Trade (Anti-dumping and Countervailing Duties) Amendment Bill

143—1

Report of the Commerce Committee

Contents

Trade (Anti-dumping and Countervailing Duties) Amendment Bill

Recommendation

The Commerce Committee has examined the Trade (Anti-dumping and Countervailing Duties) Amendment Bill. The votes were tied, and we were unable to agree on whether to recommend that the bill be passed.

Introduction

The Trade (Anti-dumping and Countervailing Duties) Amendment Bill is a Government bill that seeks to amend the Dumping and Countervailing Duties Act 1988 to introduce a bounded public interest test into New Zealand's anti-dumping and countervailing duties regime. The proposed public interest test is "bounded" because it would consider only the cost of anti-dumping and countervailing duties on downstream industries, and consumers.

The purpose of the public interest test is to assess whether the cost to New Zealand's downstream industries and consumers of imposing the duty is likely to materially outweigh the benefit to the New Zealand industry of imposing the duty. Currently, New Zealand's trade remedies regime does not provide for considering the costs of imposing duties.

If a convincing case were made that a domestic industry is suffering material injury because of dumping or subsidisation, the Ministry of Business, Innovation and Employment (MBIE) would initiate an investigation.

The proposed public interest test (which would be an additional step in an investigation) would include eight matters which must be addressed in the investigation, allowing for consideration of public interest elements such as competition and consumer benefits. At the conclusion of the investigation, the Minister would be responsible for determining whether imposing duties is in the public interest.

The bill also proposes changes which would:

- provide for the Minister to suspend or terminate existing duties, and defer or not impose new duties where users of the goods have been affected by a natural disaster
- clarify the existing review provisions regarding reviews on anti-dumping or countervailing duties that are already in place.

This report covers the key issues that we discussed during our consideration of the bill.

Labour, Green, and New Zealand First Parties oppose the public interest test. Their views are set out below.

Background about New Zealand's trade remedies regime

The purpose of New Zealand's anti-dumping and countervailing duties regime is to protect New Zealand's producers from unfair trading practices. Imports may be dumped (exported by a country at a price lower than the price that product is sold for on that country's domestic market), or may benefit from a subsidy provided by a foreign government. The trade remedies regime enables New Zealand industries to seek assistance if they believe that they are suffering material injury as result of these unfairly priced imports.

Amendments considered

We considered recommending a number of amendments to the bill. The amendments primarily aimed to align the terminology in the bill with the World Trade Organisation (WTO) Agreements.[1] However, they were also proposed to broaden the scope of one of the factors in the investigation, and to clarify the date from which the transitional provisions of the bill would apply. Should the bill be passed, National Party members of the committee would support these amendments.

Opposition members of the committee (Labour Party, Green Party and New Zealand First members) have several concerns about the criteria and methodology of the public interest test. Opposition members are not satisfied that these concerns would be addressed by the proposed amendments, and remain unconvinced that the introduction of a public interest test to New Zealand's anti-dumping and countervailing duties regime is necessary. For these reasons, Opposition members of the committee do not support the bill.

Introduction of a public interest test

Views of National Party members

National Party members of the committee support the bill's objective to achieve a net public benefit through the introduction of a public interest test. We believe that such a test would be fairer than the current regime. It would strengthen the regime by allowing the Minister to consider the wider effects that might result from the imposition of a duty. National Party members of the committee consider that a public interest test enables the effects of a duty to be assessed while still providing an effective trade remedies regime. It also fulfils the stated policy objective of increasing competition and enhancing consumer welfare.

We note that the WTO Agreements allow individual jurisdictions to implement a public interest test within their trade remedies regimes.

Views of Opposition members

The Labour, Green, and New Zealand First Parties oppose the further passage of this legislation, which weakens important protections for New Zealand businesses that suffer from unfair international competition. A robust system of anti-dumping and countervailing duties helps to ensure there is a level playing field for New Zealand business in cases where foreign producers dump or subsidise products at below their domestic prices or benefit from subsidies, and acts as a deterrent to dumping practices.

---

1 The WTO Agreements include the agreement commonly referred to as the "Anti-Dumping Agreement", and the "Agreement on Subsidies and Countervailing Measures", *Anti-dumping, subsidies, safeguards, contingencies, etc.*

This bill would weaken protection for New Zealand producers by introducing a new "consumer interest" criterion that must be considered before any countervailing duty is applied. By removing robust protection against dumping and subsidies, this legislation will bring a cost to New Zealand businesses, especially manufacturing and export-oriented businesses, and introduce uncertainty about whether the Government will impose anti-dumping and countervailing duties. We have particular concerns about the potential impact of this bill on small business.

Officials supporting the passage of the bill have acknowledged that the test that will be applied is intrinsically very subjective, and that this subjectivity will impose a cost on business, as investment decisions will have to factor an additional level of uncertainty into their risk and return calculations. We are not convinced that the test meets an adequate standard of accuracy, rigour, and consistency that is essential to ensure fair processes and outcomes.

