealand manufacturers and local jobs at risk" (Swain, 11 June 2001).

## **1.2 Factors influencing anti-dumping**

This study's main task is to identify the major factors and interest groups influencing the establishment and development of New Zealand's anti-dumping policy since its introduction in 1905. The study focuses mainly on the political factors influencing anti-dumping policy, including the incentives of parties to organise and pursue strong anti-dumping protection and apply pressure to governments. The international literature indicates that anti-dumping is biased in favour of import-competing domestic producers and their workers, who have a strong political position because they are organised and highly visible (Frey, 1985, p.156; Marceau, 1994, p.1). Some other interests, such as consumers, have difficulty organising effectively because the costs of anti-dumping are widely distributed and small on a per capita basis (Baron, 2003, p.593; Lusztig, 2004, p2). Political action aimed at affecting policies such as anti-dumping can be observed in activities such as lobbying, research and public advocacy (Baron, 2003, p.163).

## **1.3 Anti-dumping as protection**

Anti-dumping falls within a wider context of international trade policy, especially trade policy relating to protection of domestic interests. For that reason, this study commences with an analysis of the literature on protection. The term "protection" appeared for the first time in the literature on international trade theory by John Asgill (1719, p.10), who wrote of using government policies for "the protection and encouragement" of domestic industry. Parkin (1990, p. 577) suggests that protectionism may be described as "the restriction of international trade" usually by imposing tariffs or non-tariff barriers, such as quantitative restrictions. There are tensions between private and public or national interests which result either in increased or decreased demands for protection. There is significant debate in the international literature on whether or not anti-dumping is justified or merely another form of protection (for example, Bhagwati (1988), Finger (1993), and Stegemann (1991)). Hindley (1991, p.30) asks why action should be taken to increase prices in your own market just because an exporter charges a higher price in their market. The literature

shows that there is only limited economic justification for anti-dumping action and, therefore, the rationale for anti-dumping action is likely to be found in political competition, where the private interests of domestic manufacturers compete with the interests of others such as consumers.

#### **1.4 Incidence of anti-dumping**

Anti-dumping action is increasingly common in world trade. In 1980, 237 anti-dumping measures were in place and this number had risen to 1,252 at 30 June 2003 (Stevenson, 2003, p.1). Two-thirds of the measures in place in 2003 were applied by only five countries, the United States (271), India (210), the European Union (160), South Africa (96) and Canada (86). New Zealand had seven measures in place at that time.

In the early 1980s, anti-dumping action was the exclusive preserve of developed countries, with Australia, the United States, Canada and the European Community initiating almost all actions (Finger, 1993, p.4). Jackson (1997, p.272) refers to the considerable pressure exerted by domestic industries in those countries to influence government to limit import competition. The increase in anti-dumping measures since the 1980s can be explained in part by the emergence of developing countries, such as India, South Africa, Mexico, Brazil and China, as major users of anti-dumping action. Slightly more than half the anti-dumping measures in place in 2003 were applied by developing countries.

In 1905, New Zealand became the second country to introduce anti-dumping legislation (Marceau, p.8; Viner, 1923, p.204). In 1986, by acceding to the Anti-Dumping Code of the General Agreement on Tariffs and Trade (GATT), New Zealand agreed to be bound by international rules when taking anti-dumping action. New Zealand's anti-dumping legislation has been administered by the Trade Remedies Group of the Ministry of Economic Development (formerly the Ministry of Commerce) since 1988. Before that date, anti-dumping legislation was administered by the then New Zealand Customs Department.

New Zealand is regarded as a traditional user of anti-dumping measures. Miranda, Torres and Ruiz, 1998, pp.5-7) calculate that between 1987 and 1997, New Zealand imposed anti-dumping duties in 31 (3 percent) of 1,034 applications of duties worldwide, making it the eighth largest user of anti-dumping measures during that period, despite its relatively small size. Relative to the value of its imports in that period, one calculation shows New Zealand rated in the top place, "suggesting that, on a "trade-weighted" basis, it is the country that applies measures most intensively". New Zealand accounted for 27 percent (6) of worldwide anti-dumping actions against footwear and 26 percent (8) against prepared foodstuffs during that period (Miranda, Torres and Ruiz, pp.7, 35, 42 and 68). Relative to its size,

and even in absolute terms, New Zealand has been a significant user of anti-dumping measures.

## 2. Protection and anti-dumping

### 2.1 Private and public interests

Wherever trade is involved, there is usually a tension between private interests and the public or national interest. Irwin (1996, pp.14-17, 32, 64, 116) notes this tension in explaining the intellectual history of protection from the fifth century B.C. until the twentieth century. As early as the fourth and fifth centuries B.C., for example, Greek philosophers preferred to limit the extent of trade for non-economic reasons, such as the moral harm that trade posed to society and even some early Christian thought cautioned against trade promoting fraud and greed. By the seventeenth century, the private interests of merchant traders were still being contrasted with the costs or benefits of trade to the state. Pufendorf (1660), for example, stated that trade could not only be taxed, but also be prevented “either because the state may suffer some loss from its importation, or that our own citizens may be incited to greater industry, or that our wealth may not pass into the hands of foreigners”.

By the seventeenth and eighteenth centuries, the mercantilists<sup>2</sup> were arguing that regulation of trade was required because of the difference between merchants’ private interests and the nation’s broader interests of the nation. Emphasis was given to ensuring that trade was carried out in a way that was in the nation’s interests, namely that increased national wealth and power while protecting employment and domestic industries (Coats, 1992, p.46). It is notable that at this time, the private interests of traders were set against the private interests of domestic industries, with the latter’s interests being aligned with the national interest. Supporters of protection, such as John Pollexfen (1697), considered that cheap imports were not in the national interest because they were harming and destroying domestic manufacturers and local employment. The idea of some form of institutional framework guiding the outcomes of commerce was raised in the eighteenth century. For example, the English and Scottish moral philosophers held that competition between private and public interests could be moderated, but not directed, by the state creating an institutional framework which would allow the different interests to achieve an acceptable balance. The state was

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<sup>2</sup> “Mercantilism is the economic theory that a nation’s prosperity depended upon its supply of gold and silver, that the total volume of trade is unchangeable. This theory suggests that the government should play an active role in the economy by encouraging exports and discouraging imports, especially through the use of tariffs”. Retrieved from Wikipedia online encyclopaedia at <http://en.wikipedia.org/wiki/Mercantilist> on 2 December 2004.

recognized as a regulator of competition between different private and public interests, including those arising from trade.

Prior to Adam Smith's *Wealth of Nations* (1776), there was a "widespread presumption in economic thought . . . that an appropriate use of import tariffs and other government trade restrictions was likely to constitute a better economic policy than free trade" (Irwin, 1996, p.3). Arguments for protection, however, especially temporary protection to assist developing industries and nations, persisted into the nineteenth and twentieth centuries. John Stuart Mill (1848, p.922) added qualified support to an argument from the Elizabethan period that infant-industries and their employees may be protected temporarily until they were strong enough to compete in world markets. While the classical economists agreed that infant industry policies were not advisable, the German political activist, Friedrich List, (1885) argued for protection in newly industrializing countries. In general, the classical economists did not support these views.

John Maynard Keynes was particularly influential in arguing in the 1920s and 1930s for protection to increase production and thereby lower unemployment (Irwin, p.189). Keynes (1971-1989) considered that four exceptions to free trade were acceptable and legitimate, namely "to achieve noneconomic objectives (such as protection to agriculture), to insure against excessive dependence on other countries in 'key' industries, to promote infant industries, and to prevent predatory dumping". Arguments such as these set the ground for the protection of private domestic interests in the interests of the state and the public.

## **2.2 Trade liberalisation and the GATT**

Despite strong arguments for protection, the doctrine of free trade has dominated economic thought since Adam Smith (Irwin, p.217). Greenaway (1983, pp.52, 82) for example, argues that "unrestricted trade appears to be consistent with a higher level of economic welfare than restricted trade". He showed how strong protectionism during the depression of the 1930s led to a multilateral institutional framework aimed at more liberal trade policies. The Bretton Woods Conference of 1947 attempted to establish the foundations for future liberal international trade and monetary relations<sup>3</sup>, with the General Agreement on Tariffs and Trade 1947 (GATT) providing the basis for "a new multilateral, liberal world trading regime" (Trebilcock & Howse, 1995, pp.20-21). Anti-dumping action under Article VI of the GATT was one of the permitted exceptions to the Most Favoured Nation principle and provided for discriminatory action against injurious dumping of goods from a specific country (Greenaway, 1983, p.88). Trade

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<sup>3</sup> The GATT became the basis for a multilateral world trading regime only after the International Trade Organisation failed to come into existence, unlike the other two international agreements envisaged by the Bretton Woods Agreement, namely the International Monetary Fund and the International Bank for Reconstruction and Development.

liberalization has historically been accompanied by trade remedies to provide reassurance to domestic industries that they can be protected against unfair trade and that there is a safety net if lower barriers to imports result in unforeseen surges in competing imports.

Bhagwati (1991, p.14) notes that more recently developing countries have instituted anti-dumping and other trade remedy provisions at the same time as they remove trade barriers under conditions set by the World Bank. Miranda, Torres and Ruiz (p.61) state that “although antidumping can serve as a tool in enabling governments to open up their economies, it is in (sic) desirable to ensure that it is used with restraint, impartially and judiciously”. Khor (2001, p.51) of Third World Network is concerned particularly that pressure being put on developing countries before they are ready to liberalise could result in “the death of local industry in many developing countries”. It seems logical, to help sell the benefits of trade liberalization and allay the fears of domestic industries, that trade liberalisation has historically gone hand-in-hand with trade remedies such as anti-dumping.

### **2.3 Protection and anti-dumping**

Hoekman and Kostecki (1995, p.4) describe anti-dumping action as one of the forms of ‘contingent’ protection or “loopholes [that] have been a weak element of the GATT, often circumvented if too constraining, and abused if vaguely worded”. Many commentators consider anti-dumping to be a form of protectionism, sometimes in disguise (Lindsey and Ikenson, 2003, p. viii; Durling and Nicely, 2002, p.2, Hoekman & Kostecki, p.177; Finger, 1993, p.34), while Jackson (1990, p.16) wonders whether anti-dumping “makes any real policy sense today at all”. Tharakan (1991) notes that the large number of anti-dumping actions between 1980 and 1988 “has raised genuine fears that a provision of GATT which was meant for a corrective purpose is being increasingly used in a manner that contravenes the fundamental principles of GATT, namely free trade and multilateralism”.

Some hope that anti-dumping can be used in a non-protectionist manner is offered by a number of commentators. Bhagwati (1988, p.48) also argues that anti-dumping laws have a legitimate role in a free trade regime, “but not if they are captured and misused as protectionist instruments” as he argues they have become. Bhala (1995, p.20) considers that, “Whether antidumping law is economically justified is irrelevant. The practical and more ambitious inquiry is whether the law can be circumscribed to minimize the risk of protectionist abuse”. Baron (2003, p.598) casts anti-dumping in the role of preventing even greater protectionist abuse when he states that “despite the use of anti-dumping to protect import-competing industries, most countries prefer to retain the provisions as a safety valve to relieve pressure for broader protectionist measures”. Miranda, Torres and Ruiz (p.62) consider that “protectionist abuse” would be removed if anti-dumping was reformed either “on the pattern of competition rules,

especially those applicable to predatory pricing”; or by introducing a public interest test; or by including “a greater degree of economic analysis into the investigation of cases”.

Miranda, Torres and Ruiz (p.56) suggest that trade liberalisation in some countries may have led to greater recourse to anti-dumping action. There is certainly a natural tension between trade liberalisation and anti-dumping. Irwin (1996, p.3) argues that, since free trade was established as “superior to import protection in producing a greater amount of aggregate economic wealth . . . the burden of proof in economic debates has been with those advocating restrictions on trade to demonstrate how such policies would contribute to a country’s economic wealth”. While the theory of free trade seems to occupy the intellectual high ground, nonetheless trade restrictions, such as anti-dumping, continue to be maintained. One way of understanding why trade restrictions continue to be used by governments is to consider the political dynamics.

International trade policy, as Baron (2003, p.587) explains, is the result of economic and political forces. There is an economic rationale for free trade based on comparative advantage, but there are also political forces in terms of the benefits that firms, consumers and employees can gain through trade policy. Demand for protection comes from those who will benefit, such as import-competing producers and employees, whereas opposition to protection will come from those who bear a cost from protection, such as consumers. The level of demand for particular policies depends on the concentration of benefits or costs on particular individuals or groups. Protection from imports is likely to result because the benefits to import-competing industries are concentrated and costs to consumers are widespread (Frey, 1985, p.156). Consumers will have little incentive to organise and take action, whereas import-competing industries and their employees will have strong incentives to take action, such as by lobbying government.

The benefits from protection, such as through anti-dumping laws, are concentrated on import-competing industries while the costs of such protection are widely distributed among consumers. An import-competing industry with sunk costs also has more to lose in the short-term than an exporter has to gain. In brief, the incentives for protection can be stronger than the incentives for market opening and this aspect is central to understanding why anti-dumping continues as a policy instrument of choice for governments. Lusztig (2004, pp.2-3) states that “elected governments faced with the choice of appeasing indifferent consumers or belligerent producers have an obvious incentive to gratify the latter”.

## **2.4 Conclusion**

Policies that protect domestic industries from imports have been adopted over the years by governments for various reasons. The private interests of domestic manufacturers, their employees and the communities that benefit from their continued operation, benefit from protection. Traders, importers, exporters, and consumers bear the costs of protection. The state has taken on the role of deciding the extent to which benefits and costs should be distributed. When the benefits are heavily weighted towards domestic producers, those who bear the costs are likely to claim that the state operates a protectionist trade policy. There is a natural tension between arguments for free trade and those for protection and while free trade is acknowledged by most economists as the preferred trade policy, practical concerns, private interests and political pressures have seen protection adopted by most states.

Liberalisation of trade under the GATT and the WTO has resulted in an increase in more limited forms of protection, such as anti-dumping. There is significant concern that anti-dumping may be used by some nations in a protectionist manner and undermine the benefits of freer trade. The incentive for domestic producers to press for anti-dumping protection is stronger than the incentive for other interests to oppose anti-dumping and governments must make their choices about whether and how anti-dumping is implemented.

## **3. Legitimising anti-dumping actions**

### **3.1 Dumping**

Early consideration of dumping, the problems it might cause and the early history of anti-dumping was provided by Viner (1923, pp.1, 192, 216, 274; 1926, p.3-4). Dumping has been a problem in international trade since at least the sixteenth century when foreigners were allegedly selling paper at a loss to destroy England's infant paper industry. The term "dumping" was first used to describe cut prices during the English tariff controversy. Viner explains the various circumstances that allow dumping to occur, including protective duties in the country of export, lack of competition in the country of export and the incentive to lower unit costs in large-scale manufacturing industries. Various reasons have been given for why exporters dump, including surplus stocks, new market entry, gains from increased economies of scale, or to drive a competitor out of a market, that is predatory dumping, although exporters may have no intention of doing so and may be using dumping as a means of maintaining production during cyclical downturns (Viner, 1926; Kostecki, 1991).

## 3.2 The early history of anti-dumping

Government legislation on anti-dumping was enacted only in the early twentieth century in response to the strength of American trusts and German cartels that allegedly were dumping and causing injury to local industries in other countries (Viner, 1966, p.378). Canada's legislation in 1904 was soon followed by similar legislation in New Zealand in 1905, Australia in 1906, and the Union of South Africa in 1914. 1921 marked the year in which anti-dumping provisions became more widespread and anti-dumping legislation started to become more complex. Driving the need for such legislation were factors such as concerns about German dumping after the war and a post-war groundswell of support for protection. In 1921, new anti-dumping legislation was introduced by Great Britain, Newfoundland, New Zealand and the United States, while Australia and Canada extended already existing anti-dumping legislation.

## 3.3 The General Agreement on Tariffs and Trade

Negotiations for the GATT in 1947 specifically provided contracting parties, under Article VI, with the option of taking anti-dumping action against injurious dumping in certain circumstances, but did not make dumping illegal nor require contracting parties to take action against dumping (Jackson, 1997, p.257). Trebilcock and Howse (p.167) note that the wording of Article VI was "vague in important respects leading to inconsistent interpretations and applications of the provision" and that two major users of antidumping, Canada and the United States, "did not consider themselves bound by its terms because their domestic antidumping laws pre-dated the GATT . . .". Some countries, therefore, were perceived to be applying their antidumping laws in ways that raised new barriers to trade (Jackson, p.256). The 1967 Agreement on the Implementation of Article VI (the Anti-dumping Code), developed in The Kennedy Round (1964 – 1967), was intended to address these concerns by interpreting Article VI provisions on anti-dumping duties and setting out procedural rules that would ensure greater uniformity in anti-dumping practice<sup>4</sup>. The Code was revised in the Tokyo Round (1974 – 1979) (Gillies and Moens, 1998, p.585).

## 3.4 The World Trade Organisation

The Uruguay Round of multilateral trade negotiations (1986 – 1993) resulted in the Marrakesh Agreement establishing the World Trade Organization (WTO). The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the Anti-Dumping

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<sup>4</sup> Department of Industries and Commerce, *Anti-Dumping Legislation: GATT Article VI*, attached to 7 March 1972, Memorandum *GATT Anti-Dumping Code*, 107/8/19, to the Comptroller of Customs. In Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 1, Economic Affairs, General Agreement on Tariffs (sic) and Trade, Anti-Dumping and Countervailing, Location ARC, Cab 2257.

Agreement) formed part of the Agreement and was automatically binding on all WTO members (GATT Secretariat, 1994a), unlike the previous Anti-dumping Code where individual GATT contracting parties could choose whether or not to accede. Changes introduced by the new Agreement included clarifying the assessment of dumping, conditions for cumulative assessment of the effects of dumped imports from more than one country, the causal link between dumping and injury, providing threshold levels for dumping margins and negligible volumes of imports, expanding the rules of evidence, and providing for cessation of duties or a review in five years (Trebilcock and Howse, p.169-71).

In November 2001 a WTO Ministerial Conference provided a mandate in the Doha Development Agenda for negotiations aiming to clarify and improve disciplines under the Anti-Dumping Agreement, in response to concerns by some countries that greater consistency and transparency is needed in the way members interpret and apply the Agreement (World Trade Organisation, 2001).

### **3.5 Unfair trade and equity**

To a sport-loving nation like New Zealand, where wins or losses in the national game of rugby football arguably affect the mood of the whole country, the rhetoric whereby anti-dumping action is claimed to restore a “level playing field” has considerable political appeal. Jackson (1997, pp.21, 248) suggests that the level playing field idea evokes the notion of economic activity as a game, and that competition in this game should be defined by rules that all players share. He argues that the meaning of level playing field is unclear, implying the need to maintain a fair competitive international environment, yet at the same time argue against unfair activities, such as dumping, which may in fact involve economically competitive activity. He concludes that “the goal of promoting a level playing field, through national and international policies designed to inhibit dumping or subsidies, seems to have powerful political appeal”.

Lindsey and Ikenson (2003, p.vii - xi) observe that supporters of anti-dumping action argue for fairness and a level playing field, which they claim is achieved by anti-dumping duties that offset the lower pricing of imports due to “artificial competitive advantages created by market-distorting government policies abroad” (p.xi). The unfair competition from imports is claimed to arise from factors in foreign markets such as trade barriers, anti-competitive or monopolistic practices, subsidies and barriers to firm exit, such as through poor bankruptcy laws (p.vii). Lindsey and Ikenson (p.viii) argue that, rather than creating a level playing field, anti-dumping action is taken against legal commercial practices that would be acceptable in domestic competition, “In other words, antidumping laws discriminate against imports, and that is the essence of protectionism”.

Bhagwati (1988, p.35) considers that “the appropriate use of . . . anti-dumping actions to maintain fair, competitive trade” is consistent with a free trade policy, but he also expresses concern that anti-dumping can be misused and extended to undermine free trade. (1991, pp. 14). The reasons for his views are that protectionist pressures leading to an increase in unfair trade allegations can come from a number of quarters, such as corporate or labour interests, and can arise for a number of reasons, such as an oil shock, recession, increased international competitiveness, and exchange rate changes. Bhagwati (1991, p.19) concludes that such converging forces “have resulted in a capture and protectionist misuse of the traditional unfair trade mechanisms in regard to import competition, CVD and AD, in both the European Community and the United States. . .”.

