II THE VIEW FROM NEW ZEALAND

Dumping and export subsidies are the two weakest links in the CER chain, a chain whose essential fragility tends to have been lost sight of amid the political brouhaha which has surrounded CER since its inception. (A trade liberalisation agreement between two highly protectionist nations who have spent much of the last decade furiously subsidising their exports cannot be anything else but fragile.) The dominant position enjoyed by many New Zealand exporters in their home market and the lack of any serious competition law in this country means that the temptation to dump goods overseas is always present, a temptation which, alas, is not always resisted. The past habits of some New Zealand companies in this regard have undoubtedly led Australian manufacturers to see dumping where there is none thereby exposing wholly innocent exporters to the full rigours of an anti-dumping inquiry. The Australians are likely to cast an equally jaundiced eye on whatever replaces those export incentives which the New Zealand government has promised to kill off by 1987. The resulting pressure to impose countervailing duties (a pressure compounded by the survival of incentives which are not performance based) would be difficult for even the most free trade minded Minister of Customs (and there have been few such in Australia's post Federation history) to resist, especially when that Minister is constrained by a statutory framework in which treaty obligations and diplomatic initiatives no longer play any overt part. An anti dumping inquiry cannot be made to magically disappear by a high level phone call to Canberra. It is therefore incumbent on New Zealand exporters to ensure that they are well armed with strategies with which to fend off both anti dumping and countervailing duties. It also behoves the New Zealand government to ensure that replacements for the performance based export incentives conform not only with our international obligations but also with the municipal law of Australia and our other major trading partners.

A. Resisting The Duties

From an exporter's point of view it is clearly better to defuse an anti dumping or subsidisation inquiry at the outset rather than to hope for rescue at the hands of the administrative lawyers at a later stage. The absence of any system of *de novo* appeal from the Minister's decision to impose duties and the blocking of the procedural loopholes regarding cash securities so effectively exploited in *Tasman Timber Limited v. Minister for Industry and Commerce*[1] means that initial finding of dumping or subsidisation will not easily be shifted by the severely circumscribed processes of judicial review (even in their expanded Australian form). This is not to suggest that the Australian Minister of Customs encourages his subordinates to operate an open ended discretion trimmed only by the occasional *ex post facto* intervention by the courts. Exporters should start with the assumption that those administering the *Customs Tariff (Anti Dumping) Act 1976* take their statutory obligations seriously and are open to persuasion on both fact and law. Given that many of the key criteria on which the Minister has to base his decision are nowhere defined in the anti dumping legislation the scope for persuasion is considerable. To this end early legal advice and representation is essential. An effective strategy for deflecting dumping and subsidisation inquiries at the sub-ministerial level would focus on:

1. Disclosure Of Information

The *Customs Tariff (Anti Dumping) Act* 1975 contains no power to compel the supply of information from either New Zealand exporters or Australian importers. Attempts by the Australian government to extract information about individual exporters from the New Zealand government[2] are likely to be met with the objection that New Zealand statute law precludes the release of such information[3]. This was the reason advanced by New Zealand trade diplomats in the *Tasman Timber*[4] case for refusing to supply specific details of the credits obtained by, or tax deductions allowed to, individual NZ exporters under either the old or new incentive schemes.

While it may be tempting for New Zealand exporters to take refuge in their undoubted right to refuse to provide the Australian Customs with information it would be unwise of them to do so. Quite apart from leaving the complainant Australian manufacturers a clear field to influence the mind of the Minister there is a danger that the Customs will apply section 5 (4) of the *Customs Tariff (Anti Dumping) Act* which provides that:

> "Where the Minister is satisfied that sufficient information has not been furnished or is not available to enable the normal value of goods to be ascertained under the preceding subsections, the normal value of those goods shall be such amount as is determined by the Minister having regard to all relevant information".

This provision at least requires that the Minister have regard to such information as he does possess. Section 10 (7)[5], which deals with countervailing duties has no such saving grace and if read literally would appear to allow the Minister to make completely artificial assessments as to the amount of the supposed bounty or subsidy. It is true that the bare words of the section must now be read against Lockhart J's insistence in the *Tasman Timber* case that even where the material before them is inadequate the Customs must do the best they can on the facts they have "... to achieve equivalence between the duty (or cash security) imposed and the subsidy". Unfortunately Lockhart J goes on to muddy the waters of interpretation by pointing out that the Minister had not in fact availed himself of section 10 (7) in the *Tasman* case. What Lockhart J would have done if the Customs had relied on this subsection he does not say.

While it is probably advisable to supply the Australian Customs with the information they require (and it would be inadvisable to supply ambiguous or incomplete data since the Minister is free to ignore any material he considers to be unreliable[6]) there is nothing wrong with insisting on a *quid pro quo* by extracting from them all the factual material they have already gathered in relation to the inquiry[7]. While one would not expect this to include the Customs' own internal evaluations it should by this means be possible to gain access to rather more information than the bowdlerised summary which would be sufficient to satisfy the rather minimal requirements of natural justice. An alternative means whereby exporters can gauge the strength of the case being assembled against them is to use the machinery of the Trade Agreement itself. Articles 15 (5) and 16 (4) of the Australia New Zealand Closer Economic Relationship Trade Agreement (CERTA) require the member state

instituting dumping or subsidisation inquiries to provide the other member state "with full access to all *non-confidential* evidence relating to" the goods allegedly dumped or subsidised, the nature of the injury caused thereby, and the causal link between the two.

It is the practice of the New Zealand government to pass on such information to the exporters concerned. The exemption of "confidential" material from these requirements would preclude the disclosure of information voluntarily supplied to the Australian Customs from outside sources although aguably not evidence the Customs have gathered on their own initiative.

2. *Determining The Dumping Margin*

As stated earlier dumping occurs when the export price of the goods is lower than their normal value. Normal value is orginarily defined as the price of like goods sold in the ordinary course of trade for home consumption within New Zealand.

(a) Differential Pricing: Care should be taken that the Australian Customs are as far as possible comparing prices at the same level of distribution. In *Feltex Reidrubber Ltd. v. Peacock*[8] Feltex supplied a list of their domestic prices which differentiated between (i) tyres sold one-off to dealers (ii) tyres sold to car assemblers to be fitted to new vehicles (iii) tyres sold on government contract (iv) tyres bought in bulk. The tyres exported to Australia were for fitting to existing vehicles to replace tyres which had worn out. Somewhat illogically the Customs selected category (ii) to represent normal value. Equally illogically Feltex maintained it was category (iii). If any category was relevant it was probably category (i) although as Sheppard J. pointed out, this would have made Feltex's case worse, not better, since it was substantially higher than that selected by Customs. Their case might have been worse still had the Customs adopted, as Sheppard J. thought they should have, the procedure set out in section 5 (2) of the *Customs Tariff (Anti Dumping) Act* for determing normal value where the domestic sales are not suitable for that purpose. This allows the Minister to arrive at normal value by adding what he determines to be the cost of production and delivery to a constructive profit margin settled by him. Alternatively the Minister may fix normal value by reference to the highest price paid for the goods in New Zealand for export to a country other than Australia.

(b) The Period Of Comparison: Price fluctuations over a period also affect the dumping margin. The same period of reference should be taken for average normal value and average export price. Even when this is done, however, the period selected may be so short as to give undue prominence to temporarily high prices. This may be the situation in which New Zealand exporters find themselves when the price freeze is lifted. In the *Feltex Reid Rubber* case the period selected was a year. By contrast the E.E.C. Commission in one recent case thought four months was an appropriate period over which to average prices.[9]. Generally speaking, the shorter the time scale the greater the dumping margin, falls in the domestic price being rare in New Zealand.