We share the concern of submitters who drew attention to the possibility of proposed changes undermining our domestic producers in favour of a shift to Australia. They reminded us that Australia has more thoroughly considered the costs and benefits of imposing a public interest test and twice resoundingly rejected it.

Submitters were overwhelmingly opposed to this bill, warning that it would be likely to tilt the playing field in favour of dumped or subsidised imports rather than supporting local producers and jobs. They also raised concerns over how the application of a test may work in cases such as seasonal products.

The New Zealand Government should support domestic producers, especially since many of them face intense international competition from companies that are able to avoid taxes and gain other advantages through their international business structures.

As the years have passed, this Government has failed to make progress towards its goal of achieving its own target of growing exports as a percentage of GDP to 40 percent. By its own admission, the Government is now further from that target than it was when it introduced it, and achieving it is now regarded as an "aspirational" goal. We are concerned that failing to adequately support the interests of domestic producers is likely to further undermine New Zealand's ability to "pay its way in the world".

This bill was drafted in direct response to concerns about the cost of building materials in New Zealand. However, the case for change in the way Parliament addresses these issues has not been made. A pragmatic parliamentary response to the Canterbury earthquakes permitted subsidised goods into New Zealand for the purposes of ensuring a more affordable rebuild. In the wake of widespread damage, and facing a rebuild of enormous scale, Parliament decided to waive ordinary restrictions on dumping and the import of subsidised goods into New Zealand. This demonstrated that, convinced of an absence of material harm to domestic suppliers (due in this case to a sudden and widespread growth in demand that could not in its entirety be met from domestic supply), when circumstances require, Parliament in New Zealand can and does appropriately scrutinise and differ from normal practice in respect of our WTO obligations.

Certainty, transparency, and timeliness of the process

Views of Opposition members

Opposition members of the committee share the widespread concern of submitters that the bill would create uncertainty in the trade remedies regime. We concur that increased uncertainty would have negative consequences, disadvantaging the domestic industry.

We share the view of some submitters that the timeline for an anti-dumping or countervailing duties investigation is already too long. The public interest test as proposed by the bill would add 90 days to the timeframe. We consider that an even more time-consuming process is likely to deter New Zealand manufacturers from pursuing the imposition of duties, thus weakening the deterrent effect of the regime.

We are concerned that a lack of clarity about access to remedies and an uncertain regulatory system would negatively affect investment in New Zealand. We are also aware of views that this may contribute to more local manufacturing ultimately moving offshore, and that the changes in the bill would pose a disincentive to mobile capital to invest in New Zealand manufacturing companies, as foreign investors choose to invest in countries where protective measures are more dependable, rather than in New Zealand.

Additionally, we wish to avoid any unintended consequences from the introduction of a public interest test. For example, if New Zealand is seen to be weakening its anti-dumping and countervailing duties mechanism, there may be an increased risk that domestic industries and producers could be subjected to predatory pricing or predatory behaviour in trading practices.

Views of National Party members

National Party members of the committee note that even with the additional 90 days provided for under the bill, the timeline for the investigation process would be consistent with that in other jurisdictions, and faster than in Canada and the European Union. We consider that the proposed timeframe for investigations is acceptable. We are satisfied that the Minister would be able to impose provisional measures where there is a likelihood that material injury will occur during the investigation process. Therefore, businesses would still be able to access remedies in a timely manner.

We concede that the public interest test may result in some reduced certainty initially for businesses seeking remedies, but we are confident that this will be addressed once MBIE completes some investigations and publishes the results of these online. We consider that any costs associated with the initial increase in uncertainty would be minor. We understand that MBIE would be required to report after 60 days on the findings. Its findings would eventually inform the recommendation about whether or not to impose duties. We support this requirement and believe that it would facilitate a transparent process.

With regards to the impact on investment, National Party members believe that the trade remedies regime is not a factor substantially influencing firms' decisions about whether to invest in New Zealand or overseas. Factors such as workforce capability, input costs, market size, and land cost and availability are likely to be more influential. We also note that one of the factors to be considered in the assessment is "the effect of the duties on employment levels". This is a crucial consideration, and we hope the inclusion of this factor would alleviate some of the concerns about the effects that the bill could have on employment in specific industries.

We do not deem that the changes that the bill proposes would make New Zealand a more attractive target for, and therefore more susceptible to, dumping.

Methodology and defensibility of the public interest test

Part 4 of the bill as introduced contains the criteria that the chief executive must investigate in the public interest test. The assessment of whether imposing an anti-dumping or countervailing duty is in the public interest consists of eight factors. The public interest test in the bill is subjective in nature. We were advised that MBIE would make assessments and recommendations on non-numerical values across multiple (and sometimes competing) factors.

The committee examined at length how the public interest test would work in practice.

