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Wissam Aoun

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# Constructivism, Embedded Liberalism and Anti-Dumping Canadian Public Interest Query as Case Study of Embedded Liberalism

**Erratum**  
article

# CONSTRUCTIVISM, EMBEDDED LIBERALISM AND ANTI-DUMPING – CANADIAN PUBLIC INTEREST INQUIRY AS CASE STUDY OF EMBEDDED LIBERALISM

*Wissam Aoun*<sup>†</sup>

ABSTRACT: The majority of proposals for international anti-dumping reform focus almost entirely on the relevant economic factors – consumer welfare losses and gains. Therefore, almost all proposals come to the exact same conclusion; in light of the enormous welfare losses suffered by domestic consumers, international anti-dumping law should be repealed in its entirety, or at least replaced by some form of international competition law. However, this analysis views the issue of anti-dumping law through the constructivist lens, and more specifically, the embedded liberalism view of international trade law. From this perspective, economics alone does not grasp the constitutive realities at play in anti-dumping law; domestic perspectives of legitimacy and fairness shape the contours of international anti-dumping law and these constitutive norms espouse a view that protectionism, in a variety of different shapes and forms, is as much a part of international trade law as the traditional laissez-faire liberalist approach. This article concludes that public interest inquiries, which form part of a small number of countries’ anti-dumping laws, embrace the constitutive realities at play in anti-dumping law and provide an opportunity for development of legitimate international anti-dumping reform. This article examines the Canadian approach to public interest inquiry in anti-dumping, including recent developments. This article concludes that the current Canadian experience demonstrates that embracing a public interest inquiry as part of anti-dumping reform may provide true hope for future development based on an embedded liberalism view of international trade relations.

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<sup>†</sup> Wissam Aoun, Assistant Professor of Law, Detroit Mercy School of Law; Director, International Intellectual Property Law Clinic (a joint clinical program of Detroit Mercy School of Law and Windsor Law). I am very grateful and thankful to Dr. Maureen Irish, Professor of Law at Windsor Law, for all of the guidance, mentorship and assistance (and patience!) during the research and writing of this piece – thank you for all of your support over these years, without which this piece probably would never have seen the light of day. The author remains responsible for any errors or omissions.

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## I. INTRODUCTION

### A. *The Economics of Anti-dumping*

The issue of anti-dumping has become one of the most prevalent research topics for international economics and legal scholars today. This should not be surprising given the ubiquitous nature that this trade remedy has developed. Many articles and research papers detail the growing concerns over the pervasive use of anti-dumping across the globe, by developed and developing countries alike.<sup>1</sup> The majority of criticisms are directed towards the poor economic foundation of anti-dumping; while often times referred to as a form of ‘international competition law’, anti-dumping bears little legal or economic resemblance to domestic competition policies.<sup>2</sup> Competition law focuses on ‘predatory pricing’, the selling of goods below cost by a firm attempting to monopolize a market. However, selling below cost is a common occurrence in market economies, and cannot be considered predatory without the requisite intent to unduly lessen competition. Indeed, economists have paid scant attention to predatory pricing given the numerous other more effective and efficient methods of monopolizing markets.<sup>3</sup>

However, anti-dumping treats all goods imported at a price lower than the common selling price in the exporting country as being ‘dumped’,<sup>4</sup> and if ‘injury’<sup>5</sup> to the importing market is proven, the margin between the two prices is

<sup>1</sup> See for example Thomas J. Prusa, *Anti-dumping: A Growing Problem in International Trade*, 28 THE WORLD ECON. 683 (2005) [hereinafter Prusa].

<sup>2</sup> For an excellent discussion of the comparative economics of anti-dumping and Canadian competition law, see William A. Kerr, *Dumping: Trade Policy in Need of a Theoretical Make Over*, 54 CAN. J. AGRIC. ECON. 2006 at 11–31 [hereinafter Kerr].

<sup>3</sup> *Id.* at 16-17, 24.

<sup>4</sup> Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), 1868 U.N.T.S. 201 [hereinafter ADA].

<sup>5</sup> *Id.*

accommodated for by an imposed dumping duty.<sup>6</sup> In many instances, it is consumers and down-stream users who bear the burden of welfare losses by paying higher prices for the goods in question. This also creates dead weight costs to consumers who are required to subsidize the procedural mechanisms to prevent anti-dumping while accumulating no welfare benefits in instances where no anti-competitive behaviour is present.<sup>7</sup> At least one study estimates that the net losses in consumer welfare caused by the imposition of anti-dumping duties in the United States and the E.U. may be as high as two to four billion dollars USD annually.<sup>8</sup>

The economic statistics regarding the international proliferation of anti-dumping paint a harrowing picture; what was once a meagre tool for a handful of ‘traditional users’<sup>9</sup> has become a widespread phenomenon embraced by developed and developing countries alike. However, as Prusa indicates, “the sharp increase in new users may understate how concentrated the use of [anti-dumping] was until recently.”<sup>10</sup> Not only has anti-dumping use become dominated by the ‘new users’, the proliferation of the worldwide use of anti-dumping actions has been driven almost entirely by ‘new users’.<sup>11</sup> Traditional users may now account for less than half of global anti-dumping activity.<sup>12</sup> New users file anti-dumping cases approximately 15-20 times more frequently than traditional users,<sup>13</sup> and countries such as India and Argentina display a filing intensity in excess of 1000 times that of traditional users.<sup>14</sup> Undoubtedly, global anti-dumping activity is skewed between developed and developing countries,

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<sup>6</sup> *Id.*

<sup>7</sup> Valerie Stevens, *The Political Economy of Anti-Dumping in Canada: Section 45 of the Special Import Measures Act*, 64 U. TORONTO FAC. L. REV. 1, 12-15 (2006) [hereinafter Stevens].

<sup>8</sup> Gunnar Niels & Adriaan ten Kate, *Antidumping Policy in Developing Countries: Safety Valve or Obstacle to Free Trade?*, 22 EUR J. POL. ECON. 618, (2006) [hereinafter Niels & ten Kate].

<sup>9</sup> The ‘traditional users’ are Canada, the United States, the E.U., and Australia; according to Prusa, *supra* note 1, at 688, until 1987, traditional users accounted for almost all international antidumping activity, and in the period from 1980-1984, over ninety-seven percent of all GATT disputes were filed by the traditional users.

<sup>10</sup> Prusa, *supra* note 1, at 688.

<sup>11</sup> *Id.* at 689. Prusa states that “without the proliferation of antidumping [(“AD”)] to dozens of new countries, AD activity would have been fairly constant over the last 25 years.” See also Mark Wu, *Antidumping in Asia’s Emerging Giants*, 53 HARV. INT’L L.J. 1, 17-18, 22 (Winter 2012) [hereinafter Wu], detailing the staggering statistics regarding increase antidumping activity by ‘new users’ compared to the traditional users.

<sup>12</sup> Prusa, *supra* note 1, at 688.

<sup>13</sup> *Id.* at 684, measured in comparison per U.S. dollar of imports.

<sup>14</sup> *Id.* at 691, filing intensity is determined by calculating the number of cases per real dollar of imports and normalizing the ‘intensity’ measure so that the intensity level of the world’s most frequent AD user in 1980, the United States, is set to 100; therefore, filing intensity gives both an indication of comparison between other countries’ anti-dumping activity and that of the United States, as well as growth of anti-dumping activity since 1980. In addition to filing intensity, Prusa indicates that India and Argentina are filing ten to twenty times the frequency of the United States and the E.U.

with poorer countries such as India, China, Argentina, and Mexico dominating anti-dumping use.<sup>15</sup>

Behind the simple statistics regarding use and proliferation rests a plethora of political and macroeconomic factors intertwined in the global anti-dumping activity. At least one study indicates that in Mexico, the number of anti-dumping complaints and the likelihood of an injury determination increase in proportion with the appreciation of real exchange rates, widening of current account deficits, or domestic manufacturing output slow down.<sup>16</sup> Aggarwal states that for both developed and developing countries, a variety of macroeconomic factors lead to increases in anti-dumping activities. Pressures caused by adverse trade balance increase the number of anti-dumping initiations in low and lower middle income countries.<sup>17</sup> Furthermore, 1% decline in tariff rates lead to an 8% increase in anti-dumping initiations in developing countries.<sup>18</sup> Finally, in all Organisation for Economic Co-operation Development countries, a 1% decline in industrial growth rate results in a 6-7% increase in number of anti-dumping initiations.<sup>19</sup>

Furthermore, there is substantial statistical evidence that ‘retaliation’ plays a considerable role in anti-dumping activity.<sup>20</sup> Research indicates that every one percent point increase in anti-dumping cases reported against low and lower middle-income results in a fourteen to sixteen percent increase in anti-dumping initiations.<sup>21</sup> While at least one study seems to indicate that there is no ‘North-South’ divide in retaliation measures,<sup>22</sup> motivations for retaliation may differ between the two groups. While traditional users are more likely to file against new users in order to protect themselves from deflected trade,<sup>23</sup> new users are more likely to file against traditional users in order to protect themselves from trade surges resulting from increased anti-dumping activity.<sup>24</sup>

<sup>15</sup> *Id.* at 693; *see also* Niels & ten Kate, *supra* note 8, at 628.

