

CANADIAN ANTI-DUMPING PROVISIONS: HAS THE USE OF THE PUBLIC INTEREST CLAUSE HELPED CURB PROTECTIONISM?

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I. INTRODUCTION

The *General Agreement on Tariffs and Trade* (GATT) was a foundational document for the World Trade Organization through which trade liberalization was a main goal, as seen in the preamble:

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Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods (...) directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce¹

Despite the impetus for opening international trade, there is continued permission for the imposition of anti-dumping duties under Article 6 of GATT, when dumping has been found to occur and has caused or threatens to cause material injury to the domestic industry.² Dumping is found when an exporter values their goods at a lower price than if those goods were intended to be sold domestically in their own country.³

Anti-dumping measures have been discussed and criticized over the years, namely for a lack of likelihood for predatory pricing, lack of value to the domestic industry, and for having a negative impact on a variety of interest groups including domestic producers, consumers, and developing countries.⁴ Consequently, a proliferation of regional trade agreements has done some work towards curbing the use of anti-dumping measures,⁵ with some agreements excluding them altogether (Chile-Canada Free Trade Agreement being an example of the latter).⁶ Nonetheless, there is continued

¹ WTO, *General Agreement on Tariffs and Trade on 1 January 1948*, online: WTO <https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf> at 1 [GATT].

² *Ibid*, art 6(1).

³ *Ibid*, art 6(1(a)).

⁴ See Susan Hutton and Michael Trebilcock, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales" (1990) 24:3 *Journal of World Trade* 123 at 140 (failure to find predatory risk in 30 Canadian anti-dumping cases). See also Piyush Chandra and Cheryl Long, "Anti-dumping Duties and their Impact on Exporters: Firm Level Evidence from China" (2013), 51 *World Development* at 179 (significant effect on productivity of exporting country due to AD measures imposed). See also Corinne Krupp and Susan Skeath, "Evidence on the upstream and downstream impacts of antidumping cases" (2002) 13:2 *The North American Journal of Economics and Finance* 163 at 174 (downstream effects of AD duties shown).

⁵ See WTO Secretariat, "Evolution of Regional Trade Agreements in the World, 1948-2016", *World Trade Organization* (website), online: <https://www.wto.org/english/tratop_e/region_e/regfac_e.htm> (shows the increase in regional trade agreements starting in 1994).

⁶ See Terry Wu, "Canada-Chile Free Trade Agreement: An Analysis" (2002) 3 *Latin*

political support for the use of anti-dumping measures with a view that they act as a safety net for countries facing severe competition from foreign companies, thus serving as a protectionist policy few are willing to give up.⁷ For example, the United States maintained throughout the NAFTA negotiations that it was not willing to give up its anti-dumping measures in search of a broader scheme between the U.S., Canada, and Mexico.⁸ It is also highly unlikely that we will see any countries unilaterally withdraw or repeal their anti-dumping measures beyond the level stipulated by the GATT document due to a fear of being at a disadvantage maintained among member nations.

This paper operates with the view that anti-dumping measures as they exist do greater harm than good to the community overall, and are in need of major reform if not elimination. Following this perspective, the paper looks to Canada's use of anti-dumping provisions through the *Special Import Measures Act* [SIMA],⁹ and the resulting criticisms toward the policy. While Canada has been praised as an exemplary leader when it comes to considering other interests than the domestic industry importing the goods, it nonetheless has shown to be limited in addressing the issues with its policy, and is behind certain other countries in implementing WTO provisions. This paper thus focuses on what Canada has done to recognize the other interests involved in its anti-dumping policy, as well as where it could look for possible reform. As will be seen, despite having recognized the public interest in its legislation, the application of this concept is rather narrow due to the fact that it fails to properly take into account the interests of downstream users and consumers, and that it is only used in exceptional circumstances. This paper thus looks at the case law regarding anti-dumping policy to see how other, often neglected parties are treated when their interests are considered.

American Business Review 3 at 70 (elimination of anti-dumping duties over six year period starting in 1997).

⁷ Patrick Gay, "Unveiling Protectionism: Anti-Dumping, the GATT, and Suggestions for Reform" (1997) 6 Dal J of Legal Studies 51 at 66-67.

