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Preface

In preparation for its departure from the European Union, the UK needs to establish its own trade remedies framework and define the way it wishes to implement the trade remedy instruments and in particular anti-dumping, countervailing and safeguard measures.

Copenhagen Economics (CE) and Van Bael & Bellis (VBB) have been commissioned by the UK's Department for International Trade (DIT) to undertake research on a list of spec-ified questions to help inform its approach in using these instruments to protect domestic industries against certain trading practices.

These questions address a selected number of important issues pertaining to the second, third and fourth steps commonly found in anti-dumping and anti-subsidy proceedings, namely: (1) the determination of the injury suffered by the domestic industry, (2) the determination of the causal link between dumped imports and injury suffered by the domestic industry and (3) the determination of whether the imposition of protective measures is in the public interest. These questions do not concern the first step which is the determination of dumping.

All the questions discussed in this report relate in principle to both anti-dumping and anti-subsidy investigations. Even though the findings of this research refer specifically to the provisions, case-law and practice of the investigating authorities with respect to anti-dumping investigations, they equally apply *mutatis mutandis* to anti-subsidy investigations.

This report does not address injury determinations in (a) situations where the domestic industry is in a situation of so-called "material retardation" and (b) safeguard investigations[1] because these issues are very rarely considered and the limited case-law and practice of investigating authorities do not require the UK to consider options outside the existing framework of the WTO.

CE and VBB do not seek to provide a comprehensive analysis on all the subjects that are discussed in the relevant questions but rather, as set out in the research specification, to draw attention to a number of issues and options that the UK may wish to consider in formulating its own position with respect to the trade defence instruments under consideration. Likewise, it is not the purpose of this report to provide a comprehensive list of tools and guidelines designed to address a large variety of situations but rather to draw the UK's attention to some aspects of trade remedies in relation to which the specificities of the UK market – compared to other territories – should be given due consideration.

Last but not least, the spirit of this report is not to invite the UK to "reinvent the wheel" but rather to allow it to take from existing rules and practices and in particular the EU

[1] Selected issues on injury and public interest concerning safeguard investigations are summarized in an Appendix at the end of this report.

system that is well known to the UK, the concepts and practices that are valid and improve them by drawing from those countries with a mature experience in trade remedies (especially the US, Canada, Australia, India) the rules and practices that best fit the specificities of the UK economy. It is for this reason that the authors who are themselves more acquainted with the EU trade remedies system draw extensively from the EU practice as well as the relevant case-law to the extent it can help to interpret WTO rules.

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Executive summary

- This report has been produced for the UK's Department for International Trade and aims to draw attention to a number of issues that the UK may wish to consider when formulating its own position with respect to trade remedies. A brief summary of our proposals on the topics covered in this research report are described below.

- The determination of injury is a key component in any trade remedy investigation (*see Chapter 1*). In its injury assessment, the UK will have to consider a mandatory list of 15 micro- and macro-economic factors having a bearing on the state of the industry, which are enumerated in the WTO Antidumping Agreement ("ADA"). This list is not exhaustive and the UK may wish to consider expanding this list of factors, as done in the European Union and the United States, such as to address the fact that an industry might still be in the process of recovering from the effects of past dumping or subsidization. Although there is no need for the UK to formally prioritize certain injury factors over others, the UK may consider giving more weight to the evolution of market shares and the profitability of the domestic industry.

- The definition of the UK industry is of fundamental importance because it is on that basis that the determination of injury resulting from the imports of dumped products must be carried out. In this exercise, for the purpose of assessing injury, the UK may wish to give itself flexibility to achieve the best informed representation of the economic situation in the UK industry, and include all domestic producers, even though they might not have cooperated in the investigation. For the purpose of establishing standing, we would recommend that the UK clearly sets out the conditions that UK producers would need to meet. In this respect, the UK may also wish to consider increasing the standing threshold to initiate an investigation beyond 25% of the total production of the product concerned.

- The selection by the UK of adequate periods of investigation merits careful consideration because the data for these periods will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic injury. As a matter of principle, the UK should consider, for the purpose of a representative finding in the case of dumping, an investigation period covering a period of twelve months prior to the initiation of the proceedings – although that period may be decreased to a minimum of six months or increased to eighteen months depending on the circumstances of the case. With respect to the determination of injury, the UK should consider examining data over a period of three to four years, ending on the same date as the dumping period of investigation, but which should equally take into consideration the cyclicality of some industries. In situations of stronger market volatility

or cyclicality, the UK should facilitate consideration of post investigation period developments whenever warranted.

- The authors consider that as a trade oriented economy, the UK should strongly favour the application of the lesser duty rule. This is because the imposition of high antidumping duties may provide the domestic industry with protection beyond that which is necessary to remove the injury caused by the dumped imports, to the detriment of downstream users and consumers. However, the calculation of an injury margin for the application of the lesser duty rule could be adapted in certain circumstances, in particular when a significant proportion of the domestic industry is composed of SMEs. The EU, Canada, India and Australia offer interesting examples on how the lesser duty rule is applied in practice. While an injury margin cannot be calculated on the basis of a "one-size-fits-all" methodology because the facts and circumstances of each case are different, this report aims at providing the UK with general guidelines that may constitute a "common denominator" on how to calculate an injury margin.

- The UK must carry out an objective examination on the basis of positive evidence of (i) the volume of the dumped imports and the effects of the dumped imports on prices in the domestic market for like products and (ii) the consequent impact of these imports on domestic producers of such products. With respect to the volume of dumped imports, the UK may wish to consider setting the *de minimis* threshold on the basis of imports of the product concerned (as done under WTO rules). With respect to price effects of dumped imports, the Report aims at providing the UK with guidance on how to compare import prices with prices charged by domestic producers, taking into account product comparability and the level of trade.

- The determination of the causal link is another key consideration *(see Chapter 2)*. The UK should consider whether or not to continue applying the *coincidental approach* as currently conducted by the European Commission. This approach does not – in our view – set a very high standard of proof regarding causality. The coincidental approach merely establishes consistency of the facts with the hypothesis of causal injury. Instead, the UK may wish to put the price effect assessment at the centre of the causality analysis. This would follow the intention of the current EU antidumping legislation (article 3(2)), which specifically requires a two-step approach: the first step assesses the causal link between dumped imports and the effects on prices in the EU for like products while the second step considers the causal link between price effects and injury. Most authorities (EU, US, and Canada) carry out structured qualitative assessments of the causality issue based on a framework used for a case-by-case assessment. The Report proposes three different statistical approaches which can be considered should the UK want a more structured, formalised and evidence-based approach to the causality issue.

- The UK may wish to consider adopting an economic interest test as an additional condition for the imposition for trade remedies (*see Chapter 3*). The purpose of this test is to assess, irrespective of the findings of dumping and injury, whether

the imposition of measures is appropriate and proportionate in light of the interests of other groups (including the UK industry, importers, traders, distributors, industrial users and consumers) that are affected or likely to be affected, in the short term or in the long term. The views of anti-trust authorities should also be taken into account. Labour unions as well as other institutional bodies (e.g., local government, national agencies in charge of the environment, public health and safety, etc.) should be given the opportunity to make themselves heard without being required to be formally considered as "interested parties". In practice, the UK should carry out the economic interest test as an integral part of the investigation, through the sending of questionnaires to the complaining industry and other market players as part of the investigation, rather than conducting it on a separate *ex-post* basis (as done in Canada). Ultimately, the economic interest test should not allow for the alteration of the level of the duty imposed, but may lead to the non-imposition or a change in the form of the measures.

- The report proposes options for more formal quantification of economic impacts. An assessment of the wider economic interest for the UK should consider the economic impact of imposing trade remedy measures and compare this to the counter-factual situation where no measures are imposed (e.g. a continuation of alleged dumping). The assessment should cover the impacts on all relevant economic agents that are directly or indirectly affected by the imposition or non-imposition of trade remedy measures. The assessment must take into account the potentially positive impacts of imposing measures for the domestic UK producers of the product concerned (and the potential domestic upstream suppliers to those producers) against the potentially negative consequences of such imposition for the domestic UK downstream customers (e.g., user industries, consumers), importers and traders of the product concerned. The assessment should consider both the static short-term and the possible long-term impacts. Regarding the s*hort-term economic impact*, the report proposes partial equilibrium models as the most appropriate tool for providing an initial quantification of the short-term gains and losses. This assessment should always be combined with an assessment of *long-term economic impact* since the imposition (or non-imposition) of trade measures can also have longer-term impacts on the market for the product concerned. This long-term assessment, which will be qualitative in nature, should be examined in light of the conditions of competition in the market and the evolution of the structure of the market where measures are imposed, against the situation where no measures are imposed. There are no purely quantitative methods for assessing this.

- In determining whether to continue with measures (*see Chapter 4*), the UK may wish to consider initiating in a more systematic way expiry reviews combined with interim reviews (the authority is limited in expiry reviews to either terminate or extend the measures, but not to change them) in all cases where market conditions have changed since measures were originally imposed. In its assessment, the UK should not prioritise certain of the injury factors listed in the ADA over others since each case is different. However, several factors should be viewed as particularly important, including the risk of trade diversion and the existence of

large spare capacities/unused stocks. Interim reviews should be initiated only where there is conclusive evidence that the factors purporting to confirm revised dumping and/or injury determinations are the result of significant changed circumstances of a lasting nature.

- Finally, the UK should consider evaluating the effectiveness of its trade defence measures and of its policy framework (*see Chapter 5*). With respect to the former, this evaluation should be carried out during the period in which the measures are in place (e.g., interim review, anti-circumvention proceeding) and when they are set to expire (e.g., expiry review) to determine whether the adopted trade defence measures have had the desired effects on the domestic industry and on the UK economy. With respect to the effectiveness of its policy framework, the UK should, in due course, consider evaluating and reviewing whether the policy framework it ultimately implements is relevant, efficient, effective and impactful in relation to the objectives it seeks to achieve.

Chapter 1

Assessing Injury

1 Determination of injury is a key component of any trade remedy investigation. This chapter will address the following issues: the injury factors that should be considered in assessing injury (Section 1.1); application of the lesser duty rule (Section 1.2); the calculation of the injury margin (Section 1.3) and; the assessment of the volume and price effects of imports (Section 1.4). Subjects covered in these sections will also include, *inter alia*, the duration of injury and dumping periods of investigation (POI), as well as the definition of the domestic industry.

1.1 Which factors should be considered to assess injury, and over which timescales?

1.1.1. Which factors should be considered?

1.1.1.1. WTO rules

2 Article 3.4 of the Anti-dumping Agreement (ADA) provides that an investigating authority must examine the impact of the dumped imports on the domestic industry on the basis of all relevant economic factors and indices having a bearing on the state of the industry. Article 3.4 ADA lists 15 factors, which can be categorized as either macro or micro-economic indicators. The former category consists of the factors relating to the production, capacity, sales volume, market share, employment, productivity and growth which are assessed at the level of the whole industry. Micro-economic indicators relating to stock, sales prices, cash flow, profitability, return on investments, ability to raise capital, investments and wages are generally assessed on the basis of information provided by the companies that cooperate in the investigation.

3 The WTO Panels take the view that the list of these 15 factors is not exhaustive and that other factors may be considered.[2] As explained below, some jurisdictions, such as the EU and the US, account for factors beyond the 15 factors listed in the ADA.

4 Panels have ruled that the examination of all of these 15 factors is mandatory[3] and must be apparent in the final determination of the investigating authority.[4] A mechanical checklist approach, which would consist of a mechanical exercise of merely ensuring that each listed factor is simply referred to in some way, without there being a substantial evaluation, is not WTO law compliant.[5] The investigating authority has a duty to explain why its evaluation of the listed 15 injury factors

2 Panel Report, *EC – Bed Linen,* para 6.156
3 Panel Report, *EC – Bed Linen*, para. 6.154-6.159.
4 Panel Report, *Mexico – High Fructose Corn Syrup*, para. 7.128.
5 Panel Report, *Egypt – Rebar*, para. 7.45.

has led to the determination of injury, including an explanation on why some factors – which do not support the existence of injury – nevertheless do not undermine the finding of injury to the domestic industry.[6] But there is no mathematical formula for determining whether the deterioration in the industry's condition is sufficient to constitute injury. The determination involves the assessment of complex economic matters in which the investigating authority enjoys considerable discretion.

1.1.1.2. Rules applied by selected WTO members

The EU

5 Article 3.5 of the EU AD Regulation requires the European Commission to consider the same 15 economic factors and indices that are listed in Article 3.4 ADA. Interestingly, the EU General Court has ruled that the European authorities have discretion in evaluating these injury factors and may limit the examination to only those factors having a bearing on the state of the Union industry.[7]

6 The practice of the European Commission has provided some guidance on how to assess some of these factors. By way of example:

- Profitability is affected by the allocation of costs, and costs which are unrelated to the sales in the period considered may be disregarded;[8]
- The decline in sales should refer to sales in the domestic market only;[9]
- Market shares may appear to be a better indicator than the volume of imports in absolute terms;[10]
- When assessing EU consumption, the captive sales of the vertically-integrated companies may be excluded if they are not in competition with sales on the free market;[11]
- When assessing whether there has been deterioration in the level of profits of the domestic industry, previous distortion of the market should be accounted for, such as the fragile state of the domestic industry at the beginning of the investigation due to significant volumes of low-priced imports which predated the injury period of investigation, the market share of the imports of the products concerned following the elimination of import quotas, all of which may have caused a major restructuring of the sector concerned.[12]

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6 Panel Report, *Korea – Paper*, para 7.272.
7 Case T-156/11, *Since Hardware (Guangzhou) v Council*, EU:T:2012:431, para. 138. The apparent contradictory positions of the General Court and the WTO Panel would be reconciled if the EU Courts required an explanation for not examining a particular factor.
8 *Acesulfame Potassium* (China) OJ 2015, L125/15, para. 67.
9 *Polyethylene terephthalate film* (Korea, India), OJ 2001, L227/1, para. 56.
10 Case T-199/04 RENV, *Gul Ahmed Textile Mills Ltd v Council*, EU:T:2016:740, para. 143. In theory, injury could be found even when imports are falling if market shares of the domestic industry are also falling.
11 *Wire Rod* (China) OJ 2009 L203/1, para. 54.
12 *Ceramic Tableware and Kitchenware* (China), OJ 2012, L 318/28, para. 135.

7 In its injury assessment, the EU AD Regulation also states that the European Commission must consider an additional macro-economic factor which is not listed in the ADA, namely "*the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation*". Recovery from past dumping is frequently assessed as a relevant factor for the injury evaluation. It will not be regarded as a relevant factor in those cases where there is no evidence of dumping activity on the Union market prior to the investigation period.[13] Reference to that factor is made either in the context of a review investigations[14] or where anti-dumping duties exist with respect to the product under consideration originating in other exporting countries.[15]

The US

8 The US International Trade Commission (US ITC) takes into consideration certain factors beyond those listed in the ADA, such as the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative more advanced version of the domestic like product. US Congress has also directed the USITC to evaluate all factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry.

1.1.1.3. Conclusions and recommendations

9 Consideration of all 15 of the micro and macro-economic factors having a bearing on the state of the industry which are listed in Article 3.4 ADA is mandatory: there is no room for the UK to depart from this notwithstanding the EU Court ruling referred to in footnote 7.

10 However, the UK may wish to expand the list of factors listed in Article 3.4 ADA to include the following two factors:

- The "*fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation*" (as done by the EU). We consider that in the case of the UK, this factor is particularly important given the legacy of trade protective measures imposed by the EU that might disappear after the UK leaves the EU. However, even if the UK carries over existing EU AD measures, as they committed to in the Trade White Paper "Preparing for our future UK trade policy"[16],[17] the number of situations in which the effects of AD measures previously imposed could be undermined by imports of dumped products, could be significant precisely because the UK alone is a much

[13] *Silicon* (Russia), OJ 2003, L 173/14.
[14] *Polyester staple fibres* (Belarus), OJ 2002, L 274/1, where the Council noted that the situation of the Union industry had improved to a certain extent after the imposition of antidumping measures during the period considered, but the industry had not completely recovered from past dumping from certain third countries and from the circumvention.
[15] *Polyester textured filament yarn* (PTY) (India), OJ 2002, L 205/50.
[16] https://www.gov.uk/government/publications/preparing-for-our-future-uk-trade-policy
[17] It is not clear whether and how the UK would be able to extend existing measures without carrying out a new investigation without facing WTO scrutiny.

smaller market than the EU market on the basis of which injury, causality and economic interest determinations were originally made. For instance, if, in the original EU investigation, comparatively higher injury had been suffered by the UK industry (higher undercutting margins, higher volume of imports into the UK, etc.) but this was "diluted" by the lower injury suffered by other producers in the EU, this would have led to the imposition of lower duties than if the injury and causality assessment had been made exclusively on the basis of the situation of the UK industry. Obviously, this factor can only be taken into consideration in situations where the injurious effects of dumping have already been at least partially eliminated by the imposition of trade protective measures.[18]

How should the UK determine in practice whether its domestic industry is still in the process of recovering from the effects of past dumping? We consider that the UK should keep full flexibility and avoid entering into any kind of "quantification" exercise. This being said, we consider that the most appropriate parameters to evaluate the recovery process are the evolution of (a) profitability and (b) market shares. As a rule of thumb, the UK could consider in some cases that the process of recovery would not be completed if the UK industry has not recovered the profitability and market share it enjoyed prior to the injury caused by the past dumped imports. However, the main difficulty here is to determine whether material injury might be caused by other factors than the dumped imports. The UK will most likely need to carry out an evaluation on a case-by-case basis (see also Chapter 2).

In any event, we recommend the inclusion of this factor in the list to be made "optional", in order to allow the UK to use its own discretion on whether to take it into consideration or not.

- "*The actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative more advanced version of the domestic like product*" (as done by the US). We are less convinced by this factor which might be difficult to evaluate in practice, but the UK may nevertheless wish to consider including it if certain characteristics of the UK market in some industry sectors suggest that it would be appropriate to do so. This factor could appeal significantly to domestic SMEs and/or industries that are very capital intensive. But on the other hand, it could probably already be addressed within the meaning of "material retardation" in the assessment of injury.

11 Although there is no need for the UK to formally prioritise certain injury indicators over others, it goes without saying that because of the size of its market (which is possibly more volatile than that of e.g. the EU or the US especially in certain industries) and the fact that some industry sectors can be more significantly affected by the evolution of export markets, some injury indicators should

[18] It would be difficult to justify the existence of past dumping in the absence of trade protective measures confirming the existence of such dumping AND the injurious effects thereof.

probably be given more weight than others. For instance, as shown below in Section 1.4, findings concerning the evolution of market shares should normally be preferred over those concerning the absolute increase or decrease in import volumes (especially in situations of high variations in domestic consumption). Likewise, the evolution of the profitability of the domestic industry should be given more importance than the evolution of import prices which do not necessarily indicate injury especially if such prices largely depend on the fluctuation of raw material costs (steel, chemicals, etc.).

12 Issues concerning the assessment of certain injury factors:

- Profitability: notwithstanding the difficulty in assessing profitability of any given industry, this factor should always be given priority because it can help to encapsulate data relating to other injury parameters (for example: a producer might decide to concentrate its production on higher value added types of the product concerned – this might affect its market share in absolute terms but would not necessarily show injury if profitability is maintained). Profitability should in principle be assessed exclusively (1) on domestic sales of the product under investigation, (2) which are made on the open market (see also below) (3) during the relevant period under investigation. Hence, profitability on captive sales and sales to export markets should normally be disregarded.[19] Likewise, profitability should not be calculated on the basis of sales made outside of the period of investigation although they pertain to production output during that period. In the determination of profitability, the UK should consider also taking into consideration the effects of previous distortions on the domestic market including, for instance, the existence, for a long period of time, of substantial volumes of low-priced imports which predated the injury period of investigation, the elimination of quotas of the product concerned and the restructuring of the sector as a result of these events.[20]

- Domestic consumption: although the basic rule is to determine domestic consumption by including all sales made in the domestic market, the question arises whether sales made by domestic producers to their related companies for internal use (i.e., captive sales) should equally be included. The UK should consider that in situations where the market concerned shows a clear separation between a 'captive market' and the 'free market', sales on the 'captive market' must be disregarded since they do not enter into competition with products sold on the 'free market' and cannot therefore be subject to the effects of any dumping.[21] In this respect, the UK may consider applying the US system which is economically balanced:

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19 The profitability on captive sales should, in principle, be disregarded because it can be affected by the relation between supplier and customer (transfer pricing strategies). The profitability on export sales must be disregarded because the AD investigation only concerns the effects of imports on the domestic market.

20 The European Commission had considered these market distortions in *Ceramic Tableware and kitchenware* (China), OJ 2012, L 318/28 where, until January 2005, imports of tableware from China were subject to quantitative import quotas.

21 The EU Courts have also come to this conclusion. See, Case C-315/90, *Gimelec and Others v Commission*, EU:C:1991:447. para. 23. In *Hot Rolled Coils*, the European Commission considered that in an industry in

> "*If domestic producers internally transfer significant production of the domestic like product for the production of a downstream article and sell significant production of the domestic like product in the merchant market, and the Commission finds that --*
>
> *(I) the domestic like product produced that is internally transferred for processing into that downstream article does not enter the merchant market for the domestic like product,*
>
> *(II) the domestic like product is the predominant material input in the production of that downstream article, and*
>
> *(III) the production of the domestic like product sold in the merchant market is not generally used in the production of that downstream article, then the Commission, in determining market share and the factors affecting financial performance . . ., shall focus primarily on the merchant market for the domestic like product."* [22]

We consider, however, that imports made under inward processing relief arrangements should be included in the calculation of domestic consumption because they are used for production in the domestic country even if the final product might eventually be exported.

13 Typically, the most important injury factors are those that relate to the evolution of sales volumes on the domestic market ("actual and potential decline in sales"; "market share" and more indirectly "productivity" and "utilization of capacity") and those that concern the evolution of prices ("profits"; "factors affecting domestic prices" and more indirectly "return on investments"). Other factors such as "actual and potential effects on cash flow, inventories, employment, wages, growth", are commonly used to reinforce a finding of no injury or injury but should normally not be regarded as determinant.[23]

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which there is a high level of vertical integration, such as in the steel industry, the production of the EU industry destined for captive use should be excluded for the purposes of the analysis of whether injury and consumption should be assessed in relation to the entire production of the Union industry. In support of separating the 'captive market' and the 'free market', the European Commission noted the following: (i) 70% of the production of hot rolled coils was used as an input for further downstream processing works, for which no invoices were issued since the transfers occurred within the same legal entity; (ii) the movements of hot rolled coils between both markets were insignificant; and (iii) the EU producers did not purchase hot rolled coils for the captive market from independent parties inside or outside of the Community and, therefore, hot-rolled coils intended for the captive market were not in competition with other hot-rolled coils available in the Community. (OJ 2000, L31/15, para. 43).

22 Section 771(7)(C)(iv) of the Act (19 U.S.C. § 1677(7)(C)(iv)).

23 Since the list that is set out in Article 3.4 ADA is not exhaustive, other factors can be mentioned. One of them, plant closures, is commonly cited.

14 The "magnitude of the dumping margin" is – rightly so – rarely discussed at length in decisions. This is because dumping margins are often the result of calculations that can give surprising results which do not necessarily reflect the actual difference between export prices and prices (or costs) in the exporting country.[24]

1.1.2. Definition of the domestic industry

1.1.2.1. WTO rules

15 The definition of the domestic industry is of fundamental importance in an anti-dumping investigation for two main reasons: (1) pursuant to Article 3 ADA, the determination of injury resulting from the imports of dumped products must be assessed in relation to, and must affect, the domestic industry and (2) Article 5.4 ADA provides that a complaint will be deemed to have been filed on behalf of the domestic industry if it is supported by domestic producers representing at least 25% of total production of the like product (unless domestic producers accounting for a larger share of domestic production express opposition to the complaint).

16 Article 4.1 ADA gives the investigating authority two methods to define the domestic industry: it may be defined as either the "*domestic producers as a whole of the like product*" or "*those of them whose collective output constitutes a major proportion of the total domestic production of those products*". The second method focuses on the issue of how much production must be represented by those producers making up the domestic industry when the domestic industry is defined as less than the domestic producers as a whole.

17 While Article 4.1 ADA does not stipulate a specific proportion for evaluating whether a certain percentage constitutes "a major proportion" of the domestic production,[25] it is clear that the investigating authority is obliged to use "positive evidence" and its determination must be based on an "objective examination."[26] In practice, the investigating authority has to determine the "major proportion of the total domestic production" in a way that ensures that the domestic industry defined on this basis is capable of providing data supporting an accurate injury analysis. This means that the investigating authority must avoid a risk of distortion of findings that does not truly reflect the situation of the domestic industry,[27] and the higher the proportion of the domestic industry, the lower the risk.[28]

18 Article 4.1 ADA further provides that domestic producers may be excluded from the definition of the domestic industry in three cases: (a) when domestic produc-

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24 It is not uncommon for investigating authorities in some countries to determine dumping margins of several hundred percent. Frequently, such high margins are based on facts available being imposed on exporting producers found not to be cooperating.
25 Appellate Body Report, *EC – Fasteners (China)*, para. 411.
26 The concepts of "positive evidence" and "objective examination" are detailed in Section 1.4.1.1 and 1.4.1.2 respectively.
27 Appellate Body Report, *EC – Fasteners (China)*, para. 412 and seq.
28 Appellate Body Report, *EC – Fasteners (China)*, para. 411.

ers are related to importers of exporters of the product concerned; (b) when domestic producers are themselves importing the product concerned and (c) in exceptional circumstances – and under specific conditions - when the domestic territory is divided into regional markets in which producers within each market are regarded as a separate industry. These exceptions are considered to be exclusive and do not leave any discretion to exclude other categories of producers.[29]

1.1.2.2. Rules applied by selected WTO members

The EU

19 Article 4 of the EU AD Regulation[30] lays down the rules for identifying the Union industry which, in line with the provisions of Article 4 ADA, specify that the Union industry must be interpreted as "*the Union producers as a whole of the like products"* or *"those of them whose collective output of the products constitutes a major proportion* […] *of the total Union production of those products*." Union authorities enjoy broad discretion as regards the choice between these two methods when determining the Union industry.[31] The determination of the Union industry requires a two-step analysis: first, the determination of the Union production and, second, the quantification of the share of the Union production held by the producers claiming to belong to the Union industry.

20 The determination of the Union production requires an evaluation of the features of the products and the producers under consideration. With respect to the products, as a general rule, the products manufactured in the Union will, in principle, automatically fall within the definition of the Union production.[32] Products manufactured within the Union from parts imported from third-countries may be considered, on a case-by-case basis, as products manufactured within the Union provided substantial transformation of the components took place in the Union.[33] With respect to the producers, as a matter of principle, all producers of the product concerned that are located in the Union are taken into account to determine the Union industry. By way of exception, Article 4(2) of the EU AD Regulation (which mirrors the ADA) equally provides that certain producers located within the EU should not be considered as Union producers, including in particular (i) producers which are related to the exporters or importers of the allegedly dumped products and (ii) producers which are themselves importers of the allegedly dumped products.

21 The determination of the Union industry requires an additional two-step approach: (1) the determination of which Union producers meet the requirement to

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29 Panel Report , EC - *Farmed Salmon(Norway) para.7.112*
30 Article 9 of the CVC Regulation is the corresponding provision for subsidies.
31 Case T-310/12, *Yuanping Changyuan Chemicals Co. Ltd v Council*, EU:T:2015:295, para.99.
32 Except if they are excluded from the "Union Industry" because they are related to importers or exporters of the product concerned or are themselves importing the product concerned.
33 *Compact Fluorescent Lamps*, OJ 2007, L272/1.

be part of the Union industry and, (2) the determination that the share of production held by these producers meets the "major proportion" threshold set out in Article 4.