<sup>16</sup> *Supra* note 8, at 623.

<sup>17</sup> Aradhna Aggarwal, *Macro Economic Determinants of Antidumping: A Comparative Analysis of Developed and Developing Countries*, 32 *WORLD DEV.* 1043 (2004); note, Aggarwal uses the Organisation for Economic Co-operation and Development (“OECD”) criteria for country income classification.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; *see also* Michael M. Knetter & Thomas J. Prusa, *Macroeconomic Factors and Antidumping Filings: evidence from four countries*, 61 *J. INT’L ECON* 1 (2003).

<sup>20</sup> *See id.* at 1048 for an excellent summary of research regarding the role that retaliation plays in global anti-dumping activity.

<sup>21</sup> *Id.* at 1052.

<sup>22</sup> Niels & ten Kate, *supra* note 8, at 621; what this indicates is that developing countries are not more or less likely to target developed countries, and vice versa.

<sup>23</sup> Robert M. Feinberg & Kara M. Reynolds, *The Spread of Antidumping Regimes and the Role of Retaliation in Filings*, 72 *S. ECON. J.* 877, 886-887 (2006); deflected trade occurs when there has been significant anti-dumping activity in a particular industry elsewhere in the world, resulting in increased trade in third world countries.

<sup>24</sup> *Id.* at 887; *see also* Wu, *supra* note 11, at 37-40, wherein Wu elaborates on the politicized nature of the Indian anti-dumping regime and its effect on how and when antidumping cases are initiated.

*B. Specific Issues Surrounding International/Domestic Anti-dumping Law*

Prusa enumerates the problematic factors involved in the application of anti-dumping law.<sup>25</sup> In addition to the ‘bad economics’ of anti-dumping, he addresses certain contentious procedural factors as well. Primarily, the World Trade Organization (“WTO”) Anti-Dumping Agreement (“ADA”) leaves tremendous discretion to domestic authorities in implementing anti-dumping laws.<sup>26</sup> This has led to international inconsistencies in the methods used to determine dumping, domestic injury, and the imposition of duties.<sup>27</sup> This discretion appears particularly egregious when viewed in light of the seemingly unreasonable dumping duties imposed by countries with lax and non-transparent administrative authorities.<sup>28</sup> Furthermore, anti-dumping is the best option for industries seeking protection from foreign competition. Unlike the safeguard methods allowed under WTO law, anti-dumping petitions can be filed by a single interested party rather than the country as a whole, and duties are imposed against a single exporting country rather than the *erga omnes* application of safeguards.<sup>29</sup> Moreover, while safeguards require the implementing country to offer concessions to affected states, anti-dumping imposes no such obligation.<sup>30</sup>

*C. The Language of ‘Unfairness’*

Perhaps the central tenet of anti-dumping, which lays the foundation for its perceived legitimacy despite the plethora of criticisms, is what Finger and Zlate refer to as “the inflammatory rhetoric of foreign unfairness”.<sup>31</sup> The Doha Round reform proposals to the previously enumerated procedural infirmities of anti-dumping laws are what Finger and Zlate label as “thinking within the box.”<sup>32</sup> Rule shuffling, which favours one country or another while still allowing the foundation of the problem to remain intact, effectively stifles any possibility of qualitative or quantitative progress towards reducing the spread of anti-dumping usage.<sup>33</sup>

Claims of (un)fairness in international trade may provide the only legitimacy for maintaining international anti-dumping laws. Ironically, in contemporary international law, legitimacy is typically used as justification for acting outside of the law, a ‘teleological suspension of the ethical,’<sup>34</sup> in circumstances such as humanitarian intervention. However, the perception of illegitimate or ‘unfair’ trade practices is used to warrant the imposition of anti-dumping laws and duties

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<sup>25</sup> Prusa, *supra* note 1.

<sup>26</sup> *Id.* at 697.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 697, Niels & ten Kate, *supra* note 8, at 621-622.

<sup>29</sup> Prusa, *supra* note 1, at 697.

<sup>30</sup> *Id.*

<sup>31</sup> J. Michael Finger & Andrei Zlate, *Antidumping: Prospects for Discipline From the Doha Negotiations*, 6 J. WORLD INV. & TRADE 531 (2005), at 543 [hereinafter Finger & Zlate].

<sup>32</sup> *Id.* at 545.

<sup>33</sup> *Id.*

<sup>34</sup> SOREN KIERKEGAARD, FEAR AND TREMBLING (1932).

in instances where it appears there is no economic justification for such regulation.

Thus, an analysis of the anti-dumping phenomenon must move beyond pure economics and give greater consideration to the socio-economics of political trends, norms, and constitutive realities. Indeed, many of the anti-dumping reforms proposed by economists highlight the poor economics of anti-dumping, and either ignore the realities behind claims of unfair trade or give them insufficient weight.<sup>35</sup> While economists can afford themselves the comfort of remaining within the confines of economic models, legal scholars must view the reality of market transactions within the framework of political ideologies, legality, and legitimacy.

## II. CONSTRUCTIVISM AND EMBEDDED LIBERALISM

### A. Constructivism

The analysis thus far has led to an apparent impasse, a deadlocked dichotomy between economic theory and the practical effects of the perception of (il)legitimacy. A second dichotomy, the division between international harmonization of trade rules and domestic regulation, presents a similar stalemate. The apparent conflict in anti-dumping is exacerbated by the fact that aspects of each of these two dichotomies project upon one another. The economics of anti-dumping and legitimacy are intertwined with the allocation of regulative functions between domestic and international institutions.

International legal scholar Andrew T. F. Lang posits the existence of a tool for untangling the cascading dichotomies defined above. Lang proposes a re-examination of the insightful work of renowned international academic, John Gerard Ruggie. Specifically, Lang believes that constructivism,<sup>36</sup> a theory enthusiastically put forward by Ruggie in the early 1980s, may act as a ‘vanishing mediator’ in the deadlock between domestic and international institutional regulation, between domestic politics and international trade law, and a perspective lens through which critics may reconceptualise and redefine international law and economics.<sup>37</sup>

Constructivist theory rests on a fundamental premise, a basic tenet that supports and animates all other assertions, a principle which Ruggie labelled an

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<sup>35</sup> See for example Kerr, *supra* note 2; throughout this analysis, the tone is one of contempt for non-economic issues such as ‘fairness’, as if such factors are irrelevant to considerations of consumer welfare or ‘harm’; *see also* Finger & Zlate, *supra* note 31; here, although Finger and Zlate do provide many interesting and useful suggestions, they seem to rule out any possibility of ‘piecemeal’ reform, labelling any such reforms as ‘thinking within the box’, and as such, leading to no quantitative or qualitative change.

<sup>36</sup> Andrew T. F. Lang, *Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime*, 9 J. INTL ECON. L. 81 (2006) [hereinafter Lang].

<sup>37</sup> *Id.* at 99, 105, 115-116.

‘inter-subjective framework of meaning.’<sup>38</sup> This framework consists of ‘constitutive rules’<sup>39</sup> – sets of norms, beliefs, and intentions that define the contours of the regulative space, or as Lang puts it, “the rules of the game.”<sup>40</sup> The concept of ‘inter-subjectivity’ relates to the ‘shared’ aspect of these beliefs – “regimes consist of shared expectations (beliefs) about how actors will and *should* behave in their [relations] with one another...expressing collective not individual intentionality.”<sup>41</sup> Thus, ‘inter-subjectivity’ refers to the tapestry of norms and beliefs that form the underlying fabric of international relations.

The most significant aspect of Ruggie’s ‘inter-subjective framework of meaning’ is the determination that this framework precedes any form of regulation, or, one may dare restate it as ‘legitimacy preceding legality’. Lang states that the framework consists of “a set of collectively agreed answers to questions about why the regime itself exists and what is its domain of operation, about the kinds of roles that member states are expected to play, the objectives they are expected to pursue, and so on.”<sup>42</sup> Thus, Lang concisely summarizes by stating that “[c]onstitutive rules are logically prior to regulative rules, because they define the domain in which regulative rules take effect.”<sup>43</sup>

In the domestic context, one could analogize the interplay between constructivism and legislation with the ‘incomplete contract theory’ of law and its view of rules and standards.<sup>44</sup> While both rules and standards are difficult to define with precision, rules can be viewed as specific ‘laws’ that are defined with precision in order to efficiently regulate frequent behaviour.<sup>45</sup> However, if behaviour is relatively infrequent, efficiency concerns cannot justify the imposition of specific rules, and standards more aptly govern a range of conduct.<sup>46</sup> In a domestic common law system, as behaviour becomes more frequent, standards are defined with greater precision through the process of judicial interpretation and jurisprudence, and eventually, if need be, legislative intervention can turn a standard into a rule.<sup>47</sup> As such, standards precede rules, and as standards develop over time, through activity, discussion and debate, standards may eventually develop into rules through governmental or institutional intervention.

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<sup>38</sup> John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism and the Post-war Economic Order*, 36 INTL ORG. 379, 380 (1982) [hereinafter Ruggie].

<sup>39</sup> Lang, *supra* note 36, at 104.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 103.

<sup>42</sup> *Id.* at 104.