(c) Domestic Sales At A Loss: If the goods are sold in New Zealand at less than cost it becomes a matter of some moment to determine whether this is their value or

whether sales at a loss are so atypical as to be "not in the ordinary course of business" thereby justifying the imposition of a constructive value under section 5 (2). The constructive value is arrived at by looking at a pre-tax level of profit historically achieved by the exporter before the losses started. It is important to note that the *Customs Tariff (Anti Dumping) Act* does *not* prescribe that domestic sales at a loss *must* always be ignored. Indeed it does not mention such sales at all. The Australian Customs seem to derive their aversion to sales at less than unit cost from the relevant E.E.C. regulation. That regulation accepts temporary or inconsequential losses.[10] One assumes that the Australian Customs would do the same.

(d) Price Control: The current price freeze could cause problems for New Zealand exporters. Section 5 (3) of the Customs Tariff (Anti Dumping) Act allows actual domestic prices to be ignored where a government of the exporting country ". . . determines or substantially influences the domestic price of goods in that country". Where such state control of prices exists the Minister may decide to fix a constructive normal value based on what the price in the home market would have been without such control. In New Zealand's case this must inevitably widen the dumping margin.

(e) Currency Fluctuations: A combination of long term prices quoted in Australian dollars and currency movements can lead to goods being dumped through no fault of the exporter. Any decision by New Zealand not to match an Australian devaluation places New Zealand exporters in a double bind. In the long term it increases costs and reduces profits. In the short term it leads to allegations of dumping under existing contracts. Unfortunately dumping under section 8 is an objective rather than a subjective phenonomen and duties may be levied even where there is no intention to dump.

(f) Contractual Provisions: It will be clear from the above that long term fixed price contracts are dangerous. Price escalation or renegotiation clauses are unlikely to be popular with importers, however. Express agreements to indemnify importers by paying any anti dumping duties levied are not unknown. Such an agreement is unexceptional provided that it relates only to future duties. A contract to absorb existing anti dumping duties could be treated as being itself a form of dumping thus justifying the imposition of yet more duties.

(g) Transhipment, Assembly And Re-packaging: Goods shipped from New Zealand to Australia may have their ultimate origin in a third country. When this happens the Minister may assess the dumping margin as if that third country were the country of export (section 5 (7)). Raw materials which are simply transhipped in New Zealand would be so assessed. In the case of manufactured goods the country of origin is deemed to be the country in which the last significant process in the manufacture or production of the goods was performed (section 5 (8)). This would encompass goods assembled in New Zealand from parts made elsewhere but not those merely broken down from bulk and re-packaged.

(h) Domestic Sales Not At Arms Length: Sales within New Zealand which are not at arms length will be disregarded for the purposes of assessing normal value and a

constructive value will be assessed instead. The *Customs Tariff (Anti Dumping) Act*[12] treats transactions as not being at arms length if:

(i) there is any consideration payable for or in respect of the goods other than their price

(ii) the price is influenced by a commercial or other relationship between the buyer, or a business associate of the buyer, and the seller, or a business associate of the seller; or

(iii) the buyer, or a business associate of the buyer, will, directly or indirectly, re reimbursed, be compensated or otherwise receive a benefit for, or in respect of, the whole or any part of the price[12]*.

The Act deems persons to be business associates if:

"(i) one has an interest in the business or property of the other;

(ii) both have an interest in the same business or property; or

(iii) another person has an interest in the business or property of each of them".

3. ***Assessing Material Injury:***

When it comes to evaluating the harm done to Australian competitors by dumping or subsidisation New Zealand exporters are at a considerable disadvantage. Gathering evidence of injury at a distance is not easy. This is why reciprocal early disclosure should be insisted on.

Unlike its American counterpart the Australian Act nowhere defines material injury[13] or indicates the criteria to be adopted in assessing it. Nor, somewhat surprisingly, does the CERTA assist in this regard. The GATT Codes require that a determination of material injury "shall be based on facts and not merely on allegation, conjecture, or remote possibility". While the precise mix of factors which the Australian Customs think to be relevant on this issue is not easy to ascertain some of the criteria they adopt are quite alarming and should be resisted as contrary to the spirit (and sometimes the letter) of the GATT Codes.

(a) Volume of Imports: The mere fact that imports of the goods into Australia have increased significantly is not of itself evidence of injury. Under the GATT Code volume is only relevant if there is a marked difference in the quantities of dumped and undumped goods imported.

(b) Price Undercutting: To take price undercutting as evidence of injury betrays some very protectionist assumptions. GATT exists to encourage price competition across national boundaries. Even worse is the notion that because Australian producers cannot increase their prices when they wish to, dumped or subsidised imports must be to blame.

It is true that price leadership cannot itself be decisive. Thus in the *Feltex Reidrubber* case Shepphard J. was quick to point out that the fact that the New Zealand tyres were not the cheapest on the market did not lead to the conclusion that the New Zealand exports were not causing harm to Australian industry. It would be wrong however to stand this observation on its head by concluding that any price differential between Australian and New Zealand goods demonstrates material injury. The fact that the dumped goods are themselves being undercut is always relevant if

never decisive.

(c) Market Share: More relevant is the question "Has the Australian industry's share of the market declined?" Even a small loss of market share seems to be relevant. (In the *Feltex Reidrubber* case New Zealand's 1% share of the Australian tyre market was thought to be significant.)[13]* Care must be taken however to ensure that the decline is not due to competition from undumped imports and that "market" is not defined too narrowly.

Cross elasticity of demand between the dumped goods and other products should be stressed. Thus exporters of roofing tiles would seek to have the market defined as including all roofing material[14].

Care should always be taken to distinguish between a loss of market share and a contraction in the total market for the product[15]. Again if the total market increases during the dumping period then a loss of market share is irrelevant[16]. Finally, loss of market share is only an indication of injury to an industry, preservation of the market intact is not one of the legislation's aims (see infra).

(d) Return On Investment: A lower rate of return on investment among Australian producers should not be taken as evidence of material injury. It is not the function of the *Customs Tariff (Anti Dumping) Act* to guarantee any particular rate of return to domestic industry.

(e) Multi-Country Dumping: One of the difficulties faced by Feltex in the *Reidrubber* case was that Australia was at the time being invaded by tyres from the Netherlands and Korea. Sheppard J took the view that:

> "A consideration of the entirety of the legislation in question does not suggest that dumping action may not be taken where harm is being caused to Australian industry and exports are coming from a number of countries no one of which is itself exporting a substantial quantity of dumped goods. If five per cent of a particular market was an insignificant percentage, but 25 per cent was not, it would be my view that dumping action might properly be taken in respect of the exports of five countries each of which had five per cent of the market. Any other view would leave a very large loophole in the legislation for which its language provides no warrant".

There is no requirement in the *Customs Tariff (Anti Dumping) Act* that all allegations of dumping be investigated. The anti-discrimination provisions of the Codes merely require that once dumping or subsidisation is found to exist that duties be levied even handedly between countries[17]. New Zealand Companies who feel they are being unfairly penalised in this regard can request that action be taken against third country dumping or subsidisation as provided for in sections 9 and 11 of the Act[18].

(f) Government Purchasing Policies: Although by virtue of Article 11 of the CERTA New Zealand companies will not be discriminated against by the *Federal* government in this regard there is nothing to prevent *State* governments from maintaining discriminatory purchasing policies in favour of local industries. This can, para-

doxically, as one Canadian case demonstrates, have the effect of increasing the likelihood of a finding of material injury. There, because of two provinces' refusal to buy foreign generators for thier hydro-electric power schemes, dumped Japanese generators were suddenly diverted to the rest of the Canadian market with catastrophic effects on Canadian producers[19].

5. *Causation*

A showing of dumping (or subsidisation) and material injury does not itself justify the levying of duties[20]. There must be some *nexus* between the two. Article 3 of the GATT Code prescribes that the dumped goods must "be demonstrably the principle cause of material injury" and requires that other possible factors which may be adversly affecting the domestic industry be taken into account. The CER Trade Agreement, in Article 15 (2), requires only that the existence of "a causal link" to be demonstrated. The Australian Act weakens the chain of causation still further by accepting injury which "has been or is being caused or is *threatened*" by the dumping or subsidy.