- *The requirements to be included in the Union Industry*: the EU makes a fundamental distinction. For the purpose of establishing standing, Union producers are automatically included in the Union industry as long as they support the complaint and cooperate in the investigation.[34] The withdrawal of support for the complaint leads to the exclusion of the producer from the Union industry.[35] However, for the purpose of the analysis of injury, according to recent EU case-law, the fact that Union producers may or may not have supported the complaint or cooperated in the investigation is irrelevant because including all known figures related to the period considered for the purpose of the injury analysis achieves the best informed representation of the economic situation of the EU industry as prescribed in Article 4(1) of the EU AD Regulation.[36]

- *Standing*: Article 5(4) of the EU AD Regulation (which mirrors Article 5.4 ADA) provides that a "major proportion" of the Union industry corresponds to (i) the collective output of which represents more than 50 percent of the total production of the like product produced by that portion of the Union industry expressing either support, or opposition, to the complaint, and provided that (ii) the Union producers supporting the complaint represent at least 25 percent of the total production of the like product produced by the Union industry.

1.1.2.3. Conclusions and recommendations

22 The definition of the UK industry is of fundamental importance because (1) it will form the basis for the determination of the standing requirements in the filing of complaints and (2) it is on the basis of the UK industry, as defined, that the determination of injury resulting from the imports of dumped products must be assessed.

23 With respect to the standing analysis, we recommend that the UK sets out (e.g. in secondary legislation or in guidelines) a precise and transparent definition that UK producers would need to meet for standing purposes. This definition should obviously mirror the requirements of the ADA but nothing would prevent the UK from setting stricter thresholds. We consider in particular that the lower of the two thresholds set out in Article 5.4 ADA could be increased to a higher ratio than 25%. While such a low threshold might be justified in the context of the EU which is a particularly large territory with, potentially, a multitude of producers located in many different geographical territories without necessarily being grouped inside well-structured national/pan-EU associations,[37] the UK market is clearly

[34] *Biodiesel* (USA), OJ 2009 L67/22, para. 63
[35] *Certain Castings* (China) OJ 2005 L/199/1, para. 70
[36] Case T-310/12, *Yuanping Changyuan Chemicals Co. Ltd v Council*, EU:T:2015:295, para. 102.
[37] Or developing countries that do not yet have a mature and structured domestic market.

more homogeneous. By setting a higher threshold, the UK would ensure that only complaints that are filed by or on behalf of a reasonably high proportion of the total UK producers are accepted and lead to the initiation of proceedings.

24 With respect to the injury analysis, the UK may wish to give itself maximum flexibility when defining the UK industry in order to achieve the best informed representation of the economic situation of the UK industry. For example, we consider that the evaluation of the UK production of the product concerned need not necessarily be limited to what is actually consumed on the UK market, but could include the entire production in the UK i.e. even with respect to products which are exported to other markets. This is because it is likely that in certain sectors, the UK industry might be exporting a significant proportion of its production output and could well be economically dependent on these exports to maintain the viability of its production facilities in the UK.

1.1.3. Over which timescales?

1.1.3.1. WTO rules

25 The selection by an investigating authority of the period of investigation (POI) is of critical importance because it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.[38]

26 Under the ADA, there are no specific rules governing the period(s) to be used for the collection of data on injury and dumping in an anti-dumping investigation. But this does not mean that investigating authorities enjoy unlimited discretion to use any period(s) of investigation in reaching its injury and dumping determinations.[39] The selection of the POI is linked to the investigating authority's obligation under 3.1 ADA to conduct an "objective assessment" of "positive evidence".[40]

27 Although the ADA does not specify how the injury POI should be determined, the "*Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations*", which was adopted by the Committee on Anti-Dumping Practices,[41] sets forth guidelines for determining what period or periods of data collection may be appropriate for the examination of dumping and of injury. As a general rule:

- the period of data collection for dumping investigations should normally be 12 months and in any case no less than 6 months, ending as close to the date of initiation as is practicable;

[38] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.224.
[39] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.225.
[40] The principles of "objective examination" and "positive evidence" are explained in Section 1.4.
[41] WTO Committee on Anti-Dumping Practices, *Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, 5 May 2000.

- the period of data collection for injury investigations normally should be at least three years, unless a party from which data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation.

1.1.3.2. Rules applied by selected WTO members

The EU

28 EU law offers more guidance to the investigating authority as regards the selection of the periods to be used for injury and dumping data collection. Article 6(1) of the EU AD Regulation[42] provides that, for the purpose of a representative finding in the case of dumping, the investigation period shall normally cover a period of no less than 6 months immediately prior to the initiation of the proceedings. In practice, the European Commission generally sets a period of 12 months for the examination of dumping, which generally ends with the full quarter preceding the initiation of the proceeding. In some instances, a longer period for the assessment of dumping is used, i.e., 18 months.[43] With respect to the determination of injury, the European Commission usually examines data over a period of 3 or 4 years, ending on the same date as the dumping POI. The EU Court of Justice has stated that the rules relating to the selection of the injury and dumping periods are a guide, rather than an obligation, and that the European Commission enjoys considerable discretion as part of a complex economic appraisal.[44]

29 As a matter of principle, the European Commission does not take into consideration data postdating the investigation period and that rule is applied rather strictly[45] even though there have been two recent landmark cases in which post investigation period developments were taken into consideration in the determination of the form of measures.[46] However, if factors relating to the period following the investigation period justify the non-imposition, the decrease or the increase of an anti-dumping duty, because they reflect the current conduct of the exporting producers concerned, the European Commission is invited to take them into account.[47] Only the data relating to new circumstances that are manifest, undisputed, lasting, not open to manipulation or that do not stem from deliberate action of interested parties may be taken into account.[48] For example, the Euro-

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42 Article 5 of the CVC Regulation is the corresponding provision for subsidies.
43 In *Cargo Scanning Systems* (China), 2010 OJ, L 150/1, paras 6 and 7, the Commission used an investigation period of eighteen months due to the specific particularities of the product concerned/like product market, i.e., the existence of public procurement/ tendering processes which entail long lead time periods for the materialisation of a transaction and the existence of relatively few transactions.
44 Case T-33/98, *Petrotub SA and Republica SA v Council*, EU:T:1999:330, paras 126 and 161.
45 *Tubes and pipes of ductile cast iron* (India) OJ 2016, L73/53, para. 68.
46 *Grain-oriented flat-rolled products of electrical steel (GOES)*, OJ 2015, L284/109. *Hot flat rolled product of iron or steel* (Russia, Brazil, Iran, Ukraine Serbia) OJ 2017 L258/24.
47 In Case T-138/02, *Nanjing Metalink International Co. Ltd v Council*, EU:T:2006:343, para. 61., the General Court suggested that the Commission would even be "obliged" to take these factors into consideration especially when such factors would lead to higher duties. We do not consider this approach to be WTO consistent.
48 *Leather handbags (China)*, OJ 2000, L22/25, para. 15.

pean Commission has in some cases taken into consideration in its final assessment post-POI data which reflected significant changes in prices and volumes,[49] as well as data relating to improvements in market conditions.[50] .

30 Reliance on data that is subsequent to the investigation period involves additional administrative and procedural burdens for the investigating authority as it may become necessary to carry out new investigations (e.g., by sending new questionnaires and conducting additional on-spot verifications).

1.1.3.3. Conclusions and recommendations

31 The EU's usual practice which consists in selecting a dumping POI of 4 calendar quarters[51] and an injury POI of 3 years immediately preceding the initiation of the proceeding should be maintained as a general rule because it is probably the best option for most proceedings. With respect to dumping, a period of at least 1 year presents the big advantage of covering at least one financial year closing. Apart from giving a more representative picture of the overall profitability of the respondent, it also allows the investigating authority to check whether year-end adjustments in costs and prices are accurately reflected in questionnaire responses. With respect to injury, a three year period usually constitutes the minimum period allowing the investigating authority to determine trends for most injury parameters.

32 However, the UK should give itself more flexibility than the EU or other investigating authorities in a number of situations:

- With respect to the dumping POI, the UK should consider shorter periods of time (e.g. 6 to 9 months) in situations where market prices are stable and non-seasonal and the number of UK producers and exporting producers from the country(ies) targeted is significant. Such shorter periods are not likely to show dumping margins that are very different from those pertaining to a longer period while reducing significantly the amount of work for all interested parties including the investigating authority. Longer periods of time (e.g. up to 18 months) should be considered in situations where the product under consideration is subject to significant price volatility and/or has longer market cyclicality.

- With respect to the injury POI, the UK should in some cases take a period longer than 3 years to account for the cyclical nature of the industry. This is

[49] *Iron and steel ropes and cables (Czech Republic, China, Thailand and Turkey)*, OJ 2001, L211/1, para. 32. *Grain-oriented flat-rolled products of electrical steel (GOES)*, OJ 2015, L284/109.
[50] *Outer rings of tapered roller bearings* (Japan), OJ 1997, L162/22, para. 44.
[51] The use of calendar quarters to determine POIs greatly facilitates data gathering for all industry operators.

particularly important for the determination of the profitability in connection with the calculation of injury margins.

33 The UK should consider relying on post-POI data more frequently than other jurisdictions. EU practice shows that it would generally only accept to take into consideration post POI data under exceptional circumstances (frequently when put under pressure by user industries). We consider that the UK should take a more pro-active stance especially because its domestic market is significantly smaller with fewer industry operators (as compared to the EU market). In situations where there is a risk of increased volatility or large variations in terms of, *inter alia*, profitability of the UK industry, volume and prices of dumped imports, general market conditions, product availability, antitrust considerations, etc. the UK should consider extending forward the period especially with respect to important injury parameters to cover from 3 up to 6 additional months after the end of the POI.

1.2 How should the lesser duty rule be applied in practice?

1.2.1. WTO rules

34 Article 9.1 ADA states that "*it is desirable that the imposition* [of antidumping duties] *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*". In *EC-Fasteners*,[52] the Appellate Body stated that Article 9.1 ADA expresses "*a preference for duties lesser than the margin of dumping, if lesser duties are adequate to remove the injury to the domestic industry*". Therefore, the lesser duty rule (LDR) is not mandatory but simply encouraged at WTO level.

35 The question of whether the LDR should be mandatory in certain cases is part of the Doha negotiation agenda. Developing countries are especially interested in seeing a mandatory rule applied to exports from their countries, and have proposed this measure as part of a "special and differential treatment" package of trade concessions offered by developed nations to developing countries.[53]

36 For information, on 16 April 1998, the WTO Committee on Anti-Dumping Practices issued a Compilation of information provided by member states regarding the LDR in which it compares the situation in 16 countries some of which incorporate a lesser duty provision in their national laws.[54]

52 Appellate Body Report, *EC-Fasteners (China)*, DS397, para 336.
53 Congressional Report Service, *WTO: Antidumping Issues in the Doha Development Agenda*, 20 April 2006.
54 WTO Committee on Anti-Dumping Practices ad Hoc Group on Implementation, *Compilation of information provided by Members regarding LDR*, G/ADP/AHG/W/43, 16 April 1998.

1.2.2. Rules applied by selected WTO members

37 The use of the LDR is not binding upon WTO members, but it is nevertheless permitted as it is in line with the goals advocated in the WTO agreements. The jurisdictions that use the LDR in one form or another include the EU, Canada[55], India, Turkey, Brazil, Australia, New Zealand, Mexico and Argentina, while those that do not include notably the United States and China.

The EU

38 The EU systematically applies the LDR in all anti-dumping investigations.

39 In 2013, the Commission made a proposal,[56] in which it argued that the LDR should no longer apply in future anti-subsidy cases or in future antidumping cases in which there are structural raw material distortions.[57] This proposal was supported by the European Economic and Social Committee and Committee of Regions.[58] On 11 November 2016, as a top priority of the Slovak Presidency, a compromise was adopted among EU Member States within the Council.[59] This compromise further amended is now being discussed at the European Parliament.[60]

Australia

40 The antidumping law was modified in 2013 and 2015 to restrict the application of the LDR in two specific circumstances in anti-dumping proceedings: (a) where the Australian industry includes at least two small-medium enterprises; (b) where the normal value of the goods cannot be determined by reference to the exporting country's market.[61] The reasons given to justify a restriction in the application of the LDR are: (i) to make it easier for smaller producers to access remedies, and (ii) to avoid further delaying relief for local industries in complex investigations.[62]

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55 Canada only applies the LDR in some cases where a public interest assessment is undertaken

56 European Commission Press Release, *Commission proposes to modernise the EU's trade defence instruments*, 10 April 2013.

57 Kommerskollegium, *The LDR in Trade Investigations*, 2013. E.g. the Chinese steel industry.

58 COM(2016) 721 final, 30 June 2017. See in particular points 1.13 and 3.11.

59 Council of the EU Press Release, *Trade defence instruments: Council agrees negotiating position*, 13 December 2016.

60 European Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union*, 27 June 2017.

61 Customs Tariff (Antidumping) Amendment Act 2013, No. 94, 2013. available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5063 and *Customs Tariff (Anti-Dumping) Amendment Act 2015*, available at: https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r5410

62 'Complex' investigations include those where a market situation has been claimed — which requires the Anti-Dumping Commission to explore alternative methodologies for determining dumping margins (see above) — and those involving concurrent claims of dumping and subsidisation.

41 As a consequence of these legislative changes, cases in which the LDR have been applied have declined significantly in the recent years: the Productivity Commission reported that the LDR was applied to nearly half the measures in force as of May 2009, but it was only applied in four cases between 2009 and 2015.[63]

Canada

42 In Canada, the consideration of the LDR is conditional. Article 3(1) of the Special Import Measures Act (SIMA) provides that the full duty rule should be applied as a matter of course (i.e., duties are equal to the margin of dumping of the imported goods). The Canadian International Trade Tribunal (CITT) does not have jurisdiction to order duties less than the full dumping amount. But if the CITT considers that the imposition of the full duty would not in whole or in part be in the public interest (the so-called "public interest inquiry"), it may under Article 45(1) SIMA provide to the Finance Minister a statement of facts in which it will indicate one of two options: "*a level of reduction in the antidumping duty*" or "*a price or prices that are adequate to eliminate injury, retardation or the threat of injury to the domestic industry*".[64]

New Zealand

43 In New Zealand, the LDR is also applicable. Section 14(5) of the Dumping and Countervailing Duties Act 1988 provides that : "*In exercising the discretion under subsection(4) of this section, the Minister shall have regard to the desirability of ensuring that the amount of anti-dumping or countervailing duty in respect of those goods is not greater than is necessary to prevent the material injury or a recurrence of the material injury or to remove the threat of material injury to an industry or the material retardation to the establishment of an industry, as the case may require*".[65]

1.2.3. Conclusions and recommendations

44 Where dumped imports are found to cause or threaten to cause material injury to the domestic industry producing like products, the ADA permits an investigating authority to impose a duty on these imports up to the full dumping margin (that is, the difference between the normal value and the export price). Such level of imposition may have the benefit of providing a better environment for the domestic industry to recover from the injury suffered from the dumped imports.

63 Applied to one or more exporters in the aluminium extrusions, hollow structural sections, hot rolled coil steel, and quenched and tempered steel plate cases.
64 The "public interest inquiry" as applied by the Canadian authorities is further explained in Section 3.1.2.
65 WTO Committee on Anti-Dumping Practices ad Hoc Group on Implementation, *Compilation of information provided by Members regarding LDR*, G/ADP/AHG/W/43, 16 April 1998.

45 The most notable country that does not apply the LDR is the United States. It has justified its position on a number of grounds,[66] including the following: the application of the LDR involves significant additional investigatory fact-gathering processes and complex calculations; there is a lack of transparency in the methodologies and practices of WTO Members when applying this rule, as well as a lack of effective judicial review; there is no guarantee that the lesser duty amount would be sufficient to remove the injury and; the investigated parties may have an incentive not to fully cooperate in the investigation if they know that a lesser duty amount may be imposed (e.g., parties might provide only the export price information necessary to calculate the "lesser duty" while refusing to provide any normal value information necessary to calculate dumping).

46 In contrast, a number of countries, including the EU, have traditionally supported the application of the LDR. The rationale underlying the application of the LDR is to avoid overprotecting the domestic industry from dumped imports through the imposition of measures which would exceed the level of protection needed to remove injury caused by the dumped imports. At the same time, the application of the LDR equally seeks to ensure that other interests are not unduly affected,[67] such as:

- *Downstream industries*: the competitiveness of the downstream industries may be adversely affected by high antidumping duties when they are imposed on inputs which are processed to manufacture a transformed product. The competitiveness of the downstream industry will be all the more affected where the proportion of the input (subject to measures) in the total cost of production of the processed product is high, as increased production costs will likely force them to raise prices, and thereby putting themselves at a competitive disadvantage vis-à-vis their foreign competitors.

- *Consumers*: consumers will have to pay more for the product subject to antidumping duties, or for any downstream products manufactured from the product subject to antidumping duties.

- *Trade flows*: excessive protection in the form of high duties may lead some exporting companies or countries to abandon the market concerned to the detriment of the downstream industries and ultimately consumer choice.

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66 WTO Negotiating Group on Rules, *Further Comments on Lesser Duty Proposals: Paper from the United States*, TN/RL/GEN/58, 13 July 2005.

67 As explained further in this report, the purpose of the LDR, which is to prevent an over-protection to the domestic industry, must not be confused with the public interest test. While the application of the LDR will normally ensure that the domestic industry will not receive a protection that exceeds the level which would be sufficient to remove injury caused by the dumped imports, the public interest test seeks to prevent the imposition of a duty that would – even with the application of the LDR – still disproportionately affect interests of other parties.

47 According to various reports commissioned by the European Commission,[68] evidence suggests that the level of protection provided to the domestic industry under the LDR is more than sufficient to offset the injury suffered and that EU domestic industry has generally viewed the application of the LDR in a positive way.

48 We assume that the UK will generally apply the LDR - subject, possibly, to the issues highlighted below - because the imposition of high antidumping duties[69] may sometimes provide the injured domestic industry with a protection beyond that which is necessary to remove the injury caused by such imports,[70] to the detriment of downstream users and consumers. The UK is a particularly mature economy with a very developed multi-layered network of downstream industries with high added value as well as a large base of SMEs operating at various levels of the production chain. The imposition of high antidumping duties resulting solely from the mathematical calculation of dumping margins may affect negatively the UK's global production as well as supply and value chains and, in the long run, the competitiveness of its industry not only on the domestic market but also, at a more global level, in all export markets. In particular, the non-application of the LDR may lead to higher input costs and reduce availability of the product concerned for the downstream industries (especially those requiring competitively priced imports in commercially viable volumes to remain competitive on global markets). Consumers may also be affected especially if, as a result of particularly high duties on imports, choice and product availability at reasonable prices are reduced. Finally, employment might equally be affected negatively if greater workforce is employed by downstream industries than by the domestic industry that is seeking protection.

49 However, while the LDR should be the rule, the UK may also consider adapting the way injury margins are calculated under certain circumstances, in particular where small and medium enterprises (SMEs) are involved. The UK may consider providing SMEs with a higher level of protection from the risks of dumped imports. The special protection provided to SMEs may be all the more justified considering the importance of their contribution to the UK economy as a whole.[71] In practice, this would mean that the UK should be in a position to modulate the methodology used to determine target prices when SMEs are involved since they may not have the financial capacities to withstand, over a longer period, the volume and price effects of dumped imports to the same extent as larger companies.

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68 See, *Evaluation of the EU's Trade Defence Instruments*, Main report (Volume 1), BKP Development Research & Consulting, 2012, pp 75 and following, available at: hyperlink to evaluation of EU trade defence instruments .

69 Incidentally, the methodologies used for the calculation of dumping margins may sometimes lead to results that do not necessarily reflect economic expectations: for instance, it is not uncommon for the US to impose duties that are several hundred percent on grounds of non-cooperation. There are other situations where even though both the export prices and domestic of several producers are very similar, dumping margins could vary significantly because of the way production costs are calculated or allocated or even because the product mix used for the comparison between domestic prices and export prices is different.

70 This happens in fact whenever the injury margin is lower than the dumping margin and even in some cases where not all the injury suffered by the domestic industry is caused by the dumped imports.

71 For detailed data on the impact on the UK economy of SMEs, please refer to the following link: https://www.fsb.org.uk/media-centre/small-business-statistics.

Similarly, in comparison with larger company groups, the access by SMEs to capital may be more limited which, in turn, may suggest that SMEs are under pressure to obtain a higher return on their investments. A relatively easy way to reflect the particularities of SMEs would be to adapt the determination of the injury margin by setting a higher profitability target in the determination of the non-injurious price in situations where a certain (according to a threshold to be defined) proportion of the UK industry is composed of SMEs.

50 The UK may also consider granting a nascent UK industry (i.e., the production of which is not mature enough to determine a reasonable profit level) an increased level of protection similar to that given to SMEs.

51 From a purely procedural point of view, the implementation of the LDR in Canada is interesting. However, the UK should favour applying the LDR in the context of the same investigation, rather than in a separate investigation as done by Canada (under Canadian antidumping law, the application of the LDR is conditioned to a public interest test) for the following reasons:

- The principles relating to the application of the LDR and the "public interest test" should remain separate tests. This is because the implementation of the LDR, which is intrinsically tied to the calculation of an injury margin, is purely a mathematical exercise aiming at reducing the protection afforded to the domestic industry to the level of injury caused by the dumped imports. In contrast, the consideration of the "public interest" responds to different concerns (e.g., interests of consumers, users, etc.) and, to a large extent, depends on the level of cooperation of the interested parties.

- Under the Canadian antidumping rules, the Canadian International Trade Tribunal (CITT) has no jurisdiction to impose a lesser duty. A lesser duty may only be imposed if the Minister of Finance determines, in a separate procedure, that such imposition is not in the public interest. Such a mechanism is time-consuming and lacks legal certainty.

1.3 What are the options for calculating an injury margin?

1.3.1. WTO rules

52 The ADA does not give any guidance on how to calculate the injury margin.

1.3.2. Rules applied by selected WTO members

The EU

53 Although several countries apply the LDR, the EU has the most developed system for the calculation of the injury margin.

54 In some cases, the EU has calculated the injury margin by comparing the import prices at the EU border, released for free circulation with the ex-factory price of the domestic product[72] subject to adjustments reflecting differences in physical characteristics and level of trade. However, in the overwhelming majority of cases, the Commission finds that the prices of the Union industry have been depressed because of the dumped imports and sales are no longer made at reasonably profitable levels. It will therefore, as a general rule, compare the import prices with a "target price". This "target price" is generally determined by adding to the full production costs of the EU industry a reasonable profit.

55 The European Commission has a broad margin of discretion when calculating the injury margin and in particular the "target price" [73] and has done so in a number of different ways. For example:

- *A profit margin was added to the weighted average cost of production of the industry*. In *Magnesia Bricks*[74] and in *Farmed Salmon,*[75] the non-injurious price was obtained by adding a profit margin of 8% to the cost of production. In *Stainless steel fasteners*[76] and in *Footwear with uppers of leather*,[77] a profit margin of 5% was added to the weighted cost of production of the Community industry. In *Barium carbonate*, the European Commission took into consideration the fact that the Union industry was suffering from the dumped imports since 1999 and that the profit that could be achieved in the absence of dumped imports was based on the weighted average profit margin of the like product during the years 1996 to 1998. On this basis, it was found that a profit margin of 7.2% of turnover could be regarded as an appropriate minimum that the Union industry could have expected to obtain in the absence of injurious dumping.[78]

- *The costs of a representative producer (rather than the industry average) were used as base, on which a profit margin was added*: In *Silicon metal*, the production costs of a particular Community producer was considered to be most representative and were adjusted by a profit margin of 6.5%. This profit margin was considered by the European Commission to be the minimum margin guaranteeing the Community producers a reasonable return on investments.[79]

- *In a case concerning a traded commodity, the non-injurious price was calculated using the price on a world commodity market plus an extra element for hedging costs*: In *Unwrought, unalloyed zinc*, the injury elimination threshold was set on the basis of the monthly LME (London Metal Exchange)

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72 *Aluminium radiators* (China), OJ 2012, L310/1, para. 98.
73 Case T-210/95, *EFMA v Council*, EU:T:1999:273, para. 57.
74 *Magnesia Bricks* (China), OJ 2005, L93/6, para. 148.
75 *Farmed Salmon* (Norway), OJ 2006, L15/1, para. 131.
76 *Stainless steel fasteners and parts thereof* (China, Indonesia, Taiwan, Thailand and Vietnam), OJ 2005, L128/19, para. 175.
77 *Footwear with uppers of leather* (China, Vietnam) OJ 2006, L98/3, para. 134.
78 *Barium carbonate* (China), OJ 2005, L27/4, para. 135.
79 *Silicon metal* (China), OJ 1990, L80/9, para. 35.

price during the investigation period, plus a factor of 3 % (ex-factory sales premium to cover, *inter alia*, the costs of currency hedging and zinc-price hedging).[80]

- *The basic injury margin was reduced to take account of the fact that during part of the injury investigation period the imports of the products concerned were subject to quotas (the level of which could not have caused injury)*: In *Footwear with uppers of leather*, in calculating the injury margin, the European Commission first took note of the fact that the value of the total import volumes in 2003 from the countries concerned was not considered as materially injurious because of the existence of quotas. As a second step, the European Commission allocated the total non-materially injurious value amount to the imports from China and Vietnam on the basis of the respective imports of the product concerned from the countries concerned during the investigation period. Subsequently, these two non-materially injurious amounts were set into proportion to the imports of year 2005 for each exporting country concerned as the first and most recent full year available which was not subject to quantitative restrictions with regard to the product concerned. Finally, the duty levels established for the investigation period were reduced in these proportions. This resulted in injury thresholds of 16.5% and 10% for China and Vietnam respectively.[81]

- *Where other factors had contributed to injury, the injury margin was calculated on the basis of the level of undercutting (rather than the cost of production), plus a reasonable amount of profit*: in *Dicyandiamide*, the European Commission noted that the circumstances of the case required a special approach for the determination of the injury elimination level. In particular, (i) the dumping margin had to be calculated in an exceptional way by using the EU industry's cost of production; (ii) there were only two supply sources of Dicyandiamide in the world, one in the EU and one in China and it was essential not to create a monopoly and/or a critical supply situation on the EU market; and (iii) the VAT refund rate applicable to exports of the product concerned originating in China was reduced from 13 % to 5 % after the investigation period, and according to the European Commission, the reduction in the VAT refund rate for exports would most likely lead to an increase in export prices of Dicyandiamide. Under all these circumstances, the European Commission considered it appropriate to focus on the injurious effects directly resulting from the undercutting practices of the Chinese exporting producers and to base the injury elimination level on the amount that would be sufficient to eliminate the actual price undercutting. The European Commission also added a profit margin (between 0 and 5 %) which corresponded to the profit margin achieved by the Community industry.[82]

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80 *Unwrought, unalloyed zinc* (Poland, Russia), OJ 1997, L89/6, para. 76.
81 *Footwear with uppers of leather* (China, Vietnam) OJ 2006, L275/1, paras 300-301.
82 *Dicyandiamide* (China), OJ 2007, L296/1, paras 129 et 130.

