Submission to MBIE's "Applying the Public Interest Test" 22 August 2019

Consultation Note

New Zealand Steel Limited

13 September 2019

Introductory Comments

1 This submission addresses MBIE's 22 August 2019 "Applying the Public Interest Test" Consultation Note. We refer to that MBIE document as the Note. NZS very much appreciates the opportunity to contribute in this engagement on the public interest (PI) test.

2 We set out some key observations in the Summary of Submission below. The comments in Part A address Ministry questions 1 and 2 and certain other matters. Part B addresses the PIPES Model, which is objective, empirical work to inform the PI analysis. Part C has some comment on matters outside the scope of the Note's three narrow questions, but we trust that the information there will be useful to the Ministry in its trade remedy work.

3 We would be happy to discuss this submission with the Ministry.

Summary of Submission

4 NZS did not support the introduction of the public interest test at the time the Trade (Anti-Dumping and Countervailing Duties) Amendment Bill (the "Bill") was passed. While our position on the public interest test has not changed, we do not propose to revisit that debate here.

5 Fair trade is an important part of the global and domestic economy and needs to be upheld if New Zealand businesses are to be able to compete on a level playing field against international competitors.

6 It is important that New Zealand businesses can obtain remedies on dumped or subsidised and injurious imports. Unfortunately, the recent trend in New Zealand has been a weakening of our trade remedies regime. In our view, the proposals in the public interest test consultation note would, if implemented, further weaken New Zealand's trade remedies regime.

7 Our primary points are:

7.1 Canada and the EU are the only two other Members that apply a public interest test. When introducing the public interest test the focus was very much on basing our approach with that of Canada and the EU. A number of proposals in the note appear to be departures from the Canadian or EU tests without adequately explaining why New Zealand is now proposing to depart from what any other country in the world does. In our view, New Zealand should be aiming for closer harmonisation with our key trading partners, not less.

7.2 Any breakout of considerations in 10F should have the explicit purpose of ensuring the market adjusts to new, fairly traded economics. Not that markets should adjust to a level of dumped or subsidised economics.

7.3 During the passage of the Bill, MBIE repeatedly advised the select committee and Parliament that the public interest test would involve a subjective assessment. The introduction of a PIPES empirical welfare analysis appears to diverge from what MBIE advised Parliament would happen following the introduction of the public interest test. It would therefore be inappropriate to introduce it. In any event however, we discern significant difficulties and issues with PIPES.

7.4 MBIE has advised that consumer welfare empirical analysis will always drive to duty imposition failing to be in the public interest. The introduction of PIPES would therefore substantively undermine New Zealand's trade remedies regime.

Part A: Act Considerations

Context – similarity to PI tests in the EU and Canada

8 Three WTO Members - the EU, Canada and New Zealand - have elaborated PI tests in their trade remedies regime. Such PI tests occur nowhere else. The EU (where PI tests are mandatory in all AD and CVD cases) is the most experienced. Canada has discretion on whether to conduct the test

and their records appear to indicate about 17 Canadian PI occurrences in the period 1990 to 2015.[1] The Ministry has thus, and we agree, turned to examination of the EU and Canada tests, and the 2017 Bill containing the PI clauses was underpinned by the following representations to Parliament:

8.1 "The prescribed factors for consideration in the Bill are similar to the factors that Canada has prescribed in its regulation." [2]

8.2 "We developed the list of factors to be considered in the public interest test as part of its two-step public discussion and consultation process, and the public interest tests that Canada and the European Union have in place." [3]

8.3 "We modelled the public interest test on the Canadian version, making necessary modifications to recognise the differences in the New Zealand market." [4]

8.4 "The bill fixes this problem by introducing a public interest test, similar to those in the EU and Canada." [5]

9 Given the above, NZS' views are also underpinned by certain perspectives arising from examination of the EU and Canada PI test reports and their legislative terms. We anticipate that aside from the unique New Zealand intention to not examine upstream interests[6] (which was a matter known by Parliament), that the New Zealand approach and PI test outcomes will be similar to that which occurs in the EU and Canada.

Overarching comment

10 We sense in the breakout of 10F considerations in the Note a Ministry desire to engage in matters which the EU and Canada do not. We don't suggest that this is necessarily a bad thing - indeed this Ministry endeavour may be commended - however as we feel will become clear in the detailed comment on 10F, we think that certain practical issues will arise. We surmise that the EU and Canadian approaches take the more limited form than what appears proposed by MBIE because the EU and Canadian approach reflects what can meaningfully be assessed in a trade remedy PI. That said, set out below is some detailed comment on items 10F(3)(a)-(h) which we trust may assist.

Consideration a) the effect of the duty on the prices of the dumped or subsidised goods;

11 We think it useful to assess this and consideration 10F(3)(b) against the Act[7] purpose.

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[1] https://decisions.citt-tcce.gc.ca/citt-tcce/en/a/s/index.do?cont=Public+Interest

[2] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL. Departmental report to the Commerce Committee. 22 September 2016. Page 8.

[3] Ibid. Page 20.

[4] Ibid.

[5] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL Third Reading. Hon JACQUI DEAN (then Minister of Commerce and Consumer Affairs).