### **3.6 Rationales for anti-dumping**

There is a range of literature that describes dumping and discusses the grounds on which anti-dumping action is justifiable or not, for example Stegemann (1991), and Trebilcock and Howse (1999). Viner (1926) considered that anti-dumping action was justified only to prevent “substantial injury to domestic industries”. Opinion is divided, however, on whether anti-dumping action is justified on the basis of any economic rationale. Commentators identify the following forms of dumping which could give rise to possible economic justifications for an anti-dumping response:

- International price discrimination involves selling a like product in two different national markets for different prices (Viner, 1923, p.3).
- Strategic dumping is used to describe a situation where the overall strategy of the exporting nation is to close out its home market from competing imports while allowing its exporters to sell at dumped prices in the markets of other countries (Willig, 1992, cited in Marceau, 1994, p.15).
- Predatory pricing involves systematically pricing below cost to eliminate rivals in a market, with the aim of gaining a dominant position or putting a competitor out of business and then introducing higher prices than would normally be possible (Trebilcock and Howse, p.180; Hindley, 1991, p.27).
- Intermittent dumping involves dumping that lasts for several months or years only. Viner (1923, p.30) noted that great injury could be caused by such dumping, “without the redeeming feature of providing consumers in the country dumped on with a permanent cheap supply of the commodities which are being dumped”.

The literature shows that there is economic justification for anti-dumping action in only limited circumstances, namely in situations of strategic or predatory dumping (Deardoff, 1990, p.23, Hoekman and Kostecki, 1995, p.177; Ministry of Commerce, 1998, p.24; Trebilcock and Howse, 1999, p.188). Trebilcock and Howse (p.179) do not consider anti-dumping action is justified against price discrimination *per se* because “dumping gives the export country the benefit of the price discriminator’s low priced market without the social costs of its high-priced market”. Lindsey and Ikenson (2003, pp.x - xi) show that low prices are a problem only if they tend to lead to higher prices in the long term and that, therefore, economists support anti-dumping action only when opposing predatory pricing. But Lindsey and Ikenson state that economists agree that anti-dumping does not usually address predatory pricing and, therefore, it lacks any economic justification.

Trebilcock and Howse (pp.184-186) also question whether any action is justified against intermittent dumping because of its uncertain effect on consumer welfare. Recent literature argues that anti-dumping action is possibly justified on economic grounds only in the cases of strategic (Willig, 1992, cited in Marceau, p.15) or predatory dumping (Hoekman and Kostecki, 1995, p.177; Trebilcock and Howse, p.188; Willig, 1992). The literature argues for and against a response to predatory dumping depending on the situation (Trebilcock and Howse, pp.180-184). Willig (Ministry of Commerce, 1998, p.23) considers that predatory pricing is so detrimental as to justify a response. On the other hand, Hindley (p.28) considers that the expense of reducing prices to force a monopoly means that a rational firm will never use predatory pricing as a means of creating a monopoly. Hindley (pp.31, 39) considers that, while predatory pricing might provide an economic rationale for antidumping action, it is difficult to establish predatory intent. He concludes, therefore, that the scope for an economic rationale for dumping is very small compared with the large number of dumping cases and is only likely where there are very few global suppliers of a product.

The then New Zealand Ministry of Commerce (1998, pp.24-28) noted the view of many economists that, in the absence of predatory pricing, anti-dumping action was rarely justified. Therefore it is likely that anti-dumping action is usually taken for non-economic reasons, namely in response to political pressures which hold sway because they focus on the alleged unfairness of cheaper imports (Trebilcock and Howse, pp.184-186). Tharakan (p.2) argues that anti-dumping provides fertile ground for lobbyists protecting special interests and for those with the power to provide or deny it, while Jackson (1997, p.272) observes the significant pressures brought by domestic producers in the United States, the European Union,

Canada, and Australia to influence administration of anti-dumping laws in order to limit import competition. Lindsey and Ikenson (2003, p.18) agree that the main justification for anti-dumping law is based on political legitimacy rather than on economic efficiency, while Finger (1991, p.1) argues that antidumping has always been just a part of ordinary protection. Marceau (1994, p.316) points out that economists will never be able to overturn anti-dumping using efficiency arguments while people feel threatened by imports and the media influences the majority to condemn governments when unemployment persists. The power of producers is emphasised by Jackson's (p254) observation that government policymakers often given them more weight than consumers. Miranda, Torres and Ruiz (p.61) consider political arguments may explain why anti-dumping action is increasing despite its lack of economic justification.

There are a number of arguments given as rationales for anti-dumping laws, including that:

- Dumping distorts comparative advantage because it provides distorted market signals to producers in the importing country that are not based on cost efficiency (Ministry of Commerce, 1998, pp.24-25);
- Dumping is the result of market isolation (Ministry of Commerce, pp.25-26) and sporadic anti-dumping is better than economic isolation caused by broader protectionist measures (Marceau, 1994, p.318);
- Anti-dumping action ensures “fair” competition (Trebilcock and Howse, p.186) and is, therefore, a response to ensure equity between producers in different country-circumstances;
- Long-term interests of consumers, who are also producers, is served by anti-dumping action (Ministry of Commerce, p.27); and
- Anti-dumping action supports free trade regimes (Ministry of Commerce, p.24). Tharakan (p.2) notes that “[t]rade policy makers and administrators might see the provisions related to antidumping measures as a convenient instrument to be used for prying open foreign markets or triggering the flow of foreign direct investment into one’s own territory”.
- Distributive justice would see anti-dumping action as addressing net adverse effects on consumer welfare, in particular impacts on the least-advantaged members of society (Trebilcock and Howse, p.186);

- Communitarian values would support anti-dumping action against imports adversely affecting industry-dependent communities (Trebilcock and Howse, p.186); and
- Political expediency requires anti-dumping action. Baron (2003, p.598), for example, argues that anti-dumping is used as a safety valve against pressure for broader protectionist measures.

The Ministry of Commerce (1998) and Trebilcock and Howse (1999) note generally that there are arguments for and against anti-dumping action as an effective response in these circumstances. Hoekman and Mavroides (1996), Morgan (1996) and the Ministry of Commerce (1998) explore a competition approach to anti-dumping action.

In summary, the literature shows that there are many arguments both for and against anti-dumping action as a response to different types of dumping. The stronger economic rationales apply to the limited situations of predatory and strategic dumping. The main rationales for antidumping appear to result from political pressures.

### **3.7 The Development of anti-dumping in New Zealand**

This study was prompted by the lack of detailed published research on the development and implementation of New Zealand's anti-dumping policy over the past 100 years. Viner (1923, 1926, 1996) provides a reasonably detailed description of the implementation of New Zealand's early anti-dumping legislation in 1905 and 1921. Subsequent authors have provided brief descriptions of the major changes in New Zealand legislation during this time (Hastings, 1986; McPhail, 1992; Cullen, 1995; Fardell, 1996 and Butterworths, 2004). Papers have also been published that explain reviews of and developments in New Zealand's legislation (New Zealand Customs Department, 1986b; Ministry of Commerce, 1994; Ministry of Commerce, 1998). These papers, through submissions from interested parties, do cast some light on issues of concern to major stakeholders.

After Canada, New Zealand was the next country to enact anti-dumping legislation – the *Agricultural Implement Manufacture, Importation and Sale Act 1905* (Government Printer, 1905), which protected manufacturers of agricultural implements from dumping, was enacted on 31 October 1905. The first relatively full anti-dumping legislation was provided for in the *Customs Amendment Act 1921* (Government Printer, 1921), and while it did not require a test of whether domestic producers were being injured by dumping, it did allow the Minister of Customs to decline to impose an anti-dumping duty if it was not in the public interest. The *Customs Acts Amendment Act 1965* (Government Printer, 1965) finally introduced an injury test, although the public interest provision was removed a year later when the *Customs Act 1966* (Government Printer, 1966) was enacted. Anti-

dumping provisions were widened and strengthened in 1971 and 1973, while a 1983 amendment replaced the “prejudicial or injurious” test with “material injury”, which Hastings (1986) considered reflected more closely the wording of Article VI of the GATT. Hastings was drawn to consider anti-dumping when in 1986 the Minister of Customs withdrew anti-dumping duties on Foster’s canned lager on the basis that material injury was not being caused by dumping. He argued that anti-dumping law should preserve efficient competition rather than protect domestic producers and that, because of the lack of a competition-approach to the material injury test, that “the legislative history of New Zealand anti-dumping law indicates a strong tendency towards a protectionist tariff approach” (pp.213, 226). The Fosters case and significant reductions in protection for New Zealand industry led to a major review of anti-dumping legislation in 1986 that resulted in anti-dumping legislation under the *Customs Act 1966* that was consistent with the GATT Anti-Dumping Code. New Zealand finally acceded to the Code after twenty years of resistance.

The Labour government transferred responsibility for investigating anti-dumping to the Ministry of Commerce in 1988 when anti-dumping legislation was enacted under the *Dumping and Countervailing Duties Act 1988* (New Zealand Government, 1990). The Act’s purpose was to protect domestic industries from the injurious effects of dumping and subsidisation. McPhail (1992, A6), then manager of the Trade Remedies Group of the Ministry of Commerce, commented on a significant increase in anti-dumping action by New Zealand which, rather than being viewed as protectionist, he stated “should be seen as an index of the increasing openness of the New Zealand market”. Sheppard and Atkins (1994), in a study evaluating anti-dumping actions and their use by New Zealand, included brief outlines of New Zealand’s policy towards imports in the twentieth century and New Zealand’s anti-dumping history, but mainly focused on an anti-dumping case against women’s footwear from China. They concluded that anti-dumping measures were protectionist and that the legislation should be repealed.

The most recent amendments to anti-dumping legislation have resulted from multilateral and bilateral agreements. The removal of trans-Tasman anti-dumping action was passed under the *Dumping and Countervailing Duties Amendment Act 1990* (New Zealand Government, 1993) against strong opposition from significant New Zealand manufacturers (Tasman Antidumping Group, 1989). Following the negotiation of the World Trade Organisation (WTO) Anti-Dumping Agreement in 1994, the Ministry of Commerce (1994) published an explanation of proposed anti-dumping changes to ensure consistency with the Agreement and those changes were enacted in the *Dumping and Countervailing Duties Amendment Act 1994* (New Zealand Government, 1996). A Ministry of Commerce discussion paper (1998) on the future direction of trade remedy policy, introduced the possibility of interests of consumers and competition considerations being

taken into account. The discussion paper also discussed arguments for and against anti-dumping action in the international literature. No legislative change has resulted from this review. The most recent amendments to New Zealand's anti-dumping legislation were by way of the *New Zealand Singapore Closer Economic Partnership Act 2001* (New Zealand Government, 2001) following negotiation of the closer economic partnership. The influences shaping New Zealand's anti-dumping legislation are discussed in detail below under Chapters 5 and 6.

## **4. Design and method of research**

### **4.1 Previous research**

No detailed research describing how anti-dumping developed in New Zealand over the past 100 years has been published. There is certainly no comprehensive study that considers the development of anti-dumping in the context of the tension that exists between protection and free trade and between various private interests and the public interest. Overviews of the history of anti-dumping in New Zealand have been referred to in the previous chapter.

### **4.2 Literature reviews**

This study is based on comprehensive analysis of published and official unpublished sources as the main means of examining the New Zealand government's approach to anti-dumping action. Literature reviews examine the development and nature of protection and antidumping and the economic and non-economic arguments traditionally made in support of or against anti-dumping action. This understanding provided the basis for the identification of rationales for anti-dumping used in New Zealand. A further detailed literature review sets out the major issues in the development of anti-dumping action in New Zealand. It involved identifying and analysing relevant published and unpublished material, including material in government documents, legal cases, New Zealand Parliamentary Debates (NZPD), press releases and news media articles. This literature was analysed to identify themes related to particular rationales and to identify the major changes in anti-dumping policy, policy issues, debate, players and factors that have influenced New Zealand's adoption of a trade remedies regime and its evolution.

Published books and articles containing relevant material were located in the National Library, Massey University Library, Wellington Public Library, and the Ministry of Economic Development Library. Books were also inter-loaned from several university and public libraries in New Zealand. Information published on the Internet and public media databases was also accessed. Published information included: statutes; New Zealand

Parliamentary Debates; reports of select committees, the Customs Department and the Ministry of Commerce in Appendices to the Journal of the House of Representatives;

Unpublished official documents were located at New Zealand National Archives, the Parliamentary Library, the Ministry of Economic Development and the Ministry of Foreign Affairs and Trade. Unpublished documents included: select committee reports; submissions made to Select Committees; correspondence; reports to Ministers and Cabinet Committee reports and minutes. Requests for unpublished official information were made to the Ministry of Economic Development, Ministry of Foreign Affairs and Trade, New Zealand Customs Service, State Services Commission, and The Treasury.

### **4.3 Analysis**

The international literature was reviewed to identify recurring themes in the debate on the rationales for anti-dumping and the competing interests for and against it. These key themes were then examined in a detailed review of New Zealand published and primary sources. New Zealand's anti-dumping experience supports the contention of the international literature that it is largely justified on non-economic grounds and most often on grounds of equity or fairness. As indicated by the international literature, the tension between the protection of private interests and the public interest is clearly evident throughout New Zealand's anti-dumping experience, with producer interests largely persuasive in influencing the direction of anti-dumping policy. While the economic need for competition within the Australia-New Zealand free trade area saw the removal of trans-Tasman anti-dumping against strong protest from producers, producers have successfully opposed the introduction of any public interest or competition test to general anti-dumping policy. The largely successful pressure applied by producers has gained leverage since the 1970s from governments' pursuit of lower levels of general protection from imports and, more recently, bilateral free trade agreements. New Zealand's recent and significant trade liberalisation has given an impetus to the arguments for anti-dumping that does not receive equivalent emphasis in the international literature.

### **4.4 Limitations**

The study focused on the factors and interests influencing anti-dumping, and as such did not capture in detail the development of New Zealand's particular approach to anti-dumping action. The research did not consider detailed administrative arrangements for taking anti-dumping action nor the detailed outcomes of anti-dumping investigations.

The first author worked in the Trade Remedies Group of the Ministry of Economic Development, which administers New Zealand's anti-dumping regime, from December 1988 until August 2005. The author's role as a practitioner-researcher has helped to identify key issues in the implementation and change of anti-dumping policy over time. Boston, Martin, Pallot and Walsh (1996, pp.17-18) explain that some public administration literature takes a view that an administrator of policy has a vested interest in maintaining the policy and maximising resources in support of administration of the policy. To ensure that an objective view was maintained, the research was based rigorously on the facts presented to avoid assumptions that could be perceived as practitioner-bias.

The study of anti-dumping policy and action over the years was made possible by access to official government documents and submissions made to government. Some information between the 1920s and 1970s, such as some select committee submissions, was not able to be accessed. Information around the time of the 1988 transfer of anti-dumping from the Customs Department to the Ministry of Commerce and in years prior to that proved difficult to find and lack of some information limited the comprehensiveness of the study.

#### **4.5 Ethical issues**

The study involved access to published and official documents. As a practitioner-researcher, the first author had access to confidential information in the Ministry of Economic Development, but agreed with the Ministry that he would only work from information that was either already in the public domain or which was released to him under the Official Information Act 1988. Copies of requests for information are contained in the Appendices to this report. The author was permitted to use his internal access to search files for relevant information and notes that the Ministry of Foreign Affairs and Trade used a similar arrangement of access to files for *bona fide* researchers.

This research should serve to inform rather than cause harm to any particular interests. It is possible, however, that interested parties may use the results of this research in pursuit of particular policy objectives. The research report is fact-based and has not been prepared to facilitate the pursuit of any particular policy outcome.

The research is designed to allow consideration of the influences on policy-making and development, but does not require the author to make a decision on whether anti-dumping policy is justified, whether it is applied in a protectionist manner or what policy options should be pursued. The research, therefore, attempts to avoid any personal conflict with the first author's employment and any conflict that might affect or be perceived as affecting the first author's role and neutrality as a public servant. To ensure

that the author complied strictly with State Services Commission guidelines on political neutrality<sup>5</sup>, an advanced draft of this report was cleared through the author's manager in the Ministry of Economic Development.

The proposal for this research project was reviewed and approved by the Massey University Human Ethics Committee, Palmerston North Application 04/72. If any person has any concerns about the conduct of this research, they should contact Professor Sylvia Rumball, Chair, Massey University Campus Human Ethics Committee, Palmerston North, telephone 06 350 5249, email [humanethicspn@massey.ac.nz](mailto:humanethicspn@massey.ac.nz)

## 5. Flexible anti-dumping protection

### 5.1 Agricultural Implement Manufacture, Importation, and Sale Act 1905

New Zealand's first anti-dumping legislation was enacted in 1905 against a background of protectionist sentiment and the fears of a small number of manufacturers. Scholefield (1909, p.321) considered that protectionist sentiment "permeated the whole community" and was advanced by both "public opinion on the one hand and the necessities of the struggling infant industries on the other". While protective tariffs averaging about 20 percent (Duncan, Lattimore and Bollard, 1992, p.4) protected many industries, manufacturers of agricultural implements - which were an essential input to New Zealand's farming economy - were not protected because farmers were opposed naturally to any duty that might increase their costs. In 1905, however, the Liberal government of Premier Richard Seddon was petitioned by agricultural manufacturers and their employees, who had grave concerns that an American harvester trust - a monopoly - intended to undercut their prices, put them out of business and gain a monopoly of the local market (Viner (1923, pp.204-206). *Farmers* were interested in the most-modern, efficient and price-competitive implements on the one hand, while *manufacturers* and employees were concerned with ensuring local manufacture continued to prosper.

Manufacturers argued that the trust destroyed competition, because a foreign monopoly would take "the place of the present Colonial Competition" (Reid & Gray, 1905). The workers were concerned that they were disadvantaged by being distanced from the sources of inputs, on many of which they had to pay a customs duty, and that American methods and operations were not subject to Labour Laws similar to those in New Zealand (Roberts, A.J. & Co, 1905). Their fears were considered to be exaggerated

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<sup>5</sup> State Services Commission. (26 September 2003). *Political Neutrality: Fact Sheet 1 - What is 'political neutrality' and what does it mean in practice?* Retrieved on 17 November 2004 from <http://www.ssc.govt.nz/display/document.asp?docid=3453&pagetype=content&pageno=4&NavID=114>.

by some members of Parliament, such as John Duthie (Wellington City) who considered that the fear of “being swamped with dumped manufactures . . . was probably . . . largely imaginary” and the result of an “hysterical feeling [that had] been worked up” (NZPD, 1905, p.1220). Nonetheless, the Agricultural Implement Manufacture, Importation, and Sale Act Bill was introduced to the House in the final days of the Parliamentary session and, perhaps significantly, only a few weeks before the 1905 election.

The Bill proposed that, if an exporter of certain agricultural implements unduly lowered prices or interfered in competition, a “Board of Advice” would investigate and, conditional on a reduction in price by local manufacturers, the Board could recommend a duty equal to that reduction (NZPD, 1905, pp.1188-89). The Bill was contentious because the rationale for anti-dumping legislation was not clearly established, there were different views about free-trade and protection, and a number of affected parties were not represented in the debate.

Seddon, supported by some other members, appealed to a strong economic argument for anti-dumping by implying that United States’ pricing was predatory. No member of the House, he said, “would like to see our industries imperilled, or our farmers put in the hands of a foreign trust of foreign capitalists, who for the time being might give advantages, and ultimately when they had extreme power would crush the lifeblood out of the industry” (NZPD, 1905, p.1216). George Laurensen (Lyttleton) supported the Premier by noting that when the United States trust has “smashed up the local industry they will put up the price to the farmers” (NZPD, 1905, p.1219). Alfred Harding (Kaipara) contested this outcome on grounds that as long as New Zealand had free trade there would always be competition from other imports that would prevent American exploitation of New Zealanders and, even if Canada joined the Harvester Trust, “we still have Great Britain and all the world to fall back on” (NZPD, 1905, p.1230). Harding considered the legislation to be “the thin edge of the wedge for the local manufacturers of New Zealand to set up a wall of protection around this colony, and will put up the price of all sorts of machinery” (NZPD, 1905, p.1235).

The debate was emotionally-charged over whether anti-dumping legislation should be allowed as a protective measure. John Thomson (Wallace) argued that “the whole question of free-trade and protection” was opened up and could not be dealt with in the short time available (NZPD, 1905, p.1239). Alexander Hogg (Masterton) referred to the Act as “protection run amok” (NZPD, 1905, p.1218). Thomas Taylor (City of Christchurch), where some of the implement manufacturers were located, argued for “high protective tariffs . . . to promote the success of our economic system . . . [and] keep our own artisans employed under proper conditions”, while country member, Job Vile (Manawatu) argued that “we can do without protection” (NZPD, 1905, p.1221).