<sup>43</sup> *Id.*

<sup>44</sup> Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT’L L.J. 333 (1999).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Through this elaboration, the relative ambiguity between rules and standards can be seen; it is difficult to define precisely when a standard becomes a rule considering that all legislation at the domestic level is open to some interpretation. However, this framework does provide a useful tool for the analysis of the relative efficiencies/inefficiencies of an institution.

### B. Embedded Liberalism

Applying his constructivist approach to the international trade regime, Ruggie discerns an underlying constitutive norm present in international trade since the post-WWII era, which he refers to as ‘embedded liberalism.’<sup>48</sup> Opposed to traditional liberalism, which emphasizes a laissez-faire approach to free market transactions and relations, Ruggie identifies a common thread in international trade since the inception of the General Agreement on Tariffs and Trade (“GATT”) and the Bretton Woods institutions, what he describes as “a fusion of power and legitimate social purpose.”<sup>49</sup> Ruggie concludes that ever-changing perceptions of ‘legitimate social purpose’ have, in large part, shaped and determined the direction of the international economic order.<sup>50</sup>

Lang’s analysis of ‘embedded liberalism’ focuses on this conception of ‘legitimate social purpose’. Quoting Ruggie, Lang establishes the significance of ‘embedded liberalism’ in the debate regarding international/domestic trade regulation, stating that “shared ideas at the international level...are in part a function of changes in ideas at the domestic level. Particularly important, as far as the international trade regime is concerned, are changes in ideas about the purposes ‘in pursuit of which state power was expected to be employed in the domestic economy.’”<sup>51</sup> Tracing through the history of international trade, Ruggie determines that purely economic conceptions of ‘neo-protectionism’ may not necessarily run counter to the underlying intentions of the GATT/WTO. As reflected in the initial GATT texts and throughout post-WWII trade practice, all-out liberalization has not been the fundamental premise of multilateralism, but rather, “multilateralism ultimately ‘meant non-discrimination above all.’”<sup>52</sup>

Thus, Lang’s contention is that the embedded liberalism framework creates an imaginative space for international legal and economic scholars to “open our eyes to important and under-explored dimensions of our subject of study and provides a rigorous theoretical framework for their examination.”<sup>53</sup> Lang surveys the work of a number of proponents of embedded liberalism and demonstrates how their work has assisted in reconceptualising and redefining such contentious notions in international trade as ‘free trade’, ‘protectionism’, and ‘trade intervention’ in light of the “ideational determinants” surrounding legitimate social purposes.<sup>54</sup> Most importantly, Lang concludes that embedded liberalism reshapes our perceptions of the intentions of an international trade regime,

<sup>48</sup> Ruggie, *supra* note 38.

<sup>49</sup> *Id.* at 393.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 88; see also Reid M. Bolton, *Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. Through Heightened Scrutiny*, 29 BERKELEY J. INT’L L. 66, 69 (2011) [hereinafter Bolton] (“Although the ideal remedy would likely be a wholesale reform of the Article or outright appeal, those avenues are foreclosed by the complete deadlock of every round of trade negotiations over the last decade...”).

<sup>53</sup> Lang, *supra* note 36, at 105; Lang emphasizes the particular importance of the embedded liberalism framework in our current era of ‘trade and linkage’ debates.

<sup>54</sup> *Id.* at 108, 113.

especially the domestic/international dichotomy, stating that “[embedded liberalism] offers a vision of the trade regime in which a commitment to social protection was combined with, indeed inseparable from, efforts to liberalize international trade...encourage[ing] us to base our thinking on an outdated and impractical version of (say) the distinction between international and domestic matters...encourage[ing] us to continue conceiving of distributive justice concerns primarily within a single-nation optic, rather than on a broader foundation.”<sup>55</sup>

### III. THE CONSTRUCTIVIST PERSPECTIVE: ANTI-DUMPING, EMBEDDED LIBERALISM, AND THE PUBLIC INTEREST

As the foregoing demonstrates, the international use of anti-dumping remedies, despite constant criticism of its weak economic underpinning, continues to proliferate with little in the way of reform. As such, Leclerc traces a path through Canadian anti-dumping policy, pointing out that a Parliamentary Sub-Committee review of the Special Import Measures Act (“SIMA”) conducted in 1996 concluded that although repealing anti-dumping laws would be the *ideal*, it is not realistic given other countries’ reluctance to embrace Canada’s enthusiasm.<sup>56</sup> Canada is not the only country enthusiastic to see anti-dumping disappear. Canada is only one of various other countries, including Australia, that has expressed a desire to repeal anti-dumping law but does not believe that it is feasible in the current international trade climate.<sup>57</sup> Despite this fact, after many decades, the anti-dumping problem remains.

What the foregoing demonstrates is that the anti-dumping phenomenon is so intertwined with the language of ‘(un)fairness’, with both petitioners and the public alike relying on such notions to argue for and against anti-dumping penalties. Constructivism, and specifically, the notion of embedded liberalism, may provide a new lens with which to view this unique and enduring phenomenon. While international law generally can be criticized as overemphasizing the interests of certain stakeholders over others (i.e. capital over labour, governments over domestic groups),<sup>58</sup> this imbalance is quite possibly most prominent in the case of anti-dumping law. As one commentator puts it, “while consumers may not be an insular minority in general, for the purposes of anti-dumping law they have no voice in a broken political process.”<sup>59</sup>

It is this specific lack of a voice that contributes to the peculiar status quo of anti-dumping, wherein no consensus seems to emerge regarding the constitutive ‘fairness’ of the trade remedy and no significant progress towards reform develops. Alavi and Ahamat reference comments made by Janet Nuzum and

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<sup>55</sup> *Id.* at 97, 99.

<sup>56</sup> *Id.* at 123.

<sup>57</sup> Prusa, *supra* note 1.

<sup>58</sup> See Sara Dillon, *Opportunism and Trade Law Revisited: The Pseudo-Constitution of the WTO*, 54 B.C. L. REV. 1005, 1015 (2013).

<sup>59</sup> Bolton, *supra* note 52, 88-89.

David Rohr, former Commissioners of the International Trade Commission (“ITC”), wherein Nuzum and Rohr state that anti-dumping is intended to protect producers rather than consumers, and as such, we must expect some cost accruing to consumers.<sup>60</sup> However, they question the validity of such an assertion,<sup>61</sup> and indeed, the fact that the debate surrounding the fairness of anti-dumping still rages on indicates that anti-dumping reform cannot ignore public interest considerations.

As Zheng persuasively argues, it is this ‘democratic deficit’ which has led to not only lack of reform in anti-dumping law, but more importantly, to a lack of any clear consensus as to whether the maintenance of anti-dumping is, or is not, desirable.<sup>62</sup> To put it succinctly, the problem with anti-dumping is that we do not fully understand what, from a constitutive sense, the problem actually *is*. The danger, according to Zheng, is not that anti-dumping is protectionist, rather, it is that it is the confusion and arbitrariness surrounding perceptions and application of anti-dumping which are dangerous to overall trade policy.<sup>63</sup> As Zheng states:

“one way for the two sides in the antidumping debate to engage each other is for opponents of antidumping to step back and acknowledge the potential value of antidumping as a safety valve, and for supporters of antidumping to step back and acknowledge that antidumping may not be the best safety valve available.”<sup>64</sup>

Zheng implicitly recognizes the constructivist issues at play in the anti-dumping ‘democratic deficit’, stating that “this democracy deficit in antidumping hinders the process by which societal preferences on trade protectionism are formed and has implications for the broader trade agenda.”<sup>65</sup> As such, Zheng advocates for the imposition of a mandatory public interest component in anti-dumping processes. The significance of this recommendation is that it embraces the essential tension at the heart of the anti-dumping debate, bringing all stakeholders into the discussion to move past the status quo debates surrounding economic ‘(un)fairness’:

“By focusing on the “unfair” nature of the dumped imports, antidumping allows domestic interest groups to appeal to the superficial righteousness of protecting domestic producers from import competition and shields the real questions about trade protectionism from being scrutinized and debated in a meaningful manner... The question of what effect antidumping has on consumers and downstream users also becomes much less relevant when the overriding concern is about the “fairness” of the

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<sup>60</sup> Rokiah Alavi & Haniff Ahamat, *Predation and Public Interest in the WTO Anti-Dumping Duty Determination: a Malaysian Case*, 25 J. ECON. COOPERATION AMONG ISLAMIC COUNTRIES 61, 61-81 (2004).

