Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries

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In this article, the author examines the rationale for anti-dumping duties and their potential reform on a domestic and international level. Part I of the article briefly indicates the absence of any reasons based on economic efficiency to support the imposition of anti-dumping duties. In Part II, the author analyzes whether anti-dumping duties may be supported on social welfare grounds. He concludes that anti-dumping duties are not supported by non-efficiency concerns such as the need to prevent the loss of jobs in small communities.

Part III of the article shifts to the potential reform of the *Special Imports Measures Act*. The author analyzes the use of the public interest inquiry provisions of the *Special Imports Measures Act* and interventions by the Director of Investigation and Research to determine whether either route has successfully stemmed the incidence of anti-dumping duties. Unfortunately, a narrow interpretation of the words "public interest", combined with the strict standard of review that would likely apply to decisions of the Canadian International Trade Tribunal, has resulted in virtually meaningless public interest inquiries that rarely affect the imposition of anti-dumping duties. Similarly, most interventions by the Director of Investigation and Research have been rejected by the Tribunal.

The author concludes by suggesting that the only hopeful avenue for reforming anti-dumping duties lies in regional free trade agreements, which have successfully phased out anti-dumping duties. As such agreements proliferate, countries will increasingly realize the anti-competitive effects that stem from anti-dumping duties, which will hopefully result in the world-wide reform of anti-dumping law.

L'auteur évalue dans cet article les raisons qui motivent l'existence des obligations *antidumping* et examine la possibilité de leur éventuelle réforme aux niveaux national et international. La première partie de l'article signale brièvement l'absence de tout motif d'efficacité économique qui puisse jnstifier l'imposition de telles obligations. La deuxième partie analyse la possibilité que les obligations *antidumping* soient appuyées au titre du bien public. L'auteur conclut à ce sujet que les obligations *antidumping* ne sont pas motivées par des intérêts de non-efficacité comme le besoin de prévenir la perte d'emploi dans les petites communautés.

La troisième partie de l'article fait l'examen d'une réforme possible de la *Loi sur les mesures spéciales d'importation*. L'auteur analyse l'usage des dispositions concernant les enquêtes d'intérêt public dans la *Loi sur les mesures spéciales d'importation* et les interventions du Directeur des Enquêtes et Recherches, afin de déterminer si l'une ou l'autre de ces options a su enrayer avec succès la fréquence des obligations *antidumping*. Malheureusement, l'interprétation stricte des mots "intérêt public", combinée avec une norme sévère de contrôle pouvant s'appliquer aux décisions du Tribunal canadien du commerce extérieur, ont mené à des enquêtes d'intérêt public dénuées de sens et qui affectent rarement l'imposition des obligations *antidumping*. De la même façon, la plupart des interventions du Directeur des Enquêtes et Recherches ont été rejetées par le Tribunal.

L'auteur conclut en suggérant que la seule voie vers une réforme gagnante des obligations *antidumping* se trouve dans les accords de libre-échange qui ont su supprimer progressivement et avec succès les obligations *antidumping*. Comme de tels accords prolifèrent, les pays vont de plus en plus prendre conscience des effets anticoncurrentiels qu'engendrent les obligatious *antidumping*, ce qui résultera, avec un peu de chance, en une réforme des lois *antidumping*.

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Introduction

The global marketplace is expanding very rapidly. Through free trade, companies can export their products to other countries and gain access to a larger customer base. These companies make more sales and generate more profits. In addition, consumers stand to benefit from increased international competition in the form of lower prices and an increased variety of products to purchase.

To secure these interests, the *General Agreement on Tariffs and Trade*[1] was signed in 1947. *GATT*'s objectives include "developing the full use of the resources of the world and expanding the production and exchange of goods" by substantially reducing tariffs and by eliminating "discriminatory treatment in international commerce."[2] These objectives are furthered, in large part, by the *GATT* principles of "most favoured nation treatment" and "national treatment".[3] The most favoured nation principle, set out in article 1, requires that any trade advantage accorded to one country be accorded to every other member of *GATT*. Likewise, article 3 furthers the principle of national treatment by prohibiting internal taxes from being applied to "imported or domestic products so as to afford protection to domestic production."[4] These two basic principles have created a more open international market than existed during the pre-war period.

Nevertheless, *GATT* continues to permit the imposition of anti-dumping duties on companies based in member-States who dump products in foreign markets. A product is dumped if it is sold for a lower price in an export market than it is in a domestic market. If dumping does occur, anti-dumping duties may only be imposed if "material injury to a domestic industry"[5] occurs or threatens to occur as a result of the dumping.[6]

Most commentators agree that these anti-dumping provisions do not serve to promote free trade.[7] Why should a below-cost sale of a Korean car attract punitive duties? Should it not, rather, be welcomed as a transfer of wealth from Korean consumers to Canadian consumers?

Anti-dumping laws have been mainly justified on the basis that they prevent companies from establishing monopolies through the use of predatory pricing.[8] Critics of

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[1] 30 October 1947, 55 U.N.T.S. 187, Can. T.S. 1947 No. 27 (entered into force 1 January 1948) [hereinafter *GATT*].

[2] *Ibid.*, Preamble.

[3] *Ibid.*, arts. 1, 3.

[4] *Ibid.*, art. 3(1).

[5] *Special Import Measures Act*, R.S.C. 1985, c. S-15, s. 2(1) [hereinafter *SIMA*].

[6] *Ibid.*, ss. 3(1), 4(1)(a), 5(a), 6(a), 8.

[7] See Part I, below.

[8] See *e.g.* R. Bhala, "Rethinking Antidumping Law" (1995) 29 Geo. Wash. J. Int'l L. & Econ. 1 at 11; and A.V. Deardorff, "Economic Perspectives on Antidumping Law" in R.M. Stern, ed., *The Multilateral Trading System: Analysis and Options for Change* (Ann Arbor, Mich.: University of Michigan Press, 1993) 135.

anti-dumping legislation, on the other hand, argue that international predatory pricing is improbable and that anti-dumping rules simply serve to distort what would otherwise be sound economic decisions by exporters.[9]

The domestic implementation of the *GATT* anti-dumping restrictions in Canada permits some criticism of the regime. Section 45(1) of the *Special Import Measures Act*[10] allows the Canadian International Trade Tribunal (CITT), before imposing anti-dumping duties, to consider whether "the imposition of an anti-dumping duty ... would not or might not be in the public interest." Section 45(2) permits "any person interested in an inquiry" to make representations before the CITT on what the public interest actually is. Therefore, the role the CITT accords to the public interest in deciding whether to impose anti-dumping duties, as well as the Tribunal's responses to consumer welfare arguments, will help to demonstrate the extent to which *SIMA* and the CITT have a protectionist bent.

Yet another avenue of criticism of the anti-dumping regime is offered by section 126(1) of the *Competition Act*.[11] Under this section, the Director of Investigation and Research is permitted to make representations before a board where issues relating to corporate competition are raised.[12] Matthew Kronby, in a recent case comment,[13] outlines how important the Director's interventions are in stemming the incidence of anti-dumping duties. Kronby argues that in a particular case,[14] "the representations made on ... [the Director's] behalf not only bolstered Hyundai's arguments that the dumping had not caused material injury to the complainants, but appear to have had considerable influence on the Tribunal in their own right."[15] Therefore, like the public interest provision of *SIMA*, section 126(1) allows room for arguments that anti-dumping duties reduce competition and encourage the growth of domestic monopolies.

By examining cases where the public interest has been raised in CITT decisions,[16] as well as cases in which the Director has intervened under section 126(1) of the

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[9] Bhala, *ibid.* at 15-17, n. 57. See generally R. Denton, "(Why) Should Nations Utilize Antidumping Measures" (1989) 11 Mich. J. of Int'l L. 224 at 225, n. 1; and S. Hutton & M. Trebilcock, "An Empirical Study of the Application of Canadian Anti-Dumping Laws: A Search for Normative Rationales" (1990) 24:3 J. World T. 123 at 123, n. 4.

[10] *Supra* note 5.

[11] R.S.C. 1985 (2nd Supp.), c. 19.

[12] *Ibid.*, ss. 2, 7(1).

[13] M. Kronby, "Kicking the Tires: Assessing the *Hyundai* Anti-Dumping Decision From a Consumer Welfare Perspective" (1991) 18 Can. Bus. L.J. 95.

[14] *Cars Produced By or on Behalf of Hyundai Motor Company* (23 March 1988), CIT-13-87 (C.I.T.), [1988] C.I.T. No. 15, online: QL (CIT) [hereinafter *Hyundai*].

[15] *Supra* note 13 at 106.

[16] *Re Preformed Fibreglass Pipe Insulation* (28 January 1994), PB-93-001 (C.I.T.T.), [1994] C.I.T.T. No. 27, online: QL (CITT) [hereinafter *Preformed Fibreglass Insulation*]; *Re Caps, Lids and Jars* (26 February 1996), PB-95-001 (C.I.T.T.), [1996] C.I.T.T. No. 15, online: QL (CITT) [hereinafter *Caps, Lids and Jars*]; *Re Refined Sugar* (4 April 1996), PB-95-002 (C.I.T.T.), [1996] C.I.T.T. No. 125, online: QL (CITT) [hereinafter *Refined Sugar*]; and *Re Faced Rigid Cellular Polyurethane-Modified*

Competition Act, this article will examine the extent to which the CITT recognizes the illogicality of including anti-dumping rules in a system that is intended to liberalize trade. When faced with these arguments, does the CITT tend to impose anti-dumping duties? If so, what hope is there for trade liberalization short of a comprehensive reform of *GATT*? The answers to these questions may help reformers of the current regime to better understand whether their efforts should be directed toward working within or outside of the current Canadian legislative anti-dumping system.