Sometimes a particular position seemed to be taken as a matter of principle and deeply held belief about the nature of protection and free trade. Sometimes the argument supported the interests of a member's constituents, such as farmers who did not want protection that might increase their costs or deny them access to better technology, or manufacturers and workers wanting to protect their investment and livelihoods. James Allen (Bruce) appealed to the reasonableness of the measure saying that the Bill was only protective in the sense of preventing the Harvester Trust dumping in goods and selling them at, say, 50 per cent less than the cost (NZPD, 1905, p.1229). Other members argued that American implements were sometimes superior, that their innovation was sometimes adopted by local manufacturers, that they were cheaper and that free-trade would enhance the ability of New Zealand to cultivate more land thereby leading to greater overall wealth, and that American agricultural implements should not be shut out of the market (NZPD, 1905, pp.1221-1230). Edward Moss (Ohinemuri) noted that "the great trouble, if you prevent outside importations coming in, is that there is no longer any inducement to improve" (NZPD, 1905, p.1233).

While some members of the House of Representatives objected to the haste with which the legislation was being introduced, Prime Minister Seddon argued that preventive measures were required before Parliament met again or "the important industries which are established in this colony . . . run the risk of being ruined. . . unless we take action now it means that men will be thrown out of employment, and that certain industries will be paralysed, and they may never recover" (NZPD, 1905, p.1215).

The Bill had been introduced so late in the Parliamentary session, that not only had a number of members left for their constituencies, but a number of interests were not able to submit evidence to the Labour Bills Committee which was charged with examining the Bill. One of the members of the Committee, Matthew Kirkbride (Manukau) argued that the evidence heard was one-sided, because while the Christchurch manufacturers, "some of the workmen and delegates from the Trades and Labour Councils" had been heard, the Committee "did not have the evidence of the farmers . . . [nor] importers and agents of American, Canadian, and foreign manufacturers" (NZPD, 1905, p.1222).

With obvious foresight of the difficulties that farmers might have with any duty that might increase the costs of their inputs, the petitioners had addressed such concerns by arguing that competition among manufacturers in New Zealand would keep prices down and the manufacturers had asked for "protection only when we reduce our prices" (Reid & Gray, 1905). Regarding the different interests that might be affected by action taken against imports, Seddon's view was that it "is all nonsense to say that the interests of the agriculturalists and the interests of the workers in the colony are not intermingled. If you injure one you prejudice the other" (NZPD,

1905, p.1215). He pointed out that farmers would be reassured by explanations that the small number of implements included in the schedule protected against any increase (NZPD, 1905, p.1215). The law would not even come into play if not needed, because if “our industries are threatened unduly or unfairly we ought to afford them protection . . .” (NZPD, 1905, p.1215).

The motives of the local producers were clearly under question, with a number of members concerned about their seemingly high level of profitability and others concerned that protection would allow local producers to exert greater power over prices. Harding (NZPD, 1905, p.1230) considered that the Bill was “introduced to promote an advantage for a few, to the detriment and at the expense of many”. James Bennet (Tuapeka) expressed a degree of suspicion and pointed out that if manufacturers were able to reduce their prices by 20 percent, “then surely they have been making a good profit in the past out of the agriculturalists.” (NZPD, 1905, p.1189).

The Bill was amended to produce an Act that ensured that implement-manufacturers would not be injured, while at the same time farmers would not face increased prices. If, following a complaint, the Agricultural Implement Inquiry Board established that the price of any imported agricultural implements scheduled in the Act had been “materially reduced”, it could recommend that local manufacturers receive bonus payments of up to 33 percent to allow them to compete with importers (Butterworths, 2004; Viner, 1923, pp.204-205). Alternatively, if domestic or British manufacturers agreed to reduce their prices by at least 20 percent, the board could recommend that “a special countervailing duty” be applied to the foreign imports. The board was representative of concerned interests, being composed of “three representatives of agricultural and pastoral interests and employers, two representatives of labour” (NZPD, 1905, p.1188). The Act was a clever compromise between the different policy interests of farmers who did not want protection that increased their costs and public sentiment against a foreign trust that could destroy a New Zealand industry and then dictate prices (Scholefield, 1909, p.326-327; Viner, 1923, p.205)

New Zealand’s first anti-dumping legislation was never used to take action against imports. A complaint in 1908 was dismissed after an inquiry found that the goods were imported prior to the Act coming into force and were being cleared as old stock (Viner 1923, p.205; Scholefield, 1909, p.327). The legislation by its very existence may have provided a remedy (Millar in NZPD, 1906, p.127).

Although initially a temporary one-year measure (NZPD, 1905, p.1188), by subsequent legislation the Act continued in effect until 31 December 1915 (Viner, 1923, p.205). Despite the heated debate in 1905, *The Agricultural Implement Manufacture, Importation, and Sale Act Extension Act 1906*

(Government Printer, 1906) was enacted with almost no opposition (NZPD, 1906, p.127). The Act was extended again by The Agricultural Implement Manufacture, Importation, and Sales Act, 1907, before being consolidated in the *Monopoly Prevention Act 1908*.

## 5.2 Monopoly Prevention Act 1908

The 1905 anti-dumping legislation protected agricultural implement manufacturers and arguably preserved competition by preventing domination by an overseas trust or monopoly. It was eventually incorporated into Part I of the Monopoly Prevention Act 1908 to protect *manufacturers* of agricultural implements by way of a duty on importation or by bonus payments. In contrast, Part II of the Act was more *consumer* oriented in that it provided for an inquiry and the removal of customs duties on wheat, flour or potatoes if the prices of domestic supplies were “unreasonably high” in order to force down prices (Butterworths, 2004). Butterworth & Co. (Aus) Ltd (1932, p.706) note that, while the legislation under Part I of the Act was originally temporary, it was continued by the *Monopoly Prevention Amendment Act, 1913* until 31 December 1915 when it expired. The legislation was revived temporarily by the *Expiring Laws Continuance Act 1918* and then by the *Statutes Repeal and Expiring Laws Continuance Act, 1919*. Butterworth and Co. (Aus) Ltd noted that the legislation relating to agricultural implements was “continued indefinitely by section 44 of the *Finance Act, 1922*” until specifically repealed.

## 5.3 Early anti-dumping action

The first anti-dumping action taken by New Zealand is difficult to identify. Viner (1923, p.205) states that no action was taken under the 1905 Act, and by implication its successors through to 1915. The earliest mention of specific anti-dumping action is referred to in Parliamentary debate on the *Customs Amendment Bill 1921*, the Minister of Customs, the Hon. William Downie Stewart, referred to a recent incident he considered had become famous as the “gas-cooker case”. On the basis of *prima facie* evidence of dumping, an Order-in-Council was issued that required that “those importing gas cookers should obtain the consent of the Minister, and satisfy him that they were not coming in at a dumped price” (NZPD, 1921, p.938). The Minister stated that this did not amount to a prohibition, but did not explain what would happen if importers could not satisfy the Minister. The New Zealand Customs Department’s representative in London received assurances from the exporters that they “would not for the future sell their goods in such a way as to give rise to the danger which [New Zealand] had met with” (NZPD, 1921, p.938) and the Order-in-Council was reversed because it was no longer needed. Although no anti-dumping duty was imposed, the “gas-cooker case” involved essentially an undertaking that goods would not be dumped, which is a form of anti-dumping action known

as a price undertaking provided under New Zealand's current anti-dumping legislation and also under the WTO Anti-Dumping Agreement. The "gas-cooker case" is possibly New Zealand's first anti-dumping action. Despite the different interests of the "very substantial" gas cooker industry and importers, Downie Stewart explained that the Minister met with the main importers and a leading chamber of commerce, who were persuaded of the need for the measure by the Comptroller of Customs (NZPD, 1921, p.938).

## 5.4 Customs Amendment Act 1921

A review of New Zealand's tariff legislation by the Tariff Commission (NZPD, 1921, p.665-667) had concluded that, while free trade might be preferable in theory, it was not pragmatic because of the protectionist approaches of other countries. The Commission, "on the principle of the standardization of the plane of competition" was forced to adopt a protective policy. The principle invoked by the Commission is an early reference to what is now known as providing a level playing field, whereby government regulators attempt to offset the artificial advantages foreign manufacturers may be given through their governments' policies on industry assistance or protection from imports. As well as invoking the concept of the level playing field, the Commission looked to Friedrich List for support for continued protection. List had theorised that in its second stage of development a country had moved beyond the agricultural and pastoral and was developing manufactures which activity required temporary protection until industrial development was complete. Tariff protection for established industries, the Commission concluded, should continue as a temporary measure to allow those industries to develop. Thomas Wilford (Hutt) referred to protection of local industries from dumping as one of the main principles on which the tariff was based<sup>6</sup> (NZPD, 1921, p.928).

As part of its review, the Commission (NZPD, 1921, p.667-671) had been directed by government "to provide machinery to prevent dumping or unfair competition with industries established in New Zealand". Many complaints of alleged dumping were heard and the Commission described genuine dumping as "a trade practice which is apt to cause serious disorganization and unemployment in a free-trade country". The Commission recommended that, while protective duties under the Customs Tariff appeared to have partly prevented dumping, a clause based on Canadian anti-dumping law was required to prevent dumping. Taking up List's argument for the protection of developing or infant-industries, William Veitch (Wanganui) noted that dumping from all parts of the world was one of the chief difficulties for the development of new industries in New Zealand (NZPD, 1921, p.689). At the same time, Prime Minister William Massey supported provisions against dumping, which he considered were

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<sup>6</sup> Wilford stated that the first dominant principle was "the general desire of the members of the House to give preference to the Old Country", namely Great Britain (NZPD, 1921, p.928).

“about as drastic as it is possible to place upon the statute-book” because dumping “is very common, particularly in protectionist countries . . .” (NZPD, 1921, p.663). On the basis that developing industries should be protected from dumping, especially by exporters protected from import competition in their own markets, the *Customs Amendment Act 1921* introduced stronger anti-dumping provisions that would cover all imported goods.

The 1921 amendment to the *Customs Act 1913* (Government Printer, 1932) introduced a special dumping duty for the protection of local industries which might be levied by the Minister of Customs against imported goods of a type produced in New Zealand if their price to an importer in New Zealand was less than their current domestic value<sup>7</sup>, or less than their cost of production, including a reasonable profit. There was no test of whether a domestic industry had suffered or was threatened with injury before a dumping duty might be applied in these circumstances (Hastings, 1986, p.226). Although there was no injury test, New Zealand’s legislation did, however, contain “a provision exempting from the dumping duty goods of a kind not produced on a substantial scale in the importing country” and “goods not offered for sale [in New Zealand] to all purchasers on equal terms under like conditions” (Viner, 1923, pp.284 and 233). Viner explains that this provision would ensure that duties could not be applied to goods produced in very small amounts, and would “prevent the antidumping legislation through its restriction of imports, from aiding a domestic concern in exploiting its monopoly of the domestic market”, thereby protecting consumers in New Zealand. Legislators attempted, therefore to ensure that, while domestic industries were protected from unfair competition, consumers were also protected. Hastings (1986, p.226), however, considered that the 1921 legislation did nothing to preserve competition because while “ideally designed to prevent new foreign entrants into the New Zealand market [it] contained nothing to hinder the chances of a New Zealand industry achieving monopoly power regardless of how inefficient it was by world standards”.

Records of the Parliamentary debate indicate that manufacturers, including agricultural-implement manufacturers, had lobbied government and the Tariff Commission for protection (NZPD, 1921, 686). Some requests for tariff protection also appeared to be connected to protection from dumping, such as the duties proposed for sugar and sugar of milk (NZPD, 1921, pp.774-778). Wilford was also concerned that, while protecting local industry, government should also protect consumers against unjust price increases by those protected industries (NZPD, 1921, p.928). A public interest test was introduced in section 11(8) that provided for the levying of

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<sup>7</sup> “Current domestic value” was defined in the *Customs Act 1913* as “the fair market value of . . . goods when sold for cash in the ordinary course of business for home consumption in the principal markets of the country from which the goods are exported at the time when they were so exported, with ten per centum added to such fair market value”.

dumping duty “save where the Minister may otherwise specially direct on the ground that the imposition of such duty is not required in the public interest”. The public interest provision remained in effect until 1966.

For over forty years, anti-dumping appears to have been accepted in New Zealand in its 1921 form, with no changes being made to the legislation until 1965. Significant protection from dumping was afforded by the introduction, by a Labour government in 1938, of quantitative restrictions in the form of import licensing, due to a slump in New Zealand’s overseas reserves. A National government removed quantitative controls on most raw materials and some final goods . . . in 1950 and 1951”, but these were restored on all private imports in 1957 by the Nash Labour government (Duncan, Lattimore and Bollard, 1992, pp.4-5). The extent to which import licensing was a protective device for local industry was observed by the New Zealand Customs Department (1956, p.16) which in 1956 stated that “the level of protection accorded by the Tariff is usually not sufficient to provide an adequate defence against the effects of dumping”, but by 1959 Customs (1959, p.23) was satisfied that the need for prevention of injurious dumping had reduced due to the restoration of import licensing. Customs considered that dumping was more likely to occur when the Tariff in isolation acted as “an instrument of normal protection”.

It was not until Customs’ 1957 report that an indication of the extent of anti-dumping activity was reported. Customs noted that dumping was “one of the Department’s most difficult problems . . . often difficult to detect and to deal with”, but due to the nature of the problem and not the legislation. Customs (1957, p.15) reported that:

Some of the commodities on which, if dumped, dumping duty is at present payable when they are of a class or kind made in New Zealand are: Blankets; carbon paper; carpet sweepers; cigars; confectionery; electric light fittings; electric ranges; extruded brass; hearing aids; insulated cable and wire; jams, jellies, marmalade, and preserves; jelly crystals; metal office furniture; soap; socks and stockings; split peas; stainless-steel sink benches; storage batteries; toilet preparations; perfumes and perfumed spirit; typewriter ribbons; vacuum cleaners; washing machines and spin dryers.

Customs noted in the same report that “not the least of the problems associated with dumping is the need to balance the interests of the New Zealand industries affected against those of the consumers”.

## **5.5 Customs Amendment Act 1965**

In 1965, an injury test was finally required before dumping duties could be applied in situations of genuine dumping. Since 1921, a test of “prejudicial or injurious” effect to any New Zealand industry had applied only to situations of subsidisation (Section 11(2)(c)). The *Customs Amendment Act*

1965 broadened the scope of protection to include industries that might be established in New Zealand and extended the prejudicial effect requirement to cover situations of dumping.

There was little debate over this amendment, because the opposition accepted the need for the legislation. Protection was still a contentious issue, however, and opposition Labour Party member Connelly (Riccarton) took the opportunity to charge that the National government had been converted to its views about protection, because not long before government had “claimed that industry – even industry in the process of becoming established – should be able to stand on its own feet . . . [and] should be competitive with imported products right from the beginning” (NZPD, 1965, p.3676).

## **5.6 Customs Act 1966**

The *Customs Act* 1966 carried forward the existing anti-dumping legislation, with the exception of the public interest clause. There was no debate in the House over the removal of the public interest clause and the question of considering the public interest in any anti-dumping action was not raised again until 1986.

## **5.7 Customs Amendment Acts 1971 and 1973**

A National Development Conference recommendation in 1970 resulted in an examination of anti-dumping legislation that revealed only minor deficiencies in the legislation (New Zealand Customs Department, 1971, p.6-7). The 1971 amendment (Government Printer, 1971) extended anti-dumping duty to cover an additional dumping situation known as sales dumping<sup>8</sup> (NZPD, 1971, p.3745), and to allow provisional and retrospective duties to be applied (New Zealand Customs Department, 1972a, p.10). Anti-dumping legislation was strengthened further in the Customs Amendment Act 1973 to deal more effectively with sales dumping and the taking of securities over payment of dumping duties (New Zealand Customs Department, 1974, p.15). Concerns expressed by the Manufacturers Federation about the removal of import licensing, resulted in both the National (Adams-Schneider NZPD, 1971, p.3747) and Labour (Freer, NZPD, 1971, p.3749) parties viewing strong anti-dumping provisions as essential for domestic manufacturers. Minister of Finance, Hon. Robert Muldoon (1973), stated that “the Government is ready to apply anti-dumping provisions rigorously and swiftly when dumping threatens domestic industry . . .”. Although the legislation was now producer-oriented and contained no public interest test, Customs still appeared to take account

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<sup>8</sup> Sales dumping is a situation in which an importer can sell at a loss while dumping remains hidden due to a relationship between the exporter and importer or because of compensation paid to the importer by the exporter (NZPD, 1971, p.576).

of the impact of anti-dumping on consumers. It stated “let’s be fair about the whole thing – the consumer has his preferences, too, and it is he who in the long run will have to pay the dumping duty” (1972b, p.4).

## 5.8 GATT Anti-dumping Code

The GATT Anti-dumping Code (the Code) was established during the Kennedy Round of multilateral trade negotiations (1964-1967) as an attempt to explain how Article VI should be interpreted and applied to ensure more consistent application by signatory contracting parties. Although the Code was opened for signature on 30 June 1967, New Zealand maintained for almost twenty years that it was in its interest not to accede to the Code<sup>9</sup> despite strong pressure to join from other GATT contracting parties<sup>10</sup>. In explanation to GATT contracting parties, in 1972, New Zealand maintained that its anti-dumping legislation was implemented while observing “the spirit and the intention of [GATT] Article VI”, but that New Zealand’s “legislation as it stands is most suited to our needs and, in particular, provides the necessary facility to take remedial action expeditiously to protect infant industry”<sup>11</sup>. Officials noted that New Zealand’s industries were at an early stage of development compared with other industrialised countries, the New Zealand market was limited in size, import licensing was being removed, and New Zealand industries were therefore particularly vulnerable to damage from dumping.

Behind these reasons for not adhering to the Code, lay a number of supporting reasons. Officials were concerned that action might not be able to be taken on behalf of a sole New Zealand producer of a like product because a GATT Group of Experts in 1961 (General Agreement on Tariffs and Trade, March 1961) considered that duties to prevent injury to a single firm would be “protectionist in character and the proper remedy for that firm lay in other directions”<sup>12</sup>. Officials<sup>13</sup> also considered that the New

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<sup>9</sup> Department of Industries and Commerce, *Anti-Dumping Legislation: GATT Article VI*, attached to 7 March 1972, memorandum *GATT Anti-Dumping Code*, 107/8/19, to the Comptroller of Customs. In Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 1, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping and Countervailing, Location ARC, Cab 2257.

<sup>10</sup> Department of Industries and Commerce, 7 March 1972, memorandum *GATT Anti-Dumping Code*, to the Comptroller of Customs. In Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 1, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping and Countervailing, Location ARC, Cab 2257.

<sup>11</sup> Ministry of Foreign Affairs, undated and annotated “GATT briefing for 29<sup>th</sup> session”, Anti-dumping Practices: The New Zealand position, Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 1, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping & Countervailing, Location ARC, Cab 2257.

<sup>12</sup> Department of Industries and Commerce, Study report, paragraph 15, attached to Memo to the Comptroller of Customs, 7 March 1972, Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 1, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping & Countervailing, Location ARC, Cab 2257.

<sup>13</sup> Department of Industries and Commerce, Study report, attached to Memo to the Comptroller of Customs, 7 March 1972, Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 1,

Zealand legislative requirement that the Minister be of the opinion that the importation of goods “has or is likely to have any effect prejudicial to any industry” allowed anti-dumping action to be taken before the situation of “injury” under the Code existed and that this was important to New Zealand’s typically small industries which could be irreparably damaged by dumping. The notification and evidentiary requirements of the Code also required a more complex and lengthier process than under New Zealand’s legislation. When Australia acceded to the Code in 1975, New Zealand and South Africa were the only developed countries who had not acceded to the Code, but New Zealand did not bow to the even stronger pressure for New Zealand to accede to the Code<sup>14</sup>.

When the Director-General of the GATT, Arthur Dunkel, visited New Zealand in 1981, the reasons for not accepting the Code had not changed significantly, even though the Code had been revised in the Tokyo Round. There was also now a perceived greater need to retain strong and flexible anti-dumping laws in New Zealand. New Zealand was attempting to move away from very high levels of protection for sections of New Zealand industry and several industries were restructuring. While in the mid-1960s import licensing had covered 75 percent of imports, by 1981 import licensing had reduced significantly and covered only 18 percent of the value of imports (Duncan, Lattimore and Bollard, 1992, p.5-6). The Department of Trade and Industry<sup>15</sup> noted that the review of import licensing had heightened the need “to retain the ability to act quickly to give immediate assistance to our developing industries”. The effectiveness of anti-dumping action was increasingly coming under attack from New Zealand manufacturers. Manufacturers and officials considered that accession to the Code would lead to stronger resistance by New Zealand industries to the removal of import licensing and increased pressure for greater protection “because of fears of low cost dumped imports”. A New Zealand Customs Department paper<sup>16</sup> in 1981 referred to New Zealand’s “delicate industrial position” and stated that “New Zealand’s existing anti-dumping legislation has been designed to our purposes, allowing as it does immediacy of action

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Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping & Countervailing, Location ARC, Cab 2257.