- *The level of the injury margin should take into account the existence of heavy investments*. In *DRAMs*, the European Commission considered that the product life of DRAMs was short and that the industry needed substantial profits in order to finance the necessary annual investments in order to simply remain competitive. In this context, 15 % was considered a reasonable profit margin.[83]

- *The level of the injury margin may take into account hypothetical calculations.* For instance, in *Stainless steel cold-rolled flat products*, the European Commission considered it appropriate to increase the level of the profit margin previously found in its past investigation from 8.35% to 9% to account for the fact that the Community industry had increased its productivity by 31% between 1997 and 2003.[84]

56 In principle, the European Commission refers to the profit levels of the domestic industry prior to the existence of injury[85] and this level is limited to that which the Union industry could reasonably count on during normal conditions of competition, in the absence of dumped imports. In practice, this means that periods during which profits were unrepresentative should be avoided. In *Coke 80+*, the European Commission considered that years 2004 and 2005 in which the Union industry had achieved profit levels of 15% and 16.2% respectively were unrepresentative because there was a significant shortage of imports originating in China. The European Commission also considered that the level of profit achieved in 2003, i.e. 8.1%, was too low because the Union industry was still in the process of recovering from past dumping. Under these circumstances, the European Commission considered that a profit level of 10.5%, which was used in the previous investigation, was appropriate.[86]

57 The European Commission has been determining the appropriate profit margin level of the Community industry on the basis of data covering a wide variety of periods. In general, information covering a single year is taken into account. That single year may be the most recent year which the European Commission considers as representative,[87] even though it may not necessarily need to fall within the investigation period.[88] Where the result of a single year does not provide an accurate picture of the situation of the Community industry, the European Commission has also used a 3 year reference period.[89]

Australia

83 *DRAMs* (Korea) OJ 2003, L102/7, para. 178.
84 *Stainless steel cold-rolled flat products* (USA), OJ 2003, L230/9, paras 107-110.
85 *Tartaric Acid* (China) OJ 2006, L23/1, para. 38.
86 *Coke of coal in pieces with a diameter of more than 80 mm* (China), OJ 2009, L75/22, para. 68.
87 *Cold rolled flat steel products* (China, Russia), OJ 2016, L210/1, para. 156.
88 *Cold rolled flat steel products* (China, Russia), OJ 2016, L210/1, para. 161.
89 *Biodiesel* (Argentina, Indonesia), OJ 2014, L315/2, para. 208.

58 The LDR may be applied under certain circumstances. Section 269TACA of the Dumping Duty Act provides useful guidelines on how the Australian Anti-dumping Commission should identify the non-injurious price of the goods exported to Australia. These guidelines can be summarized as follows:[90]

- In principle, the Commission will calculate the non-injurious price from an unsuppressed selling price, which consists in the selling price that the Australian industry could reasonably achieve in the market in the absence of dumped imports.

- In calculating the unsuppressed selling price, the Australian industry's weighted average selling price is calculated for a period unaffected by dumping, with a preference for a one year minimum period. Seasonal fluctuations or longer cyclical trends are taken into account, if applicable.

- Selling prices of the Australian industry that are no older than five years are generally used. By way of exception, the Commission may use data older than five years where it is demonstrated that this data is relevant to the establishment of the unsuppressed selling price and if that data is verified.

- Where it is not reasonable to use the price or market approach to calculate the unsuppressed selling price, the Commission may use a weighted average of the most recent verified industry production and selling costs.

- A reasonable profit may be determined based on the following options: (i) the weighted average profit rate achieved by the industry in the most recent period unaffected by dumping, with a preference for a one year period minimum; or (ii) the profit rate of the Australian industry in a similar category of goods. Where these two options are considered unreasonable under the circumstances of the case, the Commission may use a profit rate that is calculated on the basis of the return on investment or from appropriate profit surveys. The Commission may decide not to rely on a constructed price method for a number of reasons, including the fact that: (i) a reasonable rate for historical profits could not be established; (ii) the industry's production and selling data was unsuitable for a construction approach; or (iii) the result leads to an unreasonable level of unsuppressed selling price (for example, the resulting unsuppressed selling price may be unreasonable when compared with the historical prices).

- In establishing for a single industry the unsuppressed selling price for multiple Australian producers, the Commission will generally use a weighted average figure established in accordance with the options outlined above. Alterna-

[90] For more comprehensive information on how Australia calculates the non-injurious price, please refer to the Dumping and Subsidy Manual, Australian Government Department of Industry, Innovation and Science, Anti-Dumping Commission, November 2015, pages 129-133. Available at: hyperlink to Australian Anti-Dumping Commission Handbook

tively, the following methods may also be used: (i) data in relation to a selected representative group of sales (for example, a large and/or representative contract); or (ii) data from the most efficient manufacturer or plant.

- In cases of multiple importers, multiple exporters and multiple countries, the Commission generally calculates one unsuppressed selling price for each product, or each model/type/grade of product. Deductions from this figure are made for post-exportation costs separately for each country. Therefore, one unsuppressed selling price is calculated for each country and product combination, or each country and model/type/grade combination.

India

59 The system applied in India is of particular interest because, as a strong proponent of the application of the LDR, India has introduced a specific section in its antidumping laws in which it lays down the principles for the determination of the non-injurious price.[91] Although these principles are to a large extent consistent with those applied in the EU, we consider that it is useful to reproduce them in full below because they help understand the systematic approach used by the Indian authorities in determining the non-injurious price.

(1) The designated authority is required under sub-rule (1) of rule 17 to recommend the amount of anti-dumping duty which, if levied, would remove the injury where applicable to the domestic industry.

(2) For the purpose of making recommendation under clause (1), the designated authority shall determine the fair selling (notional) price or non-injurious price of the like domestic product taking into account the principles specified herein under.

(3) The non-injurious price is required to be determined by considering the information or data relating to cost of production for the period of investigation in respect of the producers constituting domestic industry. Detailed analysis or examination and reconciliation of the financial and cost records maintained by the constituents of the domestic industry are to be carried out for this purpose.

(4) The following elements of cost of production are required to be examined for working out the non-injurious price, namely:-

(i) The best utilization of raw materials by the constituents of domestic industry, over the past three years period and the period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of raw materials.

[91] See Annexure III to the Indian Antidumping Rules, 1995.

(ii) The best utilization of utilities by the constituents of domestic industry, over the past three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of utilities.

(iii) The best utilization of production capacities, over the past ·three years period and period of investigation, and at period of investigation rates may be considered to nullify injury, if any, caused to the domestic industry by inefficient utilization of production capacities.

(iv) The Propriety of all expenses, grouped and charged to the cost of production may be examined and any extra-ordinary or non-recurring expenses shall not be charged to the cost of production and salary and wages paid per employee and per month may also be reviewed and reconciled with the financial and cost records of the company.

(v) To ensure the reasonableness of amount of depreciation charged to cost of production, it may be examined that no charge has been made for facilities not deployed on the production of the subject goods, particularly in respect of multi-product companies and the depreciation of re-valued assets, if any, may be identified and excluded while arriving at reasonable cost of production.

(vi) The expenses to the extent identified to the product are to be directly allocated and common expenses or overheads classified under factory, administrative and selling overheads may be apportioned on reasonable and scientific basis such as machine hours, vessel occupancy hours, direct labour hours, production quantity, sales value, etc., as applied consistently by domestic producers and the reasonableness and justification of various expenses claimed for the period of investigation may be examined and scrutinized by comparing with the corresponding amounts in the immediate preceding year.
(vii) The expenses, which shall not to be considered while assessing non-injurious price include,

a) research and development Provisions (unless claimed and substantiated as related to the product specific research);
b) since non-injurious price is determined at ex-factory level, the post manufacturing expenses such as commission, discount, freight-outward etc. at ex-factory level;
c) excise duty, sales tax and other tax levies on sales;
d) expenses on job work done for other units;
e) royalty, unless it is related to technical know-how for the product;
f) trading activity of product under consideration; or
g) other non-cost items like bad debts, donations, loss on sale of assets, loss due to fire, flood, etc.

(viii) A reasonable return (pre-tax) on average capital employed for the product may be allowed for recovery of interest, corporate tax and profit. The average capital employed is the sum of "net fixed assets and net working capital" which

shall be taken on the basis of average of the same as on the beginning and at the end of period of investigation. For assessment of reasonable level of working capital requirement, all the elements of net working capital shall be scrutinized in detail. The impact of revaluation of fixed assets shall not be considered in the calculation of capital employed. Interest is allowed as an item of cost of sales and after deducting the interest, the balance amount of return is to be allowed as pre-tax profit to arrive at the non-injurious price.

(ix) Reasonableness of interest cost may be examined to ensure that no abnormal expenditure on account of interest has been incurred. Details of term loans, cash credit limits, short term loans, deposits and other borrowings taken by the company and interest paid thereon may be examined in detail along with the details of assets deployed.

(x) In case there is more than one domestic producer, the weighted averages of non-injurious price of individual domestic producers are to be considered. The respective share of domestic production of the subject goods may be taken as basis for computation of weighted average non-injurious price for the domestic industry as a whole."

Canada

60 In Canada, as noted above, the CITT may consider that the imposition of the full duty would not in whole or in part be in the public interest (the so-called "public interest inquiry"). Under such circumstances, the CITT may specify to the Finance Minister in a statement of facts one of two options: "*a level of reduction in the antidumping duty" or "a price or prices that are adequate to eliminate injury, retardation or the threat of injury to the domestic industry*".

61 In practice, a public interest inquiry will: (i) determine if the imposition of the duty as calculated by the Canadian Customs and Revenue Agency "*would not or might not be in the public interest*"; (ii) if it would not, determine what type of measure should be advised to the Minister and; (iii) eventually calculate the level of the measure proposed to the minister.

62 Public interest inquiries are rather exceptional. To date, there have been three decisions, which are listed on the CITT's website, that have led to a modification of the initial duty proposed: *Certain Prepared Baby Food*,[92] *Certain Iodinated Contrast media*,[93] and *Certain Stainless Steel Round Wire*.[94] In *Certain Prepared Baby Food*, the CITT recommended a "*minimum domestic market resale price for imports"* for each category of the product concerned[95] while in the two other cases it recommended "a diminution of the level of duty".

92 CITT, *Certain Prepared Baby Food*, Public Interest Investigation No. PB-98-001, 30, November 30 1998.
93 CITT, *Certain Iodinated Contrast Media*, Public Interest Investigation No. PB-2000-001, 29 August 2000.
94 CITT, *Certain Stainless Steel Round Wire*, Public Interest Inquiry No. PB-2004-002, 22 March 2005.
95 In finalizing its proposal for the minimum domestic market resale price for imports of the product concerned from the United States, the CITT selected the net-net price, from within the range of potential price points

63 In *Certain Iodinated Contrast media*, in order to recalculate the level of duty, the CITT examined and reviewed all information provided by the parties with a particular emphasis on market data. On this basis, the CITT (i) recalculated the normal value, (ii) calculated a "public interest price", (iii) calculated the level of duty to be imposed from the difference between the normal value and the "public interest price", and (iv) proposed a reduction of the level of duty based on the difference between the initial level of duty and the newly calculated level.

64 Interestingly, in a public interest inquiry, the CITT does not calculate any injury reparation price or level of duty. In comparison with the EU practice, the proposed reduction of duty by the CITT could lead to a level of duty that does not necessarily repair the injury suffered by the domestic industry or, alternatively, the resulting duty could be higher than the injury reparation level.

1.3.3. Conclusions and recommendations

65 While it is not possible to provide a "one-size-fits-all" methodology on how to calculate an injury margin because the facts and circumstances of each case are different, it is nonetheless possible, against the backdrop of the detailed EU, Australian and Indian practices described above, to provide general guidelines that may constitute a simple "common denominator" on how to calculate an injury margin. In any event, the UK should give itself as much flexibility as possible.

66 In the best of worlds, the UK authority should first aim at calculating the non-injurious price on the basis of the selling price that the UK industry could reasonably achieve under normal conditions of competition, in the absence of dumped imports, over a defined period of time (in principle, at least a one year period). This system, which largely reflects the default rule in the Australian system, has two big advantages: (1) the use of "real" prices that were actually used in the absence of injurious dumping and (2) the fact that such prices only reflect the absence of the injurious effects of the dumped imports without necessarily reflecting the total elimination of injury that might be caused by other factors.

67 The problem with this methodology, however, is that it is very difficult to implement in practice for a number of reasons. First, the establishment of a period that is not affected by injurious dumping would require the UK authority to identify past periods where dumping did not occur. Second, the UK might need to go back several years to find a suitable period. Under the Australian system, sales prices which are up to five years old can be used (and in some cases, even older periods can be used). The use of "old prices" may no longer appropriately reflect current market values (irrespective of inflation, feedstock price fluctuations, etc). Third,

considered, that best balanced the various public interest concerns. The resultant net-net price was then translated into minimum domestic market resale prices per case equivalent for each of the four categories of the product concerned produced by Heinz. These prices were then further adjusted to correspond to the eight product categories and jar sizes sold by Gerber.

even if unsuppressed prices that are unaffected by injurious dumping were eventually found, in many situations, proper price comparisons of "like" products would be difficult for all products that are not commodities or quasi commodities.

68 Therefore, in practice, the UK authority will probably find itself in the obligation to use the more classic methodology of constructing a target selling price by adding a profit margin to the (weighted or not) cost of production of the UK industry. The big advantages of this system are the following: (1) it will be relatively easy to calculate a target price for "like" products that are imported since the periods of time are the same; (2) the target price will be based on costs that are contemporaneous to the dumped imports; and (3) the UK authority will have a substantial amount of flexibility in the determination of the level of the target price. For instance, the cost of production could be based on the weighted average cost of production of the UK industry, or the costs of a representative UK producer or even a selection of representative UK producers that would include, where appropriate, SMEs.

69 The main disadvantage of using a calculated target selling price is that it will be more difficult to isolate injurious factors other than dumped imports in setting the target price. This disadvantage could be to a certain extent reduced by ensuring that the level of the "target" profit margin to be added to the cost of production represents the level that the UK industry could have expected to obtain in the absence of injurious dumping, under similar[96] conditions of competition.

70 The authors do not wish to take a firm position in favour of one methodology versus the other because, in the majority of cases, the methodology will be dictated by the circumstances of the case and the difficulty that the UK authority might have in gathering adequate evidence for either methodology.

71 As noted above, Australian antidumping laws have included explicit provisions that circumscribe the application of the LDR where at least two SMEs are involved, and compel the investigating authority to impose duties representing the full dumping margin. While we do not consider that a blind transposition of the Australian antidumping rules to the UK would be appropriate considering the different characteristics of the Australian and UK economies, the UK may wish to consider the following alternative methods for calculating the injury margin where SMEs are involved (without having to set exceptions to the rules concerning the application of the LDR):

- The UK could consider calculating the injury margin on the basis of a higher profit ratio when the UK industry is mostly composed of SMEs. Such increased profit ratios should be determined on a case-by-case basis, depending on the industry concerned and could be based on e.g. the historical profit ratio of the most profitable SME(s). Such higher profit ratios can be justified in

[96] As opposed to "normal" conditions of competition. In other words, the level of the profit margin does not need to represent the level that the UK industry would aim to achieve in optimal market conditions but, rather, the return that it would be expecting in the absence of the dumped imports, all other market forces remaining unchanged.

light of the fact that SMEs may be disproportionately affected by the effects of dumped imports and therefore require a higher level of protection to ensure the continuation of a commercially viable business.

- Where an antidumping proceeding involves both SMEs and large companies, the UK could consider applying a certain weighting for SMEs in the determination of the (weighted average) profit ratio using in the calculation of the non-injurious price.

72 In some cases - especially in situations where the domestic industry is known to have a long record of inefficiencies for whatever reasons - the UK may also wish to consider calculating the injury margin on the basis of the costs of e.g. the three most efficient UK producers. An inefficient producer may be defined as one that has been predominantly loss-making for the last e.g. three to five years. It would indeed be inappropriate to set a non-injurious price on the basis of higher production costs than those that would normally be expected from efficient producers for two reasons at least (1) the exclusion of inefficient producers from the calculation reduces the risk that the non-injurious price would be set at a level that would equally eliminate injury caused by other factors (e.g. inefficiencies) rather than the dumped imports and (2) the duties, once they are imposed, will provide protection for a period of minimum five years. They are not supposed to protect inefficient UK producers but rather to allow those that are efficient to continue to compete in an environment where fair competition is restored.

1.4 How can the impact of the volume and price effects of dumped imports best be assessed?

1.4.1. WTO rules

73 Article 3.1 of the Anti-dumping Agreement (ADA) sets forth the two fundamental and overarching principles which must guide an investigating authority when conducting an injury investigation. Under this article, an injury determination "*shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products*" (emphasis added). These two guiding principles will be examined in turn. Against this backdrop, we will then examine how the investigating authority must assess the impact of the volume of the dumped imports and the effects of the dumped imports on prices in the domestic market for like products in a WTO compliant way.

1.4.1.1. The use of positive evidence

74 The WTO Appellate Body has clarified that the determination of injury must be grounded on "*positive evidence*", which has been defined as evidence that is affirmative, objective, verifiable and credible.[97] While positive evidence suggests that investigating authorities may not ground their injury determination on the basis of mere assumptions,[98] they may nonetheless make "*reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified*".[99] An injury determination must be based on the totality of the evidence, which includes confidential and non-confidential information.[100]

1.4.1.2. The requirement of an objective examination

75 The WTO Appellate Body has also stated that the determination of injury must be based on an "*objective examination*", which requires that the examination process (that is, the collection of information, inquiries and evaluation) must comply with the "*basic principles of good faith and fundamental fairness*".[101] In practice, this means that the injury investigation must be investigated "*in an unbiased manner, without favouring the interest of any interested party, or group of interested parties*"[102] and "*the identification, investigation and evaluation of the relevant factors must be even-handed*".[103]

76 In practice, the WTO Appellate Body has ruled that the following determinations made by the investigating authority did not meet the requisite standard of an objective examination: when only part of a domestic industry is examined, without any explanation as to why the other part was not;[104] when selective information was used;[105] or when it was considered that all imports from non-examined exporters and producers are dumped because a number of these exporters and producers were found to have dumped.[106]

77 It is on the basis of these guiding principles that an investigating authority should assess the impact of the volume of the dumped imports and the effects of the dumped imports on prices in the domestic market for like products. These two factors will be examined in turn.

1.4.1.3. Assessment of the volume of dumped imports

78 Article 3.2 ADA provides for the broad statement that the investigating authority must examine whether there has been a significant increase in dumped imports,

97 Appellate Body report, *US-Hot Rolled Steel*, para. 192.
98 Appellate Body report, *US-Hot Rolled Steel*, para. 227.
99 Appellate Body report, *Mexico – Beef and Rice*, para. 204.
100 Appellate Body report, *Thailand – H-Beams*, para. 107.
101 Appellate Body report, *US-Hot Rolled Steel*, para. 193
102 Ibid.
103 Ibid, para. 196.
104 Ibid, para. 204.
105 Appellate Body report, *Mexico – Rice*, para. 181.
106 Appellate Body report, *EC – Bed Linen (Article 21.5)*, paras. 142-146.

either in absolute terms or relative to production or consumption in the importing country. Other than the requirement that the assessment of the volume of dumped imports must be based on positive evidence and on an objective examination, the ADA does not provide any specific methodology for determining the volume of dumped imports.[107] In practice, this means that it is up to the investigating authority to decide which methodology should be used in assessing whether there has been a significant increase in the dumped imports.[108]

79 *De minimis*. Below a certain defined threshold (so-called *de minimis*) it will be presumed that the volume of imports of a given country does not cause injury to the domestic industry. Imports are considered to be *de minimis* under Article 5.8 ADA if the volume of dumped imports of a given country is less than 3 percent of imports of the like product in the importing country, unless the exporting countries targeted by the investigation which individually account for less than 3 per cent of the imports of the like product in the importing country collectively account for more than 7 per cent of imports of the like product in the importing country.

80 It is important to note that the *de minimis* volume tests set out in the WTO ADA constitute only the lowest denominator when determining whether an investigation should be initiated or terminated. This does not prevent the authorities from deciding not to take action against imports from third countries even where they exceed the *de minimis* thresholds. For example, the European Commission has considered that given the small volume of imports from other third countries (but above *de minimis* level), their limited market share and their higher average prices, these imports did not contribute to the injurious situation of the Union industry.[109]

81 *Significant increase*. Article 3.2 ADA also requires the investigating authority to consider whether there is a "*significant increase*" in dumped imports. The WTO Appellate Body has interpreted the verb *consider* as meaning that the finding of a "*significant increase*" in dumped imports does not necessarily have to be explicitly characterised for the assessment of dumped imports to be fulfilled – although the Panel recommends the investigating authority to do so. It is sufficient for the investigating authority to consider and take into account the existence of a significant increase in dumped imports.[110]

82 *Absolute or relative*. Finally, Article 3.2 ADA further provides that the increase in dumped imports must either be absolute or relative to production or consump-

[107] Panel report, *EC – Salmon (Norway)*, para. 7.632. Referring to: Appellate Body Report, *EC-Bed-Linen (Article 21.5-India)*, para. 124.
[108] Panel report, *Thailand – H-Beams,* para 7.159. The Antidumping and Countervailing Duty Handbook of the USITC, Fourteenth Edition, Publication 4540, June 2015, requires petitioners filing a complaint to demonstrate the existence of "massive" imports of the merchandise over a relatively short period. The text of the legislation (19 U.S. Code § 1677 (7)(C)(i)) however only requires the USITC to consider whether the increase of volume of imports is "significant".
[109] See, e.g., *Chamois leather* (China), OJ 2006, L 251/1.
[110] Panel report, *Thailand – H-Beams*, paras. 7.161-7.162.

tion in the importing country. According to the Panel, it is sufficient for the investigating authority to find either an absolute increase or a relative increase of the volume of dumped imports.[111]

83 *Total imports or only dumped imports*. The position taken by certain WTO members where imports in respect of which a zero or *de minimis* dumping margin was found are excluded from the injury analysis is supported by a number of WTO Panels.[112]

1.4.1.4. The effect of the dumped imports on prices in the domestic market for like products

84 Article 3.2 ADA provides that the investigating authority has to consider whether dumped imports have one (or more) of possible three effects on the prices of the domestic industry, namely (i) significant price undercutting; (ii) significant price depression; and (iii) significant price suppression. All three price effects may co-exist in the same case.[113] Each of these price effects will be reviewed in turn below.

- Price undercutting: The price undercutting calculation reflects the extent to which prices of the imported goods are lower than those of domestic products. The ADA does not provide for a particular methodology with regard to the calculation of the price undercutting.[114]

- Price depression and price suppression: The fact that the price of imported products is not below the price of domestic products does not prevent a finding of injury where, through the effects of dumped imports, domestic prices have been pushed down to a level that does not cover full costs of production and a reasonable profit (i.e., situation known as 'price depression')[115] or is prevented from increasing accordingly (i.e., 'price suppression').

85 WTO Panels have endorsed a number of methodologies to assess the price effects of dumped imports on prices in the domestic market for like products, three of which are examined below:

- "Zeroing" of undercutting margins:[116] The Panel endorsed the EC's methodology according to which an undercutting margin calculated based on a selection of transactions in which undercutting was found, while disregarding (or "zeroing") negative undercutting margins, was WTO compliant. According to the Panel, the fact that certain sales may have occurred at non-underselling

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111 Panel report, *Thailand – H-Beams*, paras. 7.161-7.162.
112 Appellate Body report, *EU – Bed linen*. See also Argentina – Poultry, para 7.299 sq.
113 Panel report, *Korea – Certain Paper*.
114 Panel report, *EC – Tube or Pipe Fittings*, para 7.281.
115 For instance, in *Aluminium Foil*, OJ 2001, L 134/1, notwithstanding low undercutting margins (one per cent for China and 6 per cent for Russia), injury was found in light of the significant depression suffered by the Union industry in the investigation period, as evidenced by the losses incurred.
116 The "zeroing" of undercutting margins for the purpose of assessing injury should not be confused with the "zeroing" of dumping margins. The latter has been found to be illegal under WTO law.

prices does not eliminate the adverse effects in the importing market of sales that were made at underselling prices.[117] Importantly, the Panel stated that the price undercutting margin is just a part of the overall injury assessment of the injury to the domestic industry and is alone not determinative in the finding of injury.[118]

- Adjustments for price comparability: The Panel has ruled that the methodology imposed on investigating authorities under Article 2 ADA when determining the existence of dumping (e.g., adjustments for price comparability) does not necessarily apply for the purpose of assessing injury. Indeed, unlike Article 2 ADA (which concerns dumping), Article 3 ADA (injury) contains no specific guidance as to how the investigating authority should consider price undercutting. In *EC-Pipe Fittings,* the EU was accused of failing to make a proper comparison between the imported product (i.e., black heart fittings) and the product manufactured by the EU industry (i.e., white heart fittings). The Panel rejected Brazil's direct reference to the methodology provided under Article 2 ADA concerning dumping (e.g., adjustments for price comparability) and instead ruled in favour of the EU. The Panel ruled that no adjustments for price comparability were necessary in the present case because the differences in cost of production were not significant and because the market (including consumer perception) did not significantly differentiate between the imported product (i.e., black heart fittings) and the product manufactured in the EU (i.e., white heart fittings).[119]

- Choice of currency in the evaluation of price trends: The Panel once again ruled that Article 3 ADA does not provide any specific method to evaluate price trends and, in particular, does not impose an obligation on the investigating authority to assess prices in the operating currency of the domestic industry. In *EC-Farmed Salmon*, Norway claimed that the price trends had to be assessed on the basis of the pound sterling, rather than on the Euro as carried out by the EU. The Panel disagreed and ruled that the EU was entitled to refer to the Euro to evaluate the price trends as long as that analysis was unbiased and objective, and based on positive evidence, which was the case here.

1.4.2. Rules applied by selected WTO members

The EU

86 Investigating authorities rely on various sources of data that qualify as positive evidence. For instance, in the EU, the European Commission uses Eurostat data

[117] Panel report, *EC – Pipe Fittings*, paras. 7.277-78. In this respect, the Panel stated: "*a requirement that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with "overcutting" prices would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number of sales at undercutting prices which might have had an adverse effect on the domestic industry*".

[118] Ibid

[119] Panel report, *EC- Pipe Fittings,* paras. 7.292-7.294.

as positive evidence of import volumes and prices. If the European Commission considers Eurostat data as unreliable, it may turn to the statistics provided by an exporting producer,[120] the complainant,[121] or other countries.[122]

87 The EU Court of Justice tends to interpret the principle of objective examination broadly. For example, it has considered that an injury assessment based on a sample of four complaining producers does not breach the principle of objective examination because if the parties are unwilling to cooperate and the data is limited, the analysis based on such limited data does not breach the principle of objective examination.[123] The EU Court of Justice has also considered that the objective examination principle does not compel the investigating authority to account for all the evidence submitted by the producers under investigation.[124]

88 The EU AD Regulation uses a different set of *de minimis* thresholds than the ADA. Under Article 5(7) of the EU AD Regulation,[125] an investigation will be terminated against countries whose imports represent less than 1% market share, unless such countries collectively account for more than 3% of Union consumption. The European Commission will normally examine the market share of the exporting producer during the investigation period,[126] and will generally rely on Eurostat data to determine whether imports are *de minimis*.

1.4.3. Conclusions and recommendations

89 As a general rule, under WTO/EU law, the investigating authority enjoys a wide discretion in injury determinations because they involve the assessment of complex economic matters. But that discretion is not without limit. When conducting an injury investigation, the UK investigating authority must use *positive evidence* and carry out an *objective examination* of the volume of the dumped imports and the effects of the dumped imports on prices in the domestic market for like products. The UK must carefully respect these two principles, as explained above.

90 Practically speaking, to the extent possible, the UK should rely on import data (volumes and prices) that is as "indisputable" as possible. To the extent that the product under investigation corresponds to HS/CN codes, preference should go to import statistics (Eurostat or UK statistics post-EU exit), followed by (1) export statistics of the exporting country(ies) concerned, (2) verified or verifiable data of

120 In *Ammonium Paratungstate* (China, Korea), OJ 1990, L83/117, the European Commission considered that the figures on the volume of sales in the Union provided by the Korean exporter should be used instead of those published by Eurostat.
121 In *Magnetic Disks* (Japan, Taiwan, China), OJ 1993, L95/5, since no precise figures concerning total imports and total consumption of the product concerned were available, the European Commission relied on the estimates made by the complainant with regard to the proportion of 3.5˝ microdisks in total imports from the countries concerned.
122 In *Biodiesel* (USA), OJ 2009, L 67/22, the European Commission used the US export statistics for establishing the volume of imports and consumption figures because Eurostat data had prior to 2007 no distinct CN Code for the various types of products concerned.
123 Case T-443/11, *Gold East Paper (Jiangsu) v Council*, EU:T:2014:774, para. 200.
124 Case T-409/06, *Sun Sang Kong Yuen Shoes Factory (Hui Yang) v Council*, EU:T:2010:69, paras. 118-120.
125 Article 14.5 of the CVC Regulation is the corresponding provision for subsidies.
126 See, e.g., *Hollow sections* (Turkey), OJ 2003, L 175/3, at para. 69.

the exporting producers or importers (depending on the level of cooperation), (3) estimates provided by the domestic industry or other interested parties and/or a combination thereof.