Part I of this article will examine whether there are any reasons based on economic efficiency to support the imposition of anti-dumping duties. In Part II, non-economic justifications for maintaining the anti-dumping regime will be canvassed in order to determine whether such concerns are effectively addressed by *SIMA*. Building on this base, Part III will address a variety of questions. First, it will outline the method used to impose anti-dumping duties and then it will consider whether *SIMA* or *GATT* can be reformed to better take into account consumer welfare interests. Finally, the article will examine whether advocates of consumer welfare can effectively integrate concerns about economic efficiency into the current anti-dumping scheme by using the public interest inquiry provisions of *SIMA*, or by encouraging the Director to intervene in Tribunal inquiries and make arguments in favour of consumer interests.

I. Efficiency Rationales for Anti-Dumping Laws

Why does *GATT* contain restrictions on dumping? Various justifications, both economic and political, are offered to support anti-dumping legislation. The economic analysis is uncontroversial and has been replicated by many scholars in the field.[17] However, it is important to briefly outline the various ways in which anti-dumping legislation is economically inefficient in order to provide a basis upon which, in Part III of this article, recent decisions of the CITT may be criticized.

The most frequently offered justification for anti-dumping laws is the prevention of predatory pricing.[18] This argument begins with the premise that monopoly power is inimical to the proper operation of a market economy. By selling products abroad at prices below their home market value, foreign companies are able to force domestic producers out of the marketplace. These foreign producers are then able to establish

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Polyisocyanurate Thermal Insulation Board (13 June 1997), PB-97-001 (C.I.T.T.), [1997] C.I.T.T. No. 61, online: QL (CITT) [hereinafter *Insulation Board*].

[17] See *e.g.* P.L. Warner, "Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust" (1992) 23 L. & Pol'y Int'l Bus. 791; Bhala, *supra* note 8; Deardorff, *supra* note 8; C. Krent, "Should Antidumping Laws be Replaced?" (1994) 32 Alta. L. Rev. 722; P. Gay, "Unveiling Protectionism: Anti-Dumping, the *GATT*, and Suggestions for Reform" (1997) 6 Dal. J. of Legal Studies 51; Hutton & Trebilcock, *supra* note 9; and M. Trebilcock & J. Quinn, "The Canadian Anti-dumping Act: A Reaction to Professor Slayton" (1979) 2 Can.-U.S. L.J. 101.

[18] Trebilcock & Quinn, *ibid.* at 104.

international monopolies which permit them to charge inflated prices without fear of competition.

However, a number of commentators have cast doubt on the likelihood of this scenario. The barriers to establishing an international monopoly are significant.[19] They include the difficulty of preventing consumer stockpiling of goods during the predatory pricing phase, as well as the need for quick exit levels, high barriers to entry in the foreign market,[20] and high home market barriers[21] in order to permit a dumper to protect its home market share. Other barriers to using predatory pricing to achieve an international monopoly include the need for the dumped product to exhibit high inelastic demand in order to prevent consumers from simply switching to a substitute product.[22] Finally, international competition *simpliciter* is a significant barrier to establishing a world-wide monopoly:[23] "a predator must not only drive domestic competitors from the export market, but foreign competitors as well."[24]

The cumulative effect of these impediments appears to be that the use of predatory pricing to achieve a monopoly in a domestic market is extremely unlikely. In their study of thirty cases in which anti-dumping duties were imposed, Hutton and Trebilcock reject the idea that anti-dumping duties are a justified means of preventing predatory pricing, since not one case offered a serious opportunity for a dumper to gain a monopoly in Canada.[25]

While predatory pricing is extremely unlikely, some commentators suggest that the Canadian economy can be hurt by dumping in other ways. Anti-dumping duties, they argue, should be kept not to protect against predatory pricing, but against the more insidious types of harm produced by the ebb and flow of sporadic dumping.

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[19] See generally Warner, *supra* note 17; B.S. Yamey, "Predatory Price Cutting: Notes and Comments" (1972) 15 J. L. & Econ. 129; F.H. Easterbrook, "The Limits of Antitrust" (1984) 63 Tex. L. Rev. 1; E.R. Easton, Book Review of *Anti-Dumping Law in a Liberal Trade Order* by R. Dale (1981) 11 Ga. J. Int'l & Comp. L. 390 at 393; Bhala, *supra* note 8 at 17; Denton, *supra* note 9 at 256; Gay, *supra* note 17 at 57; and F.H. Easterbrook, "Predatory Strategies and Counterstrategies" (1981) 48 U. Chi. L. Rev. 263 at 267, 269 [hereinafter "Predatory Strategies"].

[20] "Predatory Strategies", *ibid.* at 271-72. See also P. Areeda & D.F. Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act" (1975) 88 Harv. L. Rev. 697 at 698-99; Krent, *supra* note 17 at 727; Gay, *supra* note 17 at 56; and Hutton & Trebilcock, *supra* note 9 at 129.

[21] See Bhala, *supra* note 8 at 10. See also B.M. Hockman & M.P. Leidy, "Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws" in Stern, *supra* note 8, 155 at 158-59.

[22] Hutton & Trebilcock, *supra* note 9 at 128.

[23] Warner, *supra* note 17 at 827; and Hutton & Trebilcock, *ibid.* at 129.

[24] Hutton & Trebilcock, *ibid.* See also P. Nicolaides & R. Van Wijngaarden, "Reform of Anti-Dumping Regulations: The Case of the EC" (1993) 27:3 J. World T. 31 at 40. Nicolaides & Van Wijngaarden argue that anti-dumping legislation should take into account imports from other third countries to determine whether "the existence of independent sources of supply constitute a deterrent to predatory dumping" (*ibid.* at 47).

[25] Hutton & Trebilcock, *ibid.* at 130.

Sporadic dumping occurs when dumping is not done on a sustained basis: exporters dump for a few months at a time, then stop for a few months, then begin dumping again.[26] During periods of dumping, domestic producers are forced to exit the market temporarily or restrict production to fend off the lower-cost imports while they wait for the dumper to leave the market. Consequently, the domestic producers' higher costs for retraining and the expansion of production facilities are passed on to the consumer once the dumper exits the market.[27] If consumer costs outweigh the benefits of sporadic dumping, anti-dumping laws may be justified from a consumer welfare perspective on the basis that sporadic dumping hurts domestic consumers in the long run.

To better gauge costs and benefits to domestic consumers, it is important to understand why foreign exporters dump goods on a sporadic basis. Several explanations have been suggested:

> First, an exporter might charge low prices for "experience" or "learning by doing" goods ... [T]he exporter's rationale for such pricing is to increase market share so that it may profitably sell into the export market. This is procompetitive. Second, the exporter might want to maintain economies of scale by operating at full capacity even in times of slack home-market demand. It maintains full capacity by dumping its excess output into its export market.[28]

Therefore, sporadic dumping is motivated by rational business strategies. In these examples, the foreign exporter is simply acting in an economically efficient manner that would otherwise be praised if the exporter were a domestic producer. Why, if the practice is considered fair in a domestic context, does it become unfair in the international trade context? *GATT* is designed to liberalize international trade and seeks to eliminate artificial distortions of trade imposed by the presence of national borders.[29] While domestic consumers in Canada might be hurt by sporadic dumping, overall global welfare might be improved as a result of the exporter's gains achieved through sporadic dumping. Domestic consumers might pay more money for the goods that are sporadically dumped, but this disadvantage could be more than offset by factors like higher employment rates in the dumper's home country where the products are manufactured.

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[26] Warner, *supra* note 17 at 830.

[27] Hutton & Trebilcock, *supra* note 9 at 130; and Trebilcock & Quinn, *supra* note 17 at 108.

[28] Warner, *supra* note 17 at 830-31. See also Kronby, *supra* note 13 at 103.

[29] *GATT, Agreement Establishing the World Trade Organization* (15 April 1994) [hereinafter *WTO Agreement*] provides that "relations in the field of trade and economic endeavour should be conducted with a view to ... ensuring ... a large and steadily growing volume of real income and effective demand, and expanding the production and trade in goods and services, while allowing for *the optimal use of the world's resources*." It concludes that these objectives may be achieved by "entering into ... mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to *the elimination of discriminatory treatment in international trade relations*" [emphasis added].

Still, studies have shown that sporadic dumping is unlikely to impose deleterious effects on importing countries.[30] For sporadic dumping to have a deleterious effect on domestic producers, the sporadic dumpers must normally be unable to compete with domestic manufacturers.[31] If foreign producers regularly sold their products in a domestic market, consumers would benefit from long-term low prices. In addition, the success of sporadic dumping relies on the dumper's ability to "substantially disrupt domestic production,"[32] and on the presence of a consumer group that willingly substitutes foreign goods for domestic goods as the ebb and flow of sporadic dumping occurs.[33] Critics have dismissed these two phenomena as being fairly unlikely.[34]

Sporadic dumping, therefore, does not appear to be a problem that requires the application of anti-dumping laws since it is unclear that sporadic dumping occurs with any frequency. As well, the existence of harm to Canadian consumers might not be sufficient to justify government intervention in light of the stated objectives of *GATT* (*inter alia*, to improve overall global welfare). However, all of these arguments are effectively ignored in determining whether to impose anti-dumping duties under *SIMA*. *SIMA* requires a finding of "material injury"[35] by looking to "dumping margins ... without regard to whether the dumping is temporary or continuous"[36] and by addressing "falling domestic share instead of domestic market disruption."[37]

Thus, predatory pricing and sporadic dumping do not appear to be logical economic rationales for the current anti-dumping regime. Are there any good reasons for the current regime that are based on reasons unrelated to economic efficiency?