<sup>61</sup> *Id.*

<sup>62</sup> Wentong Zheng, *Reforming Trade Remedies*, 34 MICH. J. INT’L L. 151, 158 (2012).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 166

<sup>65</sup> *Id.* at 176.

imports. With this “unfair trade” rhetoric hijacking the antidumping process, there are no honest debates on whether and at what costs the importing country needs trade protection in the form of antidumping duties.”<sup>66</sup>

Zheng identifies the political core at the centre of the anti-dumping debate, a core that is far more complex than the typical language of ‘(un)fair’ trade. In advocating for a mandatory public interest inquiry, Zheng states that “the public interest clause is intended to transform the trade remedy process from a mechanical one based on formulas and number-crunching to a political one based on bargaining and compromise.”<sup>67</sup>

Zheng is not alone in his identification of the need for greater public interest involvement, and in recent years, an increasing number of scholars have advocated for inclusion of a mandatory ‘public interest’ inquiry in anti-dumping processes.<sup>68</sup> The growing number of voices moving past the ‘traditional’ fair versus unfair debate reflects recognition of the complex domestic socioeconomic forces animating international trade norms. Bi explicitly addresses this link, calling for greater consumer participation in anti-dumping investigations by incorporating ‘public interest’ determinations as a first step in the process.<sup>69</sup> Particularly, Bi traces the path from the development of domestic norms to the international forum, stating that after incorporating a reform package including a mandatory ‘public interest’ inquiry, “it might then be possible to bring the issue of antidumping on the agenda of multilateral negotiations again.”<sup>70</sup>

The reality is that few jurisdictions provide public interest participatory rights. “The [Anti-Dumping] Agreement does not include industrial users and consumers in a compulsory list of interested parties; this issue is left to the discretion of individual Members. In practice, the domestic laws of WTO Members rarely specify the possibility for industrial users and consumers to become an interested party.”<sup>71</sup> Viewing the anti-dumping dilemma from an embedded liberalism perspective, the lack of domestic consumer voice in the anti-dumping debate is a significant impediment to the development of a constitutive international framework regarding what exactly anti-dumping should look like. Acknowledging an embedded liberalism view of international trade relations demands that we empower the public interest voice within the anti-dumping framework, to slowly move from respective domestic forums towards international consensus on the constitutive dimension of anti-dumping. To paraphrase Kotsiubska, inclusion of public interest consideration into anti-

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<sup>66</sup> *Id.* at 180-181.

<sup>67</sup> *Id.* at 190-191.

<sup>68</sup> *Id.* at 180.

<sup>69</sup> Ying Bi, *Is Dumping Still Harmful? New Thinking on Antidumping in the Global Free Trade*, 6 J. E. ASIA INT’L L. 29, 49-50 (2013).

<sup>70</sup> *Id.*

<sup>71</sup> Viktoriia Kotsiubska, *Public Interest Consideration in Domestic and International Anti-dumping Disciplines* (Sept. 2011) (unpublished Master’s Thesis, University of Bern) (on file at the World Trade Institute).

dumping processes in various countries will contribute to an overall better understanding of the public interest issues relevant to all WTO Members.<sup>72</sup>

#### IV. CANADIAN ANTI-DUMPING LAW

##### A. *The Canadian Perspective: Political-Economic Statistics Regarding Anti-dumping and 'Protectionism'*

Canadian anti-dumping practice has improved tremendously over the last three decades. Statistics indicate that Canadian anti-dumping filing intensity is nearly one eighth what it was thirty years ago.<sup>73</sup> Furthermore, Canada's 'new user' North American Free Trade Agreement ("NAFTA") partner, Mexico, has surpassed Canada in anti-dumping activity over the last twenty-five years.<sup>74</sup> However, despite Canada's tremendous progress in reducing anti-dumping activity, it can still be considered one of the most active anti-dumping proponents. As Bown points out, Canada is the best in a bad lot. Canada trailed only the other traditional users, the United States, Australia, and the E.U., in the number of anti-dumping investigations undertaken between 1981 and 2001, and ranked as the seventh most active user during the 1995-2004 period.<sup>75</sup>

However, Bown indicates that raw statistics regarding 'improvement' in Canadian anti-dumping practice disguise the nuances of the socio-political realities surrounding Canadian anti-dumping practices. In particular, NAFTA may have resulted in the emergence of latent forms of discrimination in Canadian anti-dumping practices. Bown cites the disproportionately low percentage of anti-dumping duties imposed on U.S. imports as compared to the percentage of all imports coming into Canada, as indication of subtle discriminatory practices pervasive throughout Canadian anti-dumping activity.<sup>76</sup> While it is unlikely that Canadian authorities blatantly intend to discriminate between U.S. and non-U.S. imports, Bown posits that the integration and intertwining of the Canadian and U.S. economies resulting from NAFTA has resulted in political/economic parties joining forces to defend their combined interests, resulting in added pressure for protectionism through anti-dumping activity.<sup>77</sup>

The Canadian context of latent discrimination in anti-dumping practice is unsettling for two reasons. Primarily, while Canadian practice has been able to discriminate in favour of U.S. imports, at least one study indicates that U.S. anti-dumping activity has not been equally as favourable towards Canadian exports to

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<sup>72</sup> *Id.* at 46.

<sup>73</sup> Prusa, *supra* note 1, at 692; this decrease in filing intensity is a trend similar to all traditional users over the last two decades.

<sup>74</sup> *Id.* at 690.

<sup>75</sup> Chad P. Bown, *Canada's Anti-dumping and Safeguard Policies: Overt and Subtle Forms of Discrimination*, 30 *WORLD ECON.* 1457, 1460 (2007) [hereinafter Bown]; see also Prusa, *supra* note 1, at 23.

<sup>76</sup> See Bown, *supra* note 75, at 1462-1463.

<sup>77</sup> *Id.* at 1463, 1473.

the United States. As Blonigen's analysis indicates, NAFTA (and its Chapter 19 dispute settlement mechanism) has had little effect on U.S. anti-dumping activity against its NAFTA partners.<sup>78</sup> The same also holds true for Mexican anti-dumping practice post-NAFTA.<sup>79</sup> These statistics lead to a second major concern. With the growing proliferation of regional trade agreements ("RTAs") and free trade agreements ("FTAs") across the world, the Canadian perspective may be an indication of symptomatic forms of discrimination arising from a scattered web of international trade agreements. To put it simply, even in the absence of anti-dumping processes in their current form, the constitutive 'protectionist' tendencies may simply reconstitute themselves in new forms and modalities. Without identifying the cause and nature of these constitutive behaviours and providing a structured base of rules to address them, these behaviours may result in discriminatory practices contrary to the spirit of the WTO.

*B. The Application of s. 45 – 'Public Interest'*

As one scholar has put it, "the presence of a public interest in Canada's trade legislation is unique among trading nations,"<sup>80</sup> placing Canada among a handful of countries including, for example, Brazil, Paraguay, Thailand, Malaysia, China, and countries in the E.U. Canada's public interest clause is found under section 45 of the SIMA,<sup>81</sup> the legislation governing Canadian anti-dumping law. Furthermore, the *Special Import Measures Regulations* ("Regulations")<sup>82</sup> provide additional guidance regarding the application of the public interest inquiry. In practice, public interest is only taken into consideration following a positive injury determination by the Canadian International Trade Tribunal ("CITT"), thus making the process somewhat bifurcated. The *Regulations* provide a broad definition of 'interested parties' for the purposes of a public interest hearing, and interested parties may request standing within twenty-one days of the notice of hearing.<sup>83</sup> Based on the submissions presented at the hearing, the CITT recommends to the Minister whether anti-dumping duties should be reduced, eliminated completely, or neither.<sup>84</sup>

Despite the accolades bestowed upon Canada for attempting to counter the welfare reducing effects of anti-dumping with a public interest inquiry, the reality is that the public interest test has historically been perceived as largely ineffective. Between the early 1980s to the late 2000s, the CITT had conducted only eleven public interest hearings, and of these, only four led to a finding that

<sup>78</sup> Bruce A. Blonigen, *The Effects of NAFTA on Antidumping and Countervailing Duty Activity*, 19 WORLD BANK ECON. REV. 407, 409, 416, 419 (2005).

<sup>79</sup> *Id.*

<sup>80</sup> Stevens, *supra* note 7, at 7.

<sup>81</sup> Special Important Measures Act, R.S.C. 1985, c S-15, § 35 (Can.) [hereinafter SIMA].

<sup>82</sup> Special Important Measures Regulations, S.O.R./84-927 (Can.) [hereinafter *Regulations*].

<sup>83</sup> *Id.* at § 40.1(4).

<sup>84</sup> SIMA, at § 45(4) (It is important to note that these recommendations are not binding on the Minister).

public interest had been detrimentally affected by the imposition of anti-dumping duties.<sup>85</sup> Furthermore, the CITT had never removed the duty completely, but rather had always recommended a tariff reduction.<sup>86</sup>

Stevens has conducted a comprehensive review of Canadian anti-dumping jurisprudence, and specifically, public interest under the SIMA.<sup>87</sup> Stevens indicates that the CITT's claim in *Fibreglass Pipe*<sup>88</sup> that "the primary object of [the SIMA] is to protect Canadian producers from injury caused by dumped or subsidized imports," is the foundation of 'producer bias' in public interest cases, causing the CITT to give little weight to evidence of drastic price increases and anti-competitive after-effects of anti-dumping duties.<sup>89</sup> However, the main concern arising from this predicament is the inconsistency with which the CITT has applied the public interest test. The CITT has often applied a reasoning that seems to run entirely counter to the proposition in *Fibreglass Pipe*, and as such, has left interested parties under s. 45 with little guidance in preparing for public interest hearings.<sup>90</sup>

Stevens points to the *Grain Corn*<sup>91</sup> and *Beer*<sup>92</sup> cases, the earliest positive s. 45 decisions, as examples of the counter-intuitive reasoning applied by the CITT when considering public interest. In both cases, the CITT engaged in a balancing of producer and public interests, considered entirely in terms of economic factors such as price and market effects, in concluding that reductions in tariffs were appropriate. This type of balancing of economic interests had been explicitly rejected by the CITT in *Fibreglass Pipe*, and subsequent cases such as *Caps, Lids and Jars*,<sup>93</sup> and *Flat Hot-Rolled Carbon*.<sup>94</sup>

In two more relatively recent positive s. 45 decisions, *Prepared Baby Food*<sup>95</sup> and *Contrast Media*,<sup>96</sup> the CITT considered public health interests in addition to the prevailing economic factors such as anti-competitive effects and supply shortages. As Stevens indicates, the most concerning aspect about these decisions is that a significant proportion of the evidence submitted to the CITT regarding public health issues was largely anecdotal, with very little statistical research to substantiate the claims.<sup>97</sup> However, in *Caps, Lids and Jars*, despite substantial evidence presented regarding public health issues, the CITT disregarded this evidence as "insufficient to merit intervention."<sup>98</sup> The CITT, in

<sup>85</sup> Stevens, *supra* note 7, at 15.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Reference Re Preformed Fibreglass Pipe Insulation, C.I.T.T. PB-93-001 (Jan. 28, 1994).

