

UNIVERSITY OF THE WESTERN CAPE



**UNIVERSITY of the
WESTERN CAPE**

A CRITICAL ASSESSMENT OF ZIMBABWE'S ANTI-DUMPING LAWS

BY

TEURAI THIRDGIRL DARI (3008206)

**A thesis submitted in fulfilment of the requirements for the degree Doctor Legum (LLD) in
the Faculty of Law, University of the Western Cape**

**UNIVERSITY of the
WESTERN CAPE**

SUPERVISOR: PROFESSOR PATRICIA LENAGHAN

DECLARATION

I declare that, A critical assessment of Zimbabwe's anti-dumping laws, is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been acknowledged as complete references.

Student: Teurai Dari

Signature:



Date: 05 November 2018



UNIVERSITY *of the*
WESTERN CAPE

ABSTRACT

Anti-dumping measures, safeguards and countervailing measures are trade remedies within the context of the World Trade Organisation (WTO). More specifically, the imposition of anti-dumping measures is a remedial measure, which may be evoked when dumped imports cause or threaten to cause injury to the domestic market. Article VI of the General Agreement on Tariffs and Trade (GATT) defines dumping as a situation where products of one country are introduced into the commerce of another country at less than the normal value of the products, and causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. In such a situation, the WTO allows countries to take action, if there is a causal link between injury to the domestic market and dumping.

Zimbabwe has been a Member of the GATT since July 1948 and subsequently it became a Member of the WTO in March 1995. It also has anti-dumping legislation since 2002 namely Competition (Anti-Dumping and Countervailing Duty) (Investigation) Regulations, 2002 (Statutory Instrument 266 of 2002). Despite this, dumping remains a challenge in Zimbabwe. Different stakeholders in Zimbabwe have lobbied for anti-dumping laws to be strengthened and applied, to protect the domestic industry from dumped imports. Regardless of the lobbying, the Competition and Tariff Commission (CTC) which is the institution that deals with unfair trade practises in Zimbabwe, has to date not conducted any investigation in dumping.

This study ascertains what the shortfalls in Statutory Instrument 266 of 2002 are, and the measures to be taken, to develop a sound framework that paves way for effective anti-dumping regime in Zimbabwe. The study highlights the need for an overhaul in Zimbabwe's anti-dumping system. This study also engages in a discussion of anti-dumping laws in the European Union (EU) and South Africa, both whom have developed anti-dumping systems, which Zimbabwe can learn from. In addition, EU used to be Zimbabwe's largest trading partner, but has since been replaced by South Africa.

DEDICATION

This thesis is dedicated to my husband Obdiah Mawodza and our son Wenyasha Mawodza.

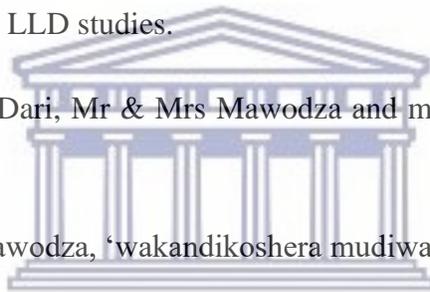


UNIVERSITY *of the*
WESTERN CAPE

ACKNOWLEDGEMENTS

I would like to extend my appreciation to the following individuals:

- My supervisor, Professor Patricia Lenaghan for her immense contribution to the completion of this thesis. Her guidance and patience throughout the period of research is immeasurable.
- I am also indebted to Professor Gustav Brink, Dr Yeukai Mupangavanhu and Professor Riekie Wandrag who provided me with critical and constructive feedback.
- The organisers of the Doctoral Colloquium for facilitating a platform to present my Chapters for peer review.
- The Graduate Lecturing Program at the University of the Western Cape, which supported the first two years of my LLD studies.
- My parents, Mr & Mrs Dari, Mr & Mrs Mawodza and my siblings for their unwavering support.
- My husband, Obdiah Mawodza, 'wakandikoshera mudiwa'.
- Dr Tinashe Kondo and Mr Mohammed for technical support.
- Dr Carol Charmaine Edson for editing my thesis.
- Above all, I would like to thank God for giving me the strength to persevere.



KEYWORDS

Anti-Dumping

Competition

Domestic industry

Dumping margin

Influx of goods

Like products

Injury

Fair trade practises

Protectionism

Zimbabwe



UNIVERSITY *of the*
WESTERN CAPE

ACRONYMS

ADA	Anti-dumping Agreement
ADR 2003	Anti-Dumping Regulations
AJA	Administrative Justice Act
BTI	Board on Trade and Industries
BTT Act	Board of Tariffs and Trade Act 107 of 1986
BTT	Board on Tariffs and Trade
C & F	Cost and freight
CFTA	Continental Free Trade Area
COMESA	Common Market for Eastern and Southern Africa
COTI	Council of Trade and Industry
CTC	Competition and Tariff Commission
DOC	USA Department of Commerce
DSB	Dispute Settlement Body
DTI	Department of Trade and Industry
EAC	East African Community
EU	European Union
GATT	General Agreement on Tariffs and Trade
GMO	Genetically modified organisms
ICAZ	Institute of Chartered Accountants of Zimbabwe
ITAA	International Trade Administration Act 71 of 2002
ITAC	International Trade Administration Commission

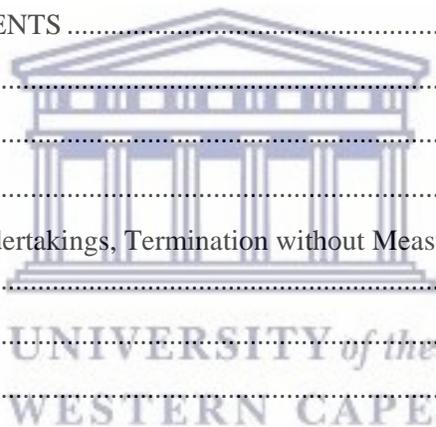
MFN	Most Favoured Nation
NT	National Treatment
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act No. 3 of 2000
SADC	Southern African Development Community
SARS	South African Revenue Service
SAZ	Standards Authority of Zimbabwe
TFEU	Treaty on the function of the European Union
TFTA	Tripartite Free Trade Area
TRALAC	Trade Law Centre
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation
ZIMASSET	Zimbabwe Agenda for Sustainable Socio-Economic Transformation
ZIMRA	Zimbabwe Revenue Authority
ZIMSTATS	Zimbabwe National Statistics Agency

TABLE OF CONTENTS

DECLARATION	ii
ABSTRACT.....	iii
DEDICATION.....	iv
ACKNOWLEDGEMENTS.....	v
KEYWORDS.....	vi
ACRONYMS.....	vii
TABLE OF CONTENTS.....	ix
CHAPTER 1	1
INTRODUCTION AND OVERVIEW OF STUDY	1
1.1 INTRODUCTION	1
1.2 BACKGROUND TO THE STUDY	2
1.3 RESEARCH PROBLEM AND OBJECTIVES.....	8
1.4 RESEARCH QUESTIONS	10
1.5 AIM OF THE STUDY.....	10
1.6 RESEARCH METHODOLOGY.....	11
1.7 CHAPTER OUTLINE.....	12
CHAPTER 2	14
INTERNATIONAL FRAMEWORK ON DUMPING.....	14
2.1 INTRODUCTION	14
2.2 BRIEF HISTORY OF WORLD TRADE ORGANISATION RULES ON DUMPING.....	16
2.3 DEFINITION OF DUMPING	18
2.3.1 Types of Dumping	19
2.3.2 Schools of thoughts on anti-dumping duties.....	22
2.4 WORLD TRADE ORGANISATION TREATMENT OF DUMPING.....	25
2.4.1 Determination of Dumping	25
2.4.1.1 Determination of Normal Value	25
2.4.1.2 Determination of Export Price	31
2.4.1.3 Comparison of Normal Value and Export Price	33
2.4.1.4 Determination of Dumping Margin	35
2.4.2 Determination of Injury	38
2.4.2.1 'Like product in the importing country'.....	39

