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Public Interest Consideration in Domestic and International Anti-dumping Disciplines

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Declaration of authorship

"This master thesis has been written in partial fulfillment of the Master of International Law and Economics Programme at the World Trade Institute. The ideas expressed in this paper are made independently, represent my own views and are based on my own research. I confirm that this work is my own and has not been submitted for academic credit in any other subject or course. I have acknowledged all materials and sources used in this paper."

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Abstract

Anti-dumping measures are applied to protect a particular domestic industry of an importing country from dumped imports causing injury to such an industry. However, what is to be done if the anti-dumping measure is in contradiction with the interests of consumers, importers or other domestic industries, which use an imported product as an input for their products? Some countries apply a so-called public interest test before making a decision on the imposition of anti-dumping measures. This paper aims to analyse the international and domestic disciplines addressing the public interest concerns within anti-dumping investigations. In particular, the paper explores the legal concept of public interest and its consideration within the AD Agreement. The paper describes the existing modalities of public interest investigation using the examples of the EU and Canada. Finally, it discusses the status and perspective of negotiations on a mandatory public interest clause within the Doha Round.

List of Abbreviations

AD Agreement or ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
AD Code	Anti-Dumping Code
CITT	the Canadian International Trade Tribunal
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT	General Agreement on Tariffs and Trade, 1994
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIMA	the Special Import Measures Act
SIMR	the Special Import Measures Regulations
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

Introduction

Some countries have provisions in their domestic anti-dumping laws obliging the investigating authorities to evaluate whether the application of anti-dumping measures is in the public interest. In other words, before imposing the measure, its impact on groups other than local producers in society and the country's overall interest should be studied. The investigating authorities may decide not to impose the anti-dumping measure based on the finding that such a measure is in contradiction with public interest, notwithstanding an affirmative injury and dumping determination, though the cases where anti-dumping measures have been eliminated or not imposed for the sake of securing wider public interest concerns are quite rare.

During the Uruguay Round some GATT Contracting Parties tried to negotiate a mandatory public interest clause in the AD Agreement, but failed to do so. During the Doha Round several WTO Members again raised this issue, but the agreement has not been reached so far.

This paper explores the legal concept of public interest in anti-dumping disciplines, its use in current domestic and international laws, problems and possible solutions for strengthening international disciplines on public interest. In achieving these objectives, historical, analytical, comparative, and case study methods of analysis are used.

The paper starts with defining the concept of public interest, in particular through applying principles of proportionality, due process and fairness. It further proceeds with analysis of public interest issues in the AD Agreement. The paper describes the modalities of public interest investigation using the examples of Canada and the EU, which probably have the most elaborate legal framework and practice in this matter. However, selected examples of other counties are also mentioned. Finally, the paper discusses the current status of negotiations on the mandatory public interest clause within the Doha Round and attempts to suggest possible ways for measuring the public interest concerns in the AD Agreement.

The paper supports the idea to include the mandatory public interest clause into the AD Agreement, which would respect the principles of proportionality and due process as well as the objectives of the WTO as defined in the preamble of the Marrakesh Agreement. However the inclusion of comprehensive public interest clauses upon the results of the Doha Round is hardly visible. The paper concludes that the strengthening of procedural rights granted to industrial users, consumer organizations and other negatively effected parties and the development of substantial rules on public interest of an advisory nature may be the first step towards a mandatory public interest clause in future.

Chapter I Legal Concept of Public Interest in Anti-Dumping Laws

The aim of this chapter is to define the concept of public interest in anti-dumping disciplines, including its correlation with principles of proportionality, due process and fairness.

1.1 Anti-dumping measures as a governmental instrument to protect public interest

Dumping occurs when a product is sold in the importing country at the price less than its normal value, which is either the price of the like product in the ordinary course of the trade in the exporting country[1] or the price of the like product when exported to an appropriate third country or cost of production in the country of origin plus "a reasonable amount for administrative, selling and general costs and for profits."[2] When dumped imports cause injury to the domestic producers of like products, the importing country may introduce anti-dumping measures.

Injurious dumping is recognized by international community as an actionable trade practice. There is no consensus on the issue as to whether dumping should be deemed unfair competition.[3] WTO law "does not pass judgment"[4] on this matter, they focus on "how governments can or cannot react to dumping."[5] Article VI of the GATT 1947 permits Contracting Parties to offset injurious dumping and regulates the imposition of anti-dumping measures. The Kennedy Round AD Code (1968) and the subsequent Tokyo Round AD Code (1979) were negotiated to expound certain concepts rooted in GATT Article VI. However, these codes bound only limited GATT Contracting Parties, explicitly agreed upon that. The AD Agreement negotiated during the Uruguay Round, has become a part of a 'single undertaking' and, thus, obligatory for all WTO Members. It provides for a more detailed regulation of anti-dumping actions on both a substantial and procedural part than its predecessors.

The AD Agreement does not cover in detail all aspects necessary to conduct the investigation; a country has to pass respective domestic regulation in order to apply anti-dumping instruments.[6] The purpose of anti-dumping legislation is to protect domestic industry from certain trade practices of foreign exporters. The dumped imports generally affect a domestic industry negatively with regard to its volume of production, sales, market share, profitability, employment, wages, ability to growth, etc. Anti-dumping measures are designed to counteract injurious dumping and restore non-dumped competition in the market of the product

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[1] The AD Agreement, Article 2.1
[2] Ibid.
[3] http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm
[4] Ibid.
[5] Ibid.
[6] Czako, J., Human, J. and Miranda, J. *A Handbook on Anti-Dumping Investigations*, Cambridge University Press, 2003, p. 5

concerned. This competition is commonly perceived as essential for effective operation of the national economy. Thus, the fact that the anti-dumping legislation is implemented itself reflects a public interest consideration. [7]

Anti-dumping measures assist a domestic producer in recovering from the material injury or prevent damages caused by dumping. However, their effect is not limited exclusively to domestic producers, but also to the trade and economy of an importing country as a whole. The anti-dumping measures may negatively affect industrial users and consumers of the product under investigation, competition, wholesale and retail services, and trade flow between importing and exporting countries. [8] To address such an effect of anti-dumping measures, domestic anti-dumping legislation of some countries enshrines a 'public interest' clause. A public interest clause is incorporated into domestic anti-dumping regulations of Argentina, Brazil, China, Canada, EU, Malaysia, Thailand, Ukraine and some others. The 'public interest' clause generally implies the consideration of broader public interest concerns, i.e. to examine, in addition to the interests of the domestic industry, the interests of other parties which may be affected by the measure as well as influence trade and competition in the market concerned.

In general, public interest may be understood as "impersonality, and as the opposite of giving privilege to private interest."[9]The European Union, which considers public interest in each anti-dumping investigation, defines the public interest test as "an appreciation of all the various interests in the [Union] taken as a whole by analyzing the likely economic impact of the imposition or non-imposition of measures on economic operators in the [Union]."[10]Petersmann fairly pointed out that "public interest" is nothing else than the sum of the individual interests of all the citizens as defined by their equal constitutional rights."[11]

The AD Agreement neither obliges nor prohibits considering wider public interest during anti-dumping investigations. Interestingly, that unlike the AD Agreement (as well as the SCM Agreement), the Agreement on Safeguards includes a public interest clause. In particular, Article 3, sentence 2 of the Agreement on Safeguards says:

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[7] Paper from Hong Kong, China '*Further Explanation of the Public Interest Proposal'*, TN/RL/W/194, dated 17 November 2005, p. 2

[8] Paper from Chile; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, '*Public Interest*', TN/RL/W/174/Rev.1, dated 7 April 2005, p.1

[9] International Trade Centre, *Business Guide to Trade Remedies in Brazil: Anti-dumping, countervailing and safeguard legislation, practices and procedures*, Geneva: ITC, 2009, p. 31.

[10] *Replies of the European Communities to the List of Questions Posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest*, G/ADP/AHG/W/114 dated 11 April 2001, p. 1

[11] Petersmann, E., in Moen, P. *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada, Graduate Institute of International Studies*, Geneva, 1998, p. 6

> "This investigation shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, *inter alia*, *as to whether or not the application of a safeguard measure would be in the public interest.*"[12] (emphasis added).

This difference is often explained by the fact that anti-dumping and countervailing measures are remedies against 'unfair' trade practice while safeguard measures - against 'fair' trade practice.[13]In other words, the policy towards offsetting or preventing dumped or subsidized imports cannot contradict public interest. However, it is still a disputable issue whether or not public interest constitutes a substantive element to examine in each safeguard investigation together with increased imports, serious injury, causation and unforeseen developments.[14]

During the Doha Round of Multilateral Trade Negotiations, a number of countries brought forward the proposal to include into the AD Agreement a mandatory requirement to consider a broader public interest before imposing anti-dumping measures. As was mentioned by Hong-Kong and China in their paper explaining the public interest proposal: "[w]ith this proposal, the importing Member does not simply assume that the application of an anti-dumping measure is beneficial to that Member, but actually considers whether that assumption is correct in the cases before it."[15]

1.2 Public interest and principle of proportionality

Anti-dumping measures are a unilateral remedy for the importing country in response to injurious dumping. In simple terms, an anti-dumping measure is a 'penalty' or 'countermeasure' of the importing country for the actions of foreign exporters. Under the principle of proportionality, the punishment should be proportionate to the wrongful act committed. In its broader sense, proportionality requires balancing competing interests and values.

Mitchell has shown that proportionality can be regarded as "a general principle of law, a principle of customary international law, and a principle of WTO law."[16] Hilf noted that "the principle of proportionality is one of the more basic principles underlying the multilateral

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[12] Agreement on Safeguards, Article 3

[13] According to the Appellate Body in *Argentina-Footwear* case "it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures", Appellate Body Report, paras. 93-95, similarly in *Korea-Dairy*, Appellate Body Report, paras. 83-84.

[14] Rios Herran & Poretti, in Wolfrum, R., Stoll, P-T. and Koebele, M.(eds.), *WTO - Trade Remedies*, Leiden: Martinus Nijhoff Publishers, 2008, p. 290.

[15] TN/RL/W/194 dated 17 November 2005, p. 2

[16] Mitchell, A. *Legal Principles in WTO Disputes*, New York: Cambridge University Press, 2008, p. 236

trading system, although there is no explicit reference to it in WTO law. However, the basic idea of proportionality, i.e. the due balancing of competing rights, is reflected several times in WTO Agreements."[17] Moreover, in two trade remedy cases *US-Cotton Yarn*[18] and *US-Line Pipe,*[19] the WTO Appellate Body recognized "proportionality as principle of customary international law."[20]

With regard to the AD Agreement, proportionality and imposition of anti-dumping measures can be considered in several dimensions.

Firstly, an anti-dumping measure must not "exceed the margin of dumping,"[21] i.e. the level of remedy cannot be higher than the level of action - price undercutting practiced by foreign exporters in the importing market compared to its home market. This idea is incorporated into the current text of the AD Agreement, which says that "the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2."[22]

Secondly, an anti-dumping measure should not exceed the level of injury caused to the domestic industry by the dumped imports. In particular, ADA Article 9.1 specifies that "[i]t is desirable…that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry."[23] Following this provision, some WTO Members (for instance, Argentina, Australia, Brazil, EC, India, New Zealand, and Turkey) practice a so-called 'lesser duty rule', meaning that the duty may be less the margin of dumping, if it is "adequate to remove the injury."[24] The lesser duty rule is not mandatory within the framework of the WTO and may be implemented in domestic legislation at the discretion of a Member. At the same time, the principle of proportionality ensures that the measures must be commensurate with the harm incurred. This approach to the principle of proportionality is widely recognized in domestic legal systems and international jurisprudence.[25]Thus, the level of anti-dumping measures which is "beyond the level of harm caused is not consistent with proportionality in general or international law."[26]

Thirdly, the wider public interest consideration should be taken into account while deciding on application or non-application of anti-dumping measures. As already noted above, the anti-dumping measures have an effect not only on domestic producers, but also on other operators,

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[17] Hilf, M., 'Power, Rules and Principles – Which Orientation for WTO/GATT Law?', *Journal of International Economic Law* 2001, pp. 120-121
[18] Appellate Body Report, *US-Cotton Yarn*, paras. 120-122
[19] Appellate Body Report, US-Line Pipe, para. 259
[20] Mitchell, A., p. 231
[21] The AD Agreement, Article 9.1
[22] Ibid.
[23] Ibid,
[24] Ibid.
[25] See more Mitchell, A., pp. 202-210
[26] Ibid., p.228

such as industrial users and consumers. In addition, they impact trade and competition relationships in the market. The application of a public interest test reflects the principle of proportionality in its broader application – weighting or balancing the competing interests and values. "[T]he government…take no action the overall costs of which are excessive in relation to its overall benefits."[27]Public interest in anti-dumping implies that the measure should not be applied or should be applied in reduced amount if the negative effect of anti-dumping measures would be disproportionate to its positive effect. The ADA Article 9.1, second sentence, envisages that "[i]t is desirable that the imposition be permissive in the territory of all Members…"[28] This gives a ground for, and even encourages, the implementation of public interest test in domestic anti-dumping legislation of WTO Members.