<sup>14</sup> New Zealand Permanent Mission to the Office of the United Nations at Geneva to the Secretary of Foreign Affairs, Wellington, 2 December 1975, Restricted Memo, Ministry of Foreign Affairs and Trade File No 104/48/28, Volume 2, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping & Countervailing, Location ARC, Cab 2257.

<sup>15</sup> Department of Trade and Industry, *Briefing note on visit of the GATT Director-General to New Zealand*, September 1981, Ministry of Foreign Affairs and Trade, File No 104/48/28, Part 3, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping & Countervailing, Location ARC, Cab 2257

<sup>16</sup> Memorandum from New Zealand Customs Department, to the Ministry of Foreign Affairs, the Ministry of Agriculture and Fisheries, the Treasury, the Prime Minister’s Department and the Department of Trade and Industry, *Discussion on the GATT Revised Anti-Dumping Code*, 11 February 1981, in Ministry of Foreign Affairs and Trade, File No 104/48/28, Part 3, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, Anti-Dumping & Countervailing, Location ARC, Cab 2257.

rather than the confining restrictive provisions set out in the new Code”. In 1983, the Treasury was to observe that “discussion of this paper at the time was inconclusive”<sup>17</sup>. At about the same time, a Customs Department official observed that New Zealand had a “long term and intransigent (sic) attitude against accepting the anti-dumping code”<sup>18</sup>.

## 5.9 1983 ANZCERTA

In the 1980s there was growing concern about the importance of effective anti-dumping as a safeguard for industry while other protection, such as import licensing, was removed and New Zealand moved towards free trade with Australia under the Australia-New Zealand Closer Economic Trade Agreement (ANZCERTA) (Ministry of Foreign Affairs, 1984). Kelsey (1995, p.97) notes that in return for the potential benefits under ANZCERTA “domestic manufacturers had agreed reluctantly to the progressive conversion of import licensing to tariffs and reduction of domestic protection”. Manufacturers and the government interacted closely and frequently in relation to matters of protection (New Zealand Customs Department, 1982, pp.11-12). Government accepted that protection would be needed for New Zealand industries because of changes brought about by CER and industry studies. Minister of Customs, Hon. Keith Allen, stated “the Government will work out the form and machinery for that protection together with the manufacturers . . .” and the government held country-wide discussions about CER. Concerns about possible dumping into New Zealand were met with confidence from Customs officials that, with the rules on anti-dumping and rules of origin “stiffened up”, they “could cope with any situation”. (NZPD, 1982, p.2158-60).

In 1983, the Treasury<sup>19</sup> questioned the rationale of anti-dumping legislation and whether accession to the GATT anti-dumping code would ensure that New Zealand manufacturers did not replace tariff protection with anti-dumping protection. The Treasury considered that anti-dumping duty could only be justified, on industry assistance grounds, in cases of short term, sporadic or predatory dumping of imports which led to industry disruption and the occurrence of temporary welfare losses in New Zealand industries

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<sup>17</sup> The Treasury. (30 May 1983). Memorandum to the Comptroller of Customs *Countervailing Duties and Anti-dumping Action*. Copied to the Department of Trade and Industry, the Secretary of Foreign Affairs, the Ministry of Agriculture and Fisheries, and the Prime Minister’s Department. In Ministry of Economic Development file TR 705 1983/41 Customs Act Amendment No.2, Dumping and Countervailing Review.

<sup>18</sup> Hunter, R., New Zealand Customs Department (3 May 1983). Memorandum, *Discussion paper: Redraft section 129*. In Ministry of Economic Development file TR705, 1983/41 Customs Act Amendment No.2, Dumping and Countervailing Review volume 1.

<sup>19</sup> The Treasury. (30 May 1983). Memorandum to the Comptroller of Customs, *Countervailing Duties and Anti-dumping Action*. Copied to the Department of Trade and Industry, the Secretary of Foreign Affairs, the Ministry of Agriculture and Fisheries, and the Prime Minister’s Department. In Ministry of Economic Development file TR 705 1983/41 Customs Act Amendment No.2 Dumping and Countervailing Review.

that had a long run comparative advantage. The Treasury noted that “New Zealand legislation, however, also makes provision for anti-dumping action to be taken on equity grounds ie, on the grounds that it would be “unfair” to allow imports at dumped prices to continue when these may be imposing losses on specific producers”. An equity rationale was seen by the Treasury as having the pragmatic advantage of providing some assurance to domestic industries at a time when the structure of protection was being removed. The Treasury considered, however, that the rationale for anti-dumping should be balanced by two further factors which were not in anti-dumping legislation, namely that: losses caused to industries by dumping needed to be weighed against gains to consumers and downstream industries caused by cheaper prices; and that gains or losses in national income resulting from dumping needed to be considered in terms of whether the impact was on high-cost or highly-protected industries or otherwise. The Treasury saw accession to the Code as limiting the use of anti-dumping as replacement protection because the Code constrained “signatories to adhere to certain agreed practices . . . in the interests of facilitating trade”

### **5.10 Customs Amendment Act (No.2) 1983**

Further amendments were made to the Act in 1983 (Government Printer, 1983) to bring anti-dumping provisions up-to-date with modern business and international practices<sup>20</sup>, including replacing the “effect prejudicial” test with the “material injury” test that was not only more consistent with Article VI of the GATT, but was a higher test that Hastings (1986, pp.226-227) considered would limit the extent to which domestic industries could invoke the law to protect themselves from any foreign competition. At the same time, Hastings considered, on the basis of the lack of a competition-approach to the material injury test, that “the legislative history of New Zealand anti-dumping law indicates a strong tendency towards a protectionist tariff approach”. One Customs Department official seems to agree, when he notes that Customs in 1982 made “great play [to the Manufacturers Federation] . . . of the benefits of not signing the GATT anti-dumping laws could be used (sic) as a protectionist measure”<sup>21</sup>. While the National government consulted with the Manufacturers Federation, the Bureau of Importers and Exporters, customs agents, Federated Farmers, and other organisations to ensure effective administration of anti-dumping legislation, both government and the opposition placed primary emphasis on the need to protect domestic industries (Allen, NZPD, 1983, p.2157). Opposition Labour member David Caygill (St Albans) agreed that “the most important reaction to the provisions was the assurance by the Manufacturers

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<sup>20</sup> Bathgate, G., New Zealand Customs Department. (23 June 1983). Memorandum, *Dumping and countervailing duties: Redraft of law*. In Ministry of Economic Development file TR705, volume 1.

<sup>21</sup> Hunter, R., New Zealand Customs Department (3 May 1983). Memorandum, *Discussion paper: Redraft section 129*. In Ministry of Economic Development file TR705, 1983/41 Customs Act Amendment No.2, Dumping and Countervailing Review volume 1.

Federation . . .” that the legislation had its support. (NZPD, 1983, p.3906-7). Only one manufacturer made a submission to the select committee. Tyree-Power Construction Ltd, a manufacturer of electrical transformers, questioned “whether all of the protection sought will be achieved without further ‘teeth’”<sup>22</sup>. Flexibility to take effective anti-dumping action was the main concern of the Manufacturers Federation<sup>23</sup>, while officials attempted to find the balance between detailed provisions and “the need to cover a wide variety of circumstances” (New Zealand Customs Department, 1984, p.17). Opposition member, Michael Moore (Papanui), who was to lead the World Trade Organisation at the turn of the century as its Director-General, noted that, because of protection from import licensing, New Zealanders were “absolute innocents in regard to dumping and countervailing duties”, and, unlike Australian manufacturers who had developed “a sophisticated system of using . . . dumping duties as a means of protecting their industries”, New Zealand had “not developed the facilities or the experience to defend our manufacturers with such duties” (NZPD, 1983, pp.2161,3907-8). The Minister of Customs averred that the 1983 amendment would ensure that the anti-dumping legislation was “as effective as that of any of New Zealand’s trading partners” (NZPD, 1983, p.3909).

### **5.11 1985 GATT dispute settlement**

As well as being the second country to introduce anti-dumping legislation, New Zealand was also the second country to be taken to GATT dispute settlement on anti-dumping (Waincymer, 2001, p.8). A GATT Panel formally ruled against the GATT-consistency of the anti-dumping approach taken by New Zealand after it had imposed anti-dumping duties on electrical transformers from Finland (GATT Secretariat, 1985). The Customs Department (1986a, p.21) reported that while the GATT panel had found that its procedures for establishing dumping were valid, the panel had ruled against the Department because “material injury to the New Zealand industry could not be attributed to the particular importation”. The Department accepted the panel’s findings, the Minister’s determination was revoked and dumping duty was refunded. The Panel’s decision was seen by some in the Ministry of Foreign Affairs and Trade as an opportunity to present several positive features to New Zealand’s advantage. On the international stage, New Zealand’s acceptance of the Panel’s decision and changes to its practice and legislation would signal to other GATT contracting parties that New Zealand was willing to abide by GATT rulings and encourage other contracting parties to do likewise. On the domestic

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<sup>22</sup> Tyree-Power Construction Ltd, Submission to the Statutes Revision Committee on the Customs Act Amendment Bill No. 2, SR/83/70, 30 September 1983, held at the Parliamentary Library, Wellington.

<sup>23</sup> Morrison, M.R, Tariff and Trade Officer, New Zealand Manufacturers Federation Inc. Letter of 11 October 1983 to the Comptroller of Customs, held with Statutes Revision Committee papers, SR/83/69, at the Parliamentary Library, Wellington.

stage, in an environment in which the New Zealand government was removing border protection, the GATT decision could make it easier for the government “to resist protectionist sentiment in local industry”<sup>24</sup>.

## 5.12 1986 – The Fosters lager case

The next major challenge to New Zealand’s administration of anti-dumping came from the Australian brewer Carlton United Breweries (CUB)<sup>25</sup>, after New Zealand had imposed anti-dumping duties on Fosters canned lager. CUB successfully applied for interim relief to preserve its position until its substantive application for judicial review could be heard. The Customs Department was required to accept a bond from CUB for any duty that might be eventually payable. The Brewers Association, comprised of New Zealand brewing companies New Zealand Breweries Limited and Dominion Breweries Limited, appealed. The Court of Appeal dismissed the appeals, noting that CUB had established a *prima facie* case for challenging the duty. CUB’s challenge against the duty was brought under two broad headings<sup>26</sup>, namely that there was “insufficient evidence to justify the calculation which formed the basis of the decision to impose the duty” and “prescribed formalities were not observed”. A hearing was set down for 21 April 1986, however, as Clifton in *The Dominion* of 22 April 1986<sup>27</sup> reported:

*Carlton’s appeal made the department think again. It decided there were deficiencies in the procedural steps it took in imposing the dumping duty, and in the material it gave Mrs Shields [the Minister of Customs] before she made the dumping duty order. The department’s lawyer told the court Mrs Shields had decided to revoke the duty order.*

Clifton reported that Shields immediately ordered the Customs Department to carry out a review, stating that while “anti-dumping investigations were a relatively new area to her department and the Fosters episode had been a learning experience. . . . New Zealand would now look at joining the [GATT] anti-dumping code”.

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<sup>24</sup> Ministry of Foreign Affairs, 5 June 1985, Note for File, Ministry of Foreign Affairs and Trade File No 104/48/32/2, Volume 2, Economic Affairs, General Agreement on Tarriffs (sic) and Trade, NZ/Finland: Anti-Dumping Case, Location ARC, Cab 2259.

<sup>25</sup> Davison CJ., High Court, and Cooke, Richardson, McMullin, Somers and Casey JJ, Court of Appeal. *Carlton and United Breweries Ltd and Carlton and United Breweries (Queensland) Ltd v Minister of Customs*. 1 NZLR [1986], 423 12, 13 and 14 March 1986.

<sup>26</sup> Russell McVeagh McKenzie Bartleet & Co, 4 April 1986, *Fosters Litigation*, Confidential memorandum to New Zealand Breweries Limited and Dominion Breweries Limited. In Ministry of Foreign Affairs and Trade file 650/3/8, Volume 1, New Zealand External Trade, Imports, Safeguards Anti-Dumping and Civil, Location TAI, Cab B1566.

<sup>27</sup> Clifton, J. 22 April 1986. *Beer war prompts customs review*. Sourced from Ministry of Foreign Affairs and Trade File No 650/3/8, Volume 1, External Trade, Imports, Safeguards Anti-Dumping & Civil, Location TAI, Cab B1566.

The Brewers Association and the Manufacturers Federation were scathing in their criticism of Customs' administration of anti-dumping. David Williams of the Brewers' Association<sup>28</sup> expressed concern that Customs had been "shown to have had neither the resources nor the experience to properly process the dumping complaint". Williams resolved to "pursue with the appropriate ministers the question of legislative amendments to bring New Zealand law into line with Australian legislation [which he considered was tougher] and with the General Agreement on Tariffs and Trade anti-dumping code". The Director-General of the New Zealand Manufacturers' Federation, D A Walker<sup>29</sup> pulled no punches when, in May 1986, he wrote to the Minister of Customs attaching a paper entitled "*Case Failure: A Question of Management or Legislation Inadequacies or Both?*" Walker stated that the Federation was most concerned about "the major inadequacies in New Zealand's anti-dumping facilities" exposed by the Fosters lager case. He pointed out that the major deficiencies lay in case management, staffing and the legislation. Walker observed that the Brewers Association considered "the Customs Department's handling of the case was appalling" and considered there were "shortages of knowledge and experience for dumping action at all staff levels in the Customs Department". He agreed with Williams about deficiencies in the legislation, but that this was secondary to a lack of planning by officials for the changed trading situation brought about by the removal of import licensing. Walker confirmed that "dumping and countervailing are now major issues for New Zealand manufacturers" and that Customs "needed urgent direction". Noting that "the clients of the anti-dumping service are the New Zealand manufacturers", Walker recommended that a strategic steering committee be set up which included officials and the Manufacturers' Federation. The pressure applied by manufacturers drew a quick response from government.

Within days of the Fosters case, the Ministry of Foreign Affairs<sup>30</sup> advised its Minister of the need to change New Zealand's anti-dumping legislation to accede to the GATT Anti-Dumping Code to reflect the Code's procedural and evidentiary requirements and that dumping investigations could proceed "only on a basis of a clear connection between injury (or threat thereof) to an industry and the dumped imports complained of". On 12 May 1986, the Minister of Overseas Trade, Mike Moore, presented a paper<sup>31</sup> to the Cabinet

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<sup>28</sup> The Dominion, 22 April 1986, *Shields' decision ends beer row*.

<sup>29</sup> Walker, D.A., New Zealand Manufacturers Federation. (14 May 1986). Letter to Hon. Margaret Shields, Minister of Customs. In Ministry of Foreign Affairs and Trade file 650/3/8, volume 1, New Zealand External Trade, Imports, Safeguards Anti-Dumping & Civil, location TAI, Cab B1566.

<sup>30</sup> Ministry of Foreign Affairs, 24 April 1986, Memorandum to the Minister of Foreign Affairs regarding New Zealand Anti-Dumping Legislation. In Ministry of Foreign Affairs and Trade file 650/3/8, Volume 1, New Zealand External Trade, Imports, Safeguards Anti-Dumping and Civil, Location TAI, Cab B1566.

<sup>31</sup> Moore, M, Minister of Overseas Trade, 12 May 1986, Paper to the Cabinet Development and Marketing Committee. In Ministry of Foreign Affairs and Trade file 650/3/8, Volume 1, New Zealand External Trade, Imports, Safeguards Anti-Dumping and Civil, Location TAI, Cab B1566.

Development and Marketing Committee (CDMC) that recommended CDMC “note the Customs review” of anti-dumping and “agree to recommend to Cabinet that the legislation be amended to bring it into conformity with the Anti-Dumping Code to allow New Zealand to implement it”. Mr Moore noted that the arguments against accepting the Code “resolve into the contention that our present position gives the Customs Department flexibility . . . apparent freedom to manoeuvre in terms of evidence it may require before initiating” and during investigations, but pointed out that it was “incorrect, however, to draw a major distinction between the basic principles of the General Agreement itself (in particular, the provisions of Article VI) and the terms of the Anti-Dumping Code”.

### **5.13 1986 review of anti-dumping legislation**

On 23 May 1986, the Minister of Customs, Margaret Shields, presented a paper<sup>32</sup> to CDMC, referring to the withdrawal of her decision in the Fosters case, recommending New Zealand notify its intention to accept the GATT Anti-Dumping Code, and requesting approval of a review of anti-dumping legislation and the expansion of training. The political impetus for the review was clearly due to pressure from New Zealand manufacturers. The National Business Review (NBR)<sup>33</sup> reported on 6 June 1986 that manufacturers had mounted “a concentrated effort to get the government to strengthen the measures to protect industries if the rapid removal of goods from import licensing should create problems”. Cabinet agreed on 9 June 1986 that “New Zealand should notify its intention to accept the Agreement on Implementation of Article VI of the GATT (Anti-dumping Code)”<sup>34</sup> and announced that a high-level working group would consolidate the Customs Department’s ongoing review of anti-dumping and countervailing legislation. The group’s terms of reference were to “(a) ensure that the legislation is in accordance with the requirements of the GATT Anti-Dumping Code; (b) to recommend any changes in legislation that would improve the Government’s ability to respond to complaints of dumping practices” (New Zealand Customs Department, 1986b, p.4). The working group convened by the Customs Department, consisted of representatives from Customs, the Department of Trade and Industry, the Ministry of Foreign Affairs and Trade, the New Zealand Bureau of Importers and Exporters (Inc), the New Zealand Manufacturers Federation and Federated Farmers of New Zealand.

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<sup>32</sup> Shields, M, Minister of Customs, 23 May 1986, Paper to the Cabinet Development and Marketing Committee. In Ministry of Foreign Affairs and Trade file 650/3/8, Volume 1, New Zealand External Trade, Imports, Safeguards Anti-Dumping and Civil, Location TAI, Cab B1566.

<sup>33</sup> National Business Review, 6 June 1986, *T-shirts pushed as protection test case*. Volume 17, No 22, Issue 676. In Ministry of Foreign Affairs and Trade file 650/3/8, Volume 1, New Zealand External Trade, Imports, Safeguards Anti-Dumping and Civil, Location TAI, Cab B1566.

<sup>34</sup> 9 June 1986, Acceptance of the GATT Anti-dumping Code, Ministry of Foreign Affairs and Trade File No GATT 10, Volume 3, Box B1692, General Agreement on Tarriffs (sic) and Trade (GATT), Anti-dumping, General, Location CLP.

Submissions to the review were made by manufacturers (New Zealand Manufacturers Federation (Inc), New Zealand Sugar Company Ltd, Fisher & Paykel Ltd, Tyree-Power Construction Ltd), importers (New Zealand Bureau of Importers and Exporters (Inc), Fox and Gunn Ltd), a consultant (Trade Consultants Ltd) and government agencies (Customs Department, Government Stores Board, and the Treasury). Manufacturers wanted effective anti-dumping legislation. Fisher & Paykel<sup>35</sup> and Trade Consultants<sup>36</sup> submitted that anti-dumping legislation should provide speedy action to prevent material injury in New Zealand's small market where injury would occur more quickly than in larger markets. Importers were concerned that anti-dumping minimised disruption to their businesses<sup>37</sup>, that clear, concise and simple legislation addressed the problem of unfair practices but did not result in additional barriers to imports<sup>38</sup>.

The Treasury's view<sup>39</sup> was that "anti-dumping policy is ultimately a way of enforcing rules about competition" and "not a way of maintaining levels of industry assistance", which are achieved through tariffs and import licensing and that "it could be argued that [anti-dumping procedures] should only parallel the Commerce Act provisions for anti-competitive aspects of predatory pricing . . ." (New Zealand Customs Department, 1986b, p.9). The Treasury's view put to CDMC<sup>40</sup> was that "there would be net benefits in not having any anti-dumping or countervailing legislation and procedures". Treasury did, however, acknowledge "the argument that there may be presentational advantages in maintaining such measures during part of the trade liberalisation process, provided that their distortionary potential is kept to a minimum".