⁸ Jean-Marc Leclerc, "Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries" (1999) 44 McGill L J 111 at 139.

⁹ *Special Import Measures Act*, RSC 1985, c S-15 [SIMA].

II. WTO AGREEMENT AND INTERPRETATION

WTO members, including Canada, drafted an agreement (the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* [WTO Agreement]) with respect to anti-dumping implementation in 1994 as a result of the Uruguay Round of negotiations.¹⁰ Within the agreement, there are several guiding provisions of interest to those seeking representation in terms of public interest. For example, Article 6.2 posits that all interested parties must be given the right to defend their interests in any investigation being conducted, and that failure to participate in the investigation should not be prejudicial to their case.¹¹ The *WTO Agreement* also includes a definition of interested parties in Article 6.11 that incorporates the exporters of goods, the government of the exporting company, as well as producers of products similar to those being exported.¹² While domestic consumers are not included in the definition, the agreement allows for governments to include them in the list of interested parties. Additionally, there is Article 6.12, which provides for downstream users (including industrial users and consumer groups) to participate in the dumping determination investigation.¹³ Thus, while there is no public interest definition specifically provided for in the *WTO Agreement*, the group is not completely ignored when applying its principles. Also of note is how the *WTO Agreement* prescribes the imposition of anti-dumping duties in Article 9.1: “It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry”.¹⁴ Finally, Article 15 is of interest because it requests that member parties take into consideration whether the exporter’s country is a developing country before imposing its anti-dumping measures, with a view

¹⁰ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (Antidumping Agreement, WTO member states, 15 April 1994, Annex 1A s 8 [WTO Agreement]).

¹¹ *Ibid.*, art 6.2.

¹² *Ibid.*, art 6.11.

¹³ *Ibid.*, art 6.12.

¹⁴ *Ibid.*, art 9.1.

towards finding an alternative remedy.¹⁵ Seeing as anti-dumping measures have shown an effect on the productivity of exporting nations,¹⁶ the special status given to developing countries is deemed necessary by the WTO members behind the agreement.

As will be seen below, Canada's policy deviates from the *WTO Agreement* in several ways, though not to the degree that the U.S. follows its own path. While there is language in the agreement that seems to mandate the involvement of interested parties throughout the investigation, Canada does not include interested parties until after dumping has been determined to cause or threaten to cause material injury to the domestic industry.¹⁷ However, the WTO Appellate Body has itself made it easier for nations to act unilaterally with regards to their policy through the Appellate Body's own interpretation of the *WTO Agreement*. For example, they interpreted Article 6.2 (defence of interests) as a general duty, with no specific rules relating to what steps investigating authorities have to take or at what point they need to include interested parties.¹⁸ To date the WTO has not interpreted Article 6.11 (definition of interested parties) or 6.12 (downstream user participation) in its decisions. Meanwhile, while Canada has not specifically defined interested parties in its legislation, the *Special Import Measure Regulations [Regulations]* provides for downstream users of the goods to be included as interested parties in the definition of public interest,¹⁹ keeping it more in line with 6.12 of the *WTO Agreement*. Additionally, Article 9.1 of the *WTO Agreement* (imposition of anti-dumping duty) has been interpreted by the Appellate Body as providing no mandatory obligation on member nations to address the removal of injury rather than the margin of dumping in applying anti-dumping duties.²⁰

¹⁵ *Ibid*, art 15.

¹⁶ See Chandra and Long, *Supra* note 4 at 179.

¹⁷ *SIMA*, *supra* note 9, s 45(1)-(6).

¹⁸ WTO, *Guatemala-Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WTO 24-10-2000, online: <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/WT/DS/156R.doc>> at para 8.238.

¹⁹ *Special Import Measures Regulations*, SOR/84-927, s 40.1(2)(d)(i)-(vi) [*Regulations*].