To sum up, the current principle of proportionality is implemented in the AD Agreement in a narrow meaning. It still permits applying anti-dumping measures at a level higher than the injury suffered or having a disproportionately negative impact on the other interested parties and economy as a whole. However, certain WTO Members have implemented the principle of proportionality into domestic anti-dumping regulations in its broader meaning by incorporating a lesser duty rule and a public interest clause.

1.3 Public interest and principles of fairness and due process

The anti-dumping investigation is a quasi-judicial administrative proceeding. Thus, the investigating authorities are expected to follow the rules of natural justice in its course and applying the measures. In other words, they have to comply with principle of 'due process', which "broadly requires administrative and judicial proceedings to be fair." [29]

The AD Agreement requires WTO Members to provide in their domestic anti-dumping regulations a number of procedural rights in order to ensure that interested parties have all the opportunities to present a case in full: ample opportunity to present in writing all evidence, the right to request a hearing, the right to participate in a hearing, to have enough time for responding to a questionnaire, including the possibility of requesting an extension, right to access non-confidential information, the right to have a disclosure of final findings, etc.

However, all these rights are only granted to interested parties. The AD Agreement does not include industrial users and consumers in a compulsory list of interested parties; this issue is left to the discretion of individual Members. In practice, the domestic laws of WTO Members rarely specify the possibility for industrial users and consumers to become an interested party.

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[27] Bermann, , in Mitchell, p. 185.
[28] The AD Agreement, Article 9.1
[29] Mitchell, A., p. 145

This approach is inconsistent with the so-called 'hearing rule' of due process, which requires providing "to persons whose interests may be adversely affected by a decision an opportunity to present their case."[30] The interests of industrial users and consumers of the product concerned definitely may be adversely affected by anti-dumping measures. Moreover, the concept of 'equality of arms', which may be considered a part of the hearing rule, requires "a fair balance between the opportunities afforded the parties involved in litigation."[31] WTO rules require that industrial users and representative consumer organizations, if the product is commonly sold at the retail level, be provided with an opportunity to submit information regarding dumping, injury and causation, while they do not enjoy all rights granted to the interested parties, unless they qualified as such.[32]

Currently, the AD Agreement secures the principle of fairness and due process partially. Industrial users, consumer organizations, upstream industries, retailers, traders, which undoubtedly may be affected by the anti-dumping measure, often do not have the right to become an interested party and defend their interests in the course of anti-dumping investigations.

[30] Ibid., p. 148
[31] Ibid., p. 148-149
[32] The AD Agreement, Article 6.12

Chapter II Measuring Public Interest under AD Agreement

The aim of this chapter is to explore the consideration of public interest issues in the AD Agreement.

2.1 Negotiations on public interest clause during the Uruguay Round

The current text of the AD Agreement negotiated during the Uruguay Round neither provides an explicit public interest clause nor prohibits public interest consideration. Put differently, it is *permissive* to public interest consideration in domestic anti-dumping laws and practices. The same was true for the previous edition of the agreement – Tokyo Round Anti-Dumping Code of 1979.

During the Uruguay Round Members extensively discussed the inclusion of the mandatory public interest consideration into the AD Code. For instance, Canada pointed out that "[a]nti-dumping actions may have unintended consequences for the national economy as a whole. Scope should be provided to enable these broader economic considerations to be brought forward and considered."[33] Likewise, Singapore noted that the objective of a public interest clause would be "to ensure that investigating authorities consider anti-dumping complaints in a wider context, taking into account not only the interest of the affected domestic industry, but also the interest of user industries, and the costs of the anti-dumping intervention to the national economy."[34]

Several Members filed concrete proposals to include public interest clauses into the agreement, however none of them were incorporated into the final draft of the Agreement.[35] Japan submitted one of them, which suggested adding the following footnote to Article 8 (currently Article 9):

> "[b]efore imposing anti-dumping duties, the authorities shall take into account its impact on the entire national economy."[36]

Nordic countries went further and suggested that Article 8 should have been amended with a new paragraph, which required public interest consideration not only while deciding on application of anti-dumping duties, but also - on initiation of the investigation:

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[33] *Submission by Canada on Amendments to the Anti-Dumping Code*, GATT Doc. MTN.GNG/NG8/W/65 dated 22 December 1989, p.5.

[34] *Communication from the Delegation of Singapore, Proposed Elements for a Framework for Negotiations Principles and Objectives for Anti-Dumping Rules*, GATT Doc. MTN.GNG/NG8/W/55 dated 13 October 1989, p.2.

[35] Stewart, T. (editor), *The GATT Uruguay Round: A Negotiating History (1986 – 1992)*, Vol. II: Commentary, Kluwer Law and Taxation Publishers, Deventer, pp. 1689 – 1690.

[36] *Submission of Japan on the Amendments to the Anti-Dumping Code, GATT* Doc. No.MTN.GNG/NG8/W/48/Add.1 (29 January 1990), p. 3.

> "In deciding on the initiation of an anti-dumping investigation, on whether or not to apply provisional or definitive antidumping measures and on the extent and level of such measures the investigating authority should consider whether an investigation or antidumping measures would be in the public interest."[37]

The above provision had to be supplemented with a footnote describing the coverage of the public interest consideration:

> "Consideration of the public interest should cover such questions as the competitive situation, the interests of consumers and industrial users of the product subject to the complaint and other relevant economic circumstances."[38]

An interesting approach was suggested by Korea to appraise public interest within the injury consideration. In particular, they proposed amending Article 3.1 with an additional obligation to consider "other interests on the domestic economy, including the interests of producers purchasing for production the imported or like products."[39] The proposed criteria for public interest assessment were production, competitiveness, and profitability of firms purchasing the imports; the interests of consumers; and the degree of competition or concentration in the domestic industry producing the like product."[40]

The opponents to an explicit public interest clause in the agreement argued the possibility of addressing public interest in multilateral agreement completely, since it is an issue for the national legislative authority rather than international negotiations.[41] They were also concerned that a public interest consideration would make an anti-dumping investigation even more politicized, expensive and time-consuming.[42] Finally, the United States also argued that to implement a public interest clause in a country with a retrospective system of duty collection would be highly complicated, because it would require the revision of injury findings every year.[43] The opponents also argued that the public interest clause "would open the door for lobby groups to influence the outcomes and introduce to exporters' minds

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[37] *Drafting Proposals of the Nordic Countries Regarding Amendments of the Anti-Dumping Code, GATT* Doc. No. MTN.GNG/NG8/W/76, (11 April 1990), p. 4.
[38] Ibid.
[39] *Submission by the Republic of Korea on the Anti-Dumping Code, GATT* Doc. No. MTN.GNG/NG8/W/40/Add.2, 20 December 1989, p. 3.
[40] Ibid.
[41] Stewart, T., pp. 1688-1689
[42] Ibid., p. 1689
[43] Ibid. 1688.

uncertainties in proceedings which should better be determined by the objective assessment of the facts."[44]

In addition, certain Members, which participated in the discussion, were of the opinion that if the public interest clause became mandatory, it should not have been subject to the WTO dispute settlement procedure.[45]

Once proponents of the public interest clause realized that their proposals were unlikely to succeed, they focus on negotiating broader procedural rights for the users and consumers of the product under investigation.[46] This resulted in the discretionary right of Members to decide on a list of interest parties in their national laws[47] and the obligation to provide industrial users and representative consumer organization with the opportunity to express their views on dumping injury and causality.[48]

2.2 Preamble of the Marrakesh Agreement

Pursuant to Article 31.2 of the VCLT, the preamble constitutes a part of the context of a treaty. While the preamble does not have a function to set out legal obligations,[49] it traditionally serves to state the objectives of a treaty. In addition, a preamble can serve plenty of other functions among which are facilitating consensus in negotiations, supporting acceptance, easing ratification, etc.[50]

Interestingly, the AD Agreement does not have a preamble. Unlike its previous editions, both the Kennedy and Tokyo Round Anti-dumping Codes included a preamble. The inclusion of a preamble into a treaty is not compulsory, but desirable; however the treaty objectives may be stated in other parts of an agreement or be expressed implicitly.[51] During the Uruguay Round Members tried to clarify the objectives previously stated in the Kennedy and Tokyo Round Codes. There were even proposals to modify the preamble with explicit public interest objectives, in particular Hong Kong suggested including the following recital: "recognizing that anti-dumping practices should be subject to balanced consideration of wider public interest."[52] Finally, WTO Members failed to agree on any text of the preamble to the AD Agreement at all.

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[44] Didier, P. *WTO Trade Instruments in EU Law*, London: Cameron May, 1999. p. 129
[45] Didier, P., p. 130
[46] Moen, P., p. 36.
[47] The AD Agreement, Article 6.11
[48] The AD Agreement, Article 6.12
[49] Bogdandi, V., in Wolfrum, R., Stoll, P-T. and Kaiser, K. (eds.), *WTO-Institutions and Dispute Settlement*, 2006, Koninklijke Brill NV. Printed in the Netherlands, p. 4
[50] Ibid.
[51] Qureshi, A., *Interpreting WTO Agreements. Problems and Perspectives*, New York: Cambridge University Press, 2006, p. 177
[52] Stewart, p. 1502

At the same time, the AD Agreement is an integral part of the WTO Single Undertaking, all of which are informed by the preamble of the Marrakesh Agreement.[53] The Appellate Body in *US-Shrimp* stated that the preamble of the Marrakesh Agreement "informs not only the GATT 1994, but also the other covered agreements."[54] Moreover, the preamble of the WTO Agreement is of particular importance, because it lays down the objectives of the entire trade regime.[55]

The first recital to the Marrakesh Agreement enshrines "first-order economic objectives of the WTO"[56], in particular: "raising standards of living, ensuring full employment, ensuring a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services."[57]

If anti-dumping measures are a remedy to an 'unfair' trade practice, they would contribute to securing the above objectives. Anti-dumping measures would restore 'fair' competition in the market of the product concerned, which, in turn, is an essential condition in maintaining effective demand, expanding production, and ensuring full employment, the growth in volume of real income and raising standards of living. Nonetheless, the practice of anti-dumping measures application has already shown that this remedy may have the opposite effect. The public interest investigation aims to assess whether the proposed measures may result in such a negative outcome and mitigate negative consequences by reducing or elimination the measures.

It should be noted that the first recital does not aim to establish a common interest or a WTO interest; it rather implies that "WTO Members have interests to be considered."[58] The public interest as a matter of anti-dumping law refers to the interest of a particular importing country, not to the interest of the international community or exporting countries concerned.

Even though public interest consideration is allowed under the AD Agreement, the inclusion into the agreement of a broader and obligatory public interest clause will allow to approach better WTO objectives enshrined in the preamble of the Marrakesh Agreement.