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<sup>35</sup> Fisher & Paykel Ltd. (26 June 1986). *Fisher & Paykel Limited's submissions to the anti-dumping service working group meeting held in Wellington*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>36</sup> Painter, G.W, Trade Consultants Ltd. (25 June 1986). Discussion paper prepared for the anti-dumping service working group, *New Zealand's requirements in the anti-dumping area*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>37</sup> Fox, C.R. Fox and Gunn Limited. (24 June 1986). *Submission to the anti-dumping service working group meeting Wellington Thursday 26<sup>th</sup> June 1986*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>38</sup> Blackburn, J.F. President, The New Zealand Bureau of Importers and Exporters (Inc.). (20 June 1986). Letter to the anti-dumping review group, *Anti dumping review – Importers views*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>39</sup> The Treasury. (Undated). *Customs department review of anti-dumping legislation*. In Ministry of Economic Development file TR706/3, volume 3.

<sup>40</sup> Minister of Commerce. (Undated). Memorandum for the Cabinet Development and Marketing Committee, under cover memorandum dated 3 November 1986, *Review of New Zealand's anti-dumping and countervailing legislation and procedures*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

The review team noted that, even under GATT Article VI and the GATT Anti-Dumping Code, “countries have considerable latitude as to precisely how they operate their anti-dumping system” ranging from “a highly protective manner which offsets to a great extent the benefits of dumping to the consumer, or in a way which is open and flexible and allows the country to take maximum advantage of cheap imports” (New Zealand Customs Department, 1986b, p.1). The working group proposed “extensive changes” to anti-dumping legislation and “sought to strike a balance between the two ends of the spectrum, considering that “neither the highly protective approach nor the non-interventionist views outlined by Treasury, provide an adequate basis for the restructuring of New Zealand’s anti-dumping system” (New Zealand Customs Department, 1986b, p.9). The review proposed statutory timeframes, clearer and simpler provisions for determining dumping, specific criteria for assessing material injury and procedural provisions. The proposed amendments complied with the Code and aimed to provide “a system that provides a fast and effective response to injurious dumping, without constituting an unjustifiable impediment to international trade or unduly negating the benefits of international competition” (p.1). The Minister of Customs, Hon. Margaret Shields<sup>41</sup>, recommended the legislative changes to CDMC. Apparently against the advice of her department<sup>42</sup>, the Minister also recommended that “the legislation be modified to require the Minister of Customs to take into account the cost of a duty on the users of goods when setting a duty”. This recommendation was proposed by the Ministry of Agriculture and Fisheries who preferred that “provision be made in the proposed legislation for “the national interest” to be taken into account before any anti-dumping or countervailing action is taken”<sup>43</sup> because of a concern that anti-dumping focused on the domestic industry, with little account being taken of the effect on users of the goods<sup>44</sup>. The Customs Department<sup>45</sup> argued that such a national interest philosophy would need to be studied for its effect and that the New Zealand

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<sup>41</sup> Cabinet Development and Marketing Committee. (3 November 1986). Memorandum DM (86) 151, *Review of New Zealand’s anti-dumping and countervailing legislation and procedures*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>42</sup> Although the Cabinet Committee paper records that the Minister recommended the Committee agree that the cost of a duty on users of goods be taken into account when setting a duty, that recommendation is scored out in the attached memorandum to the Cabinet Committee signed by Minister Shields.

<sup>43</sup> Belgrave, M.J., New Zealand Customs Department. (Undated). Memorandum to the Minister of Customs, *Review of New Zealand’s anti-dumping and countervailing legislation and procedures*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>44</sup> Minister of Commerce. (Undated). Memorandum for the Cabinet Development and Marketing Committee, under cover memorandum dated 3 November 1986, *Review of New Zealand’s anti-dumping and countervailing legislation and procedures*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

<sup>45</sup> Belgrave, M.J., New Zealand Customs Department. (Undated). Memorandum to the Minister of Customs, *Review of New Zealand’s anti-dumping and countervailing legislation and procedures*. In Ministry of Economic Development file TR706 1987/89 Customs Act Amendment – Dumping and Countervailing Review No.3.

Manufacturers' Federation would be against such a proposal as it could have the effect of negating any protection its members had against unfair pricing practices . . .”.

CDMC agreed to the amended legislation, but did not accept a public interest test. Following implementation of the amendments through the *Customs Amendment Act (No 3) 1987*<sup>46</sup>, CDMC<sup>47</sup> agreed “to recommend to Cabinet that New Zealand now formally accepts the [Anti-Dumping] Code”<sup>48</sup>. “New Zealand was welcomed for the first time as a full member of the GATT Anti-dumping Committee at its meeting on 30 May 1988”<sup>49</sup>.

## 6. Anti-dumping under international rules

The fourth Labour government, which came to power in 1984 as a result of a snap election, introduced sweeping changes in economic and trade policy. A significant reduction in industry assistance and protection “expos[ed] ‘fortress New Zealand’ to the global competitive market-place . . .Kelsey (1995, p.86). From 1985, “the basic thrust of tariff policy . . . [was] towards lower and more uniform rates of tariff protection”<sup>50</sup>. In November 1986, the Labour government announced a final date of 1 July 1988 for the removal of import licensing outside of industry plans (Duncan, Lattimore and Bollard, 1992, p.6). Kelsey (1995, p.99) observes that “the effective rate of assistance for manufacturing fell from around 37 percent in 1985/86 to around 19 percent in 1989/90”, by which time most import licensing had been removed with the remainder to be removed by 1992. The National government implemented a tariff reduction programme from 1993 to 1996 which resulted in a one-third reduction for general tariffs (Duncan, Lattimore and Bollard, 1992, pp.7-8). Throughout the process of reducing protection and opening the New Zealand market to global competition, New

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<sup>46</sup> Part VA, comprising ss 186A to 186P, was inserted, as from 13 June 1987, by s 2 Customs Amendment Act (No 3) 1987 (1987 No 89). Retrieved 17 October 2004 from Brookers online at [http://www.brookers.co.nz.ezproxy.massey.ac.nz/libraries/frameset.asp?headingswithhits=on&advquery=%5Brank+30%5Dcustoms+act+1966&depth=all&softpage=BROWSE\\_VW&hitsperheading=on&clientID=2878186798&tocview=hitlist&infobase=statutes.nfo&record={A8EC83A8}](http://www.brookers.co.nz.ezproxy.massey.ac.nz/libraries/frameset.asp?headingswithhits=on&advquery=%5Brank+30%5Dcustoms+act+1966&depth=all&softpage=BROWSE_VW&hitsperheading=on&clientID=2878186798&tocview=hitlist&infobase=statutes.nfo&record={A8EC83A8}).

<sup>47</sup> Moore, M, Minister of Overseas Trade and Marketing to the Cabinet Development and Marketing Committee. (12 April 1988). *Acceptance of anti-dumping code*, Ministry of Foreign Affairs and Trade File No GATT 10, Volume 3, Box B1692, General Agreement on Tariffs (sic) and Trade (GATT), Anti-dumping, General, Location CLP.

<sup>48</sup> Cabinet Development and Marketing Committee. (13 April 1988). Ministry of Foreign Affairs and Trade File No GATT 10, Volume 3, Box B1692, General Agreement on Tariffs (sic) and Trade (GATT), Anti-dumping, General, Location CLP.

<sup>49</sup> Ministry of Foreign Affairs. (13 June 1988). Geneva to Wellington, Cable. Ministry of Foreign Affairs and Trade File No GATT 10, Volume 3, Box B1692, General Agreement on Tariffs (sic) and Trade (GATT), Anti-dumping, General, Location CLP.

<sup>50</sup> Ministry of Commerce and Customs Department. (12 March 1992). Memorandum to the Cabinet Committee on Enterprise, Growth and Employment on *Review of the effectiveness of trade remedies and tariff enforcement; Apparel, leather apparel, footwear and headwear*, p.2. In Ministry of Economic Development file TR709 1991/1992 Review of TR Effectiveness (Apparel and Footwear).

Zealand manufacturers continued to focus on ensuring effective anti-dumping provisions remained available.

## 6.1 Dumping and Countervailing Duties Act 1988

Sir George Laking, in a review of border protection co-ordination, had referred in May 1988 to anti-dumping action as one of the areas in which the Treasury and the Department of Trade and Industry considered there was “a confusion between the policy and operational roles of the Customs Department . . . [which] had either acted to establish policy or advised its Minister in ways which, at best, did not cohere with and, at worst, contradicted, what might be loosely described as “economic” or “industry” policy”<sup>51</sup>. By 18 August 1988, Cabinet had agreed that the Ministry of Commerce would have responsibility for anti-dumping duties on its establishment (Department of Trade and Industry, 1988, p.1). Part III of the *Trade and Industry Act Repeal Bill* 1988 related to dumping and countervailing duties and, with some minor amendments, effectively transferred the powers in Part VA of the Customs Act 1966 from the Minister of Customs and the Comptroller of Customs to the Minister of Commerce and the Secretary of Commerce respectively<sup>52</sup> under the *Dumping and Countervailing Duties Act* 1988 which came into force on 1 December 1988.

There were few submissions on the Bill because the legislation was largely unchanged, apart from the changes in responsibility for administration of anti-dumping. New Zealand Sugar Company Limited’s (NZSC)<sup>53</sup> concern was to ensure that the transition from the Customs Department to the Ministry of Commerce was smooth and that the Ministerial responsibility for subsequent reviews was clarified. The Chemical Importers Industry Group (CIIG)<sup>54</sup>, an association of 21 importers, was concerned that protection was not re-established, that competition was maintained and that the national interest was considered in any anti-dumping action. The CIIG cited anti-dumping duties on imported refined sugar as restoring “the previous position of absolute market dominance” that the sole New Zealand refiner of sugar had held under import licensing, which for sugar was abolished in 1986. The CIIG argued that “as tariffs drop, local

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<sup>51</sup> Laking, G.R. (May 1988). Interim report as quoted by Silva, D., Chemical Importers Industry Group, *Submission to the Commerce and Marketing Committee on the Trade and Industry Act Repeal Bill*. Reference CM/88/164 1W at the Parliamentary Library, Wellington.

<sup>52</sup> Department of Trade and Industry. (15 November 1988). Memorandum to the Commerce and Marketing Select Committee, *Trade and Industry Act Repeal Bill*. Reference CM/88/168 at the Parliamentary Library, Wellington.

<sup>53</sup> New Zealand Sugar Company Limited. (Undated). *Submission on Trade and Industry Act Repeal Bill* 1988. Reference CM/88/167 at the Parliamentary Library, Wellington.

<sup>54</sup> Silva, D., Chemical Importers Industry Group, *Submission to the Commerce and Marketing Committee on the Trade and Industry Act Repeal Bill*. Reference CM/88/164 1W at the Parliamentary Library, Wellington.

manufacturers will attempt to use the anti-dumping provisions as a means of avoiding the need to become internationally competitive . . .”. The CIIG proposed two ways of avoiding this situation. Anti-dumping provisions could be repealed, allowing “New Zealand consumers and [downstream] producers benefit. If the pricing is deliberately disruptive, the predatory provisions of the Commerce Act ought to suffice”. CIIG suggested alternatively that “if we must have anti-dumping provisions, these should be invoked only if their application can result in the national interest”. The CIIG’s suggestions were not taken up.

## **6.2 Dumping and Countervailing Duties Amendment Act 1990**

In 1988, New Zealand and Australia agreed to a *Protocol to the Australia New Zealand Closer Economic Relations - Trade Agreement on Acceleration of Free Trade in Goods* under which it was agreed that neither country would take anti-dumping action against the other from 1 July 1990 when free trade in goods had been achieved and the application of their competition laws to relevant anti-competitive conduct affecting trans-Tasman trade in goods had been harmonised<sup>55</sup>. The Department of Trade and Industry explained that “in a free trade environment anti-dumping is unlikely to afford appropriate remedies to deal with anti-competitive trans-Tasman trade; and that the retention of anti-dumping might act to protect domestic industry from legitimate competition” (1988, p.6). A joint Australia/New Zealand officials paper noted that between the two countries “there has been a low incidence of anti-dumping actions<sup>56</sup> . . . . “ and that “removal of trade barriers will also render dumping to be largely redundant as the scope for price discrimination between the domestic and export markets (a pre-condition for dumping) is reduced” (1988, pp.75-76). Kelsey (1995, p.101) notes that:

Trans-Tasman application of competition law from July 1990 and the repeal of anti-dumping laws for trans-Tasman transactions signalled a major shift in emphasis. Traditional concerns about fairness in international trade gave way to the new efficiency focus of competition law operating within a single market.

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<sup>55</sup> Department of Trade and Industry. (1988). *Agreed Documents from the 1998 review of ANZCERTA*, August 1988. Wellington: Author. As cited in an undated email from the Ministry of Commerce responding to Mark Wiedman’s (Yale University) email of 6 March 1996 in Ministry of Economic Development File TR662 CER.

<sup>56</sup> Ministry of Commerce. (5 April 1990). Memorandum to the Commerce and Marketing Select Committee attaching the Ministry’s briefing paper on the Commerce Law Reform Bill. Reference CM/90/18 Moc/4 at Parliamentary Library, Wellington. The memorandum noted that between 1982 and 1988, dumping investigations into 8 Australia products had been initiated with anti-dumping duties being applied to 5 – canned beer, aluminium foil, welding electrodes, and aluminium sheet, plate and coil.

Early support from manufacturers<sup>57</sup> for the removal of trans-Tasman anti-dumping disappeared as the date for change approached. By May 1989, *The National Business Review*<sup>58</sup> was reporting that New Zealand manufacturers were “collecting ammunition for a bitter battle with the government over plans to scrap anti-dumping legislation in New Zealand and Australia by next July, creating a single trans-Tasman market regulated only by competition law”. Many submissions were made to the Commerce and Marketing Select Committee on the Commerce Law Reform Bill Part III, which made amendments to the *Anti-dumping and Countervailing Duties Act 1988*.

The New Zealand Manufacturers Federation<sup>59</sup> was strongly opposed to the premature removal of “anti-dumping provisions which act as an important safety net against unfair trade.” A group of “23 major New Zealand manufacturing companies . . . was formed under the auspices of the New Zealand Manufacturers’ Federation” as the The Tasman Anti-dumping Group (TAG)<sup>60</sup>. While TAG fully supported CER, it submitted that neither free trade in goods nor appropriate legislation would be in place by 1 July 1990 – that “free trade . . . will only happen once the substantial barriers to trade still existing in Australia are removed” and that “unfair trade practices, which currently would be dealt with under existing anti-dumping legislation, could not be countered with amendments to the Commerce Act, or the Australian Trade Practices Act, because the overall objectives of both Acts are incompatible with the specific issue of dumping”. TAG considered that the business community had been misled by statements that the provisions of the Commerce Act 1986 would take the place of anti-dumping duties in relation to trans-Tasman trade. There was a particular concern that if a producer in Australia sold at dumped prices, imports from third countries would follow the prices down without risk of anti-dumping action. TAG considered that the removal of trans-Tasman anti-dumping “could result in a further reduction in the New Zealand manufacturing sector which is clearly not in the long term interests of the New Zealand economy”. Individual submissions from New Zealand manufacturers (Winstone Industries<sup>61</sup>, Alcan New Zealand Limited<sup>62</sup>, Alliance Textiles<sup>63</sup>) similarly

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<sup>57</sup> Ministry of Commerce (August 1989) which included a memorandum for the Cabinet Policy Committee, *Removal of anti-dumping measures from Trans-tasman trade*. In Ministry of Economic Development file TR700 Legal General.

<sup>58</sup> *The National Business Review*. (23 May 1989). *Manufacturers Federation group in CER revolt*.

<sup>59</sup> New Zealand Manufacturers Federation Inc. (Undated). Submission to the Commerce and Marketing Select Committee, *Commerce Law Reform Bill*, CM/90/63 27. Held at the Parliamentary Library, Wellington.

<sup>60</sup> The Tasman Anti-dumping Group. (February 1990). *The Commerce Law Reform Bill – a submission to the Parliamentary Select Committee on Commerce and Marketing*. Reference CM/90/60 24 at the Parliamentary Library, Wellington.

<sup>61</sup> Winstone Industries Ltd. (28 February 1990). *Submission to the Commerce and Marketing Select Committee on the Commerce Law Reform Bill Part III Amendments to Anti-dumping and Countervailing Duties Act 1988*, CM/90/69 31. Held at the Parliamentary Library, Wellington.

opposed the removal of trans-Tasman anti-dumping provisions. Alliance Textiles believed that “existing dumping law has been an essential protection against . . . unfair competition” and that the proposed competition law would protect against dumping by Australian firms only if “the Australian firm was in a dominant position and has the purpose of eliminating New Zealand competitors”. On the other hand, Federated Farmers<sup>64</sup> supported “the thrust of the Bill, particularly, the decision to subject trans-Tasman dumping of goods to competition law”. Government officials<sup>65</sup> stated that it was never intended that competition law provisions “would catch all actions currently caught by dumping as many of those actions have no anti-competitive purpose or effect”.

On 16 August 1989, the Cabinet Policy Committee (CPC)<sup>66</sup> considered the removal of anti-dumping laws on trans-Tasman trade in goods originating in either country under ANZCERTA and “agreed that further consultations should take place in order to formalise the understandings reached between New Zealand and Australia”. By October 1989, *The National Business Review*<sup>67</sup> was reporting that “manufacturers on both sides of the Tasman have united to fight the scrapping of anti-dumping measures under CER” with the joint approach becoming “official this week in a Melbourne meeting between the Manufacturers’ Federation and the Australian Chamber of Manufacturers”. The Ministry of Commerce<sup>68</sup>, on 5 April 1990, provided a briefing paper on the Commerce Law Reform Bill to the Commerce and Marketing Select Committee which noted that manufacturers had suggested that the issue be deferred for further discussion in 1992 at the next CER review. The Ministry chose not to comment on suggestions “that New Zealand should attempt to renegotiate Article 4 of the

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<sup>62</sup> Allan, J.K., Alcan New Zealand Ltd. (23 February 1990). Letter to the Commerce and Marketing Committee on the Commerce Law Reform Bill, CM/90/30 4W. Held at the Parliamentary Library, Wellington.

<sup>63</sup> Kensington Swan. (26 February 1990). *Submission to Commerce & Marketing Select Committee on behalf of Alliance Textiles (NZ) Ltd.* Reference CM/90/47 15W at the Parliamentary Library, Wellington.

<sup>64</sup> Smith, M.V., Federated Farmers of New Zealand (Inc.). (26 February 1990). Submission to the Commerce and Marketing Select Committee on the Commerce Law Reform Bill. Reference CM/90/51 18 at the Parliamentary Library, Wellington.

<sup>65</sup> Ministry of Commerce. (Undated). Draft memorandum for the Cabinet Policy Committee from the Minister of Commerce, Hon. David Butcher, *Removal of anti-dumping measures from trans-Tasman trade* and particularly Annex 3 “Consultation with New Zealand manufacturers”. Departments associated with the draft report were the Ministry of Commerce, Department of Justice, Ministry of External Relations and Trade and The Treasury. In Ministry of Economic Development file TR700 Legal General, volume 1.

<sup>66</sup> Cabinet Policy Committee. (16 August 1989). POL (89) M 26/8 as cited in Minister of Commerce. (6 November 1989). Memorandum to the Cabinet Policy Committee, *Amendments to the Dumping and Countervailing Duties Act 1988*, POL (89) 241. In Ministry of Economic Development file TR701 Legislation.

<sup>67</sup> The National Business Review. (27 October 1989). *Manufacturers united in fight over dumping.*

<sup>68</sup> Ministry of Commerce. (5 April 1990). Memorandum to the Commerce and Marketing Select Committee attaching the Ministry’s briefing paper on the Commerce Law Reform Bill. Reference CM/90/18 Moc/4 at Parliamentary Library, Wellington.

1988 Protocol” but commented that it was “anomalous and impractical for dumping and competition law to apply contemporaneously to trans-Tasman commerce” and any delay to the legislation would have serious consequences for future harmonization of other sections of the Commerce Act. The pressure applied by manufacturers did not prevail and the *Dumping and Countervailing Duties Act* 1988 was amended so that from 1 July 1990 New Zealand [and Australia by reciprocity] could no longer take anti-dumping action against goods of Australian origin. Until then, Australia had been New Zealand’s main target for anti-dumping action. McPhail (1992, p.A-5) noted that, “During the period before the removal of trans-Tasman anti-dumping, 11 of 26 investigations, over 40%, involved Australian exports.”