The difficulty of demonstrating a causal relationship should not be underestimated. To isolate the significant economic and industrial factors among the ingredients which could conceivably be used to explain the injury suffered by the Australian producers is no easy task. Indeed so difficult is it that those administering the legislation may be forgiven for hoping that if no-one mentions causation the problem will go away. (This was what appears to have happened in the *Feltex Reidrubber* case where the Customs *sub silentio* assumption that a causal link existed is inferentially endorsed by Sheppard J's equally *sub silentio* judgment. An alternative means of sidestepping the issue of causation is to place an unstated burden of proof[20] on exporters so *they* must identify the factors other than dumping which will explain the sufferings of the Australian industry. This approach is inherently unfair since most of the facts on which such a finding could be made are peculiarly within the knowledge of the complainant companies.

(a) Injury Prone Industries: Some Australian industries are more vulnerable to competition from dumped imports than others. The product may be one to which there is a high consumer resistance or for which the demand fluctuates wildly. The Australian producers may be late starters in an already developed field. They may be recovering from previous bouts of dumping[21]. In these cases is the vulnerability itself a cause of injury or must, as one Canadian writer put it, the exporter take his competitor as he finds him[22]? Accepting the second argument comes dangerously close to saying that losses attributable to a general economic downturn[23] or high wage levels[24] or strikes[25] should be compensated for by the imposition of anti dumping or countervailing duties.

(b) Non Competitive Industries: A 1977 study by Peter Lloyd demonstrated that many Australian anti dumping cases were initiated by companies which would not have been able to compete effectively anyway irrespective of dumping[26]. Where, for example, imported goods would undersell the local product even if the dumping margin were removed or where eonsumers prefer the import even though it costs more

than its Australian equivalent[27]. When faced with this situation the United States Trade Commission has ruled that the injury cannot be blamed on dumping. It is to be hoped that the Australian Customs will follow suit.

(c) Self Induced Injury: It may turn out upon investigation that the Australian producer has deliberately kept its prices low for reasons which have nothing to do with dumping. Price cutting may be aimed, for example, at gathering a larger share of the market. The fact that imports disrupt this strategy is no reason for the imposition of duties[28].

(d) Future Injury: The *Customs Tariff (Anti Dumping) Act* gives the Minister no power to investigate future dumping. Duties may be levied only in respect of goods which *have been* exported to Australia. This does not prevent him, however, from attempting to assess the future effects of past or present dumping as the reference "to *threatened* injury in sections 8 (2) and 10 (1) makes quite clear. Article 3 of the GATT Code, however, states that determinations of material injury shall not be based on conjecture or remote or hypothetical possibilities. There must be a real likelihood of future harm[29].

(4) What Is An Australian Industry?

Although it is "Australian industry" which the *Customs Tariff (Anti Dumping) Act* seeks to protect, nowhere in the statute is that term defined. Nor is CERTA of any assistance in this regard. Only the GATT Codes make an attempt to set some limit to the concept of a domestic industry and even here the definitions adopted are both sketchy and tangential to many of the real issues likely to be raised.

(a) Industries and Markets: It is important to distinguish between industries and markets. An industry is not a product market as that term is used in competition law. Donald and Heyden in their seminal work on trade practices law in Australia[30] describe the difference thus:

> "An industry is a grouping of firms making related products. A market is the structure through which products are moved to buyers. An industry may serve many markets. The steel industry produces a vast range of products from steel sheet through girders to wire. Conversely, a market may be served by many industries. The market for houses is served by the brick industry, the timber industry, the glass industry and many more. Similarly, buyers for a number of industries may be purchasing in the same market. The steel industry serves the steel sheet market in which automobile manufacturers, white goods manufacturers and builders of railway carriages buy".

This is why the Australian Customs should be dissuaded from attaching undue significance to market share. It is perfectly possible for New Zealand importers to capture a large slice of the Australian market for a highly specialised product and yet leave the Australian industry which makes that product largely untouched by the invasion. If the product in question forms only a tiny part of the Australian industry's

total output or sales there may be no material injury to the industry as a whole. Conversely, the damage may be spread across several industries with insignificant effect on any single one of them. Unlike its Canadian counterpart the Australian Act protects *industries* not *goods*[31]. Although this can, as we shall see, work to the disadvantage of New Zealand exporters, here it works to their advantage. The *Customs Tariff (Anti Dumping) Act* does not exist to preserve the Australian competitive edge in particular products but to sustain the industries which make them. The distinction is vital and should be insisted upon.

(b) Proportion of Domestic Production: What proportion of the Australian industry must be affected before material injury occurs. This, it must be stressed, is not a question of *locus standi*. The *Customs Tariff (Anti Dumping) Act* sets up no machinery for initiating complaints. Inquiries may be initiated (or resisted) by trade unions, consumer groups, individuals and state governments. The Customs may conceivably even act of their own motion without outside prompting. (It is the current practice of the Australian Customs not to act unless requested to do so by a major proportion of the firms affected.) The problem of standing in the strict administrative law sense only arises when judicial review is sought[32]. Until then it is purely (subject to the requirements of natural justice) a question of departmental convenience as to how and from whom evidence of material injury is collected. As regards the *sufficiency* of that evidence however, the proportion of Australian industry affected cannot be wholly irrelevant. Clearly the Act does not require that every one of the industry's constituent firms be able to demonstrate injury. Equally clearly, injury confined to a single firm whose share of the total national output is small, should not of itself be sufficient to justify the imposition of duties. (Unless of course it is a one firm industry[33]). Where the line is to be drawn the *Customs Tariff (Anti Dumping) Act* does not say. The framers of the GATT Code were less reticent. Article 4 (a) of the Anti Dumping Code, for example, specifies that:

> "In determining injury the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products . . ."

This prescription is not easily integrated into the Australian legislation. As was pointed out earlier, nothing in the Act requires the identification of "industry" with the producers of specific products and yet this is the very test adopted by the Codes. Even if the two approaches could be reconciled it would still be necessary to determine what amounted to a "major proportion" of domestic production. Those who negotiated the Codes were apparently under the impression that "major" meant "more than half" a formula whose mathematical precision has yet to find favour with any municipal court[34] and which is unlikely to recommend itself to the Australian Customs without judicial prodding.

(c) Importers and Affiliates: It is not beyond the bounds of possibility that a New Zealand company might one day find itself to the opposite side of an anti dumping controversy from its Australian subsidiary. Is the subsidiary part of the Australian

industry? There seems no reason why not and certainly there is nothing in the Act to force a contrary interpretation on the Customs[35].

Less straightforward is the situation where Australian producers unconnected with New Zealand exporters are also importers of the dumped or subsidised products. Article 4 (a) (ii) of the Anti Dumping Code simply exises the importing producer from the domestic industry. Nowhere in the Act, however, is such drastic surgery expressly authorised.

(d) Regional Industries: Australia is a large country. Is it large enough to have distinct regional industries? Certainly the GATT Codes allow for such an eventuality by prescribing that:

> "in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market, or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

American[35]* and Canadian[36] Customs authorities have not been slow in utilising the concept of a separate industry and it is to be expected that the Australians will follow suit. This would, of course, greatly magnify the effect of the dumping or subsidy by measuring its effect over a much smaller area[37]. High rail and road transport costs and a strong historical tradition of state separatism in Australia makes resort to such arguments extremely likely[37]*.

Article 8 (e) of the Code provides that where injury is confined to a regional industry duties should only be collected on imports consigned for final consumption in that region. Any attempt to levy regional duties in Australia would run up against section 51 (ii) and 88 of the Australian Constitution which forbid the imposition of taxes which discriminate between States or parts of States and require customs duties to be "uniform". The result of this is that an Australia wide tariff may be imposed to protect a purely regional industry.

Should it appear that there is a real danger that the Australian Customs are about to be talked into accepting the existence of separate regional industries attempts should be made to dissuade them by insisting on the need for

(i) some sort of **de minimus** requirement so as to exclude tiny idiosyncratic industries whose share of domestic production is minute but which just happen to be geographically distinct. (Some Tasmanian producers could be in this category, for example)

(ii) rigid adherence to the GATT Codes' requirement that *all or almost all* of the regional producers by adversely affected by the dumped or subsidised imports

(iii) the region to exist in the minds of consumers and not simply in the organisation

charts of producers. Regions which correspond to franchise areas or result from an agreed geographical division of markets should be disregarded
dumped or subsidised imports to be concentrated in the region in question[38]
regional producers to sell only inside the region, and
the region not to be supplied by producers located elsewhere in Australia.