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[53] Qureshi, A., p. 172
[54] Appellate Body Report, *US-Shrimp*, para. 129
[55] Bogdandi, V., p. 5
[56] Ibid., p.7
[57] Marrakesh Agreement Establishing the World Trade Organization, preamble
[58] Bogdandi, V., p. 9

2.3 GATT Article VI and ADA Article 9.1

GATT Article VI condemns dumping causing injury to the domestic industry, but it does not require WTO Members to impose anti-dumping measures in each case when injurious dumping has been found.[59]

The Appellate Body in *US-1916 Act* clarifies that the verb 'may' in GATT Article VI:2 be "understood as giving Members a choice between imposing an antidumping duty *or not*, as well as a choice between imposing an anti-dumping duty equal to the dumping margin or imposing a lower duty."[60] The Appellate Body also explained that the "meaning of the word 'may' in Article VI:2 is clarified by Article 9 of the Anti-Dumping Agreement on the 'Imposition and Collection of Anti-dumping Duties'."[61]

Article 9.1 of the AD Agreement reaffirms the discretionary nature of the anti-dumping measures. According to the Appellate Body in *EC-Bed Linen*, "Article 9.1 confers on Members the discretion to decide whether to impose an anti-dumping duty in cases where all the requirements for such imposition "*have been fulfilled*."[62] In other words, when dumping, injury and causation have been found, the WTO Member may still decide not to impose anti-dumping measures. It also remains to the discretion of WTO Members whether the amount of duty should be the full dumping margin or less.

ADA Article 9.1 clarifies that it is "desirable that the imposition be *permissive* in the territory of all Members."[63] A number of WTO Members have implemented this provision through the introduction of the *public interest clause* into their legislations.[64] Article 9.1 further states that it is desirable that "the duty be less than the margin if such lesser duty"[65] adequately removes the injury to the domestic industry. This provision is known as *'lesser duty rule'*. A public interest clause and a lesser duty rule may be characterized as WTO-plus provisions in the domestic anti-dumping legislation.[66]

The key difference between the public interest clause and the lesser duty rule is that "the latter adjusted a duty to a level adequate to remove the injury to the domestic industry, while the former assessed the effect of a duty on other sectors of the economy."[67]This paper explores

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[59] GATT Articles VI:1 and VI:2
[60] *US-1916 Act*, Appellate Body Report, para. 113-116
[61] Ibid.
[62] EC-Bed Linen (Recourse to Article 21.5 – India), para. 122.
[63] The AD Agreement, Article 9.1
[64] Vermulst, E., The WTO Anti-Dumping Agreement, Oxford University Press, 2005, p. 171
[65] The AD Agreement, Article 9.1
[66] Luo, Y. Anti-dumping in the WTO, the EU and China. The Rise of Legalization in the Trade Regime and its Consequences, Wolters Kluwer, 2010, p. 135
[67] Note by the Secretariat, 'Summary *Report of the Meeting Held on 11, 13 & 15 April 2005'*, TN/RL/M/26, dated 11 May 2005, p. 2.

the issue of public interest. At the same time, the lesser duty rule may be regarded as a soft public interest clause (this argument is discussed in Section 4 below).

2.4 Procedural rights of consumers and industrial users

Article 6 of the AD Agreement provides for essential procedural rights of the interested parties in anti-dumping investigations, such as: ample opportunity to present in writing all evidence, the right to request a hearing, the right to participate in a hearing, to have enough time for responding to a questionnaire, including the possibility of requesting an extension, the right to access non-confidential information, the right to have a disclosure of final findings, etc.

At the same time, Article 6.11 sets out a non-exhaustive list of interested parties, namely:

- an exporter or foreign producer or the importer of product subject to investigation, or their trade or business associations;
- the government of the exporting country;
- a producer of the like product in the importing country, their trade or business associations.

Therefore, industrial users and consumers are not listed therein, while they obviously can have a legitimate interest in the anti-dumping investigation, because it may result in higher duties and consequently higher prices for a product subject to investigation.[68]

Simultaneously, ADA Article 6.11 does not preclude Members from allowing other actors to become an interested party to the investigation. So, consumers, industrial users, buyers, retailers, and traders of the product under investigation may become an interested party to the investigation subject to the national anti-dumping regulation of the importing member.

By way of illustration, New Zealand does not have a public interest clause in its domestic anti-dumping regulation, but industrial users and consumer organizations are viewed as interested parties and enjoy the same opportunities as any other interested parties.[69]Brazil, which has a public interest clause in its domestic regulation, provides industrial users and consumer organizations with the opportunity to participate fully in the investigation.[70] India

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[68] Bellis in Wolfrum, R., Stoll, P-T. and Koebele, M.(eds.), *WTO - Trade Remedies*, p. 121.

[69] Paper by New Zealand '*Practical Issues and Experience in Applying Article 2.4.2. Practical Issues and Experience in Providing Opportunities for Industrial Users and Consumer Organizations to Provide Information under Articke 6.12*', G/ADP/AHG/W/83 dated 29 March 2000 p. 3

[70] Paper by Brazil '*Practical Issues and Experience with respect to Questionnaires and Requests for Information under Articles 6.1 and 6.1.1. Practical Issues and Experience in Providing Opportunities for Industrial Users and Consumer Organizations to Provide Information under Article 6.12. Practical Issues and Experience in Conducting "New Shipper" Reviews under Article 9.5*',G/ADP/AHG/W/90 dated 25 April 2000, p. 6

adds to the list of interested party "any party which can establish a locus of interest in the investigation."[71]

Alternatively, industrial users or traders can become an interested party, if they import a product under investigation themselves without an intermediary company, so they may be qualified as importers and enjoy all rights of an interested party.

Without becoming an interested party to the investigation, industrial users, and representative consumer organizations if the product is commonly sold at the retail level, shall have opportunities "to provide information which is relevant to the investigation regarding dumping, injury and causality."[72] The obligation to provide such opportunities is imposed on Members in accordance with Article 6.12 of the AD Agreement.

However, commentators have raised concerns that there is no provision that obliged investigating authorities to seriously take this information into account while making final or preliminary determinations.[73] Indeed, there is no explicitly written obligation in the AD Agreement that the views of representative consumer organizations and industrial users be taken into account while deciding on the outcome of the investigation. Nonetheless, the right to submit information to the investigating authorities corresponds to the obligation of the latter to consider the submission, otherwise Article 6.12 becomes pointless. The nature of any administrative proceeding implies that if a party is entrusted with the right to provide information, such information upon its submission is included in the record of a case, studied by the authorities and taken into consideration while deciding on the case in hand. If information is not taken into consideration because it is irrelevant, unverifiable or non-acceptable according to any other reasons, the interested party who submitted such information should be notified and explained in a respective decision.

In addition, ignorance of important information submitted by industrial users or consumer organizations or giving unjustifiably minor weight to such information may be qualified as a biased and non-objective evaluation of facts in accordance with Article 17.6 (i). The Panel in

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[71] Paper by India '*Practical Issues and Experience in Applying Article 2.4.2. Practical Issues and Experience with Respect to Questionnaires and Requests for Information under Article 6.1 and 6.1.1. Practical Issues and Experience in Providing Opportunities for Industrial Users and Consumer Organizations to Provide Information* under Article 6.12. Practical Issues and Experience in Conducting "New Shipper" Reviews under Article 9.5' G/ADP/AHG/W/92 dated 1 May 2000, p. 3

[72] The AD Agreement, Article 6.12

[73] Horlick, G. 'How the GATT Became Protectionist, An Analysis of the Uruguay Round Draft Final Antidumping Code', Journal *of World Trade*, 27 (5), 1993, p. 11-12; Indian Council for Research on International Economic Relations, Aggarwal, A., *The WTO Anti-Dumping Agreement: Possible Reform Through the Inclusion of a Public Interest Clause*, Working Paper No. 142, New Delhi, 2004, p.3. ; Moen, P. *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada, Graduate Institute of International Studies*, Geneva, 1998, p. 37.; Palmeter, D., A Commentary on the WTO Anti-Dumping Agreement, *Journal of World Trade*, 30(4), 1996, p.58; Luo, Y. *Anti-dumping in the WTO, the EU and China. The Rise of Legalization in the Trade Regime and its Consequences*, Wolters Kluwer, 2010, p. 135

US-Stainless Steel stated that "the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in unbiased and objective manner."[74]

Pursuant to Article 6.12 representative consumer organizations and industrial users have a right to submit information only relevant to the investigation regarding dumping, injury and causality. This provision does not stipulate the explicit possibility to provide information on the harm which anti-dumping measures may cause to industrial users and consumers. However, representative consumer organizations and industrial users usually possess information which supports their position in the case and is valuable for the investigating authorities for making dumping, injury and causality findings. For instance, they may provide important data on consumers' tastes and habits, end uses and quality of the product under investigation, comments on market conditions and participants. As the practice of the EU shows decisions on the non-imposition of anti-dumping measures are often supportive to the finding of no injury.[75] Thus, the right of industrial users and consumer organisations to contribute to the injury investigation is of high importance in protecting their interests in the course of the investigation.

So, under the AD Agreement representative consumer organizations and industrial users may enjoy all the rights of the interested parties, once they are listed as such in the domestic anti-dumping law. If not, they have to be at least provided with the opportunity to contribute relevant information regarding dumping, injury and causality, which is further taken into consideration during the investigation.

Finally, it is worth noting that another WTO trade remedy agreement – the SCM Agreement – includes a provision requiring the consideration of consumer and industrial user interests while deciding on the application of countervailing duties.[76] However, this provision is of a discretional nature. Article 19.2 of the SCM Agreement, which generally reflects the provisions of GATT Article 9.1, additionally says that it is desirable to establish procedures which would allow investigating authorities to take due account of representations made by consumers and industrial users of the imported product subject to investigation.

This 'public interest' requirement of the SCM Agreement also reflects the provisions of Article 6.12 of the AD Agreement (see Table 2.1 below). At the same time, Article 19.2 is more precise than Article 6.12, because it requires establishing certain *procedures*, whereas Article 6.12 requires providing *opportunities* for industrial users and representative consumer organizations to express their views. Article 19.2 emphasizes that such procedures must allow

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[74] Panel Report, *US-Stainless Steel (Korea)*, para. 6.18.
[75] Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments*, Wolters Kluwer, 2011, p. 380
[76] SCM Agreement, footnote 50 to Article 19.2

investigating authorities "to take due account of representations made by domestic interested parties,"[77]while Article 6.12 is silent on this matter. This raises concerns that this provision does not oblige investigating authorities to seriously take submissions of the domestic interested parties into account (as discussed above in this Section). In contrast to Article 6.12, Article 19.2 does not limit participation of representative consumer organizations to only those cases where the product is commonly sold at the retail level. Moreover, Article 6.12 confines the submissions of the domestic interested parties to the issues of dumping, injury and causation.

Table 2.1 Consideration of consumer and industrial user interests in AD and SCM Agreements

Article 19.2 of the SCM Agreement	**Articles 6.12 and 9.1 of the AD Agreement**
The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member. It is *desirable* that the imposition should be permissive in the territory of all Members, that the duty should be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry, and that *procedures should* be established which would allow the authorities concerned to take due account of representations made by domestic interested parties[50] whose interests might be adversely affected by the imposition of a countervailing duty (footnote original, emphasis added). [50]For the purpose of this paragraph, the term "domestic interested parties" shall include consumers and industrial users of the imported product subject to investigation.	*Article 9:* The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry. *Article 6.12:* The authorities *shall* provide *opportunities* for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality. (emphasis added).

[77] The SCM Agreement, Article 19.2

However, in the end Article 6.12 ensures the rights of the industrial users and consumer organizations to a larger extent, since by using the word ‘shall’ it establishes a legal obligation of WTO Members to provide opportunities for industrial users and consumer organizations to make their views known. Article 19.2 introduces the ‘public interest’ requirement by using the words ‘desirable’ and ‘should’, which speaks for the discretional nature of the rule.

Chapter III Public Interest Issues in Domestic Laws of WTO Members: Practical Experience of the EU and Canada

The aim of this chapter is to describe modalities of public interest investigation. The examination focuses on the practice of Canada and the EU, though the selected experience of several other countries is provided at the end.

3.1 Legal framework

In the European Union the public interest clause is stipulated in Article 21 of the Council Regulation No. 384/96 of 22 December 1995 on the protection against dumped imports from countries not members of the European Communities (hereinafter – *EU Regulation*). Article 21(1) explains that a public interest test has to be based on examination of "all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."[78] It further states that in such an examination special consideration is given to "the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition."[79]

Article 21(2)-(4) and (6) of the EU Regulation envisages procedural rights of interested parties, including: the right to request a hearing, the right to review a non-confidential file, the right to make submissions and respond to the submissions of other interested parties, the right to make submissions on imposition of provisional duties, right to be informed of final findings.