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[30] See generally R.P. Alford, "Why a Private Right of Action would Violate GATT" (1991) 66 N.Y.U. L. Rev. 696 at 704, n. 54.

[31] M.J. Trebilcock & R. Howse, *The Regulation of International Trade* (London, England: Routledge, 1995) at 118. An argument could be made that sporadic dumpers who would ordinarily be able to compete with domestic manufacturers might choose not to do so to purposely hurt domestic producers. If the foreign producer has deeper pockets than the domestic producer, it could successfully do so. In these circumstances, the foreign producer benefits not because it has a better product, nor because it is more efficient, but simply because it has aecess to more resources than does the domestic producer. In these *quasi*-anti-trust circumstances, a stronger argument can be made for using anti-dumping legislation to restrict sporadic dumping.

[32] *Ibid.*

[33] *Ibid.*

[34] *Ibid.* See also Trebilcock & Quinn, *supra* note 17 at 106.

[35] *SIMA*, ss. 2(1), 42(1). See also *WTO Agreement*, *supra* note 29, Annex 1A, s. 8: "Agreement on Implementation of Article VI of the General Agrecment on Tariffs and Trade 1994" at art. 3 [hereinafter *Implementation Agreement*].

[36] *SIMA*, s. 2(1). "Dumped" means that "the normal value of the goods exceeds the export price thereof." See also ss. 15-23, 29-30.

[37] Warner, *supra* note 17 at 833. See also *Implementation Agreement*, *supra* note 35 at art. 3.4 where the examination of the impact of the dumped imports, while including "all relevant economic factors," specifically outlines "actual and potential decline in sales, profits, market share" and does not limit the inquiry to domestic market disruption having a deleterious impact on domestic consumers.

II. Non-Efficiency Rationales for Anti-Dumping Laws

Some kinds of government policy are not based on economic concerns, but rather on shared concerns for social welfare. Consider, for instance, the pricing scheme used by Canada Post. A letter sent from Toronto to Montreal costs the same amount as a letter sent from Toronto to Whitehorse. This scheme cannot be justified on the basis of economic efficiency; rather, it relies on decidedly non-economic concerns like "nationhood", "communitarianism", or "fairness".[38] Similarly, to confine an analysis of anti-dumping law to concerns of economic efficiency alone would ignore these less tangible values that arguably form the very basis of what it means to be a Canadian.

Hutton and Trebilcock describe this perspective as focusing on

> the private non-pecuniary costs of the community and individual disruption which ensues when domestic production is displaced by low-priced foreign goods. The theory recognizes that personal identity derives in large part from various social and community attachments. To disturb too many of these attachments, or to radically alter the nature of a community, may impair the welfare of individuals as social beings. In our modern, rapidly-changing society, individuals are often left with comparatively few traditional attachments to institutions such as family and religion, and job displacement may be particularly traumatic to the individuals and communities concerned.[39]

The harm is not confined to workers having to move elsewhere to find jobs; entire communities can be devastated by the loss of only a few jobs, since unemployed workers no longer have incomes to purchase goods and services from local industries. Additional jobs may also be lost in those industries, forcing even more people to move elsewhere to find employment.

A study performed by Hutton and Trebilcock examined a series of thirty cases where anti-dumping duties were eventually imposed by the CITT. The authors examined the effects of the duties to determine whether any cases could be justified on communitarian grounds. They discovered that most of these thirty cases involved workers centred around large communities like Toronto or Montreal.[40] Since workers in large cities are more likely than workers in small communities to find employment without relocating, worker disclocation in those cities should not engage communitarian concerns.[41] Hutton and Trebilcock's study did discover five cases that "involved communities which arguably could not absorb the loss of jobs without serious disruption to the quality and character of life in the community."[42] Here too, though, the authors criticized the imposition of anti-dumping duties because "in each of these five cases, [the application of anti-dumping duties] also protected jobs in prosperous and

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[38] For a discussion of "fairness" in anti-dumping cases, see Warner, *ibid.* at 834 and 834-35, n. 262-67.

[39] Hutton & Trebilcock, *supra* note 9 at 135.

[40] *Ibid.* at 137.

[41] *Ibid.*

[42] *Ibid.* at 143.

diverse economic centres ... where laid-off workers could most easily be re-absorbed and communitarian values are the least implicated by a lay-off."[43]

The administration of *SIMA* itself also militates against a system designed to protect less-fortunate communities. An anti-dumping inquiry involves, among other things, finding "injury, retardation or a threat to cause injury."[44] "Injury" is defined as "material injury to a domestic industry."[45] "Domestic industry" means "domestic producers *as a whole* of the like goods or those domestic producers whose collective production of the like goods *constitutes a major proportion of the total domestic production of the like goods*."[46] *SIMA* envisages harm to Canada as a whole, and not on a community-by-community basis. Unless the community depends on an industry that produces the "whole of the like goods" or whose production "constitutes a major proportion of the total domestic production," entire communities can be left in the lurch.

SIMA does contemplate a situation where a regional producer is deleteriously affected by dumping while others in the rest of the country are not. Anti-dumping duties may be imposed in these types of situations if "the producers in the market sell all or almost all of their production of like goods in the market" and "the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada."[47] There must also be material injury "to all or almost all of the production of like goods in the regional market"[48] stemming from "a concentration of ... goods into the regional market."[49] It is not clear whether this type of provision would help a small community whose employment needs revolve around one industry. If that industry sold a good portion of its products outside of the market, that small-town industry would fall outside the ambit of section 2(1.1). If any of the other three criteria are not met, its bid would also fail. It might then lay off employees or shut down completely, and throw the town into chaos. For *SIMA* not to respond to such a blatant example of the need to protect communities suggests that if it is premised on the need to protect fragile communities, it at least does so imperfectly.

III. Reforming the *SIMA* Regime

The analysis in Part I of this article demonstrates that anti-dumping duties do not appear to be motivated by economic concerns such as the growth of monopolies through predatory pricing or sporadic dumping. Part II demonstrates that communitarian values are also not the motivation behind the anti-dumping regime. It follows, therefore, that decisions of the CITT, operating within the framework of *SIMA*, would also not be motivated by either of these types of concerns. Even if *SIMA* is, in fact,

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[43] *Ibid.*
[44] *SIMA*, s. 42(1).
[45] *Ibid.*, s. 2(1).
[46] *Ibid.* [emphasis added].
[47] *Ibid.*, ss. 2(1.1)(a), (b).
[48] *Ibid.*, s. 42(5)(b).
[49] *Ibid.*, s. 42(5)(a).

premised on economic or communitarian interests, the current anti-dumping mechanism addresses these problems in either an overly broad or imperfect manner. Predatory pricing seldom, if ever, has the effect of giving the predator a monopoly position, and sporadic dumping is an infrequent phenomenon. Moreover, anti-dumping duties sometimes help communities and workers who need them least, rather than those who need them most.

Part III of this article will now examine how anti-dumping duties are imposed. The intention here is to determine whether the structure of *SIMA* favours domestic producers at the expense of domestic consumers. Next, it will consider the feasibility of reforming *SIMA* or *GATT* to take better account of consumers' interests. Finally, this article will analyze what, if anything, consumer interest advocates can do to further their cause under the current regime if substantive legislative reform is improbable.

A. Procedure in Dumping and Subsidy Investigations Under SIMA

SIMA outlines the complex procedure by which the Deputy Minister of Revenue can impose anti-dumping duties. In the first phase, the Deputy Minister determines whether to initiate an investigation. Investigations may begin in one of two ways: the Deputy Minister can act on his or her own initiative, or an investigation may be initiated as a result of a written complaint submitted to the Deputy Minister by a domestic producer.[50] Once a "preliminary determination"[51] of dumping is made by the Deputy Minister, the Tribunal must hold an inquiry to determine whether the dumping "has caused material injury."[52] "Injury" is defined in section 2(1) of *SIMA* as "material injury to a domestic industry." If the Tribunal concludes that material injury has occurred, it must advise the Deputy Minister that the dumped goods have caused injury.[53] An anti-dumping duty in the amount equal to the "margin of dumping of the imported goods"[54] is then imposed, which is generally equivalent to the difference between the price at which the goods are imported into Canada and the price for which the goods are sold in the exporter's home market.[55]

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[50] *Ibid.*, s. 31(1); s. 31(2) limits the circumstances under which a written complaint may be made, since the complaint must be supported by "domestic producers whose production represents more than 50 percent of the total production of like goods by those domestic producers who express either support for or opposition to the complaint." Of those domestic producers who do support the complaint, their production must represent 25% or more of the total production of "like goods by the domestic industry."

[51] *Ibid.*, s. 38.

[52] *Ibid.*, s. 42(1)(a).

[53] *Ibid.*, s. 43(1).

[54] *Ibid.*, s. 3(1)(a).