(e) ***Unborn Industries***: Sections 8 and 10 of the *Customs Tariff (Anti Dumping) Act* allow duties to be imposed where "the *establishment* of an Australian industry has been or may be materially hindered" as the result of past or present imports of dumped or subsidised goods. The proposed new industry should be something more than a gleam in a marketing manager's eye, however. Article 3 of the Anti Dumping Code requires that for industries not yet in existence ". . . convincing evidence of the forthcoming establishment of an industry must be shown, for example, that the plans for a new industry have reached a fairly advanced stage, a factory is being constructed or machinery ordered".

A distinction should also be made between dumping which inhibits the formation of an entirely new industry and that which impedes the launching of a new product within an existing industry. In the latter case the importance of the product to the industry as a whole must be gauged which, in turn, involves some assessment of its likely success when launched. In the former case the only issue is whether the dumping has prevented or will prevent the industry from being set up in the first place. The industry's subsequent fate is irrelevant.

5. The Problem of Like Goods

The GATT Codes define the domestic industry as the producers of *like goods* to those imported. The Australian Act contains no such limitation although it does use the term in other contexts: In section 5, the price of goods exported from New Zealand is compared with the price paid for like goods sold in the ordinary course of trade within New Zealand. Before retrospective duties can be imposed on New Zealand goods under section 13 it must be shown *inter alia* that large quantities of "goods of the same kind" have been dumped on the Australian market during a short period. Under section 8 (7) the Minister may, by notice in writing, exempt goods from third country dumping duty if he is satisfied

> "that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade;"

Not only is any mention of like goods missing from those portions of the Act where the Codes might lead one to expect to find it, where it is used it is neither confined nor illuminated by the context (the sections in which is occurs are all tangential to the main thrust of the Act). There are two ways in which this double omission is likely to give rise to problems of interpretation:

(a) ***Likeness and Cross-Elasticity***: Article 2 of the Anti Dumping Code provides that:

"(b) Throughout this Code the term "like product" shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration".

The emphasis here is on physical resemblance rather than substitutablity. (An emphasis which is more apparent in the French text of the Code which refers to "produit similaire".) This is probably the kind of comparison the draftsman intended to be made in sections 5 and 13 of the Act. In section 8 (7) however, the reference to "directly competitive goods" clearly embraces goods which can be used for the same purpose as the dumped goods.

When it comes to selecting the relevant Australian industry it is only cross elasticity which matters. Any dumped import which displaces a domestic product is harming the industry which produces that product even if though the two resemble each other not at all. If imports of roofing tiles depress sales of corrugated iron in Australia then the potential for injury exists whether or not iron and tiles are "like" in any physical sense. Up to this point cross elasticity works against the New Zealand exporter. In assessing whether the injury is *material* however, cross elasticity works in the exporter's favour since he can best resist claims of loss of market share by widening the product market as much as possible[39].

(b) Components: Goods manufactured in Australia may contain New Zealand components, components which are not made in Australia at all. Clearly the dumping of such parts will cause injury to those Australian manufacturers of the finished product who do not use New Zealand parts[40] and it is not necessary to consider whether the part is "like" the whole.

The problem can arise in reverse when only the finished article is sold in New Zealand while parts alone are exported to Australia. If the part is substantially the same as the end product (or to put it another way, if the part requires minimal processing to turn it into the finished article) then the two will be like goods for the purposes of section 5 (1) even though they are sold in different markets to different types of customer. If the component being investigated is only one of several discrete parts which go to make up the finished article then there may be no sale of "like" goods within New Zealand thereby justifying an article Ministerial determination of normal values under section 5 (2) (a).

If New Zealand exports *both* the parts and the finished article of the dumping of *either* may cause material injury to an Australian industry whether that industry produces components, products, or both. Short term mass dumping of parts however, does not justify the imposition of *retrospective* duties on small scale imports of the complete article since components and end products are not "goods of the same kind" as these words are used in section 13.

6. Retaliatory Duties

New Zealand exporters cannot defend themselves against the imposition of countervailing or anti dumping duties by pointing to dumping in New Zealand by their

Australian competitors or taking issue with the Australian governments' own export subsidies. The Australian anti-dumping legislation does not require complainants to have clean hands[40]*.

It is only a question of time before some inventive New Zealand mind turns its attention to the possibility of using this country's own anti-dumping machinery to retaliate against duties imposed across the Tasman. Such machinery does exist albeit in rather a rusty condition (New Zealand's all pervasive import licensing system makes resort to anti-dumping or countervailing duties largely unnecessary).

(a) The New Zealand Legislation deals with both dumping and subsidies in a single omnibus provision: section 129 of the *Customs Act* 1966. Although the *effect* of section 129 is broadly similar to sections 8 and 10 of the Australian Act there are some significant differences:

(i) The New Zealand Minister of Customs may be even less subject to judicial control than his Australian counterpart[41].

(ii) There is no power to impose countervailing duties as such. Subsidisation is treated as a form of dumping (but the duty imposed cannot exceed the amount of the subsidy[42]).

(iii) The New Zealand Act talks in terms of *prejudicial effect* rather than material injury[43].

(iv) The goods complained of must be of a "like class or kind" to goods manufactured or intended to be manufactured in New Zealand[44].

(v) Sales at less than the cost of production in New Zealand are *per se* dutiable even if the goods are also sold at a loss in the country of origin.

(vi) Retrospective duties may be imposed on goods imported in the four month period prior to the New Zealand manufacturer or seller lodging its complaint[45].

(b) Australian Counter Retaliation: The Australian Customs are clearly mindful of the possibility of retaliatory duties. In 1982 they secured the passage of amendments to the *Customs Tariff (Anti Dumping) Act* which would enable them to mount an appropriate response[46]. Armed with these new powers the Australian Minister of Customs can dispense with the need to show material injury and impose countervailing duties on imports from any country:

(i) which itself imposes duties *in the nature of countervailing duties* on Australian goods without any or any proper inquiry into whether material injury was caused to the local industry by those goods[47], or

(ii) which imposes countervailing duties or their equivalent in respect of Australian assistance to exporters while bestowing the same or similar assistance on its own exports to Australia[48].

In the first case these counter countervailing duties can be imposed on *any* imports from the country in question after a date fixed by the Minster[49]. In the second, these may be applied only to goods from that country which received the financial assistance in question. The amount of the counter-countervailing duty (to coin an ugly expression) is fixed either by calculating the amount of the subsidy or other financial assistance bestowed on the foreign goods or in the case of non-financial assistance to cost of granting that assistance or the value of that assistance to the person obtaining it[50].

New Zealand is particularly vulnerable to counter retaliation of this kind. It is true that counter-countervailing duties cannot be imposed in response to anti-dumping duties proper, where export assistance plays no part in determining the dumping margin. It matters not, however, that the New Zealand legislation makes no separate provision for countervailing duties. Duties imposed under section 129 (2) (c) of the New Zealand Act are certainly *in the nature of* countervailing duties even though the New Zealand Act refers to them under the general rubric of a "dumping duty". If the New Zealand Customs were to interpret "*effect prejudicial*" as requiring a lower test of harm than "*material injury*" Australian retaliation would be inevitable. Again, before complaining of hidden assistance to Australian importers it would be wise to ensure that similar covert help is not made available to New Zealand companies.

*(c) **Parrying the Counterthrust***: Should the New Zealand Customs wish to escalate this tariff war still further they have the means to hand in sections 127 and 130 of the Customs Act 1966.