2.4.2.2 The ‘domestic industry’	40
2.4.2.3 Injury	42
2.4.3 Causation.....	50
2.5 PROCEDURAL REQUIREMENTS FOR LEGISLATING ANTI-DUMPING MEASURES.....	52
2.5.1 Initiation.....	52
2.5.2 Conduct	54
2.5.3 Imposition of provisional measures	57
2.5.4 Price Undertakings.....	57
2.5.5 Imposition, Collection of Anti-Dumping Duties and Retroactivity	58
2.5.6 Duration and Review of Anti- Dumping Duties	60
2.5.7 Publication of the Notice.....	61
2.6 CHALLENGES WITHIN THE WORLD TRADE ORGANISATION ANTI-DUMPING RULES ...	62
2.7 WORLD TRADE ORGANISATION DISPUTE SETTLEMENT	65
2.8 CONCLUSION.....	70
CHAPTER 3	73
THE USE OF ANTI-DUMPING MEASURES IN SOUTH AFRICA	73
3.1 INTRODUCTION	73
3.2 OVERVIEW	75
3.3 THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK.....	76
3.3.1 Legislative Framework	76
3.3.2 Institutional Framework.....	80
3.4 SUBSTANTIVE PROCEDURES	82
3.4.1 Determination of dumping	82
3.4.2 Determination of Injury	93
3.4.3 Causal Link	98
3.4.4 Public Interest Considerations	99
3.5 PROCEDURAL REQUIREMENTS	101
3.5.1 Pre-initiation Phase	101
3.5.2 Initiation and Preliminary Phase	103
3.5.3 Final Phase	105
3.6 REVIEWS.....	107
3.7 CONCLUSION.....	115

CHAPTER 4	117
THE USE OF ANTI-DUMPING MEASURES IN THE EUROPEAN UNION	117
4.1 INTRODUCTION	117
4.2 OVERVIEW	118
4.3 THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK	121
4.3.1 Legislative Framework	121
4.3.2 Institutional Framework	123
4.4 SUBSTANTIVE PROCEDURES	126
4.4.1 Determination of dumping	127
4.4.2 Determination of Injury	137
4.4.3 Causal Link	142
4.4.4 Community Interest	143
4.5 PROCEDURAL REQUIREMENTS	145
4.5.1 Initiation of Proceedings	145
4.5.2 Investigative Process	147
4.5.3 Confidentiality	148
4.5.4 Provisional Measures, Undertakings, Termination without Measures and Imposition of Definitive Duties	150
4.6 REVIEWS	153
4.7 CONCLUSION	154
CHAPTER 5	156
THE NEED FOR A SOUND ANTI-DUMPING FRAMEWORK IN ZIMBABWE	156
5.1 INTRODUCTION	156
5.2 OVERVIEW	157
5.3 THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK	159
5.3.1 Legislative Framework	159
5.3.2 Institutional Framework	161
5.4 SUBSTANTIVE PROCEDURES	164
5.4.1 Determination of dumping	165
5.4.2 Determination of injury	173
5.4.3 Causal Link	177
5.5 PROCEDURAL REQUIREMENTS	178



5.5.1 Initiation.....	179
5.5.2 Provisional measures and final determination of dumping and prejudice	182
5.5.3 Duration, termination and suspension.....	186
5.6 REVIEWS.....	187
5.7 ECONOMIC AND NON-ECONOMIC REASONS FOR CREATING AN EFFECTIVE ANTI-DUMPING REGIME.....	190
5.8 CONCLUSION.....	196
CHAPTER 6	199
CONCLUSION AND RECOMMENDATIONS FOR CREATING AN EFFECTIVE ANTI-DUMPING REGIME IN ZIMBABWE	199
6.1 INTRODUCTION	199
6.1.1 Main Research Question	199
6.1.2 Ancillary Research Questions.....	200
6.1.3.1 Chapter 1	200
6.1.3.2 Chapter 2.....	200
6.1.3.3 Chapter 3.....	201
6.1.3.4 Chapter 4.....	203
6.1.3.5 Chapter 5.....	203
6.2 RECOMMENDATIONS	205
6.2.1 Anti-Dumping Authority.....	205
6.2.2 Legislation.....	206
6.2.3 Issues to be addressed	207
6.3 FINAL REMARKS	213
BIBLIOGRAPHY.....	214



UNIVERSITY of the
WESTERN CAPE

CHAPTER 1

INTRODUCTION AND OVERVIEW OF STUDY

1.1 INTRODUCTION

Trade remedies allow countries to take remedial action against imports causing material injury to a domestic industry.¹ They can be categorised into three groupings, namely: anti-dumping measures;² countervailing measures³ and safeguard measures.⁴ The difference between these is that anti-dumping and countervailing measures seek to counter unfair trade, whereas safeguards protect domestic industries from a sudden surge in imports.⁵ Anti-dumping and countervailing measures are sometimes confused because they both remedy unfair trade practices.⁶

Rogers once gave an intuitive quote on dumping, noting that ‘if the other fellow sells cheaper than you do, it is called dumping because, if you sell it cheaper than him, that is mass production’.⁷ This assessment brings to the fore several questions such as; What then should be termed as ‘dumping’? How can dumping be regulated? Is dumping not a result of one country being more competitive than others?

Cohn sheds light onto what constitutes the practice of dumping as: ‘occurring when a firm sells products in an export market at a lower price than it charges in the home market or below the cost of production’.⁸ One might then pose the question as to why firms might sell goods at a price below cost. Numerous reasons can be advanced in this regard, including that the one party might want to drive the other parties out of business.⁹

¹Australian Government Department of Foreign Affairs and Trade ‘Trade remedies: Anti-dumping, countervailing measures and safeguards’ available at <http://dfat.gov.au/trade/topics/pages/anti-dumping-and-safeguards.aspx> (accessed 01 April 2018).

²Anti-dumping measures are applied when there is dumping injuring the domestic industry in the importing country. These can be in form of duties or undertakings.

³Countervailing measures are applied to counter the effect of subsidised imports that are found to be injuring domestic producers.

⁴Safeguard measures are applied to protect the domestic industry where there is surge of imports that causes serious injury to the domestic industry.

⁵Murigi WC *The Development of a Successful Antidumping Regime In Kenya* (unpublished LLM thesis, University of the Western Cape, 2013) 1.

⁶Anti-dumping and countervailing measures both remedy unfair trade practises but the first one is applied where a product is exported by the exporting country at price lower than in the exporting country domestic market, whilst countervailing measures remedy harm caused by subsidised imports.

⁷Bovard J *The Fair Trade Fund: How Congress Pillages the Consumer and Decimates American Competitiveness* (2016) 107 (hereafter Bovard J (2016)).

⁸See generally Cohn T *Global Political Economy* (2015).

⁹Gottheil F *Principles of Microeconomics* (2013) 473.