With respect to the volume of dumped imports, the UK should consider the following recommendations:

91 *The basis on which to apply the de minimis rule*. In situations where sales in the UK emanate largely from the UK producers, the WTO thresholds (which are based on imports) will be more easily exceeded. On the contrary, where imports account for the largest share of the UK market, the EU thresholds (which are based on consumption) will more likely be exceeded. Obviously, in situations where the EU thresholds are exceeded but not the WTO thresholds, the proceeding should be terminated. Given the fact that, due to its limited size and its relatively strong exposure to outside markets, a significant proportion of the UK market is held by imports in a large number of industry sectors, the UK may wish to consider setting its threshold by reference to the percentage of imports if it wishes to take a more liberal approach, and to consumption if it wishes to set the *de minimis* threshold at a lower level of import volumes. Considering the size of the UK market, its developed trading pattern and the fact that the WTO thresholds are in any event compulsory, we would suggest the WTO thresholds based on import volumes.

92 *The data covered by "imports":* the UK should exclude non-dumped imports whenever possible. This is equally a way to effectively increase the *de minimis* threshold. For reasons of practicality, this determination should ideally be done "by exporter" rather than by "individual transactions". On the denominator side, for the reasons explained in Section 1.1.1.3 domestic sales on captive markets should normally be excluded from the domestic consumption when they do not enter into competition with the free market. However, on the numerator side, this exclusion should not be applied to imports of products sold by importers related to captive industrial users as such imports are also in competition with domestic production (since domestic producers could theoretically also supply UK producers that are related to exporting producers). In essence, both the numerator and the denominator should cover only sales on which both domestic producers and exporting producers are competing.

93 The *market shares:* the UK should refrain from setting any kind of parameter in addressing/quantifying ("significant") the evolution of import volumes in absolute terms.[127] Rather, the UK should concentrate on the evolution of import volumes in relative terms, that is, in comparison with domestic consumption in order to determine the evolution of the respective market shares held by the UK industry and foreign exporters when assessing the impact of the volume of dumped

[127] The European Commission proposal referred to in Section 1.2.3 in which it seeks to address production overcapacities of certain exporting countries (e.g., the steel industry) makes a reference to the idea of so-called "volume injury". We are not convinced that this concept should be used for other purposes (e.g. possible non application of the LDR) than to determine the existence of injury.

imports. This is because in a smaller market such as the UK (as compared to the EU), where the number of industry operators tends to be more concentrated, domestic consumption can vary dramatically from year to year especially with respect to certain industry sectors. Furthermore, the evolution of the market share should be assessed in terms of volumes rather than prices. We do not agree with the EU practice that has occasionally measured market share in value terms.[128]

With respect to price effects of dumped imports, the UK may wish to consider the following issues:

94 The biggest challenge that the UK will generally be facing in the assessment of the price effects of dumped imports relates to the appropriateness of the comparison of import prices with prices charged by the domestic producers. This challenge concerns especially two aspects: product comparability and level of trade.

- Product comparability:

  With the exception of commodities, imported products are rarely identical to domestically produced products. In the majority of cases, the EU practice consists in grouping product types together in order to form a basis which is as representative as possible of the total volume of imports.

  In some cases (whether products are compared on a "model-by-model" basis or after grouping in various categories), the prices are adjusted upwards or downwards in order to reflect differences in physical characteristics but only if they affect the prices charged to end-users.

  Because the EU applies the LDR, the determination of the price effects of dumped imports and the determination of the injury margin are often carried out in a single exercise. All products or categories of products (both domestically produced and imported) are identified with so-called PCNs ("product control numbers") which are then compared together.

  Although this system has a number of advantages (in particular, it aims to take into consideration the greatest volumes of imports), it does not correctly reflect the price effects of dumped imports in many cases for at least two important reasons: (1) a number of parameters used to create the PCNs do not reflect differences in qualities that do not easily reflect differences in physical characteristics and (2) the comparison does not take into consideration price volatility during the Period of Investigation.

  The UK should aim at overcoming these distortions in the comparison of prices by (1) selecting only those models that are clearly identical for both

[128] For instance in *Advertising matches* (OJ 1997, L158/8), the EU found that the EU industry had suffered injury because although the market share held by the Japanese exporters and the EU producers alike had remained stable and in both cases, sales had decreased in absolute terms by the same ratio, the market share held by the Japanese producers in terms of value had increased significantly because they had increased their import prices although prices of the EU industry had remained stable.

UK producers and imported goods (even if this means making a selection that is far less representative in terms of total imports); (2) making the comparison at similar periods of time (e.g. comparison on a quarterly basis); and (3) to the extent that customers would purchase from both UK producers and exporting producers, make the comparison on a customer-by-customer basis.

- Level of trade:

  Import prices and prices charged by the domestic industry should be compared at the same level of trade. In cases where export sales are made by the exporters directly to unrelated customers on the domestic market, the comparison is generally made at a CIF level that is further adjusted by a margin reflecting post-importation costs. In some cases, adjustments can be made if sales to different categories of customers are made at different prices.

  In cases where export sales are made through related importers, current EU practice consists in netting back the price charged by the related importer to a CIF value by deducting not only post-importation costs but also Selling, General and Administrative Expenses (SGA) and profit. We consider that the UK should not deduct the importer's profit and SGA from the free circulation price as this would amount in practice to use the transfer price as a basis for the comparison.

95 Given the challenges facing the UK in the determination of the effects of price undercutting on prices in the domestic market, the UK should consider using the *profitability* of the UK industry as an equally important proxy for several reasons. First, an increase or decrease in price in absolute terms of the product concerned, without taking into account the possible variations of other factors, such as costs of production, is artificial (e.g., a steel producer may remain profitable despite a decrease in the price of the final product if there is a corresponding decrease in the cost of raw material). Second, for the reasons explained above, it is often difficult to accurately attribute a causal link between the injury suffered by the domestic industry and the existence of price undercutting.

96 When assessing the profitability of the UK industry, account could be given to a number of factors including, amongst others, (i) the maturity of the market; (ii) whether the industry is capital intensive; (iii) the performance history of the UK industry under normal conditions of competition, in the absence of dumped imports; (iv) other costs, such as those related to environmental compliance.

97 How should the profitability of the UK industry be assessed? We recommend considering the following:

- Profitability should be calculated as a return on sales rather than return on capital for two reasons at least: (1) the return on capital is already listed as a separate factor in Article 3.4 ADA and, more importantly (2) as long as the

return on sales is limited to sales made on the domestic market, this factor will more accurately measure the impact of the dumped imports on the domestic market (rather than on other markets or products).

- The EU uses EBIT (Earnings Before Interest and Taxes) as a standard tool for measuring profitability. We consider that EBITDA (Earnings Before Interest, Taxes, Depreciation and Amortisation) would generally constitute a more accurate tool as this method tends to eliminate – at least partially - distortions in the case of groups of companies or integrated producers that may result in transfer of profits to other legal entities. It also helps to neutralize the cost effect of start-up operations or new investments.

- The profitability of the UK industry should – as a general rule - be calculated by using the weighted average profit of all cooperating UK producers. However, in order to reflect differences in types and sizes of domestic producers, the UK may wish to consider giving a more balanced weight to SMEs, for instance by calculating separate weighted averages for SMEs and large companies and calculating a further average of the resulting weighted averages.

98 Based on the above factors, a strong injury case would exist if there is a decline in the market shares and/or a decline in the profitability of the UK industry.

Chapter 2

Assessing Causality

99 This chapter describes methods to determine whether the claimed injury is caused by the dumped imports, which requires an assessment of other relevant factors that may also be injuring the domestic industry.

2.1 What is the best way of assessing the causal link between injury and dumping, subsidies or increased imports? (CE)

2.1.1. WTO rules

100 Pursuant to Article 3.5 ADA: "*It must be demonstrated that the dumped imports are, through the effects of dumping … causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports*."

101 The Kennedy Round Antidumping Code, in 1967, expressly required that dumping be "*demonstrably the principal cause*" of the injury. This strong requirement was weakened in the succeeding Tokyo Round in 1979, which required merely that "*injuries caused by other factors must not be attributed to the dumped imports*".

2.1.2. Rules applied by selected WTO members

The EU

102 Pursuant to Article 3(2) of the EU AD Regulation: "*A determination of injury shall be based on positive evidence and shall involve an objective examination of: (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Union market for like products; and (b) the consequent impact of those imports on the Union industry*"

103 This usually implies the investigation of a causal link in two steps: first, that dumped imports have an effect on prices in the EU market for like products and, second, that the dumped imports have an impact on the EU industry. In many cases, the Commission assesses the effect on prices in the EU market for like products as well as the claimed loss of market shares by EU producers (e.g. lightweight thermal paper, 2016/2005, recital 101).

104 In accordance with Article 3(6) of the EU AD Regulation, the Commission examines whether the dumped imports from the countries concerned caused material

injury to the Union industry. Article 3(6) says: "*It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, that shall entail demonstrating that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Union industry as provided for in paragraph 5, and that impact exists to a degree which enables it to be classified as material.*"

105 Pursuant to Article 3(7) of the EU AD Regulation, the Commission also examines whether other known factors could at the same time have injured the Union industry. The Commission aims to ensure that any possible injury caused by factors other than the dumped imports from the countries concerned is not attributed to the dumped imports.

106 In a typical investigation, the Commission takes the view that, since the injury of the Union Industry coincides in time with the dumping and/or price undercutting or that dumping and/or price undercutting preceded the injury, then this is sufficient to claim causation (e.g. steel tubes case). The Commission then lists alternative hypotheses or objections from parties involved as to how the injury suffered by the Union Industry might have been caused by other factors (e.g. increased imports from third country exporters), usually dismissing them as insignificant, or taking the view that these other factors are not "breaking the causal link".

Canada

107 The Tribunal's mandate in a preliminary injury inquiry is set out in subsection 34(2) of the Special Import Measures Act (SIMA). It requires the Tribunal to determine *". . . whether the evidence discloses a reasonable indication that the dumping or subsidizing of the* [subject] *goods has caused injury or retardation or is threatening to cause injury*".

108 The "reasonable indication" standard that applies in a preliminary injury inquiry is lower than the evidentiary threshold that applies in a final injury inquiry under section 42 of SIMA. The term "reasonable indication" is not defined in SIMA, but is understood to mean that the evidence need not be "conclusive or probative on a balance of probabilities" Nevertheless, simple assertions are not sufficient and must be supported by relevant evidence. Similarly, the outcome of the Tribunal's preliminary injury inquiry must not be taken for granted.

109 Specifically, the Tribunal has previously been satisfied that the threshold for the "reasonable indication" standard was met where:

- the alleged injury or threat of injury is substantiated by evidence that is sufficient in the sense that it is *"relevant, accurate and adequate"*; and,
- in light of the evidence, the allegations stand up to a "*somewhat probing examination"*, even if the theory of the case might not seem convincing or compelling.

110 When determining whether the *reasonable indication* standard has been met in a preliminary injury inquiry, the Tribunal must rely on the information or evidence provided in the complaint, the Canada Border Services Agency's (CBSA) record and submissions from the parties.

The US

111 The US antidumping and countervailing duty law defines "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[129] The law directs the US International Trade Commission (USITC) to consider the following causal links: (1) the volume of imports of the subject merchandise, (2) the effect of imports of that merchandise on prices in the United States for domestic like products, and (3) the impact of imports of such merchandise on domestic producers of domestic like products in the context of production operations within the United States.[130]

112 Like in the EU approach, the primary causal link goes via price effects. Assuming that "significant underselling" has been established, the USITC is instructed to consider whether "*the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree*."[131]

113 When examining the impact of the dumped imports on the domestic like products, the USITC evaluates all relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to: (1) actual and potential declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity; (2) factors affecting domestic prices; (3) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment; (4) actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product; and (5) in antidumping investigations, the magnitude of the margin of dumping. The USITC is instructed to evaluate all such relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry.[132]

114 When defining the domestic like product, the USITC generally considers a number of factors, including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities, production processes, and production of the employees; (5) customer and producer perceptions; and (6) price (when appropriate). No single factor is sufficient in itself, and the USITC may consider other factors relevant. Generally, the USITC neglects

129 See 67 Section 771(7) of the Act (19 U.S.C. § 1677(7)).
130 See USITR (2015), "Antidumping and Countervailing Duty Handbook", page II-29.
131 See USITR (2015), "Antidumping and Countervailing Duty Handbook", page II-30.
132 See USITR (2015), "Antidumping and Countervailing Duty Handbook", page II-30.

minor variations between the articles subject to an investigation and looks for "clear dividing lines among possible like products".[133]

115 When determining whether imports compete with each other and with the domestic like product, the USITC conducts a qualitative case-by-case assessment in which it generally considers the following four factors: (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific customer requirements and other quality-related questions; (2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market. Again, no single factor is decisive, and the list of factors is not exclusive. Still, these factors form a framework for determining whether the imports compete with each other and with the domestic like product. When determining the degree of competition, only a "reasonable overlap" of competition is required.[134]

2.1.3. Conclusions and recommendations

116 To impose trade defence measures consistently with the WTO, a national anti-dumping authority must show that the dumping has *caused* injury to the domestic industry producing a like product.

117 The current EU approach can best be described as broadly consisting of demonstrating that injury and dumping *coincide*, and a brief dismissal of other factors as "insignificant". The approach can best be described as a "coincidental approach".

118 The UK should overall consider whether or not to continue with a similar approach. The current *coincidental approach* applied by the EU Commission does not – in our view – set a very high standard of proof regarding causality. The coincidental approach merely establishes consistency of the facts with the hypothesis of causal injury. Consistency of the facts with the hypothesis of causal injury would only work as strong evidence if, at the same time, the investigating authority provided evidence of *inconsistency* with the facts for *all other* alternative hypotheses that could explain the observed injury. This would imply that each of the alternatives would need to be disproven, i.e. that each of the alternative explanations of the observed injury is shown to be inconsistent with the facts. This is rarely done in practice and can be a very cumbersome approach, which would not be recommended.

119 The EC rules (Article 3(2)) specifically require a two-step approach which first looks at the causal link between dumped imports and the effects on prices in the

[133] See USITR (2015), "Antidumping and Countervailing Duty Handbook", page II-34.
[134] See USITR (2015), "Antidumping and Countervailing Duty Handbook", page II-41.

EU for like products, and secondly between price effects and injury on the factors considered (see section 1.1).

120 The UK can consider a similar requirement, which should – if followed-through – put the analysis of the price effects at the centre of the causality analysis.

121 Price effects will - in many cases - be a sensible focus of a trade remedy investigation since much of the claimed impacts would be captured in pricing information and responses by market actors to changes in prices offered in the market place. However, the investigation approach should also consider the case where there is no impact on price and hence test whether the claimed dumping causes injury via loss of market shares for the domestic industry.

122 In this context, an appropriate assessment of causality could consider:
- *alternative explanations for price differences*: product differentiation, imperfect information, rigidity of contracts, switching costs, exchange rate fluctuations or other explanations;
- *alternative explanations for injury*: domestic factors, internal factors, third country factors, other factors;
- whether "breaks" in the causal chain are considered in combination or individually.

123 Furthermore, the UK can consider addressing some of the related steps in the current EU investigation approach, which stands in the way of a more rigorous and evidence-based causation analysis, including:

- **Cumulation analysis**: Assessment of whether imports from the countries concerned can be cumulated, i.e. bundled and regarded as one. This includes – among others – an assessment of the conditions of competition between the dumped imports and the domestic like products, which often involves an assessment of whether the products are considered interchangeable, sold via same channels, or are considered as the same type of product. This is a rather qualitative assessment, which typically concludes that the imported products are indeed in competition with the domestic products and this typically results in finding e.g. *"clear price competition"* (e.g. Steel tubes, 2017 L/141, recital 176).

- **Presumption of irrelevance of competition**: The Commission has taken the view that the degree of competition between the imported products and the domestic product is irrelevant for the assessment of injury (e.g. Steel tubes, 2017/141, recital 175).[135] Such conclusions would pre-empt a need for a genuine and objective assessment of causality, since any causal relationship will critically hinge on the existence of, and degree of, price competition between the imported and domestic products in question. The Commission is also found to be setting the standard of

[135] The Commission takes the view in this case that the question of competition between different product types is not decisive for the injury assessment. Furthermore, the Commission says (para. 176), that *"even if the question of actual competition between product types was relevant, the Commission notes that the assertion of the absence of competition is not underpinned by the evidence on file"*.

proof as the complete absence of competition, i.e. that causality is established unless there is proof of its complete absence. This approach is debatable, and alternative approaches could openly investigate (without prior assumptions) the degree of competitive pressure exerted by the imported product on the price of the domestic product without a black/white presumption. The options for more formal ways of testing this are described in more detail below.

- **Presumption of pre-import situation being at non-injurious level**: Related to the above, the Commission has taken the view that the situation for the domestic industry prior to the alleged dumping or price undercutting constitutes a "fully competitive" situation, and hence that re-installing profit levels to the *ex-ante* situation would constitute the appropriate non-injurious level. This hinges on the assumption that the situation without the import is a competitive outcome. This can complicate the conclusion on causality, injury and levels of measures required to return to a non-injurious situation. The complication arises in cases in which the situation for the domestic industry prior to the alleged dumping or price undercutting may *not* be considered fully competitive.

124 To cater for such situations in its future trade remedies policy, the UK can consider either separating or integrating the competition assessment in the trade remedy approach.

- In a separate approach, the trade remedy investigation would simply discard the complications relating to the pre-dumping situation being less than fully competitive and delegate that responsibility to the relevant competition authority and simply keep it informed.

- In an integrated approach, the investigating authority would need to consider the level of profitability of the domestic industry under normal conditions of competition, eventually assisted by the relevant antitrust authorities. If such an assessment concluded that the pre-dumping levels of profitability were above the profit levels deemed reasonable under normal conditions of competition (eventually consulting with competition authorities), then the causality test should only investigate whether the alleged dumping or price undercutting depressed profit levels below the level of profitability under normal conditions of competition.

125 The UK can consider reversing the order of procedural steps to reach a better informed determination on causality. This would entail the following order/logic of the assessment:

- Consider the domestic situation prior to the alleged dumping and whether it represents a competitive outcome.

- Consider the degree of price competition from imported products – evidence on the degree of competitive pressure exerted by alleged dumped imports on prices of domestic industry, which can contain two sub-elements:

- *Link from dumped price to domestic price* – if there is a causal relationship between the pricing behaviour for the imported products under investigation and the domestic price for like products, what are then the further causal chains to other injury indicators?
- *Link from dumped price to domestic market shares* – in the event there is no causal relationship between the dumped price and the domestic price, it should be investigated if dumped price can be demonstrated to have caused loss of market shares for the domestic industry through other channels.

126 Most authorities (EU, US, and Canada) perform structured qualitative assessments of the causality question based on a framework on a case-by-case assessment (see e.g. the US approach described above).

Formal approaches to causality

127 If the UK wants a more structured, formalised and evidence-based approach to the causality issue along the lines described above, the following approaches can be considered.

128 Three complementary approaches are presented below. The description follows a logical sequence starting with the most simple approach (approach 1) with minimal data requirements. Approach 2 can be added on top of approach 1, and will allow for more advanced testing of causality. Finally, approach 3 can give further evidence provided that approach 1 and 2 are already performed.

129 Each approach provides an individual conclusion that will provide information on the causality test at different levels. So the three approaches are ordered in terms of increasing complexity and efficacy in addressing the causality issue. Approach 1 could be conducted as the only formal step, and still help to inform the assessment of causality. All three approaches are commonly used in competition economics, e.g. to determine damages related to cartel claims.

Approach 1: Causality Screening (Price linkage analysis)

130 This approach can help to test the hypothesis that imported products influence the prices of domestic products. The approach uses price data as the only input. It contains two steps: i) to test whether the two products are on the same market, and ii) to test whether import prices are influencing domestic prices (or the other way around).

131 The approach requires time series with price data (e.g. from the investigation and/or unit prices from import statistics). The approach can be fairly standardized, and results can be reported in a systematic and transparent manner (e.g. traffic lights or similar). Price data forms the basis for the causality screening approach. Using standard statistical tests available in most data software, the approach will use fluctuations in the price data to assess whether the imported and domestic products are likely to compete on the same market.

132 The test investigates whether prices display a similar pattern and can be shown to respond to each other. In absence of such a connection, it is deemed unlikely that the imported and domestic products compete on the same market and hence it should be deemed unlikely that the dumped imports can be a cause of injury.

133 If, in contrast, the two products are found to be competing on the same market, the next step is to assess the direction of the pricing mechanism. It must be established if there is a price leader and a price follower. If the imported products are likely to be price leaders, then it is probable that imports can be a cause of injury. However, the approach cannot be used to test whether imported products are the sole cause of injury, nor can it be used to determine how large a share of a claimed injury is caused by the imported products. The test can be simple and powerful as an initial screening to test – and eventually dismiss – claims of causal injury via normal price effects.

134 *Main advantages*: Simple to execute in the sense that it only requires the prices of the imported products and the prices of domestic of similar products, together with control variables that reflect the general state of the economic environment. Such controls are usually readily available from e.g. national statistics.

135 *Main challenges*: The analysis requires a sufficient amount of price data. A powerful analysis would normally require around 20-30 periods pre-dumping and 10-20 periods during dumping. If data exist from a large cross section of transactions, then fewer periods are required.

136 *Potential sources of data*: The approach can – in instances where the products under investigation can be defined by means of HS codes – be performed based on standard trade data by deriving unit prices from the division of imported values and imported quantities. Such data are currently available from Eurostat, and should – post-EU – be available from the relevant UK customs authority.

137 *Econometrics methods*: Time series, trend analysis, structural break testing, error correction models and co-integration, Granger causality, counterfactual analysis.

Approach 2: Economic Causality (Structural Economic Model)

138 A weakness of approach 1 is that it only investigates a causal link from the prices of the imported product to the prices of the comparable domestic products. However, the approach must also consider the other measures of injury for the domestic industry. The lack of a causal link between prices does not automatically rule out a causal link from a dumped product to, for example, lost market share.

139 To make a more complete causal investigation, import volumes should be included in the modelling framework. This involves estimating a structural model for the demand for the imported product and for the domestic product, and hence determining the demand sensitivity to the import and domestic price of the product concerned. With such a model, it is possible to infer the likelihood of a causal

link all the way from import prices to a key indicator of injury, namely market share or sales volume for the domestic industry.

140 The outcome of the analysis would typically be counterfactual prices and volumes that the domestic producers would have experienced *in the absence of the dumped products*. Based on these counterfactual market shares and margins, the results can be estimated and compared to the actual outcomes. This will provide information not only on whether or not there is causality, but actually estimate the size of the injury caused by the imported product.

141 *Main advantages*: Delivers a framework that quantifies the likelihood of a causal link from import prices to injury *and* estimates the order of magnitude of injury associated with the dumped imports.

142 *Main challenges*: The method requires both information on price and volume from imports and domestic transactions, as well as some general control variables such as overall demand. A powerful analysis requires similar length of data series as approach 1. If data exist from a large cross section of transactions, then fewer periods are required.

143 *Potential sources of data*: Eurostat, HM Revenue & Customs.

144 *Econometrics methods*: Error correction models and co-integration, Granger causality, Structural VAR (vector auto-regression), Global VAR, counterfactual analysis.

Approach 3: Benchmark-based Causality (benchmark market)

145 Benchmarking models estimate a *counterfactual* price based on prices and volumes from product or geographical markets that are sufficiently similar to the market in question and which were not affected by dumped products. The idea is to use the benchmark market as a control group for the market allegedly affected by dumping. Say that the affected and benchmark markets are sufficiently similar, such that, all things equal, the only difference is that the affected market faced the dumped products. Then the injury could only have been caused by the dumped products. Conversely, if both markets encounter the same development in the dumping period, then this development cannot be assigned to the dumping. So in this case any injury emerging should not be considered as resulting from dumping.

146 *Main advantages*: Approach delivers a causal conclusion by construction.

147 Main challenges: A central issue with this approach is the requirements for the benchmark market to be accepted as sufficiently similar to constitute a valid control. The assessment of the quality of a candidate benchmark market can be informed by a battery of tests (see methods below) to establish the validity of a

given candidate benchmark market. This can allow for data-driven criteria to assess whether the benchmark approach provides valid results in a particular case.

148 *Potential sources of data:* Eurostat, HM Revenue & Customs.

149 *Econometrics methods*: Difference-in-difference, propensity score matching, regression discontinuity, counterfactual analysis.

Sequence of the approaches

150 A natural sequence of the approaches could be to apply approach 1 first, and consider supplementing it with approach 2 and possible approach 3. There should be no reason to consider approach 3 in a specific case if approaches 1 and 2 are negative (i.e. that hypothesis of the two products belonging to the same market can be rejected).

Chapter 3
Assessing Economic Interest

151 The question of whether investigating authorities should adopt a public interest test is the subject of a heated debate. The EU practice has shown that the inclusion of a public interest test as an additional condition for the imposition of trade remedy measures has contributed to balance the various interests represented by cooperating parties. This Chapter will address the main issues that the UK will need to consider, namely, whose interests should be considered (3.1); which factors should be considered (Section 3.2); what techniques should be used in weighing the various interests (Section 3.3); and, finally, how the public interest test should be assessed in practice in the context of investigations (Section 3.4).

3.1 Whose interests should be considered?

3.1.1 WTO rules

152 In essence, the so-called "Public-interest test" is a rule of reason test for the investigating authority which allows it to assess the consequences of the imposition of a dumping duty on the overall national economy. In practice, this test aims at taking into account the interest of the parties other than the domestic industry initiating the complaint.

153 A public interest test has two components: (i) proportionality (i.e., whether the interests of the domestic industry are not disproportionally protected in comparison with other interests), and (ii) due process (i.e., any interested party has a right to make itself known and heard during the investigation).

154 Economically speaking, since value chains are globally integrated, assessing all the consequences of an antidumping duty on the national economy is relatively complex. However, within the context of an AD investigation, the investigating authority should create the conditions to be able to assess whether – and, possibly, at what level – the imposition of an AD duty would appropriately take into account the balance of interests of parties cooperating in an investigation.

155 Under the WTO, there is no obligation to take public interest into consideration in AD investigations. The question of whether a public interest test should be made mandatory at the WTO level has been a source of intense debate between WTO members within the framework of the Doha Negotiations.[136]

156 Even though there is no provision on public interest, the WTO does not prohibit consideration of the public interest: Article 9.1 ADA confers full discretion to

[136] WTO Negotiating Group on Rules, *Communication from the Chairman*, TN/RL/W/254, 21 April 2011.

Members to decide whether to impose an anti-dumping duty when all requirements are fulfilled.[137] There is still no agreement on the lists of factors/interests that need to be taken into account, whether of a purely economic nature or including non-economic considerations (such as the ones listed in Article XX GATT- General exemptions).

3.1.2. Rules applied by selected WTO members

The EU

157 Article 21(1) of the EU AD Regulation specifically mentions that the public interest test "*shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers*". This language suggests very clearly that the determination of the public interest is extremely wide and is not limited to the interests of certain parties only.

158 Article 21(2) of the EU AD Regulation expressly extends to users and consumer organizations the status of "interested parties". If certain conditions are met (previous registration, the respect of certain deadlines, etc), those two categories are entitled to (a) provide information to the Commission (b) receive information provided by other parties, (c) request a hearing (d) comment on the application of provisional duties and respond to comments provided by other parties, (e) be informed of the Commission's disclosure and, finally, (f) the right to have their comments taken into account. The other interested parties enjoying those same rights listed in Article 21(2) of the EU AD Regulation are (i) the complainants and (ii) importers and their representative associations.