²⁰ WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WTO 15-07-2001, online: <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/WT/DS/397AB>>

Finally, Article 15 has been interpreted by the WTO to mean that investigating countries have an obligation to consider the effects of anti-dumping duties on the developing country that the trading company belongs to before imposing such duties:

In our view, while the exact parameters of the term are difficult to establish, the concept of "explore" clearly does not imply any particular outcome. (...) Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, *Article 15 (...) does impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.* [Emphasis added]²¹

It is clear that Canada fails to honour this obligation on two fronts. First, it imposes duties before the public interest inquiry is commenced. Second, its inquiry does not take the status of an exporting country as "developing" into account throughout its investigation. With the majority of anti-dumping cases involving companies from developing countries, and the resulting negative effect on the countries themselves having been established,²² it is more imperative that this issue be addressed.

III. OVERVIEW OF ANTI-DUMPING PROCESS

The entire anti-dumping process has been codified under the *Special Import Measures Act* and its regulations, and determines the issues of dumping, injury to the domestic industry, and the levying of duties as a result.²³ The proceedings under which these factors are determined are split between two bodies: the Canadian Border Services Agency (CBSA) and the Canadian International Trade Tribunal (CITT). The CBSA is responsible for determining whether goods are being dumped into the country. This body is involved once there has been a complaint made by a domestic producer to the President of the CBSA, unless he decides to investigate on

R.doc> at para 336.

²¹ WTO, *European Communities – European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO 30-10-2000, online: <<http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/DS/141R-00.doc>> at para 6.233.

²² See Chandra and Long, *supra* note 4.

²³ SIMA, *supra* note 9.

his own initiative.²⁴ The CITT is responsible for determining whether the dumping has caused injury or threatens to cause injury to the domestic industry. It does a preliminary investigation of injury concurrently with the CBSA's, and makes a judgment within sixty days of being notified of the dumping.²⁵ If the case fails to meet the injury determination, the CITT can cause the CBSA's dumping investigation to be terminated.²⁶

Of special note to foreign exporters is the imposition of provisional duty fees on the importers when there has been a preliminary determination of dumping by the CBSA, but before injury has been demonstrated.²⁷ The duties (i.e. fees) are meant to counter the effect of dumping and are only retroactively returned if the final determination of injury is not found or if the amount is reduced by the Minister of Finance as a result of the public interest investigation. The consideration of public interest only happens after the CITT has made a final determination of injury to the domestic industry. Therefore, interested parties other than the exporting companies are not involved in the investigation until after duties have been imposed for some time and the CITT has made them permanent. Also of note is that although the language of the public interest clause states that the CITT can conduct its own investigation, the Tribunal has made it clear through practice that the onus is on interested parties to make a case:

When the Tribunal finds injury in an inquiry conducted pursuant to section 42 of SIMA, the consequent anti-dumping and/or countervailing duties become the normal state of affairs, or the default position, with respect to all goods to which the finding applies. It is this set of conditions that a requester for a public interest inquiry seeks to have varied by means of a recommendation from the Tribunal to the Minister of Finance. It is therefore incumbent on the requester to present at least a prima facie case to the Tribunal that the initiation of a public interest inquiry is appropriate.²⁸

²⁴ *Ibid*, s 31(1).

²⁵ *Ibid*, ss 34(2) and 37.1(1) and (2).

²⁶ *Ibid*, s 35(1).

²⁷ *Ibid*, s 8(1).

²⁸ *Re Carbon Steel Welded Pipe*, 2008 CarswellNat 5682, 13 TTR (2d) 248 at para 14.

IV. USE OF SECTION 45 IN CANADA AND EFFECT OF REGULATIONS

As mentioned earlier, Canada has a provision for public interest consideration under Section 45 of *SIMA*:

If, as a result of an inquiry referred to in section 42 arising out of the dumping or subsidizing of any goods, the Tribunal makes an order or finding described in any of sections 3 to 6 with respect to those goods, the Tribunal shall, on its own initiative or on the request of an interested person that is made within the prescribed period and in the prescribed manner, initiate a public interest inquiry if the Tribunal is of the opinion that there are reasonable grounds to consider that the imposition of an anti-dumping or countervailing duty, or the imposition of such a duty in the full amount provided for by any of those sections, in respect of the goods would not or might not be in the public interest.²⁹

This section had previously been analyzed and critiqued based on decisions made by the CITT, the board responsible for determining whether dumping has caused injury to the domestic industry. In Jean-Marc Leclerc's article on anti-dumping reform in Canada, he questioned the justification for anti-dumping laws in the country from a social and economic perspective, and then looked at the operation of section 45 and the CITT's interpretation of public interest.³⁰ As this review of cases was written before the introduction of the *Regulations* it gave a good overview of what the Tribunal saw as relevant before factors were prescribed.