In Canada the public interest consideration is provided for in section 45 of the Special Import Measures Act (hereinafter – *SIMA*) and section 40 of the Special Import Measures Regulations (hereinafter – *SIMR*). SIMA subsection 45.1 specifies that a public interest inquiry shall be initiated upon request of the interested person or through investigating authority own initiative, if there are reasonable grounds to consider that the imposition of an anti-dumping duty or its imposition in full amount "would not or might not be in the public interest."[80] SIMA subsection 45.3 further says that in such an inquiry "the Tribunal shall take into account any factors, including prescribed factors, that it considers relevant." The list of prescribed factors for public interest consideration has been defined in subsection 40.1(3) of the SIMR. These factors can be summarized as follows:

(a) availability of non-dumped imports of the same products;

(b) effect of a full anti-dumping duty on:

[78] EU Regulation, Article 21(1)
[79] Ibid.
[80] SIMA, subsection 45.1

(i) competition in the domestic market for product concerned;

(ii) Canadian producers that use the product concerned as an input in the production of other goods and in the provision of services (or in other words, the interests of a downstream industry);

(iii) competitiveness by limiting access to technology or the product concerned as an input for other goods and services;

(iv) consumer choice or availability of products at competitive prices;

(c) effect of non-imposition or reduction of the duty on companies producing inputs, including primary commodities, used in the domestic manufacture or production of like goods; and

(d) any other factors that are relevant in the circumstances.

EU and Canadian public interest clauses may be characterized as negative ones, because both of them require proof that the imposition of anti-dumping measures *are not* in the public interest.[81] Namely, Article 21(1) of the EU Regulation provides that once the dumping, injury and causation are found, the measures may not be applied, if "it can be *clearly* concluded that *it is not in the Union interest to impose such measures."*[82] Similarly, SIMA recommends the reduction or elimination of an anti-dumping duty, if it concludes that the imposition of such duties or their imposition in the full amount "*would not or might not be* in the public interest."[83] Both clauses stipulate a certain bias in favour of the domestic industry,[84] whereas the wording in the EU Regulation is even stronger in this regard.

The standard of the non-imposition of the measures is rather high and practically difficult to comply with. The decision on the non-application of the measures on the basis of a public interest test is "therefore an exception departing from normal rules and occurs only in special circumstances."[85]

3.2 Institutional framework

The EU operates a unitary system, where all substantive elements of anti-dumping proceedings such as dumping, injury, causation and public interest are considered by the same institution. In the EU this function is entrusted to the Commission. The latter is also entitled to initiate and terminate investigations as well as impose preliminary measures. Definitive anti-

[81] Sinnaeve, A. 'The 'Community Interest Test' in Anti-Dumping Investigations: Time for Reform?', *Global Trade and Customs Journal*, Vol.2, Issue 4, 2007, p. 158.
[82] EU Regulation, Article 21(1).
[83] SIMA, subsection 45.1.
[84] Regarding the EU public interest clause see Sinnaeve, A., p. 175.
[85] Luo, Y., p. 136.

dumping measures are adopted by the Council of Ministers based on a proposal from the Commission.

In contrast, Canada practices a bifurcated assessment process, where dumping and injury analysis are conducted by different institutions. In Canada a dumping investigation is conducted by the Canada Border Services Agency, while injury and causality matters are considered by the Canadian International Trade Tribunal (hereinafter – *CITT*). In case of a positive injury finding, the CITT is also authorized to consider a public interest inquiry, if it is initiated by an interested party. The CITT is also entitled to self-initiate a public interest investigation, but has failed to do this so far.[86] The CITT opinion on public interest is subject to further approval by the Minister of Finance.

It is occasionally discussed whether the competition authorities should be involved in a public interest investigation. The practice of the EU and Canada suggests that the competition authorities do not participate on a permanent basis in anti-dumping investigations, but they can contribute, if needs be. In Canada the competition authorities are entitled to intervene in the injury part of the investigation and are authorised to take part in the public interest investigation, including the submission of any information relevant to competition concerns or other aspects of public interest consideration.[87] In the EU the competition authorities may contribute to anti-dumping investigations, if appropriate.[88] For instance, in cases where the anticipated measures may considerably affect the conditions of competition or where an ongoing or completed investigation conducted by the competition authorities has any relevancy to the present anti-dumping investigation.[89]

This approach to the participation of competition authorities in the anti-dumping investigation is fair enough. On the one hand the investigation is not complicated by adding the separate considerations of the competition authorities, but on the other hand the latter has a right to inform the trade authorities of its opinion. Such an opinion may be of value, especially in terms of the public interest analysis, which often involves certain competition concerns.

3.3 Procedural approach

The Union interest is considered as a substantial element (as well as dumping, injury and causation) in each and every new anti-dumping investigation or review (both expiry and full

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[86] Productivity Commission, Inquiry Report, '*Australia's Anti-dumping and Countervailing System*', No. 48, 18 December 2009, p. 61.
[87] *Replies of Canada to the List of Questions Posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest*, G/ADP/AHG/W/116 dated 24 April 2001, p. 3
[88] *Replies of the European Communities to the List of Questions Posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest*, G/ADP/AHG/W/114 dated 11 April 2001, p. 3
[89] Ibid.

interim reviews)[90] conducted in the EU. The Union interest shall be analysed before imposing definitive as well as preliminary measures. If following the preliminary regulation interested parties do not submit any additional substantive information, the definitive regulation merely confirms the conclusions reached in preliminary determination.[91]

By contrast, in Canada a public interest consideration is not obligatory in each anti-dumping investigation and is subject to a separate inquiry from interested parties or the CITT's own initiative. Given this fact, there is a specific procedure to initiate a public interest investigation, called 'commencement phase' [92] of a public interest inquiry. The commencement phase starts with the request of an interest party, which has to meet specific requirements: (i) it must be submitted in writing within forty-five days of the CITT's injury order;[93] (ii) it must mention public interest affected by anti-dumping measures;[94] (iii) the request must discuss the availability of like goods from other sources and the expected effect of the duty on competition, consumers, and Canadian producers that "use the goods as inputs in the production of other goods" or "in the provision of services."[95] After submission of such a request other interested parties have twenty-one days to file their comments on it.[96] Within ten days following the receipt of responding submissions, the CITT makes a decision whether to initiate a public interest investigation.[97] The relevant notice of the decision is published in the official gazette.[98] After that, the 'investigation phase'[99] of a public interest inquiry begins.

To participate in the public interest investigation, including the right to file submission, the relevant notice shall be made to the CITT within twenty-one days after publication in the official gazette. The persons eligible to participate in the investigation are (i) any persons "engaged in production, purchase, sale, export, or import"[100] of the dumped products, like products or inputs of like products; (ii) any persons acting in their behalf; (ii) any users of any like goods; and (iii) Canadian consumer advocacy associations.[101] This list gives the opportunity to a broad range of interested parties to make their views knows on public interest concerns. For instance, the following parties participated in or at least made comments in

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[90] In Case T-132/2001 *Euroalliages and Others* it was confirmed that the Union interest should be considered within the expiry review investigation.
[91] E.g. *Mesh Fabrics* (China), 2011, definitive regulation at recitals 61-62; *Cargo Scanning System* (China), 2010, definitive regulation at recitals 121-122;
[92] CITT, *Guideline – Public Interest Inquiries*, Ottawa, 2000, p.1
[93] SIMR, subsection 40.1(1)
[94] SIMR, subsection 40.1(2) (b)-(c)
[95] SIMR, subsection 40.1 (2) (d)
[96] CITT, *Guideline – Public Interest Inquiries*, Ottawa, 2000, p.2
[97] Ibid.
[98] Ibid.
[99] CITT, *Guideline – Public Interest Inquiries*, Ottawa, 2000, p.1
[100] SIMR, subsection 41(a)
[101] SIMA, subsection 45(6), SIMR, subsections 40.1(4), 41 in Bowman, G. et al., *Trade Remedies in North America*, Wolters Kluwer, 2010, p. 263.

certain investigations: welfare organizations, health organizations, hospitals, unions, the town of Creston, National Anti-Poverty Organisation.

Compared to Canada, the list of interested parties in the EU is narrower. The following parties can contribute to a public interest investigation in the EU: complainants, importers and their representative organizations, representative users, representative consumer organizations.[102] In contrast to Canada, parties with non-economic interests cannot participate in the investigation. The regulation and practice generally suggests that only parties with economic interests may have standing in a public interest investigation. In the case of *Bureau Europeean des Unions de Consommateurs v. Commission* it was clarified that the party has standing if there is "an objective link between the party's activities and the product under investigation."[103] Representatives of upstream industries are not directly mentioned in the list, but as standard practice, their interests are taken into account. Exporters and governments of exporting countries have no standing in the public interest investigation.[104] However, in *Petrotub and Republica v. Council*, the Court found that exporters have to be informed of the results of public interest consideration and be heard on the matter of the Union interest on the basis of Article 20 'Disclosure' of the EU Regulation.[105] Moreover, in *Polyester Staple Fibres,* one association of Chinese exporters and two Korean exporters were mentioned as parties concerned and made their views known.[106]

In the EU the collection of information for a public interest test is performed together with data collection for dumping and injury investigations. The investigating authorities are sent questionnaires to known union producers, industrial users, upstream industries, importers, traders, consumer organizations, etc. The time-limit for replying to the questionnaire is specified in the notice for initiation. While in Canada the submissions are filed for thirty-five days after the notice on initiation of public interest investigation; an additional ten days are given to respond to other submissions.[107] The CITT normally holds hearings after fifty-six days starting from the notice of initiation.[108] The entire 'investigation phase' of a public interest investigation is taken approximately 100 days.[109]

The non-cooperation of interested parties is a major problem of the public interest consideration in the EU. The conclusion is usually drawn based on the information submitted

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[102] EU Regulation, para. 21.2.
[103] Case T-256/97 *Bureau European des Unions de Consommateurs v. Commission, para. 75, in Muller,* W., Khan, N. & Scharf, T. *EC and WTO Anti-Dumping Law*, Oxford University Press, 2009, p. 714.
[104] Muller, W., p. 714.
[105] Joined cases T-33/98 and T-34/98 *Petrotub SA and Republica SA v. Council* paras. 203-204.
[106] *Polyester stample fibres* (Belarus, China, Korea, Saudi Arabia), 2008, regulation maintaining the anti-dumping duties at recitals 10.
[107] Bowman, G. et al., p. 263.
[108] Ibid, p. 263-264.
[109] CITT, *Guideline – Public Interest Inquiries*, Ottawa, 2000, p.4.

by the interested parties (e.g. reply to the questionnaire, comments), so the participation of users, consumers and their organizations are critically important. The Commission often interprets non-cooperation as evidence of negligible impact of the measures on users, consumers or other parties potentially concerned.[110] While in Canada the public interest test is requested by interested parties that have initially presumed a more active approach of the parties allegedly harmed by the anti-dumping measures.

Finally, an important distinction between the Canadian and EU approach to a public interest investigation is its final result. In the EU a public interest investigation may result only in complete elimination of the anti-dumping measures, whereas in Canada it may lead to either elimination or reduction of the duty, but up to now the CITT has made the decision only on reduction of duties. The issue of inclusion of similar flexibility into the EU system has been introduced for debate by the Commission in so-called Green Paper.[111]The Commission notes that due to the lesser duty rule such flexibility would be limited only to downward adjustment. Following this proposal, commentators note that modulating the duty level due to public interest concerns implies unclear parameters compared to the precise methodology of dumping and injury margin calculation, which "would lose part of its relevance if the so-established outcome could at the end be modulated according to non-precise parameters."[112]There is also a concern whether it is possible to express the balancing of interests in quantifiable parameters.[113]In the same context, there is a proposal to provide the option of exempting certain products from anti-dumping duties as a result of public interest consideration.[114]

It is worth noting that sometimes upon public interest consideration the Commission decides to change the form of proposed anti-dumping measures from the *ad valorem* duty rate to the minimum import price[115]or adjust the period of duty application.[116]

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[110] E.g. Expiry review and partial interim review on *Okoume plywood* (China), 2011, at recital 87; expiry review on *Furfuraldehyde* (China), 2011, at recital 80; expiry review on *Synthetic fibre ropes* (India), 2010, at recital 90-91; Expiry review on *Polyethylene Terephthalate* (China), 2010, at recitals 101-102, 105-107; *Zeolite A powder* (Bosnia and Herzegovina), 2011 provisional regulation, at recital 98; *Certain compressors* (China), 2008, definitive regulation at recital 131; *Citrus fruits* (China), 2008, provisional regulation at recital 113.