[6] We believe that the Ministry should keep this topic in current view as the Ministry rationale for New Zealand's unique exclusion of upstream considerations in its PI test (such as at page 16 paragraph 8 of Cabinet paper "A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime", and paragraph 46 of the 22 September 2016 Departmental report to the Commerce Committee) was not elaborated to any extent.

We observe that Dixit 2017's view aligns with NZS in this respect. Dixit states: "The exclusion of upstream industries was not discussed in detail throughout the process, so it is not clear why the interests were limited to the domestic producer industry, consumers and downstream industries." This is at Dixit page 41, which in turn is footnoted 86 to Hansard.

[7] As amended in Trade (Anti-dumping and Countervailing Duties) Amendment Act 2017 (2017/21).

11.1 That clause 1A is: "The purpose of this Act is to enable New Zealand to apply anti-dumping and countervailing duties in accordance with its obligations as a party to the WTO Agreement. Anti-dumping and countervailing duties are intended to prevent material injury or the threat of material injury to an industry, or the establishment of an industry being materially retarded, due to dumped or subsidised goods being imported into New Zealand." [8]

12 The EU and Canada elaborate on this matter. Canada (footnotes omitted) puts it thus:

12.1 "33. As intended by Parliament, and in conformity with the applicable WTO agreements, once the Tribunal makes a finding of injury or threat of injury pursuant to section 43 of SIMA, anti-dumping and countervailing duties are imposed in order to remediate the injury caused to the domestic industry by unfair trade. Consequently, the subject goods imported subsequent to a Tribunal finding are expected to compete in the Canadian market at non-dumped and non-subsidized prices, and, as the market adjusts, new prices and/or sources of supply are likely to emerge for all market participants, including downstream users and consumers of the goods subject to duties.

34. Accordingly, in an inquiry under section 45 of SIMA, the Tribunal would normally expect evidence of some negative impact on certain market participants as they adjust to a fairly traded market. These are natural consequences of the imposition of duties and, as such, must be considered as intended consequences of imposing duties and must be differentiated from unintended consequences, such as the following:

- undue reduction of competition in the domestic market, which might lead to unnecessarily high prices;
- unacceptable reduction in choice, quality or quantity of product for consumers;
- significant damage to downstream industries;
- absence of imports from other sources to which the finding or order does not apply;
- inability of the domestic industry to supply all the domestic market, either geographically or seasonally;
- damage to some aspect of society considered to have an overwhelming priority, such as health, safety, education, or public or national security;
- normal values or export prices that, while accurate, may not reflect the economic realities and may force exporters out of the domestic market; and
- price increases larger than necessary to eliminate the injury from dumped or subsidized imports." [9]

13 An example Canadian outcome is:

13.1 "Effect of the Anti-dumping Duty on Downstream Competitiveness (clause 40.1(3)(b)(iii)(A) of the Regulations)

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[8] Section 1A: inserted, on 29 November 2017, by section 6 of the Trade (Anti-dumping and Countervailing Duties) Amendment Act 2017 (2017 No 21).

[9] Canadian International Trade Tribunal Dumping and Subsidizing. Tribunal Opinion and Supporting Reasons. Public Interest Inquiry No. PB-2014-001.

> 140. The Tribunal expects that the readily available supply of weaving wire from non-subject countries and the apparently successful approach to sourcing weaving wire by at least one firm in the industry will mean that downstream users do not experience problems with their supply of products manufactured with weaving wire as a result of the imposition of the anti-dumping duty. Consequently, the Tribunal does not consider that the imposition of the anti-dumping duty in the full amount has significantly impaired or is likely to impair the competitiveness of downstream users of products manufactured with weaving wire." [10]

14 The EU say:

> 14.1 "(545) It is expected that the imposition of countervailing duties will restore fair trade conditions on the Union market, allowing the Union industry to align the prices of OCS to reflect the costs of the various components and the market conditions." [11]

15 The New Zealand PI test will similarly expect the relevant New Zealand segment adjusting to new, fairly traded economics. While both the EU and Canadian PI reports show this outcome, the Canadian reports perhaps make this point more expansively. We raise this important matter because Note consideration a) bullets one to four might incorrectly be read the other way around, and if so the New Zealand PI test will not be similar to the EU and Canada PI test, and not produce similar outcomes in like circumstances.

Consideration b) the effect of the duty on the prices of like goods produced in New Zealand

16 Bullets One and Two: We are uncertain how the Ministry will be able to isolate this. MBIE may wish to post the draft detailed questionnaires to a portal on MBIE's website. We think those may assist in party's assessment of what's intended in bullets one and two.

17 Bullet Four: We are uncertain what this means.

18 Bullet five: We do not think perfect substitutability will present. The term refers to goods which are identical in every way except for price, or alternatively where the utility consumers obtain from one good is the same as another. That is not the case in respect of the goods with which NZS is familiar.

19 As a general point, NZS observe that the matters in bullets one to six will be difficult. We refer to some New Zealand literature consistent with NZS' view. Dixit 2017 refers to the identification of this consideration b) as one which is "Vague and difficult to apply". [12]

Consideration c) the effect of the duty on the choice or availability of like goods

20 Bullets One and Two: We see these as connected, near the same thing. May we suggest that it will require a whole of industry, dynamic, into the future outlook.

21 <below bullet five>: This raises a matter of necessary disclosure which is convenient to address here. The Ministry will be collecting very detailed information (here on price sensitivity, but also in other areas). We note that interested parties must be adequately informed of this information so that they can understand the Ministry views and defend their interests.