Views of Opposition members

Opposition members of the committee consider that there is a lack of detail and specificity about how each factor would be considered, and are unconvinced of the public interest test's workability. We believe that the suggested criteria are too vague. Notably, the factors to be considered are not ranked in any order, so it would be difficult to verify that they had been considered equally. Without any weighting assigned to the criteria, their prioritisation, or any prescriptive formula to be followed when making an evaluation, the process lacks transparency. There is an absence of examples about how the tests are conducted. In our view, it may make it difficult for affected businesses to know what information to provide when forming an application, or during the course of an investigation. We are particularly concerned about the burden this may place on small businesses with limited time and resources.

We also questioned the legal defensibility of a decision arising from a public interest test which does not take a quantitative approach. We understand that factors judged to be relevant or irrelevant may eventually set precedent, but consider that it would be difficult for businesses to form a legal case as the decision-making process in the test is unclear. This increases potential legal uncertainty and could contribute to a reduction in the deterrent effect of the anti-dumping and countervailing duties regime.

Views of National Party members

We are aware that a number of options were considered regarding the development of a public interest test for New Zealand's anti-dumping and countervailing duties regime. One of these options was a total welfare analysis, which proposed an analysis of both economic and non-monetary impacts of imposing duties. It is likely to have involved complete cost-benefit quantification. We see that this option was subsequently rejected because it would result in duties almost never being imposed because of a net loss to the economy. Additionally, because of the large number of factors to take into account, there would be less regulatory certainty, and high administration and compliance costs as a result of this option.

National Party members conclude that the bounded public interest test proposed in the bill achieves the appropriate balance between continuing to provide assurance to domestic producers that they can seek relief from dumped and subsidised injurious imports, and taking into account the wider public interest. We understand that there was concern about an objective test on the basis that duties would be imposed less often.

National Party members are pleased that there is a presumption in favour of imposing duties in the bill as introduced. This is reflected in the test by the requirement for duties to be imposed unless the harm of imposing the duties to downstream industries and consumers materially outweighs the benefits to domestic producers. We consider this to be a reasonably high threshold. We also emphasise the importance of including a materiality threshold in a subjective test. The materiality threshold is important because:

- it recognises that assessments should be made in a timely manner
- a strict threshold for imposing or not imposing duties is unlikely to be achievable in a timely manner due to the large amount of information required
- there should always be a presumption in favour of duties
- it helps to mitigate uncertainty
- MBIE will be able to refer to existing WTO jurisprudence for guidance.

If the bill was passed, we would support a subjective test where weightings are based on the nature of specific industries and the extent to which the duties affect each individual factor.

Negotiating position and ministerial discretion

The committee received advice from the Ministry of Foreign Affairs and Trade (MFAT) about its position on the proposal to include countervailing duties in the public interest test. We requested information about whether it would tarnish New Zealand's reputation as being firm against subsidies, and whether it would erode our negotiating position.

In MFAT's view, New Zealand's reputation would not be harmed by the proposed amendments to the domestic trade remedies regime. MFAT informed us that New Zealand has no trade-distorting subsidies and takes initiatives in reforming agricultural and environmental subsidies, which is likely to be the basis for its reputation. MFAT is of the opinion that other countries would not regard the incorporation of a public interest test as being damaging or contrary to the stance that New Zealand takes on subsidisation.

MFAT also told the committee that it does not think the incorporation of a public interest test in New Zealand's trade remedies legislation would affect negotiating positions in agreements that it is involved in.

MFAT considers that the fact that New Zealand has an anti-dumping regime sends a signal that it is worried about trade distortion, and that New Zealand is consistent in the application of its views.

Opposition members of the committee consider that the message that New Zealand is sending through the introduction of a public interest test is contradictory to its firm stance against subsidies in international trade. Opposition members believe that New Zealand's position in international negotiations may be compromised if changes to its legislation infer that dumping below domestic prices is sometimes acceptable when it confers benefits.

Opposition members of the committee also remain concerned about the discretion the bill gives to the Minister with regards to placing barriers on international trading partners. These members think that the parameters and application of the public interest test should be clearer. Opposition members consider that there need to be safeguards to protect Ministers from pressure over decisions about imposing duties, and note that the subjectivity of the criteria in the public interest test would impinge upon the Minister's ability to negotiate.

Appendix

Committee procedure

The Trade (Anti-dumping and Countervailing Duties) Amendment Bill was referred to the committee on 28 June 2016. The closing date for submissions was 11 August 2016. We received and considered 18 submissions from interested groups and individuals. We heard oral evidence from 8 submitters. We received advice from the Ministry of Business, Innovation and Employment and from the Ministry of Foreign Affairs and Trade.

Evidence and advice received on the bill is available on the Parliament website at www.parliament.nz.

Committee members

Melissa Lee (Chairperson)
Kanwaljit Singh Bakshi
Ria Bond
Dr David Clark
Hon David Cunliffe
Clare Curran
Gareth Hughes
Brett Hudson
Alfred Ngaro
Simon O'Connor

Mojo Mathers and Barry Coates replaced Gareth Hughes for some consideration of this item of business.