[111] The Commission of the European Communities, the Communication from the Commission 'Europe's trade defence instruments in a changing global economy', A Green Paper for consultation, Brussels, 2006, (hereinafter – *Green Paper*) p. 7.

[112] Sinnaeve, A., p. 177

[113] Ibid.

[114] Green Paper, p. 7

[115] *Melamine* (China), 2011, definitive regulation, paras. 75-76, 78

[116] Expiry review on *Integrated electronic compact fluorescent lamps* (China, Vietnam, Pakistan, Philippines) the measures were extended only for one year, because the duties caused substantial price increase and consumers were unable to switch to energy-saving, 2007, at recital 107, 118.

3.4 Substantive approach

3.4.1 Economical vs. non-economical considerations

The discussion of 'public interest' issue during the Doha Round Negotiations has raised a question whether the public interest is a purely economic category, or it also includes non-economic considerations such as worsen of relationship with exporting country, public health, environmental concerns, etc.

In the practice of the EU, public interest is only considered an economic category. The non-economic considerations are not taken into account during the public interest investigation. The examples of such irrelevant considerations are as follows:

- The worsening of relationship with exporting country. In *Refractory Chamottes*, the Council noted that foreign producers and exporters are expected to operate according to the principles of fair trade.[117]

- General policy considerations. For instance, in *Fluorescent Lamps*,[118] the argument in favour of energy saving policy was invoked. Some interested parties claimed that the anti-dumping measures would contradict the European energy policy, because the price of energy saving lamps would rise and their sales would shrink. The Commission took the approach that the Union industry should not have suffered from the dumped imports and paid the cost of the Union energy saving policy. Importantly, it was also found that the anti-dumping duties would not cause significant price increase for consumers. In *Footwear with Uppers of Leather* the Commission explained that "the [Union] interest analysis is an economic analysis focusing on the economic impact of taking/not taking anti-dumping measures on operators within the [Union]. It is not a tool by which anti-dumping investigations can be instrumentalised for general political considerations relating to foreign policy, development policy etc."[119]

- Environmental concerns. In *Polyester Staple Fibres*[120] it was stated that Union producers made polyester staple from recycled materials, which requires less energy consumption comparing to chemical process and transport of polyester staple fibres from Asian countries, which generate carbon emissions. Thus, "replacement of Community production by dumped imports, in particular from the PRC and Korea, would increase carbon

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[117] *Refractory chamottes* (China), 1996, definitive regulation at recital 23
[118] *Integrated electronic compact fluorescent lamps* (China), 2001, provisional regulation at recitals 115-116
[119] *Certain footwear with uppers of leather* (China,Vietnam), 2006, definitive regulation at recital 279
[120] *Polyester stample fibres* (Belarus, China, Korea, Saudi Arabia), 2008, regulation maintaining the anti-dumping duties at recitals 80

emissions and set back the EU climate change objectives."[121] However, the argument was rejected and the Commission recalled again that the public interest investigation focused on economic effect of the measures concerned.

In Canada while economic criteria play a principle role in the analysis, the non-economic consideration may be also taken into account and become a ground for decision. In *Iodinated Contrast Media* and *Baby Food* cases the CITT recommended the reduction of the duty primarily due to health and welfare care concerns. In *Baby Food* case the duty was reduced approximately up to two third of the full duty in large part in order to mitigate the consequences for low-income families and concerns over child health and welfare. [122] In *Iodinated Contrast Media,*[123] a product under investigation was the low osmolality contrast media (LOCM), which is diagnostic imaging agents used for X-ray purposes in soft tissue or organ examination. The CITT found that "price increase at a level that would lead to a significant reduction in the number of procedures or to a shift towards greater use of HOCM[124] would reduce the quality of health care for patients and, as a result, would not be in the public interest."[125] (footnote non-original). In addition, the CITT concluded that the expected price increase would reduce the radiologist choice and would shift additional burden on hospital budgets, which is contrary to the best interest of patients.

3.4.2 Effect on competition

The effect on competition is explicitly mentioned as a criterion for the public interest test in Canada.

In *Stainless Steel Wire*[126] case the CITT recommended the reduction of anti-dumping duties from 181 to 35 percent on belting wire and wireline originating in or exported from the United States. The CITT came to the conclusion that the anti-dumping duty would significantly lessen competition in the market of the product concerned where a short delivery time is required. Belting products made of belting wire are predominantly used in auto assembling and food industries. Belting products are used by these industries in the assembling lines. The auto assembling "industry operates on 'a just-in-time delivery basis'."[127] The food preparation industry is mostly running constantly on '24/7 basis' and characterized by low margins of profit. Therefore, both of them need suppliers, which are able to assure quick and reliable time of delivery. The CITT found that delivery from countries

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[121] Ibid.
[122] *Certain Prepared Baby Food*, 30 November 1998, PB-98-001.
[123] *Certain Iodinated Contrast Media*, 29 August 2000, PB-2000-001.
[124] LOCM create fewer adverse side effect than high osmolality contrast media (HOCM)
[125] *Certain Iodinated Contrast Media*, 29 August 2000, PB-2000-001, p.11
[126] *Certain Stainless Steel Round Wire*, 22 March 2005 as amended 1 April 2005, No. PB-2004-002
[127] Ibid., para. 73

non-subject to the investigation take considerably more time than delivery from the United States. In addition, the speedy delivery is of high importance for the users of wireline, namely gas and oil drilling companies. It was found that most drilling work used to occur within December – March and usually companies involved are well prepared with all equipments. However, in practice unforeseen disruptions during work performance lead to emergency demand that cannot be satisfied domestically. The CITT came into conclusion that under such circumstances "the loss of even one country as a source of supply is significant."[128]

In *Iodinated Contrast Media,*[129] the CITT also found that the measure would lead to a reduction in competition. In particular, there was great concern that the full duty might have led to remaining one supplier instead of three in the market, which would consequently result in reduced "ability of purchasers to prevent this lone supplier from increasing its prices."[130] The new sources of supply were found to be uncertain in terms of both reliability of supply and price.

Even not directly specified in EU 'public interest' clause, "the preservation of a competitive situation on the market is a relevant consideration in the context of the assessment of the potential effect of measures on, in particular, the Community industry, users, consumers and suppliers." [131] The issues of competition are frequently involved in anti-dumping investigations conducted in the EU. They usually arise as an argument that anti-dumping duties would reduce competition in the market and may even lead to a monopoly of domestic producers. In most cases, the Commission takes the view that the reductions of competition is unlikely to happen because of availability of alternative sources of supply. Additionally, the aim of anti-dumping measures is not to limit the access to market for certain foreign producers, but to cure the market distortion having resulted from unfair trade practices. [132] However, in certain cases the competition concerns were reflected on the measures applied. For instance, in a review investigation on *Potassium Chloride* the Commission decided to change the form of the measure, because anti-dumping measures had lead to the elimination of a significant supply source and reduced competition in the market.[133]

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[128] Ibid., para. 98.
[129] *Certain Iodinated Contrast Media*, 29 August 2000, PB-2000-001.
[130] Ibid., p. 12
[131] Sinnaeve, p. 170
[132] The issue of competition were discussed in e.g. *Certain ring binder mechanisms* (Thailand), 2011, definitive regulation at recitals 50; *Continuous filament glass fibre* (China), 2010, provisional regulation at recitals 145-149; *Certain prepared or preserved citrus fruits* (China), 2008, definitive regulation at recital 49.
[133] *Potassium chloride* (Belarus, Russia), 2006, definitive regulation at recital 169.

3.4.3. Interests of domestic industry and upstream industries

It is presumed that anti-dumping measures are imposed in the interest of domestic industry suffering from injurious dumping. However, the domestic industry should be able to benefit from the measures by increasing the prices or quantities of product sold.[134] For instance, in Canada in *Iodinated Contrast Media* the CITT found that considering current market conditions the domestic industry would not able to raise the price much with the full amount of the duties imposed.[135]

In most EU cases, the Commission rules that the domestic industry is viable and competitive enough to benefit from the measures or that imposition of anti-dumping measures are crucial for the domestic industry to remain viable or restore its competitiveness in the market. However, sometimes the investigation shows that the current conditions of the domestic industry or market patterns do not allow domestic producers to benefit from measures imposed. For instance, during the expiry review in *Ferro-Silicon* case, the Commission found that the domestic industry was not able to maintain the market share and earnings, closed two companies and reduced employment, albeit "imports from the countries almost disappeared."[136]

The positive impact of anti-dumping measures on the domestic industry concerned will have, in turn, positive effect on their suppliers. Likewise, upstream industry suffers from the further worsening of the domestic industry situation. For example, in *PTFE case* the Community made a conclusion that anti-dumping measures would be in the interests of upstream industry, which depends largely from (75 percent of turnover) domestic industry concerned (PTFE producers).[137]

3.4.4 Interests of users

Anti-dumping measures often target imported raw materials or intermediate goods, which are further used by local industries for processing purposes. The impact of the measure on the user industries primarily implies the increase in their production costs. It concerns the ability of downstream industry to compete not only within the Union market but also in export markets. Thus, the determination of public interest often involves a conflict of interest between user industries, which aim to prevent the rising of their production costs, and domestic industry, which claim imposition of protective measures to renew 'fair'

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[134] Muller, W., p. 716.
[135] *Certain Iodinated Contrast Media*, 29 August 2000, PB-2000-001, p. 14.
[136] *Ferro-silicon* (Brazil, China, Kazakhstan, Russia, Ukraine, Venezuela), 2001 regulation terminating the proceeding at recital 151
[137] *PTFE* (China, Russia), 2005, definitive regulation at recital 137

competition.[138] The increase of prices for the users concerned, however, would not itself be a reason justifying non-imposition of the measures for the EU because low prices for imported products are seen by the EU as a consequence of 'unfair' trade practice. At the same time, as was mentioned above, there is no consensus on the issue of whether dumping is 'unfair' trade practice.[139] The AD Agreement "does not pass judgment" [140] on this matter. In this vein, if dumping is not 'unfair', the analysis conducted by the EU would be different.

The investigating authorities will attempt to predict the effect of anti-dumping measure on the users' cost of production. They will first seek to define the share of product subject to investigation in the users' cost of production and to predict the cost effect of anti-dumping measures.[141] Calculating the expected cost increase is important, but it is nearly impossible to define the exact threshold indicating disproportional effect of the measure, because the impact of the latter on the users depends on plenty of factors, such as: the level of competition on the market, profit margins of market players, the availability of other sources of supply, etc.[142] The investigating authorities will consider the existence of alternative sources: non-dumped imports from countries concerned, domestic industry, imports from non-subject countries, imports under low anti-dumping duty, etc. They will also consider the extent to which the user industry might "pass on any cost increases to the next stage of the economic chain." [143] If the product concerned is used by several different industries the effect will be considered for each user industry separately. [144]

Even though the interests of industrial users are the most frequently involved in public interest considerations, the example of non-application of the measure due to the interests of users is quite rare both in the EU and Canada. The general tendency is that the investigating authorities give more weight to the interests of complainant industry.

For instance, in Canada in *Stainless Steel Wire* case, where the CITT recommended the reduction of the duties, it was found that belting wire constitutes a major portion of the cost of belting products. The duties would substantially impair the competitiveness of the Canadian producers of belting products.

The *Gum Rosin*[145] case is a rare example of non-application of anti-dumping measures due to user industries concerns in the EU. The investigation showed that the measures would result in substantial cost increase for number of industries, which provide jobs for a lot of

[138] Muller, W., p. 722
[139] See supra note 3
[140] Ibid.
[141] Sinnaeve, p. 166
[142] Ibid, p. 167, similarly Muller, W., p. 723
[143] Sinnaeve, p. 166-167
[144] Muller, W., p. 723, e.g. Expiry review and partial interim review on Silicon (China, Korea), 2010, at recitals 147-157
[145] *Gum Rosin* (China, Taiwan), 1994, regulation terminating the proceeding

employees. However, this finding alone was not convincing for not imposing measures; it was supported by the findings that the measures would not be effective in removing injury to domestic industry.[146] The commentators note that this case shows the general tendency that "[i]nterests of users are rarely decisive on its own, only when it is doubtful whether the [Union] industry will benefit from measures, the negative impact on users becomes important."[147]

Having considered the fact that the non-imposition of measures due to users' interests is exceptional in the EU, but consideration of their interests is involved almost in every investigation, the Commission has developed plentiful "repertoire of excuses"[148] to explain the imposition of anti-dumping measures.