Consideration d) the effect of the duty on product and service quality

22 An overall comment here is that this consideration b) may warrant some refinement. Our more detailed comments are:

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[10] Canadian International Trade Tribunal Dumping and Subsidizing. Tribunal Opinion and Supporting Reasons. Public Interest Inquiry No. PB-2004-002. Page 35.

[11] Official Journal of the European Union AS587.

[12] FINDING THE BALANCE: A Public Interest Test in the Dumping and Countervailing Duties Act 1988 Kalyani Dixit. A dissertation submitted in partial fulfilment of the requirements for the degree of Bachelor of Laws (Honours) at the University of Otago. October 2017. Page 51. "Dixit 2017".

23 Bullet One: In New Zealand Steel's field, the relevant New Zealand standard is salient, not standards elsewhere.

24 Bullet Two: We are uncertain what this may mean. *Products* meet or don't meet the relevant standard, not participants. And "market standard" will carry a different meaning depending on perspective and particular party's needs. There is no such thing as a "market standard".

25 Bullet Three: In our view this needs some refinement on the basis of the following comments:

25.1 Only some market participants manufacture.

25.2 Technical standards are largely the domain of manufacturers, and have linkages through the chain.

25.3 Service standards ought not be presumed uniform.

25.4 Manufacturers meet the relevant standard by its terms, not something else. We feel that the term "consciously producing products or services above the standard" is somewhat a misnomer in this field.

25.5 We don't know how MBIE may intend grappling with the concept "services above a standard".

26 Bullet Four: May we suggest this will be particularly challenging. We also note that the term "services in the market" might mean examining the ability of entities which provide a service. We note that the EU doesn't do that, and while the Canada does go that far (at least in the steel sector), Canada doesn't examine services in the market per se, but in relation to goods which use goods in the provision of services. We are uncertain what MBIE intends to do here.

27 Bullet Five: This will be particularly challenging, and we observe the neither the EU or Canada offer views as deeply as MBIE appears to intend here. We also note that goods either meet the quality (product) standard or do not.

28 We recall that Dixit 2017 notes this consideration d) as one of three which are "Vague and difficult to apply", which is a view consistent with the above New Zealand Steel comments.

Consideration e) the effect of the duty on the financial performance of the domestic industry

29 Bullet Three: We do not consider this relevant, and note that the EU and Canada's work appears to not encompass this topic.

30 Bullet Four: The EU and Canada's work appears to not encompass this topic.

31 Bullets Three and Four: It is unclear what direction of public interest interpretation MBIE might make on the information it obtains here, or quite what is intended. For example, financial market effects may have in mind New Zealand's country risk as an investment destination (non-imposition of bona fide duties against unfair trade being negative to that), or it might mean something else. We also presume that *forward* capital investment (making, or not making such investments) is more salient to PI than a past circumstance?

32 Last paragraph: The entirety of this Act factor 10F(3)(e) is on the "domestic industry", i.e. it does not address consumers. We are therefore uncertain why MBIE suggests bringing into play under 10F(3)(e) an empirical model which attempts to compare consumer effects to industry effects. In any event, for reasons given in Part B we do not anticipate PIPES proceeding.

Consideration f) the effect of the duty on employment levels

33 <below bullet three>: This is objective modelling which we consider is out of scope for reasons given in Part B below.

Consideration g) whether there is an alternative supply (domestic or internationally) of like goods available

34 Bullet Six: We are uncertain what's in view here – is it "non-price" etc on the local side or import side or both?

Consideration h) any factor that the Chief Executive considers essential to ensure the existence of competition in the market

35 Bullet One: This highlights a matter of concern - the Act provides for duties with (subject to some circumstances) a five-year term. Bullet one however, highlights the fact that the Period of Investigation may have some out of cycle features. We do not think it feasible for the Ministry to adequately take this temporal matter fully into account.

36 Bullets Two and Three: We think it will be challenging to undertake this analysis, as the terms substitute and complementary do not mean the same thing to all parties. Dixit 2017 raises consideration h) as the third of those which are "Vague and difficult to apply". [13]

37 Bullet Five: It is unclear what this item intends, but may we recall purpose here. Competition has a specific anchor regarding what is the normal and desired condition of competition. We refer to the EU and Canada PI tests to which the New Zealand test is asserted similar.[14] The EU (emphasis below is added) and Canada say:

37.1 EU: "(561) When calculating the amount of duty necessary to remove the effects of the injurious subsidisation, it was considered that any measures should allow the Union industry to cover its costs of production and to obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector **under normal conditions of competition, i.e. in the absence of subsidised imports**, on sales of the like product in the Union. It is considered that the profit that could be achieved in the absence of subsidised imports should be based on the year 2008 when Chinese imports were less present on the Union market. It is thus considered that a profit margin of 6.7 % of turnover could be regarded as an appropriate minimum which the Union industry could have expected to obtain in the absence of injurious subsidisation." [15]

37.2 Canada: "129. ... From a competition point of view, the duties seem to have played their intended role. They allowed for the establishment of competitive market conditions free of the influence of unfair trade practices. ..." [16]

37.3 Canada: "Effect of the Anti-dumping Duty on Downstream Competitiveness (clause 40.1(3)(b)(iii)(A) of the Regulations)

140. The Tribunal expects that the readily available supply of weaving wire from non-subject countries and the apparently successful approach to sourcing weaving wire by at least one firm in the industry will mean that downstream users do not experience problems with their supply of products manufactured with weaving wire as a result of the imposition of the anti-dumping duty. Consequently, the Tribunal does not consider that the imposition of the anti-dumping duty in the full amount has significantly impaired or is likely to impair the competitiveness of downstream users of products manufactured with weaving wire." [17]

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[13] Dixit 2017. Page 51.