[55] *Ibid.*, s. 2(1) defines "margin of dumping" as "the amount by which the normal value of the goods exceeds the export price of the goods." "Export price" (the price at which goods are imported into Canada) is also defined in s. 2(1) and involves making calculations outlined in ss. 24-30; "normal value" is calculated in accordance with ss. 15-23, 29, 30 and generally involves determining the price

One of the most critical stages of this process is the Tribunal's determination of whether "injury to a domestic industry" has occurred. Section 37.1(1) of the *Special Import Measures Regulations*[56] prescribes several relevant factors for the Tribunal to consider:

> (a) the volume of the dumped ... goods;
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> (b) the effect of the dumped ... goods on the price of like goods, and ... whether the dumped ... goods have significantly undercut, depressed or suppressed the price of like goods ...;
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> (c) the resulting impact of the dumped ... goods on the state of the domestic industry and, in particular, all relevant economic factors and indices that have a bearing on the state of the domestic industry ...; [and]
>
> (d) any other factors that are relevant in the circumstances.

The Tribunal's main focus, therefore, is on the dumped goods' effect on domestic industry. "Domestic industry", according to section 2(1) of *SIMA*, is limited to domestic producers of like goods. If the notion of domestic industry was given a broad definition to include an examination of the effects of dumping on the entire economy, the Tribunal would be required to inquire into factors like potential savings to consumers and commercial users of the dumped products or the resulting benefits to the Canadian economy as a whole. These considerations, coupled with an economic analysis similar to the one performed in Part I of this article, might lead the Tribunal to impose anti-dumping duties in only the most extreme circumstances. Anti-dumping duties might only be imposed if a foreign producer successfully engaged in predatory pricing or if it succeeded in harming domestic consumers through sporadic dumping. Instead, "domestic industry" is limited to "domestic producers as a whole of the like goods or ... whose collective production ... constitutes a major proportion of the total domestic production of the like goods."[57] *SIMA* seems to either assume that harm to a domestic industry is in and of itself harmful to Canada's overall economic welfare, or treats Canada's overall economic welfare as irrelevant to the determination of harm (and the consequent imposition of anti-dumping duties).

B. *Reforming* SIMA *to Recognize Consumer Welfare Interests*

Given the absence of any economic or political rationale for anti-dumping duties, *SIMA* would better reflect efficient liberalized trade needs if it recognized a broader range of interests before the CITT could make a finding of injury. Unfortunately, political reform of anti-dumping duties is unlikely. This portion of the article will assess

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of the goods when they are sold during a sixty day period (s. 15(d)), "at the place from which the goods [are] shipped directly to Canada" (s. 15(e)) to an arm's length purchaser (s. 15(a)(i)) in the same or substantially the same quantities as the sale in Canada (s. 15(b)) in the ordinary course of trade (s. 15(c)). If these conditions are not met, alternative methods of pricing the goods are provided for in ss. 16-23, 29, 30.

[56] S.O.R./84-927.

[57] *SIMA*, s. 2(1).

the likelihood of political reform of anti-dumping legislation on a domestic and international level.

1. Reforming or Repealing *SIMA*

Attempts by other countries to repeal their domestic anti-dumping legislation have been unsuccessful. For instance, in Australia such proposals amounted to "easy prey for opposing political interests" who questioned why Australia should be deprived of protection permitted under *GATT*, since the country's trading partners were not also repealing their dumping laws.[58] In the end, "the Australian government was not prepared to provide Australian industry with a lesser safeguard against unfair competition than those provided by these other countries."[59] The Canadian government appears no more enthusiastic about the idea. A Parliamentary Sub-Committee review of *SIMA* in 1996 used similar logic as Australian opponents of the idea to conclude that anti-dumping laws should not be repealed. The Sub-Committee's report stated:

> Although Canada would like to eliminate anti-dumping remedies in the context of free trade areas ... the Sub-Committees are of the opinion, after having heard testimonies on this subject, that the elimination of anti-dumping remedies *even though this would be the ideal*, is unrealistic in the short and medium term without endangering Canadian industries. Thus far, the U.S. government and U.S. industry have not been receptive to Canadian efforts to seek altemative arrangements or substantive reforms to existing trade remedy laws.[60]

Therefore, the Sub-Committee declined to follow a course that it felt was ideal because it feared that other countries would not follow suit.

Ironically, the same type of argument was used by protectionists during the mid-nineteenth century who thought that lowering trade barriers without requiring other countries to do the same would result in economic suicide. However, despite these arguments, Britain repealed its Corn laws in 1846 to permit the importation of corn without requiring other countries to remove their trade restrictions on British goods.[61] This policy "reflected the insights of classical trade theory that *unilateral* trade liberalization enhanced national welfare over the protectionist base case."[62] The benefits thought to accrue to Britain as a result of unilateral trade liberalization stem from

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[58] Gay, *supra* note 17 at 68.

[59] *Ibid.*, quoting H.K.C. Steele, "The Australian Antidumping System" in J. Jackson & E. Vermlust, eds., *Antidumping Law and Practice* (Ann Arbour, Mich.: University of Michigan Press, 1989) 223 at 230.

[60] Canada, *Minutes of Proceedings of the Sub-Committee on the Review of the Special Import Measures Act (SIMA) of the Standing Committee on Finance* (Ottawa: House of Commons, 1996) at 5 [emphasis added] [hereinafter *Sub-Committee Report*].

[61] Trebilcock & Howse, *supra* note 31 at 18.

[62] *Ibid.* [emphasis in original].

Adam Smith's theory of absolute advantage. According to Smith, it is economically efficient for

> every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. The taylor does not attempt to make his own shoes, but buys them of the shoemaker. ... The shoemaker does not attempt to make his own cloaths, but employs a taylor. All of them find it for their interest to employ their whole industry in a way in which they have some advantage over their neighbours, and to purchase with a part of its produce ... whatever else they have occasion for.[63]

Nations that lower trade barriers benefit from more efficiently-produced foreign goods, and can concentrate instead on producing goods for which the country has an absolute advantage. Why not do the same with anti-dumping laws? For example, Canada might benefit from more cheaply-produced foreign fresh grapes, and could instead focus its own grape manufacturing efforts on growing apples for cider production. In this example, the margin of dumping (*i.e.*, the difference in price between the grapes sold for export to Canada and the cost of the grapes in the exporter's home market) is effectively transformed into a subsidy given by a foreign industry to the Canadian apple industry. Assuming the risk of predatory pricing is negligible, Canada's economy would be more efficient and more profitable if it welcomed the effective subsidy and used it for more profitable purposes.[64] The conclusions of the Parliamentary Sub-Committee, while appearing equitable and fair at first glance, are unpersuasive and not in Canada's long-term economic interests.

2. Reforming or Repealing Article 6 of *GATT*

Since the unilateral reform of anti-dumping laws is seen as unfair to domestic producers without a concomitant obligation on its trading partners to do the same, efforts at reform might be better directed to the international reform of anti-dumping agreements. However, reform does not appear any more likely on the international front. The most compelling argument in favour of retaining anti-dumping provisions in *GATT* is that they provide a useful "safety valve" for governments who are faced with intense competitive pressure from foreign imports.[65] Without anti-dumping provisions, countervailing duties, etc., governments would not sign on to *GATT* and the

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[63] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. by R.H. Campbell & A.S. Skinner (Oxford: Clarendon Press, 1976) vol. 1 at 456-457. Note that I have retained the original language and spelling used by Smith in his text.

[64] Of course, eventually the transfer of wealth from one country to another will be so great that the dumping will have to stop if the foreign producer acts in a rational, self-interested way. This makes it risky for the recipient of the dumped products to rely on a "subsidy" that could instantly vanish. Beneficiaries of subsidies, therefore, would be best advised to use the effective subsidy in projects that are not capital intensive and do not require significant sunk costs and start-up expenses that would take years to recoup.

[65] See generally Gay, *supra* note 17 at 66-67; and J. Bhagwati, *Protectionism* (Cambridge, Mass.: M.I.T. Press, 1988) at 35.

end goal of worldwide trade liberalization (and its resulting benefits) would not occur.[66] Viewed from this perspective, anti-dumping duties are simply a means to achieving liberalized trade, negotiated through compromise.

GATT is replete with similar instances of compromise. For example, articles 22 and 23, which set out rules governing dispute settlement mechanisms, underline the importance of negotiation by stating that the "aim of the dispute settlement mechanism is to secure a positive solution to a dispute."[67] The preferred solution to any dispute is "a solution mutually acceptable to the parties ... and consistent with the covered agreements."[68] Each party must "accord sympathetic consideration to [and] afford adequate opportunity for consultation"[69] if disputes arise under *GATT*. Realistically, with over 120 different States now members of *GATT*, it is difficult to achieve consensus on any matter of international trade without some form of compromise:

> The *GATT* system has very few intellectually pure principles and most of the time represents a compromise between opposing factions. Allowing nations to react against dumping would satisfy those that wished to condemn dumping, whereas conditioning such a reaction upon certain findings—in particular, injury—would please those nations that wished to see no control of dumping. Simply making dumping actions obligatory would not have represented a compromise at all.[70]

In the end, the development of trade policy "is primarily a political exercise."[71] Reformers must understand that while anti-dumping actions may not be economically efficient, the alternative of a pre-*GATT* world of extreme trade restrictions would be far worse. On the other hand, political problems like anti-dumping call for political solutions in the form of negotiations and compromise, both of which are subject to the vagaries of "back-room deals". Should critics of the system be content to leave reform to politicians and diplomats, or can other methods of reform be found by working within the parameters of *SIMA*?