### **6.3 Anti-dumping in the early 1990s**

Import licensing on most goods had been removed in the years leading up to the enactment of the *Dumping and Countervailing Duties Act* 1988 and tariff levels continued to be reduced after its enactment. Indicative of the perceived link between lowering of border protection and effective trade remedy legislation, the Officials Post-1992 Tariff Review Committee<sup>69</sup> report of 31 July 1991 to the Cabinet Strategy Committee (CSC) included an observation of the “considerable criticism of trade remedies legislation” by mainly manufacturers, noting that “clearly it is vital that . . . the trade remedies legislation is effective”. Almost all of the concerns were raised by New Zealand manufacturers who had taken or would take anti-dumping action - Winstone Wallboards (plasterboard from Thailand), NZ Footwear Manufacturers’ Federation (certain men’s footwear from China, Indonesia, Korea, Taiwan and Thailand and women’s footwear from China), Pacific Steel Ltd (galvanised wire from South Africa and Malaysia and reinforcing steel bar from Thailand). The Review Committee noted that “Government has already made clear that reviews of the [trade remedies legislation] will take place” and recommended that the CSC “agree that the proposed reviews of trade remedies legislation proceed in accordance with developments in GATT”. In the meantime, the textile, clothing, footwear and carpet industries which had a history of relatively high levels of protection captured the attention of the National government.

### **6.4 Review of effectiveness of trade remedies on apparel, footwear and headwear**

In December 1990, the Minister of Commerce asked a Caucus sub-committee to review the current state and prospects of the textile, apparel and carpet industries in terms of their international competitiveness,

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<sup>69</sup> Ministry of Commerce. (31 July 1991). *Officials Report on the Post-1992 Tariff Review*, pp.41-45, 70 and 73. Wellington: Author. In Ministry of Economic Development file TR708 1991 Tariff Review, volume 6.

discriminatory external trade practices and the post 1992 tariff regime. In May 1991, the review reported that, after having been heavily protected for many years, these industries were under severe pressure following the removal of import licensing, the reduction of tariff rates, the dumping and subsidisation of imports, and discriminatory trading practices in their export markets (Cliffe and Robertson, 1991a, p.1). Import licensing had been removed from leather apparel and headwear in July 1987, from adults' footwear in July 1991 and was to be removed from textile apparel on 1 July 1992. The review considered the industries could prosper, compete and contribute to New Zealand if they were given time to adjust, that they were not targeted in New Zealand by unfairly priced imported products, and if access to export markets improved (Cliffe and Robertson, 1991b, p.1). The review noted that among the National Government's industrial policy goals was the "strengthening of measures to combat unfair trade practices and dumping in New Zealand" (1991b, p.3). To address unfair trading practices, the review recommended that "alternative specific tariffs for apparel and textiles [due for removal in July 1992] be held at present levels subject to a review of unfair trading practices and the effectiveness of anti-dumping mechanisms and their implementation . . ." (1991a, p.6). The Ministry of Commerce and the Customs Department were subsequently directed, in relation to apparel and footwear, to review the effectiveness of trade remedies and tariff enforcement matters "and report against this background on the need for specific duties"<sup>70</sup>. Officials sought submissions from and visited textile apparel, leather apparel, footwear and headwear manufacturers and also "several significant retailers and importers".

The Ministry of Commerce and the Customs Department<sup>71</sup> considered the retention of specific tariffs<sup>72</sup> on textile apparel was justified, "on the grounds that the nature of the apparel industry, that is, its large number of small production units, and its vulnerability to single sporadic shipments of goods, do present this industry with problems that make it more difficult for it to use the trade remedy legislation as effectively as other industries . . . to a marked extent, the impact of 'unfair' trade cannot be resolved by way of the existing trade remedies legislation"<sup>73</sup>. The Treasury<sup>74</sup>, Ministry of

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<sup>70</sup> Ministry of Commerce and Customs Department. (12 March 1992). Memorandum to the Cabinet Committee on Enterprise, Growth and Employment on *Review of the effectiveness of trade remedies and tariff enforcement; Apparel, leather apparel, footwear and headwear*. In Ministry of Economic Development file TR709 1991/1991 Review of TR Effectiveness (Apparel and Footwear).

<sup>71</sup> Ministry of Commerce and Customs Department. (12 March 1992). Memorandum to the Cabinet Committee on Enterprise, Growth and Employment on *Review of the effectiveness of trade remedies and tariff enforcement; Apparel, leather apparel, footwear and headwear*. In Ministry of Economic Development file TR709 1991/1991 Review of TR Effectiveness (Apparel and Footwear).

<sup>72</sup> Specific tariffs are tariffs that are levied on the basis of a certain dollar amount per unit and, therefore, are particularly effective against low-cost imports.

<sup>73</sup> Minister of Commerce. Undated memorandum to the Cabinet Committee on Enterprise Growth and Employment, *Review of the effectiveness of trade remedies and trade enforcement: Apparel,*

External Relations and Trade and the Ministry of Agriculture and Fisheries disagreed that specific tariffs should be maintained on apparel. The Minister of Commerce, Hon. John Luxton, announced on 22 June 1992<sup>75</sup> that specific tariffs would be retained on some apparel and leather clothing from 1992 to 1996 to give “New Zealand clothing manufacturers a better opportunity of competing with falsely valued or “unfairly” priced [dumped] imports”. Specific duties for footwear and headwear were not introduced because those industries could more easily resort to anti-dumping duty.

On 23 October 1992, *The National Business Review* (NBR)<sup>76</sup> reported that the levying of anti-dumping duties had “raised fears government is going soft on its open market policy. However, the Ministry of Commerce denies these duties amount to protectionism in sheep’s clothing, saying anti-dumping duties enhance free trade, not hinder it”. NBR reported that while importers had been in the media recently claiming that “consumers are being prevented from getting the best deal by protectionist government regulations . . . the Consumers Institute doesn’t agree . . . Spokesman Peter Sutton says the institute isn’t against dumping duties per se, if they are properly applied”. Gilbert Peterson of the New Zealand Manufacturers Federation claimed that, rather than being protectionist, anti-dumping duties are “exactly the opposite. They encourage a true free market. . . . We’re one of the most deregulated economies in the world. We need anti-dumping laws”.

## **6.5 Dumping and Countervailing Duties Amendment Act 1994**

In 1993, the Ministry of Commerce and the Treasury began a review of trade remedy legislation, including anti-dumping. Minister of Commerce, Hon. Philip Burdon<sup>77</sup>, proposed that the review take a two-pronged approach and proceed on the basis of the publication of two papers. The first paper, *Trade Remedies and the GATT* (Ministry of Commerce, 1994) would explain changes that needed to be made to align New Zealand’s legislation with WTO Agreements reached in the Uruguay Round of

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*leather apparel, footwear and headwear.* In Ministry of Economic Development file TR709, volume 1.

<sup>74</sup> The Treasury. (1992). *Treasury comment on specific tariff proposal for clothing.* In Annex II to an undated memorandum from the Minister of Commerce to the Cabinet Committee on Enterprise Growth and Employment, Review of the effectiveness of trade remedies and trade enforcement: Apparel, leather apparel, footwear and headwear. In Ministry of Economic Development file TR709, volume 1.

<sup>75</sup> Luxton, J., Minister of Commerce. (22 June 1992). Press statement, *Government approves specific tariffs for clothing.* In Ministry of Economic Development file TR709 1991/1991 Review of TR Effectiveness (Apparel and Footwear), volume 1.

<sup>76</sup> The National Business Review. (23 October 1992). *Anti-dumping measures help trade – ministry.*

<sup>77</sup> Cabinet Strategy Committee. (22 March 1994). Memorandum, *Review of trade remedies legislation*, attached to CSC (94) 28. In Ministry of Economic Development file TR712 Review of Trade Remedies.

Multilateral Trade Negotiations, including the WTO Anti-dumping Agreement (GATT Secretariat, 1994b). The second paper<sup>78</sup>, which would prove to be far more controversial and would not be published until 1998, would set out economic issues relating to trade remedies in New Zealand, particularly anti-dumping and “the relevance of competition policy approaches to the application of anti-dumping measures”. This paper would also address the issue of the national interest and whether the producer-oriented focus of the law should be widened to include downstream producers and consumers. No doubt aware of the sensitivity of the issues being raised, Burdon recommended that officials provide copies of the papers to Ministers and report back to the Cabinet Strategy Committee (CSC) with a summary of the main issues raised by the second discussion paper before its public release. CSC<sup>79</sup> agreed to the publication of the first Explanatory Paper and agreed to further consider the second proposed discussion paper after it had seen a draft.

At the conclusion of the Uruguay Round of Multilateral Trade Negotiations in 1994, the National government introduced the GATT (Uruguay Round) Bill, which led to amendments to the Dumping and Countervailing Duties Act 1988 to “ensure consistency with the World Trade Organisation agreements on dumping and countervailing duties” (NZPD, 1994, pp.5083-5084). The main amendments to affect anti-dumping legislation were: specific information requirements for applicants for dumping investigations; a limit of five-years on duties (unless extended by a review); removal of the need to make a preliminary determination after 60 days (although provisional anti-dumping measures could be applied or a price undertaking entered into after 60 days); the disclosure of essential facts and conclusions of the investigation before the investigation was completed; the removal of normal value provisions applying to exports from countries where governments had significant control over trade and/or prices (that is, non-market economies); and termination of investigations if minimum threshold levels for dumping and volumes of dumped imports were not met.

During debate on the Bill, opposition Labour MP, Rick Barker (Hastings), who had been approached by several manufacturers concerned that their industries and employees were at risk from low cost imports, stated that “the current laws we have on dumping are completely and utterly inadequate” (NZPD, 1994, p.4777). Barker was concerned that some manufacturers were being hindered from taking anti-dumping action by retailers threatening to take retaliatory action against them by not stocking their products, and that large numbers of people were being laid-off in the

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<sup>78</sup> Hon. P. Burdon, Minister of Commerce. (21 March 1994). Memorandum to the Cabinet Strategy Committee, *Review of trade remedies legislation*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>79</sup> Cabinet Strategy Committee. (23 March 1994). Minutes of a meeting of the Committee, *Review of Trade Remedies Legislation*, CSC (94) M 6/6. In Ministry of Economic Development file TR712 Review of Trade Remedies.

clothing and footwear industries, particularly in provincial areas. Minister of Commerce Burdon expressed concern about the use of anti-dumping as a non-tariff barrier to imports in some countries and stated that anti-dumping legislation had “been made more precise and more transparent so that it cannot be used to frustrate legitimate and fair competition” (NZPD, 1994, p.2854). Manufacturers supported some changes<sup>80</sup> and several manufacturers opposed other changes, such as the removal of the requirement to make a preliminary determination after 60 or 90 days<sup>81</sup> and the removal of provisions for calculating normal values in “non-market economies”<sup>82 83</sup>. Concern was also expressed that the essential facts of dumping investigations should be released to parties to allow them to defend their interests<sup>84 85</sup> and that appeal by way of judicial review was inadequate in that it was limited to matters of process rather than whether the determination itself was correct<sup>86</sup>. Major unions<sup>87</sup> expressed significant frustration that anti-dumping law did not contain adequate powers for officials to initiate anti-dumping cases and collect relevant data and for unions to apply for investigations to initiate cases. The unions wanted anti-dumping legislation “reviewed and strengthened” and preferred price triggers that would automatically require imports to be reviewed rather than being dealt with on a case-by-case basis.

On the other hand, merchants and importers opposed trade remedy legislation such as anti-dumping. The Retail and Wholesale Merchants Association<sup>88</sup> considered trade remedy legislation was seen by many to be a

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<sup>80</sup> New Zealand Manufacturers Federation Inc. (Undated). Submission to the Commerce Select Committee, *GATT (Uruguay Round) Bill*, 53, C/94/444. Held at the Parliamentary Library, Wellington.

<sup>81</sup> Trade Consultants Ltd. (26 August 1994). *Submission: GATT (Uruguay Round) Bill Parts X and XI*, 33, C/94/517. Held at the Parliamentary Library, Wellington.

<sup>82</sup> Croft, J.J., Blackburn Croft & Co. (25 August 1994). *Submission to the Commerce Select Committee on the GATT (Uruguay Round) Bill Part XI*, on behalf of Wattie’s Ltd, 19, C/94/398. Held at the Parliamentary Library, Wellington.

<sup>83</sup> Potter, J. W. H, Nestlé New Zealand Ltd. (25 August 1994). *Submission to the Commerce Select Committee on the GATT (Uruguay Round) Bill Part XI*, 17, C/94/393. Held at the Parliamentary Library, Wellington.

<sup>84</sup> Croft, J.J., Blackburn Croft & Co. (25 August 1994). *Submission to the Commerce Select Committee on the GATT (Uruguay Round) Bill Part XI*, on behalf of Wattie’s Ltd, 19, C/94/398. Held at the Parliamentary Library, Wellington.

<sup>85</sup> Potter, J. W. H, Nestlé New Zealand Ltd. (25 August 1994). *Submission to the Commerce Select Committee on the GATT (Uruguay Round) Bill Part XI*, 17, C/94/393. Held at the Parliamentary Library, Wellington.

<sup>86</sup> Croft, J.J. (22 September 1994). *Supplementary submission to the Commerce Select Committee on the GATT (Uruguay Round) Bill Part XI*, on behalf of Wattie’s Ltd, 19A, C94/399. Held at the Parliamentary Library, Wellington.

<sup>87</sup> N.Z. Trade Union Federation and Textile, Clothing and Footwear Union Council. (26 August 1994). *Submission on the GATT (Uruguay Round) Bill 1994*, 50, C94/440, to the Commerce Select Committee. Held at the Parliamentary Library, Wellington.

<sup>88</sup> Retail and Wholesale Merchants Association of New Zealand Inc. (August 1994). *Submissions of the Retail and Wholesale Merchants Association of New Zealand Inc. to the Commerce and Marketing Select Committee in relation to the GATT (Uruguay Round) Bill*, 44, C/94/432. Held at the Parliamentary Library, Wellington.

means for “uncompetitive domestic manufacturers” to seek protection and it was costly for members to defend their interests against such actions. The Association preferred that an independent tribunal carry out investigations, rather than the Ministry of Commerce being given further investigation responsibilities. The Association also shared some of the manufacturers’ concerns, namely, it was opposed to removal of the preliminary determination, favoured a definition of a non-market economy and preferred confidential information “to be analysed by an independent arbitrator rather than the Ministry of Commerce”. The Importers Institute<sup>89</sup> opposed anti-dumping measures, except in the rare instances where they are used to counter anti-competitive behaviour, e.g predatory behaviour”. The Institute quoted Ron Sheppard of Lincoln University who considered that despite the appearance of free trade as “the objective of all responsible international traders, the concept of protectionism is alive and well and is establishing a position for itself within the anti-dumping/countervailing duties area, euphemistically called ‘Trade Remedies’”<sup>90</sup>. The Institute also noted the limitations of judicial review and called for “an appeal structure for the purpose of the prompt review of administrative actions and determinations”. At the same time, the Institute considered the Ministry’s approach to be “thoroughly professional” and compared “more than favourably with any other anti-dumping authority in the world today”.

The Ministry of Commerce<sup>91</sup> opposed suggestions for an appeal process additional to judicial review by pointing out that judicial review “also provides a remedy for unreasonableness (also known as substantive unfairness)” and that an additional appeal mechanism would lead to uncertainty and “would serve to sway the focus from a judicial review challenge that has a strong basis, to debates over which vested interest can argue the longest over a particular issue”. Unions could apply under the legislation for dumping investigations on behalf of industries, but would need to provide the required information. The *Dumping and Countervailing Duties Amendment Act 1994* came into force on 1 January 1995 and included a provision for the release of essential facts and conclusions, but no separate appeal mechanism was introduced.

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<sup>89</sup> Silva, D., Importers Institute. (August 1994). *Submission to the Commerce Select Committee: GATT (Uruguay Round) Bill*, 43, C/94/431. Held at the Parliamentary Library, Wellington.

<sup>90</sup> Sheppard, R. (23 August 1994). Paper prepared for an Importers Institute Seminar, Agribusiness and Economics Research Unit, Lincoln University as quoted in Silva, D., Importers Institute. (August 1994). *Submission to the Commerce Select Committee: GATT (Uruguay Round) Bill*, 43, C/94/431. Held at the Parliamentary Library, Wellington.

<sup>91</sup> Trade Remedies Group, Ministry of Commerce. (October 1994). *GATT (Uruguay Round) Bill: Judicial Review*, MOC/4 to the Commerce Select Committee. Held at the Parliamentary Library, Wellington.

## 6.6 1998 review of trade remedies

Minister of Commerce, Hon. John Luxton, announced on 16 March 1998<sup>92</sup> that trade remedy policy would be reviewed and that the Coalition National/NZ First Government had “agreed that trade remedy action against imported goods should take account of national interest criteria . . . and the review will consider when and how a public interest test should be applied”. A discussion paper for public consultation (Ministry of Commerce, 1998) on the future direction of trade remedy policy, introduced the possibility of interests of consumers and competition considerations being taken into account. Luxton was keen to ensure that trade remedies did not replace general forms of protection and that trade remedies were consistent with the coalition government’s overall economic strategy of maximising national welfare<sup>93</sup>. A summary for the Cabinet Economic Committee<sup>94</sup> (CEC) noted that:

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

The Minister<sup>95</sup> noted that “the effectiveness of trade remedies has been debated in New Zealand for the past few years. One view is that trade remedies should provide an effective and swift response to “unfair” or “disruptive” imports. The alternative argument is that use of trade remedies is protectionist, and inconsistent with the Government’s policy of trade liberalisation and effective competition in local markets”. While the Minister perceived that “some manufacturers and employee groups could see the thrust of the Paper as weakening their protection against lower cost imports . . . . In fact the intention of the Paper is to highlight the need to retain the ability to deal effectively with unfair competition, but to balance fair competition against the interests of consumers”. In the same week that CEC<sup>96</sup> agreed to the review, including the release of the discussion paper,

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<sup>92</sup> Luxton, J., Minister of Commerce. (16 March 1998). Media release, *Luxton announces trade remedy policy review*.

<sup>93</sup> Luxton, J., Minister of Commerce. (19 February 1998). Memorandum to the Cabinet Economic Committee, *Review of Trade Remedies*. In Ministry of Economic Development file TR712 Review of Trade Remedies, volume 3.

<sup>94</sup> Cabinet Economic Committee. (23 February 1998). *Review of Trade Remedies*, ECO (98) 9. In Ministry of Economic Development file TR712 Review of Trade Remedies, volume 3.

<sup>95</sup> Hon. J. Luxton. (19 February 1998). Memorandum to the Cabinet Economic Committee, *Review of Trade Remedies*. In Ministry of Economic Development file TR712 Review of Trade Remedies, volume 3.

<sup>96</sup> Cabinet Economic Committee. (25 February 1998). Minutes of a meeting of the Committee on *Review of Trade Remedies*, ECO (98) M 2/4. In Ministry of Economic Development file TR712, volume 3.

Alex Sundakov of the New Zealand Institute of Economic Research<sup>97</sup>, stated that “one of the urban myths in New Zealand is that we now have one of the most liberal trade regimes in the world. In fact we have administrative machinery of protectionism sitting in the Dumping and Countervailing Duties Act 1988”.

In March 1998, the discussion paper and a consultation and terms of reference document were released<sup>98</sup>, resulting in submissions described by the Ministry of Commerce<sup>99</sup> as falling into “two camps of those who want to maintain the current protection for manufacturers from “unfair trade”, and those who believe that there is no reason to deny consumers access to the cheapest goods”. Strong opposition to a net national interest test was expressed by 27 New Zealand manufacturers, six organisations representing manufacturers, an Australian manufacturer, unions, and representatives of fruit and produce growers<sup>100</sup>. The main arguments of those opposed to a national interest test were<sup>101</sup> that the aim of trade remedy law, to promote “competition between fairly traded goods” was quite different to the aim of competition law which was directed towards economic efficiency, that competition law could not address unfair trade, that such an approach would deny remedies and dispute settlement available under the WTO Agreement, and that the difficulty in defining national benefit would result in increased subjectivity, complexity and costs.

On the other hand, those who supported some form of public interest test, namely one importer and a number of diverse organisations (Commerce Commission, New Zealand Business Roundtable, Federated Farmers of New Zealand (Inc) and the Retail Merchants Association of New Zealand (Inc)), supported the alignment of trade remedies policy with competition policy largely on grounds that “New Zealand should apply the same competition rules to international trade as it does to domestic trade”. The Importers Institute<sup>102</sup> argued that anti-dumping had become “the last focus point for protectionists in New Zealand” and was puzzled that, against the views of most economists, “successive governments continue to pay heed to

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<sup>97</sup> Sundakov, A. (27 February 1998). *Time to review anti-dumping laws*. In *The National Business Review*, Wellington.