In Zimbabwe, dumping remains a key challenge that may negatively affect macro-economic stability and hamper the growth of local industries. This has somehow been witnessed through a heavy influx of cheaper goods, making it difficult for local industries to flourish. Mugano contends that the influx of goods is mainly because of, among others, ‘dumping, flouting of rules of origin, porosity of borders, corruption, trade liberalisation and lack of industrial competitiveness’.¹⁰

1.2 BACKGROUND TO THE STUDY

When dealing with dumping as a factor affecting macro-economic stability and hindering the growth of local industries, it is important to look at how best anti-dumping should be regulated. An analysis of the international framework that is applicable to anti-dumping provides members with a foundation of how to regulate anti-dumping.

The World Trade Organisation (WTO) was established in 1995.¹¹ It was born out of the General Agreement on Tariffs and Trade (GATT), which had been in existence since 1948.¹² One of the key aims of the WTO is to upsurge production and trade between Members by means of reducing barriers and tariffs.¹³ These WTO laws on the reduction of barriers and trade tariffs are not without exception. Where a Member is involved in an unfair practice against another, such unfairness would qualify as an exception.¹⁴ These exceptions are ‘trade remedy laws’ that consist of countervailing measures, safeguarding measures and anti-dumping laws.¹⁵ This study focuses on anti-dumping laws because at a global scale, dumping is seen as a serious threat to economies.¹⁶

Dumping as a form of price discrimination has welfare implications, which can be assessed from three points of view, ‘namely income distribution, the level of output and the competitive process itself’.¹⁷ As such, a sound legal framework provides a basis for effective regulation of dumping.¹⁸ When regulation is effective and anti-dumping measures are utilised there is a general benefit to

¹⁰Mugano G ‘Time to tighten screws on dumping’ *The Herald* 31 October 2013.

¹¹Andersen H *EU Dumping Determinations and WTO Law* (2009) 1(hereafter Andersen H (2009).

¹²Bown CP *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (2010) 11.

¹³Andersen H (2009) 1.

¹⁴Andersen H (2009) 1.

¹⁵Anwar R & Raslan A *Anti-dumping: A developing country perspective* (2009) 1 (hereafter Anwar R & Raslan A (2009).

¹⁶ Bovard J (2016) 107.

¹⁷Dale R Welfare Implications of Dumping. In: *Anti-Dumping Law in a Liberal Trade Order* (1980) 21.

¹⁸ Payments Association of South Africa ‘Legal & Regulatory Framework’ available at <http://www.pasa.org.za/national-payment-system/legal-regulatory-framework> (accessed 19 February 2019).

domestic producers through cessation or reduction of imports.¹⁹ Even if the use of anti-dumping measures do not effect a cessation of imports, the price of the product can be greatly affected, negatively impacting an exporter's profitability.²⁰ Besides these benefits the use of anti-dumping measures are also 'becoming the largest trade barriers threat to international trade'.²¹ As such, a sound regulation may positively contribute in minimising the use of anti-dumping measures as a form of protectionism.²²

Article VI of GATT contains regulations on dumping.²³ The Article dwells on trade aspects, providing Members with the option to levy additional tariffs in exceptional situations, rather than directly providing for the legality of dumping.²⁴ These additional tariffs are known as anti-dumping duties. Skyes defines anti-dumping duties as:

'Tariffs in addition to ordinary customs duties that are imposed to counteract certain [allegedly] "unfair" pricing practices by private firms that injure or threaten to cause "material injury" to a competing industry in an importing nation.'²⁵

Whilst anti-dumping duties are concerned with tariffs, dumping on the other hand is where 'products of one country are introduced into the commerce of another country at less than the normal value'.²⁶ Herein, the normal value is understood as meaning the domestic price at which the commodity is marketed and sold in the exporting country.²⁷ Placing Article VI into context, one could for example cite an example where a commodity is sold in the United States for \$10, while when exported, the product is exported to the South African market for R65 (approximately \$6).

¹⁹ Dorn JW & Layton DW 'The WTO Anti-Dumping Agreement: A Guide For Developing Countries' in The World Bank *Legal Aspects of International Trade* (2001) 189.

²⁰ Dorn JW & Layton DW 'The WTO Anti-Dumping Agreement: A Guide For Developing Countries' in The World Bank *Legal Aspects of International Trade* (2001) 189.

²¹ Qian K 'The impact of The USA's anti-dumping measures against China with a case study' (unpublished Master of International Business Bodø Graduate School of Business 2010) 1.

²² See generally Funke N 'Trends in protectionism: Anti-dumping and trade related investment measures' (1994).

²³ Stoll PT & Schorkopf F *Wto: World Economic Order, World Trade Law* (2006) 150 (hereafter Stoll PT & Schorkopf F (2006)). It is important to highlight that when WTO was formed there was a merge of GATT in WTO, hence the application of GATT in the WTO system.

²⁴ Stoll PT & Schorkopf F (2006) 150.

²⁵ Skyes AO 'Trade Remedy Laws' (2005) John M. Olin Law & Economics Working Paper No. 240 2.

²⁶ Article VI.1 of GATT 1994.

²⁷ Andersen H (2009) 1.

Anti-dumping rules have developed over time. Importantly, the Tokyo round²⁸ saw the negotiating Member States agreeing upon more comprehensive rules, which were further supplemented during the Uruguay round²⁹ where subsequent expansion was undertaken.³⁰ This expansion, during the Uruguay round, gave birth to the Agreement on Implementation of Article VI of GATT usually referred to in many circles as the Anti-dumping Agreement (ADA).³¹ The Uruguay ADA is, however, subject to a binding dispute resolution system.³² It is important to note that, while the crux of these anti-dumping regulations is to combat injurious dumping, they also seek to ensure that protectionist tendencies are nipped in the bud. For this reason, a balancing approach must be adopted.

Since the WTO anti-dumping rules have been in place, they have not been without success. To date, the WTO has heard 128 cases relating to dumping.³³ The latest one, dated 17 October 2018 is a request consultation by Ukraine ‘concerning anti-dumping measures applied in the Kyrgyz Republic on the importation of certain types of steel pipes.’³⁴ The number of disputes points to the fact that more and more countries are embracing anti-dumping rules.

On development of anti-dumping rules, Anwar and Raslan aver that anti-dumping regulations have emerged together with trade liberalisation.³⁵ The rationale behind their point of view is that ‘anti-dumping regulations help these countries adjust to trade liberalisation and maybe used as safety valves to reassure domestic markets against the adverse effects of trade liberalisation’.³⁶ This contention is somewhat true in suggesting that trade liberalisation brings about some undesired effects such as dumping due to open markets. In some other countries, adoption of anti-dumping rules may not necessarily emerge together with trade liberalisation but may emerge after trade liberalisation.

²⁸Tokyo Round was between 1973 and 1979.

²⁹Uruguay Round was between 1986 and 1994.

³⁰Stoll PT & Schorkopf F (2006) 150.

³¹Stoll PT & Schorkopf F (2006) 150.

³²See generally The European Commission ‘The Uruguay Round’ available at http://europa.eu/rapid/press-release_MEMO-94-24_en.htm (accessed 29 October 2017).

³³ WTO ‘Dispute Settlement: The Disputes Chronological list of disputes cases’ available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 09 August 2018).

³⁴WTO ‘Dispute Settlement: The Disputes Chronological list of disputes cases’ available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 25 October 2018).

³⁵Anwar R & Raslan A (2009) 7.

³⁶Anwar R & Raslan A (2009) 7.