C. Public Interest Inquiries

1. The Operation of Section 45

While *SIMA* adopts as its primary aim the protection of domestic producers, there is still one avenue through which critics of the scheme may argue in favour of consumer interests. Section 45(1) of *SIMA*, the "public interest" provision, permits the

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[66] Gay paraphrases Bhagwati in saying "the existence of some form of trade barrier is a political necessity in order to allow for the removal of trade barriers in other areas" (*ibid.*).

[67] *WTO Agreement*, *supra* note 29, Annex 2: "Understanding on Rules and Procedures Governing the Settlement of Disputes" at art. 3.7.

[68] *Ibid.*

[69] *GATT*, art. 22.

[70] Denton, *supra* note 9 at 248.

[71] Gay, *supra* note 17 at 66.

Tribunal to determine whether the imposition of anti-dumping duties would be in the public interest. Section 45 states:

> 45(1) Where, as a result of an inquiry referred to in section 42 ..., the Tribunal makes an order or finding [of material injury] ... and the Tribunal is of the opinion 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, the Tribunal shall, forthwith after making the order or finding,
>
> (a) report to the Minister of Finance that it is of that opinion and provide him with a statement of the facts and reasons that caused it to be of that opinion; ...
>
> 45(2) Where any person interested in an inquiry referred to in subsection (1) makes a request to the Tribunal for an opportunity to make representations to the Tribunal ... [on the public interest question], the Tribunal shall afford that person an opportunity to make representations to the Tribunal on that question orally or in writing, or both, as the Tribunal directs in the case of that inquiry.

Regulations developed under *SIMA* limit "person[s] interested in an inquiry" to persons engaged in the production, purchase, sale or trade of goods currently the subject of an investigation; persons engaged in the production of like goods that are the subject of an investigation; persons authorized by Parliament or the legislatures to intervene in the process; a user of any like goods subject to an investigation; and "any association whose purpose is to advocate the interests of consumers in Canada."[72] Interestingly, the words "public interest" are not defined in either *SIMA* or the Regulations.

Given the impediments to advocates of the public interest, how successful has section 45 been in restricting the instances where anti-dumping duties are imposed? An examination of recent decisions of the CITT shows that the provision has been used infrequently, and that when it is used, anti-dumping duties are seldom reduced. Between 1992 and 1997, only five public interest inquiries have been held,[73] while twenty-seven section 42 inquiries were held during the same period.[74] Not one of those five public interest inquiries resulted in the Tribunal reversing its initial decision to impose anti-dumping duties. Since 1984, only two public interest inquiries have resulted in a request that a duty of less than the full margin of dumping be imposed.[75]

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[72] *SIMA*, s. 41.

[73] See online: Canadian International Trade Tribunal <http://www.citt.gc.ca/dumping/interest/consider/indexn_e.htm> (last modified: 8 September 1997). These results were tabulated by accessing the CITT's web page and counting the number of public interest inquiry decisions available in that database. The same methodology was used to determine the number of s. 42 inquiries in *infra* note 75.

[74] See online: Canadian International Trade Tribunal <http://www.citt.gc.ca/dumping/inquirie/findings/indexn_e.htm> (last modified: 28 October 1997).

[75] Gay, *supra* note 17 at 71. The cases in which a lower margin of dumping was recommended were *Grain Corn* (1987), 14 C.E.R. 1 (CIT), [1987] C.I.T. No. 4, online: QL (CIT); and *Re Beer* (2 October 1991), NQ-91-002 (C.I.T.T.), [1991] C.I.T.T. No. 56, online: QL (CITT).

2. CITT Interpretation of the Public Interest

Why has section 45 of *SIMA* been so unsuccessful at limiting the circumstances under which anti-dumping duties are imposed? When the provision was first introduced, it was thought to be a way of balancing producer interests with consumer interests:

> The public interest provision was enacted in 1984 at the suggestion of the Consumers' Association of Canada, and followed a House of Commons Report which found that "concentration on producer interests is too narrow a focus and the consumer interest must be considered."[76]

Subsequent decisions of the CITT, however, have severely limited the effect of the public interest provision. During the *Grain Corn*[77] public inquiry hearings in 1987, the Canadian Import Tribunal (the predecessor to the CITT) outlined circumstances under which public interest considerations should affect the imposition of anti-dumping duties. The Tribunal's judgment stated:

> Section 45 ... is to be applied on an exceptional basis as, for instance, when the relief provided producers causes a substantial and possibly unnecessary burden to users, downstream producers and consumers of the product ... The tribunal is not charged with a broad responsibility for trading of benefits to one group against injury to another.[78]

More recent public interest inquiries of the CITT have continued to apply public interest considerations narrowly. The CITT requires "compelling or special circumstances that necessitate a consideration of the public interest"[79] or "a sufficiently compelling public interest issue to warrant a departure from the primary object of *SIMA*"[80] before the Tribunal proceeds to a public interest investigation. Since the Tribunal has held that *SIMA*'s "primary purpose ... is to protect Canadian producers from injury caused by imports of dumped or subsidized goods,"[81] arguments in favour of consumer welfare are often rejected by the Tribunal. Presumably, although it does not say so, the CITT considers that an overly broad interpretation of the public interest rule that would give equal consideration to consumer welfare interests would make *SIMA* ineffective, since the imposition of anti-dumping duties, by definition, is simply an equal trade-off between domestic producers and domestic consumers. For instance, if two dollars worth of anti-dumping duties are imposed on a product, the domestic producer derives a corresponding benefit of two dollars. Accordingly, domestic consumers suffer a loss of at least two dollars. Viewed from this perspective, it would be much more difficult to establish "material injury to a domestic industry" if anti-

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[76] Warner, *supra* note 17 at 812 quoting Canada, House of Commons Sub-Committee on Import Policy, *Report on the Special Measures Import Act* (Ottawa: Queen's Printer, 1982) at 27.

[77] *Supra* note 75.

[78] Gay, *supra* note 17 at 71, quoting *Grain Corn, ibid.*

[79] *Insulation Board, supra* note 16 at para. 19.

[80] *Preformed Fibreglass Insulation, supra* note 16 at para. 14.

[81] *Insulation Board, supra* note 16 at para. 19.

dumping duties are considered to be a transfer of wealth from consumers to producers. If the Tribunal also considered the interests of end users or those of the dumper, the arguments for avoiding the use of anti-dumping duties canvassed in Part I of this article would begin to wind their way into the proceedings. For instance, the Tribunal might consider whether it is economically efficient for foreign producers to dump their products sporadically in Canada, whether predatory pricing is realistic, whether small communities truly benefit from the imposition of anti-dumping duties, and so on. The end result would likely be that anti-dumping duties would only be imposed in the rarest of circumstances. *SIMA*, and to a lesser degree the CITT, would lose their *raison d'être* as consumer welfare interests gained equal importance with domestic producers' interests.

However, these types of arguments would likely not influence the CITT, given its narrow reading of the public interest provision. The Tribunal would have to be persuaded that its interpretation of the meaning of "public interest" is wrong. Is the CITT correct in only applying the public interest provision in "exceptional circumstances"? Should the words "public interest" be given a broader meaning? The CITT's interpretation of the public interest can theoretically be challenged on administrative law grounds: one can argue that the CITT's interpretation of the public interest is incorrect, and that a court should substitute its broader interpretation of the provision for that of the Tribunal.

The first hurdle for an applicant using this line of argument would be section 62(1) of *SIMA*, which provides that a person may appeal a decision of the CITT "on any question of law." A court would likely interpret the words "public interest" as a matter of opinion, not a question of fact or law, and would refuse to interfere with the Tribunal's exercise of judgment.[82] Even if the applicant could overcome that hurdle, the standard of review applicable to the decision of the CITT would likely prevent an appellate court from overturning the CITT's decision. A court faced with an appeal from a statutory tribunal will not simply consider whether the tribunal decided the case correctly. Instead, a court will first consider the standard of review that applies to that particular tribunal's decision. As was stated in *Pezim* v. *British Columbia (Superintendent of Brokers)*,[83] standards range from "the standard of reasonableness to that of correctness." The reasonableness standard, "where deference is at its highest, [is

[82] See generally *Union Gas Co. of Canada* v. *Syndenham Gas and Petroleum Co.*, [1957] S.C.R. 185, 7 D.L.R. (2d) 65 [hereinafter cited to S.C.R.]. In that case, the Court considered whether a right of appeal on any question of fact or law gave a court the right to set aside an administrative tribunal's decision that was based on the tribunal's assessment of "public convenience". The Court held that a right of appeal on questions of fact or law did not extend to questions of "public convenience," as "the determintation of public convenience [is not a question of fact]. ... [I]t is not an objective existence to be ascertained; the determination is the formulation of an opinion" (*ibid.* at 190). Absent a right of appeal on matters of opinion, the words "public interest" in *SIMA* are likely to be viewed as sufficiently similar to "public convenience" that a court would refuse to interfere with the tribunal's assessment of the public interest.