159 Although Article 21(2) of the EU AD Regulation suggests that the list of parties which are entitled to certain rights is limited to certain parties only (i.e. in practice, cooperating parties only), the EU has made it clear that the list is not exhaustive (there have been cases in which comments made by raw material suppliers have been taken into consideration) and that it only includes economic considerations: "*the interest test is an economic analysis focusing on the economic impact of taking anti-dumping measures on operators within the EU. In terms of that, it is not a tool by which anti-dumping investigations can be instrumentalised for general political considerations relating to foreign policy, development policy, etc.*"[138] Likewise, although the wording of Article 21 of the EU AD Regulation seems to give major weight to the complainants,[139] it is important to stress that the public interest test also includes domestic producers other than the complaining producers.

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[137] The use of the term "may" in Article VI:2 of the GATT 1994 indicates that WTO Members have a choice. See Appellate Body report *US-1916 Act (EC)* paras. 113-116.

[138] Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam.

[139] Article 21(1) of the EU AD Regulation directs the investigating authority to give "special consideration" to "eliminate the trade distorting effects of injurious dumping".

160 On the question of whether the different interests have to be weighed and measured, the EU's position is that the public interest test is not "*a cost/-benefit analysis in the strict sense*" and the various interests are not weighted against each other in a mathematical equation.

Canada

161 Canada has – on paper - the most developed form of public interest test as it constitutes an investigation on its own right.

162 The Canadian system makes a distinction between parties that can initiate a public interest inquiry ("requesters") and those that may take part in the public interest investigation itself ("interested parties") by submitting information to the Canadian International Trade Tribunal (CITT or the Tribunal). Requesters can be a party to the injury investigation or any group or person affected by an injury finding made by the Tribunal. Interested parties are defined very widely and would include any exporting or domestic producer of the product under investigation as well as any trader, distributer, importer of these products; any domestic producer of a product used in the production of the product concerned as well as any distributer of such products and; more generally, any user of the product concerned including consumer associations.

163 It is also worth noting that labour unions can take part in a public interest inquiry. The Director of Investigations of Canada's Competition Bureau can also make presentations regarding the impact of measures on competition during public hearings.

164 In its final advice to the Ministry of Finance, the CITT may consider the effects that the imposition of a duty is likely to have on (i) the availability of goods from other countries or producers to which the duty does not apply; (ii) competition in the domestic market (including downstream producers in Canada, limiting access to technology and the choice or availability of goods at competitive price for customers); (iii) the effect on upstream producers; and (iv) any factor relevant in the circumstances. Additionally, in conducting a public interest inquiry, the Tribunal may take into account any factor that it considers relevant, which does not specifically exclude social, environmental or political issues.

165 In practice, however, very few public interest inquiries are conducted: only 18 decisions have been issued since the creation of the CITT. This limited number of decisions might be due to the fact that the decision of the CITT to reduce the level of the duty is not binding on the Ministry of Finance. Also, interested parties are not incentivized to pursue a public interest inquiry since out of these 18 cases, only four have resulted in a recommendation to the Minister of Finance to lower the full duty level. In these cases, the CITT essentially applied the LDR, advising the rate to be set at the level necessary to recover the injury suffered by domestic producers.

166 More generally, as matter of principle, the Parliament in Canada is considered to have enacted laws in the public interest so that the imposition of duties is presumed to be in the public interest.[140] Therefore a reversal of this presumption can only occur on grounds which are case specific. This understanding has been confirmed by a flexible interpretation of the word "public" and by a wide discretion given to the CITT to consider "relevant factors" in its analysis. In *Aluminium Extrusions from China,* the CITT clarified that its interpretation of "public" depends on the factual circumstances of the case and may refer to the public at large, a segment of that public (including a particular region), downstream industries, downstream customers or downstream users.[141]

167 In *Prepared baby food*, the CITT clarified its views on the factors it finds the most compelling: "*In the Tribunal's view, a public interest investigation conducted pursuant to SIMA permits a wide variety of factors to be taken into account in considering the appropriate level of duties. The Tribunal finds support for this broader, more encompassing approach in a recent decision of the Federal Court of Canada, in which the Court stated: "A review of the jurisprudence concerning 'public interest' reveals that it is a broad, somewhat undefined and flexible concept, which nevertheless includes considerations beyond the interests of the parties to a dispute". This is not to say, however, that there are no boundaries on the factors that the Tribunal may take into account. As was stated in Grain Corn, the Tribunal is not "an advisor to the Minister of Finance on the distribution of wealth and income between different private interests." Consequently, in this case, the Tribunal has focused on those factors that are relevant to the appropriate level of duties.*"[142]

168 In practice, the list of factors considered in a public interest inquiry varies depending on the nature of the products under investigation. Beyond the non-exhaustive list in Appendix 4 of the public interest inquiry guidelines, the CITT freely determines "any other factors that are relevant in the circumstances". Ultimately, the reasons for recommending a reduction of the duties may be based on these other relevant factors. For example, in *Prepared Baby food*, the CITT considered "income distribution and children's health", and in *Iodinated contrast media*, it considered "health care externalities for patients and cost implications for hospitals".

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[140] Canadian Import Tribunal, *Grain Corn from the United States*, Report on Public Interest, October 1987, para 2:"*In deciding what meaning is to be attached to the public interest provision, the Tribunal accepts that SIMA itself, as with all legislation, was enacted by Parliament in the interest of the public good. It would follow that section 45, being a specific provision within the statute, is to be applied on an exceptional basis, as for instance when the relief provided producers causes substantial and possibly unnecessary burden to users (downstream producers) and consumers of the product*."

[141] CITT, *Aluminum Extrusions from China*, Decision and Reasons, Public Interest Inquiry No. PB-2008-003, June 30 and July 10 2009, para 3.

[142] CITT, *Prepared Baby Food from the United States*, Report To The Minister Of Finance, Public Interest Investigation No.: PB-98-001No. PB-98-001, November 30, 1998, citing the Federal Court decision in *Wang Canada Limited v. Minister of Public Works and Government Services*, Court File No. T-944-98, September 28, 1998, para 12.

169 To conclude, rather than limiting itself to a purely economic analysis, the Canadian approach aims at a holistic analysis: "*the Tribunal does not view the section 45 process as a contest between parties. Rather, the Tribunal concluded that the responsibility imposed on it by section 45 requires it to analyse and evaluate the consequences flowing from the application of the countervailing duty, for all parties affected, and by weighting the relative merits of each, to form an opinion as to whether, and how, on balance, the public interest would best be served*".[143]

New Zealand

170 The Anti-dumping law in New Zealand has recently been amended and now provides for a public interest test as a second step in the investigation in the event a positive determination of dumping and injury has been made.

171 The public interest test was initially developed by the New Zealand Ministry of Business, Innovation and Employment (MBIE) in a study on the residential construction sector market,[144] as part of the government's wider response to the New Zealand Productivity Commission's report on housing affordability.[145] The study sought to reduce the costs of building materials in New Zealand and proposed, among other initiatives, to suspend anti-dumping duties on residential building materials, and develop a public interest test for the trade remedies regime.[146] In November 2013, the MBIE issued an options paper which was subject to public consultation,[147] following which the Cabinet agreed to temporarily suspend anti-dumping duties on residential construction materials and directed officials to develop a bounded public interest test for the trade remedies framework. In June 2014, the MBIE released an initial discussion paper subject to public consultation and in June 2015 the Cabinet agreed "in principle" to introduce a bounded public interest test into New Zealand's anti-dumping and countervailing duties regime. In August 2015, the Cabinet confirmed the introduction of this test and introduced it to the House of Representatives in May 2016.

172 In support of that bill, the MBIE stated in a departmental report that: "*we consider that introducing a public interest test strengthens, rather than weakens the regime, by enabling the Minister to consider wider effects of imposing a duty before that duty is imposed. The public interest test will allow the Minister to determine that imposing a duty is not in the public interest, and decline to impose*

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143 Canadian Import Tribunal, *Grain Corn from the United States*, Report on Public Interest, October 1987, as cited in the Dissenting Opinion of Tribunal Member Michèle Blouin in *Beer from the United States* – CITT, Public Interest Opinion No.: PI-91-001, November 25, 1991, paras 6-7.

144 The MBIE study is available at : http://www.mbie.govt.nz/info-services/building-construction/legislative-other-reviews/past-work-and-older-topics/residential-construction-sector-market-study

145 The New Zealand Productivity Commission Report, dated March 2012, is available at http://www.productivity.govt.nz/inquiry-content/1509?stage=4] and http://www.productivity.govt.nz/inquiry-report/housing-affordability-final-report

146 New Zealand Government, Ministry of Business Innovation and Employment, Trade (Anti-Dumping and Countervailing Duties) amendment bill, departmental report to the Commerce Committee, 22 September 2016, p31.

147 Options paper available at : http://www.mbie.govt.nz/info-services/building-construction/legislative-other-reviews/past-work-and-older-topics/residential-construction-sector-market-study/options-paper

those duties. Therefore, some duties that would have been imposed under the current/former Act might not be imposed once the public interest test is implemented. On the other hand, if the Minister determines that imposing a duty is in the public interest, then it must be imposed. The public interest test strikes a balance between assessing the effects of a duty before it is imposed, and continuing to provide an effective trade remedies regime"[148]. This departmental report also refers to the 2009 Australian Productivity Commission's proposal to introduce a public interest test and supports the approach taken by the Australian Productivity Commission while underlying the government of Australia finally decided not to follow that approach.[149]

173 According to Section 10 F: "*In investigating whether imposing the duty is in the public interest, the matters the chief executive must investigate include the following:(a) the effect of the duty on the prices of the dumped or subsidised goods, (b) the effect of a duty on the prices of the like goods produced in New Zealand, (c) the effect of the duty on the choice or availability of like goods, (d) the effect of the duty on product and service quality, (e) the effect of the duty on the financial performance of the domestic industry, (f) the effect of the duty on employment levels, (g) whether there is an alternative supply (domestically or internationally) of the like goods available, (h) any factor that the chief executive considers essential to ensure the existence of competition in the market*".

174 In the initial proposal of the bill which was subject to a public consultation, the objectives of the public interest test were defined as: (i) maintaining the effectiveness and underlying objective of the antidumping and countervailing duties regime; (ii) increased competition and enhanced consumer welfare; and (iii) allowing for discretion to take account of natural disasters such as earthquakes. This last non-economic criterion was part of a 'stand-alone' policy provision relating to natural disasters such as earthquakes "*when a natural disaster has significantly impacted on users of the product concerned*".

175 Also, with respect to the weighting and the measuring of the different factors, the MBIE considers "*it inappropriate to prescribe weighting, as it is likely that different products in different markets will require different weightings*".

176 Other jurisdictions with a public interest test include:

- In Colombia, a public interest test must be carried out before any decision on the antidumping measure is made.[150]

- Ukraine: Article 36 of the Anti-dumping law provides that: "*the conclusion on whether the national interests require application of the anti-dumping*

[148] New Zealand Government, Ministry of Business Innovation and Employment, Trade (Anti-Dumping and Countervailing Duties) amendment bill, departmental report to the Commerce Committee, 22 September 2016, p5.
[149] See above p 13. See also Australian Productivity Commission, Inquiry report n°48, 18 December 2009, available at : https://www.pc.gov.au/inquiries/completed/antidumping/report/anti-dumping.pdf
[150] Uría Menéndez, *Anti-Dumping guide: A Latin American overview for Chinese exporters,* August 2012.

measures shall be based on evaluation of all interests, including those of the national producers and consumers, effect of the imports subject to an anti-dumping investigation, on employment of the population, investments of the national producers and consumers as well as international economic interests of Ukraine." The last criterion of "international economic interests of Ukraine" clearly leaves room for political considerations. Another point of interest is that individual customers, not only customer associations, are considered to be interested parties in Ukraine.

- In Brazil, a 'public interest analysis' has been legally instituted in the new Antidumping Decree. Even if the investigating authorities positively determine the existence of dumping, injury and causal link, the Council of Ministers of the Chamber of Foreign Trade (CEMEX) may decide, in special circumstances, not to impose antidumping measures or to suspend antidumping proceedings based on the reason of national interest/public interest.[151]

- In Taiwan, Article 16 of the Regulations Governing the Implementation of the Imposition of Countervailing and Anti-Dumping Duties adopts a similar "public interest clause" which allows the authority to consider the influence of the case on the overall economic interests of the country.

- South Korea also has a public interest test in its antidumping law.[152]

- China has also incorporated a public interest test into its Antidumping Regulation. Article 33 authorizes the authority to terminate an antidumping process as a result of an acceptable price undertaking, which is in the public interest and Article 37 states "the imposition of antidumping duty should be in accordance with public interest." Like most countries, procedures concerning the examination of public interest are not elaborated in the Chinese legislation.

- The situation in India is very similar to the Chinese one.[153]

- Singapore law has a unique feature. The Antidumping Legislation requires consideration of the "public interest" factor before an investigation is initiated.

177 Other jurisdictions without a public interest:

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[151] Article 3 of the Brazilian Antidumping Decree No 8.058 of 26 July 2013.
[152] Article 44 of the Korean Customs Act (consolidated version, September 2017).
[153] Article 25 of the Indian Customs Act 1962: "*25. Power to grant exemption from duty.—*
(1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette, exempt generally either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification goods of any specified description from the whole or any part of duty of customs leviable thereon. 1[(2) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by special order in each case, exempt from the payment of duty, under circumstances of an exceptional nature to be stated in such order, any goods on which duty is leviable.]

- In Australia, there is no formal public interest test but the Minister of Trade has unfettered discretion not to impose a measure.[154] Nonetheless, there has been a proposal to introduce such a test.[155] Although this test would not have applied to provisional measures, interested parties would have been given ample opportunity to comment on the assessment made by the national authority. This test would also have been based on a presumption of conformity of the measure, which could be rebutted on a yes/no basis. The Australian government finally decided not to adopt such a test, given that the current powers of the Minister of Trade did not render it necessary.

- The US does not have a public interest test. Consumers and industrial users have an opportunity to provide to the Department of Commerce and the International Trade Commission information that is relevant to a case. If there is a finding of dumping or subsidisation and resulting injury, however, it is mandatory for the Department of Commerce to issue an Anti-dumping or Countervailing duty order. As a result, consumers and industrial users rarely file comments.

3.1.3 Conclusions and recommendations

178 There is no obligation under WTO law for the UK to take public interest into consideration in AD investigations. However, in practice, many countries has adopted some form of a public interest test (e.g., including the EU, Brazil, Canada, New Zealand, Ukraine), while those who have not include the United States and Australia.

179 The purpose of the public interest test is to assess, irrespective of the findings of the dumping and injury, whether the imposition of measures on imports is appropriate and proportional in light of the interests of other groups (e.g., the user industry, importers, traders, consumers). This proportionality assessment is carried out even where the level of the duty has been reduced due to the application of the LDR (i.e., under this rule, the investigating authority may impose duties at a level which is less than the full dumping margin, if that level is adequate to remove the injury suffered by the domestic industry).

180 If the UK adopts some form of public interest test, we strongly recommend that the public interest analysis be limited to the analysis of the economic impact of the imposition or non-imposition of antidumping measures. In fact, rather than speaking about the "public" interest test, we would prefer to refer to the "economic" interest test.

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154 Government of Australia, Department of Innovation, Science, Research and Tertiary Education, *Australia's Trade Remedies System*, available at http://ris.pmc.gov.au/sites/default/files/posts/2012/12/AUSTRALIA-TRADE-REMEDIES-SYSTEM-RIS.pdf

155 Government of Australia, *Australia's Anti-dumping and Countervailing System, Productivity Commission Inquiry Report. No 48,* 18 December 2009, p.90, available at : http://www.pc.gov.au/inquiries/completed/antidumping/report/anti-dumping.pdf

181 This analysis should also determine whether other forms of measures (including a limitation of the scope and/or duration thereof) would be more appropriate, (whether the product scope should be changed, etc.). It is also important to stress that the public interest test should not be used as a tool by which antidumping investigations would be instrumentalised for general political considerations (e.g. foreign policy strategies). On the other hand, this test should not amount to a strict cost / benefit analysis (while various interests are assessed, they should not be weighed against each other in mathematical equations, as such an exercise would be difficult to quantify).

182 In carrying out the public interest test, the UK should consider interests of all operators that are affected or likely to be affected by the imposition of duties. The following interests should be considered by the UK when carrying out an economic interest test:

- The UK industry of the like product:[156] we would suggest the UK to adopt a wide definition. For instance, we would definitively not limit this list to the UK complaining industry. We would equally not limit this to UK producers that have made themselves known during the investigation (e.g. through any form of "registration" process) as this could exclude a number of companies – in particular smaller SMEs – that might not have realized the importance of the investigation and possible impact of the outcome on their business at an earlier stage. We would equally suggest adding "newcomers", namely UK producers that only started to produce the product concerned after the period of investigation and/or are in a start-up process. The UK might also consider giving attention to former UK producers that decided to delocalize their production to low-cost third countries. Finally, we would refrain from excluding producers belonging to international groups whose headquarters are located outside the UK except if they are related to producers that are manufacturing the product under investigation in exporting countries that are targeted by the investigation. In certain circumstances, domestic producers that are only assembling the product concerned in the UK could also be included on a case by case basis if the assembly operations meet certain requirements (e.g. they are likely to confer UK origin to the assembled product, etc.). Obviously, UK producers of components of the product under investigation cannot be considered as UK producers even if their production is ultimately used by a related assembly operation outside the UK.[157]

- Importers, traders and distributors of the product under investigation and/or the product concerned in the UK: in some cases, the UK might wish to include business operators that are not legally located in the UK but are involved in the purchase, sale and distribution of the product concerned in the

[156] The "like product" is the product produced by the UK industry. The "product under investigation" is the product imported from the exporting country(ies) concerned by the investigation.
[157] These producers might eventually be considered as up-stream user industries but only if a significant proportion of their production is used for the production of the product concerned in the UK.

UK.[158] However, business operators located in the UK, but only involved in the purchase, sale and distribution of the product concerned outside the UK, should be disregarded.

- Industrial users of the product under investigation and/or the product concerned in the UK: this category covers both those users that use the product under investigation and/or the product concerned for final use (e.g. consumables) as well as those that integrate the product concerned and/or under investigation for downstream production.

- Suppliers of products used in the production of the product concerned in the UK: although this group should include all suppliers of products (including consumables) used as a direct input for the production of the product concerned, it would be advisable for the UK to "draw a clear line" and exclude other suppliers of the products or services that would only be indirectly affected by the injury suffered by the UK producers if protective measures are not imposed. We consider it to be essential for the UK to draw a line by leaving out interests that are not immediately linked with the product under investigation (i.e. macro-economic considerations, general policy objectives such as the ones listed in Article XX GATT). For example: the supplier of carbon black would directly be affected by the potential closure of a tyre producer in the UK and would therefore qualify but not the neighbouring supplier of wheels.

- Consumers: this group would generally be represented by consumer associations.

- Agencies including local government stakeholders: this group, which may have to be defined more precisely by the UK, would normally represent interests in the following three broad areas: national security; environment and; public safety. However, since the public interest test is an "economic" test, only considerations that fall within the parameters of an economic assessment of the measures should be taken into consideration.

- Antitrust authorities: given the comparatively smaller size of the UK economy as compared to the larger EU market within which it has developed over the last 30 years, concerns raised by interested parties that the imposition of anti-dumping measures would reduce competition in the UK are likely to increase significantly especially in certain industries where market operators are relatively concentrated. We consider that the UK antitrust watchdog should be allowed to express its opinion.

- Labor unions: interests of this group should also be taken into consideration as long as they fall within the parameters of an "economic" analysis of the public interest test.

[158] For example: trading companies registered in e.g. Switzerland but employing agents and distributors located in the UK.

183 The question of whether different weightings should be given to the various interests has been the subject of heated debate in various arenas.[159] In the EU practice, the assessment of the Union interest calls for "*an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers*", as well as those of importers, distributors, retailers and suppliers of the EU industry. Interestingly, although the European Commission has stressed that the interests of all these economic actors have to be assessed "on an equal basis" as those of the domestic industry in the Union interest test,[160] the practice shows that all things equal, a preference is generally given to the interests of the domestic industry. Therefore, rather than speaking in terms of "equality", the public interest test is in essence a question of "proportionality".

184 It is not always desirable to find ways to "measure" the weight to be given to different interests - especially in situations of conflict – because each case is different. For this reason, it is impossible to provide for a common denominator that would apply to all situations. However, as a rule of thumb, the UK may consider using at least the following three parameters in the determination of the public interest test, namely (1) job creation, which includes the prevention of job losses in the UK; (2) added value creation in the UK and (3) the respect of a healthy competitive environment. If these three parameters are applied correctly, in most cases, the UK will find that the interests of importers, traders and distributors will be given a lower priority than those of most other parties.

185 The first parameter (i.e., job creation) is fundamentally important because it can potentially carry, on its own, very broad economic implications and its potential impact on the economy can be significant. It is also relatively easy to measure: for instance, if the risk of job loss – or potential for job creation - is greater within the user industry than the UK industry, the UK authority should probably give more weight to the former. Finally, it can affect various categories of interests including, at least indirectly, consumer interests.

186 The second parameter (i.e., added value in the UK) is equally important because it concerns the economic development of an industry and its potential for growth. By way of example, the production of complex parts and components of the product concerned might carry far more added value (including R&D potential) than the final assembly operation in the UK of such product. Alternatively, a supplier of e.g. packaging material to the UK industry of the product concerned is likely to carry less weight in terms of added value creation than e.g. the production of the product concerned (e.g. a tableware set).

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[159] See e.g. the ill-fated Green Paper initiative launched by the Commission in 2006 (COM/2006/0763 final).
[162] *Crystalline silicon photovoltaic modules and key components (China)*, OJ 2013, L 325/1, para. 354. But see also *Footwear with uppers of leather* (China, Vietnam), OJ 2006 L275/1, para. 279:
"At the same time, the Community interest test is not a cost/-benefit analysis in the strict sense. While the various interests are put in balance, they are not weighed against each other in a mathematical equation, not least because of obvious methodological difficulties in quantifying each factor with a reasonable margin of security within the time available, and because there is not just one generally accepted model for a cost/-benefit analysis" […] Measures would only be considered as not in the interest of the Community, if they had disproportionate effects on the aforementioned parties."

187 The third parameter (i.e., healthy competitive environment), while probably less easy to measure, is nevertheless a cornerstone which requires the assessment of a number of issues that are common to the interests of many parties, namely: access to the product concerned or under investigation in sufficient quantities; sufficient choice of suppliers; competitively viable prices; etc.

188 The interest of consumers in public interest tests has frequently been deprioritized in the jurisdictions applying this test. For instance, in EU practice, the Union institutions have generally given little weight to consumers' interests. Notably, the absence of comments from consumers or consumer organizations is always interpreted by the European Commission as an indication that there is no real concern about the impact of the imposition of anti-dumping measures.[161] In many cases, the EU has concluded that an increase in prices on to the final consumers, if any, would be negligible and would not affect consumers',[162] especially in situations where the price increase must be assessed on the life cycle of the product[163] or where the Union market is characterised by a large number of producers and/or a large range of products available and a high level of price competition.[164] In Canada, although the legal text is clear,[165] consumers' interests do not seem to be on top of the priority list. For instance, in *Caps, lids and jars suitable for home canning,*[166] the Tribunal considered the argument that a price increase would lead some consumers to turn to cheaper and unsafe alternatives, before concluding that are no compelling public interest to issue a report to the Minister of Finance. We consider that the examination of the interests of consumers should not be de-prioritized. In examining the interests of this group, the UK should, above all, consider issues such as product availability, alternatives (choice) and security of supply. The effect on prices can be important especially in situations where there is low price elasticity.

189 The question arises of whether the UK should adopt an "isolated market" exception and in particular whether special account should be given to regional interests when evaluating the public interest (as done in the EU).

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161 See e.g. *Citrus fruits* (China), OJ 2008, L 178/19, para. 113; *Certain compressors* (China), OJ 2008 L 81/1, para. 131; *Candles, tapers and the like* (China), OJ 2008, L 306/22, para.189; *Ironing boards* (China, Ukraine), OJ 2007 L 109/12, para. 53; *Footwear with uppers of leather* (China, Vietnam), OJ 2007 L 275/1, paras 254-257; *Certain prepared or preserved sweetcorn in kernels* (Thailand), OJ 2006 L 364/68 para. 109; *Chamois leather* (China), OJ 2006, L 80/7, para. 81; *Side-by-side refrigerators* (Korea), OJ 2006 L 59/12, para. 111; *Plastic sacks and bags*, (China, Malaysia Thailand), OJ 2006, L 270/4, para. 216; *Castings* (China), OJ 2005, L 199/1, para. 140; *Gas-fuelled non-refillable pocket flint lighters* (China, Taiwan), OJ 2004, L 326/1, paras 111-112; *Large rainbow trout (Norway, the Faroe Islands)*, OJ 2003, L 232/29, para. 117; *Bicycles* (China), OJ 2000, L 175/39, para.141.

162 *Trichloroisocyanuric acid* (China, USA), OJ 2005, L 261/1, paras 93-94 where the Commission considered that the measure would lead to an increase of maximum 10 EUR per year which was not considered to be of a nature to lead the consumer to switch to alternative products; *Certain prepared or preserved sweetcorn in kernels* (Thailand), OJ 2006, L 364/68, para. 110; *Certain prepared or preserved citrus fruits (China)*, OJ 2008, L 350/35, para. 58.

163 *Ironing boards (China, Ukraine)*, OJ 2007, L 109/12, para. 53.

164 *Colour television receivers (China, Korea, Malaysia, Thailand)*, OJ 2002, L 231/1, para. 224.

165 Pursuant to Subsection 40.1(3) of the Special Imports Measures Regulations, one of the criteria the CITT should take into account when assessing the public interest is : *"whether the imposition of an anti-dumping or countervailing duty in the full amount has significantly restricted or is likely to significantly restrict the choice or availability of goods at competitive prices for consumers or has otherwise caused or is otherwise likely to cause them significant harm."*

166 CITT, *Certain Prepared Baby Food,* Public Interest Investigation No PB-95-001, 26 February 1996.

190 Under Article 4.1 (ii) ADA,[167] an investigating authority may in exceptional circumstances identify two or more isolated markets for the product concerned. This situation will arise where (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. The ADA further specifies that in that case "*injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market*".

191 The "isolated market" exception is rarely used, even in the EU which is nevertheless considered to be a particularly large territory with a large number of regional specificities.[168] Given the fact that the geographical territory of UK is relatively small compared to the EU, it is unlikely that the "isolated market" exception would frequently be relied upon in practice by the UK. But nothing prevents the UK from giving itself the flexibility to consider the regional and distributional impacts and effects of the measures on, amongst others, prices and the development of a particular region. Indeed, irrespective of the particular situations addressed in Article 4.1 (ii) ADA above, the UK could well be advised to take into consideration regional interests and considerations particularly if the domestic industry is concentrated in a particular region. Although the economic interest assessment would eventually need to be carried out on the basis of the whole country, the UK might consider that the imposition or non-imposition of measures might disproportionately affect jobs and skills in a particular region to such an extent that they should be taken into consideration in the overall economic test analysis.

3.2 Which factors should be considered in assessing and balancing wider economic interests?

192 In this section, we consider the proportionality component of a possible public interest test in the future UK trade defence approach. The objective of such a test of "public interest" or "wider economic interest" is to investigate how the interests of the domestic industry are taken into account together with other interests such as user industries and final consumers.

3.2.1. Basic rules

193 As mentioned above, the UK is not obliged under WTO law to apply a public interest test, but the UK would be free to choose to do so.

[167] Article 4.1(b) of the EU AD Regulation mirrors the provisions of the ADA.
[168] The EU last used the "isolated market" exception in 1994 in *Ammonium nitrate* (Lithuania, Russia, Belarus, Georgia, Turkmenistan, Ukraine, Uzbekistan), OJ 1994 L129/24, paras 7 et seq.

194 Following from this, there are no legal guidelines on how to assess and balance the various economic interests at stake in relation to a specific trade defence case.