Zimbabwe is one typical example. On one end, markets open up and policies that promote trade liberalisation are adopted.³⁷ On another end, when the markets are under pressure, the government is quick to impose protectionist measures.³⁸ Moreover, anti-dumping regulations in Zimbabwe may have evolved separately from trade liberalisation. This is due to the fact that Zimbabwe had already initiated a number of unilateral reforms geared towards liberalisation before enacting anti-dumping regulations.³⁹ It only enacted a statute that investigates unfair trade practices in 2002 but liberalisation had started around 1991.⁴⁰ In addition, after first efforts of liberalisation there was a subsequent policy review in 1998 that showed that liberalisation was not sustainable and this led to increase in tariffs.⁴¹ Thus, anti-dumping regulations did not emerge together with liberalisation because they were enacted after liberalisation policies were already abandoned.

In Zimbabwe, the Competition and Tariff Commission (CTC) is the investigative body responsible for dealing with cases of unfair trade practices.⁴² The functioning of the Commission is capacitated by two statutory instruments, namely: (1) Anti-Dumping and Countervailing Duty (Investigation) Regulations, 2002 (Statutory Instrument 266 of 2002) and (2) The Competition (Safeguards) Regulations 2006.⁴³

According to the Zimbabwe National Trade Policy:

‘Government will capacitate and strengthen the Investigating Authority for it to be able to establish the existence of unfair trade practices caused by dumping and subsidised imports, with a view to initiating anti-dumping-action as well as instituting countervailing measures.’⁴⁴

³⁷For example, Zimbabwe inherited a heavily regulated foreign trade economy, but in 1991-1995 Zimbabwe undertook the International Monetary Fund (IMF) driven Economic Structural Adjustment Program (ESAP). Under this program, the markets were liberalised, quantitative controls abolished, and tariffs and duties reduced and harmonized. See Makochekanwa J & Kambarami P ‘Zimbabwe’s Experience with Trade Liberalisation’ (2012) 245 *African Economic Research Consortium* 14 (hereafter Makochekanwa J & Kambarami P (2012)).

³⁸After 1995, there were policy reversals, which were made resulting in the process of trade liberalisation process becoming unsustainable. See Makochekanwa J & Kambarami P (2012) 14.

³⁹Tekere M ‘Trade Liberalisation under Structural Economic Adjustment – Impact on Social Welfare in Zimbabwe’ (2001) 8.

⁴⁰Zimbabwe's Economic Structural Adjustment Programme (ESAP) spearheaded trade liberalisation in Zimbabwe. It was launched in 1990, and was meant to herald a new era of modernised, competitive, export-led industrialisation.

⁴¹Makochekanwa A, Hurungo TJ Kambarami P ‘Zimbabwe’s Experience With Trade Liberalization’ (2012) *African Economic Research Consortium Research Paper* 245 16 (hereafter Makochekanwa A, Hurungo TJ Kambarami P (2012)).

⁴²Zimbabwe National Trade Policy 2012-16.

⁴³Zimbabwe National Trade Policy 2012-16.

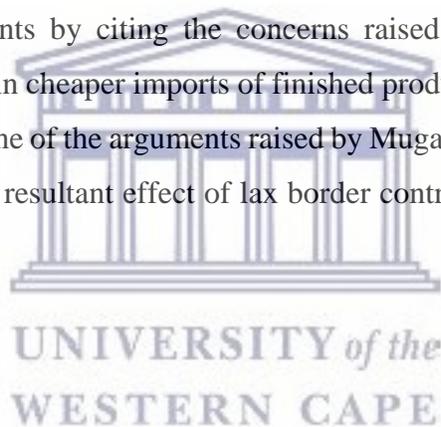
⁴⁴Zimbabwe National Trade Policy 2012-16.

Despite these promised measures, dumping of foreign goods remains a problem that is deep-seated inside the Zimbabwean market.⁴⁵ At the Annual Conference of the Institute of Chartered Accountants of Zimbabwe (ICAZ) in 2015, it was noted with concern that the Zimbabwean economy was struggling due to the closure of numerous businesses that produce secondary goods.⁴⁶ In 2012, Muganda of Buy Zimbabwe⁴⁷ averred that Capri Zimbabwe⁴⁸ was suffering because of dangerous dumping practises by some South African companies such as Defy.⁴⁹ Though the company has not shut down, it alluded to the problem of unfair practices in the market.

This sentiment resonates with ICAZ, which noted that:

‘This is due to low priced imports some of which are subsidised and some which would not qualify under the certificates of origin and the fact that the Zimbabwean companies are operating in a high cost environment.’⁵⁰

ICAZ substantiates its averments by citing the concerns raised by local manufacturers, who concede that traders who bring in cheaper imports of finished products have unfairly pushed them out of the market.⁵¹ Similar to one of the arguments raised by Mugano, ICAZ argues that the influx of imported finished goods is a resultant effect of lax border controls by the Zimbabwe Revenue Authority (ZIMRA).⁵²



⁴⁵Sibanda OS ‘Are anti-dumping measures in multilateral trade justifiable or not? A call for an academic debate in Africa’ (2003) 44(2) *Codicillus* 87.

Sibanda observes that dumping remains a problem in Zimbabwe (as well as other African Countries in Zimbabwe such as Kenya and Angola) because of the lack of an adequate legal infrastructure, technical skills and appropriate safeguard mechanisms and anti-dumping practices.

⁴⁶ICAZ ‘The Future of the Manufacturing Sector’ available at <https://www.icaaz.org.zw/iMISDocs/manufacture.pdf> (accessed 16 September 2015).

⁴⁷Buy Zimbabwe is an organisation that work closes with different institutions and the government to encourage Zimbabweans to locally produce and consume local goods and services both home and abroad.

⁴⁸Capri Zimbabwe is a company that manufactures refrigerators.

⁴⁹Muganda RG ‘Lets enforce dumping laws’ *The Herald* 27 September 2012 available at <http://www.herald.co.zw/lets-enforce-dumping-laws/> (accessed 03 March 2018).

⁵⁰ICAZ ‘The Future of the Manufacturing Sector’ available at <https://www.icaaz.org.zw/iMISDocs/manufacture.pdf> (accessed 16 September 2017).

⁵¹Mugano has also been most insightful on this, discoursing that ‘in order to curtail the influx of certain goods which are threatening the survival of local industry, government must consider a mix of safeguard measures under WTO rules’ see Mugano G ‘Time to Tighten Screws on Dumping’ *The Herald* 31 October 2013.

⁵²ICAZ ‘The Future of the Manufacturing Sector’ available at <https://www.icaaz.org.zw/iMISDocs/manufacture.pdf> (accessed 16 September 2017).

One of the subsequent arguments that arise is that not only are these cheaper imports pushing out local producers out of the market, but also some of them are also sub-standard goods.⁵³ Taylor notes that:

‘The Zimbabwean market has been invaded by Chinese goods, locally known as ‘zhing zhongs’ (a derivative term to refer to anything that is substandard), which have been undercutting local industries. [Taylor cites the opinion of one economist who opined that] “there was quite an element of dumping [in Zimbabwe] with factory seconds and rejects coming in, and this was true especially of footwear and clothes.” A huge influx of goods from China was experienced from 2004 onwards and although Harare increased the import duties on such merchandise, China’s penetration of the economy remains apace.’

Since 2009, the Standards Authority of Zimbabwe (SAZ) has been advocating for the formulation of a statutory framework operating in the form of an import/export Pre Shipment (PVoc) scheme in order to curb the flooding of substandard products.⁵⁴ Substandard products are

‘products of faulty workmanship, rejects and products of limited use as made, by reason of their dimensions or of defects including defects of quality, which are sold below the undertakings published list prices for first quality products’.⁵⁵

It should, however, be noted that not all substandard products and cheaper products amount to dumping because some of them may not have been exported at prices below the normal value.