[14] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL Third Reading. Hon JACQUI DEAN (then Minister of Commerce and Consumer Affairs).

[15] Official Journal of the European Union AS587. Paragraph 561 on page 73.

[16] Canadian International Trade Tribunal Dumping and Subsidizing. Tribunal Opinion and Supporting Reasons. Public Interest Inquiry No. PB-2014-001. Paragraph 129.

[17] Canadian International Trade Tribunal Dumping and Subsidizing. Tribunal Opinion and Supporting Reasons. Public Interest Inquiry No. PB-2004-002. Page 35

Part B: PIPES Model

Overarching comments

38 May we suggest that PIPES analysis is not useful in informing trade remedies PI work. We feel that it is an unrealistic endeavour, and there are certain other difficulties arising from the PIPES proposal appearing now, not in 2014-2016. These matters are discussed below.

PIPES is simply an unrealistic endeavour, and we feel it is unsuitable

39 PIPES empirical analysis is very difficult in this field and so we think that is unrealistic to anticipate worthy input therefrom. We discern the following specific issues:

39.1 The overarching problem that all the forward empirical PIPES information will be estimates, for example the supply curves. It will be very difficult to assess how good those estimates may be, and it will not be possible to adequately test and refine them with the industry parties to whom the data relates. Indeed, obtaining data at all is anticipated a challenge as parties are not obliged to co-operate with a Ministry questionnaire request. That issue is apparent in the Official Journal of the European Union AS587 at paragraph 553 and similarly in AS634 at paragraphs 600 and 602.

39.2 Cross-price elasticity on a product specific to New Zealand is but one example of a critical factor which will be a very difficult[18] to establish and it will be an un-verified estimate. We again recall Dixit 2017 who considers in a New Zealand context that the effect of the duty on the prices of like goods is "Vague and difficult to apply".

39.3 The task of developing elasticities will likely alone consume all the Ministry's $50,000 budget for PI test salaries and other expenses,[19] as well as possibly take 9-11 months on focus groups for the questions etc, which is a length of time incompatible with the Act's PI timing requirements.

39.4 PIPES is ID'd to take account of downstream (as opposed to consumer), but as far as we can ascertain, it doesn't.

39.5 We discern a process difficulty in parties not being able to adequately defend their interests because nothing of any moment will appear unredacted on the public file.

39.6 PIPES is suggested to inform bullets one to five in 10F(3)(e), but we don't consider it capable. (e) and those bullets are a much larger subject.

39.7 Marketing decisions are highly commercially sensitive and so we suggest that this will not be accurately model-able. Indeed, PIPES has no ability to reflect dynamic behaviour through time, i.e. take account of various party decisions when price/segment share is being considered, or perhaps industry production decisions.[20] Put another way, PIPES assumes the shocked stated is static, but that may be only the first round in a dynamic environment. We recall that the Ministry is itself aware that market conditions frequently change, as it observed in a recent document (emphasis added) "MBIE considers it unreasonable to restrict an applicant from applying for duties in any case, as **market conditions frequently change.**" [21] And we note that some of the CITT PI work also illustrates this dynamism.

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[18] Ministry of Commerce. Trade Remedies in New Zealand. A Discussion Paper. Feb 1998. Page 40.

[19] RIS "Options Regarding the Development of Public Interest Test for New Zealand's Anti-dumping And Countervailing Duties Regime". Paragraph 125 and table at paragraph 126, page 25.

[20] James M. Devault. The Welfare Effects of U.S. Antidumping Duties. Open Economies Review 7: 19-33 (1996). Page 30.

[21] MBIE Department Report to the Commerce Committee. 22 September 2016. Page 28.

39.8 As an aside, the above paragraph highlights another very related issue. That is, the New Zealand PI test was said to take account of relevant longer-term effects, which PIPES cannot. As evidence that longer terms effects are to be taken into account, the Cabinet paper (emphasis added by NZS) said in the section "Design...", said:

> "When assessing the above factors, the likely impact of the duties will be assessed over a time period sufficient to take into account any **relevant longer term effects** which may result from the imposition of duties." [22]

39.9 The import supply curve in particular will be near-impossible to meaningfully map, and in any event it is highly dynamic. We recall that submitters have previously drawn predatory traders (opportunistic commerce) to the Ministry's attention.[23] We do not foresee PIPES credibly accommodating those matters.