(i) adopting the Australian tariff: Under section 127 Orders in Council may be made adopting in whole or in part the tariff of any country as it applies to goods from New Zealand. This may be done where that country imposes *excessive* rates of duty on New Zealand goods or in any case where the Governor General is of the opinion that adoption of the foreign tariff "is necessary or advisable in protection of furtherance of the public interest"[51].

The only obstacle to the use of this section appears to be in the use of the words "the tariff". It could be argued that this applies only to a country's general tariff and does not embrace one-off imposts such as anti dumping or countervailing duties. The Australian anti-dumping legislation while it provides that it is to be read as one with their *Customs Act* 1901[52] is not incorporated into the general tariff which is contained in a separate statute[53]. It could equally well be said that because the Australian *Customs Tariff (Anti Dumping) Act* uses the term "tariff" in its title (though nowhere else) the duties it allows to be imposed are part of that country's tariff structure. If the latter interpretation be correct the powers conferred by section 127 would then be exercisable in respect of Australian anti dumping duties proper and would not be confined to countervailing imposts.

(ii) special surcharges: Under section 130 surcharges of up to 25% may be levied by Order in Council on imports from any country which in the opinion of the Governor General discriminates between New Zealand exports and those of a third country or, once again, which imposes excessive duties on goods from New Zealand. These surcharges are imposed on top of any other duties to which the goods in question may be liable.

B. THE FUTURE OF EXPORT ASSISTANCE

It is central to CER that all performance based export incentives be abolished according to the agreed timetable. Any request by the New Zealand government to extend that timetable is likely to meet with a very frosty reception in Canberra and if pursued could well jeopardise the whole future of CER. We will therefore assume that the timetable will be met. In addition New Zealand in acceding to the GATT Subsidies

Code has solemnly undertaken to do away with those incentives which cannot be squared with the Code by 1985. It is assumed that this promise will be kept. These obligations impale the New Zealand government on the horns of awkward dilemma: assistance which helps only exporters is in breach of our international obligations and is assailable under the municipal law of most of our trading partners. Across the board assistance which helps exporters along with everyone else is very expensive, and may encourage exporters to divert their sales to the domestic market since they will receive the assistance whether they export or not. The recent interdepartmental discussion paper[54] on the future of export assistance in its review of the alternatives currently being thrust on government by various interest groups is concerned mainly with the second horn of the dilemma. I shall be concerned mainly with the first, viz: How to devise forms of export assistance which will both survive our accession to the Subsidies Code and conform to the tariff laws of our major trading partners (laws which do not always follow the Code). No concessions are made here to issues of fiscal policy or social justice even though it would be a foolish government which ignored such things. An export assistance scheme must be politically saleable as well as legally viable.

1. The Demise of Performance Based Incentives

Under Article 9 of CERTA New Zealand must, by 1987, do away with:

(i) export performance taxation incentives
(ii) export suspensary loans
(iii) the increased export taxation incentive; and
(iv) export investment allowances.

New Zealand's obligations do not stop there, however. Even during twilight years before 1987 the listed incentives must not be increased or extended to new goods. Nor can they be resurrected after that date by semantic sleight of hand. The introduction of any new form of export assistance which has a similar trade distorting effect to the demised incentives is likewise forbidden under Article 9.

There have been suggestions that performance based incentives (P.B.I.'s) can be eliminated from Trans Tasman trade and retained for exports to the rest of the world[55]. A two tier system would face enormous difficulties. It would fly in the face of our obligations under the Subsidies Code. It would be a signal to customs authorities in other countries that our P.B.I.'s could not really be defended (remembering that one of them has already been ruled to be a subsidy under United States law[56]). A two tier system would be constantly under assault by American and E.E.C. countervailing duty inquiries and would, one suspects, eventually collapse under pressure from other GATT signatories. Only if they are funded from levies on the industry in question are P.B.I.'s likely to be acceptable (or so the American International Trade Commission has ruled[57]).

2. Survivors and Alternatives

CERTA does not proscribe all of the current incentives. The Export Market Development Incentive (EMDI) for example, remains untouched. Nor does CERTA even attempt to strike at general fiscal policies which only incidentally benefit exporters. Exporters are likely to find these a rather thin diet after the richer foods they

have become accustomed to. Can they be supplemented by new forms of assistance? Any such alternative scheme would have to run the gauntlet of section 10 of the Australian Anti Dumping Act and its American and E.E.C. counterparts. With this in mind, what forms should export assistance take after 1987?

(a) Across the Board Assistance: Some exporters, despairing of constructing incentives which are countervailing duty proof, prefer to pin their hopes on such things as reducing the overall level of protection, devaluation, lower company tax, accelerated depreciation, increased investment allowances and lower taxes on fuel and transport. Across the board aid of this kind is extremely costly in terms of revenue forgone or disbursed. It can also be double edged (reduced protection against imports for example). Exports insofar as they benefit at all, benefit only in passing. What is more, across the board assistance may still be assailable under the municipal law of our trading partners. This will no doubt seem especially galling when exporters cast envious eyes across the Tasman at the generous investment allowances and greatly accellerated depreciation allowed to their Australian competitors. They may take some small cold comfort in the fact that such assistance has attracted countervailing duties in the United States[57*].

(i) subsidy objectively determined. The earlier American cases define a subsidy as any advantage in fact *enjoyed* by exporters due to state action rather than the result *intended* by the foreign government[57°]. Under this test neither the name or form of the subsidy is decisive[58]. Since all governments assist business in some way the literal application of this principle in municipal law would quickly bring international trade to a shuddering halt[59]. Conscious of this perhaps, some American judges have begun to put a gloss on the objective test by requiring that the across the board assistance provided by foreign governments is in some sense "unfair" or has a distorting effect on international trade. Evidence of unfairness or distortion is secured by asking (i) what proportion of the assisted industry's output is exported[60]? (ii) does the amount of the assistance vary with the volume of exports even if exportation is not a condition precendent to receipt of the assistance[61]? (iii) does state aid assist a particular industry or are its benefits spread across the whole economy? (Thus in one case subsidies on coal production were held not to be countervailable if they were granted for all types of coal and not imply those used by steel exporters. The fact that steel exporters benefitted from the subsidised coal was not thought to be decisive[61*].) Not all American judges share these views[62]. In no case has the objective standard been explicity abandoned. (Indeed it has recently been re-affirmed[63].)

Even the fiercest American proponents of an objective test do not treat general changes in the tax structure of exporting countries as subsidies. Only changes benefitting particular regions or groups are likely to be so treated.

(ii) indirect subsidies. The framers of the Australian anti dumping legislation clearly had some sort of objective test in mind since section 10 (1) of the Customs Tariff (Anti Dumping) Act allows countervailing duties to be imposed where:

> "in the country of origin or the country of export of the goods there has been paid or granted, directly or indirectly, upon the production, manufacture,

carriage or export of those goods a subsidy, bounty, reduction or remission of freight or other financial assistance".

The assistance need not be direct and may be bestowed on all goods produced or transported within that country whether or not they are exported. Quantifying the benefit to exporters may be difficult in such cases but this is in itself no bar to the imposition of duties as the American experience has shown. We may expect the Australian Customs to be equally inventive, given the Minister's power to fix a notional level of subsidy under section 10 (7)[64].

(iii) restucturing assistance. It has long been the practice of governments to ease the pain of (or to encourage) structural changes in the economies of their countries by subventions from the public purse. The framers of the Subsidies Code were clearly of two minds about these practices. They did not wish to prevent signatories from using subsidies for (in the words of Article 11) "the promotion of social and economic policy objectives . . . which they consider desirable". They also saw that restructuring assistance can be a highly convenient means of hiding an export subsidy. Unable to square this particular circle they contented themselves with listing what they saw as being the legitimate aims of such assistance. These were:

(a) the elimination of industrial, economic and social disadvantages of specific regions,
(b) to facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade,
(c) generally to sustain employment and to encourage re-training and change in employment,
(d) to encourage research and development programmes, especially in the field of high-technology industries,
(e) the implementation of economic programmes and policies to promote the economic and social development of developing countries,
(f) redeployment of industry in order to avoid congestion and environmental problems.