3.2.2. Conclusions and recommendations

195 The public interest test will always include an element of judgement and qualitative assessments of various elements of the combined evidence.

196 The UK should aim at introducing an appropriate amount of structure and rigour to the public interest test and give sufficient guidance to both complainants and opponents on the appropriate approach and elements to be considered. There will inevitably still be some room for flexibility and discussion.

197 In assessing the wider economic interest, the UK should consider the economic impact of imposing trade remedy measures (e.g. imposing an antidumping duty) and compare this to the counter-factual situation that would occur if no measures were imposed (e.g. a continuation of alleged dumping).

198 The assessment should comprise impacts for all relevant economic agents that are directly or indirectly affected by the imposition or non-imposition of trade remedy measures.

199 The assessment must evaluate the potentially positive impacts from imposing measures for the domestic UK producers of the product concerned (and the eventual domestic upstream suppliers to those producers) against the potentially negative consequences for the domestic UK downstream customers (user industries, importers, traders or consumers) of the product concerned.

200 In a quantitative welfare economic assessment of a trade remedy intervention, the key factor to consider would be producer and consumer surplus in the UK, i.e. the contribution to economic growth and consumer welfare taking into account the effects on both the domestic industry, importers, user industries and final consumers in the UK, and considering both volume and price effects of the intervention. The analysis could be supplemented by employment impacts using standard data on the employment in affected industries, although trade remedies would have no long-term impact on employment.[169]

201 The assessment should consider both the static short-term impacts and the possible long-term impacts.

- **Short-term economic impacts:** Imposition (or non-imposition) of trade remedy measures will have short-term impacts on the market for the product concerned (typically a 1-3 years view). Trade remedy measures (e.g. import duties) will make imports of the product concerned more expensive for im-

[169] The long-term level of employment is determined by the labour supply and the structure of the UK labour market.

porters and user industries and costs may eventually be passed on to downstream producers and potentially end at the final consumers. On the other hand, imposition of trade remedy measures could improve the economic performance of domestic producers of the product concerned as long as measures are in place and these gains needs to be balanced against the increased cost for importers, users and final consumers. The tariff revenue accruing to Government should also be accounted for.

- **Long-term economic impacts:** Imposition (or non-imposition) of trade remedy measures can also have longer-term impacts on the market for the product concerned. It may therefore be useful to assess the longer term implications of imposing or not imposing measures. This should centre around the conditions of competition in the market, and consider how the structure of the market in question will evolve in the situation measures are imposed against a continuation of the situation with no measures. While quantitative methods can be helpful in this assessment, no general recommendations for proportionate quantitative analysis can be given at this stage.

202 Measures would be against the wider economic interest of the UK if – on balance – and considering both short-term and long-term impacts across all relevant affected economic actors in the UK – the negative impacts are disproportionate to the identified positive impacts.

203 In general, the short-term economic impact of an AD duty would show a net loss to the economy if the negative effects outweigh the positive effects. There is however an exception, if the domestic industry has strong market power on the world market for the specific good. In this case imposing a tariff on the good can improve the country's terms-of-trade which potentially will result in a net economic impact gain for the country (the so-called "optimal tariff" theory). Applying anti-dumping measures to reinforce such an unintended and anticompetitive conduct would be debatable.

204 The purpose of a quantitative analysis of the short-term economic impacts (i.e. using a partial equilibrium model) would be to provide an initial assessment of the relative sizes of short term impacts to help to provide context to the rest of the assessment, i.e. how big are the net losses for consumers and user industries relative to the estimated gains for the domestic industry. This should provide valuable context to the assessment of the long-term implications. In general, if the short-term losses are shown to be big, any longer term benefits would need to be considerable.

3.3 Is there a practical way of using more formal quantitative techniques (e.g. partial equilibrium approaches)?

205 Formal quantitative modelling should help provide for economically robust conclusions and greater consistency. What data would be required? How could the findings be interpreted?

- **Formal quantitative techniques** (such as partial equilibrium models) **can be helpful to assess short-term economic impacts**, i.e. balancing the cost of the measures for importers, user industries and final consumers against the expected gains for domestic producers and potential UK suppliers to the domestic UK producers.

- **Qualitative assessments** (such as structural competition assessments) **can be helpful to provide information on longer-term economic impacts**, i.e. assessing how the imposition or non-imposition of trade remedy measures will affect future competition in the market concerned.

3.3.1 Experience with quantitative modelling

206 Results from partial equilibrium models have been submitted by affected parties in EU antidumping cases. The European Commission has not – to our knowledge – used or published any formal modelling of the wider economic interest in relation to the assessment of Union interest.

207 In the US, the Office of Economics at the USITC developed a partial equilibrium model, "Commercial Policy Analysis System (COMPAS)," which was used as part of the assessment of antidumping cases. The COMPAS model is a spreadsheet-based model used to estimate the effect of dumped imports (or duties) on the domestic industry, user industries, consumers and the treasury.[170] Certain assumptions concerning the responses to changes in prices (so-called elasticities) are incorporated in the model on a case-by-case basis. In conducting its analysis, however, the USITC no longer regularly relies upon COMPAS.[171]

3.3.2 Conclusions and recommendations

3.3.2.1 Formal quantitative techniques (short-term impacts)

208 Formal quantitative models can be helpful to assess short-term economic impacts of imposing trade remedy measures. Partial equilibrium models have been used by the US authorities in the past to assess (*ex-ante*) the short-term welfare effects of imposing trade remedies.

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170 See Francois & Hall (1993), "COMPAS—Commercial Policy Analysis System".
171 See Department of Commerce (2015), "Enforcement and Compliance Antidumping Manual", chapter 18 on "International Trade Commission (ITC) Injury Determinations", page 9. The document does not provide any reasons why the USITC is no longer using this model on a regular basis.

209 A partial equilibrium model uses observable market data on domestic production, trade volumes, domestic demand and prices to assess the demand and supply responses to the imposition of import duties.

210 A partial equilibrium model is helpful to balance the economic impacts across different economic actors, and to take into account their expected response to the new market situation after the imposition of measures, e.g. an import duty.

211 In order to estimate behavioral effects from the price changes resulting from the imposition of an AD duty, the model includes elasticities of demand, supply and substitution to calculate the change in volume for a given price change, e.g. from imposing an AD duty. Further, a simplifying assumption could be that the exporter does not lower the price further, when the AD duty is imposed, i.e. the exporter does not absorb any of the duty imposed.

212 A partial equilibrium model calculates the net welfare effect from imposing an AD duty by balancing the positive impacts for domestic producers (and eventually their upstream suppliers) against the negative impacts for importers, users, traders and final consumers (and eventually other downstream actors).

213 More precisely, a partial equilibrium model evaluates the changes in:

- **Supplier/producer surplus** (upstream): *Producer surplus* is the difference between the price that producers are willing and able to supply a good for and the price they actually receive.

- **User/consumer surplus** (downstream): *Consumer surplus* is the difference between the total amount that consumers are willing and able to pay for a good or service (indicated by the demand curve) and the total amount that they actually pay (the market price).

- **Government revenue** from tariffs on imported goods

214 The standard static partial equilibrium model typically results in a net welfare loss from a tariff:

- The supplier/producer surplus increases from higher prices and volume

- The user/consumer surplus decreases from higher prices and lower volume

- The government revenue increases from tariff on imported volumes

215 In total, the government revenue and the producer gain will not typically outweigh the combined welfare loss for the users/consumers.

216 A partial equilibrium assessment would form a starting point for the overall assessment. The size of the net loss can vary from case to case. The size of any net

welfare loss would then be used as a starting point for the wider long-term assessment.

217 The factors to include to ensure a stringent structure in the partial equilibrium model are:

- Data on bilateral trade, prices, production, and tariffs
- Elasticities of supply, demand and substitution

218 The partial equilibrium model data requirements:

- **Trade data**: There are extensive data sets available on Eurostat (or standard UK statistics after the UK leaves the EU) or through UN Comtrade Database. These show bilateral trade flows in value terms. Bilateral trade data is available for detailed tariff lines. The application of trade data to a specific case will be relatively straight forward if the product concerned is confined to specific HS-codes or CN-codes. If the product concerned does not match CN-codes one-to-one, further data work is required to calibrate the model.
- **Domestic production for domestic use:** One key input of the model is the total expenditures on the products of the industry in the UK market. The simplest way to approximate total expenditure is to calculate *apparent consumption*, defined as the total shipments of UK producers in the industry minus their exports plus UK imports. These data can be retrieved from Eurostat or UN Comtrade, or similar UK data and from the *EU Prodcom* database[172] or UK equivalent.

219 The welfare impacts depend on the elasticities applied in the model:

- The larger the **supply elasticity** (the flatter the supply curve) the larger the welfare loss from imposing tariffs on imports from other countries, as the capacity of the country to change import prices (and therefore improve its terms of trade) will be more limited. This is so because the higher price will increase supply and thereby consumption.
- The larger the **demand elasticity** (the flatter the demand curve), the larger the change in welfare of imposing tariffs on imports. This is so because even a small increase in tariffs will lead to a large decrease in demand.
- The larger the **substitution elasticity** (the smaller the vertical distance between UK supply curve and the other country's supply curve) the larger the welfare loss from imposing tariffs on imports from the other country. This is

[172] Prodcom provides statistics on the production of manufactured goods. Prodcom uses the product codes specified on the Prodcom List, which contains about 3900 different types of manufactured products. Products are identified by an 8-digit code. It is essential that the domestically produced product is a like product to the import product by matching the HS or CN codes.

so because UK demand can more easily shift away from the imported products and no longer take advantage of the cheaper foreign good.

220 Elasticities have to be determined in accordance with the product in question. The elasticities are important for the results of the analysis, and the application of such elasticities should be performed with a high degree of transparency around the exact parameter values and their sources. Elasticities are often available from econometric estimates. These estimates are subject to uncertainty, and since the size of these parameters will influence the result of the analysis, it is customary and advisable to conduct sensitivity analyses of the choice of elasticities ranging from the lower to the upper end of the range found in the literature.

221 The UK could consider providing a standard set of elasticities (or ranges of elasticities) for the most common products as guidance based on already available collections of elasticities. Such datasets with elasticities are available from GTAP or USITC. These elasticities are mainly estimated at a relatively high product level meaning that their validity in the specific AD case needs to be assessed case by case by considering the product specificities. It would often be appropriate to produce and report sensitivity analyses reflecting the degree of uncertainty of the underlying parameters such as the elasticities.

222 With the partial equilibrium model, it is possible to calculate a net welfare effect of imposing an AD duty. From a pure welfare economic assessment, the model can therefore be used in a public interest test to answer whether or not the loss of consumer surplus for downstream industries and consumers of imposing the duty is likely to materially outweigh the gain in producer surplus to the domestic industry of imposing the duty (plus eventually the gain in terms of government revenue from the tariff). As all of these elements are measured in comparable monetary terms, the partial equilibrium framework will provide a net-welfare assessment with the appropriate weight to each element.

223 In the assessment, is advisable to consider bundling the welfare effect for the downstream producers and upstream users respectively and look at the impact for the two broad groups from an imposed AD duty. The overall distribution of the welfare effects between the user industry, wholesalers, retailers and final consumer should not be relevant for an assessment of the net welfare effect. However, it is possible to quantify the impacts for various user groups (user industry, wholesalers, retailers and consumers) provided that the relevant information about the passing-on of the duty is available.

3.3.2.2. Long-term impacts

224 Imposition (or non-imposition) of trade remedy measures can also have longer-term impacts on the market for the product concerned.

225 Imposition of measures will have positive overall long-term impacts if it maintains a healthy competitive outcome and preserves the ability of the domestic industry to compete in a market that is not distorted by dumping or price undercutting. The rationale for trade remedies is to deal with predation, i.e. foreign firms pricing below cost, subsidising their entry and gaining of market shares in the foreign market; hence avoiding anticompetitive behaviour.

226 The imposition of measures might also have unintended negative impacts if it allows the domestic industry to achieve economic rents above the normal market level. This can be the case, if the domestic industry is relatively concentrated with only a few suppliers, and if the imposition of trade remedies effectively shuts out an important (or possibly the only) outside competitor to the domestic industry.

227 There are no formal models available for quantifying all of these long-term economic impacts of the imposition or non-imposition of trade remedies and balance the effects against each other. Hence, the assessment of possible structural changes to the nature of competition in the market in question should be assessed via qualitative means.

228 It may therefore be useful to assess the longer term implications of imposing or not imposing measures via a structured qualitative approach with a screening approach as known from competition economics. This could centre around the conditions of competition in the market, and consider how the structure of the market in question will evolve in the situation where measures are imposed against a continuation of the situation where no measures are imposed.

229 There are no quantitative methods for assessing this, but rather a range of different indicators to consider. It is beyond the scope of this research to develop such a screening mechanism, but the UK could consider applying a combination of the following three high-level elements:

- An assessment of the degree of competition in the domestic industry (using indicators of competition such as HHI-index and many more)

- An assessment of the degree of competition imposed by the imported products being investigated (with and without measures)

- An assessment of other non-UK suppliers and their ability to enter or service the market in question and thereby exert competitive pressure on the domestic industry

230 Such indicator-based approach can be helpful to inform about longer-term economic impacts, i.e. assessing how the imposition or non-imposition of trade remedy measures will affect future competition in the market concerned. However, to be practical, the UK can consider a proportionate approach in which the requirements are minimal where a case presents limited competition concerns.

3.4 How could consideration of wider economic interests be used in practice as part of an investigation?

231 This question raises two major issues, namely (1) whether the investigating authority should only rely on information submitted by the complainants and other interested parties or more actively seek to obtain information on its own initiative and (2) whether the results of the public interest test should only lead to a decision of whether or not to impose an anti-dumping measure or whether these results could allow the investigating authority to modulate the scope/duration/level of the anti-dumping measure.

3.4.1 WTO rules

232 WTO rules on this aspect only address the due process obligation towards interested parties enshrined in Article 6 ADA (AB EC-Tube or Pipe Fittings (2003), para 138). Especially "*Article 6.1 requires that all interested parties in an anti-dumping investigation be given notice of the information which the authorities require as well as ample opportunity to present in writing all evidence*".[173]

3.4.2 Rules applied by selected WTO members

The EU

233 At EU level, the public interest test is frequently examined at an advanced stage of the investigation, i.e. when the EU Commission has already provisionally determined the existence of dumping, injury and causality. In the questionnaires sent by the Commission to interested parties, only the questionnaires "for importers not related to exporting producers" and "for users not related to exporting producers" incorporate questions on the Union interest.[174] These questions do not appear in the questionnaires directed to exporting producers. In some particular cases, the Commission may issue additional ad-hoc questionnaires (for instance if interested parties argue that post-period of investigation data should be taken into consideration in the injury and public interest assessments).

234 In the assessment of the Union interest, the core criterion is whether the duty is "clearly disproportionate" or not. Legally, there is a presumption that "*measures would normally be against the Union interest if it can be established that the Union industry would not be able to benefit from such measures, i.e. that the industry does not have the potential to recover from injurious dumping/subsidisation and play a role in the Union market in terms of market share, production capacity, technology etc. Measures would also be against the Union interest if*

[173] Appellate Body Report, *EC-Fasteners (Article 21.5 –China)*, paras 5.148 -5.151.
[174] See standard questionnaires templates, available at: http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping/#_templates

their adoption entails disproportionate negative consequences for the user industry of the product concerned. Proportionality is also applied in relation to possible negative consequences for importers, traders or consumers."[175]

235 Practice shows that the EU will usually aim to calculate the impact of the measures on industrial users by calculating the likely impact of the cost increase on the downstream product if measures are imposed. This is done by calculating first a ratio between the cost of the input and the total cost of production of the downstream product. The EU will then examine whether (a) exporters and importers are likely to pass on the full amount of the duty or only part thereof to their customers; (b) the users concerned have access to alternative sources of supply than from the country(ies) under investigation; (c) the users can actually easily switch suppliers or are prevented/limited from doing so for technical or logistical reasons; (d) the users can pass on the cost increase and/or absorb it because they enjoy comfortable profit margins; etc.

236 Although the level of duty cannot be modified, this test is not simply a yes/no test. It can result in (i) a modification of the scope of the duty (e.g. exclusion of products); (ii) a modification of the type of the measure (e.g. a minimum price, a price undertaking); or (iii) a limitation of the duration of the measure (e.g. from five to two years).

237 The public interest test is carried out not only in new investigations but also in expiry reviews. Theoretically, this test can also be carried out in interim reviews if such reviews explicitly cover this test. Anti-absorption, anti-circumvention and newcomer reviews are not concerned by this test.

Canada

238 In Canada, the public interest inquiry represents a completely new proceeding after the duty has been imposed. Pursuant to section 45 of the Special Import Measures Act (SIMA), once the Canadian International Trade Tribunal (CITT) has issued a finding of injury or an order, it initiates a public interest inquiry within 45 days, on its own initiative or at the request of an interested person, "*if it is of the opinion that there are reasonable grounds to consider that the imposition of an anti-dumping or countervailing duty, or the imposition of such a duty in the full amount provided for by any of those sections, in respect of the goods would not or might not be in the public interest*".[176]

239 In the event that the CITT decides to collect information through questionnaires, it will prepare questionnaires to be completed by domestic producers, importers, trading companies and purchasers but also foreign producers and foreign governments. The information requested in these questionnaires is specific to the public

[175] DG Trade, *Working Document, draft guidelines on Union Interest* (2013), available at: http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150839.pdf

[176] See also, CITT, *Public Interest Inquiry Guidelines*, available at : http://www.citt-tcce.gc.ca/en/Public_Interest_Guidelines_e#_Toc391382666

interest issues relevant to the case. In some cases, prior to finalizing the questionnaires and posting them on its Web site, the CITT may give parties and counsels an opportunity to comment on the replies to the questionnaires. Respondents have approximately three weeks to complete the questionnaires.

240 In practice, the outcome of the CITT's investigation is not a yes/no decision as to the conformity of the calculated duty with the "public interest", but is a recommendation to the Minister of Finance to reduce the duty level. Basically, this is an application of the LDR aiming at determining whether the full level of duty (equal to the dumping margin in Canada) is necessary for the protection of the Canadian producers.[177] This analysis, however, is not focused on identifying an "injury margin" *per se*: rather, it is focused on the "excessiveness" of the duty, taking into account the results of the public interest inquiry.[178] In a public interest inquiry the CITT would therefore not calculate any injury reparation price or level of duty and it may well be that the proposed reduction of duty by the CITT could lead to a level of duty that does not fully repair the injury suffered by the domestic industry during the period of investigation and be lower than the injury reparation level. For an interesting description of the reasoning and methodologies followed, please refer to the CCIT's Report to the Minister in Iodinated Contrast Media.[179]

New Zealand

241 In May 2017, a new law[180] introduced a public interest test in anti-dumping proceedings in New Zealand.[181]

242 The public interest test is carried out as the last step of initial and review investigations.[182] Just as in the EU and many other countries,[183] this test is a "bounded test". It creates a presumption of conformity, namely that "*imposing the duty is in the public interest unless the cost to downstream industries and consumers of*

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177 In *Beer*, the Tribunal clearly affirmed the lesser duty principle in rather categorical terms: "*Antidumping duties at levels higher than necessary to remove material injury are excessive. Duties that are excessive penalize certain products and exporters by raising prices unnecessarily high and, perhaps by excluding them from the market altogether. In our view, this is not in the public interest*."

178 Ciuriak, *Trade Defence Practice in Canada*, 27 February 2012.

179 CITT, *Certain Iodinated Contrast media*, Public Interest Investigation No.: PB-98-001, 29 August 2000.

180 Trade (Anti-Dumping and Countervailing Duties) Amendment Bill, available at : https://www.parliament.nz/en/pb/bills-and-laws/bills-proposed-laws/document/00DBHOH_BILL69249_1/trade-anti-dumping-and-countervailing-duties-amendment

181 See also, list of submissions received in the framework of a public consultation on a bounded public interest test: http://www.mbie.govt.nz/info-services/business/trade-tariffs/trade-remedies/public-interest-test-for-the-anti-dumping-regime/submissions-bounded-public-interest-test.

182 Government of New Zealand, Ministry of Business, Innovation and Employment, *Introducing a Bounded Public Interest Test and Automatic Termination Period into the Anti-Dumping and Countervailing Duties Regime,* Supplementary Discussion Paper, June 2015.

183 Government of New Zealand, Cabinet Economic Growth and Infrastructure Committee, *A bounded public interest test and Automatic termination period for the Anti-dumping and Countervailing duties regime,* 2015: "The presumption in favour of duties is a feature of the public interest tests other countries have adopted".

imposing the duty is likely to materially outweigh the benefit to the domestic industry of imposing the duty".[184] From the discussion paper released by the government of New Zealand in preparation of this bill,[185] it is apparent that a simple comparison of costs and benefits would have unlikely ever found that the imposition of duties is justified. Instead, the "materiality threshold" creates a presumption in favour of the imposition or continuation of a duty when there is a finding of injurious dumping or subsidisation.

243 When the Minister of Commerce makes an affirmative decision that (i) there is a dumping, which is (ii) causing or threatening to cause material injury to a domestic industry, he shall (iii) determine the rate of the anti-dumping duty, and (iv) direct the chief executive to immediately start the second phase of the investigation (called "public interest").[186]

244 The MBIE (Ministry of Business, Innovation and Employment) intends to carry out public interest investigations by providing questionnaires on public interest factors to parties that are likely to be affected by the imposition of duties.[187] The MBIE will make individual assessments against each of the above-mentioned criterion in the Act with the information from the questionnaires. Officials will also supplement this information with information that MBIE has access to, or that the MBIE has gathered through the investigation. These assessments will be based on qualitative and quantitative analysis, where appropriate.

3.4.3 Conclusions and recommendations

245 In applying the public interest test in anti-dumping investigations, the UK needs to consider the following main issues: (1) should the UK carry out the public interest test as a separate investigation?; (2) should the UK rely exclusively on information provided by interested parties, if any?; and (3) is it conceivable that the "public interest test" would lead to the determination of a duty that is lower than the dumping or injury margin and if not, what other options are available? These issues are examined below.

3.4.3.1 Should the UK carry out the public interest test as a separate investigation?

246 The EU and Canada have the most developed practice for the assessment of public interest in AD/CVD investigations. Although both systems share a number of common features (notably in the identification of the domestic interests), they differ in two very important ways:

184 Trade (Anti-dumping and Countervailing Duties) Amendment Bill.
185 Government of New Zealand, Ministry of Business, Innovation and Employment, *Public interest test for the anti-dumping regime*, available at: http://www.mbie.govt.nz/info-services/business/trade-tariffs/trade-remedies/public-interest-test-for-the-anti-dumping-regime.
186 Trade (Anti-dumping and Countervailing Duties) Amendment Bill, section 10 D.
187 Government of New Zealand, Ministry of Business, Innovation and Employment, *Trade (Anti-Dumping and Countervailing Duties) Amendment Bill, Departmental report to the Commerce Committee*, 22 September 2016, page 49.

- Under the EU system, the public interest assessment forms an integral part of the investigation while in Canada, it forms a completely separate investigation that is not triggered "automatically" but only at the request of interested parties;

- Although the EU makes no connection between the LDR and the public interest test, in the Canadian system, the outcome of the public interest test could lead to the application of the LDR.

247 We consider that the UK should not embark in a separate *ex-post* public interest investigation for a number of practical reasons. First of all, the initiation of a separate investigation is particularly cumbersome and time consuming. More importantly, it leads to a "shoot-first, negotiate later" situation that can produce irreparable harm to user interests. It also leaves a significant period of legal uncertainty to all operators on the pending outcome of the investigation. Finally, it requires renewed cooperation by interested parties.

248 Also, unlike the Canadian model, we believe that the public interest test should be completely independent from any application of the LDR (see above). In our opinion, the public interest test is largely subject to the voluntary participation of interested parties and in particular importers, industrial users and end users/customers. The inherent risk of the Canadian model is that a lack of participation by interested parties in the separate investigation would result in the non-application of the LDR.

3.4.3.2 Should the UK rely exclusively on information provided by interested parties, if any?

249 We consider that given the importance of the public interest test for the UK, which is a very mature economy with a multi-layered network of downstream industries that creates high added value and a large base of SMEs operating at various levels of the production chain, the UK's investigating authority should seek to play a more active role in the assessment of the public interest than other countries (with due consideration of budgetary constraints).

250 It is for this reason that we consider the Canadian "information gathering process" to be far more developed and effective than that of most other countries including the EU (e.g., the standard questionnaires are relatively complete). In this connection, the UK may also wish to consider the following:

- "Public interest test" questions could be asked in the questionnaires sent to the complaining industry at the very first stages of the investigation (possibly even prior to initiation). Complainants often have the best knowledge of the market and this would allow the investigating authority to get information as early as possible.

- The UK should try to ensure that the information it receives from interested parties is as representative as possible. To that extent, targeted questionnaires could subsequently be addressed to interested parties as well as identified market players that have not yet formally registered as interested parties. This would especially reduce the risk that the authority would be receiving information from only the most-organized players on the market with strong lobbying capacities.

- In some cases, the UK should consider issuing short questionnaires with simple and more straightforward questions which can easily be handled by smaller SMEs without requiring too much effort.

- Finally, the UK should ensure that the initiation of anti-dumping proceedings is given adequate publicity to ensure that consumers are informed of their existence. To this effect, the UK could commit to systematically inform national consumer associations of the initiation of proceedings, give them a copy of the complaint and invite them to submit comments.

251 The UK should also "institutionalize" the practice of oral hearings including, possibly, confrontational hearings in which all parties are present. Confrontational hearings can be particularly useful for at least three reasons. The first reason is transparency: hearings in which all interests (including consumer associations, etc) are present give an excellent opportunity for all parties to be informed of their respective interests. The second reason is effectiveness: experience shows that in many cases, the investigating authority is given conflicting evidence by each party. Hearings in which all parties are present generally allow them to confront the same evidence that is before them. Typical situations would concern product definition (should certain product types be included or excluded from the product scope) or product comparability (how should imported and domestically produced products be compared to each other?). Other situations may relate to the interpretation to be given to macro and/or micro economic indicators. The third reason is efficiency: in situations where there are a wide variety of multiple interests (including user industries, consumers, etc.), confrontational hearings allow the investigating authority to streamline multiple requests for individual hearings and it also tends to reduce multiple filings of post-hearing submissions and comments by each interested party.

252 Confrontational hearings in EU practice are extremely rare because, like any hearing, they are organized only upon request by interested parties and in the overwhelming majority of cases the complaining industry refuses them. While the UK should not compel interested parties to attend such hearings, it may wish to suggest in its guidelines that failure of an interested party to attend may allow it to disregard certain considerations/evidence produced by any such party.

3.4.3.3 How should the public interest test affect the determination of a duty by the Investigating Authority?

Imposing a lower duty?

253 Under the Canadian system, the public interest test could lead to a duty that is lower than the dumping margin (but not necessarily lower than the injury margin). In the EU system, the public interest test cannot lead to the determination of a duty that is lower than the effect of the LDR (i.e. the lower of the dumping and injury margins).

254 Overall, we consider that the EU system is to be preferred because it is more predictable and it reflects better the objective and specificity of each step in a proceeding: the determination of dumping concerns the exporting producers and leads to the calculation of the dumping margin; the determination of injury concerns the domestic industry and leads to the calculation of the injury margin and application of the LDR if a lower duty is sufficient to protect it from the dumping practised by the exporting producers and; finally, the public interest test concerns predominantly other interested parties and leads to the determination of whether the duty that results from the first two assessments meets the public interest test or not.

255 The public interest test should not allow the authority to alter the mathematical calculation resulting from the determination of the dumping and injury margins and the application of the LDR. If the UK nevertheless considers that the conclusions of the public interest test should allow it to further modulate the level of the duty, we consider that this should be done through a different determination of the level of target profit that should be granted to the domestic industry in the determination of the injury margin.