<sup>89</sup> Stevens, *supra* note 7, at 15, 19.

<sup>90</sup> *Id.* at 19.

<sup>91</sup> Reference Re Grain Corn Public Interest, C.I.T.T. MN-89-002 (Dec. 29, 1989).

<sup>92</sup> Reference Re Beer, C.I.T.T. NQ-91-002 (Nov. 9, 1992).

<sup>93</sup> Reference Re Caps, Lids and Jars, C.I.T.T. PB-95-001 (Feb. 26, 1996).

<sup>94</sup> Prusa, *supra* note 1, at 16, 25; Reference Re Flat and Hot-Rolled Carbon, C.I.T.T. NQ 98-004 (Sep. 3, 1999).

<sup>95</sup> Reference Re Certain Prepared Baby Food, C.I.T.T. NQ-97-002 CITT (Nov. 30, 1998).

<sup>96</sup> Reference Re Certain Iodinated Contrast Media, C.I.T.T. NQ-99-003 (Aug. 29, 2000).

<sup>97</sup> Stevens, *supra* note 7, at 22.

<sup>98</sup> *Id.*

*Caps, Lids and Jars*, defined the standard justifying intervention to protect public interest as requiring “compelling or special” circumstances. In *Grain Corn*, the CITT stated that public interest provisions should only be applied on an “exceptional basis.”<sup>99</sup> However, in *Prepared Baby Food*, the standard was defined as “sufficiently compelling.”<sup>100</sup>

Ciuriak summarizes the four main successful public interest cases before the CITT, and the CITT’s reasoning for reducing duties, as follows:

“*Beer*: consumer benefits and increased competition in the like goods industry;

*Prepared baby food*: income distribution and children’s health tempered by communitarian concerns about the impact of elimination of tariffs on the Canadian producer’s community;

*Iodinated contrast media*: healthcare externalities for patients and cost implications for hospitals; and

*Stainless steel wire*: downstream industry competitiveness.”<sup>101</sup>

As Ciuriak points out, while the CITT to date has shed “some light on its views as to what a public interest test is *not*, it is less helpful in identifying what it *is*.”<sup>102</sup> According to Ciuriak, when trying to reconcile the confused CITT line of cases regarding ‘public interest’ and anti-dumping duties, “if one may be permitted a generalization, the Tribunal sees the purpose of duties as being to restore competition, albeit on a qualified, “fair” basis, not to eliminate it.”<sup>103</sup> Furthermore, he states that the only apparent common element, if any, in these decisions is the lack of an alternative supply of goods where duties were prohibitive:

“When duties have prohibitive effects on imports, the Tribunal tends to be sympathetic towards redress. Accordingly, in terms of its statutory criteria, limited availability of the subject goods for downstream users is clearly the principal consideration for the Tribunal. In this regard, the Tribunal considers the availability of domestic and alternative sources of import supply and, as well, whether there is continued supply of the subject goods, in particular from suppliers facing low margins of dumping or subsidisation. If these conditions are met, it is unlikely that the other factors listed in the regulations – e.g., impacts on competition in the market

<sup>99</sup> C.I.T.T. MN-89-002, *supra* note 91, at 2.

<sup>100</sup> *Id.* at 27.

<sup>101</sup> Dan Ciuriak, *Trade Defence Practice in Canada: Canada Country Report for the Evaluation of the European Union’s Trade Defence Instruments* 91 (Ctr. for Int’l Governance Innovation, Working Paper No. SI2.581682, 2012) [hereinafter Ciuriak].

<sup>102</sup> *Id.* at 81.

<sup>103</sup> *Id.* at 83.

or on the competitive position of downstream users – will be judged to be significantly impaired.”<sup>104</sup>

Furthermore, Ciuriak highlights the unfortunate fact that public interest inquiries take place not only after the injury determination rather than as part of it, but also only after the CITT decides that a public interest inquiry is warranted.<sup>105</sup> He states that this raises serious transparency issues, given the appearance that “the real public interest test is conducted by the Tribunal prior to the full investigation; the full investigation is primarily, it would appear, to validate the internal review and to determine the extent to which duties should be lowered.”<sup>106</sup>

Some could characterize the history of ‘public interest’ practice in Canadian anti-dumping law as a case study in disappointment and missed opportunity. However, these conclusions depend entirely on the perspective from which one views the situation, especially considering recent developments. Specifically, the recent *Concrete Reinforcing Bar*<sup>107</sup> CITT decision, followed by the *Gypsum Board Reference*<sup>108</sup> demonstrate a genesis in public interest participation in anti-dumping processes that is unique to global anti-dumping practice.

The anti-dumping inquiry was initiated by several manufacturers of steel products, including ArcelorMittal Long Products Canada, AltaSteel Ltd., and Gerdau Ameristeel Corporation. The mobilization of parties, both in favour of and opposed to, reduction or elimination of duties was substantial and diverse in the history of Canadian public interest inquiries. Twenty-eight parties participated in the inquiry, including local governments (provincial and municipal), foreign governments, various unions, trade associations, and professional associations.<sup>109</sup>

In a tip of the hat to what Stevens called the ‘producer bias’ inherent in Canada’s public interest inquiry, the CITT stated that it “considers it established that the imposition of duties following an inquiry under section 42 of SIMA is in the public interest”<sup>110</sup> and that the purpose of the (apparently redundantly named) ‘public interest’ inquiry “is to determine whether the duties have unintended consequences such that it would be in the public interest to consider their elimination or reduction. If such is the case, the Tribunal will need to assess whether and in what way these public interest concerns can be mitigated.”<sup>111</sup>

The CITT set out a list of unintended consequences for which a reduction or elimination of duties would be justified.<sup>112</sup> This list contained a number of ‘qualifying’ terms, including “undue reduction of competition in the domestic

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<sup>104</sup> *Id.* at 83.

<sup>105</sup> *Id.* at 140.

<sup>106</sup> *Id.*

<sup>107</sup> Reference Re Concrete Reinforcing Bar, C.I.T.T. NQ-2014-001 (Dec. 22, 2015).

<sup>108</sup> Reference Re Gypsum Board, C.I.T.T. GC-2016-001 (Jan. 19, 2017).

<sup>109</sup> See *id.* at 2 (includes full list).

<sup>110</sup> *Id.* at 14.

<sup>111</sup> *Id.* at 15.

<sup>112</sup> *Id.*

market, which might lead to unnecessarily high prices”, “unacceptable reduction in choice, quality or quantity of product for consumers,” “significant damage to downstream users,” and “damage to some aspect of society considered to have an overwhelming priority, such as health, safety, education, or public or national security” (emphasis added).<sup>113</sup> Unfortunately, the CITT did not provide much guidance regarding the interpretation of these terms so as to provide meaningful guidance. Ultimately, the CITT rejected the arguments put forth by the three overarching public interest groups representing downstream users of rebar (fabricators and developers), purchasers of condominium units, and the B.C. government and taxpayers bearing the costs of public infrastructure:

“In the Tribunal’s view, the current global picture of the B.C. rebar market appears to reflect a competitive market for fairly traded rebar, with multiple sources of supply and prices that respond to supply and demand, as well as factors such as fluctuations in the price of scrap and the strength of the Canadian dollar. The duties thus seem to have had their intended consequences of neutralizing the effects of unfair trade practices while allowing market forces to generate a new competitive environment for fairly traded goods.”<sup>114</sup>

“[N]o persuasive evidence has been adduced in this case to show that such effects represent anything more than the normal and intended consequences of the application of anti-dumping and countervailing duties or to show that any difficulties faced by fabricators cannot be overcome. On the contrary, the evidence indicates that fabricators currently have access to low world rebar prices from multiple sources which, in the Tribunal’s view, will allow them to continue to compete for business in the admittedly highly competitive rebar fabrication market in British Columbia, notwithstanding any changes in their operations that may be necessary as a result of the new market conditions.”<sup>115</sup>

The CITT highlighted the availability of potential supplies from foreign sources, including from suppliers in Japan and Hong Kong, as a key mitigating factor against the reduction of anti-dumping duties.<sup>116</sup> With respect to real estate pricing, the CITT stated that real estate pricing is driven “by other, far more significant factors” than subject goods, rejecting the notion that reduction or elimination of duties would have a significant effect on real estate prices.<sup>117</sup>

Shortly after this ruling was released, many of the same initiating parties in the *Concrete Reinforcing Bar* case, including ArcelorMittal Long Products Canada, AltaSteel Ltd., and Gerdau Ameristeel Corporation filed an anti-dumping complaint against rebar imported from countries including Chinese

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *Id.* at 17-18.