The Commission often found that the cost of the product concerned in the total cost of users' production is relatively small, so the effect of the measure is negligible.[149] The measures are also often justified by the fact that the cost increase can be absorbed by the high profit margins of user industries, without significant effect on overall profitability.[150]

For example, in *Zeolite A Powder*,[151] it was found that cost of the product concerned in the total cost of the final product constituted less than 5 per cent on average, and thus the Commission concluded the product under investigation does not represent "a very significant cost element in the finished product."[152]The Commission further compared the expected cost increase with profitability rates of co-operating users. The profitability of users on the finished product concerned was around 11 per cent and for all their products was over 20 per cent. Therefore, the Commission concluded that the measure would not lead to a significant impact on users.

Notably, in EU injury investigations "[e]ven a relatively small undercutting margin may be a sign of injury." [153] In *Refractory Chamottes*, the Commission found a continued price undercutting by 4 per cent, which was an indication of injury due to its systemic character.[154]However, a small undercutting margin may also show lack of injury or causation,

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[146] Sinnaeve, p. 168
[147] Ibid.
[148] Wellhausen, M. '*The Community Interest Test in Antidumping Proceeding of the European Union*', Wellhausen Published, 30 March 2001, p. 1070.
[149] Expiry review on *Graphite electrode systems* (India),2010, at recitals 95-96; *Sodium gluconate* (China), 2010, definitive regulation at recital 31; *Aluminum road wheels* (China), 2010, definitive regulation at recital 151;
[150] *Sodium gluconate* (China), 2010, definitive Regulation, at recital 31; expiry review on *Sodium cyclamate*, 2010, at recital 146;
[151] *Zeolite A Powder* (Bosnia and Herzegovina), 2010, provisional regulation, at recitals 98-110;
[152]Ibid., at recitals 104;
[153] Muller, W., p. 293
[154] *Refractory Chamottes* (China), 1995, provisional Regulation at recital 24.

if Union producers have been able to raise their prices in spite of price undercutting by foreign exporters.[155]

According to the Commission, the negative effect of the anti-dumping measures can be also mitigated by the existence of alternative imports from non-subject countries.[156]At the same time, it should be noted that existence of non-subject imports may indicate the absence of causation between allegedly dumped imports and injury to domestic industry. The US practice is of value on this matter. In *Bratsk Aluminium Smelter, et al. v. U.S. et al.,* the United States Court of Appeals for the Federal Circuit noted that anti-dumping measures may result in "the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers."[157]The Court pointed out that the investigating authority "has to explain, in a meaningful way, why the non-subject imports would not replace the subject imports and continue to cause injury to the domestic industry."[158]

The Commission explains that the anti-dumping measures even may yield benefits for industrial users because they ensure a variety of supply sources.[159]For instance, foreign sources of supply located geographically far from the Union might not always guarantee regular and prompt deliveries.[160] Thus, it is in the interest of the users to have sources of supply within the Community in order to avoid dependency from external supply.[161]Anti-dumping measures would ensure availability of the product concerned in the short term, reliability and consistency of the supply.[162] In this respect it should be noted that under specific circumstances in an industry there should be a means to conclude whether the measure to ensure prompt or regular supply would be in the public interest, which cannot be secured otherwise. In the modern world logistic services are generally developed enough to meet strict deadlines of delivery. Such findings of the Commission should be based on explicit submission, where users emphasize that anti-dumping measures would ensure prompt, regular, reliable and consistent supply. Alternatively, there should be precise evidences in the record proving failure of exporters to ensure reliable, regular or prompt delivery.

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[155] Muller, W., p. 293,
[156] Expiry review on *Graphite electrode systems* (India), 2010, at recitals 95; Expiry review on *Polyethylene terephthalate* (China), 2010, at recitals 97-98;
[157] *Bratsk Aluminium Smelter, et al. v. U.S. et al.,* United States Court of Appeals for the Federal Circuit, dated April 10, 2006, p. 7
[158] Ibid, p. 12
[159] *Aluminum road wheels* (China), 2010, definitive regulation at recital 155; Expiry review on *Tungsten* (China), 2011, at recital 111
[160] Muller, W., p. 727
[161] Van Bael Bellis, p. 388
[162] Expiry review on *Furfuryl Alcohol* (China), 2009, at recital 111

3.4.5 Interests of consumers

As was mentioned above products under investigation often include intermediate goods or raw materials used for the processing rather than purchased by final consumers. Therefore, anti-dumping measures imposed on them generally do not have direct effect on final consumers.[163] Though it is possible to argue an indirect effect on them, since a low price of raw materials leads to a cheaper price of final products at the retail stage.[164] Final goods also become subject to the investigation from time to time, among them refrigerators, colour television receivers, lighters, salmon, shoes with uppers of leather, etc. Some of the products may simultaneously constitute a final and an intermediate product, for instance, sugar.

In *Stainless Steel Wire* case the CITT explains the meaning of the term 'consumer'. The CITT refers to the Canadian Oxford Dictionary, which says that 'consumer' means "a person who consumes, esp. one who uses a product… a purchaser of goods or services" and that 'consumer goods' as "goods put to use by consumers, not used in producing other goods".[165] Taking into consideration this description, the CITT concluded that producers, which used the product concerned as an intermediate good in the manufacturing of the finished good, are not consumers.[166]

Consumers are generally presumed as a group considerably effected by the anti-dumping measures, because the measures usually cause prices of the product concerned to rise. The evaluation of consumer interests is listed as a part of public interest test in EU and Canadian 'public interest' clause. However, in practice the investigating authority gives little weight to them.

Lack of attention to the consumer interests is well-explained by the public choice theory, which suggests that "policymaking under democratic government depends on the interplay of special interest forces in the political "marketplace".[167] Elected governmental officials tend to maintain their own political interests, thus they stand for the interests of those groups in society, which, in turn, can further support them during the election campaign.[168] The potential benefits of a producer or an association of producers for pursuing trade initiative are quite high, while the gain for each individual consumer is rather small.[169] Comparing to consumers, producers feel the advantages gained upon results of trade policy to a larger

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[163] Sinnaeve, p. 169
[164] Bentley, P. *Anti-dumping and countervailing action: limits imposed be economic and legal theory*, Edward Elgar Publishing Limited, 2007, p. 166
[165] *Certain Stainless Steel Round Wire*, 22 March 2005 as amended 1 April 2005, No. PB-2004-002, footnote 112.
[166] Ibid.
[167] Buchanan and Tullock (1962): Olson (1965) in Sykes, A. *The WTO Agreement on Safeguards. A Commentary*, New York: Oxford University Press, 2006, p. 64
[168] Sykes, A. p. 64
[169] Ibid. p. 65

extent. So, governmental officials are likely to choose caring about the interest of producers, rather than consumers.[170] While the overall benefit for consumers as a group may be high, they usually constitute quite a large non-homogeneous group, which rarely acts as well-organized force. Consequently, they are not sufficient enough in participation in anti-dumping proceeding, which is very technical and complex. The cost of sponsoring the establishment and effective activity of a consumer association often outweighs the potential benefit.[171]

Additionally, the impact of the measures to consumers may be difficult to appraise because of the heterogeneous nature of the group and their location at the end of the distribution chain.[172] Yet, it appears that consumer purchasing decisions are often quite difficult to access in commercial terms, one of the examples is "brand loyalty despite the availability of cheaper substitutes."[173]Anyhow, once the investigating authority examines the impact of anti-dumping measures on consumers, they normally focus on two criteria: prices and consumer choice.

Price increase is one of the expected outcomes of anti-dumping measures, which may harm consumers. However, in time the benefit of low prices may disappear. Dumped prices of the product concerned may force some firms to leave the market, which according to the Commission leads to reduced competition and higher prices in the market.[174] At the same time, price increase is one of the purposes of the anti-dumping measures, especially taking into consideration the fact that the injury is often taken the form of depressed prices.[175]

The EU normally does not consider a minor price increase as a heavy burden for consumers. The investigating authority believes that the impact on prices is insignificant, while "maintenance of a viable Union industry is in the consumer's best interest"[176] because "it is in long term interest of consumers to maintain a variety of sources of supply and competition."[177] Nevertheless, in some cases the Commission has found that the duties would increase the price charged to final consumers considerably, but finally concluded the long-term advantages of improving alternative suppliers would mitigate the short-term increase in prices.[178]

Another question usually considered by the investigating authority is whether the price increased caused by the anti-dumping duties will be really reflected on prices paid by

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[170] Ibid.
[171] Ibid.
[172] Muller, W., p. 729
[173] Sinnaeve A., p. 168, similarly, Muller, W., p. 729
[174] Muller, W., p. 730-731
[175] Sinnaeve, A., p. 169
[176] Wellhausen M., p. 1075
[177] Plain Paper Photocopiers (Japan), 1995, definitive regulation at recital 95
[178] Ibid., p. 1076

consumers. In *Ironing Boards* case[179] the Commission found that "average retail price of an ironing board is around EUR 35, whilst the average unit dumped import price at the Community frontier, i.e. including transportation costs, was found to be EUR 6,53."[180] In the worst case scenario, when consumers would share the burden together with importers and retailers, the price paid by consumers would increase by less than half a euro, considering that the life of an ironing board is five years minimum. Moreover, the Commission found that the consumer did not benefit from the recent increase of low-priced imports because the retail prices had not fallen in reaction to these low import prices. Consequently, the Commission stated that "there is no reason to believe that retail prices would change should anti-dumping measures be imposed."[181] Based on the above, the Commission concluded that "any financial impact of anti-dumping measures on the consumers of ironing boards would most likely be negligible. On the other hand, should the anti-dumping measures not be imposed, the Community production would in all likelihood disappear and the choice of product types available to the consumers may decrease."[182]At the same time, the Commission offered no evidence for the statement that the choice of available products might decrease.

Similarly, in *Sugar* case the Consumers' Association of Canada claimed that the anti-dumping duties would lead to a price increase for sugar and many other products containing sugar. The CITT rejected this claim stating that the duties would not lead to a significant price increase because "competition among the refiners, the countervailing power of the re-sellers and the availability of refined sugar from non-subject countries will combine to restrict further increases in domestic refining margins."[183]However, as was mentioned in this Section above, availability of non-subject imports may indicate an absence of causal link between dumped imports and injury to the domestic industry.

Reduced competition which may occur after the imposition of duties may result not only in price increase, but also in limited consumer choice. Some exporters may decide to leave the market after the imposition of the measures. The reduction in consumer choice is unlikely to happen if there are plenty of supply source of the product concerned. Besides, if the exporters concerned already have plants within the Union, there is no risk of limited consumer choice after the imposition of the measures.[184]

In *Certain Laser Optical Reading Systems*, the Commission came to the conclusion that anti-dumping measures would considerably limit the variety of the product in the market, which

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[179] *Ironing boards (China, Ukraine)*, 2006, provisional regulation at recital 147-150
[180] Ibid., at recital 148
[181] Ibid.
[182] Ibid., at recital 149
[183] *Refined Sugar*, 4 April 1996, No. PB-95-02, p. 36
[184] Sinnaeve, p. 170; similarly, Muller, W., p. 731

the Union industry could not compensate for in the foreseeable future. In this case, it was decided not to adopt measures based on the Community interest grounds.[185] In *Footwear with Uppers of Leather*, children's shoes were not subject to preliminary measures due to the public interest consideration. However, the Union industry challenged this decision arguing that children's shoes are produced within the Union as well. At the final stage of the investigation the Commission decided to spread the duties on children's shoes because there were no grounds to distinguish them from other types of shoe under investigation.[186]

In *Beer Case*, the CITT recommended the reduction of the anti-dumping duties to a level necessary to remove injury to the domestic industry. One of the grounds for this decision was consumer interest considerations. In particular, the CITT was of the opinion that the duty in the full amount of dumping margin would reduce consumer choice and "may eliminate the brand as an effective competitor in the marketplace."[187]

3.4.6 Interests of importers and traders

Considering the experience of the EU and Canada, up to now there have been no cases terminated because of the interest of importers or traders.