<sup>98</sup> Ministry of Commerce. (February 1998). *Policy review of trade remedies: Consultation document and terms of reference*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>99</sup> Ministry of Commerce. (10 September 1998). Memorandum to the Minister for Enterprise and Commerce, *Review of Trade Remedies Policy*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>100</sup> Ministry of Commerce. (May 1998). *Trade Remedies Policy Review: Summary of Submissions*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>101</sup> Ministry of Commerce. (10 September 1998). Memorandum to the Minister for Enterprise and Commerce, *Review of Trade Remedies Policy*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>102</sup> Silva, D, Importers Institute. (25 May 1998). Letter to the Ministry of Commerce, *Trade remedies policy review*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

the self-interested views of a small group of companies, officials and consultants”<sup>103</sup>. By August 1999, disappointed at the delay in the review of trade remedies, the Importers Institute<sup>104</sup> stated, “We would like the next review to take account of the mainstream economic consensus . . . , which recognises “trade remedies” for what they are: a euphemism for protectionism”.

The review had been delayed by concerns about the cost and complexity of the proposed new approach that required further consultation<sup>105</sup>. The Ministry of Commerce was also concerned to ensure that consideration was given to “the decisions regarding the removal of general protection through tariffs, and the perceived likelihood of an increase in dumping resulting from the Asian financial crisis and the removal of the prohibition on parallel importing.” In 1999, the Ministry<sup>106</sup> noted that while “several parties were strongly supportive of moves to embrace competition policy principles when dealing with dumping”, those against a national interest test incorporating a competition law approach had several major concerns, namely that New Zealand would be taking the lead in moving away from accepted international practices, that there was little to gain from a national interest test that created uncertainty, encouraged political intervention and diluted the efficacy of anti-dumping, that increased uncertainty might discourage new investment in manufacturing; and “there is little evidence that the current focus on damage to a manufacturer and a proposed national interest test are in fact so different as to justify the changing of the current legislation, criteria and proceedings”, especially if government and industries incurred unjustified cost increases. Luxton<sup>107</sup> pointed out that the concept of a national interest test in anti-dumping legislation was not new, however, and was already provided for in European Union and Canadian legislation. Second, it was not intended that the introduction of a net national benefit test would remove trade remedies, but rather would “ensure that trade remedies . . . are consistent with the Government’s objectives of encouraging economic growth through the operation of open and competitive markets”.

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<sup>103</sup> The Importers Institute. (11 January 1999). *Dumping policy research*. Retrieved from website of Daniel Silva Ltd at <http://www.dsl.co.nz/Instutute/Article.asp?Ref=30> on 11 July 2004.

<sup>104</sup> The Importers Institute. (18 August 1999). *Still stuck with anti-dumping*. Retrieved from website of Daniel Silva Ltd at <http://www.dsl.co.nz/Instutute/Article.asp?Ref=13> on 11 July 2004.

<sup>105</sup> Ministry of Commerce. (19 June 1998). Memorandum to the Minister of Commerce, *Review of Trade Remedies*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>106</sup> Ministry of Commerce. (16 July 1999). Memorandum to the Minister for Enterprise and Commerce, *Review of Trade Remedies Policy*. In Ministry of Economic Development file TR712 Review of Trade Remedies, volume 4.

<sup>107</sup> Minister of Commerce. (1998). Letter to Bruce Goldsworthy, Director – Manufacturers’ Division, Employers and Manufacturers Association. Ministry of Commerce file TR712 Review of Trade Remedies, 98/502.

The Ministry of Commerce reported to Minister for Enterprise and Commerce, Max Bradford, on 16 July 1999<sup>108</sup> that the review's conclusion was that "the case for a detailed net national benefit test has not been demonstrated as costs would likely outweigh benefits", but that "there would . . . be benefit in including a provision which would require the Minister to take account of the public interest in determining whether or not to impose duties, and to have particular regard to the impact on competition". Barber, in the *National Business Review*<sup>109</sup>, considered this outcome to be a partial victory for domestic manufacturers. Barber also reported that, while the Minister had accepted the ministry's recommendations, he had "given them no legislative priority". The Ministry proposed that the lesser public interest test be introduced<sup>110</sup> and advised the Minister that his options were "to obtain policy decisions now and wait until the end of this year; or prepare a Cabinet paper in conjunction with a bid for legislative priority". The Minister opted for preparation of a paper at the end of the calendar year, namely after the general election. Llewellyn, of the *Independent Business Weekly*<sup>111</sup> stated, "Protectionists will be pleased. They will have the opportunity to bend the ear of the next government".

Manufacturers<sup>112 113</sup> were concerned that they be consulted about any public interest test. The Manufacturers Federation<sup>114</sup> was concerned about what government thought the Minister should "take into account in determining what is the public interest" and, noting that the Ministry<sup>115</sup> did not intend to call for submissions on the matter, intended to express concerns to the incoming government about "the integrity of the consultation process", as well as the "politicising of a decision" on trade remedies, the uncertainty

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<sup>108</sup> Ministry of Commerce. (16 July 1999). Memorandum to the Minister for Enterprise and Commerce, *Review of Trade Remedies Policy*. In Ministry of Economic Development file TR712, volume 4.

<sup>109</sup> Barber, D. (20 August 1999). *Manufacturers Hold Sway in Unfair-Competition Claims*. National Business Review.

<sup>110</sup> The Ministry also proposed that provisions for third country anti-dumping action be removed, namely anti-dumping action against imports into New Zealand that are injuring another country's industry.

<sup>111</sup> Llewellyn, I. (1 September 1999). *Parliament dumps anti-dumping law change*. Independent Business Weekly.

<sup>112</sup> Carlaw, S. New Zealand Manufacturers Federation Inc. (17 September 1999). Letter to the Ministry of Commerce. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>113</sup> Mudgway, J. (3 November 1999). Letter on trade remedies policy to the Director, Competition and Enterprise Branch, Ministry of Commerce. Ministry of Commerce file TR712 Review of Trade Remedies, volume 4.

<sup>114</sup> Carlaw, S. New Zealand Manufacturers Federation Inc. (10 November 1999). Letter to the Ministry of Commerce. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>115</sup> Ministry of Commerce. (15 October 1999). Letter to Simon Carlaw, Chief Executive, New Zealand Manufacturers Federation Inc, *Trade Remedies Policy Review*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

created, the additional costs involved, “probable impact of the new criteria on investment and job growth” and “the case for retention of an effective, reasonable and lawful process for addressing unfair trade”. Three weeks before the 27 November 1999 election that was to see a Labour/Alliance coalition government replace nine years of National government, the New Zealand Footwear Industry Association (NZFIA) also expressed its concerns to Labour MP Paul Swain, noting that “it is very possible that you may be in a position of authority when such a [Cabinet] paper is submitted”<sup>116</sup>. The NZFIA suggested that “it appears that, unable to justify the imposition of this test in an open way, the Ministry is trying to impose it ‘through the back door’.” At the same time, Graham Painter of Trade Consultants Ltd<sup>117</sup>, wrote to the Minister of Commerce, Hon Max Bradford, indicating that manufacturers were surprised the trade remedies review had concluded in favour of “a discretionary provision for the Minister to take account of the public interest”. Painter asked to meet with the Minister before the election, to clarify “aspects of the Government’s policy and thinking toward industry”, noting that the “outcome of the meeting would be of considerable interest across the manufacturing sector prior to the election”.

By mid-2000, Hon Paul Swain, now Minister of Commerce in the newly-formed Labour/Alliance coalition government and in charge, *inter alia*, of anti-dumping asked the Ministry to defer putting a paper to him on a public interest test until more pressing legislation had been passed through the House and negotiations on anti-dumping had been concluded in the proposed closer economic partnership with Singapore<sup>118</sup>. The Ministry of Economic Development<sup>119</sup> commented that perhaps because he was sensitive to the concerns of manufacturers, “the Minister has said that he would like to look again at the proposal for a public interest test before taking it further”. Former Prime Minister, Sir Geoffrey Palmer,<sup>120</sup> considered that “the Government of the day was persuaded not to advance that [public interest] policy and it was thought that the Labour spokespeople had been convinced as well”.

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<sup>116</sup> Mudgway, J. (3 November 1999). Letter on trade remedies policy to Mr P. Swain MP. Ministry of Commerce file TR712 Review of Trade Remedies, volume 4.

<sup>117</sup> Painter, G., Trade Consultants Ltd. (3 November 1999). Letter to Hon. Max Bradford, Minister of Commerce, *John Slater, National Party President: Review of Trade Remedies Policy*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>118</sup> Ministry of Economic Development. (29 June 2000). Email to the Australian Customs Service. In Ministry of Commerce file TR712 Review of Trade Remedies.

<sup>119</sup> Ministry of Economic Development. (29 June 2000). Email to the Australian Customs Service. In Ministry of Commerce file TR712 Review of Trade Remedies.

<sup>120</sup> Palmer, G. (July 2000). *Aide-Memoire*. In Ministry of Economic Development file TR697 FTA Singapore.

## 6.7 New Zealand Singapore Closer Economic Partnership Act 2001

In Auckland on 11 September 1999, New Zealand's National Party Prime Minister Jenny Shipley and the Prime Minister of Singapore announced their intention to negotiate a comprehensive bilateral Free Trade Agreement that would include, *inter alia*, a provision on anti-dumping. Dumping had never been a significant issue between the two countries, with the only anti-dumping action in the past two decades being taken by New Zealand against imports of lead acid batteries from Singapore. As negotiations with Singapore were "entering their concluding stages", the Cabinet External Relations and Defence Committee<sup>121</sup> was advised on 16 June 2000 that consultations had been held "with New Zealand business groups, unions, and civil society" with anti-dumping measures being raised as one of the issues of concern. Of particular concern to manufacturers was the development of a "competition test" under the draft CEP's anti-dumping provisions"<sup>122</sup>. The New Zealand Manufacturers Federation (Inc.) wrote to Minister Swain on 5 July 2000<sup>123</sup> expressing opposition to "a Trade Remedies clause that provides for a national interest test" and which they understood was to be considered by a Cabinet Committee that day. The Federation strongly urged that "the Trade Remedies clause in the draft agreement not proceed in its current form", pointing out that such a proposal "is substantially the same as that originally advanced by the previous Government" and that "we received assurances, which we valued, that your Government did not favour an approach that both delivered a negative signal to New Zealand industry and placed jobs at greater risk". Opposition to the draft competition proposal was also expressed by the New Zealand Sugar Company Ltd (NZSC)<sup>124</sup> to a number of Ministers and Members of Parliament. NZSC and Fisher & Paykel<sup>125</sup> considered that inclusion of a

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<sup>121</sup> Cabinet External Relations and Defence Committee. (16 June 2000). Memorandum to the committee ERD (00) 22, *Singapore-New Zealand Closer Economic Partnership Agreement: Progress Report on Negotiations*. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>122</sup> Ministry of Economic Development. (Undated). Draft letters to the New Zealand Manufacturers Federation, Fisher & Paykel Ltd and New Zealand Sugar Company Ltd. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>123</sup> Carlaw, S., New Zealand Manufacturers Federation (Inc.). (5 July 2000). Letter to Hon Paul Swain, Minister of Commerce. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>124</sup> Dr John Burman, Chief Executive Officer, New Zealand Sugar Company Limited. (4 July 2000). Letter, *Singapore free trade agreement negotiation* to Minister of Commerce, Hon. Paul Swain, Deputy Prime Minister Rt. Hon. Jim Anderton, Finance Minister, and the Minister for Trade Negotiations, the Hon. Jim Sutton, Trevor Mallard MP and Bruce Cunliffe MP. The letter was copied to the Prime Minister Rt. Hon. Helen Clark, Dr the Hon. Michael Cullen (who had visited the company in November 1999), and Ann Hartley, MP for Northcote. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>125</sup> Richardson, M., Fisher & Paykel Ltd. (5 July 2000). Letter to David Cunliffe, Chairperson, Commerce Select Committee, *Singapore/New Zealand Closer Economic Partnership*. Copied to Rt Hon Helen Clark, Prime Minister; Hon Jim Anderton, Deputy Prime Minister and Minister for Economic Development; Hon Paul Swain, Minister of Commerce; and Hon Jim Sutton, Minister for Trade Negotiations. In Ministry of Economic Development file TR697 FTA Singapore.

competition test was an attempt to introduce through the back door a discredited idea that had been rejected in the previous government's trade remedies review. Former Labour Government Prime Minister, Sir Geoffrey Palmer, in July 2000 presented an *aide-memoire*<sup>126</sup> to the Minister reminding him of previous representations and an implicit understanding by manufacturers that a public interest test that included a competition element was no longer under consideration. Sir Geoffrey argued that "to continue with the proposed clause in the current Treaty negotiations will cause great harm to New Zealand manufacturers and it will cost . . . a great many jobs . . .".

Officials<sup>127</sup> advised the Minister that New Zealand had "sought to include consideration of competition issues within the FTA in general" and that the competition test for anti-dumping was neither a major issue within the CEP nor was it meant to "comprise a major new element in anti-dumping investigations". Officials advised that the Minister "may wish to discuss dropping the "competition test" from the anti-dumping provisions of the CEP with Singapore with Trade Negotiations Minister Sutton, and if he took that approach he "could inform Sir Geoffrey and/or others that you will consider the question of a general competition test, (ie the "public interest test") . . . when you consider the results of the trade remedies review later this year". Swain<sup>128</sup> replied to the New Zealand Manufacturers Federation, Fisher & Paykel Ltd and NZSC that when he learned that "a number of New Zealand companies were strongly opposed to the competition test under the CEP, [he] agreed, following consultations with my Ministerial colleagues, that the issue was not worth taking further". New Zealand moved to eliminate the competition test from the Agreement and the Minister "asked the Ministry of Economic Development to delay proposals to Cabinet on the [Trade Remedies Policy] Review until the CEP talks had been completed as both could necessitate changes to the Dumping and Countervailing Duties Act".

Manufacturers were keen to see that the matter was finally put to rest. Sir Geoffrey Palmer wrote to Minister Swain on 20 July 2000<sup>129</sup> asking that he consider seeing a deputation including Simon Carlaw (Chief Executive of the Manufacturers Federation), Graham Painter (Director of the Bell Gully Trade Group) and himself about the Government's approach to the development of policy concerning a national interest test in relation to anti-

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<sup>126</sup> Palmer, G. (July 2000). *Aide-Memoire*. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>127</sup> Ministry of Economic Development. (Undated). Memorandum, *Singapore CEP: Anti-dumping provisions: Competition test*. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>128</sup> Ministry of Economic Development. (Undated). Draft letters to the New Zealand Manufacturers Federation, Fisher & Paykel Ltd and New Zealand Sugar Company Ltd. In Ministry of Economic Development file TR697 FTA Singapore.

<sup>129</sup> Palmer, G., Chen & Palmer. (20 July 2000). Letter to Hon Paul Swain, Minister of Commerce, *Trade remedies*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

dumping. The Ministry of Economic Development<sup>130</sup>, in October 2000, noted that the Minister “had indicated that one issue [he] wished to see further discussion of was the question of some form of “public interest test”” in trade remedies and asked the Minister of Commerce to agree that a “discussion paper on a “public interest test” should be submitted for consultation with key interest groups”. The Minister discussed the issue with officials early in 2001 and the Minister “requested that a paper be prepared for the Cabinet Finance Infrastructure and Environment Committee”<sup>131</sup>. Officials noted that “the paper would seek approval to release a Discussion Paper to interested parties proposing a “public interest test” be added to the Dumping and Countervailing Duties Act 1988”. The attached discussion paper<sup>132</sup> explained that in dumping investigations “in a very few cases, special circumstances might be identified over and above this finding [of dumping causing material injury] that would necessitate a consideration of the public interest”. The discussion paper was never released and the question of whether a public interest test should be incorporated in anti-dumping legislation has as yet not been raised again.

*The Agreement between New Zealand and Singapore on a Closer Economic Partnership (NZSCEP) came into force on 1 January 2001. It preserved the right to take anti-dumping action but minimised “the opportunities to use anti-dumping in an arbitrary or primarily protectionist manner” by providing higher thresholds for taking anti-dumping action and by reducing the period for reviewing anti-dumping duties (Ministry of Foreign Affairs and Trade, 2002). While the New Zealand Singapore Closer Economic Partnership Act 2001 was supported by both Labour and National parties, Rod Donald of the Green Party was strongly against a softening of anti-dumping provisions, which he saw as undermining New Zealand manufacturers, particularly textiles, clothing, footwear and whiteware manufacturers at a time when “Fisher & Paykel is having to lay off 200 staff because cheap Korean whiteware is flooding into New Zealand” (NZPD, 2000, p.6607). Winston Peters, leader of NZ First party, referred to a Te Kuiti shoe manufacturer laying off half its staff because of “unfair overseas competition” (NZPD, 2000, p.6613).*

A review of post 1996 tariffs resulted in further tariff reductions that were frozen in 1999 by the incoming Labour/Alliance coalition government. In

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<sup>130</sup> McLeod, R., Ministry of Economic Development. (26 October 2000). Memorandum to the Minister of Commerce *Trade remedies review: Public interest test*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>131</sup> McLeod, R., Ministry of Economic Development. (23 February 2001). Memorandum to the Minister of Commerce, *Trade remedies review: Public interest discussion paper*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

<sup>132</sup> Ministry of Economic Development. (Undated). *Draft discussion paper – Trade remedies policy review: Public interest test*. Attached to McLeod, R., Ministry of Economic Development. (23 February 2001). Memorandum to the Minister of Commerce, *Trade Remedies Review: Public Interest Discussion Paper*. In Ministry of Economic Development file TR712 Review of Trade Remedies.

September 2003, however, the Labour/Progressive government agreed to further phased tariff reductions until 2009, with a review to be carried out in 2006 to determine post-2009 tariff reductions (Ministry of Economic Development, 2003). By mid-2004, further trade liberalization looked likely in the form of a number of potential bilateral agreements, with negotiations underway for a Thailand/New Zealand CEP and a Chile/Singapore/New Zealand CEP<sup>133</sup> and the possibility of several negotiations, namely with China<sup>134</sup>, between ASEAN and Australia and New Zealand<sup>135</sup>, and with Malaysia<sup>136</sup>. In an environment of continuing trade liberalization, New Zealand manufacturers can be expected to vigorously pursue the retention of effective anti-dumping legislation.

As at 4 October 2004<sup>137</sup>, New Zealand had final anti-dumping duties in place on canned peaches from Greece and South Africa, galvanised wire originating from Malaysia and South Africa, hog bristle paint brushes from China, plasterboard from Thailand, reinforcing steel bar and coil from Thailand, refrigerators and refrigerator-freezers from Korea and washing machines from Korea. At the same time, the Trade Remedies Group of the New Zealand Ministry of Economic Development was carrying out dumping investigations into oil filters from China, Indonesia, Korea and Thailand, and oral liquid paracetamol from Ireland.

## 7. Rationales and competing interests

This study's central focus has been on identifying the major factors justifying the adoption and evolution of anti-dumping in New Zealand. The international literature indicates that the rationale for anti-dumping action is found in political competition between different interests, rather than any purely economic rationale. An underlying theme is that domestic manufacturers and their employees are likely to have strong incentives to organise and apply political pressure to protect their private interests

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<sup>133</sup> Ministry of Foreign Affairs and Trade. (2004). *Closer economic partnerships/Free trade agreements*. Retrieved on 10 November 2004 from <http://www.mfat.govt.nz/foreign/tnd/ceps/ceptest.html>.

<sup>134</sup> Clark H, Prime Minister. (14 April 2004). *New Zealand and China to work towards FTA*. Retrieved on 10 November 2004 from <http://www.beehive.govt.nz/ViewDocument.cfm?DocumentID=19432>.

<sup>135</sup> Ministry of Foreign Affairs and Trade. (2004). *ASEAN-Australia/New Zealand Free Trade Agreement Public consultation document*. Retrieved on 10 November 2004 from <http://www.mfat.govt.nz/foreign/regions/sea/fta/aseanausnzfta.html>.

<sup>136</sup> Ministry of Foreign Affairs and Trade. (2004). *Malaysia-New Zealand Free Trade Agreement parallel study process public consultation document*. Retrieved on 10 November 2004 from <http://www.mfat.govt.nz/foreign/regions/sea/fta/malaysianzfta.html>.