Pursuit of these worthy ends is not of itself enough to ward off countervailing duties. Article 11 places no obligation on signatories to do anything other than note the existence of the listed policy objectives. There is no expectation that they be incorporated in a signatory's municipal law as legitimate defences to countervailing action and this has not happened. American case law, for example, cuts right across the high minded platitudes of Article 11 and judges the acceptability of restructuring assistance by its social spread rather than its social worth. Thus topping up of private sector redundancy payments by the state is permissable, provided the payments are available to the whole working population. State funded retraining programmes must not be directed towards the needs of individual employers[64]* or designed to make workers better at their present jobs[64]●. Regional development schemes are anathema to the Americans since they are by definition preferential[64]- (it makes no difference whether such schemes compensate industries for staying where they are or assist them to relocate). Research and development assistance will be countervailable unless the

results of the research are made publicly available[64+] The Australian attitude to restructuring assistance has yet to be made known.

(b) Export directed assistance: If, as seems likely, the New Zealand government plumps for an incentive scheme which assists exports directly then it should ensure that it does so less crudely than under the present arrangements. Terms such as "grant" should be studiously avoided. Efforts should be made to exploit *lacunae* in the countervailing duty laws of other countries. The government should avoid devices Shich are at odds with the Illustrative List of subsidies annexed to the Subsidies Code. This leaves very little room to manoeuvre as will be seen when each of the possible alternatives is examined in detail.

(i) currency manipulation. A differential exchange rate for export earnings is one of the alternatives being currently mooted. Unlike devaluation or a surcharge on foreign exchange it would benefit only exporters. American courts have been quick to strike down currency manipulation schemes[65]. Only schemes which adopt a wide band of exchange rates for export earnings have had any success in deflecting American countervailing duties. One such scheme was devised by the Uruguayan government. It assigned different exchange rates to the sale abroad of different commodities according to their local manufactured content. The higher the domestic value added the better the exchange rate. American trade officials were unable to satisfy the courts that a subsidy existed (or if it existed how much it was) because they were unable to point to the "real" exchange rate[66].

(ii) offsetting import protection. Most New Zealand manufactures have an import input of some kind. High tariffs and import licensing inevitably make such manufactures less competitive when exported. It is not unnatural, therefore, that exporters should seek some form of compensation for the cost of import protection. Existing drawback provisions in the *Customs Act* 1966[67] go some way towards fulfilling this need. They do not, however, remit the full duty and they may only be claimed in respect of goods directly incorporated in a particular product. (These may be either imported parts or local parts which are interchangeable with them.) Protection costs arising further back in the chain of production are not compensated for nor are these associated with import licensing. There have been recent proposals to embody these costs in the drawback system. This would be administratively difficult but not impossible. The gain to exporters would not offset the loss of the present P.B.I.'s. Duties on non Australian goods[68] would probably have to be increased thereby driving up domestic costs generally. The Illustrative List annexed to the Subsidies Code impliedly sanctions drawbacks provided they do not exceed the duty charged and are confined to imported goods "which are physically incorporated in the export product". Packaging, fuel and costs associated with imported plant are excluded[69]. (The list makes some allowance for substituting domestic products for the imports on which drawback is paid providing that the substituted products are equal to and have "the same quality and characteristics, as" the imported goods. In such cases import and export should occur within a reasonable time of each other, normally two years.)

Attempts to compensate for import licensing would be forbidden as the costs

associated with it are not "import charges" as that term is used in the Illustrative List. The List does not, however, require that the exporting firm itself incorporate the imports into the product. The E.E.C. Anti Dumping Regulation echoes the drawback provision of the Subsidies Code. Australian and American law are silent on the subject.

A somewhat more sophisticated approach to the problem of import protection is to be found in the submissions of the Manufacturers Federation[70] to the inter-departmental committee on export assistance. The proposal falls into two parts. The first would reward import substitution by granting a tax credit based on the domestic value added to manufactured goods (to be determined according to their banding in the existing Export Incentive Schedule). Thus far the proposal confers an equal advantage on both exports and import substitution and is therefore open to the same objection as other forms of across the board assistance (and may be no more successful in warding off countervailing action). The second part of the scheme is more interesting (and more vulnerable to retaliation). This introduces a "deflator" which reduces the tax credit according to the amount of import protection the goods receive. Where the protection is by tariff then the domestic content is deflated by that amount. If protection is by import licensing then the tender premiums are used instead. In other cases imported and local price comparisons are made by consultation with the industry in question. At this point the scheme becomes more than a little hazy.

Exports, it is said, receive no protection therefore should be zero rated on the deflator. Whether this be true or not (and it can only really be true of an industry which exports the whole of its output) the zero rating means that our trading partners will simply regard the scheme as a thinly disguised variant of the existing E.P.T.I. Their suspicion can only be heightened by the suggestion that industries which do not currently engage in international trade should have a 100% deflator applied to their products. The scheme would be more defensible against countervailing action if it made no assumptions about the protection enjoyed by exporters and deflator was applied to all goods whatever their destination. There would then be little incentive to export.

(iii) subsidised finance and insurance. One form of discrimination in favour of exports, which is almost universal, is the provision by public agencies of finance and insurance at rates, or in amounts, or for periods (or on goods) for which it would not otherwise be available. The very ubiquity of these practices may explain why the Subsidies Code seems to take a relatively benign attitude towards them. Only when such services are offered below cost do they find their way on to the Illustrative List. Cost in the case of export finance is defined as what the lending agency[70]* pays for the funds or what it would have to pay for funds of the same maturity in the same currency in international money markets[71]. The fact that the funds are offered at less than domestic market rates is not *per se* objectionable[72]. Nor does it matter that the loans are offered in quantities or for periods for which they are not normally obtainable. (A suspensory loan, however, would be treated as a grant and would not be permitted.) Even where export credits are offered below the cost they may be permitted where (i) they offer no material advantage in the field of export credit terms i.e. they are not lower than the rates of (subsidised or unsubsidised) interest available to producers in the country of destination or (ii) they conform to an international undertaking on

trade finance such as the O.E.C.D. arrangement on Export Credits. (New Zealand's domestic interest rates are currently somewhat higher than those stipulated by the O.E.C.D.).

Although the relative mildness of the Subsidies Code is echoed in the relevant E.E.C. regulation[73] American law on the subject of export finance is far more uncompromising. Any loan at interest rates lower than the market rate in the country of origin is apt to be treated as a subsidy[74]. Loans which are available only to preferred categories of producers (e.g. those in specified regions or belonging to designated manufacturing sectors) are likewise countervailable[75].

The Australian Act is equivocal on the matter of export finance. On the face of it cheap loans would appear to come within the category of "financial assistance" referred to in section 10 (1) (remembering that the subsection embraces indirect as well as direct assistance). As against this the assistance must be paid or granted on goods that have been exported to Australia which suggests the financing of a particular export contract rather than general credits made available to exporters unrelated to any particular goods. Certainly, this is the sense in which the Australian Customs appear to have been interpreting the statute[76] and would mean that loans to finance an exporter's general expansion or to acquire or replace plant or equipment could not be taken into account when assessing countervailing duties.

(iv) promotional aid. There have been proposals to increase the existing Export Marketing Development Taxation Incentive from 150% to 200% and to broaden the definition of qualifying expenditure so that it includes research and development costs of new products with "export potential" (a term whose studied imprecision is hardly likely to recommend itself to the Inland Revenue). In so far as promotional aid is not linked to individual export contracts then it too may escape Australian retribution (see (iii) above). The Subsidies Code does not mention promotional assistance by name but outlaws:

> "The allowance of special deductions directly related to exports or export performance, over and above those granted in respect of production for domestic consumption, in the calculation of the base on which direct taxes are charged".