[83] [1994] 2 S.C.R. 557 at 590, 114 D.L.R. (4th) 385 [hereinafter *Pezim* cited to S.C.R.].

applied in] those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal."[84] The correctness standard, on the other hand, applies to tribunals that have "no greater expertise on the issue in question."[85]

Which standard of review would apply to decisions of the CITT? A case close on point is *Pezim*. In that case, the Supreme Court considered "the appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation."[86] The Securities Commission was given authority to make its decision in virtue of the *Securities Act*,[87] which, like *SIMA*, does not contain a privative clause. In determining the appropriate standard of review, the Supreme Court considered a number of different factors. Among these were sections 14 and 144 of the British Columbia *Securities Act*, which provided the Securities Commission with a broad power to make orders it considered to be "in the public interest." The British Columbia *Securities Act*, like *SIMA*, does not contain a definition of the "public interest". Iacobucci J., for a unanimous court, found that these public interest provisions revealed "the breadth of the Commission's public interest mandate,"[88] which demonstrated "the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest."[89] This, in the court's opinion, was "an additional basis for judicial deference."[90]

The Supreme Court had previously considered the standard of review applicable to the CITT in *National Corn Growers Association* v. *Canada (Import Tribunal)*,[91] where the majority appeared to assume that since *SIMA* contained a privative clause, the standard of review applicable to the Tribunal's decisions was that of patent unreasonableness.[92] Since that case was decided, however, the privative clause has been removed from *SIMA*.[93] Therefore, *Pezim* and other cases which involve review of a tribunal's decision in the absence of a privative clause and where there is a statutory right of appeal are still important cases for assessing the standard of review that will be applicable to the Tribunal's decisions. In *Pezim*, the Court held that "even where there is no privative clause and where there is a statutory right of appeal, the concept

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[84] *Ibid.*

[85] *Ibid.*

[86] *Ibid.* at 588.

[87] R.S.B.C. 1990, c. 418.

[88] *Pezim*, *supra* note 83 at 594.

[89] *Ibid.* at 595.

[90] *Ibid.*

[91] [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449 [hereinafter cited to S.C.R.].

[92] *Ibid.* at 1370.

[93] See *Re Synthetic Baler Twine With a Knot Strength of 200 LBS or less, Originating in or Exported from the United States of America (United States* v. *Canada)* (1995), CDA-94-1904-02 (Ch. 19 Panel) at 7-8, online: NAFTA Secretariat <http://www.nafta-sec-alena.org/english/index.htm> (date accessed: 29 January 1999) [hereinafter *Baler Twine*].

of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise."[94] Given the Supreme Court's decision in *Pezim*, and given that an international trade tribunal is likely to be seen as a specialized tribunal, deference will likely be shown to the CITT's narrow interpretation of the public interest provisions of *SIMA*. The words "public interest" are capable of "almost infinite extension",[95] and a court will likely be reluctant to wade into the debate without good reason. Determining the meaning of "public interest" requires, at a minimum, intimate knowledge of *SIMA*, its purposes, and the administration of international economic law—skills that an appellate court would not have.

3. Legislative Change to Section 45

Since a direct challenge to the CITT's interpretation of the public interest provisions of *SIMA* is unlikely to succeed, and a repeal of *SIMA* is unlikely, is there any hope for the reform of *SIMA*? One possible avenue might lie in changes proposed to section 45 of *SIMA* by the *Sub-Committee Report* of 1996. The changes appear motivated, at least in part, by the observations of former CITT Vice-Chairman MacMillan. During the Sub-Committee hearing, she admitted that "[t]he statute provides no guidance as to what the public interest is. The criteria for public interest should be articulated more clearly, in a broader sense."[96] To this end, the Sub-Committee recommended a series of reforms to section 45. The most important recommendation was that "a non-exclusive list of factors be included in section 45 of *SIMA* that would guide the CITT respecting whether and how to conduct a public interest inquiry."[97] The *Sub-Committee Report* continued by proposing the type of factors the CITT ought to consider in its assessment of the public interest. The report stated:

> Public interest is a term that should receive as clear an operational definition as do the terms dumping or subsidy, which are defined in law, or the term injury, which is largely defined in regulations. Factors that might form a test for public interest could include: significant damage to downstream users; problems of access to inputs due to the imposition of the full duty; restriction of competition in domestic market; significant impact on choice or availability of products to consumers; elimination of competition in the marketplace; and so forth. It is understood that any criteria or facts expressed in legislative language would take precedence over previous CITT practice, such as the "exceptional basis" test applied in the *Grain Corn* case.[98]

Whether these proposed changes will make any difference to the public interest process is unclear. To a certain extent, the Tribunal has already considered these factors in its public interest investigations, and has still rejected the elimination or reduc-

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[94] *Pezim*, *supra* note 83 at 591.
[95] *R.* v. *Zundel*, [1992] 2 S.C.R. 731 at 774, 95 D.L.R. (4th) 202.
[96] *Sub-Committee Report*, *supra* note 60 at 34.
[97] *Ibid.* at 35.
[98] *Ibid.*

tion of anti-dumping duties. In *Refined Sugar*, the Tribunal considered the impact that anti-dumping duties would have on downstream users and consumers, and concluded that "the margin increases will not likely have a significant adverse effect on industrial users, re-sellers and consumers over this period."[99] Likewise, the Tribunal extensively considered the effects anti-dumping duties would have on competition in the marketplace. Despite testimony that the "domestic sugar refining industry is highly concentrated [and] is characterized by high fixed costs,"[100] the CITT found that recent increases in competition in the domestic market,[101] the tendency of large industrial users of sugar to shield themselves from higher prices by signing multi-year contracts,[102] the sheer purchasing power of some industrial users,[103] the ability to substitute sugar with other sweeteners,[104] and the ability to import sugar from countries not subject to anti-dumping duties[105] would mitigate any excessive competitive advantage domestic producers might otherwise have gained from the imposition of anti-dumping duties. The CITT in *Refined Sugar* appears to have addressed virtually every one of the considerations suggested in the *Sub-Committee Report*, but still refused to reduce the anti-dumping duties imposed.

Moreover, the addition of these supposedly "new" factors might actually aggravate the interests of consumers. Some of the wording proposed by the Sub-Committee harks back to the "exceptional basis" test used in *Grain Corn*: "*significant* damage to downstream users; *problems* of access to inputs; *significant* impact on choice or availability of products to consumers; and *elimination* of competition in the marketplace."[106] This language is not, in the Sub-Committee's words, "as clear an operational definition as ... the terms dumping or subsidy,"[107] which have precise and definite meanings. Is "significant" different from "exceptional"? If so, in what way? Does "elimination" of competition mean anti-dumping duties can be reduced if there is some reduction in competition, or does "elimination" mean the complete withdrawal of all competition?[108] Far from improving consumers' lot, the addition of these factors might actually increase the threshold needed before anti-dumping duties are reduced,

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[99] *Refined Sugar*, *supra* note 16 at para. 152.

[100] *Ibid.* at para. 103.

[101] *Ibid.* at para. 106.

[102] *Ibid.* at para. 107.

[103] *Ibid.* at para. 113.

[104] *Ibid.* at para. 118.

[105] *Ibid.* at para. 122.

[106] *Sub-Committee Report*, *supra* note 60 at 35 [emphasis added].

[107] *Ibid.*

[108] "Elimination of competition" would appear to require an end to all competition before anti-dumping duties could be reduced or eliminated. The Merriam Webster dictionary defines "to eliminate" as "to eradicate" or "to remove". "Eradicate", in turn, is defined as "to pull up by the roots" or "to do away with as completely as if by pulling up the roots." "Remove" is defined as "to get rid of: eliminate", and suggests the sentence "*remove* a tumor surgically" as an example of its proper use. See online: Merriam-Webster online <http://www.m-w.com> (date accessed: 29 January 1999).

making section 45 even less effective for advocates of consumer welfare than it currently is.

In addition to these guiding factors, the Sub-Committee made two other recommendations of note. First, it recommended that the CITT's decision "that an anti-dumping ... duty might not be in the public interest ... should be a formal decision reviewable by a Federal Court."[109] The Sub-Committee also recommended that the "lesser duty concept" (the idea that an anti-dumping duty should not simply reflect the difference between the normal and export prices but should instead only be applied to the extent required to remedy the injury) should "be incorporated in section 45 of *SIMA*."[110]

The recommendation that an anti-dumping duty should be reviewable by the Federal Court is not a very clear proposal for reform. If the Sub-Committee proposes to apply a broader right of appeal to the Federal Court of Appeal, where questions of fact and law and opinion may be appealed, will this new method of appeal only apply to public interest investigations? If a broader right of appeal is, in fact, what the Sub-Committee recommends, will this make a court change the standard of review it has applied to the Tribunal's decisions in the past? Or will courts simply reason that notwithstanding the broader right of appeal, courts should apply a high standard of deference toward decisions of the CITT since it deals with highly complex questions of trade with unique policy considerations, all administered by a group of experts? The Sub-Committee leaves these questions unanswered, and is content simply to propose that the Tribunal's decision should be reviewable by the Federal Court. The wording of these revisions will be significant, and their interpretation by courts will determine the extent to which these proposed changes are substantive or simply "smoke and mirrors".

The lesser duty concept, on the other hand, appears to be a worthwhile change that will, if nothing else, at least alleviate some of the harm caused to consumers by the imposition of anti-dumping duties. Currently, the WTO Anti-Dumping Agrecment states that "it is *desirable* that the imposition of the duty be less than the margin [of dumping], if such lesser duty would be adequate to remove injury to the domestic industry."[111] This does not, therefore, appear to be a mandatory provision of *GATT*, since the provision uses exhortatory language instead of compulsory words like "shall" or "must". Nor is the lesser duty concept contained in *SIMA*. Nevertheless, it has been argued during public interest inquiries that the CITT should apply the lesser duty concept. To date, however, the Tribunal has refused to apply the concept. In response to arguments made by industrial users of sugar in *Refined Sugar*, the CITT remarked:

> Contrary to the submissions of certain parties, the Tribunal is not required under Canadian law to employ a "lesser duty" approach in considering the public interest under section 45 of *SIMA*. The Tribunal is of the view, however, that

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[109] *Sub-Committee Report, supra* note 60 at 35.