Anti-dumping measures can cause importer costs to increase. However, similarly to users, the fact of a cost increase as such is not a reason for non-imposition of measures. The investigating authorities consider share of the product concerned in total turnover of the importers, profit margins and to what extent importers are able to pass on the cost increase to their customers.[188] The investigating authority usually concludes that importers can mitigate these negative consequences. The activity of importers and traders usually focus on variety of products originating in numerous countries, so they can easily switch to other products or seek for new sources of supply.

For instance, in *Certain Refrigerators, Dishwashers and Dryers* the CITT recognized that importers "may be required to make adjustments resulting from new market conditions."[189]

Interestingly, in *Certain Ring Binder Mechanisms* (RBM),[190] it was concluded that the anti-dumping measures may negatively affect the activity of one importer, which also produces the RBM within the Union. Sales of product under investigation are crucial for this importer, since many of its customers require the availability of a full range of products. The product under investigation is less sophisticated product, which are ordered to offer a complete

[185] *Laser optical reading systems*, regulation on terminating the investigation dated 21 December 1998, recital 18
[186] *Footwear with uppers of leather* (China, Vietnam), 2006, provisional regulation at recitals 250-252; definitive regulation at recitals 254-257
[187] *Beer*, 25 November 1991, No. PI-91-001, p. 4
[188] Sinnaeve, p. 165
[189] *Refrigerators, Dishwashers, and Drayers* (3October), PB-2000-002
[190] *Certain ring binder mechanisms* (Thailand), 2011, provisional regulation at recitals 97-98, 103.

products range. Moreover, sales of the product under investigation constitute a non-negligible part of importer's turnover (around 15%). Even though the Commission concluded that the measures would have a significant impact on the importer's situation, the measures were applied. It was justified by the fact that the importer had benefited from dumped imports a lot in the past and that negative impact would largely result from non-dumped imports from India, which cannot be considered 'unfair' trade.

3.5 Selected experience of several other countries

3.5.1 Australia

The remarkable fact is that Australia in some cases experienced to given 'warning' to foreign producers rather than to impose anti-dumping measures due to public interest concerns.[191] This practice became known as "Sorbitol-approach", because it was first applied in the investigation regarding the chemical product sorbitol.[192] It was also further applied in the investigations concerning automotive lead acid storage batteries, canned ham, polyvinyl chloride and triethanolamine.[193]

However, Australia has recently experienced extensive promotion on the inclusion of a public interest clause into domestic regulation.[194]

3.5.2 China

China introduced a public interest clause in its recent anti-dumping regulation, which came into force in 2004.[195] Article 37 of the China's AD Regulation says that "[i]mposition and collection of the anti-dumping duties shall be in the public interest."[196] At the same time, the regulation does not provide any further explanations on what constitute a 'public interest' and the way it should be considered. As was pointed out by Wu X. even though the anti-dumping law includes a public interest clause, the "MOFCON has no rules on how to decide what constitutes 'public interests' and which authorities shall make a decision regarding public interests."[197]

There have been several cases where Chinese users of the product concerned have made an attempt to involve public interest reasoning to avoid imposition of anti-dumping duties, but

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[191] Hoekman, B., Mavroidis, P., 'Dumping, Anti-Dumping and Antitrust', *Journal of World Trade*, 1996, Vol. 30, p. 46
[192] Ibid.
[193] Ibid.
[194] Proposals and rationales behind them are described in Productivity Commission, Inquiry Report, '*Australia's Anti-dumping and Countervailing System*', No. 48, 18 December 2009
[195] Wu, X., p. 204, similarly Harpaz, M.P. 'China's WTO Compliance-Plus Anti-Dumping Policy'. *Journal of World Trade* 45, No.4 (2011), p. 753
[196] Harpaz, M.P., footnote 165.
[197] Ibid., p. 204

their arguments were then rejected.[198] An exceptional example is *Cold-Rolled Steel* case, where the anti-dumping duty was suspended due to a drastic change in the state of the market and shortage of supply in China.[199]

MOFCON sometimes used other instruments of anti-dumping legislation to reflect public interest concerns: (i) *Lysine* case was terminated on the grounds of no-injury determinations, but it is widely believed that the true reason was to protect the interests of Chinese users; (ii) in *HH* and *Chloroform* cases MOFCON accepted price undertakings from certain exporters having considered the interests of user industry; (iii) in *BPA-I* case the MOFCON accepted the withdrawal of domestic industry competition having considered the user argument that domestic producer could not meet the demand, because at that moment 90 percent of the market had been covered by imported products.[200]

3.5.3 Ukraine

Ukraine, another example of relatively new user of anti-dumping instruments, having passed anti-dumping legislation at the end of 1998, which stipulates consideration of public interest before the imposition of preliminary or definitive anti-dumping measures.[201]The Ukrainian 'public interest' clause by its wording mainly adopted the EU 'public interest' clause but with certain important differences. In particular, it directly says that public interest tests, apart from the interests of domestic industry and consumers, includes the appreciation of effect of dumped imports on employment of population, investments of domestic industry and consumers, and international economic interest of the importing country. The clause does not mention interest of industrial users of the product concerned as an object of public interest test. However, in practice the term 'consumers' is understood as the final consumers as well as industrial users of the product concerned.[202] Interestingly, individual consumers have standing in a public interest investigation and sometimes they are even registered as an interested party to anti-dumping proceedings.[203]

The application of the domestic industry to initiate an anti-dumping investigation normally includes a separate chapter explaining that public interest requires the application of anti-

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[198] AD-32, *EOA* (Final), MOFCOM Public Notice 2004-57 (14 November 2004), AD-34, *IMP* (Final), MOFCOM Public Notice 2006-24 (12 May 2006) in Wu X., p. 205

[199] AD-17, *Cold-Rolled Steel*, MOFCOM Public Notice 2004-53 (10 September 2004) in Wu X., p. 207

[200] Wu, X., p. 205-206

[201] Article 36 of The Law of Ukraine No. 330-XIV "On Protection of the Domestic Producer from Dumped Imports" dated 22 December 1998 lastly amended 10 April 2008

[202] For instance, in anti-dumping investigation on imports of *float glass* originating in Russia, Bulgaria, Poland, Turkey, and Belarus a lot of industrial users of float glass participated in the investigation as importers/consumers of the product concerned. In the safeguard investigation on imports of *ferroalloys*, steel plants were listed as domestic consumers of the product under investigation.

[203] For instance, in anti-dumping investigation on imports of *float glass* originating in Russia, Bulgaria, Poland, Turkey, Belarus Mr. Oleksiy Rodnov was registered as an interested party to investigation.

dumping measures. All interested parties practically can make comments on this statement of the domestic industry. As standard practice the hearing includes public interest issues as a separate item of the agenda. In most cases the investigating authorities state that public interest requires imposition of anti-dumping measures, but there have been several cases where anti-dumping measures have not been applied due to the public interest consideration.

The anti-dumping investigation on *Pneumatic Rubber Tires* was terminated without application of anti-dumping measures due to the drastic changes in the internal market of Ukraine.[204] The anti-dumping investigation on imports of *Steel-Wire Ropes* was terminated without application of anti-dumping measures because such measures would be in contradiction with public interest (the public notice does not provide detailed reasoning on the matter).[205] Equally, Ukraine used to suspend application of several anti-dumping measures based on public interest consideration (anti-dumping measures on ammonium nitrate,[206] throwing device[207]).

[204] *Pneumatic rubber tire* (Belarus), 2011, public notice on termination of anti-dumping proceeding
[205] *Steel-wire rope* (Russia), 2007, public notice on termination of anti-dumping proceeding
[206] *Ammonium nitrate* (Russia), 2010, public notice on termination of anti-dumping measures
[207] *Throwing device* (Russia), 2010, public notice on termination of anti-dumping measures

Chapter IV Negotiations on Public Interest Clause during the Doha Round

The chapter discusses the current status and perspectives of negotiations on the mandatory public interest clause within the Doha Round. It also attempts to give suggestions on possible ways of measuring the public interest concerns in the AD Agreement.

4.1 Proposals on public interest clause

At the beginning of the Doha Round large number of WTO Members pointed out the necessity to improve and clarify certain anti-dumping rules, which are often used as a means of abuse and protectionism.[208] The mandate for negotiations on anti-dumping rules is expressed in the Doha Ministerial Declaration, which states:

> "[i]n the light of experience and of the increasing application of these instruments by members, we agree to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT 1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants. In the initial phase of the negotiations, participants will indicate the provisions, including disciplines on trade distorting practices, that they seek to clarify and improve in the subsequent phase."[209]

Following the above statement in the Doha Declaration, Members filed papers specifying anti-dumping disciplines, which require improvement. The question regarding elaboration of disciplines on public interest was raised by Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, Turkey (all together known as FANs),[210]European Communities[211] and Canada.[212]The proponents argued the necessity to clarify rules on consideration of the wider public interest and discuss the introduction of the mandatory public interest test.

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[208] Kazeki ,J. 'Anti-dumping negotiations under the WTO and FANs', *Journal of World Trade*, Vol. 44, No. 5 (2010), p. 936.
[209] Doha Ministerial Declaration, No. WT/MIN(01)/DEC/1 dated 14 November 2001, para. 28
[210] *Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Thailand and Turkey, Anti-Dumping: Illustrative Major Issues*, TN/RL/W/6 dated 26 April 2002
[211] *Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement)*, TN/RL/W/13 dated 8 July 2002
[212] *Submission from Canada Respecting the Agreement on Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement*), TN/RL/W/47 dated 28 January 2003; *Communication from Canada, Improved Disciplines under the Agreement on Subsidies and Countervailing Measures and the Anti-Dumping Agreement*, TN/RL/W/1 dated 15 April 2002

In the course of the further negotiations on the changes to the AD agreement, there were a number of papers[213] and precise proposals submitted on the issue of public interest. The proposals are listed in Table 4.1 below.

Table 4.1 Proposals on Inclusion Public Interest Clause into the AD Agreement

Date	Submitting Members	Document Name	Document Number
1 July 2005	Chile; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand	Further Submissions on Public Interest	TN/RL/GEN/53
17 November 2005	Canada	Public Interest	TN/RL/GEN85
21 April 2006	Canada	Procedures for Adversely Affected Domestic Interested Parties	TN/RL/GEN/111
6 June 2006	Hong Kong; China; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu	Economic Effects of Anti-Dumping Measures	TN/RL/GEN/142
30 November 2007	Draft Consolidated Chair Texts of the AD and SCM Agreement		TN/RL/W/213
12 March 2008	Colombia; Hong Kong, China; Israel; Japan; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand	Public Interest	TN/RL/W/222
21 April 2011	Draft Consolidated Chair Texts of the AD and SCM Agreement		TN/RL/W/254

[213] e.g. TN/RL/W/174/Rev.1 dated 7 April 2005; TN/RL/W/194 dated 17 November 2005; TN/RL/W/188 dated 10 October 2005

The proponents suggested the inclusion of public interest clause into the AD Agreement as either additional provisions of Article 9 or as a new article. Briefly, the proposed public interest clauses suggest including mandatory public interest consideration in the course of the anti-dumping investigations. The investigating authorities would have to consider the effect of the measures on other domestic market operators (such as industrial users, traders, consumers, etc.), along with the interests of the applicant, the effects on competition in the market and availability of product concerned. In addition, parties which may be affected by the measure have to possess relevant procedural rights allowing them affectively present their concerns, i.e. access to the non-confidential file of the case, opportunity to comment, participate in hearings, etc.