39.10 The import supply curve is made up of the intentions of many overseas parties, from several countries. That WTO Member mix will change through time.[24] As observed in NZHC 2309, intentions of a foreign industry (its volume and pricing, we suggest to an equation) is difficult. Justice Dobson in NZHC 2309 records:

> "[49] In Mr Croft's experience, he has not observed any previous decisions in which MBIE has relied on intent. Mr Croft doubted that the intent of an entire industry, as distinct from an individual exporter, could be ascertainable." And
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> "[53] No doubt in some contexts, marketing intentions of a country's particular industry will be ascertainable through, for example, published comments. In other circumstances, however, there will be no evidence from which to discern an objective intention of an industry. I accept Mr Croft's opinion (in the absence of such an objectively disclosed intention) that the unarticulated and potentially diverse intentions of the participants in an industry such as the Spanish preserved peach industry are unlikely to yield reliable evidence about the volume and pricing of future exports to New Zealand." [25]

39.11 PIPES does not take account of the fact that the calculated surplus to the domestic industry can be 100% of that industry's total EBIT or economic activity (i.e. it can be 100% felt by one entity), whereas a loss of consumer surplus in the same case (on an individual consumer basis) is likely to be a negligible amount of that consumer's total economic activity, i.e. the latter is not individualized.

39.12 We do not discern PIPES being able to handle temporal matters. This is again one of the issues identified by Devault [26] and lack of long term perspective in the Bill was a matter

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[22] Cabinet paper "A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime". Page 16.

[23] RIS "Options Regarding the Development of Public Interest Test for New Zealand's Anti-dumping And Countervailing Duties Regime". Paragraph 125 and table at paragraph 150, page 30.

[24] As evidence we refer, for example, to New Zealand imports of 7214.10 and 7214.20. One Member had zero volume share of New Zealand imports in 2016, but 32% one year later in 2017. That product has no trade measures into New Zealand. Source: TradeMap.

[25] High Court of New Zealand. CIV-2017-404-2831 [2018] NZHC 2309.

[26] James M. Devault. The Welfare Effects of U.S. Antidumping Duties. Open Economies Review 7: 19-33 (1996). Page 30.

of comment to Parliament.[27] A discrete time-related concern here is that PIPES takes no account of short-run elasticities usually being stronger than long run.

39.13 As the EU (which does not use mathematic equation) notes below, there is no general accepted model of cost-benefit analysis. The EU say:

> "It follows from the above, that the Community interest test is not a cost-benefit analysis in the strict sense, i.e. while the various interests (advantages and disadvantages) are put in balance, they are not weighed against each other in a mathematical equation, not least because of obvious methodological difficulties in quantifying each factor with a reasonable margin of security within the time available, and because there is not just one generally accepted model for a cost-benefit analysis."[28]

40 The views above are consistent with previous Ministry advice. Specifically, the Ministry advised that it would be difficult to conduct an objective test.[29] The 2019 Note does not contradict that view, indeed the difficulty is now described by the Ministry as extreme.

40.1 BARRY COATES (Green). "... but **in the select committee we had officials who were quite open with us to say that it was extremely difficult to provide an objective** and conclusive assessment of this national interest in ways that could be sure that the national interest outweighed the long-term damage that companies would face by being driven out of business by predatory pricing from their overseas competitors."

41 For the above reasons (responding to Note question 3 at page 4), we do not consider that PIPES will be useful, nor suitable for informing the analysis.

PIPES proposal appearance in 2019

42 While we acknowledge that PIPES might on one hand be thought an administrative treatment under the Act, we feel that the August 2019 PIPES empirical welfare analysis and economic model proposal is very important and was therefore more correctly an event for 2014 through 2016 such that it received examination during Bill passage in 2017. The Bill preamble documents for the PI test on which parties submitted do not identify anything akin to the PIPES welfare[30] analysis[31] which is

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[27] For example BARRY COATES (Green) in the Third Reading: "In one of the amendments we said: "OK, if you're going to do this, you need not only to look at the short term; you need to look at the long term. What does it mean in terms of a dynamic economy?". You cannot just take a snapshot in time. Actually, you have to understand the dynamics over many years..."

[28] EUROPEAN COMMISSION Directorate-General for Trade Directorate B – Trade defence Brussels, 13 January 2006 D/568 NOTE TO ALL THE MEMBERS OF THE ANTI-DUMPING COMMITTEE AND TO ALL DELEGATES TO THE COUNCIL WORKING PARTY ON TRADE QUESTIONS Subject: Clarification paper The Community interest test in anti-dumping and anti-subsidy proceedings. Page 4.

[29] The February 1998 Ministry of Commerce (MBIE's predecessor) Trade Remedies Group Discussion Paper included the following comment at page 40: "For example, assessing the consumption and production effects accurately requires an estimate of the responsiveness (elasticity) of these activities to price. Calculating such values may be difficult." There is nothing in the 2019 Note to explain how the difficulties which the Ministry acknowledged then have abated.

[30] Total welfare substantially being the sum of the producer and consumer surplus. That is what's being addressed in PIPES. We would not consider any distinction which the Ministry may point to between total welfare, and welfare, to be material for present purposes, because (upstream being excluded) near all welfare is that of PIPES producer welfare and consumer welfare.

[31] The Cabinet paper confirming the PIT. "A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime". In the RIS section Paragraph 11 on page 3.

proposed now. It appears there was a MBIE verbal mention of a Treasury-effected welfare model[32] to the Commerce Committee at some point, however, as below, the weight of representation in the Bill's passage is that the test would be subjective, which is to say, qualitative. We point to the following evidence. Paragraphs 42.2 to 42.8 are Hansard during debate on the Bill.