Leclerc first pointed to *SIMA* as it was written and saw a single-minded focus on the effects of dumping on domestic producers of the imported goods when defining "domestic industry".³¹ He commented that a broader definition of the industry would take into account other producers who would use the imported goods in their own products and who would benefit from more competition. However, the existence of section 45 gives advocates for the wider interests of the domestic industry an opportunity to argue that the full imposition of duties is not in the public interest. At the time the article was written there had only been two cases where the Tribunal had decided to recommend that duties should be less than the automatic margin of dumping, and none in the five year period Leclerc was

²⁹ *SIMA*, *supra* note 9, s 45(1).

³⁰ Leclerc, *supra* note 8.

³¹ *Ibid* at 122.

focused on. He saw this as being due to a narrow application of the public interest clause.³²

Leclerc discussed how the Tribunals made clear that there would need to be an exceptional and unnecessary burden on interested parties, and that they would not engage in pitting the injuries sustained by one group against those of another unless they rose to that level.³³ He went on to question how such an interpretation could be challenged in the future, and concluded that it would be extremely difficult to argue against the Tribunal on administrative grounds due to the level of deference shown towards them.³⁴ Leclerc also expressed hesitation towards proposed legislative reform to the public interest clause which was meant to broaden the definition of public interest and take precedence over the need for an exceptional basis to challenge the automatic provisions.³⁵ In fact, as will be seen below, the language of the prescribed factors in Canada's *Regulations* is even more restricting than the proposed reforms from 1996.

Valerie Stevens' article on section 45 had a similar focus to that of Leclerc, but asserted a few more trends in the CITT's interpretation of the public interest.³⁶ One of these trends was the consistent refusal of the CITT to acknowledge the effect of price increases on downstream users as a determinative issue, even though it was brought up in nearly every case.³⁷ This trend came after recognizing that the price effect of anti-dumping duties was inevitable. CITT decisions were also criticized for seeking out domestic competition arguments when exporters are priced out of the market due to imposed sanctions, even though the number of domestic producers in certain cases was severely limited.³⁸ The article also considered a line of cases where the stated objective was to balance the interests of domestic producers with domestic users, and concluded that it stood in

³² *Ibid* at 127.

³³ *Ibid* at 127.

³⁴ *Ibid* at 130.

³⁵ *Ibid* at 130-131.

³⁶ Valerie Stevens, "The Political Economy of Anti-Dumping in Canada: Section 45 of the *Special Import Measures Act*" (2006), 64 U Toronto Fac L Rev 1 [Stevens].

³⁷ *Ibid* at 16.

³⁸ *Ibid* at 18.

contrast to the majority of decisions where the interest of the producer was the primary concern.³⁹

So what's come from the cases since the *Regulations* were enacted? This paper looks at the recent decisions where the prescribed factors have been included in the Tribunal's decisions. Since the *Regulations* came into effect in 2000, there have been fifty three *SIMA* investigations on domestic injury caused by dumping. Of those cases, only seven of them considered the public interest element and only two followed through with the investigation, with both resulting in the reduction of duties imposed being recommended by the Tribunal.⁴⁰

The Tribunal in *Re Certain Iodinated Contrast Media [Media]* was the first to acknowledge the prescribed factors from the *Regulations* in its decision on public interest, and was important for being one of the few Tribunals that found a full imposition of duties was not in the public interest.⁴¹ Though it considered the prescribed factors in its decision, the Tribunal maintained the historical interpretation of section 45 in that there would need to be an exceptional case made for the public interest to be considered.⁴² Since the goods in question were used by hospitals to treat patients, the reduction was based on the health care implications on the general public when hospitals opted not to invest in the protected goods, and this was considered a sufficiently "exceptional" to warrant consideration.⁴³

The decision seemed to be of limited use, however, as the investigation came down to a policy decision to provide adequate health care to the general public and in essence concluding that, in this case, the harm factor under the *Regulations*⁴⁴ applied to physical harm rather than economic.⁴⁵ However, it could be argued that economic considerations may have been compelling enough, due to the fact that the health concern was a result of

³⁹ *Ibid* at 19.