The 'public interest' proposals have met with strong opposition from some Members, primarily the United States and a few other AD users. One of the main arguments of opponents is that a public interest clause would "impinge on Members' sovereignty"[214] and should remain in "the self-interest of every Member."[215] They argue that public interest is quite complex to define and this discretion should be left to individual Member states. The initial proposals on public interest submitted by FANs and Canada had suggested the non-inclusive lists of criteria for measuring public interest. However, the subsequent proposals suggested including the public interest clause that would only require WTO Members to provide in their national laws a mechanism for public interest consideration without specifying criteria for the public interest test at the multilateral level. As was explained by Canada, "the purpose of any new provision would be to ensure that the domestic law of each Member in fact provides a mechanism to allow for the consideration of such representations whenever it is determined by the competent authorities of the importing Member, that such consideration is warranted."[216]The majority of Members, which provided comments on public interest proposals, also emphasized that the question of what constitutes public interest should be decided at a national level. Noteworthy is that the EU supports the inclusion of the mandatory public interest clause, because the EU has it in its domestic law and applies it on a permanent basis. At the same time, the EU does not suggest any precise criteria for a public interest test for the incorporation into the AD Agreement. Probably, the reason is that the EU prefers to avoid judging of its practice on public interest by WTO adjudicative bodies. So, it can be concluded that the current common understanding achieved during the negotiations is that the definition of public interest and criteria for the test has to remain at the discretion of Members.

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[214] WTO Negotiating Group on Rules, '*Communication from the Chairman'*, TN/RL/W/254 dated 21 April 2011, p. 19

[215] TN/RL/M/26, p. 2

[216] *Paper from Canada, 'Procedures for Adversely Affected Domestic Interested Parties'*, TN/RL/GEN/111, dated 21 April 2006, p. 1

Additionally, opponents emphasize that public interest consideration will make an anti-dumping investigation even more time-consuming, expensive and burdensome. [217] An introduction of the mandatory public interest clause may cause "serious administrative resource implications,"[218] which could be of special concern for developing countries.

The opponents are also concerned as to whether such measures have to be subject to domestic judicial review and WTO dispute settlement proceeding. As a result of a compromise to the United States, the First Chairman's Text suggested that the 'public interest' clause shall not be subject to the WTO dispute settlement proceeding. However, exclusion of opportunity to have recourse to domestic court and WTO dispute settlement system would undermine the rationale for and efficiency of the public interest clause. The fair proposal in this regard was made by the group of countries[219], which suggested procedural aspects of public interest to be subject to WTO dispute settlement proceeding (for instance, the opportunity to be heard), while excluding substantial issues from its scope. However, the substantial aspects should be subject to domestic judicial review nonetheless.

4.2 Suggestions on measuring public interest concerns in the AD Agreement

Adopting the recommendations on public interest consideration

Having considered the current status of negotiations, it is unlikely that WTO Members will manage to agree on a comprehensive public interest clause.[220] In the best case scenario, the Members will make commitments to provide in their domestic legislation a mechanism to consider public interest without specifying detailed disciplines on how it should be done and what should be deemed under the term 'public interest', and excluding the possibility to challenge public interest consideration in domestic courts or under the WTO dispute settlement proceeding.

At the same time, many countries possess political will for and realize the rationale behind the public interest consideration, but lack the knowledge and experience to conduct such analysis in a proper way (for instance, China and Ukraine). In order to assist those countries in applying public interest consideration effectively, the recommendations developed within the WTO may be of value. The recommendations should provide, *inter alia*, the indicative list of

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[217] TN/RL/M/26, p. 2 and TN/RL/W/254, p. 19

[218] Paper from South Africa, '*Proposals on Issues Relating to the Anti-Dumping Agreement'*, TN/RL/GEN/137 dated 29 May 2006, p. 4

[219] Proposal submitted Colombia; Hong Kong, China; Israel; Japan; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand, TN/RL/W/222 dated 12 March 2008.

[220] Communication from Trinidad and Tobago '*Non-Paper Providing an Overview of the Main Points Made in the Briefing Sessions Arranged by the Geneva Group of Commonwealth Developing Countries and ACP Group of States on the Proposals for Modifications in the Agreement on Anti-Dumping Practices'*, TN/RL/W/228, dated 11 April 2008, p. 4

criteria for public interest test and possible modalities for public interest consideration. They can be used by WTO Members for drafting a public interest clause, improving the existing one and enhancing practice of its application. Such recommendations can be developed within the WTO Committee on Anti-Dumping Practices. Previously the Committee issued the Recommendation concerning the timing of the notification under Article 5.5, [221] the Recommendation concerning the periods of data collection for anti-dumping investigations,[222] the Recommendation concerning indicative list of elements relevant to a decision on a request for extension of time to provide information[223] and others.

The experience of the EU and Canada can be taken as a basis for preparing such recommendations. Their experience shows that the public interest is practically possible to measure. Many commentators note, however, that in the EU and Canada the public interest tests rarely result in elimination or reduction of anti-dumping measures, which may lead to the conclusion that a public interest test is non-effective in practice. It is worth noting in this regard that the public interest clause is rather an exception by its nature,[224]therefore rare non-imposition of the measures or their substantial reduction should be an expected outcome.

If WTO Members manage to achieve the best scenario, as noted above, and negotiate at least a 'simple' version of the public interest clause, providing only an obligation to introduce a mechanism for public interest consideration in their domestic legislation, the recommendation will be a guide for Members (especially developing countries) for creating or improving such a mechanism. If WTO Members fail to negotiate inclusion of mandatory public interest clause at all, such recommendations will assist those Members, which have a desire to practice public interest investigation in their jurisdictions. This will contribute to expanding the practice of public interest consideration in various countries and to a better understanding of public interest issues by WTO Members.

Taking into account that the public interest clause appeared to be a hot issue for discussion during both Uruguay and Doha Rounds, it is likely that the public interest issue in the AD Agreement might rise again during the next round of negotiations. If by that time WTO Members gain more experience and understanding of public interest consideration, it will be easier for them to negotiate commitments on 'public interest' clause at a multilateral level.

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[221] G/ADP/5 dated 3 November 1998
[222] G/ADP/6 dated 16 May 2000
[223] G/ADP/7 dated 1 May 2001
[224] See more on page 21 above

Economic v. non-economic concerns

Some Members argue that AD Agreement is an economic instrument and 'public interest' clause should not change this basic concept.[225] Indeed, the AD Agreement does not allow imposing measures for non-economic reasons, but it does not preclude members from the non-imposition of the anti-dumping regardless of the reasons for such a decision. If the 'public interest' clause is introduced, it should leave room for non-economic consideration (such as ecological, health, welfare concerns). WTO Members should have the discretion to decide whether the public interest clause covers on non-economic concerns.

WTO dispute settlement and judicial review

Certainly, WTO dispute settlement proceeding is an essential achievement of multilateral trading system; it is a "central element in providing security and predictability"[226] to the system. The exclusion of the public interest clause from its scope would considerably undermine the effectiveness of the clause. However, currently WTO Members greatly oppose the possibility of challenging compliance with the public interest clause under the WTO dispute settlement mechanism due the sovereignty issues. A compromise on this matter was suggested by certain WTO Members as discussed above, in particular only procedural aspects should fall under the scope of WTO dispute settlement system. In any case, substantial aspects (as well as procedural) have to be subject to the domestic judicial review. Otherwise, the investigating authority would possess unlimited power in public interest considerations.

Procedural rights of affected persons

Providing the opportunity for all effected parties to participate fully in the proceeding is an important element in securing public interest concerns in applying anti-dumping instruments. Such an approach will reconcile the principle of fairness and due process. The AD Agreement has to deem all downstream domestic parties whose interests might be affected by the measure as interested parties to the proceeding.[227]As discussed above, contribution of this group to the dumping, injury and causation findings can be substantial enough. Generally, industrial users, retailers, buyers, consumer organizations and others may provide useful information regarding the product concerned, market conditions, competition between market participants, etc. Such information may have certain influence on the authorities' determinations, which implicitly reflect public interest concerns.

[225] TN/RL/W/194, dated 17 November 2005 p. 2
[226] DSU, Article 3
[227] TN/RL/W/222, p. 3

Moreover, from the perspective of good governance the wide participations of effected parties on decision-making process create the feeling that the conclusion finally reached by the authority is the correct, fair and legitimate one.

4.3 Lesser duty rule as a soft public interest clause

Apart from the mandatory 'public interest' clause, during the Doha Round the parties extensively discussed the inclusion of the mandatory lesser duty rule. As noted above, the lesser duty rule implies that an anti-dumping duty shall be less than the margin of dumping, if it is adequate to remove the injury caused to the domestic industry. Under Article 9.1 of the AD Agreement, the application of the lesser duty rule is optional.

The lesser duty rule is occasionally indicated to be "a soft option to ensure public interest,"[228] because it "at least alleviates some of the harm caused to consumers by the imposition of anti-dumping duties."[229]

Having considered the experience of the EU and Canada, Moen concludes that the lesser duty rule in the EU, which may also be regarded as an instrument of balancing producer and non-producer interests, is more effective than the application of public interest clause in the EU and Canada.[230] In contrast, Aggarwal argued that the lesser duty rule supports inefficiency, the "more inefficient the domestic industry the greater is likelihood of higher injury margins."[231] Thus, Aggarwal comes to the conclusion that "a more direct public interest test should be preferred."

Anyhow, application of the lesser duty rule results in imposing an anti-dumping duty, which is proportionate to the harm caused by dumped imports. The downstream parties negatively affected by the measures generally benefit from the lesser duty rule, because it reduces the burden of price increase carried by these market participants.

The public interest clause certainly addresses a wider range of public interest concerns, however the lesser duty eliminate at least partially the negative effect of anti-dumping measures.

The EU is an example of simultaneous application of both the lesser duty rule and the public interest clause. Such an approach fully incorporates the principle of proportionality and reflects the high degree in securing public interest concerns while application of anti-dumping instruments.

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[228] Indian Council for Research on International Economic Relations, Aggarwal, A., p. 18
[229] Ibid.
[230] Moen, P. *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada, Graduate Institute of International Studies*, Geneva, 1998, p.5
[231] Ibid., p. 19

Conclusion

The adoption of anti-dumping legislation reflects a public interest consideration, because it aims to protect domestic industry from 'unfair' trade practices of foreign exporters and restore fair competition in the market. However, occasionally anti-dumping measures have a disproportionately negative effect on other domestic downstream interested parties (such as industrial users, consumers, retailers, etc.) and the country's overall interest. The public interest test in the course of the anti-dumping investigation implies the consideration of wider public interest concerns in order to prevent these negative consequences occurring. The public interest investigation reflects the principle of proportionality in its broader application – weighting or balancing the competing interests and values.

From a procedural perspective, an anti-dumping investigation is a quasi-judicial administrative proceeding, where the investigating authorities are expected to follow the rules of natural justice. The principle of due process and fairness suggests that downstream domestic parties should participate in anti-dumping investigations as interested parties with the same rights and obligations as traditional interested parties (such as foreign producers, exporters, and domestic producers of like products).

The EU and Canada are among the few users of the public interest test in the course of anti-dumping proceeding. Their practice shows that it is possible to elaborate criteria for effective public interest test and develop respective procedural rules. The rare non-imposition or elimination of anti-dumping measures due to the public interest concerns are not an indication of the ineffectiveness of the test, but rather show that the public interest clause is an exception by its nature.

Currently, the AD Agreement takes a permissive approach to the public interest test; it neither requires nor prohibits public interest consideration (Article 9.1). Regarding procedural aspects, the AD Agreement left for the discretion of WTO Members to define downstream domestic parties as interested parties to the investigation. At the same time, Article 6.12 requires investigating authorities at least provide industrial users and consumer organizations (if the product concerned sold at the retail level) with opportunities to provide information during the investigation. The paper concludes that this right corresponds to the obligation of investigating authority to consider such information. Ignoring important information submitted by industrial users or consumer organizations or giving unjustifiably minor weight to such information may be qualified as biased and non-objective evaluation of facts in accordance with Article 17.6 (i).

During the Doha Round WTO Members negotiate on the inclusion of a mandatory public interest clause into the AD Agreement. However, it is unlikely that Members manage to agree

upon a comprehensive public interest clause. At the same time, the active negotiations on this issue show the desire of many WTO Members to elaborate and strengthen disciplines towards securing wider public interest concerns. The expansion of procedural opportunities granted to domestic downstream interested parties should be the first step in addressing public interest concerns. The development of substantial legal rules concerning public interest on a multilateral level, even of an advisory nature, would assist countries which have a desire to conduct public interest investigation, but have a lack of modalities for doing this. The experience of the EU and Canada can serve as a basis for drafting such rules. In the long run, it would lead to a better understanding of public interest issues from practical experience and may result in the adoption of the mandatory public interest clause in the future.

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