42.1 Cabinet Paper: "**nor would the test involve** a total welfare analysis of the impact of duties". [33]

42.2 Dr MEGAN WOODS (Labour—Wigram). "Officials told the select committee, when this bill was there, that this was going to be **an incredibly subjective test.**"

42.3 FLETCHER TABUTEAU (NZ First). "Let us be very clear in the House tonight. The Government officials have acknowledged that the test that will be applied to determine consumer interest **will be intrinsically subjective** ..."

42.4 Dr DAVID CLARK (Labour—Dunedin North). "They are subjective. We heard from officials at the select committee that they could not say, because they were subjective — **and they used the word "subjective"** — how these criteria would be weighted."

42.5 Dr DAVID CLARK (Labour—Dunedin North). "That public interest test is **highly, highly subjective"**

42.6 BARRY COATES (Green). "We went back to officials time and time again and said: "How are you going to do this? **What is the quantification of this thing?". We did not hear any satisfactory answers as to how they are going to quantify these factors.**"

42.7 Hon DAVID CUNLIFFE (Labour - New Lynn). "... , **how is it measured? It is all qualitative**".

42.8 Dr MEGAN WOODS (Labour—Wigram): "I would like to know why it is that objective tests around—for example, a numerical objective test around a proportion of a market that was affected **or other proportionalities and numerical measures were not put into play and that we have a solely subjective test at play here.**"

42.9 MBIE statement: "135. The public interest test in the Bill is subjective in nature. That is, MBIE will be making assessments and recommendations **based on non-numerical values** across multiple (and often competing) factors." [34]

42.10 MBIE statement: "The PIT is **subjective** in nature." [35]

42.11 Commerce Committee Report (under heading "Methodology ..." : "The public interest **test is subjective in nature**. We were advised that **MBIE would make assessments**

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[32] One Member who stood-in on the Commerce Committee mentioned it in speech to Parliament – once in the second reading and once in Committee Stage. It is hard to discern exactly what was said to the Commerce Committee as the second reading comment was joined to the outcome of such test always showing greater consumer welfare effect than producer welfare (as we understand it, the Commerce Committee report at page 6 refers to that test as having been rejected), and the Parliament Committee Stage comment was couched as "that might apply" as opposed to will apply.

[33] The Cabinet paper confirming the PIT. Title is "A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime". In the RIS section Paragraph 11 on page 3.

[34] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL Departmental report to the Commerce Committee 22 September 2016. Page 50.

[35] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL Departmental report to the Commerce Committee 22 September 2016. Page 36.

and recommendations on non-numerical values across multiple (and sometimes competing) factors." [36]

42.12 Commerce Committee Report: Officials supporting the passage of the bill have acknowledged that **the test that will be applied is intrinsically very subjective**, .. [37]

42.13 Commerce Committee Report (under heading "Methodology ..." : "**Without any ... prescriptive formula** to be followed when making an evaluation..." [38]

42.14 Commerce Committee Report (under heading "Methodology ..." : "**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. ..." [39]

42.15 The section "Annex 1: Design of the Bounded Public Interest Test" in the Cabinet paper does not mention PIPES or anything like it. [40]

42.16 The section "Applying the test (under option B)" (B being the Bill option) in the RIS does not mention PIPES or anything like it [41], nor does an overlay of the dry run against that section of the paper reveal PIPES.

Concern about informing a PI test via PIPES with its known direction

43 MBIE advised that consumer welfare empirical analysis (PIPES) will always drive to duty imposition failing to be in the public interest. As an aside, this what MBIE's worked example in the Note at page 18 shows. We understand that this known outcome is precisely why the empirical welfare approach was rejected. We refer to the evidence below (emphasis added by NZS):

43.1 Commerce Committee Report: "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**." [42] <as an aside, this view is verified by Devault 1996 [43]>

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[36] Trade (Anti-dumping and Countervailing Duties) Amendment Bill. 143—1. Report of the Commerce Committee. Page 6.

[37] Ibid. Page 4.

[38] Ibid. Page 6.

[39] Ibid. Page 7.

[40] Cabinet paper "A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime". Page 16.

[41] RIS "Options Regarding the Development of Public Interest Test for New Zealand's Anti-Dumping And Countervailing Duties Regime". Pages 21 and 22.

[42] Trade (Anti-dumping and Countervailing Duties) Amendment Bill. 143—1. Report of the Commerce Committee. Page 6.

[43] James M. Devault. The Welfare Effects of U.S. Antidumping Duties. Open Economies Review 7: 19-33 (1996) at pages 27 and 30.

43.2 Cabinet Paper June 2015: "it is unlikely that the test would ever find the imposition of duties is justified." [44]

44 This highlights a certain tension – it is difficult to see why the Ministry would wish to inform its PI test using an empirical, non-subjective model which it knows will only ever drive for duty non-imposition. Particularly given that the Ministry has observed "This would likely mean that there would no longer be an effective anti-dumping and countervailing duties regime available to domestic manufacturers." [45]

The Dry Run is absent PIPES

45 The Ministry's dry run of the test resulted in a Public Interest Report dated 6 April 2016 and it was thus was on the record and available to the Commerce Committee to represent what will happen in MBIE's PI work should the Committee have asked for it. The dry run PI Report which MBIE conducted does not mention PIPES, and the other documents pre-Act also do not mention PIPES, but rather indicate that the test, past tense, "has been developed" [46]. These items perhaps only major in informing that the PIPES August 2019 proposal post-dates MBIE's 2016 PI dry run, but they do buttress our view that the appropriate PIPES appearance time was pre-Act in 2014-2016, not post Act in 2019.