⁴⁰ Canadian International Trade Tribunal, Government of Canada, *Public Interest Inquiries (Decisions)*, online: <<http://www.citt.gc.ca/en/dumping-and-subsidizing/public-interest-inquiries-section45/decisions>>.

⁴¹ *Certain Iodinated Contrast Media (Re)*, 2000 CarswellNat 7109, 2000 CarswellNat 7110 (WestLaw Next Canada), at para 1 [*Media*].

⁴² *Ibid* at para 20.

⁴³ *Ibid* at para 51.

⁴⁴ *Regulations*, *supra* note 19 at s 40.1(3)(b)(iv).

⁴⁵ See *Media*, *supra* note 41 at paras 45-68.

a clear monopoly being established by the domestic producer as a result of foreign withdrawal. Despite the fact that the CITT consistently looks for any sign of domestic competition,⁴⁶ it would have been hard for them to deny that it was lacking in this instance.

The other successful case in terms of recommending a reduction in duties levied was *Re Certain Stainless Steel Round Wire [Stainless Steel]*.⁴⁷ It was the first case to formally follow the enacted legislation that amended *SIMA* to include the prescribed factors contained in the *Regulations*, while the *Media* case informally considered the same factors.⁴⁸ The prescribed factors as they were at the time are included here:

- (3) For the purposes of subsection 45(3) of the Act, the following factors are prescribed:
- (a) whether goods of the same description are readily available from countries or exporters to which the order or finding does not apply;
 - (b) whether imposition of an anti-dumping or countervailing duty in the full amount
 - (i) has eliminated or substantially lessened or is likely to eliminate or substantially lessen competition in the domestic market in respect of goods,
 - (ii) has caused or is likely to cause significant damage to producers in Canada that use the goods as inputs in the production of other goods and in the provision of services,
 - (iii) has significantly impaired or is likely to significantly impair competitiveness by
 - (A) limiting access to goods that are used as inputs in the production of other goods and in the provision of services, or
 - (B) limiting access to technology, or
 - (iv) has significantly restricted or is likely to significantly restrict the choice or availability of goods at competitive prices for consumers or has otherwise caused or is otherwise likely to cause them significant harm; and
 - (c) whether non-imposition of an anti-dumping or countervailing duty or the non-imposition of such a duty in the full amount provided for in sections 3 to 6 of the Act is likely to cause significant damage to domestic producers of inputs, including primary commodities, used in the domestic manufacture or production of like goods.

⁴⁶ See for example Stevens, *supra* note 36.

⁴⁷ *Certain Stainless Steel Round Wire (Re)*, 2005 CarswellNat 4550, 9 TTR (2d) 766 [*Stainless Steel*].

⁴⁸ *Ibid* at para 33.

(d) any other factors that are relevant in the circumstances⁴⁹

The Tribunal looked at all of the prescribed factors in this case, and found that there was a valid public interest argument made.⁵⁰ The decision boiled down to the effect that anti-dumping duties would have on downstream producers. The Tribunal acknowledged that the good in question was not readily available from other nations, and that it was best to have the U.S. competitors as a source of competition for the good.⁵¹ It also noted that the demand for the good was relatively inelastic, and that anti-dumping duties would be felt by downstream producers due to continued demand for the product from the U.S. importers, no matter the price. Furthermore, due to domestic competition between downstream users, the producers would have been unable to pass on the increased cost to the consumers.⁵² It would have been interesting to see what the Tribunal would have said if competition was not high between downstream producers and they were simply able to increase prices. The Tribunal indicated that the producers were a group that had to be accounted for by public interest inquiries due to the fact that they had no say in the normalizing effect used in imposing anti-dumping duties.⁵³ As the end consumers were not recognized, there remains the question of whether they would be protected under such a case.