With the challenges presented in the introduction and background, it becomes important to investigate the anti-dumping regulations in Zimbabwe. The next section discusses the research problem and objectives, the benefits of the study, the research methodology and the Chapter outline.

⁵³ICAZ ‘The Future of the Manufacturing Sector’ available at <https://www.icaaz.org.zw/iMISDocs/manufacture.pdf> (accessed 16 September 2017).

⁵⁴ICAZ ‘The Future of the Manufacturing Sector’ available at <https://www.icaaz.org.zw/iMISDocs/manufacture.pdf> (accessed 16 September 2017).

⁵⁵Glosbe Dictionary ‘Sub-standard’ available at <https://glosbe.com/en/en/substandard%20product> (accessed 16 September 2017).

1.3 RESEARCH PROBLEM AND OBJECTIVES

Dumping has been a problem in many economies across the world.⁵⁶ With a divergence of opinions on how strict dumping should be regulated, it becomes difficult for countries to agree on when a particular act by an exporting country, constitutes dumping on the importing market. Within the context of the WTO, dumping takes place when selling a product below the normal value. However, anti-dumping action can only take place when dumping causes injury.⁵⁷

Article VI of GATT, further clarified by the ADA, enables the domestic country to take action against dumping.⁵⁸ Application of these two agreements allows a country to act in a manner and form that would violate GATT principles of non-discrimination and one of having a binding tariff.⁵⁹ Herein, the domestic market has the right to combat dumping by imposing an extra import duty on the offending product.⁶⁰ The purpose of this import duty is to equalise the value of the imported good, with that in the domestic market. Therefore, investigations of anti-dumping remain within the bounds of domestic law and must be consistent with the ADA.⁶¹

In Zimbabwe, the government has only applied precautionary measures in order to guard the market against cheaper and allegedly dumped imports, with variable results. These results include instances where this has actually encouraged and promoted smuggling; or it has succeeded in protecting the domestic market; and the measures sometimes were not adequate to protect the domestic market from harm.⁶² For these reasons, there has been massive lobbying by different industries in Zimbabwe for the government to enforce anti-dumping laws in order to protect the

⁵⁶See generally Trebilcock MJ *Advanced Introduction to International Trade Law* (2015).

⁵⁷WTO 'Understanding the WTO: The Agreement' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed 25 September 2017).

⁵⁸WTO 'Understanding the WTO: The Agreement' available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed 25 September 2017).

⁵⁹The two basic rules of WTO are the most favoured nation (MFN) and national treatment (NT) which are premised on the notion of non-discrimination. They ensure that there is a levelled playing field between all trading partners. On-discrimination in trade policy means there is equal treatment of trading partners.

⁶⁰Government of India: Ministry of Commerce and Industry 'Anti-Dumping & Anti-subsidy measures: FAQs' available at http://commerce.nic.in/traderemedies/ad_measures_3.asp (accessed 08 March 2017).

⁶¹South African Government 'Trade and Industry on anti-dumping duties imposed on imported frozen chicken portions' 2 March 2015 available at <http://www.gov.za/speeches/anti-dumping-duties-imposed-frozen-chicken-portions-imported-germany-netherlands-and-united> (accessed 08 March 2017).

⁶²Kachembere J & Majaka N 'Car duty goes up, bale imports banned' *Daily News* 30 July 2015.

domestic industry from dumped goods.⁶³ In 2012, Zimbabwe's local newspaper reported that one of the local refrigerator manufacturers, Capri had fallen victim to dangerous dumping practices.⁶⁴ The CTC also cited that some allegations referred to it for investigations in the 2012 financial year did not technically involve dumping.⁶⁵ In 2013 the CTC handled a complaint by Kind Brands (Pvt) Limited on dumping of imported shoe polish on the local market.⁶⁶ The CTC closed the case due to lack of interest by the company, because of its failure to furnish the required information needed to pursue an investigation.⁶⁷

Although years have passed since these allegations, the issue of dumping has remained prevalent in Zimbabwe. The CTC had its first trade tariffs workshop on the 18th of August 2018.⁶⁸ Amongst the issues discussed was the role of anti-dumping measures in reindustrialisation.⁶⁹ It was emphasised that anti-dumping measures should be applied to remedy the injurious dumping on Zimbabwe's local industries.⁷⁰ The need to strengthen the current anti-dumping laws was also emphasised echoing Mugano's 2013 sentiments.⁷¹

Within the above context, the main objective of this study is to examine the current anti-dumping framework in Zimbabwe for purposes of creating a sound anti-dumping system. Before examining Zimbabwe's anti-dumping framework, the study analyses the WTO anti-dumping framework. Both substantive and procedural provisions will be discussed in relation to how Members who intend to use these provisions should go about. In addition, the study considers if there are any problems within the framework. Most importantly, the WTO framework will be the foundation for development of a successful anti-dumping regime in Zimbabwe. Looking elsewhere, this thesis examines the legal and institutional framework on dumping in the European Union (EU) and South

⁶³Companies such as Capri, Willowvale Mazda Motor Industries, Owest Motors, National Foods, and Olivine amongst others have called for the enforcement of anti-dumping laws but to date Zimbabwe has never investigated any dumping allegation.

⁶⁴Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012.

⁶⁵See generally CTC Annual Report 2012.

⁶⁶See generally CTC Annual Report 2013.

⁶⁷See generally CTC Annual Report 2013.

⁶⁸See generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

⁶⁹This was a live recording; see generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

⁷⁰This was a live recording; see generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

⁷¹This was a live recording; see generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018) See also discussion by Mugano on the need tighten screws on dumping in Mugano G 'Time to Tighten Screws on Dumping' *The Herald* 31 October 2013.

Africa both whom have experience in utilising anti-dumping measures. The aim is to draw lessons from these frameworks where Zimbabwe can learn to ensure protection of its domestic industries.

1.4 RESEARCH QUESTIONS

Even though Zimbabwe has anti-dumping regulations in place, there are, however, problems concerning the investigating authority and the substantive requirements and procedure that need to be addressed to enable creation for a sound anti-dumping system, providing a platform for development of a healthy and competitive market. The main question the thesis seeks to answer is; is there a need for assessing Zimbabwe's national anti-dumping framework? In order to ascertain the need and ensure the framework is satisfactory in protecting the domestic industry protected from injurious dumping, the thesis will also answer these supporting questions:

- a) How is dumping defined under the provisions of the WTO and what are the procedures for the use and implementation of anti-dumping rules by a Member?
- b) What are some of the problems in anti-dumping rules at the WTO level?
- c) How is dumping regulated under the provisions of South Africa: is it in compliance with international obligations under the WTO?
- d) How is dumping regulated under the provisions of EU: is it in compliance with international obligations under the WTO?
- e) How is dumping regulated under Zimbabwe's national anti-dumping framework: is it in compliance with international obligations under the WTO?
- f) What lessons can Zimbabwe learn from the EU and South Africa, who have successful anti-dumping experience?

1.5 AIM OF THE STUDY

By attempting to answer the above research questions, the study aims to contribute towards the fuller elaboration of preventing dumping in Zimbabwe, a subject that has lacked in-depth scrutiny thus far. There is no doubt that the study brings immense relevance to the existing body of knowledge in anti-dumping laws. Local industries have been heavily under siege from imports, which has resulted in the near annihilation of the local clothing industry and the contraction of

multiple other manufacturing industries.⁷² Due to these problems, the effects of dumping practises have trickled down to other downstream businesses, such as retailers. Thus, the pressing need on how to use anti-dumping laws to protect local industries from dumping has become unavoidable.