Other options

256 While we strongly recommend the UK not to allow itself to impose a lower duty if the public interest test leads to the conclusion that the duty – even with the application of the LDR – allows a protection to the UK industry that is disproportionately high, there a number of options that can adequately address a wide variety of public interest concerns. The main options which we recommend the UK to consider on a case by cases basis are briefly described below.[188]

257 The non-imposition of measures on grounds of public interest remains a rare occurrence. For instance, in the EU, measures were not imposed on that ground in *White Phosphorous*[189] and in *Leather, plastic and textile handbags*.[190] In *White Phosphorous,* the non-imposition of measures was justified by the fact that the

[188] Some options could even be combined in the same proceeding.
[189] *White Phosphorous (Kazakhstan)*, OJ 2013, L43/38, paras. 190 – 196.
[190] *Leather, plastic and textile handbags (China),* OJ 1997,L208/31, paras 105 and seq.

product concerned is a highly important raw material for the user industry representing a considerable proportion of their total cost of production and that the viability of users would be at stake if measures were imposed. It was also found that the imposition of measures would not provide sufficient relief to the Union industry as imports from Kazakhstan would remain more competitive in terms of prices and would therefore not guarantee that the Union industry would overcome its current fragile situation. In *Leather, plastic and textile handbags*, the EU considered that the imposition of measures on plastic handbags would not benefit the EU industry because, given the fact that the production process could be easily transferred to a third country, the product concerned would be sourced from third countries in the medium term. It was also considered that the employment levels of the EU industry in that sector were limited (500 people) in comparison with the employment for the distribution chain (4100 people).

258 Under EU rules, the European Commission may only decide to impose measures based on the dumping or injury margins (LDR) or not to impose measures. There is no possibility to impose a lower duty on grounds of public interest. However, within this limitation, the EU investigating authorities have imposed creative remedies to account for the Union interest, including:

- *A change in the form of the measure*. For instance, in *Grain Oriented Electric Steel*, the European Commission chose to impose variable duties reflecting a minimum import price. In that case, the European Commission justified these measures on the basis of a significant rise in import prices of the product concerned after the period of investigation which, had they been combined with *ad valorem duties*, would have disproportionately affected the downstream user industry.[191]

- *Product exclusion*: In *Footwear with Uppers of Leather*,[192] the European Commission excluded children shoes from the scope of the investigation at the provisional stage on consumer interest grounds. These shoes were however included at the definitive stage.

- *Price undertaking*: In *Typewriter Ribbon Fabrics*,[193] the European Commission considered that, where there was only one Union producer and one Chinese producer/exporter of the product concerned, it was not in the Union's interest that there be only one supplier of the product concerned. Therefore, any protective measures should not lead to the withdrawal of Chinese imports from the Union market or eliminate competition between these imports and Union production. In this context, a price undertaking was considered appropriate.[194]

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191 *Grain Oriented Electrical Steel (China)*, OJ 2015, L284/109.
192 *Footwear with Uppers of Leather (China, Vietnam)*, OJ 2006, L98/3, paras 250-252 (provisional stage); OJ 2006, L275/1, paras 254-257 (definitive stage).
193 *Pure Silk Typewriter Ribbon Fabrics (China)*, OJ 1990, L174/27.
194 See also, *Citric acid(China)*, OJ 2008, L323/62 : undertakings were accepted in the case largely because the EU industry was nearly monopolized by one single producer.

259 *Limitation of the duration of the measure*: In *Integrated Electronic Compact Fluorescent Lamps*,[195] in the context of an expiry review, the European Commission took the decision to limit the duration of the measures to one year because the Union industry was heavily reliant on imports of the product concerned and was against the continuation of the measures.

260 *Suspension of the measure*: the EU provides in its rules that anti-dumping measures can be suspended in the Union interest, for a period of nine months "*where market conditions have temporarily changed to an extent that injury would be unlikely to resume as a result of the suspension*". Such situations can occur for instance where there are temporary shortages or temporary price increases. Under EU rules, the suspension may be further extended by a period of up to one year.

[195] *Integrated Electronic Compact Fluorescent Lamps* (China, Vietnam, Pakistan, Philippines), OJ 2007, L272/1, paras 100 and 115.

Chapter 4
Assessing Measures

261 During their normal period of validity, anti-dumping measures can be amended through review investigations if there are changed circumstances on the basis of which the definitive measures originally imposed were established. The most common types of reviews are expiry reviews and interim reviews.[196]

262 Expiry reviews are initiated towards the end of the period of validity of the measures in order to determine whether the existing measures should continue for a new period or whether they should be left to expire. Interim reviews are initiated during the normal period of validity of the measures. Their scope may be limited to certain exporters only; to the dumping or injury determinations only; to the scope of the product; or even only to the form of the measures.

263 This chapter only concerns expiry reviews and interim reviews that cover dumping and/or injury, and will address two issues in particular: (a) what analysis should be done in determining whether the measures should be continued (Section 4.3) and (b) what evidence could be used to help the adoption of inform decisions about how often reviews should be conducted (Section 4.4). These issues will be examined after a brief summary of the rules currently applicable to the UK (Section 4.1) and the rules applicable in other jurisdictions (Section 4.2).

4.1 WTO rules

264 Article 11.3 ADA states that duties can be imposed for a maximum renewable period of five years. Pursuant to Article 11.2 ADA, review investigations can be initiated where warranted by the investigating authority at its own initiative or provided that a reasonable period of time has elapsed since the imposition of the definitive duty by any interested party which submits positive information substantiating the need for a review. Authorities will examine "*whether the continued imposition of the duty is necessary to offset the dumping*" and "*whether the injury would be likely to continue or recur if the duty were removed or varied, or both*".

265 However, the ADA does not prescribe any particular methodology to be followed by an investigating authority when conducting a likelihood investigation.[197] WTO case law has emphasised that the need for the continued imposition of the duty implies a necessity test and a prospective analysis: "*the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to*

[196] Other reviews would typically include: newcomer reviews (addressing the situation of new exporting producers), anti-absorption reviews in the EU system (addressing situations where the exporters reduce their export prices in order to "absorb" the effect of the anti-dumping measure on import prices), and reviews implementing WTO dispute settlement proceedings.
[197] Appellate Body report, *US-corrosion-Resistant Steel Sunset Review* (2004), paras 123 and 149.

offset dumping",[198] "*an investigating authority must necessarily be examining whether that future injury would be caused by dumping with a commensurately prospective timeframe. It is clear that the continued imposition of an anti-dumping duty is tied to the recurrence of dumping*",[199] "*if at any point in time, it is demonstrated that no injury is being caused to the domestic industry by the dumped imports, the rationale for the continuation of the duty would cease*".[200]

266 WTO case law offers little guidance on the nature of the prospective analysis. It only states that the risk of continuation of dumping means that "*a measure might be continued if it is proven that the absence of the measure is likely to lead to continuation or recurrence of dumping and injury*".[201] As a general rule, WTO case law suggests in very clear terms that the expiry of the measure is the rule and that "*authorities must conduct a rigorous examination in a sunset review before the exception (namely, the continuation of the duty) can apply*".[202]

4.2 Other jurisdictions

The EU

267 In the EU, any importer, exporter or EU producer can request an interim review of measures once they have been in place for at least a year. EU Member States and the European Commission can request a review at any time. An expiry review can be initiated only at the request of the EU industry or by the Commission at its own initiative.

268 The Commission's assessment of the "likelihood of resumption of dumping" in expiry reviews, does not amount to a *de novo* review. It can result only in the repeal or continuation of the duties in force and cannot lead to a change in the level or form of the duties. However the "likelihood" analysis is by its very definition rather abstract in economic terms because at the moment of the review, the domestic industry should (in general) no longer be suffering from any injury anymore following the application of the anti-dumping measure. In practice, at the end of the five-year period, duties are often extended and the likelihood analysis tends to be used in support of the continuation of measures that are frequently no longer adapted to the evolution of, amongst others, the market or the public interest.

269 In the context of interim reviews, the EU will consider whether "*the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established*."

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198 Panel report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, para 6.43.
199 *Idem*
200 Appellate Body Report, *US-Anti-dumping Measures on Oil Country Tubular Goods*, para 93.
201 Appellate Body Report, *US-corrosion-Resistant Steel Sunset Review,* para 107.
202 Appellate Body Report, *US-corrosion-Resistant Steel Sunset Review,* para 104.

The US

270 In the US, administrative reviews are conducted by the Department of Commerce. They can be requested yearly by any interested party.[203] An administrative review provides interested parties an opportunity to have the Department of Commerce to review a particular company's entries, exports, or sales made during the period of review. The outcome of this review determines the actual weighted-average margin and duty assessments for that period and the future cash deposit rate.

271 Unlike administrative reviews, expiry reviews do not allow for the recalculation of the duty. In the US, expiry reviews are carried out every five years only to decide on whether or not measures shall be continued.[204] The Department of Commerce will revoke the order imposing the duty after review unless it determines that *dumping* would be likely to continue or recur, *and* the USITC determines that material injury would be likely to continue or recur.[205]

272 No later than 30 days before the fifth anniversary of the date of publication of an antidumping or countervailing duty order or suspension of an investigation, the Department of Commerce publishes in the Federal Register a notice of initiation of a review. If no interested party responds to the notice of initiation, the Department of Commerce issues a final determination, within 90 days after initiation of the review, revoking the order or terminating the suspended investigation. If interested party responses are adequate, a "full review" will be conducted.[206] At the same time that the Department of Commerce initiates a five-year review, the USITC publishes in the Federal Register a notice of institution of a five-year review, requesting interested parties to provide certain specific information (the questionnaires are different for review investigations[207]). Similarly to the Department of Commerce, if the USITC concludes that the responses of interested party to the notice of institution are inadequate, it may decide to conduct "an expedited review". In the alternative the USITC will conduct a "full review".

New Zealand

273 In New Zealand, the law as amended in May 2017 states three different types of reviews: (1) reassessment of the rate or amount of the duty; (2) partial reviews; and (3) full reviews. All types of reviews may modify the level or rate of the duty. However, only "partial reviews" and "full reviews" aim at investigating into the "continued imposition of duty".

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[203] US Department of Commerce, *2015 Anti-Dumping Manual*, Chapter 21, available at http://enforcement.trade.gov/admanual/index.html.
[204] US International Trade Commission, *Antidumping and countervailing duty handbook*, fourteen edition, June 2015, available at : https://www.usitc.gov/trade_remedy/documents/handbook.pdf.
[205] *Idem* p III-3, referring to Section 751(d)(2) of the Act (19 U.S.C §1675(d)(2)).
[206] *Idem*, p III-7.
[207] See questionnaire samples, available at https://www.usitc.gov/trade_remedy/question.htm.

274 At the end of the five year period, the industry must apply for a continuation of the duties prior to their expiry. If the industry does not apply for a sunset review, the duty is repealed. Reviews are initiated on the basis of an application from an interested party and must include positive evidence justifying the need for a particular type of review. However, the Chief Executive might initiate reviews at his own discretion.

275 Only "full reviews" are a *de-novo* investigation that recalculate dumping and injury margins and apply a public interest test. Before the new law was enacted, no *de-novo* investigations were carried out to assess the likelihood of recurrence of dumping".[208]

276 Interestingly, in a position paper debating the then existing New Zealand trade law framework, the MBIE proposed to enact an "automatic termination period" after five, eight or 10 years - without the possibility for the duty to be continued[209] in order to avoid the risk that duties would become embedded in a manner that would prevent the industry concerned from adjusting to international competition. However, such a proposal was finally not part of the May 2017 amendment.[210]

Canada

277 In Canada, the legislative framework is extremely detailed and elaborated and specifically provides for: (1) expedited reviews/ re-investigations; (2) interim reviews; and (3) expiry reviews. Expedited reviews/ re-investigations are initiated by the Canada Border Services Agency (CBSA),[211] interim reviews and expiry reviews are both initiated by the Canadian International Trade Tribunal (CITT).

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208 E.g. New Zealand Government, Ministry of Business. Innovation and Employment, *Review of Anti-dumping Duties on preserved peaches from China,* July 2017:
In assessing whether there is a likelihood of a recurrence of dumping if the duties were to be removed, export prices and normal values have been established based on the following sources of information:
- *HW's application for the review investigation;*
- *information provided by exporters and importers*
- *verified information from the original investigation*

209 Government of New Zealand, Ministry of Business, Innovation and Employment, *Introducing a Bounded Public Interest Test and Automatic Termination Period into the Anti-Dumping and Countervailing Duties Regime,* Supplementary Discussion Paper, June 2015. p 6 and 12.

210 Stakeholders were firmly opposed to an ATP arguing that "*the ATP could re-orientate the dumping and countervailing duties regime from one which provides domestic producers with protection from dumped or subsidised imports to one which provides domestic producers with a limited time-period to adjust to dumped or subsidised import competition*". Government of New Zealand, Ministry of Business, Innovation and Employment, *Introducing a Bounded Public Interest Test and Automatic Termination Period into the Anti-Dumping and Countervailing Duties Regime*, Supplementary Discussion Paper, June 2015, p 11. Following the results of a public consultation, the government decided to drop its proposals arguing that *"the combination of both a public interest test and an ATP poses too high a risk that the anti-dumping regime will not provide the necessary level of protection to domestic industry when faced with dumped or subsidised imports*" Government of New Zealand, Office of the Minister of Commerce and Consumer Affairs, Office of the Minister for Building and Housing, Cabinet Economic Growth and Infrastructure Committee, *A Bounded Public Interest Test for the Anti-Dumping and Countervailing Duties Regime*, para 12.

211 Canada Boarder Service Agency's website, in particular : http://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/menu-eng.html

278 Pursuant to subsection 13.2 of the Special Import Measures Act (SIMA), expedited reviews are carried out to update normal values, export prices or amounts of subsidy and to establish values for new products or models of subject goods or for new exporters. They often take place on an annual basis.[212] They can lead to revised normal values, export prices, and amounts of subsidy applicable to imported goods covered by orders or findings of the Canadian International Trade Tribunal.[213] Considerations of injury made by the CITT are not part of a re-investigation. In that sense they could be considered as equivalent to the US "administrative reviews".

279 Re-investigations are initiated by the CBSA and take into account the following factors: *(a) the elapsed time since the last re-investigation (consideration will be given to initiating on the anniversary of the order or finding or of the initiation of the last re-investigation); (b) the volume of imports of the subject goods and any fluctuations in import volume;(c) the presence of new products, models or exporters;(d) changes in the nature or amount of subsidies; (e) the number of requests for re-determination;(f) information on costs and selling prices in the industry sector or country of export; (g) the number of requests for a re-investigation and representations received from interested parties;(h) the timing of the next potential expiry review; and (i) any other relevant consideration.* Re-investigations are not based upon the determination of "the likelihood of recurrence of dumping". However they aim at ensuring the values in place accurately reflect current market conditions.

280 Interim reviews[214] are concerned with "a *finding of injury, threat of injury or retardation, or an order continuing such a finding pursuant to an expiry review*".[215] They can be initiated at any time by the CITT.[216] The quality of evidence needed to establish that the interim review is warranted is rather high: *"facts or changed circumstances must also be sufficiently compelling to indicate that an interim review, if conducted, would likely result in the Tribunal's order or finding being amended*."[217] Since 1989, the CITT has only initiated 35 interim review processes, 18 of which were ultimately rejected.[218]

281 Expiry reviews are initiated upon request or at the discretion of the CITT by the issuance of a notice before the end of a 5 years period. The CBSA is responsible for determining "the likelihood of continued or resumed dumping"[219] while the CITT is responsible for determining "*whether the expiry of the finding or order is*

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212 *Idem*
213 Canada Boarder Service Agency's website, in particular : http://www.cbsa-asfc.gc.ca/sima-lmsi/ri-re/menu-eng.html
214 CITT, guidelines on interim reviews, available at : http://www.citt.gc.ca/en/Interim_Review_Guidelines_e
215 *Idem* , and 76.01 of SIMA.
216 *Idem*
217 CITT, *Aluminium extrusions*, Request for Interim Review No. RD-2011-005**,** Order and reasons, 12 September 2013.
218 Ciuriak, *Trade Defence Practice in Canada*, 27 February 2012, p 127.
219 E.g. Canada Border Services Agency, *Certain Bicycles originating in or exported from Chinese Taipei and the People's Republic of China*, Decision RR-2011-002 4366-47, 10 August 2012.

likely to result in injury to the domestic industry or retardation of the establishment of a domestic industry".[220]

282 In making its assessment the CBSA is guided by the list of factors in subsection 37.2(1) of the Special Import Measures Regulations (SIMR), notably the continued existence of dumping; the present and likely future performance of the exporters, foreign producers, brokers and traders including, where applicable, in respect of production, capacity utilization, costs, sales volumes, prices, inventories, market share, exports and profits; unused capacities of the exporting producers; the imposition of duties by other third countries; the risk of product diversion to Canada*;* changes in the domestic or international market conditions that affect supply, prices, market share and inventories; etc.

283 In making its assessment the CITT is guided by the list of factors in subsection 37.2(2) of the SIMR which include those listed above as well as the following other factors in particular: the likely volume of the dumped goods if the measures expire; the likely prices of the dumped goods if the measures expire and in particular the likelihood of undercutting; the likely performance of the domestic industry, taking into account that industry's recent performance, including trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits; the likely performance of the foreign industry, taking into account that industry's recent performance, including trends in production, capacity utilization, employment levels, prices, sales, inventories, market share, exports and profits; the likely impact of the dumped goods on the domestic industry with respect to relevant economic factors and indices, including any potential decline in output, sales, market share, profits, productivity, return on investments or utilization of production capacity, and any potential negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital.

284 In undertaking its analysis, the CITT distinguishes between the likely impact of the dumped imports from the likely impact of any other factors that affect or are likely to affect the domestic industry such as changes in market conditions[221] (e.g. the likely performance of the domestic industry if the order is continued) prior to issuing its order.

Australia

285 In Australia the trade defence system is administered by an Anti-Dumping Commission[222] which investigates into (i) the existence of dumping, (ii) the existence of material injury to the domestic industry, (iii) the causal link between the

[220] E.g. (on the same case) CITT, *Certain Bicycles originating in or exported from Chinese Taipei and the People's Republic of China*, Order, 7 December 2012. See also, CITT Expiry Review Guidelines, available at: http://www.citt.gc.ca/en/Expiry_Review_Guidelines_e .

[221] E.g. CITT, *Flat Hot-rolled Carbon and alloy steel sheet and strip*, Expiry Review No. RR-2015-002, orders, 12 August 2016.

[222] See Customs Act 1901, as lastly amended, Part XVB.

dumping and the injury, and recommends the Minister for Industry[223] (the Minister) whether duties should be imposed. The particularity of the system is that the Minister has unfettered discretion on deciding whether or not to impose measures recommended by the Anti-Dumping Commission.[224]

286 In Australia, decisions issued by the Anti-Dumping Commission and the Minister can be reviewed by the Anti-Dumping Review Panel,[225] such as the rejection of applications on *prima facie* grounds, the termination of investigation on *de minimis* grounds, the outcome of investigations or continuation inquiries. The Anti-Dumping Review Panel may also review the Minister's decision to impose measures or not[226] and report back to the Minister who may require it to reinvestigate several elements of the case (i.e. often referred as a "reinvestigation"). However, the decision to impose duties solely and ultimately lies with the Minister.

287 Apart from "reinvestigations", the Australian anti-dumping system also provides for other types of reviews: (i) accelerated reviews, (ii) interim reviews, and (iii) sunset reviews. Accelerated reviews are also referred as "new exporter reviews" and are conducted pursuant to Division 6 of the Customs Act 1901 which reflects Article 9.5 ADA. Interim reviews are dealt in Division 5 of the Customs Act 1901. Division 6A of the Customs Act 1901 relates to sunset reviews.

288 The Anti-Dumping Commission Dumping and Subsidy Manual[227] indicates a non-exhaustive list of factors that may be considered by the Commission in its assessment of likelihood of recurrence of dumping and material injury, namely (non-exhaustive list) : (1) In assessing the likelihood of continuing or recurring dumping: "*the pattern of exports since the measures were imposed; volumes and values of the imported goods; effectiveness of the measures ; whether exports are likely to continue or resume (such as volume of exports before and after measures were imposed, exporters' production capacity, exporters' supply chains, exporters' other markets, third country sales, and the world market for the goods); whether dumping will resume (such as exporters' margins, volume of exports before and after the measures were imposed, effect of the measures, the level of dumping compared with the level of measures i.e. NIP, any changes in the level of the measures as a result of review); exchange rate fluctuations;*

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223 In practice the Minister for Industry delegates his decision-making authority to the Parliamentary Secretary. Also, on 19 July 2016, the Prime Minister appointed the Parliamentary Secretary to the Minister for Industry, Innovation and Science as the Assistant Minister for Industry, Innovation and Science. Therefore, under the current governmental structure «the Minister» should be understood as referring to «the Assistant Minister for Industry, Innovation and Science».

224 This 'Yes/No' ability given to the Minister is the reason why Australia's government has refused to introduce a public interest test, although the productivity commission recommended the introduction of such a test. See Australian Productivity Commission, Inquiry report n°48, 18 December 2009, available at : https://www.pc.gov.au/inquiries/completed/antidumping/report/anti-dumping.pdf

225 See Division 9 of the Customs Act 1901 – section 269 ZZL. For more information see also : http://www.adreviewpanel.gov.au/Pages/default.aspx

226 Australian Government, Productivity Commission, Research Paper, Developments in Anti-Dumping Arrangements, February 2016, figure 2.1 at p34, available at: https://www.pc.gov.au/research/completed/antidumping-developments/anti-dumping-research-paper.pdf. For a complete list of reviewable decisions see: http://www.adreviewpanel.gov.au/About/Pages/ReviewableDecisions.aspx

227 Australian Government, Department of Industry Innovation and Sciences, Anti-Dumping Commission, *Dumping and Subsidy Manual*, April 2017, available at : http://www.adcommission.gov.au/accessadsystem/Documents/Dumping%20and%20Subsidy%20Manual%20-%20April%202017.pdf

changes in technology; exporters' historic margins; exporters' historic volume and value of exports; duty absorption by the exporters (or other means of circumventing measures); exporters' volumes and values to third countries; normal values in the exporting country; export trends after the measures were imposed; changes in distribution channels; changes in transport costs; demand in exporters' home markets; evidence of sales below costs; high dumping margins; high tariffs in the exporting country; exporters' dependence on export markets; world capacity; other possible sources of supply by importers; end user preferences; exporters' domestic profit on sales of like goods; availability of other markets. (2) In assessing the likelihood of continuing or recurring injury: "*the state of the Australian industry; production capacity; other causes of injury; market size and share; demand for the goods; any changes in the structure and operation since the measures were imposed; price of exports compared with NIP and USP; measures relevance to selling prices; the impact of imports of the goods not dumped from other sources; changes in technology, product types, consumer preferences, demand and supply".*

289 Finally, in its report to the Minister, the Commission may recommend that a dumping duty notice: (i) remains unaltered; (ii) no longer applies to an exporter or to particular goods; (iii) has effect in relation to a particular exporter or exporters generally, as if different variable factors had been ascertained; or (iv) expires on the specified expiry day.[228]

4.3 What analysis should be done in determining whether to continue with measures?

290 In expiry reviews and in interim reviews that cover also injury, the UK should first examine whether, even though anti-dumping measures are in place, there is still material injury or a threat of injury as well as causality during the period under review. If this determination is affirmative, measures should be maintained (in expiry reviews) or modified (in interim reviews). If this determination is negative, the UK should examine whether the expiry or repeal of the measure is likely to lead to a recurrence of dumping and injury. Hence, the UK should not simply satisfy itself with the determination that there is no dumping or injury during the period of investigation but rather that there is no evidence showing that in the absence of measures, dumping, material injury or threat thereof and injury are likely to recur.

291 With respect to dumping, the UK will need to examine whether the factors that originally led to the existence of dumping [229] are still present and likely to continue in the future. For instance, if imports are made through related importers, the likelihood that the importer would maintain its resale prices on a duty paid basis at the same level (e.g. because the market has now adapted to such prices),

[228] Australian Government, Department of Industry Innovation and Sciences, Anti-Dumping Commission, *Dumping and Subsidy Manual*, April 2017, p 179/182.
[229] Such as e.g. high prices in the exporting country, unreasonably low export prices, etc.

would normally be an indication that the removal of the measure would not lead to a decrease in resale prices.

292 With respect to injury, such a prospective analysis is more difficult. Some guidance is given by the legal texts and WTO case-law on the "likelihood" assessment. For instance, in *DRAMS*, the WTO Panel said that 'likely' means 'probable' which implies a higher threshold than simply finding that a result might be possible or plausible.[230]

293 The UK would normally not need to examine in detail each individual factor contained in Article 3 ADA but in *US-Oil Tubular Sunset Reviews,* the WTO Appellate Body considered that in a determination of likelihood of recurrence of injury, certain of the factors listed in Article 3 ADA may prove to be probative or possibly even required in order to arrive at a 'reasoned conclusion'. In particular, the WTO Appellate Body considered that "*factors such as the volume, price effects and the impact on the domestic industry of dumped imports,, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury investigation*".[231]

294 In EU practice, a wide variety of factors have been given to justify the decision to maintain or repeal measures in sunset reviews:

To maintain measures:

- the imminent risk of trade diversion due to the imposition of measures in other third countries;
- the existence of large spare capacities (or unused stocks) or low capacity utilization levels in the exporting country concerned;
- the fact that prices charged by the exporting producers to third countries are lower than those in the EU;
- the existence of large raw material reserves in the exporting country;
- the existence of continued dumping and/or undercutting;
- the attractiveness of the domestic market in terms of volumes.

To repeal measures:

- prices in third countries are higher;
- increased capacities in the exporting country are primarily directed at other markets;
- the low and decreasing level of imports;
- the very high level of capacity utilization rates in the exporting country;
- the fact that the domestic industry did not take advantage of the measures to improve its performance/profitability, etc.

[230] Panel report, *US – DRAMS*, par. 6.45 et seq. Appellate Body report *US-Oil Tubular Sunset Reviews,* para 88. Appellate Body report *US-Corrosion –Resistant Steel Sunset Review,*paras 110 – 111.
[231] Appellate Body report, *US-Oil Tubular Sunset Reviews,* para 283-284.

- the fact that the domestic industry had secured long-term contracts with large customers on the domestic market.

295 We would not recommend the UK to prioritise certain factors over others since each case is different. However, we tend to consider the following factors to be particularly important: the risk of trade diversion; the existence of large spare capacities/unused stocks and the fact that export prices charged by the exporting producers to third countries are lower than sales to UK. These three factors summarize the imminent risk of a potentially massive increase in imports if the measures are repealed because of the attractiveness of the UK market compared to other markets in terms of prices.

296 Since expiry reviews would in principle only allow the investigating authority to maintain the measures or extend them but not to change them,[232] the UK should consider more actively initiating systematically expiry reviews combined with interim reviews in all cases where the continued imposition of measures, if any, should be modified in order to reflect new market conditions. Apart from the fact that any renewal of measures would no longer be based on "old" injury data, this might actually reduce the number of interim reviews that would otherwise be requested during the period of application of the measures (particularly ahead of the initiation of expiry reviews), and, even more importantly, it is likely to lead to increased cooperation by interested parties (since they would know that the investigating authority has more options than simply maintaining or repealing the existing measure).

297 Investigating authorities - and interested parties alike - sometimes ask themselves how to calculate injury or dumping margins if, as a result of the existing measures, imports have stopped altogether or have not stopped but are no longer made at prices that show dumping or injury. In the context of an expiry review, this issue can be addressed as follows:

- *In the absence of any imports*: the investigating authority will normally not be able to reach a finding of continuation of injurious dumping but it will have to address the second main question which is whether there is a likelihood of recurrence of injurious dumping;
- *If there are imports*: the investigating authority might reach a conclusion that there is no injurious dumping but this does not prevent it from still reaching the conclusion that in the absence of measures, there is a likelihood of recurrence of injurious dumping. The investigating authority could also find that the dumping and/or injury margins have increased or decreased. In both cases, the initiation of a concomitant interim review may adequately address these changes.