[110] *Ibid.* at 36.

[111] *WTO Agreement, supra* note 29 at art. 9.1 [emphasis added].

> the relevant provisions of the *GATT* and WTO agreements provide a useful backdrop against which to consider the balancing of the various interests affected by the imposition of the anti-dumping and countervailing duties.[112]

However, the Tribunal concluded its analysis by holding that "the public interest does not warrant the reduction or elimination of the duties."[113] Would the inclusion of a requirement to incorporate the lesser duty concept in section 45 have changed the Tribunal's conclusion? Again, like the recommendation that the public interest decision of the Tribunal be reviewable by the Federal Court, it depends how the concept is integrated into *SIMA*. If *SIMA* is changed to *require* the Tribunal to apply duties only to the extent needed to remedy the harm to domestic industries, the change will be a substantive one. It would force the Tribunal to quantify harm caused to domestic industry and to apply duties only to the extent required to eliminate that harm. Conversely, if the lesser duty concept is simply a factor for the Tribunal to consider, it might not affect the Tribunal's final decision, since the Tribunal already appears to consider, to a certain extent, the lesser duty concept. In *Refined Sugar*, however, this did not have the effect of reducing anti-dumping duties.

D. Interventions by the Director of Competition

Since section 45 is ineffective whether in its present or proposed amended form to promote consumer welfare interests, is there any hope for consumer welfare interests to make their way into the proceedings? Section 126(1) of the *Competition Act* might offer one means of criticizing the imposition of anti-dumping duties. This section permits the Director of Competition to appear before boards and tribunals to "make representations". So far, the Director has intervened in six of the reported cases heard by the Tribunal.[114] Some commentators, such as Matthew Kronby, praise the Director's intervention,[115] arguing that the Director's submissions have considerable influence on the Tribunal's decision as to whether material injury has occurred. However, it appears that in most cases in which the Director intervened, the Tribunal still imposed anti-dumping duties.

In one of the more recent public interest inquiries, the Director opposed the imposition of anti-dumping duties on home canning products imported from the United States that were found under section 43(1) of *SIMA* to have caused material injury to the domestic industry.[116] The Director argued that imposing anti-dumping duties on these imports "would result in the complete elimination of competition in the supply of caps, lids and jars in Canada"[117] due to the "withdrawal of domestic and foreign suppliers of the ... goods over the recent past, the maturity of the market and the high

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[112] *Refined Sugar*, *supra* note 16 at para. 10.
[113] *Ibid.* at para. 156.
[114] See generally *supra* note 16.
[115] Kronby, *supra* note 13.
[116] *Caps, Lids and Jars*, *supra* note 16 at para. 1.
[117] *Ibid.* at para. 8.

cost of entry."[118] Thus, even if prices increased in the domestic market as a result of anti-dumping duties, there would be little motivation for competitors to enter the industry and skim off the excess profits. The Director also appeared to challenge interpretations of the "public interest" made by the Tribunal in previous cases. The Tribunal summarized the Director's submissions in this respect:

> [T]he public's interest in free competition is the controlling feature of this case, and this interest is supported by legislation and judicial statements of principle. *In [the Director's] view, the "public interest" requires a balancing of the interests of the domestic producers with the interests of consumers and users.* The Director submitted that, if the Tribunal does not conclude that the anti-dumping duties should be removed altogether, it should entertain submissions ... to determine whether or not a reduction of anti-dumping duties to a level sufficient to permit price competition to continue ... would be appropriate.[119]

In response, the Tribunal first addressed the meaning of "public interest" and the circumstances required before a recommendation could be made that anti-dumping duties be reduced or not imposed. Contrary to the Director's submissions and consistent with its previous decisions, the Tribunal held that "the primary purpose of *SIMA* is to protect Canadian producers from injury."[120] The Tribunal did not agree with the Director's argument that the public interest involves a balancing of the interests of domestic producers with those of consumers. Instead, it relied on its previous interpretation of the public interest in holding that the Tribunal requires "compelling or special circumstances"[121] to warrant overriding the primary purpose of *SIMA*. In other words, consumer interests are not balanced against producer interests as a matter of course; for consumer interests to be considered, "compelling or special circumstances" must exist. The Director's first submission on the meaning of "public interest" was therefore rejected.

In considering whether "compelling or special circumstances" were present in the case, the Tribunal did hypothesize that "a potential public interest might" relate to the potential for one company in Canada to gain a monopoly over the production and distribution of caps, lids, and jars in the country.[122] The Tribunal then addressed the Director's arguments on this issue and rejected them one by one. The Tribunal was not convinced that no alternative suppliers for canning products existed, since there were other active manufacturers in Canada, the United States and Mexico. Any temptation for the domestic producer to raise its prices in response to anti-dumping duties would therefore be held in check by these potential competitors. The Tribunal appeared to reject the Director's arguments about the difficulty domestic or foreign competitors might have in entering the Canadian market due to the high cost of entry and the maturity of the market.

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[118] *Ibid.*
[119] *Ibid.* at para. 9 [emphasis added].
[120] *Ibid.* at para. 17.
[121] *Ibid.*
[122] *Ibid.* at para. 18.

The Tribunal also addressed the question of whether anti-dumping duties would result in a price increase. It agreed with the Director that prices would increase as a result of the anti-dumping duties; indeed, it found this was "a natural consequence of an injury finding."[123] However, it considered that factors like foreign competition, the bargaining power of large retailers and the potential to switch to alternative food preservation methods would limit the prices charged by domestic producers of canning products. Again, the Director's arguments were rejected, and the Tribunal considered that a compelling public interest did not exist which would warrant a report being issued to the Minister of Finance.

Interestingly, the Tribunal's arguments in *Caps, Lids and Jars* appear to belie its initial decision to impose anti-dumping duties. One of the main arguments in support of anti-dumping duties is the prevention of predatory pricing.[124] In this case, the Tribunal agreed that there was no danger of a company gaining a monopoly hold on the market; foreign competitors were healthy, and consumers could switch to alternative methods of canning if monopoly prices were charged. Moreover, in the Tribunal's opinion, even if monopoly prices were charged, "purchases of caps, lids and jars account for only a small proportion of overall consumer expenditures."[125] Why, if a domestic producer would find it difficult to establish a monopoly, would it be any less difficult for a foreign producer to do so? If the foreign dumper did gain a monopoly on production, would it really matter since canning products are not a significant consumer expenditure? Stripped of its otherwise useful purpose (that is, to prevent predatory pricing), *SIMA* appears simply to protect domestic producers from injury, and harm to consumers (even when advocated by an impartial government spokesperson) is only assessed in exceptional circumstances.

Caps, Lids and Jars is even more interesting since it appears that, by deciding to impose anti-dumping duties on American exports, the Tribunal did not meet its own stated objective of protecting Canadian industry. Certainly, domestic consumers were hurt by the decision, since the Tribunal acknowledged that prices of canning products would rise in response to the anti-dumping duties. However, a careful reading of the case reveals an interesting picture of potential anti-competitive practice within the domestic industry which does not appear to have been considered by the Tribunal. The facts of the case, as summarized by the Tribunal, reveal that on November 1, 1994 (seven months before the Tribunal's hearing), one of the Canadian complainants, Bernardin, was sold to the American dumper, Alltrista. The Tribunal notes that "subsequent to its acquisition of Bernardin, ... [Alltrista] withdrew from the Canadian market."[126] By purchasing Bernardin, Alltrista to a large extent ensured it would benefit no matter how the case was decided. If anti-dumping duties were assessed against

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[123] *Ibid.* at para. 21.

[124] See generally Part I, above.

[125] *Caps, Lids and Jars*, *supra* note 16 at para. 19.

[126] *Re Home Canning Products* (20 October 1995), NQ-95-001 (C.I.T.T.), [1995] C.I.T.T. No. 72 at para. 19, online: QL (CITT).

Alltrista's exports, its American rival, Kerr, would suffer the same fate. However, since Alltrista withdrew from the market, its exports could not be subject to anti-dumping duties. By purchasing Bernardin, Alltrista acquired a competitive edge in Canada that would allow it to extract even higher profits from Canadian consumers, since Bernardin (now owned by Alltrista) would be shielded by anti-dumping duties. Kerr's inability to continue dumping in Canada might make it a weaker rival for Alltrista in its home market. For example, Kerr might be unable to maintain full production to achieve economies of scale because it could no longer dump its products in Canada. Whatever its reasons for dumping its products, Kerr would be deprived of the benefits of its rational, self-interested behaviour with the imposition of anti-dumping duties. The argument that Alltrista simply wanted to hurt its American rival and gain additional profits from Canadian consumers is reinforced by the fact that Bernardin still participated in the Tribunal's proceedings and argued that dumping had resulted in material injury to a domestic industry. Why would Bernardin (now owned by Alltrista) argue a position that might hurt its parent company? While the Tribunal considered the impact of Alltrista's dumped products in determining that material injury had been caused to a domestic industry, it does not appear that Alltrista participated in the hearing, since its arguments are not reproduced in the Tribunal's decision.