This research also comes at a time where the Government has dismally failed in job creation opportunities, leading to reliance in informal trading.⁷³ Although efforts to revive the economy are notable, the domestic industry is failing to compete. In addition, the thesis will also clarify the existing misconceptions on dumping in Zimbabwe in order for dumping laws to safeguard the domestic industry.⁷⁴ To this end, the thesis seeks to diminish the obscurity on the issues of both competition and dumping.

There is also a gap in literature insofar as anti-dumping laws in Zimbabwe are concerned. A contribution to the limited body of knowledge is made by this study, as it examines the institutional framework in Zimbabwe with regard to unfair trade practices and suggests what the nature of scope of their power with regard to dumping should be. Additionally, the study attempts to clarify the adequacy of anti-dumping rules within the WTO/GATT regime. In this effort, such evaluations may be beneficial to the WTO in revamping its anti-dumping rules in ensuring the adequate protection of the industries of its Members. Lastly, the thesis makes recommendations that pave the way for development of an effective anti-dumping regime in Zimbabwe.

1.6 RESEARCH METHODOLOGY

This thesis is a desktop study that engages in a theoretical review of the literature in order to furnish answers to the research questions posed above. The study will use primary sources, inclusive of national legislation and regional and international agreements. These include the Zimbabwean Statutory Instrument 266 of 2002, the different WTO agreements that cover anti-dumping rules and South African and EU anti-dumping legislation. This thesis will also provide a critical review of the provisions of these primary legislations in order to ascertain what exactly is provided for,

⁷²In 2014, it was reported that Zimbabwe's textiles and clothing industry was still seriously weighed down by the pre-inclusive government challenges and was operating below 10% capacity.

⁷³Since 2013, elections the government has not delivered on the jobs it promised the people during election campaign.

⁷⁴Such misconceptions include, for example, the importation of basic commodities from South Africa, goods which are sold lower than the price in the Zimbabwean market, the value of which goods is more than they are sold in the South African market.

and what could be done better. The thesis also consults secondary sources such as journal articles, academic textbooks, academic commentaries, newspaper articles and internet sources.

Furthermore, the thesis looks at what South Africa and the EU do with the aim of drawing lessons for Zimbabwe in the later Chapters. South Africa's selection is based, amongst other reasons, its geographical nexus with Zimbabwe. It is also an established user of anti-dumping provisions and there has been a transition of its laws since 1914.⁷⁵ South Africa is also Zimbabwe's biggest trading partner in Southern African Development Community (SADC).⁷⁶ The selection of the EU is on the basis that the Union used to be the major export destination for Zimbabwe, accounting for two-thirds of total exports.⁷⁷ In addition, the EU has also continuously amended its anti-dumping laws, with each amendment improving on its predecessor.⁷⁸

It is also imperative to investigate how South Africa and the EU protect their respective domestic industries against dumping, since both have been cited in several dumping cases. Of note is that this thesis is not a comparative study, but rather uses South Africa and the EU as cases of best practices in order to draw lessons for Zimbabwe.⁷⁹ As a result, the use of South Africa and the EU provides guidance to Zimbabwe on the characteristics of a successful anti-dumping system.

1.7 CHAPTER OUTLINE

This thesis comprises of six Chapters:

Chapter 1 is the introduction. It provides an overview of the background to the study, the problem, the significance of the study, and methodology.

⁷⁵Brink G 'One Hundred Years of Anti-dumping in South Africa' (2015) 49 *Journal of World Trade* 325.

⁷⁶The Southern Times 'South Africa still ranks high on Zimbabwe's trading partners' list' available at <https://southernafrican.news/2016/06/29/south-africa-still-ranks-high-on-zimbabwes-trading-partners-list/> (accessed 20 November 2017); Department of Research and Information 'Economic overview: Recent developments in the global and South African economies (2016) 9.

⁷⁷Zimbabwe National Trade Policy 2012-16.

⁷⁸See generally Bridges 'EU Institutions Sign Off on Draft Changes to Anti-Dumping Legislation' (2017) *Bridges* Volume 21 - Number 3.

⁷⁹The study cannot be a traditional comparative study because Zimbabwe has never conducted any anti-dumping investigation whilst South Africa and EU have conducted numerous investigations; for a discussion of what a comparative entails see generally Boele-Woelki K 'What comparative family should entail' in Boele-Woelki K (ed.) *Debates in family law around the globe at the dawn of the 21st Century* (2009) 3- 36.

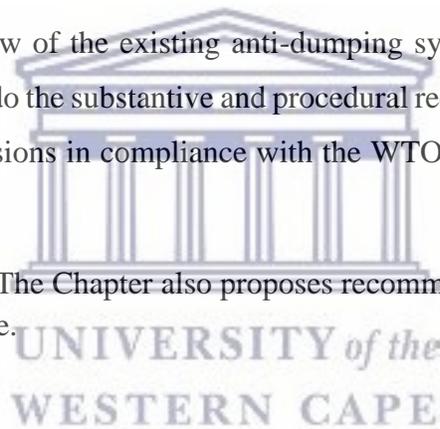
Chapter 2 discusses the international anti-dumping framework within the context of the WTO. Special reference will be made on the relevant provisions of GATT as well as the substantive and procedural requirements for enacting anti-dumping measures as provided for in the ADA. Whilst discussing substantive and procedural requirements, the Chapter also discusses some of the problems in anti-dumping rules at the WTO level.

Chapter 3 discusses what South Africa is doing in order to regulate the injurious dumping of goods into its domestic markets. It assesses South Africa's legislative framework as the best African practice with the aim of drawing lessons for Zimbabwe in Chapter 5.

Chapter 4 discusses anti-dumping laws in the EU and how the laws have been used to regulate the injurious dumping in the EU. The aim is also to use the EU as a case of best practice and draw lessons for Zimbabwe in Chapter 5.

Chapter 5 discusses an overview of the existing anti-dumping system in Zimbabwe. It looks at how dumping is defined. What do the substantive and procedural requirements of the anti-dumping provision entail? Are the provisions in compliance with the WTO? What lessons can Zimbabwe learn from SA and EU?

Chapter 6 concludes the study. The Chapter also proposes recommendations for the reform of anti-dumping laws in Zimbabwe.



CHAPTER 2

INTERNATIONAL FRAMEWORK ON DUMPING

2.1 INTRODUCTION

International trade has seen consumers all over the world enjoy a wide range of goods, especially in this 21st century. More importantly, many countries worldwide have embraced trade liberalisation as a means to advance their international trade.¹ Trade liberalisation has significantly facilitated a freer movement of goods from one country to another than before: thereby, creating larger markets with more affordable goods.²

Within the above context, the World Trade Organisation (WTO) is the multilateral body responsible for regulating rules that govern international trade and trade liberalisation.³ The primary function of the WTO is to ensure that there is a balance of power among Members. To achieve this, the WTO uses two basic principles, namely: the most favoured nation (MFN) and the national treatment (NT). The notion of non-discrimination underpins the MFN principle, which is the cornerstone of the WTO system.⁴ Article 1.1 of the General Agreement on Tariffs and Trade (GATT) is the founding provision for the MFN principle. It 'prohibits discrimination between like products originating in, or destined for, different countries'.⁵ Hence, the extension of a favour should be done at the very instance where such a favour has been granted to one trading partner, equally and unconditionally.⁶

Moving on to the NT principle, it is also based on non-discrimination; thereby, it prohibits discrimination between imported and domestically produced goods with respect to internal taxation or other government regulation.⁷ In other words, the NT principle prohibits Members from giving discriminatory treatment that results in treating imported products less favourably compared

¹Trade liberalisation is concerned with the removal of or reduction in trade practices that suppress free flow of goods and services from one nation to another. It includes eliminating both of tariff and non-tariff barriers.