(v) transport and energy subsidies. New Zealand does not at present subsidise either internal or external freight charges on exported goods. Nor does it allow exporters access to cheap energy not available to other producers. The imminent loss of the P.B.I.'s has led to a sudden interest in such subsidies. Both are covered in the Illustrative List (by implication if not by name[77]). Paragraph 3 of Article VI of the GATT allows countervailing duties to be levied only on subsidies "on the *transportation of a particular product*". A similar qualification would almost certainly be read into section 10 (1) of the *Customs Tariff (Anti Dumping) Act*. The Australian Customs interpret this subsection as applying to both state and private subsidies on freight[78]. Under section 12 of the Act the existence of an *external* freight subsidy is fixed by reference to the "normal freight payable for such goods on the air or shipping route in question". The normal freight is to be constructed from the ruling rates for the carriage of like goods at the time of exportation. This the Australian Customs does by

inquiring whether the allegedly subsidised rate was freely available to other shippers on the same terms and conditions. There is no averaging of trans Tasman freight rates nor any inquiry as to whether the rate in question is below cost[79]. The Act contains no statutory aids for ascertaining the extent and amount of an *internal* transport subsidy.

*(iv) **joint ventures with state agencies.*** It is not unknown for governments to aid their exporters by engaging in joint production or marketing ventures with them either directly or through state controlled or funded agencies. In such cases the profits taken may bear no relation to the public funds invested. Does this amount to a subsidy? Nothing in the Subsidies Code compels such a conclusion. The Americans judge government equity investment in a company according to the soundness of the investment[80]. If the government investment was reasonably sound at the time it was made[81] it is not regarded as a subsidy. Presumably they would treat joint ventures in the same way. How the Australians will treat them remains a matter for conjecture.

*(vii) **remission of indirect taxes.*** Most countries either exempt goods destined for export from indirect taxes or remit such taxes once the goods are exported. From a purely legal point of view these afford the most promising means of avoiding countervailing duties. Article VI of GATT itself absolutely prohibits the imposition of duties in such cases. Even the Americans, quicker than most to sniff a subsidy, accept that refunds of internal commodity taxes do not attract countervailing duties[81]. The tax remitted must be levied on the goods themselves rather than on general turnover[82]. Nor can the remission exceed the tax paid or due[83]. (The same proviso has been made by the Commission of the European Communities[84]).

There is no guarantee, however, than an Australian Minister of Customs newly released from the need to have regard to Australia's international obligations will feel any compulsion to heed the admonition in Article VI on indirect taxes. The distinction made in GATT between the remission of direct and indirect taxation is conceptually difficult to justify. By the laws of logic either both are subsidies or neither is. It is to be hoped that the Australian Customs will prefer comity to logic.

The present sales tax base in New Zealand is too narrow and the rate too low to afford much relief to exporters through its remission. Even if sales tax was increased or a value added tax imposed to replace it exporters may feel they have gained nothing since they do not currently pay such taxes anyway. Only if increases in indirect taxes were coupled with a general cut in company or other direct taxes would exporters be compensated for the loss of the P.B.I.'s.

FOOTNOTES

1 Unreported No. G 196 of 1982, Federal Court, Sydney, 15 February 1983, Coram Lockhart J.

2 Article 16(6) of CERTA obliges New Zealand in a subsidisation inquiry to give the Australians access to relevant nonconfidential information to the fullest extent possible and, subject to the Subsidies Code, to facilitate

investigations within its territory. There is no corresponding obligation in the case of an anti dumping inquiry.

3 *Inland Revenue Department Act 1974*, section 13. See also *Statistics Act 1975*, section 21, *Trade and Industry Act 1956*, section 13. These sections apply to all information *held*, not merely that supplied to the department in question. "Confidential" as that term is used in Article 16 (6) of CERTA may apply only to the latter.

4 n. 1, supra.

5 See also section 10 (7A).

6 Section 5 (4A).

7 It may be possible for some of this information to be extracted under the Australian *Freedom of Information Act 1982* although much of it would be exempt from disclosure as internal working papers (Ibid section 36) or because its disclosure would amount to a breach of confidence (Ibid section 45) or unreasonably affect the competitive position of those who supplied it (Ibid section 43).

8 6189 or 1982, Federal Court Sydney, 25 February 1983, Coram Shepperd J.

9 *Lithium Oxide From U.S.A. and U.S.S.R.* O.J. 1980, C.23.

10 *Re Edible Gelatine (Sweden)* [1981] 1 C.M.L.R. 490, cf. *Re Spanish Welded Link Chain* [1981] 1 C.M.L.R. 493.

11 This is the attitude taken by the United States Commerce Commission 19 C.F.R. 353, 55 (1980),

12 Section 4 (2).

12* Ibid, section 4 (3).

13 The American Legislation defines it as "harm which is not inconsequential, immaterial, or unimportant". It also sets out detailed criteria by which it is to be assessed. See 19 U.S.C. 6, 1677 (7) c.

13* In Canada material injury has been found even where the domestic industry has increased its sales during the dumping period. A static or declining share of an increasing market was held to be evidence of material injury *Re Billiard Tables* (1980) 2 C.E.R. 38.

14 Cf. *Re 12 Gauge Shotshells* (1979) 1 C.E.R. 273. Although there is now an extensive body of Australian case law on market definition under their trade practices legislation most of it is of little assistance for this purpose. Arcane concepts such as "symmetry", "arbitrage" or "production flexibility" are

concerned more with *potential* than with *actual* product substitution. Only the latter is relevant in an anti dumping inquiry. See generally on this subject G. de Q. Walker *Product Market Definition in Competition Law* (1980) 11 Fed. L. Rev. 386.

15 *Re Asbestos Cement Pressure Pipe* (1979) 1 C.E.R. 42.

16 *Re Calcium and Zinc Stearates* (1980) 2 C.E.R. 96.

17 Anti Dumping Code, Article 8 (2), Subsidies Code, Article 4 (3).

18 See also CERTA, Articles 15 (8), 16 (8).

19 *Re Hydro Electric Generators* (1980) 2 C.E.R. 44.

20 Onus of proof, however useful a concept in adversary proceedings, is apt to be misleading when applied in an inquisitorial context.

21 *Re Stainless Steel Cast Pipe Fittings* (1979) 1 C.E.R. 281, *Cf. Lumber Co.* v. *United States* (1968) 290 F. Supp. 585.

22 Philip Slayton *The Anti Dumping Tribunal*, Study Paper, Law Reform Commission of Canada, 1979, P. 24.

23 See *Re Methyl Ethyl Ketone Peroxide* (1980) 2 C.E.R. 161.

24 New Zealand manufacturers have in the past cited high internal costs as a justification for export assistance. This can be a double edged argument.

25 *Re Asbestos Cement Pressure Pipe* (1979) 1 C.E.R. 42.

26 "Anti Dumping Actions and the GATT System", London: Trade Policy Research Centre, 1977, pp. 26 ff.

27 *Re Ceramic Tiles* (1980) 2 C.E.R. 134.

28 *Re Compressed Air Sprayers* (1979) 1 C.E.R. 254.

29 Cf. *Armstrong Bros. Tool Co.* v. *United States* 483 F. Supp. 312 (1980).

30 *Trade Practices Law*, Vol. 1, p. 93, Sydney Law Book Co. 1978.

31 Under the Canadian *Anti Dumping Act* (R.S.C. 1970 Chap A-17) there must be a finding that dumping "has caused, is causing or is likely to cause, material inuury to the production in Canada of like goods, or is materially regarding the establishment of the production in Canada of like goods".

32 See *Administrative Decisions, (Judicial Review) Act* 1977, (Cwth), s. 3 (4).

33 The concept of a one firm industry is accepted in E.E.C. anti dumping law.

See *Lithium Hydroxide from U.S.A. and U.S.S.R.* O.J. 1980, L23.

34 Indeed it has been rejected in Canada. See *McCulloch* v. *Anti Dumping Tribunal* [1978] 1 F.C. 222.

35 E.E.C. law expressly excludes from the domestic industry all producers who are related to the exporters of dumped or subsidised products. E.E.C. Council Regulation No. 3017/79, article 4 (5) O.J., 1979, L 339/6.

35* *Pasco Terminals Inc.* v. *United States* (1979) 477 F. Supp. 201.