While the *Stainless Steel* case was instructive as to how the Tribunal could balance the needs of domestic industry and other domestic producers, the Tribunal has not been consistent in their application of the factors. For example, the Tribunal took into account the effect of anti-dumping measures on downstream users (appliance resellers in this case) in a similar case (*Re Certain Refrigerators, Dishwashers, and Dryers [Refrigerators]*), and concluded that competition among appliance producers and resellers would keep the effects of the measures from reaching end consumers.⁵⁴ Similar to *Stainless Steel*, the Tribunal acknowledged that there would be a direct price

⁴⁹ *Ibid* at para 37.

⁵⁰ *Ibid* at para 94.

⁵¹ *Ibid* at para 74.

⁵² *Ibid* at para 78.

⁵³ *Ibid* at para 91.

⁵⁴ *Re Certain Refrigerators, Dishwashers and Dryers*, 2000 CarswellNat 7107, at para 36 (WestLaw Next Canada) [*Refrigerators*].

effect on the downstream users (appliance retailers). The same logical conclusion led to a recommendation of reduced duties in the *Stainless Steel* case alone. The only difference was a concern for competition at the domestic industry level rather than the downstream user level.

Additionally, while the prescribed factors in the *Regulations* do cover a variety of interests, including those of consumers, it is the Tribunal which gets to decide which factors it believes to be relevant.⁵⁵ The recent *Re Aluminum Extrusions from China [Aluminum]* decision represented the limited effect that the *Regulations* have on public interest inquiries. While there were broad public interest arguments made by representatives of downstream producers that covered multiple prescribed factors, the Tribunal decided that foreign competition, domestic competition, and effects on downstream producers were the only relevant factors.⁵⁶ The board considered the competition factors first, and found that the presence of other foreign exporters as well as multiple domestic producers indicated that the public interest inquiry was not justified.⁵⁷ Perhaps due to the order of investigation or due to the order of importance, the Tribunal dismissed the domestic user factor after acknowledging a price effect, much like the *Refrigerators* case.⁵⁸

Thus, an examination of all cases referencing the *Regulations* has shown that despite the variety of factors addressed within, the *Regulations* have allowed Tribunal members to choose what they deem relevant to the case. Further, what has been seen is a top-down approach in the public interest investigation, where any broader issues are only determinative if there can first be established a lack of competition as a result of the anti-dumping duties. Even in the *Media* case where health care was the stated concern, there was a lack of competition that could be found at the domestic production level. Therefore it seems that despite the *Regulations*, the only situation in which duties may be reduced is when they create a clear monopoly for the domestic producer by pricing out the competitor.

⁵⁵ *Re Aluminum Extrusions from China*, 2009 CarswellNat 3116, 13 TTR (2d) 602, at para 18 [Aluminum].

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at paras 20 (public interest decision) and 25 (competition analysis).

⁵⁸ *Ibid* at para 29.

V. INTERNATIONAL USE OF PUBLIC INTEREST

Where could Canada look for alternative use of broad interest factors? As seen in Stevens' article, the U.S. does not consider any interests other than that of its domestic producers and the offending exporter.⁵⁹ However, the European Union has a community interest provision mostly analogous to Canada's public interest inquiry.⁶⁰ One of the major differences between the two processes is that the EU does not impose anti-dumping duties until after the community interest factors have been assessed.⁶¹ More important, however, is the clear balance among varying interests that must be observed when compared to the CITT. The language used by the EU is clearer in that interests must be "taken as a whole, including the interests of the domestic industry and users and consumers".⁶² The CITT has conversely made clear that there is a hierarchy of interests, with domestic producers having the largest stake in terms of protection. Finally, the EU's anti-dumping regulation distinguishes itself from Canada by applying a "lesser-duty" rule, as opposed to Canada's automatic margin of dumping determination.⁶³ The EU has thus mandated what is merely suggested in article 9.1 of the *WTO Agreement* discussed previously.

Despite the fact that the EU provision has been seen as ineffective in its implementation of community interests,⁶⁴ several recent cases have proved to be illustrative of the EU broadening the scope of parties heard from. In a recent book on trade relations between China and the EU, Qingjiang Kong used case-studies to analyze which factors were assessed in terms of community interests.⁶⁵ One example involved anti-dumping measures against light-bulb exporters from China. In determining the community interest before applying duties, the commission heard from a

⁵⁹ Stevens, *supra* note 36 at 9.