<sup>116</sup> *Id.* at 19.

<sup>117</sup> *Id.*

Taipei, Hong Kong, and Japan.<sup>118</sup> These countries comprise many of the same countries cited by the CITT in *Concrete Reinforcing Bar* as alternative suppliers of rebar. This behaviour calls into question the (un)competitive strategy of the domestic manufacturers. There has been substantial public backlash from both the decision in *Concrete Reinforcing Bar* as well as subsequent conduct of the initiating parties.<sup>119</sup> These individuals have expressed dissatisfaction not only with anti-dumping law generally, but their perception of Canada's seemingly flawed public interest inquiry.

All of the foregoing dissatisfaction has culminated in the recent *Gypsum Board Reference*. The *Gypsum Board Reference* is unique not only to Canadian public interest processes, but to international anti-dumping generally. As one commentator states with respect to the *Gypsum Board Reference*: “[t]his has never happened before. This is very important. Trade lawyers outside Canada (and inside Canada) will be shocked by the steps being taken in Canada during an active anti-dumping proceeding.”<sup>120</sup>

In June of 2016, the Canada Border Services Agency (“CBSA”) initiated an investigation following a complaint filed by CertainTeed Gypsum Canada Inc. (“CTG”). In September of 2016, the CBSA finalized a preliminary determination of dumping along with provisional anti-dumping duties ranging from 105% to 276.5%.<sup>121</sup>

It is at this point that the inquiry took an entirely unique turn. The Governor in Council, on the recommendation of the Minister of Finance, directed the CITT to inquire into “whether the imposition of provisional duties or duties, applicable to gypsum board imported from the United States for markets in Western Canada, is contrary to Canada’s economic, trade or commercial interests, and specifically whether such an imposition has or would have the effect of substantially reducing competition in this market or causing significant harm to consumers of those goods or to businesses who use them.”<sup>122</sup>

The novelty of this inquiry lies in the fact that this was the first time in Canadian history that the broader economic impact inquiry was conducted simultaneously with the injury inquiry, rather than post-injury determination.<sup>123</sup> Furthermore, the *Gypsum Board Reference* was conducted pursuant to Section 18 of the *Canadian International Trade Tribunal Act*, rather than the standard

<sup>118</sup> See CAN. BORDER SERV. AGENCY, CERTAIN CONCRETE REINFORCING BAR: NOTICE OF INITIATION OF AN INVESTIGATION (Aug. 19, 2016).

<sup>119</sup> See Namkik Ekinci, *Rebar in the Public Interest*, FIN. POST (May 19, 2015), <http://business.financialpost.com/fp-comment/rebar-in-the-public-interest>.

<sup>120</sup> Cyndee Cherniak, *Canada Acknowledges Antidumping Proceedings Hurt Consumers*, CAN.-U.S. BLOG (Oct. 19, 2016), <http://www.canada-usblog.com/2016/10/19/canada-acknowledges-antidumping-proceedings-hurt-consumers/>.

<sup>121</sup> C.I.T.T. GC-2016-001, *supra* note 108, at 1-2.

<sup>122</sup> *Id.* at 3.

<sup>123</sup> See Gordon LaFortune, *Consumer and Business groups now can have a voice in the Gypsum Board dumping inquiry*, WOODS LAFORTUNE LLP: INTERNATIONAL TRADE LAW (Oct. 27, 2016), <http://www.wl-tradelaw.com/consumer-and-business-groups-now-can-have-a-voice-in-the-gypsum-board-dumping-inquiry/>.

Section 45 inquiry pursuant to SIMA, which allows the Governor in Council to refer to the CITT for inquiry or report “any matter in relation to the economic, trade or commercial interests of Canada with respect to any goods or services”. The *Gypsum Board Reference* is the first time such a reference has been conducted in almost two decades and the first reference relating to an ongoing anti-dumping proceeding.<sup>124</sup>

The CITT received a massive 108 notices of participation for the inquiry, which included Canadian producers, unions, distributors, suppliers, home builders and Members of Parliament.<sup>125</sup> The CITT concluded that the imposition of the proposed duties “will substantially reduce competition in Western Canada, ha[ve] caused and will continue to cause significant harm to businesses who use them, and harm consumers of those goods.”<sup>126</sup> The CITT based its conclusion on several important findings. Primarily, the evidence suggested that the imposition of duties would have the immediate effect of turning Canadian consumers away from imported product towards the domestic producer, CTG. This was problematic given the historical evidence of CTG’s inability to adequately supply Western Canada with product.<sup>127</sup> The imposition of duties limited the availability of imported supply of product to Western Canada, and a number of other factors, including quality, and limited domestic purchasers’ ability to turn to other imported sources.<sup>128</sup> As such, the CITT concluded that “the imposition of duties, in their full amount, in respect of imports of the subject goods will have the effect of substantially reducing competition in the Western Canadian market in the future, including losses in sources of supply, excessive price increases and reduced consumer choice.”<sup>129</sup>

Interestingly, when assessing potential harm to Canadian consumers, the CITT mimicked its traditional language in Section 45 inquiries, stating that higher prices are a natural result of anti-dumping duties and as such, on a *prima facie* basis, are in the public interest absent unintended or unwanted consequences.<sup>130</sup> The CITT concluded that the imposed duties would cause harm to businesses who intend to use the product.<sup>131</sup> The CITT’s conclusion was largely based on evidence of home builders and other construction contractors entering into long-term agreements at pre-duty prices<sup>132</sup>; a rationale that seemed to be given little weight by the CITT in the *Concrete Reinforcing Bar* decision.

Adding to the entirely unique nature of this Reference, the CITT specifically pointed out the need to factor assistance for rebuilding Fort McMurray following the devastating fire of May 2016, which destroyed approximately 1,600

<sup>124</sup> Cyndee Cherniak, *What is a CITT Section 18 Reference?*, CAN.-U.S. BLOG (Oct. 24, 2016), <http://www.canada-usblogger.com/2016/10/24/what-is-a-citt-section-18-reference/>.

<sup>125</sup> C.I.T.T. GC-2016-001, *supra* note 108, at 3-4.

<sup>126</sup> *Id.* at 1.

<sup>127</sup> *Id.* at 17.

<sup>128</sup> *Id.* at 18.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 19.

<sup>131</sup> *Id.* at 21.

<sup>132</sup> *Id.* at 21.

residential and non-residential structures.<sup>133</sup> The CITT highlighted the relatively large number of uninsured and under-insured home owners affected by the fire, a number potentially as high as twenty percent of the total number of home owners, and the effect that duties might have on these individuals during the rebuilding process.<sup>134</sup> Although not providing specific quantification of how this disaster should tie into duty calculation, the CITT did emphasize that this reality weighed into their overall consideration of the unintended consequences.

The CITT summarized its conclusion by stating that:

“the imposition of the provisional duties in this case led to unintended or unwanted effects. The sudden increase in prices threw a market previously characterized by relatively stable prices and predictable annual price changes into disarray. This situation generated large unexpected losses for downstream businesses using gypsum board, causing significant harm to these industries. It has harmed consumers through unwanted increases of overall construction and renovation costs for homes due to rising prices for gypsum board. It will, in the future, result in a substantial reduction in competition with several accompanying negative effects.”<sup>135</sup>

The CITT recommended that the provisional duties that had been collected to date be retained by the Federal government and used to refund the higher costs for imported and domestically produced gypsum board purchased since the imposition of the provisional duties.<sup>136</sup> Furthermore, the CITT recommended that final duties on any cooperating exporters should not exceed forty-three percent of the export price, a significant decrease from the originally proposed duties.<sup>137</sup> At the time of writing, the Minister of Finance had not yet released a statement as to what would be done following receipt of the CITT’s recommendations.

### C. The Constitutive Dimension of Canadian Anti-dumping Practice

Stevens offers a number of theories which she indicates may be used as an ‘interpretative tool’ with which to analyze the prevalence of producer bias in public interest hearings.<sup>138</sup> These theories include the tariff-formation model, which states that results of public interest hearings are influenced by the relative turnout of interested parties (either producers or public interest groups),<sup>139</sup> and the political support theory, which states that the CITT is in a ‘political’ position, weighing producer interests against general social welfare.<sup>140</sup> Summarizing the considerations involved in each of these theories, Stevens states that “the best

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<sup>133</sup> *Id.* at 33.

<sup>134</sup> *Id.* at 34.

<sup>135</sup> *Id.* at 23.

<sup>136</sup> *Id.* at 36.

<sup>137</sup> *Id.*

<sup>138</sup> Stevens, *supra* note 7, at 26.

<sup>139</sup> *Id.* at 25-26.