²See generally Froning D 'The Benefits of Free Trade: A Guide For Policymakers' (2000) *Centre for International Trade and Economics* No. 1391.

³World Trade Organisation *Understanding the WTO* 5ed (2015) 9 (hereafter WTO (2015))

⁴Mayurama W 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46(2) *Stanford Journal of International Law* 177.

⁵See Appellate Body Report, Canada – Autos, para. 84.

⁶Van den Bossche P *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) 371.

⁷Article III.I of GATT states that 'The contracting parties recognise that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production'.

to like domestic products.⁸ However, exceptions such as the allowance of ‘the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product’ are provided for.⁹ Hence, when charges are levelled for purposes of transporting goods, such charges do not constitute a violation of NT principle because they do not deal with the origins of the concerned products. Therefore, NT applies only when a product has entered a certain market, as such customs duty on imported products do not violate NT principle.¹⁰

Despite the WTO aims of creating an equal playing field, this is not always achieved, as unfair trade practices, which may cause harm to domestic industries, may occur. By way of definition, an unfair trade practice is a prejudicial trade conduct that has the effect of potentially limiting permitted market competition.¹¹ In international trade, unfair trade practises take place in two forms, namely: dumping and subsidies.¹² This thesis, however, deals exclusively with dumping owing to the fact that there have been calls by Zimbabwean industries to tighten anti-dumping laws so that the government protects their goods from dumped products.¹³

In light of the above, there is a pressing need to look at the WTO anti-dumping framework to protect domestic products from those dumped from outside. This study is also pertinent owing to the fact that Zimbabwe is a Member of the WTO. In doing so, this Chapter first turns its attention to the history of rules on dumping because it is through the past events that elaborate why anti-dumping legislation came about. Having set the historical scene, the Chapter discusses the definition of dumping; types of dumping, effects and schools of thoughts on anti-dumping duties. Thereafter, the Chapter will discuss dumping under WTO in relation to substantive requirements

⁸Jensen LC & Hønneland G *Handbook of the Politics of the Arctic* (2015)192.

⁹Article III.I of GATT 1994.

¹⁰WTO (2015) 11.

¹¹Korea Fair Trade Commission ‘Unfair Trade Practices’ available at http://eng.ftc.go.kr/policyarea/competitionpolicy_practices.jsp?pageId=0201 (accessed 07 April 2018). See generally also, Hoekman BM and Mavroidis PC ‘Dumping, antidumping and antitrust’ (1996) 30 *Journal of World Trade*.

¹²The WTO defines a subsidy as ‘any financial benefit provided by a government which gives an unfair advantage to a specific industry, business or even individual’ The WTO lists five types of subsidies. See WTO ‘Agreement on subsidies and countervailing measures’ available at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (accessed 27 May 2017). For a detailed analysis of the remedies, see Erixon F ‘Anti-dumping in the European Union’ in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) 128-130.

¹³Muganda RG ‘Lets enforce dumping laws’ *The Herald* 27 September 2012 also see Mugano G ‘Time to Tighten Screws on Dumping’ *The Herald* 31 October 2013.

for determining both dumping, injury and causation. The Chapter will also discuss the procedural requirements for enacting anti-dumping measures, reviews and the institutions that deal with dumping. The Chapter will then discuss challenges within WTO anti-dumping rules and the WTO dispute settlement processes. The last part contains a conclusion.

2.2 BRIEF HISTORY OF WORLD TRADE ORGANISATION RULES ON DUMPING

Dumping has been a part of GATT since its inception in 1947.¹⁴ However, anti-dumping rules had already found their existence prior GATT negotiations. For instance, Canada was the first country to enact anti-dumping rules as part of its national laws in 1904.¹⁵ In addition, the United States of America (USA), South Africa, Australia, France, New Zealand and the Great Britain incorporated anti-dumping rules in their respective national laws by mid-1920s.¹⁶ As a result, basic tests such as the determination of normal value were put in place around this time.¹⁷ Furthermore, dumping was determined by using tests such as ‘price on the home market of the country of exportation, price of the product when exported to other countries and cost of production in the country of exportation’.¹⁸ It is of note that while these countries had put some anti-dumping laws in place, USA was the only country, which used the three determinants mentioned above.¹⁹

Despite the existence of these basic tests, there was no consensus on whether to include dumping provisions during the 1947 GATT negotiations.²⁰ For instance, the inclusion of Article VI in GATT was only made possible at the persistence of the USA.²¹ The USA had to submit proposals modelled on USA’s 1921 Anti-Dumping Act.²² They also outlined four types of dumping that had

¹⁴See generally Lloyd PH ‘Anti-Dumping and Competition Law’ in Appleton AE & Plummer MG (ed) *The World Trade Organization: Legal, Economic and Political Analysis* Volume I (2007) 68-80.

¹⁵Pomfret R *International Trade: Theory, Evidence and Policy* (2016) 184.

¹⁶See generally Snyder F ‘The Origins of the ‘Nonmarket Economy’: Ideas, Pluralism & Power in EC Anti-dumping Law about China’ (2001) 7(4) *European Law Journal*; Mastel G *Antidumping Laws and the U.S. Economy* (2016).

¹⁷Luo Y *Anti-dumping in the WTO, the EU, and China: The Rise of Legalisation in the Trade Regime and Its Consequences* (2010) 56.

¹⁸Snyder F *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (2010) 217.

¹⁹The tests included the ‘price on the home country of the country of exportation, price of the product when exported to other countries and cost of production in the country of exportation’ Paul J *International Marketing: Text and Cases* (2008) 234.

²⁰Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organization* 3ed (2013) 675.

²¹See generally Riesenfeld SA ‘The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment’ (1971) 65(3) *American Journal of International Law*.

²²See generally Johnson TE ‘The Retroactive Application of the Antidumping Act of 1921’ (1979) 1(1) *Northwestern Journal of International Law & Business* 262-283.

to be included as part of dumping provisions.²³ These were service dumping, price dumping, social dumping and exchange dumping.²⁴ Of the four, only price dumping was accepted and became a part of Article VI.²⁵

Once inserted in GATT in 1947, Article VI laid the foundation of anti-dumping framework that exists to date.²⁶ Though it has remained unchanged, the provision has been continuously supplemented. For example, additions to Article VI were made during the 1967 Kennedy round and then by the Anti-Dumping Code during the 1973–1979 Tokyo negotiations.²⁷ Nonetheless, problems still arose at the Uruguay round in the 1980s with USA, Japan and China, for example, vying different implementation disciplines of anti-dumping measures.²⁸ Despite their differences, a consensus was reached as is now reflected in Article VI of GATT 1994 and Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement (ADA)).

Despite this consensus as reflected in the ADA, there are also recent developments of supplementing Article VI framed within the Doha round. Negotiations and proposals have been tabled by some WTO Members urging the need improve the ADA.²⁹ In this regard, USA specifically emphasised that anti-dumping measures should remain effective in countering unfair trade practices.³⁰ The constant lobbying for anti-dumping laws to continue being amended is an indication that dumping is a complex issue, which constantly needs to be monitored to see if the laws still cater for emerging markets and changing trade dynamics. In addition, due to the complexity of dumping, there is need for a sound definition bearing in mind that WTO does not

²³Raju KD *World Trade Organisation Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence* (2008) 11 (hereafter Raju KD (2008)).