⁶⁰ *Ibid.*

⁶¹ Council Regulation (EC) No 1225/2009 of 30 November 2009, on Protection Against Dumped Imports from Countries not Members of the European Community, [2009] OJEU 51, art. 21(1).

⁶² *Ibid.*

⁶³ *Ibid.*, art 9(4).

⁶⁴ See Stevens, *supra* note 36 at 10.

⁶⁵ Qingjiang Kong, *China-EU Trade Disputes and Their Management* (Singapore: World Scientific Publishing Company, 2012).

variety of interested parties, including the exporters, importers, downstream users, consumers, other EU members, and even environmental groups.⁶⁶ What came out of the different stakeholder arguments heard was the realization that the protection of domestic industries may be too narrowly interpreted due to globalization effects. With several domestic producers outsourcing their work to China, they were the ones being directly burdened by the imposition of duties on those imported goods.⁶⁷ There is thus an important globalization effect that makes it more difficult to apply protectionist policies in light of the beneficiaries becoming harder and harder to define. This is why a balance among interests is more desirable in determining injury before applying anti-dumping duties.

VI. CONCLUSION

Despite being seen as a leader in considering broader interests in its anti-dumping regulation, Canada still falls short of its WTO commitments with regards to the agreement it signed. Canada fails to provide a lesser-duty provision, fails to involve interested parties until injury has been determined to the domestic industry, and does not consider the countervailing effect on developing countries. While the *Regulations* enacted in 2000 were meant to give a broader operational definition to the public interest, it had a negligible effect on the consideration of factors employed by the Tribunal due to the discretionary nature of the proceedings. Consequently the entire anti-dumping process as seen through *SIMA* operates to protect the domestic producers first and foremost. Consumers lack the political mobilization needed to challenge individual decisions through public notice of their dumping finding, as required under *SIMA*. As they have been missing from the majority of Tribunal inquiries, consumers' interests remain indirectly served by the arguments put forth by the importers and downstream producers. Even when broad consumer interests have been represented through submissions by the Director of Competition, who has the authority to do so, these have effectively been denied by the CITT.⁶⁸ The tribunal has not strayed from the "exceptional

⁶⁶ *Ibid* at 35.

⁶⁷ *Ibid* at 38.

⁶⁸ Leclerc, *supra* note 8 at 139.

nature” of public interest it historically required in order to lessen the countervailing measures employed.

It is also apparent from this analysis that the justification for providing anti-dumping legislation leads to a counterintuitive effect: The assertion by the CITT has been that an elimination of dumping would ensure continued competition and would protect the domestic industry from the control of few parties. However, the resulting imposition of duties has continued to factor against the ultimate competitiveness of downstream producers. The competition factor has been the most dominant in the Tribunal’s decision-making process, and it is unlikely that it would change based on the legislation as it is enacted. Perhaps calling for a mandatory review of prescribed factors as they become alleged would help resolve part of the bias. However, it does not look like the public interest clause will be interpreted any differently in the future.

The evidence suggests that anti-dumping duties cause more harm than good, and that the logic behind it is no longer relevant. It has also been suggested that the harm caused by anti-dumping practices towards developing countries can be curbed through increased use of the public interest clause.⁶⁹ There is thus an impetus for reform that goes beyond the domestic interests of downstream users and consumers. One suggestion would be to include interested parties earlier in the process, during the preliminary injury inquiry under *SIMA*, to avoid the bias caused from retroactively applying public interest concerns after duties have been imposed. This is the position taken by the EU in its anti-dumping procedures. However, reforms like these are unlikely to change the historical protection of the domestic industry, which maintains strong political support. There may be a time where anti-dumping measures are phased out, perhaps due to increased use of regional trade agreements to liberalize trade. Alternatively, the other way they might be phased out is by the natural consequences of globalization, due to the increased multinational character of domestic industries. As was seen in the light-bulb case, the negative impact of anti-dumping duties on even the upstream domestic producers makes it harder to justify protectionist measures politically since the domestic industry itself becomes harder to define and thus protect through anti-dumping measures.

⁶⁹ Aggarwal Aradhna, *The Anti-Dumping Agreement and Developing Countries: An Introduction* (New York: Oxford University Press, 2007) at 231-233.