<sup>140</sup> *Id.* at 29.

interpretive tool is one that combines the political economy of the process with the specific economic traits underlying each market system addressed.”<sup>141</sup>

The most insightful conclusion that Stevens draws from her interpretative analysis is that the ‘free rider problem’ is perhaps the most significant issue preventing greater consideration of the public interest in anti-dumping activity. The welfare losses resulting from the imposition of duties is spread so thin across the entire population that it is either unfeasible or unrealistic to expect public interest to play a large enough role in anti-dumping inquiries in order to counter the producer bias inherent in the process.<sup>142</sup> Hence, in the *Grain Corn* and *Beer* cases, it was large down-stream users, not general public interest groups acting on behalf of consumers, which acted as interested parties in the hearings. Furthermore, in *Prepared Baby Food*, the turnout of public interest groups was possibly the largest mobilization of interested parties acting on behalf of direct consumers in the history of Canadian anti-dumping law.

To put Stevens’ point succinctly, the reason public interest has not been a more effective counter to producer bias in anti-dumping activity is because the public is simply not interested, at least not as interested as producers who wield the resources and power to put their interest into practice. Thus, at the domestic level, the challenge lies in searching for ways to mobilize sufficient public interest groups in order to counter the efforts of large producers.

Prior to Stevens, Leclerc had conducted a survey of CITT decisions in an attempt to draw conclusions regarding possibilities for anti-dumping reform in Canada.<sup>143</sup> Similar to Stevens, Leclerc points to the CITT’s reasoning in cases such as *Fibreglass Pipe* and *Caps, Lids and Jars* as creating a precedent which does not allow balancing of consumer and producer interests. Instead, the CITT must focus on dumping margins and injury and can only deviate when public interest is “sufficiently compelling... to warrant a departure from the primary object of SIMA.”<sup>144</sup> Thus, Leclerc states that “SIMA seems to either assume that harm to a domestic industry is in and of itself harmful to Canada’s overall economic welfare, or treats Canada’s overall economic welfare as irrelevant to the determination of harm.”<sup>145</sup> Leclerc concludes that “a narrow interpretation of the words ‘public interest’, combined with the strict standard of review that would likely apply to decisions of the Canadian International Trade Tribunal, has resulted in virtually meaningless public interest inquiries that rarely affect the imposition of anti-dumping duties.”<sup>146</sup>

<sup>141</sup> *Id.* at 26.

<sup>142</sup> *Id.* at 28; see also Wu, *supra* note 11, at 27-28, (“Furthermore, public choice theory explains why consumers, who are hurt by rising prices caused by antidumping tariffs, do not pressure their governments for reform. The negative welfare cost of antidumping duties is diffused across a large number of consumers; the cost borne by any individual consumer is therefore small...”).

<sup>143</sup> Jean-Marc Leclerc, *Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries* 44 McGill L.J. 111 (1999) [hereinafter Leclerc].

<sup>144</sup> *Id.* at 127. See also C.I.T.T. 27 PB-93-001, *supra* note 88, at ¶ 14.

<sup>145</sup> Leclerc, *supra* note 143, at 122.

<sup>146</sup> *Id.* at 111.

Leclerc's statement brings us full circle to the wager of embedded liberalism – in international trade law more than simple economics is at stake. The paradox that Leclerc perceives in the CITT's application of Canadian anti-dumping law results from an implicit assumption that anti-dumping law is purely economic in nature. However, a broader perspective which embraces the constitutive realities at play, both at the international level and at the Canadian domestic level, may assist in uncovering a concealed image of anti-dumping law, one that combines laissez-faire economics with various perceptions of legitimacy and social purpose required to 'embed liberalism'. Hence, concepts of 'harm' may encompass different dimensions and perceptions beyond pure economic indicators such as price increases and market distortions.

Leclerc implicitly realizes the reality of embedded liberalism in anti-dumping law when he states that "some kinds of government policy are not based on economic concerns, but rather on shared concerns for social welfare... on decidedly non-economic concerns like "nationhood", "communitarianism", or "fairness"... [T]o confine an analysis of anti-dumping law to concerns of economic efficiency alone would ignore these less tangible values..."<sup>147</sup> Ciuriak also highlights the relative lack of consideration for non-economic considerations, such as social, environmental, or political issues in the public interest inquiry, and in this respect, focusing exclusively on economic factors may bolster the compliance of Canada's public interest inquiry with the WTO Agreement.<sup>148</sup> Despite this fact, Ciuriak states that some practitioners believe it is necessary to bring non-economic social effects into the public interest inquiry in order for it to be successful.<sup>149</sup>

What the years of confusion and disappointment have created is an environment with no consensus on either the definite benefits or disadvantages of anti-dumping law in its current form or the application of Canada's public interest inquiry. Recent cases have added layers of complexity; specifically, the *Concrete Reinforcing Bar* and *Gypsum Board Reference* cases involved large numbers of stakeholders, each group making a persuasive argument for the advantages/disadvantages of anti-dumping duties in the specific context of each case. Some might argue that this lack of consensus is the culmination of three decades of misguided Canadian legislation.

Rather, the confusion itself, and the political processes it has unleashed, may be sufficient justification in and of themselves. The attempt to create a public interest space in Canada's anti-dumping process, and the debate fomented there within, is the solution. This conclusion may seem like a half-hearted attempt to find some justification or meaning within decades of confused and unsatisfactory public interest inquiry processes. The developments currently taking place in Canada, which are unique not only to Canada but to global anti-dumping law generally, have emerged within the public interest sphere in Canada's anti-dumping forum; developments which are changing the norms of not only public

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<sup>147</sup> *Id.* at 122.

<sup>148</sup> Ciuriak, *supra* note 101, at 140.

<sup>149</sup> *Id.*

interest inquiries but of anti-dumping law generally. These emerging norms are manifesting themselves in new legal modalities that have the potential to transcend the Canadian domestic sphere into the broader international trade forum.

In this sense, despite the confusion and disappointment, Canada is still much farther ahead than most nations with respect to developing legitimate norms towards the potential of true reform. Novel transformations of anti-dumping practice, processes, and perceptions have emerged from recent Canadian cases, of which transformations are unique both domestically and internationally. Perhaps continuing down the current path will materialize in a final, definitive answer regarding the benefits and/or disadvantages of anti-dumping practice. Or, the solution may be that there is no definitive answer and that anti-dumping law is destined to remain politicized. Such a conclusion should not be viewed as a failure. Perhaps the solution is to create a 'political' space, accessible through a public inquiry mechanism, which functions based on a definitive set of procedural rules capable of consistent, non-discriminatory application amongst nations; rules viewed as being fair and legitimate.

The key lesson from recent Canadian public interest practice is that the public interest space appears to provide a testing ground from which the necessary conclusions can be derived. Imagine if a similar public interest inquiry mechanism was available in jurisdictions around the world. Similar case studies to those developed in Canada would create a body of evidence from which the necessary conclusions can be drawn at the domestic level, extrapolated internationally, and international rules could be developed.

The enduring nature of anti-dumping practice insinuates that at the heart of this trade remedy lies a politicized core. To deny this would be naïve at best, and willfully ignorant at worst. The embedded liberalism view takes this rationale one step further, telling us that at the heart of international trade generally lies a political core, a core around which compromise must be forged to secure the international liberal trade order. Perhaps the persistence of the anti-dumping remedy is testament to this fact, and that anti-dumping practice more than any other area of international trade law necessitates the inclusion of a public interest inquiry. What public interest processes, spread out across various jurisdictions around the world, can teach us may be valuable not only for anti-dumping reform, rather, the experiences gained may provide valuable lessons about the liberalized international trade order generally.

## V. EMBEDDED LIBERALISM AND POSSIBILITIES FOR REFORM

### *A. Canada and the International Forum*

Canada's efforts to reform anti-dumping practice, both domestically and internationally, have been widely acknowledged. Renowned international economist Aradhna Aggarwal has suggested a reform package for the WTO

ADA that bears a striking resemblance to the SIMA and the *Regulations*.<sup>150</sup> Primarily, Aggarwal suggests that the WTO ADA be amended to include a public interest clause, with enumerated factors for consideration similar to those in the *Regulations*.<sup>151</sup> The ‘public interest’ test would mimic the ‘injury’ test under the ADA, with a list of factors which every Member would be obligated to consider when applying anti-dumping laws. This addition would add tremendously to international harmonization of anti-dumping laws, and ultimately bolster legitimacy. The WTO Appellate Body has previously stated that of the fifteen factors enumerated under the ADA, ‘injury’ tests are mandatory, in that Members must assess them in “an economically and factually correct manner.”<sup>152</sup> Thus, if the ADA incorporated a public inquiry test similar to the injury test, Members would have recourse to the WTO Dispute Settlement Body (“DSB”) to challenge other Members’ insufficient consideration of such enumerated factors.

Despite the rejection of the addition of a public interest provision in the ADA during the previous WTO Uruguay round, Canada submitted proposals for such an addition during the Doha Round,<sup>153</sup> demonstrating an ongoing desire to keep this issue alive. Most notably, Canada submitted a proposal which suggests bringing the ADA further into harmonization with the Agreement on Subsidies and Countervailing Measures.<sup>154</sup> This proposal embodies the Canadian constitutive position far greater than any other proposal. While Canada recognizes the need for some protectionism under ‘legitimate’ circumstances, continuing efforts should be made to refine and align perceptions of legitimacy with objectively definable factors such as illegal subsidies under the Agreement on Subsidies and Countervailing Measures.