PIPES makes the New Zealand PI test further dissimilar to the EU and Canadian PI tests

46 MBIE and the previous Minister of Commerce and Consumer Affairs who sponsored the Bill advised that the New Zealand test is consistent or similar to the EU and Canada tests, however neither of those prescribe a PIPES model or anything like it. Evidence of the "consistent" and "similar" statements (that is, a New Zealand PI test without PIPES) having been made are:

46.1 MBIE Statement: "*Approaches in Canada and the European Union* 132. This is consistent with practices in Canada and the EU." [47]

46.2 Sponsoring Minister: Hon Jacqui Dean advised Parliament: "The bill fixes this problem by introducing a public interest test, similar to those in the EU and Canada." [48]

46.3 MBIE Statement: "We modelled the public interest test on the Canadian version, making necessary modifications to recognise the differences in the New Zealand market." [49]

46.4 Dixit 2017: (recording the New Zealand academic understanding of the above) "The proposed public interest test was modelled on the Canadian and EU approaches, ..." [50]

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[44] Cabinet paper "A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime". Paragraph 30 page 16.

[45] RIS "Options Regarding the Development of Public Interest Test for New Zealand's Anti-Dumping and Countervailing Duties Regime". Page 23.

[46] RIS "Options Regarding the Development of Public Interest Test for New Zealand's Anti-dumping And Countervailing Duties Regime". Paragraph 138 at page 25.

[47] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL Departmental report to the Commerce Committee 22 September 2016. Page 49.

[48] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL Third Reading. Hon JACQUI DEAN (Minister of Commerce and Consumer Affairs).

[49] TRADE (ANTI-DUMPING AND COUNTERVAILING DUTIES) AMENDMENT BILL. Departmental report to the Commerce Committee. 22 September 2016. Page 8.

[50] FINDING THE BALANCE: A Public Interest Test in the Dumping and Countervailing Duties Act 1988 Kalyani Dixit. A dissertation submitted in partial fulfilment of the requirements for the degree of Bachelor of Laws (Honours) at the University of Otago. October 2017. Page 28.

47 Given the above, if PIPES proceeds, New Zealand's already dissimilar PI test will become further dissimilar to the EU and Canada. That circumstance would be of concern.

Why is PIPES (or lookalike) not prescribed by EU and Canada?

48 This is a subset of the above dissimilarity matter. Having now proposed PIPES, the Note significantly omits to address the reasons why neither of the Ministry's peers EU or Canada prescribes PIPES or similar for their PI tests. NZS suggests that Ministry explanation of this will have been useful contribution. This point serves to highlight a matter which NZS feels ought to concern the Ministry. That is, there is no international acceptance of prescribing anything PIPES-like in trade remedies PI.

How does PIPES address empirical model problems?

49 May we suggest it is unclear how PIPE addresses the issues arising in the Devault etc work which MBIE described as follows:

> 49.1 "Although these models have good theoretical foundations, they are very difficult to apply in practice. Data availability limits the level of sophistication possible when applying economic models to real life scenarios. The data requirements in these cases are substantial and not practicable for the test required in the Act. Because of this, MBIE has developed the PIPES model to assist in the considerations set out in the Act. The framework of the PIPES model is set out below." [51]

50 The above extract paraphrases to a) economic models have difficulties, and b) because of that, MBIE developed PIPES. We are uncertain what MBIE considers must exist between the third and fourth sentences in 49.1 above. Put another way, how, exactly and with detailed elaboration, does MBIE's development of PIPES at b) in fact address a)? We presume MBIE's in-Department PIPES development work took account of, and in MBIE's view solved, the issues MBIE identifies in the first three sentences of 49.1. The Note however, does not provide this information or engage the matter.

[51] MBIE's Note at third paragraph on page 10.

Part C: Other Comments and Suggestions

Circumscribed Process

51 The Note at page 4 requests parties "only respond to the matters below", and in respect of PIPES asks: "3. To what extent to do you consider the PIPES model, discussed in Part 2 of this paper, is useful in informing the analysis of the public interest?".

52 We do not support the Ministry's approach in requesting party's limit their PIPES comment only to PIPES "usefulness", because compliance with that Ministry requirement will have forestalled most of NZS' discussion in Part B. As a general observation, we feel that trade remedy administration is not assisted by so tightening and guiding the interested party's responses. May we suggest that, within reason, the opposite approach is preferred in public consultation. Indeed, the below points are all grounded in Note-related perspective, but are not permitted by the Ministry's "only respond to the matters below" request. We feel that public administration is perhaps better with the Ministry being aware of the below perspectives from industry, than not being aware.

Submission Time

53 NZS feels that the Ministry may usefully provide more time for interested parties to submit views on its various discussion documents. Other Ministry documents may be released in the future, perhaps even under this current Note topic. In our view, submission periods less than four to six working weeks should be avoided. Larger topics, or new topics not previously consulted on, would be at the six weeks end. We offer some further comment and reasons below.