36 Slayton (Ibid n. 22 supra) at p. 28.

37 Certainly the concept of a distinct geographic market is well known in Australian competition law. See *Pioneer Concrete* v. *Mildura Quarries* [1975-76] A.T.P.R. 15,901; *Allied Mills* v. *Peerless Flour* [1975-76] A.T. P.R. 16, 112.

38 As required under American law for example. See 19 U.S.C. 1677 (4) (c) and *Taiwanese Steel Plate* Case I.T.C. No. 970 (1979), *Belgian Sugar* Case I.T.C. No. 972 (1979), *Ellis K. Orlomtz Co.* v. *United States* (1961) 200 F. Supp 302

39 Supra n. 14.

40 It may be argued that injury is self inflicted (supra p.7) since the complainant manufacturers could use the dumped parts. This would not be so where there is already in existence a contractual obligation to use other parts and where the dumped parts are not technically compatible with a particular manufacturers product.

40* American courts will sometimes entertain an argument based on reciprocity. See *United States* v. *Hammond Lead Products Inc.* (1971) 440 F. 2nd 1024 at 1031. The approach is not without its critics however. See *A.S.G. Industries Inc.* v. *United States* (1979) 467 F. Supp. 1200 at 1277.

41 The *Customs Act* 1966 allows the Minister to impose duties if in his opinion the statutory criteria have been met. The Act also contains a protective clause (section 129 (12)) which provides that "every determination of the Minister made under the authority of this section shall be final. Too much should not be made of this. The courts have never let finality clauses stand in their way (*R.* v. *Smith* (1970) 1 Mod 44, *R.* v. *Medical Appeal Tribunal exp. Gilmore* 1 Q.B. 574, *Techiernin* v. *Rostrom* [1972] 1 Q.B. 182) and they are nowadays much less cowed by subjectively expressed discretions than once they were. *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough* [1977] A.C. 1014

42 *Customs Act 1966* section 129 (4) (c).

43 Ibid section 129 (2).

45 Ibid section 129 (11).

46 *Customs Tariff (Anti Dumping) Amendment (Countervaling Duties)* 1982.

47 *Customs Tariff (Anti Dumping) Act 1975* s. 10 (2B), (2D).

48 Ibid s. 10 (2C).

49 The specified date is that on which a notice is published in the Commonwealth *Gazette* applying section 10 to the goods in question.

50 *Customs Tariff (Anti Dumping) Act* 1975 s. 10 (5).

51 *Customs Act* 1966 (N.Z.) s. 128.

52 *Customs Tariff (Anti Dumping) Act* (Cwth.) 1975, section 6.

53 *Customs Tariff Act* (Cwth.) 1966-1973.

54 *Export Assistance Review: Discussion of Proposals*, May 1983. The participating departments were Treasury, Trade and Industry, Agriculture and Fisheries and the Prime Minister's Department.

55 Submissions of the Export Institute of New Zealand to the Interdepartmental Committee on Export Assistance - 13 December 1982.

56 The U.S. Department of Commerce ruled in the *Delta Ear Tags Case* (Fed. Reg. 8 January 1981), that the Increased Export Taxation Incentive was a "grant, bounty or subsidy," within the meaning of section 303 of their Tariff Act 1980 (19 U.S.C. 1303) Cf. *Re Women's Shoe Subsidies (Brazil)* [1982] 2 C.M.L.R. 416.

57 *Re Steel Subsidies Belgium* [1982] 3 C.M.L.R. 550.

57* *Radial Tires from Canada* 1975 T.D. 73 - 10, 6 Cust. Bull 24.

57° *Downs* v. *United States* (1901) 187 U.S. 496, at 512 *Nicholas & Co.* v. *United States* (1919) 249 U.S. 34 at 39.

58 *United States* v. *Zenith Radio Corporation* (1977) 64 C.C.P.A. 130 at 139 (Customs Court of Appeal).

59 It is perhaps as well that later American judges have quietly ignored the suggestion made by one member of the U.S Supreme Court in the *Downs* case that other countries' tariff barriers served as a stimulus to exports. *Downs* v. *United States* (1901) 187 U.S. 496 at 512.

60 *A.S.G. Industries Inc.* v. *United States* (No. 1) (197) 467 F. Supp 1187.

61 *A.S.G. Industries Inc.* v. *United States* (No. 2) (1979) 467 F. Supp 1195.

61* *Re Steel Subsidies (Belgium)* [1982] 3 C.M.L. R. 550.

62 *A.S.G. Industries Inc.* v. *United States* (No. 3) (1979) 467 F. Supp. 1200.

63 *United States* v. *Watson* (1979) 603 F. 2nd 192 *A.S.G. Industries Inc.* v. *United States* (No. 1) (1979) 610 F. 2nd 770.

64 The E.E.C. Anti Dumping Regulations lay down a sophisticated procedure for determining the value of indirect subsidies. See Article 3 (4) O.J. 1979 L. 339/5.

64* *Re Steel Subsidies* (U.K.) [1982] 3C, J.L.R. 587 at 597.

64° Idem.

64• *A.S.G. Industries Inc.* v. *United States* (1979) 467 F. Supp. 1200 at 1238.

64- Idem.

65 *Woolworth Co.* v. *U.S.* (1940) 115 F. 2nd 348; *Mueller & Co.* v. *United States* (1940) 115 F. 2nd 854; *Robert E. Miller* v. *United States* (1946) 34 C.C.P.A. 101.

66 *Energetic Worsted Corp.* v. *United States* (1963) 224 F. Supp. 606.

67 ss. 183 - 185.

68 Under article 4 of CERTA tariffs on Australian goods cannot be increased.

69 The last two are not presently available under the drawback system *Customs Act* 1966 s. 183 (1) (c).

70 *New Zealand Manufacturers Federation Submission to the Export Incentive Review.*

70* Defined in the Illustrative List as governments or special institutions controlled by and/or acting under the authority of governments.

71 Export guarantees and cost, credit and exchange insurance should not be offered at premium rates which are manifestly inadequate to cover the long term operating costs and losses of such programmes.

72 Under para (4) of the Illustrative List governments may not pick up any part of the *costs* of *obtaining* export credits. This refers to transaction charges not subsidised interest rates. It is conceded that "cost" to an accountant or economist includes interest but elsewhere in para (4) where interest rates are clearly meant they are referred to as such and are not subsumed into any wider category such as "costs".

73 E.E.C. Council Regulation 30 17/79. O.J. 1979, L. 339/13.

74 *A.S.G. Industries Inc.* v. *United States* (1980) 495 F. Supp. 904; *Radial Tires From Canada* (1973) T.D. 73 - 10 6 Cust. Bull 24; *Consumer Electronics from Japan* (1974) 39 Fed. Reg. 33207; *Re United Kingdom Steel Subsidies* [1982] 3 C.M.L.R. 587.

75 *Re United Kingdom Steel Subsidies* op. cit.

76 *Review of Australia's Anti Dumping and Countervailing Legislation,* Department of Industry and Commerce, Canberra, June 1983, paras 14.3, 14.4.

77 Para (c) forbids freight subsidies. Para (d) proscribes "The delivery by governments . . . or their agencies of . . . domestic services for use in the production of exported goods on terms or conditions more favourable than for the delivery of like and directly competitive . . . services for use in the production of goods for domestic consumption.

78 *Review of Australia's Anti Dumping and Countervailing Legislation,* para 11.7.

79 It has been suggested that the *Customs Tariff (Anti Dumping) Act* be amended so that "normal freight" is defined as the nett rate offered by the conference lines Idem.

80 *Re Steel Subsidies (U.K.)* [1982] 3 C.M.C.R. 587 at 591.

81 *Zenith Radio Corp.* v. *United States* (1978) 437 U.S. 443 at 445.

82 Idem.

83 See cases noted at n. 58 supra. See also *United States* v. *Hill Bros. Co.* (1901) 107 F. 107.

84 *Re Stainless Steel Bar Subsidies (Brazil)* [1981] 1 C.M.L.R. 526. See also paras (g) and (h) of the *Illustrative List.*