<sup>137</sup> *New Zealand Gazette*. (7 October 2004). *List of products subject to anti-dumping action*. No 130, p.3186. Extract published in the Customs Edition of the *New Zealand Gazette* of 12 October 2004. Retrieved from on 14 November 2004 [http://www.dia.govt.nz/pubforms.nsf/URL/CustomsGazette131Oct04.pdf/\\$file/CustomsGazette131Oct04.pdf](http://www.dia.govt.nz/pubforms.nsf/URL/CustomsGazette131Oct04.pdf/$file/CustomsGazette131Oct04.pdf).

because the costs of dumping are heavily concentrated in their private interests. The incentives for other interests to apply political pressure against anti-dumping will vary, depending on the extent to which the costs of anti-dumping affect their private interests and the extent to which they are able to organise. Anti-dumping action has a significant impact on the business of importers but the costs to consumers are more dispersed. We are likely to observe considerable pressure from domestic manufacturers, significant pressure from importers, but little pressure from consumers.

Governments regulate the extent to which different interests are taken into account in policy considerations such as anti-dumping. While they may be influenced by pressure from particular interest groups, they will also consider policy that is in the national interest. There is a natural tension between the protection of the private interests of producers and the public or national interest. The tension will be least noticeable when the interests of producers are considered broadly to coincide with the public interest, but increases when questions are raised about other effects in the economy, such as effects on competition or prices for downstream producers and consumers.

To relate the theoretical frameworks of the international literature to New Zealand's experience, this study now analyses the development of rationales for anti-dumping in New Zealand, the involvement of competing interests in the anti-dumping debate and examines the tension between protection of private interests and the public interest.

## **7.1 Rationales for anti-dumping**

Anti-dumping was introduced into New Zealand legislation in 1905 on grounds that predatory pricing would see the demise of local manufacturers, loss of employment, lack of availability of machinery designed for New Zealand conditions and an increase in prices once locally-produced goods were no longer available. The international literature indicates that this is one of the very few grounds on which anti-dumping can be justified for sound economic reasons, although some argue that the argument fails because of the cost to the predatory exporter and the likelihood of continued competition from other countries. Similarly in New Zealand, not everyone was convinced, citing the availability of machinery from other countries which would keep prices down. While an economic argument was used as the basis of the argument for New Zealand's first anti-dumping legislation, it was not particularly persuasive. Strong support for anti-dumping came rather from political arguments highlighting the potential loss to New Zealand of industry and employment and from equity arguments claiming that United States exporters had unfair advantages relative to New Zealand industries.

By 1921, the Tariff Commission was forced by the protective policies adopted by other countries to accept the “level playing field” argument and applied this equity argument to its approach in maintaining protection from dumping. For the next fifty years, anti-dumping appears to have been largely accepted in New Zealand as a legitimate part of its international trade policy. Anti-dumping was justified even as late as the 1970s in terms of the need to protect infant industries, or at least small industries in a country that was not as industrialized as larger industrialized countries. As tariff and quantitative protection from trade began to fall away from New Zealand’s borders, strong anti-dumping provisions were seen as a way of assuring manufacturers that, notwithstanding trade liberalization, protection would still be available to them if they suffered injury from unfair competition.

A free trade agreement with Australia in 1983 required even more reassurance for manufacturers. At the same time the Treasury, concerned that anti-dumping did not adversely impact on the benefits of trade liberalization, argued that anti-dumping could only be justified, on industry assistance grounds, when short term or intermittent dumping (especially predatory dumping) disrupted domestic industry. The Treasury confirmed that anti-dumping in New Zealand was usually taken on equity grounds, that is against “unfair” competition, and by 1986 was arguing that, while there were net benefits in having no anti-dumping procedures, they could be useful from a presentational point of view while going through a period of trade liberalisation. Anti-dumping action in New Zealand continued to be justified on equity grounds, while providing a safety net for manufacturers increasingly exposed to international competition.

In 1998, in a move away from equity arguments and towards economic efficiency, new rationales were proposed for anti-dumping in New Zealand, namely whether anti-dumping action was in the net national interest and whether the activity involved was anti-competitive. The New Zealand experience shows that the adoption and evolution of policies such as anti-dumping involve more than just blind adherence to apparently-sound economic theory. Competing interests and the political pressures they apply have been very influential in the formation of anti-dumping policy in New Zealand.

## **7.2 Competing interests**

Pressure from domestic manufacturers and their employees, in the form of petitions and delegations, was very apparent in the haste with which the 1905 anti-dumping legislation was able to be implemented. The legislation would not have been implemented, however, without taking account of the interests of farmers who in a largely agricultural-dependent New Zealand wielded considerable political influence. Prime Minister Seddon considered the interests of farmers and manufacturers to be intermingled and the

resulting legislation was a compromise that established a Board, representing both interests, that could recommend action to ensure protection for manufacturers yet not result in increased prices to farmers.

In 1921, manufacturers lobbied government and the Tariff Commission for protection, with the general tariff seen by manufacturers as helping protect against dumping. The introduction of import licensing in 1938 combined with tariff protection provided significant protection against dumping for the next thirty years and more, although New Zealand continued to take anti-dumping action. Consumers received occasional mention in Parliamentary debate and the Customs Department continued to be aware of the impact of anti-dumping duties on consumers, even after the 1921 public interest test was removed from anti-dumping legislation in 1966.

From the 1970s, as the general level of protection reduced, government was sensitive to the needs of producers who would be concerned if New Zealand did anything to make anti-dumping action more difficult, and this included acceding to the GATT Anti-Dumping Code. Manufacturers' concerns were heightened when New Zealand entered into a free trade agreement with Australia (ANZCERTA) in 1983. On the one hand, manufacturers wanted freer access to the larger Australian market, but at the same time faced open competition from Australian manufacturers. With greater trade liberalization in the 1980s, governments consulted extensively with manufacturers, importers, farmers and other interests, but it is clear that satisfying manufacturers of anti-dumping provisions was a key concern during this time. Government's sensitivity to the concerns of manufacturers, who were bearing the costs of reductions in protection, was clearly seen in the speed with which Labour government reacted to restore confidence in anti-dumping after the failure of anti-dumping action against Fosters canned lager.

Government departments also held views on interests affected by anti-dumping actions. The Treasury, in 1983, considered that anti-dumping legislation should include a provision that balanced the costs of dumping to producers against the gains to consumers. The Ministry of Agriculture and Fisheries, in 1986, took up the case for users of goods who were taxed by anti-dumping action. The Ministry of Commerce, in 1998, published a discussion paper that considered the net national interest and the possibility of a competition approach to anti-dumping. Against opposition from local manufacturers, none of these proposals succeeded.

While importers had previously expressed concerns about anti-dumping and were organized under the New Zealand Bureau of Importers and Exporters (Inc), it was not until 1988 that a group of 21 importers, organized as the Chemical Importers Group, made a substantive attack on anti-dumping. Concerned that anti-dumping was effectively handing back to manufacturers the market dominance they enjoyed under import licensing, the Group

argued that anti-dumping be either repealed or be invoked only if in the national interest. Importers gained further voice in the form of the Importers Institute which, representing a wider range of importers, argued for the repeal of anti-dumping legislation in 1994, except where anti-competitive behaviour was involved.

The removal of trans-Tasman anti-dumping in 1990, signalled the first major defeat for manufacturers when they were unsuccessful in persuading government of the need for continued trans-Tasman anti-dumping. Manufacturers, especially in the more highly-protected areas of textiles, clothing and footwear, continued to lobby government for more effective anti-dumping provisions as tariff protection was reduced. Unions joined the call for stronger anti-dumping action. Manufacturers were quick to recognise that a national interest test, and particularly one that considered whether activity was anti-competitive, would make it more difficult to take action against anti-dumping and opposed such a provision with great vigour, as did unions and upstream producers such as fruit growers. The Importers Institute considered that government was not addressing the real issue of whether anti-dumping legislation should exist in an open economy. Farmers, retailers and the New Zealand Business Roundtable supported a form of public interest test. The range of organisations representing their diverse opinions had grown over the years, although consumers continued to receive relatively little representation.

As predicted by the literature, strong demand in New Zealand for protection from anti-dumping has come from local manufacturers, as beneficiaries of protection. The strongest demand has come from those with the most to lose, with significant concern expressed over the years by industries that have traditionally been dominant in the New Zealand market, such as the refined sugar and plasterboard industries. Strong demand for effective anti-dumping legislation has also come from those who had benefited from high levels of protection in the past, such as the textile, clothing and footwear industries.

## **7.3 Protection and the public interest**

### **7.3.1 Protection**

Protectionist sentiment in New Zealand formed a background for anti-dumping policy from 1905 until the 1970s when quantitative restrictions on imports began to be removed and tariffs began to reduce significantly. In the first decade of the twentieth century protectionist sentiment was widespread, being captured both by public opinion and the needs of infant industries (Scholefield, 1909, p.321). The “infant industry” argument found favour in New Zealand, along with the protectionist views of List relating to newly industrializing countries. It is not difficult to see why, at a time when a geographically-isolated New Zealand was developing an industrial base,

that public interest would have equated closely with protection of local manufacturers. Nonetheless, there was significant opposition to the introduction of any further protection, with several arguments in the House supporting the benefits of free trade.

Until 1965, there was no injury test to determine whether dumping would cause harm to a domestic industry and anti-dumping duties were imposed to deal with dumping regardless of whether a need existed in each particular case to protect an industry from injury. Even when an injury test was introduced, New Zealand resisted international pressure to join the 1967 GATT Anti-dumping Code for twenty years, claiming that it complied with the spirit of Article VI of the GATT. Because of its small domestic market, New Zealand needed the flexibility to protect its “infant” industries against exporters of more fully developed industrialized nations. This flexibility in the application of anti-dumping measures became even more important from the 1970s onwards as the protection afforded by import licensing began to be removed and New Zealand moved towards the free trade agreement with Australia. In part New Zealand’s need for flexibility was because of its perception that the Code did not take account of the interests of a small country that had a limited number of producers and that it imposed too much of an administrative burden. Some, such as Hastings (1986) and a Customs official, considered New Zealand’s flexible approach to indicate a protectionist approach.

On the other hand, the Treasury was concerned in 1983 that reduced tariff protection was not replaced by anti-dumping actions and wondered whether New Zealand should reconsider its non-acceptance of the GATT Anti-Dumping Code. New Zealand’s failure to administer anti-dumping in a legally-defensible manner in the Fosters canned lager case, and consequently its failure to provide protection to the local industry, led to calls for robust anti-dumping provisions and, ironically, manufacturers saw that being achieved through accession to the GATT Anti-Dumping Code, which suited government officials concerned at resisting protectionist sentiment by domestic industries. Following accession to the Code, New Zealand carried out anti-dumping action that has never been challenged as inconsistent with GATT and WTO rules and for every two investigations carried out, only one resulted in anti-dumping action<sup>138</sup>, indicating perhaps that Bhala’s (1995) wish for anti-dumping law to be circumscribed to minimize abuse was being met. Even as New Zealand through the 1990s became one of the most open economies in the world, however, critics continued to refer to anti-dumping in New Zealand as a thriving form of protectionism.

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<sup>138</sup> Ministry of Economic Development. (31 March 2001). *Anti-dumping law and practice in New Zealand*. Retrieved on 17 November 2004 from [http://www.med.govt.nz/buslt/trade\\_rem/guides/adlpinz.html](http://www.med.govt.nz/buslt/trade_rem/guides/adlpinz.html).

### **7.3.2 Competition**

Butterworths (2004) describes the 1905 anti-dumping legislation as “the earliest New Zealand legislation directly concerned with competition” by protecting local manufacturers from “unfair competition” and preventing potential market domination by an overseas monopoly. At the same time, debate in the House indicated a concern to ensure that New Zealand manufacturers were not handed a monopoly through anti-dumping legislation. The concerns about monopolisation were recognised when the legislation was incorporated in the *Monopoly Prevention Act 1908*.

Hastings (1986, p.226) considered that the 1921 anti-dumping legislation did nothing to preserve competition in the New Zealand market because it protected New Zealand industries and, regardless of how efficient or inefficient they were, did not prevent them from establishing monopolies. At the same time, the public interest test could be used to prevent adverse effects on competition, although competition was not specifically mentioned, while a provision that exempted goods from anti-dumping action where goods were not sold in New Zealand to all purchasers on equal terms under like conditions was intended to ensure that a domestic industry did not exploit any monopoly of the New Zealand market.

Competition from dumped imports could either benefit the country or cause it economic loss, as recognised by the Treasury in 1983. By 1986, the Treasury was arguing that anti-dumping was a way of enforcing rules about competition, rather than providing assistance to industries, and that, from an economic perspective, anti-dumping, should arguably deal with anti-competitive aspects relating to predatory pricing. The Chemical Importers Group argued in 1988 that competition rules would suffice instead of anti-dumping. By 1990, ANZCERTA had developed to the point where officials considered that for trans-Tasman trade, at least, trade practices provisions in New Zealand and Australian legislation would be sufficient to deal with anti-competitive practices and that anti-dumping action was no longer appropriate within the free trade area. Competition law was not a replacement for trans-Tasman anti-dumping law, but it did show government’s recognition that some anti-dumping action did not enhance national welfare. In 1998, a review concluded that the impact of anti-dumping duties on competition should be considered before anti-dumping action was taken, but was met with strong opposition from manufacturers and unions. A competition test proposed in early negotiations for the New Zealand Singapore Closer Economic Partnership Agreement was similarly opposed successfully.

### **7.3.3 Public Interest**

The opposing issues of protectionism and the public interest are at the centre of the debate about anti-dumping. The debate in 1905 centred on whether the interests of producers should be protected at the expense of other

interests, particularly farmers, and was addressed by a compromise that ensured duties or bounties did not prop up the prices of domestic producers. In 1921, the concern about any adverse effect anti-dumping action might have on other interests was dealt with to some extent by a clause that allowed the Minister of Customs to decline to impose an anti-dumping duty if it was not required in the public interest. The public interest clause was removed from the legislation in 1966, but was raised again in 1986 by the Ministry of Agriculture and Fisheries who argued that the national interest should be taken into account before anti-dumping action is taken. By 1983, the Treasury was interested in a provision in anti-dumping legislation that looked at whether dumping resulted in gains or losses in national income and in 1986 it considered there were net benefits in having no anti-dumping provisions. In 1988, the Chemical Importers Group argued that anti-dumping action should be repealed or should be taken only if such action was in the national interest.

A review of anti-dumping in 1998 was premised on agreement by the National/NZ First coalition government that trade remedies should take the national interest into account. While a full net national interest test was not considered to be justified, the review concluded that the legislation should incorporate a public interest test that took account of the impact on competition when considering anti-dumping action. Some form of public interest test was supported by farmers, retailers and the New Zealand Business Roundtable, but was strongly opposed by manufacturers and unions.

The tension between protection of private interests and the public interest is clearly demonstrated in the New Zealand experience of debate about anti-dumping. When New Zealand viewed itself as being in the relatively early stages of building industrial capability and complementing its farming activities, the public interest was equated with the protection of industry. Trade liberalisation brought with it questions about whether anti-dumping was consistent with strategies for economic growth and whether it should consider interests that are wider than the private interests of producers. At the same time, trade liberalisation has been used by manufacturers as an argument for the retention of anti-dumping.

#### **7.3.4 Future research**

This research paper explains why New Zealand has continued to take anti-dumping action against injurious dumped imports. The question of how New Zealand has implemented the anti-dumping action that it does take has not been examined in detail. New Zealand's agreement to have an anti-dumping regime means that it presumes that in certain circumstances anti-dumping action will be taken. The way in which an anti-dumping regime is administered, however, including its adherence to international rules, will determine the extent to which anti-dumping action will be taken.

Further research could examine the impact of anti-dumping action on particular interests and whether the political benefits and costs of such action have resulted as anticipated by the interest groups. Other research could focus on the extent to which the availability of anti-dumping has impacted on trade or whether such availability has led to greater liberalisation of trade. On the other hand, trade liberalisation can have serious adverse consequences for domestic industries that do not have time to adjust to sudden influxes of imports, and further research could examine whether anti-dumping action has increased as a result of trade liberalisation.

Finally, the issue of whether anti-dumping should address activity which is anti-competitive and that anti-dumping action should not hinder competition points to further research into the relationship between international trade and competition policies.

## 8. Conclusion

The rationales justifying the existence of anti-dumping in New Zealand over the past one hundred years have largely been non-economic and based on equity grounds, that is anti-dumping was a response to competition perceived as unfair. The original legislation in 1905 was, no matter how tenuously, based on an economically-justifiable concern about predatory pricing that could see the New Zealand market monopolised by a United States' trust. The rationale for anti-dumping became more equity-based in 1921, when protection of industry was based on trying to level the playing field with trading partners who were competing unfairly by dumping from behind protective tariff walls. Until 1965, protection of producers on grounds of fairness, even when no evidence was required that they were being injured by such competition, became the overriding rationale for anti-dumping. The original anti-dumping legislation protected manufacturers and employers, while also ensuring consumers (namely farmers) did not incur increased costs. Legislation from 1921 to 1966 became largely producer-oriented and from 1966, when a public interest test was removed, became solely producer-oriented in terms of the benefits of anti-dumping action.

The absence of a public interest test from 1966 coincided with an absence of strong economic argument for anti-dumping and increasing political pressure from domestic manufacturers from the 1970s as other forms of protection began to be removed. The rationales for anti-dumping in a time of trade liberalisation involved both equity considerations and the understanding that limited protection in the form of anti-dumping was a preferable political trade-off for the perceived benefits of free trade. Political pressure from manufacturers and the sensitivity of governments involved in trade liberalisation appear to have been the main drivers for the maintenance of anti-dumping over the past thirty years. We can conclude, therefore, that while there was initially a perceived economic justification for anti-dumping provisions, the rationales for anti-dumping in New Zealand have since resulted more from the pressures of political competition. The fact that political pressure from local manufacturers has been the main driver of continued anti-dumping legislation is consistent with the international literature.

Political pressure from local manufacturers for anti-dumping has been usually highly persuasive throughout one hundred years of anti-dumping, except when anti-dumping was removed from trans-Tasman trade. In the anti-dumping debate in New Zealand over the years, manufacturers, employees and farmers have been highly organised and have used their resources to lobby and influence governments. Protectionist sentiment, particularly arising in the middle of the twentieth century as New Zealand's industries were allegedly still developing, supported the arguments of

manufacturers for protection against dumping. Trade liberalisation, starting in the 1970s, saw the debate about protection reopened and the gradual emergence of organised groups other than manufacturers, such as importers, who became significant contributors to the anti-dumping debate. The considerable pressure from domestic manufacturers for anti-dumping and the recent emergence of other interest groups is consistent with the international literature, as is the lack of representation for consumers.

The natural tension between the protection of the private interests of producers and the public or national interest is regulated, however, by the state. An interesting observation in this study is that governments and their officials have tended to advance the public interest and look for acceptable solutions that meet broader policy objectives consistent with the national interest. Government departments, however, are limited to only presenting the arguments for and against particular policies, subject to Ministerial approval, and play an important role in identifying the concerns of particular interests through the consultation process. Private interests are advocated by those who benefit from or bear a cost from a policy such as anti-dumping. Consistent with the international literature, where costs or benefits are concentrated, as with domestic manufacturers, the incentives to apply pressure to achieve a policy goal are great. The lack of consumer involvement or pressure in the anti-dumping debate in New Zealand is due to the dispersed cost to them of anti-dumping action. Trade liberalisation may have contributed inadvertently to a lack of pressure from consumers, because freer trade provides alternatives to the goods subject to anti-dumping action, lessening the incentive for consumers to oppose anti-dumping.

The tension between protection and public interest was not noticeable when New Zealand considered that protection of manufacturers coincided with the public interest. In the past two decades, various interests have begun to challenge the producer-oriented nature of anti-dumping law in New Zealand. Manufacturers have lobbied powerfully to retain strong anti-dumping provisions and have opposed strongly any suggestion that anti-dumping should be replaced by the potentially more selective protection that any public interest test could offer - particularly one that might adopt a competition law approach. Continued trade liberalisation in New Zealand, including through bilateral free trade agreements, offers manufacturers a platform from which to continue to apply significant pressure for strong and effective anti-dumping provisions. The added pressure that can be exerted in favour of strong anti-dumping provisions arguments during periods of trade liberalisation does not appear to receive the emphasis in the international literature that the New Zealand experience indicates is demanded. Other interest groups will no doubt continue to press for consideration of wider interests than only producers in considering anti-dumping action. Governments will need to decide whether and how they balance such interests.

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