Kerr may indeed have been weakened by the anti-dumping duties since, in 1997, it was purchased by Alltrista.[127] The circumstances under which Kerr was acquired and the reasons for which Bernardin was acquired by Alltrista are speculative. Nonetheless, it seems fair to suggest that Bernardin (and consequently, Alltrista) benefited from the imposition of anti-dumping duties. However, whether these speculations are accurate is less important than the fact that the Tribunal did not even stop to consider them. Instead, it considered only whether material injury to a domestic industry had occurred, and recommended the imposition of anti-dumping duties. This recommendation may have helped Alltrista to reduce competition in the United States and may have harmed Canadian consumers. If the Tribunal at least considered Alltrista's acquisition, it might have concluded that Kerr's continued competition in the market was warranted, or that Alltrista's acquisition of Bernardin suggested that Bernardin would raise is prices to super-profitable levels once anti-dumping duties were imposed.

Finally, how effective can *SIMA* be if it can be circumvented by simply purchasing a domestic complainant? Since the purpose of *SIMA* is to protect domestic industry, the Tribunal examines indicia like the loss of sales, loss of employment, and so on, to determine whether material injury has been caused.[128] If loss of employment, though, can be achieved by purchasing the complainant and closing down its Canadian manufacturing plants (which did not occur here, but could have), how realistic is

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[127] See online: Securities and Exchange Commission <http://www.sec.gov/Archives/edgar/data/895655/0000895655-98-000006.txt> (date accessed: 29 January 1999). This annual statement refers to Alltrista's acquisition of "certain assets from Kerr Group, Inc. related to their home food preservation products."

[128] See generally Part III.A., above.

the premise that the Tribunal is genuinely concerned with the protection of domestic industry?

The *Preformed Fibreglass Insulation* public interest inquiry was another case in which the Director intervened to argue in favour of consumer interests. As in *Caps, Lids, and Jars*, the Director argued "that the imposition of anti-dumping duties ... would curtail effective import competition, would confer a benefit to [the domestic producer] beyond the elimination of material injury and would likely reduce economic welfare in Canada."[129] However, unlike *Caps, Lids and Jars*, the Tribunal acknowledged that Manson, the domestic producer, was the sole producer of the goods subject to anti-dumping duties, that there were no readily available substitutes for the goods, and that there was "little likelihood of competition from the subject goods produced in countries other than the United States [*i.e.*, the country potentially subject to the anti-dumping duties]."[130] The Tribunal also recognized that the price of domestic goods would rise if anti-dumping duties were imposed.

As in *Caps, Lids and Jars*, the Tribunal rejected the suggestion that anti-dumping duties should not be imposed simply because it is likely that prices for the goods would rise. The Tribunal held that a price increase "is a natural consequence of the regulatory scheme ... [and such an argument] would lead to the conclusion that it is in the public interest not to apply anti-dumping duties in the full amount in virtually every case that comes before the Tribunal."[131] The Tribunal also rejected the contention that anti-dumping duties would give Manson "a more dominant position in the market and possibly enable it to abuse that position."[132] The Tribunal felt it could not "forecast with certainty what precise events may unfold in the marketplace."[133] Instead, it preferred to leave the question of any anti-competitive activities to the Director, who had "the proper authority to address them."[134] The Tribunal also surmised that since Manson's plant capacity was limited, and since anti-dumping duties could only be imposed for a period of five years (at which time the order is reviewed), it would not be in Manson's interest to further expand its plant capacity to serve the entire domestic market. American goods, while higher in price, could therefore still supply the Canadian market to pick up on Manson's shortfall.

It is surprising that the Director's arguments regarding Manson's incentives to abuse its dominant position were dismissed by the Tribunal. The Tribunal admitted that Manson was the only supplier of the goods, that little foreign competition was likely, and that no close substitutes existed for the subject goods. Moreover, the complainant in the case had, in an unrelated case, been previously found guilty of the tort

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[129] *Preformed Fibreglass Insulation, supra* note 16 at para. 4.
[130] *Ibid.* at para. 16.
[131] *Ibid.* at para. 23.
[132] *Ibid.* at para. 24.
[133] *Ibid.*
[134] *Ibid.*

of conspiracy, and had damages totalling $180,000 assessed against it.[135] The tort of conspiracy requires that "the predominant purpose of the defendants' conduct be to cause injury to" a competitor.[136] This information is difficult to reconcile with the Tribunal's opinion that Manson's dominant position in the market would not be abused. Manson could have sought to expand its plant capacity quickly and concentrate on signing long-term contracts at inflated prices to cement its dominant position beyond the five-year period in which the duties are imposed. The Tribunal did not address Manson's previous conduct in determining whether to reduce the anti-dumping duties to encourage continued competition between Manson and United States exporters. Instead, the Tribunal simply supported the imposition of anti-dumping duties to the extent that normal prices in the United States exceed export prices, and left any "speculative anti-competitive activities" to the Director to sort out. Is it really so speculative to think that a company found guilty of a tort requiring an intention to injure a competitor would likely exploit its dominant position once anti-dumping duties gave it a privileged position in the marketplace?

Contrary to Kronby's assessment that "the active and successful involvement of the [Director] will help to offset the consequences of the protectionist legislative framework within which such disputes are currently resolved,"[137] the involvement of the Director in both public interest inquiries and section 42 hearings in the post-*Hyundai* period appears to have been unsuccessful. Either the Director's arguments were rejected as out of tune with the purpose of *SIMA*, or the Tribunal took the position that it is the Director's responsibility to oversee any anti-competitive conduct.

Conclusion

While *GATT* has been largely successful in reducing barriers to trade, anti-dumping provisions remain a significant obstacle to liberalized trade that would benefit consumers. Numerous studies, canvassed in Part I of this paper, demonstrate the extent to which anti-dumping legislation does not appear to be motivated by anything other than protectionism. It does not prevent predatory pricing, since predatory pricing is an improbable phenomenon at best; nor does it prevent the alleged harm caused by sporadic dumping, since that too is unlikely. Even if consumers are harmed by sporadic dumping, this may not be a valid reason to prohibit the practice, since it is rational, pro-competitive behaviour on an international scale. Moreover, anti-dumping legislation cannot be supported on non-efficiency grounds, since the protection of small communities and less fortunate people are usually not the focus of an anti-dumping investigation.

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[135] *Wallace Construction Specialties Ltd.* v. *Manson Insulation Inc.* (1993), 113 Sask. R. 161, 106 D.L.R. (4th) 169 (C.A.) [hereinafter cited to Sask. R.].

[136] *Ibid.* at 167, quoting *Canada Cement Lafarge Ltd.* v. *British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 47 N.R. 191.

[137] *Supra* note 13 at 117.

Despite these conclusions, however, there does not appear to be a realistic chance of reform of either *GATT* or *SIMA* in the near future. Any chance for reform is caught in a "catch-22" situation. Domestic legislatures are unwilling to drop protectionist measures unless their trading partners do likewise. Hence, *SIMA* seems out of reach. *GATT* does not appear ripe for reform either, since without anti-dumping laws, many countries would balk at further liberalized trade. Finally, any opportunity for advocates of consumer welfare interests to work within the system, whether under section 45 of *SIMA* or through representations made by the Director of Competition, have effectively been denied by the CITT's narrow reading of the purpose of anti-dumping laws. Even recommendations made by Parliamentary Sub-Committees charged with the task of reforming *SIMA* are far removed from real reform which would balance the interests of consumers against domestic industries faced with dumping.

Perhaps the only hope that consumer welfare advocates can find in this state of affairs is in regional free trade agreements. The European Union, for instance, no longer engages in anti-dumping actions against its trade partners, and limits any investigations of unfair trade through dumping to instances where predatory pricing is at issue. However, in the *NAFTA*[138] context, the United States "has shown extreme unwillingness to participate in any meaningful negotiations to eliminate the use of anti-dumping ... laws."[139] On a bright note, Canada has succeeded in "phasing out the use of anti-dumping remedies in the recently concluded Canada-Chile Free Trade Agreement."[140] Furthermore, since the United States is unwilling to compromise its anti-dumping duties within *NAFTA*, recent reports have suggested that Canada and Mexico are considering exempting each other from the application of their respective anti-dumping laws.[141] While they will first seek an agreement between themselves, reports say they apparently hope to later include the United States in the agreement.[142]

As regional trade agreements proliferate, and as countries realize that repealing anti-dumping laws does not hurt their economies, perhaps the trend to eliminate anti-dumping laws in regional trade agreements will extend itself to *GATT*. For instance, if Canada does not feel threatened by Chile dumping its products into Canada, why would it feel the need to protect against dumped products from a country like Spain? Also, if it is true that Canada does not feel threatened by dumped products originating from its largest trading partner, would it feel threatened by dumped products coming from smaller trading partners? Through incremental changes in regional trade agree-

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[138] *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter *NAFTA*].

[139] R. Dattu & J.W. Boscariol, "Changes to Canada's Trade Remedy Laws on the Way" (1997) McCarthy Tétrault Legal Update at para. 3, online: McCarthy Tétrault <http://www.mccarthy.ca/home/mccarthy/web/docs/mt-ctrem.html> (date accessed: 29 January 1999).

[140] *Ibid.*

[141] R. Palmer, "Canada, Mexico to discuss killing anti-dumping provisions" *The Financial Post* (8 June 1996) 38.

[142] *Ibid.*

ments, countries like Canada will increasingly realize that national economies (and consumers in particular) benefit from dumping. Hopefully an understanding that article 6 of *GATT* is veiled protectionism, devoid of valid economic or political rationale, will follow.