[232] Neither the form nor the level of the measure can be changed in an expiry review but the duration could be limited to shorter periods than 5 years (for instance, 2 years if the excess capacity in the exporting country is expected to disappear gradually within that period).

4.4 What evidence could be used to help inform decisions about how often reviews should be conducted?

298 The UK could – in theory – limit the duration of measures to a period that is shorter than five years. Unless there are compelling reasons to do so which may be dictated by particular market conditions affecting the product concerned,[233] we would recommend the UK to maintain the standard five year period which is commonly applied by investigating authorities around the world.

299 Therefore, this question must essentially be addressed in the context of interim reviews that cover dumping and/or injury determinations.[234] Although Article 11.2 ADA only provides that "a reasonable period of time" must have elapsed since the imposition of the definitive measures before interim reviews may be initiated at the request of an interested party, virtually all countries have set this period at one year. In the US, yearly administrative reviews are the norm but that is generally not the case in most other jurisdictions.

300 For reasons that concern not only budgetary constraints but also the predictability of the duration of measures for interested parties, we consider that it would not be appropriate for the UK to embark into systematic yearly interim reviews or to set low evidentiary thresholds in accepting requests for interim reviews covering dumping and/or injury.

301 It is obviously not possible to set in stone what evidentiary thresholds should be met as each case must be examined on its own merits. However, the UK may wish to consider accepting to initiate interim reviews only if conclusive evidence is shown that the factors purporting to confirm the revised dumping and/or injury determinations are the result of significantly changed circumstances of a lasting nature. This would, for instance, exclude evidence purporting to show reduced dumping on the domestic market[235] although prices of the product concerned are lower in other export markets or are known to be subject to wide fluctuations on worldwide markets.

[233] For instance, the anticipation of a substantial change in domestic market conditions or the UK industry that would require to limit the duration of protective measures to only two or three years.
[234] Evidence concerning interim reviews that address ad hoc situations (such as newcomer requests, product scope exclusions, reviews pursuant to a WTO dispute settlement proceeding, etc.) is not examined in this section.
[235] . . .or increased dumping in the event the request is filed by the complaining domestic industry.

Chapter 5
Other aspects

302 This chapter addresses other aspects. In due time, there will be a need to evaluate the effectiveness of the policy framework more generally which would also need to be thought into the process from the beginning.

303 It would be useful to distinguish between the effectiveness of *specific investigations* and the effectiveness of the *policy framework*. The former is addressed in section 5.1 and the latter in section 5.2.

5.1 How can the effectiveness of the policy framework and impact of specific investigations be assessed?

Assessing the effectiveness of specific investigations

304 When investigating whether specific measures have had the desired effect in specific cases, we would assume that the UK would allow for requests for interim and expiry reviews along the same lines as in the current EU approach.[236]

305 *Expiry and interim reviews* are usually requested by producers – although the UK might also want to retain the right to launch reviews on its own initiative. Reviews must include evidence that the expiry of measures would be likely to result in a continuation or recurrence of dumping and injury. In the current EU approach, this is normally demonstrated by showing that: dumping and injury are continuing; the removal of injury is only due to the measures in force; and further dumping and injury are likely if the measures are allowed to expire. Allowing for interim and expiry reviews and providing easy access for producers should give sufficient assurances that the measures are working effectively from a domestic industry viewpoint.

306 *Circumvention of measures* is another area of concern for the domestic industry. Circumvention can take many forms (product modifications, re-classification, exporting via another exporter with lower duty, exporting in parts and assembling in the UK or in non-targeted third country, etc.). Mechanisms should be in place to address concerns about circumvention. First of all, processes and access points shall be available for producers to report concerns about circumvention. Secondly, customs authorities should be ready to register imports alleged to be circumventing the measures, and the appropriate authority should be enabled to impose a duty retroactively, should circumvention be found.

[236] Anti-dumping measures are usually imposed for five years. They expire automatically, unless a review determines that if they were to expire, dumping and injury would probably continue or recur.

5.2 Future reviews and evaluations

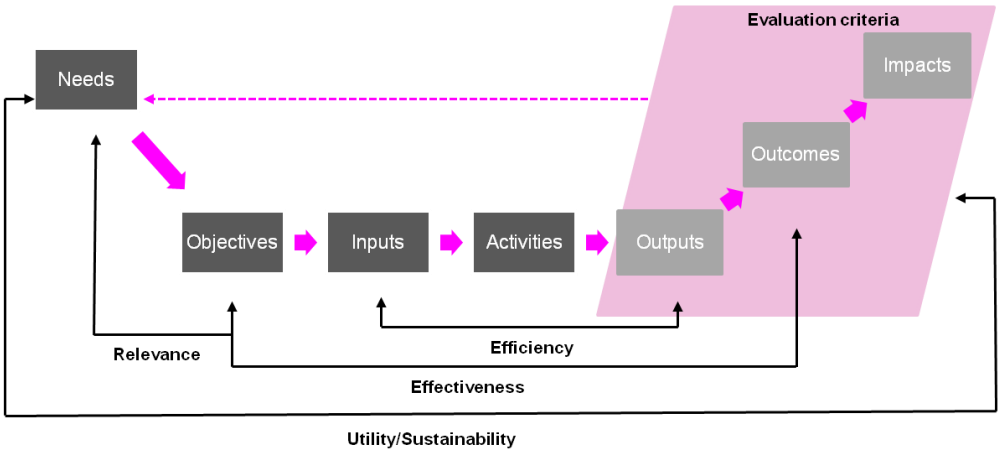
Assessing the effectiveness of the policy framework

307 When assessing the overall effectiveness of the UK's trade remedy policies, it can be helpful to consider a generic evaluation approach and consider all relevant aspects of the policy framework, which would go beyond strict effectiveness, and also include aspects such as (see Figure 1 for overview):

- *Relevance*: How well do the policies address the needs of the main users?
- *Efficiency*: How good are the authorities at transforming input[237] to output?
- *Effectiveness*: How well does the trade remedy policies fare in terms of meeting the objectives and delivering desired outcomes?
- *Impact/utility*: How good is the trade remedy policy at creating the desired impact?

308 Initial considerations for each of these four aspects are given in the following.

Figure 1 Overall evaluation framework



Source: Copenhagen Economics based on the European Commission's evaluation standards

Relevance

309 It would be important to evaluate the relevance of the policy and thereby assess how well these policies address the needs of the main users.

[237] *Inputs*: Financial, human, material, organisational or regulatory means used to implement policies.
Output: The product of the intervention, basically everything that is obtained in exchange for the inputs.
Outcomes: The immediate results of the intervention for the direct beneficiaries, which occur due to changes in output.
Impacts: The consequences of the intervention beyond its direct and immediate outcomes for the beneficiaries. The impacts could be both expected and unexpected as well as direct and indirect, e.g. the overall economic impact.

310 This can among other comprise the following evaluation questions:

- *To what extent do the UK trade remedy policies address the needs of the domestic industries?*
    - *Assessment criteria*: Transparency; access to information; burden and requirements for submitting complaints; burden and requirements during investigations; duration and keeping of deadlines during investigation.

- *To what extent do the UK trade remedy policies address interests of other stakeholders?*
    - *Assessment criteria*: Transparency; access to information; burden and requirements during investigations; duration and keeping of deadlines during investigation.

- *To what extent do the trade remedy measures applied contribute to the Department's and Government's overall mission and ambition in the area of trade and industry policy, i.e. increase competitiveness and welfare?*
    - *Assessment criteria*: Net economic cost or benefit in terms of competitiveness; net impact on welfare, innovation and employment; firm entry in import competing against import-using industries.

- *To what extent does the use of trade remedy policies adequately respond to the international environment and its recent developments?*
    - *Assessment criteria*: Changes in market conditions and value chains and how policies adapt to these; risk of retaliation addressed by other users of trade remedy instruments.

- *Do UK policy decisions regarding trade remedies (e.g. zeroing, public interest test, LDR, etc.) contribute to achievement of objectives?*
    - *Assessment criteria:* Balance of costs/benefits in terms of costs, competitiveness, welfare, including indicators such as share of cases in which consideration of these factors modifies decisions; challenges to UK trade defence cases at the WTO.

Efficiency

311 The efficiency dimension would normally address how well the authorities are doing at transforming input to output - i.e. how many resources are deployed relative to the relevant output measures (investigations, determinations, reviews, hearings, etc).

312 This can among other comprise the following evaluation questions:

- *To what extent are trade remedy investigations undertaken efficiently?*

- *Assessment criteria*: Duration of investigations; cost of investigations; transparency of investigations; acceptance of investigation results by foreign producers; consistency and coherence of investigations; time required to impose (provisional and definitive) measures; resource requirements for the investigating authority and interested parties; circumvention of measures in place swiftly dealt with; number and outcomes of court cases and disputes at the WTO Dispute Resolution Body.

- *Is efficient and effective support provided to the interested parties in relation to trade remedies?*
  - *Assessment criteria:* Active use of support by UK domestic industry without artificial increase in the number of complaints; availability of support to non-complaining interested parties; financial, resources and time costs of support; use of support services by UK industry and other interested parties; use of trade remedies by SMEs; "success rate" of complaints made by SMEs.

Effectiveness

313 Effectiveness criteria should address how well trade remedy policies fare in terms of meeting the objectives and delivering the desired outcomes – e.g. the outcome of UK producers receiving the appropriate and timely amount of protection.

314 This can among other comprise the following evaluation questions:

- *To what extent do trade remedy measures restore profits of UK producers competing with dumped or subsidised imports from third countries?*
  - *Assessment criteria:* Short- and long-term effects of AD and AS instruments on UK producers' competitiveness, growth and jobs, market share, profits, investment (including new firm entry), new product introductions into export markets, and jobs in UK industries affected by dumped or subsidised imports.

- *To what extent do trade remedies restore competitive conditions in UK markets distorted by anticompetitive behaviour, i.e. subsidised or dumped imports?*
  - *Assessment criteria:* Short- and long-term effects of AD and AS instruments on non-complaining firms in "protected" UK industries (profits, investment and employment, price level etc).

Impact

315 Outcomes for other stakeholders should also be considered. This would be captured in the assessment of the wider economic impacts of the measures as addressed in Chapter 3. This should include both short-term and long-term impact and consider the effects of trade remedies on user industries, wholesalers, retailers, and consumers and should comprise an assessment of unintended consequences.

Appendix A

Comparative Analysis of the Public Interest Test and Serious Injury Standards in the context of EU and WTO Safeguards and Anti-Dumping/Anti-Subsidy Investigations

316 This memorandum compares the different standards and requirements relating to safeguards and anti-dumping/subsidies investigations at both the EU level and the WTO level. It is divided into two parts. The first part lays out the fundamental differences between the injury analyses carried out in a safeguards investigation as compared to an anti-dumping or -subsidies investigation, and also highlights any differences between EU and WTO practice. The second part uses the same approach to analyse the applicability of a public interest test in safeguard investigations. It also adds a brief comparative perspective on practices in Canada, New Zealand and the United States.

1. STANDARD OF SERIOUS INJURY ANALYSIS

317 As a fundamental difference between the two disciplines, safeguard measures are applied to "fair trade", without a requirement for unfair trade practices such as dumping or targeted government subsidies. Furthermore, it is designed as an economic emergency exception and is therefore of an extraordinary nature. As a result, the threshold to be met in order to apply safeguard measures is higher than that of anti-dumping and countervailing measures.

318 In the framework of the WTO Agreement on Safeguards (the "***SA***"), safeguard measures may be applied only if increased import volumes of a product cause or threaten to cause "serious injury" to the domestic industry that produces like or directly competitive products.[238]

319 Article 4.1(a) of the SA in turn defines the term "serious injury" as a significant overall impairment in the position of a domestic industry. The Appellate Body has recognised that the standard of serious injury defined in the SA as "very high" and "exacting".[239]

320 This standard is stricter than the standard of "material injury" enshrined in the Anti-Dumping Agreement (the "***ADA***") and the Agreement on Subsidies and

[238] Article 2.1 of the WTO Agreement on Safeguards.
[239] Appellate Body Report, *US – Lamb,* para. 124. Appellate Body report, *US – Wheat Gluten,* para. 149.

Countervailing Measures (the "***SCM***"). An analysis of serious injury in the framework of a safeguards investigation entails the examination of:

- whether the imported product and the domestic product are "like or directly competitive" products;
- whether Union producers of the "like or directly competitive" product are experiencing "serious injury", or "threat thereof"; and
- whether there is a causal link between the imports and serious injury.

321 Each of these issues will be discussed in detail below, and the differences between the safeguards "serious" injury and the ADA/SCM "material" injury standards will be highlighted.

1.1 Like or directly competitive products

322 Determination of like or directly competitive products is crucial since the injury allegedly caused by imports must be assessed in relation to the producers of such products.

323 Unlike the ADA and SCM, which analyse the impact of the imports on the domestic producers of like products for a finding of material injury,[240] the SA analyses the impact of the imports in the position of the domestic producers of like or directly competitive products.[241]

324 Although not much discussed in the context of safeguards, the general WTO case law on the meaning of like or directly competitive products is well established. The factors that are considered in determining likeness of products include, *inter alia,* (i) physical characteristics of the products; (ii) end-use; (iii) consumer habits and preferences regarding the products; and (iv) customs classification of the products. In addition, "directly competitive" typically goes beyond a pure likeness analysis to include a more permissive analysis of demand elasticity.[242]

325 The EU uses a similar criterion in determining the like or directly competitive products. The Commission usually takes into account the following elements: (a) international tariff classifications, physical properties and internationally recognized manufacturing standards; (b) sales distribution channels and price comparability; (c) end-uses; and (d) consumer perception.[243]

[240] Article 3.1 of the WTO Anti-Dumping Agreement. Article 15.1 of theWTO SCM Agreement.
[241] Article 2.1 of the WTO Agreement on Safeguards. Appellate Body Report, *US – Lamb (2001),* paras. 84-6.
[242] Appellate Body report, *Korea — Alcoholic Beverages*, paras. 114–117.
[243] *Certain steel products*, OJ 2002, L 261/1, paras 16-18.

1.2 Whether the domestic industry is experiencing "serious injury"

326 Once the relevant industry has been established, the next step is to consider whether the industry is experiencing serious injury. This analysis can be divided into three steps.

1.2.1 Volume of imports

327 An increase in imports of the product concerned is a prerequisite for a finding of injury in the framework of the SA, ADA and SCM. However, the standard as to the amount of such increase is much higher in the SA than in the ADA and SCM.

328 With regard to volume, the ADA and SCM focuses on whether there has been a "significant increase" in dumped or subsidised imports, either in absolute or relative terms.[244] Yet WTO case law does not clearly define the term "significant" beyond its ordinary meaning. The EU anti-dumping and anti-subsidy practices adopt a similar approach.[245]

329 The SA on the other hand sets a very high threshold concerning the "increased quantities" of imports, in light of which the Appellate Body clarified that the increase of imports must be both quantitatively and qualitatively recent, sudden, sharp and significant enough to cause serious injury.[246] Furthermore, the investigating authorities are required to examine the import trends over the entire period of investigation. In other words, a comparison of end points will not be sufficient to demonstrate that a product is being imported in such increased quantities within the meaning of the SA.[247]

330 The same strict approach can also be observed in the EU practice on safeguards, where proceedings concerning certain steel products were terminated for a certain number of products after it was found that the volume of imports had, despite an increase over the period selected, decreased at the end of this period. The decrease in imports in both absolute and relative terms led the European Commission to conclude that it could not be established that there was a sudden, sharp and significant increase in imports in the recent past.[248]

1.2.2 Price of imports

331 The ADA and SCM explicitly instructs the investigating authorities to examine the effect of the dumped imports on prices with a particular focus on whether price

244 Article 3.2 of the WTO Anti-Dumping Agreement. Article 15.2 of the WTO SCM Agreement.
245 See, Article 3.5-7 of Council Regulation 2016/1036, and Article 8.2 of Council Regulation 2016/1037.
246 Appellate Body report, *Argentina – Footwear (EC),* para. 131.
247 Appellate Body report, *US — Steel Safeguards*, paras. 354–355.
248 *Certain steel products*, OJ 2002,L 261/ 1, paras 16-22.

undercutting, underselling or depression took place.[249] The SA, however, does not make a mandatory reference to a price analysis.

332 Certain jurisdictions like the EU, however, require the investigating authorities to perform an analysis to determine whether the price of imports has significantly undercut the prices of a like product within the EU.[250]

1.2.3 Impact of imports on the domestic industry

333 Volume or price effect alone does not justify an imposition of safeguards. It is also necessary to establish that the domestic industry was impacted by looking at "*all* relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry."[251] These factors include but not are not limited to: (i) the rate and amount of the increase in imports of the product concerned, in absolute and relative terms; (ii) the share of the domestic market taken by increased imports; and (iii) changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment, and hence *any other* "relevant factor" must also be considered.[252] Furthermore, the investigating authority must give a reasoned and adequate explanation of how each of the factors considered supports a conclusion of serious injury.[253]

334 The EU subsidies regime closely mirrors these requirements.[254]

335 The ADA and SCM contain similar lists of relevant factors, including consideration of (i) actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; (ii) factors affecting domestic prices; and (iii) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.[255] Like with safeguards, all the enumerated factors must be considered and supported by adequate reasoning and evidence.[256] The standard of analysis is therefore largely similar between the SA and the SCM/ADA.

336 Again, the EU legislation closely follows the WTO agreements in this area.[257]

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249 Article 3.2 of the WTO Anti-Dumping Agreement. Article 15.2 of the WTO SCM Agreement.
250 Article 10.1(b) of Council Regulation 260/2009.
251 Article 4.2(a) of the WTO Agreement on Safeguards (emphasis added).
252 Article 4.2(a) of the WTO Agreement on Safeguards. Appellate Body report, *Argentina – Footwear (EC),* para. 136.
253 Appellate Body report, *US – Lamb,* para. 103.
254 Article 10.1(c) of Council Regulation 260/2009.
255 Article 3.4 of the WTO Anti-Dumping Agreement. Article 15.4 of the WTO SCM Agreement.
256 Appellate Body report, *Thailand – H-Beams,*, para 124.
257 Article 3.5 of Council Regulation 2016/1036. Article 8.4 of Council Regulation 2016/1037.

1.3 Causation

337 The final step in ascertaining either serious or material injury is to establish: (1) a "causal link" between the increase in imports and the injury suffered by the domestic subsidy, and (2) that the injury cannot be attributed to other simultaneous factors ("non-attribution" analysis). The requirements of causality are well established in WTO case law, and apply across the board to the SA, ADA and SCM.[258] The EU likewise does not differentiate between the separate regimes in any relevant way.[259]

1.4 Standard of threat of serious injury analysis

338 As an alternative to either serious or material injury, it is sufficient to find "threat thereof" to the domestic industry. However, the standards for finding threatened injury sharply diverge between safeguards and dumping/subsidies measures.

339 In the safeguards context, complaints typically allege "serious injury or threat thereof" together, since "threat" has been held to signify a condition with a lower injury threshold than actual injury.[260] They can thus be brought either as alternatives or in combination. The threat must nevertheless be "clearly imminent", i.e. on the "verge of occurring" with a high likelihood of materialising,[261] and must be based on facts and not mere allegation.[262]

340 In contrast, the ADA and SCM provide for separate factors beyond those for material injury in assessing the existence of a mere threat of injury and that these must be applied with "special care".[263] It is highly unusual that a threat of injury is alleged as the basis for duties, and clear that threat implies a higher burden of proof.

341 In the dumping context, the EU had never based a dumping case on threat of material injury until 2009, but in that case it did so in part because the relevant Union industry had previously been subject to dumping and was thus considered extra vulnerable.[264] However, the Commission also resorted to a threat analysis in the recent *China – Hot rolled steel* case, where even though imports had fallen

[258] Article 4.2 of the WTO Agreement on Safeguards. Article 3.4-5 of the WTO Anti-Dumping Agreement. Article 15.4-5 of the WTO SCM Agreement.
[259] Article 3.5-7 of Council Regulation 2016/1036. Article 8.4-6 of Council Regulation 2016/1037. Article 10.1(d) of Council Regulation 260/2009. See also the approach taken by the Commission in e.g. *Certain prepared or preserved citrus fruits (namely mandarins etc.),* OJ 2004, L 104/67.
[260] Appellate Body report, *US – Line Pipe*, paras. 170-1.
[261] Appellate Body report, *US – Lamb,* para. 125.
[262] Article 4.1(b) of the WTO Agreement on Safeguards.
[263] Article 3.7-8 of the WTO Anti-Dumping Agreement. Article 15.7-8 of the WTO SCM Agreement. Although it should be noted that the EU legislation does not contain any such "special care provisions".
[264] *Certain seamless pipes and tubes* (China), OJ 2009, L 94/48, paras 88-9.

after having been made subject to mandatory registration, definitive duties were justified on the basis of the threat posed by future dumping.[265]

342 The only instance in which the Commission has found a threat of serious injury permitting safeguard duties was in a case prolonging existing measures.[266]

1.5 Conclusion

343 Given the extraordinary and overtly protectionist nature of safeguards, a finding of serious injury is harder to establish than the standard of material injury in the dumping or subsidies context, including at the European level. This is mostly due to the high burden of proving a sudden and sustained rise in the volume of imports over the whole period of investigation. As a result, "[m]arket penetration levels required for injury determinations under [the safeguards Regulation] are significantly higher".[267] The impact and causation analysis is largely similar for all three disciplines, yet safeguards standards are slightly less burdensome in relation to like products – allowing directly competitive products to also be examined – as well as in relation to the threat of injury analysis.

2. THE APPLICABILITY OF A PUBLIC INTEREST TEST IN SAFEGUARDS INVESTIGATIONS

2.1 At the WTO Level

344 To recall, the public interest test is not directly referred to in the WTO ADA and SCM agreements:

> Article 9.1 ADA: *"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 19.2 of the SCM: *"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,*

[265] *Hot-rolled flat products of iron, non-alloy or other ally steel* (China), OJ 2017, L 92/68.
[266] *Beach slippers*, O.J 1984, L 340/30.
[267] Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments*, 5th Ed. (2011), at 724.

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 interests parties whose interests might be adversely affected by the imposition of a countervailing duty"

345 Unlike the two provisions mentioned above, the WTO Agreement on Safeguards directly refers to the assessment of the public interest:

Article 3.1: *"A Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public in consonance with Article X of GATT 1994. 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. The competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law."*

346 While the above paragraph suggests that the investigating authorities "shall" assess whether or not the application of a safeguard would be in the public interest, WTO Panels and the Appellate Body have neither underlined such a nature nor detailed the content of such assessment. Rather, it emphasised that "[t]he *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities".[268]

347 Further, given that pursuant to Article XIX GATT safeguards are taken as "emergency actions", authors have considered that the assessment of the public interest test was generally of a lesser practical importance than for dumping and subsidies.[269]

[268] Appellate Body report, *US – Wheat Gluten*, paras. 53–54.
[269] Balázs Horváthy, *"The concept of 'Union Interest'" in EU External Trade Law*, 2014.

2.2 At the EU Level

348 While the assessment of the Union interest is defined in Article 21 of the EU AD Regulation on Dumping (2016/1036) and 31 of the EU AD Regulation on Subsides (2016/1037) and is a formal step of these investigations, it is not defined in the existing EU regulations on safeguards and common rules for imports, namely: 2015/478, 2015/755, and 2015/936.[270] These regulations only state that surveillance measures as well as the imposition of safeguards shall be applied where "required by the interests of the Union".[271] Neither these regulations nor the case-law of the Court of Justice has as of yet clarified the general wording. However, the phrase suggests that the Union Institutions would retain their discretion not to impose safeguard measures even in cases where an injury determination has been made, if intervention were found to be against "the interests of the Union".

349 At the outset, it is worth stressing that the number of safeguards cases is particularly low.[272] Second, when safeguards measures are taken within the framework of commercial agreements, the EU does not assess Union interest, or at least does not specifically refer to such an assessment in Regulations imposing safeguard measures[273].

350 In other cases, the assessment of Union interest is rather brief. For example in *Certain Steel Products*, the Commission examined the claims of users and importers and concluded that the disadvantages likely to be suffered by them were not considered to be such as to outweigh the benefits expected to accrue to Union producers. [274]

351 With regards to capital intensive industries, the assessment of other Union interests than those affecting domestic industries is more succinct. For example, in *Mandarins*, the EU found that the Union producers had invested heavily in their production systems and their position would clearly be put in jeopardy if a continuation of the high level of imports at low prices were not prevented by the imposition of definitive safeguard measures. The EU concluded that the "disadvantages likely to be suffered by users and importers, if at all, are not considered such as to outweigh the benefits expected to accrue to the Community producers as a consequence of the measures, which are considered the minimum necessary to prevent further deterioration in the situation of the Community producers."[275]

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[270] Such was also the case in former Council Regulations 3030/93, 517/94, 427/2003, 260/2009, 625/2009
[271] See Council Regulation 2015/755, para 8, articles 7, 9 and 13.
[272] Balázs Horváthy, "*The concept of 'Union Interest'" in EU External Trade Law*, 2014
[273] See examples of safeguards actions at : http://eur-lex.europa.eu/search.html?textScope0=tite&qid=1505837522577&DB_TYPE_OF_ACT=regulation&CASE_LAW_SUMMARY=false&DTS_DOM=ALL&typeOfActStatus=REGULATION&type=advanced&lang=fr&andText0=mesures%20de%20sauvegarde&SUBDOM_INIT=ALL_ALL&DTS_SUBDOM=ALL_ALL.
[274] *Certain steel products (China)*, OJ 2002, L 261/ 1, paras 687–692.
[275] *Certain prepared or preserved citrus fruits (namely mandarins etc.),* OJ 2004, L 104/67, paras 96-104.

2.3 Comparative analyses: other jurisdictions

352 In Canada, public interest inquiries are only carried out as regard to Dumping and Subsidies.[276]

353 However, the Canadian International Trade Tribunal (***CITT***) is also in charge of undertaking safeguards inquires.[277] With respect to free-trade agreements which grant authority to the CITT to conduct bilateral safeguard inquiries (e.g. with the United States, Mexico, Israel, Chile, Colombia, Costa Rica, Panama, Iceland, Norway, Switzerland, Liechtenstein, Peru and Jordan), the CITT has never conducted such inquiries.[278] With respect to other safeguard inquiries, there is no mention of a public interest analysis either in law or in practice.[279] Upon receipt of a proper complainant of serious injury, the CITT merely notifies the complainant "as well as other persons and governments that may have an interest in the matter".[280]

354 In New Zealand, pursuant to the 2014 Safeguard Measures Act: "the chief executive must seek submissions relating to a safeguard investigation from interested persons (giving an appropriate time period) and must consider any submissions received". Further, the Chief Executive and the Minister shall consider the public interest in imposing, reviewing and extending safeguard measures. Pursuant to Section 13(e) such analysis includes the following elements:

(i) the likely effectiveness of a safeguard measure in assisting the domestic industry:

(ii) the alternatives to a safeguard measure:

(iii) the likely effect of a safeguard measure on the market (including on consumers):

(iv) New Zealand's international relations and trade goals:

(v) the strategic importance of the domestic industry"

355 In the United States of America, the International Trade Commission is in charge of safeguard investigations but does conduct any kind of public interest analysis.

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276 See Canadian *Public Interest Inquiry Guidelines*: "Under section 45 of SIMA, a public interest inquiry can only be conducted after the Tribunal issues a finding of injury, threat of injury or retardation caused by dumped and/or subsidized imports (injury finding), which leads to the imposition of anti-dumping and/or countervailing duties".

277 CITT, *Safeguards Inquiry Guidelines,* available at: http://www.citt-tcce.gc.ca/en/Safeguard_Guidelines_e.

278 CITT, *Canadian International Trade Tribunal 25 Years of Excellence*, available at : http://www.citt-tcce.gc.ca/en/citt-25-years-excellence

279 E.g. *Outdoor Barbeques from China – CITT,* Market Disruption Safeguard Inquiry No. CS-2005-001, October 2005.

280 CITT, *Safeguards Inquiry Guidelines.*