53.1 The 23 August 2019 Ministry PI Note provides 16 working days for submissions. This can be insufficient because:

(a) Relevant staff within an interested party organization may be away (perhaps on annual leave or at conference), and ought to be assumed by the Ministry to already have defined commitments in the given 16 days. Not all of those commitments ought to be assumed moved in order to accommodate challenging Ministry timing requests. Indeed, one key staffer may be away early in the 16 days, back-to-back with another key staffer later in the 16 days. Such circumstances are very challenging when consultation time is so limited.

(b) Certain aspects which the Ministry seeks to consult on may necessitate third-party research. Insufficient time can foreclose that avenue.

(c) Squeezed timeframes may compromise submission quality.

(d) Some documents which parties wish to examine in a consultation period may take time to obtain. That is the case on the footnotes at Note pages 9 and 10. While those documents did all prove available, they weren't all just click and appear. It took 4 of the 16 days to extract all of the pages of one document from its primary source in Germany.[52]

(e) The reach to interested parties appears to be only by MBIE push-email. No other publicity is apparent – for example on the Ministry trade remedies website with a prior note to media drawing attention to an upcoming matter. We feel that the current approach carries a risk of interested parties not being aware of the matter, and needing to receive notice from advisers. That may not occur in time or perhaps not at all. This theme has been previously been flagged to the Ministry by New Zealand industry.[53]

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[52] We refer to Open Economies Review, January 1996, 7, Issue 1, pp 19 – 33. It took four of the sixteen available days to receive the full 14 pages from the source in Heidelberg. First receipt of that article comprised only pages 19 and 20, not the full 14 pages between 19 and 33. All the while NZS could do nothing with the 2 pages it possessed.

[53] Document number 005 in email from the Ministry Tuesday, June 17, 2014 10:30 AM.

(f) Certain documents relevant to the consultation matter are some years old and have been removed from the previous Ministry portal and new links were not provided by the Ministry in the Note. We refer to the two Cabinet papers, two discussion papers[54] and two RIS' - none of which are now live at http://disclosure.legislation.govt.nz/bill/government/2016/143 yet all underpin the New Zealand PI test existence. As it happens, NZS has file copy of some these, but we would not anticipate that all parties will. We suggest other documents[55] also be provided in a Note bibliography via live web links.

At this juncture may we observe that:

i. OIA or other direct request to the Ministry probably has limited utility if seeking Ministry documents within a 16-day submission period. OIA-deemed requests will likely mean document arrival sometime after the 16th working day;

ii. the comment above about four to six weeks assumes four to six weeks during which the relevant documents have been available.

53.2 This PI submission matter was not pre-heralded. Advance notice can assist a party's ability to make time available.

53.3 Adequate time being provided by the Ministry at the outset can avoid need for some parties to perhaps request extension.

53.4 Lastly, we observe that concern about the Ministry not providing sufficient submission time, and document unavailability, has been raised before. For example, the April 1998 Bell Gully submission to the Trade Remedies Policy Review raised several of the above issues, and from time to time NZS has also observed similarly.

Suggestion: Briefing Sessions

54 We recall that the Ministry has previously conducted very helpful live briefing in Auckland (and Wellington, we think) where Ministry officials presented a matter in open forum, responded to questions from the floor (and to the floor's follow-up questions), and generally informed parties in the discussion. That Ministry process and initiative had considerable utility and was appreciated.

55 Might we suggest a return to that approach please. In respect of the Note, ideally it would comprise: a) Issuance of the Note containing a full, tested, live web-link bibliography, accompanied by a notice of date/time of an upcoming Ministry briefing session; then, say three weeks later b) a live briefing session/discussion on the Note; then c) parties being provided four to six weeks after the briefing to lodge any submission. Such an arrangement would:

55.1 Allow parties appropriate time to study and discuss the Note internally (industry organisations may need to reach externally to do this, which may take time) and perhaps develop questions. This is important because, as will have been seen above (for example at paragraphs 17, 31, 32, 34 and 37) we are uncertain what MBIE intends

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[54] As an aside, one of the papers is mis-titled, which does not assist party's in their effort to locate it. We refer to Discussion Paper, Ministry of Business, Innovation and Employment (MBIE), A Bounded Public Interest Test for the Anti-dumping and Countervailing Duties Regime, June 2014, which is actually "Introducing ...." – unless there were two documents, which we think is not the case.

And there were two RIS' of identical title (one on June 2015 and one in August 2015) which is awkward, and also, neither RIS is dated, which exacerbates the awkwardness. In that circumstance and with the dated MBIE links now gone, one can't easily tell which RIS one may have found.

[55] E.g. further EU and Canada material, and the Professor F. H. Gruen Australian review paper.

under several bullets, how it intends interpreting information, or indeed the direction of public interest it has in view.

55.2 Provide MBIE an elaboration opportunity, and facility for parties to put questions and hear Ministry response.[56] The written submissions from parties four to six weeks later will likely then be more refined and have enhanced utility in the Ministry's work.

55.3 Provide opportunity for insight for the Ministry from parties. We refer, for instance to paragraphs 18 and 23 to 25 where industry's commercial familiarity with these matters might be of assistance.

56 For the above reasons we feel that the process suggested in paragraph 55 will elicit better, more helpful, and more informed input for the Ministry. And from industry side, better and more nuanced awareness of Ministry thoughts and its work.

[56] The session can have included a presentation from MBIE's PIPES model staffer, for elaboration of the items raised in Part B above – particularly the matters at paragraphs 39 and 50.