#### B. Canada and the Domestic Forum

The proposals for reform at the international level assist in defining the Canadian constitutive position regarding legitimacy and anti-dumping. However, an entirely ‘rules based’ approach, internationally governed through the WTO institutional mechanism, causes a number of concerns. Primarily, how can civil society, namely consumer groups, engage the WTO system in order to protect their own interests? In the event that a Member state does not bring an action against a state imposing anti-dumping duties against it, what recourse do such

<sup>150</sup> Aradhna Aggarwal, *The WTO Anti-Dumping Agreement: Possible Reform Through the Inclusions of a Public Interest Clause*, 4, 9 (Indian Council for Research on Int’l Econ. Rel., Working Paper No. 142, 2004).

<sup>151</sup> *Id.* at 10.

<sup>152</sup> EDWIN VERMULST, *THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY* 95 (2006); *see also* Report Re Thailand – Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-beams from Poland, W.T.O WT/DS122/AB/R (Mar. 12, 2001) 7.236-7.237.

<sup>153</sup> J. Michael Finger & Andrei Zlate, *WTO Rules That Allow New Trade Restrictions: The Public Interest Is a Bastard Child* (U.N. Millennium Project Task Force on Trade, Paper, 2003), 26-29 (TN/RL/W/1, 04/15/02 & TN/RL/W/1, 01/28/03) [hereinafter Finger & Zlate II].

<sup>154</sup> *Id.* (TN/RL/W/1, 01/28/03).

groups have available to them within the WTO system? Furthermore, even if a Member state does bring an action against an imposing state, would such civil groups present amicus briefs and submissions against their own home states? Although it has seen considerable improvement, the WTO is still plagued by institutional illegitimacy due to the inability to incorporate civil society groups (such as Non-Governmental Organizations and other non-state actors) into the DSB; the WTO DSB has either systematically disregarded the submissions of civil society groups, or has only recognized them when joined with a participating Member state's submissions.<sup>155</sup> Several recent proposals provide suggestions for greater consumer participation at the WTO, including the possibility of government funding for consumer advocacy groups, which would engage in public interest hearings on the behalf of consumers and other aspects of under-represented civil society.

However, beyond the procedural institutional issues, this tension is symptomatic of the inability of formal 'rules based' legitimacy to encompass and provide a forum for the resolution of the substantive aspects of legitimacy involved in anti-dumping regulation. These substantive issues cannot be defined with sufficient precision to warrant specific rules for regulation. The concept of 'fairness' and the balancing of consumer and producer interests in light of the 'harm' caused by dumping are difficult to conceptualize, hence the frustration expressed by numerous economists and legal scholars in the face of the ever-changing perceptions of 'fusion of power and legitimate social purpose' involved in anti-dumping regulation, to put it in Ruggie's terms.

Therefore, much of the concern surrounding the substantive legitimacy issues involved in anti-dumping regulation are better characterized as standards, rather than rules, requiring gradual defining in order to achieve the precision required for more formal rules for regulation. It is easy to forget that the more formal regulative issues involved in anti-dumping (such as how to determine what constitutes 'injury' or a 'like product' for anti-dumping purposes), as embodied in the Canadian reform proposals, are concerns that have developed over many years of global anti-dumping practice. These concerns have gradually appeared in the international forum, changing the international constitutive landscape to reflect the constitutive norms and beliefs emerging within domestic populace. Even the current provisions of the ADA developed in the Uruguay round as a reaction/reform to the prevalent concerns emerging from the previous Kennedy round anti-dumping laws. These 'standards based' issues require the appropriate domestic mechanisms in which to develop into constitutive norms capable of developing into an international regulative framework. Thus, in the quest for further anti-dumping reform, a space must remain open at the domestic level for legitimacy concerns to continuously define, and redefine themselves.

To return to public interest analysis and critique, embedded liberalism, driven through the public interest processes at the domestic level, provides civil

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<sup>155</sup> Jeffrey L. Dunoff, *Public Participation in the Trade Regime: Of Litigation, Frustration, Agitation and Legitimation*, 56 RUTGERS L. REV. 916, 963 (2003-2004).

society the space within which to voice its interest, and ultimately, to reshape the international regulatory framework. In the context of anti-dumping, by engaging the appropriate domestic mechanisms and exercising the right to voice their concerns, civil society groups are able to reshape the constitutive rules. The changing norms within one state influence other states in two ways; primarily, the pressure placed on the state itself will require it to shift its stance towards these same issues in the international forum, and second, civil society and public interest groups in other states may adopt such methods to change the norms within their own home states.

Thus, a piecemeal reform, similar to the approach taken by Canada over the last three decades and within the Doha Round, is the key to opening anti-dumping up to the possibility of greater reform in the future. Primarily, the Canadian position, as evidenced by the numerous proposals submitted to the WTO during the current Doha round, seeks to create greater certainty and formal legitimacy in the international application of anti-dumping laws, in an attempt to create an international climate of non-discriminatory anti-dumping practices. Second, Canada's emphasis, both within its domestic laws and at the WTO, on incorporating public interest into anti-dumping, creates the necessary opening for substantive change and constitutive reform, thereby accepting the realistic tensions between non-discrimination and protectionism, formal and substantive justice, and the interaction between these issues and the ever-changing constitutive norms which affect our perceptions of legitimacy.

At the domestic level, the challenge lies in empowering civil society in order to exercise the voice of public interest. Finger and Zlate state that in order to better incorporate the public interest into anti-dumping law:

“[r]eform depends also on the entrepreneurship of lobbyists/lawyers to organize the users/consumers into an effective political force. There is an untapped client base here, we are confident that as the number of trade lawyers grows and competition for the presently recognized ‘interested parties’ grows more intense, some among the new entrants into the trade bar will recognize the business opportunity that adding users as interested parties would provide, and will develop this market – as the present generation of trade lawyers developed a market among protection users and subsequently among foreign exporters. The remedy is more and hungrier trade lawyers.”<sup>156</sup>

Returning to the Canadian example, in light of the apparent conflicting interpretations which the CITT has given to s. 45 of the SIMA and the recent developments stemming from *Concrete Reinforcing Bar* and *Gypsum Board Reference* cases, it appears that more intelligent, creative, and determined lawyers must be willing to engage this system in order to create the jurisprudence necessary to give body to the constitutive norms which define the Canadian ‘public interest’. A larger body of jurisprudence provides guidance to future

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<sup>156</sup> Finger & Zlate II, *supra* note 153, 16-17.

interested parties on how to conduct their legal actions accordingly. Similarly, the process of judicial interpretation may lead to government intervention, amendments to the current legislation, and possibly a shift in Canada's position at the international level. This same process, reproduced across jurisdictions worldwide, would open a new international discussion on the constitutive norms at play in international anti-dumping practice.

## VI. CONCLUSIONS AND POSSIBILITIES FOR FUTURE RESEARCH

Viewed in light of the constructivist perspective on international law, and more specifically, the embedded liberalism view of the international trade regime, the current Canadian approach to international anti-dumping reform appears to be the most coherent and realistic approach to this contentious issue in international and Canadian domestic law. This piecemeal approach suggests that the WTO ADA be reformed to provide greater formal legitimacy and certainty by clarifying the procedures and analyses conducted within anti-dumping practice, such as the application of 'injury', 'like products', and 'public interest' inquiries. This increased formal legitimacy will assist in promoting less discrimination in international anti-dumping practice, bolstering a perception of greater overall legitimacy.

More importantly, Canadian public interest experience demonstrates the space created by domestic public interest processes is an essential opening for development of international norms and further reform of anti-dumping law generally. The public interest space allows domestic society to express its views on the ever-changing perceptions of social purpose, fairness, and legitimacy, thereby (re)shaping the constitutive norms that form the fabric of social consciousness and applying pressure for changes at the international level. With decades of debate regarding the appropriateness of anti-dumping law behind us, perhaps the inclusion of public interest inquiries around the world will create a new forum for a new discussion, and a better understanding of the complex socioeconomic factors at play in global anti-dumping practice.

Given the dual aspect of this analysis focusing on the international/domestic dichotomy, neither international anti-dumping law (specifically, the WTO ADA) nor domestic jurisdictions outside of Canada were examined extensively. Future research could examine each area in far greater detail. At the international level, an analysis of the Canadian proposals for WTO ADA reform could be undertaken to assess what impact prior WTO practice, both in the domestic application of the ADA in various Member states and prior WTO DSB decisions, would have on the future application of these reforms. At the Canadian domestic level, a far more in-depth analysis of the possibilities of judicial review under s. 45 of the SIMA is definitely warranted, especially in light of the effects of current jurisprudence and recent developments. Another interesting topic may be an examination of what role, if any, the law of class actions can play in protecting consumer interests in the context of anti-dumping law. Unfortunately,

given the constraints of this article, these interesting topics fall outside the scope of this analysis, but hopefully provide direction for future scholarship.