²⁴Service dumping is where subsidies are given which allows exporter to sell at lower price, exchange dumping is where exporter manipulates exchange rates to gain advantage in export industry, social dumping is where cheaper labour is used and in the end it lowers product price in Raju KD (2008) 11.

²⁵Price dumping is where the product is sold at a lower price than it is sold in the home country.

²⁶Ndlovu L 'South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy' (2013) 28(2) *Southern African Public Law* 282.

²⁷WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

²⁸Bown CP and McCulloch R 'US–Japan and US–China trade conflict: Export growth, reciprocity, and the international trading system' (2009) 20(6) *Journal of Asian Economics* 669-687.

²⁹An informal group of 15 participants (Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Chinese Taipei; Thailand; and Turkey) calling themselves "Friends of Anti-Dumping Negotiations" (FANs) has called for the reform of the current Anti-Dumping Agreement' see https://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm (accessed 08 April 2016).

³⁰See generally briefing notes at https://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm (accessed 08 April 2018).

regulate dumping but it regulates how governments can react to it. As such, the next section discusses different definitions of dumping.

2.3 DEFINITION OF DUMPING

Viner defined dumping as the taking place of international price discrimination.³¹ Price discrimination is a pricing strategy where same provider in different markets' transacts identical or similar goods or services at different prices.³² In simple words, price discrimination occurs when a company sells the same product for different prices in different markets.³³ Viner's definition is, however, problematic in defining dumping because price discrimination is not an unfair trade practice as opposed to dumping itself. To illustrate this point, price discrimination occurs where a Zimbabwean cooking oil producing company sells its cooking oil for 5 dollars locally and 7 dollars in Zambia, the difference in prices cannot constitute dumping in the Zambian market. This is because the price in Zambia is not less than the normal value of cooking oil in Zimbabwe; also the difference in price may be due to import duty, which has nothing to do with dumping.

In terms of GATT, Article VI defines dumping as a situation when 'products of one country are introduced into the commerce of another country at less than the normal value of the products, and causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.³⁴ Thus, the provision encompasses three elements of dumping, namely: dumping occurs only when a product is introduced by the exporting country at less than normal value; the domestic industry experiences material injury; and there is a link between the dumping and the injury.³⁵ To this end, if any of these elements were not satisfied, then one cannot argue that dumping has occurred.

In addition to GATT, Article 2.1 of the ADA defines dumping as the introduction of certain products:

³¹Viner J *Dumping: A problem in International Trade* (1923) 4.

³²See generally CTI Reviews *Microeconomics: Economics, Microeconomics* 5ed (2015) available at <https://books.google.co.za/books?id=qz7MAwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> (accessed 08 April 2018).

³³Economics Online 'Price Discrimination' available at http://www.economicsonline.co.uk/Business_economics/Price_discrimination.html (accessed 08 April 2018).

³⁴Article VI.1 of GATT 1994. For a commentary of article VI of GATT, see also Vermulst EA & Graafsma F *WTO Disputes: Anti-dumping, Subsidies and Safeguards* (2002) 418.

³⁵Czako J, Human J & Miranda J *A handbook on anti-dumping investigations* (2003) 2.

‘into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country’.³⁶

The ADA and GATT definitions have some slight deviations. While the ADA is silent about material injury but talks about export price, the opposite is true for GATT. Arguably, the differences are not that important because Article VI should always be read together with the ADA since the latter supplements the former.

The term dumping is also used to describe a situation where a product is banned in the exporting country.³⁷ The effect is that the ‘dumped’ product can find its way on markets of poor countries even though it is banned in the exporting country.³⁸ Overall, there is a consensus that dumping occurs when selling the product at a lower price than it sells for in the exporting country as contained in the ADA.

2.3.1 Types of Dumping

There are several reasons one can table in giving reasons for dumping and it is from these reasons that the types of dumping can be framed. The formulated types of dumping particularly in relation to commerce dumping are sporadic, predatory and continuous dumping.³⁹ The classifications are because of the effects and continuity of dumping.⁴⁰

Starting with sporadic or distress dumping, it is dumping, which is occasional, and casual, occurring at scattered instances and is not exactly a manifestation of an established price policy.⁴¹ It occurs mainly when an exporting country produces more goods than needed in its domestic industry.⁴² Viner, a significant contributor to international economics, avers that a producer may

³⁶Article 2.1 of ADA. For a commentary of article 2.1 of ADA, see also McMahon *J The WTO Agreement on Agriculture: A Commentary* (2006) 111.

³⁷World Health Organisation ‘Trade, foreign policy, diplomacy and health’ available at <http://www.who.int/trade/glossary/story018/en/> (accessed 08 April 2018).

³⁸World Health Organisation ‘Trade, foreign policy, diplomacy and health’ available at <http://www.who.int/trade/glossary/story018/en/> (accessed 08 April 2018).

³⁹Carbaugh *R International Economics* 12ed (2008) 163 (hereafter Carbaugh R (2008)).

⁴⁰Viner J ‘Dumping as a Method of Competition in International Trade II’ (1923) 1(2) *The University Journal of Business* 182 (hereafter Viner J (1923)).

See generally, Aggarwal A *The Anti-Dumping Agreement and Developing Countries: An Introduction* (2007).

⁴¹Dale R *Anti-dumping Law in a Liberal Trade Order* (1980) 8.

⁴²See generally Ehrenhaft PD ‘Protection against International Price Discrimination: United States Countervailing and Antidumping Duties’ (1958) 58(1) *Columbia Law Review* 44–76.

choose to sporadically dump his goods rather than store the surplus stocks to the next season as he may incur storage charges.⁴³ Moreover, reducing prices in the domestic market in order to increase sales is not an option; because once prices are reduced, it is difficult to then sell the products again using the original price.⁴⁴ Consequently, the producer opts to sell the excess goods to the importing country or countries at a lower price than the exporting country.⁴⁵

There are different views on the selection of the importing country where producers sporadically dump the products. For example, Aswathappa observes that the importing country is usually a country where the product is not normally sold.⁴⁶ On the contrary, Alamri states that sporadic dumping is dependent upon the elasticity of foreign demand for the manufacture's commodity and if the producer is a monopolist in the domestic market.⁴⁷ In support of Alamri, Leclerc states that sporadic dumping is motivated by rational business strategies as such producers mainly act in an economically efficient manner.⁴⁸ The study supports Lecrec and Alamri, because the issue of demand is a business strategy, which determines where the product is needed most. Therefore, it makes more business sense to undertake sporadic dumping in a country where there is high demand of the product.

Sporadic dumping can also be unintentional.⁴⁹ This may take place due to prices in the export markets rising without notice or inexperienced exporters.⁵⁰ Sporadic dumping is brief in nature and may not necessarily injure the domestic industry of the importing country.⁵¹ Dwivedi also submits that this type of dumping is not so much of a threat to the domestic industry of the importing country because it is short lived and at most, it prevents a downslide in the domestic industry of the exporting country.⁵²

⁴³Viner J (1923) 183.

⁴⁴Viner J (1923) 183.

⁴⁵Lee YS *Safeguard Measures in World Trade: The Legal Analysis* 2ed (2005) 200.

⁴⁶Aswathappa K *International Business* (2015) 459.

⁴⁷Alamri MA 'A Conceptual Framework: "Dumping" And "Anti-Dumping" In The International And Regional Legal Systems' (2017) 5 (1) *Global Journal of Politics and Law Research* 31.

⁴⁸Leclerc JM 'Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries' (1999) 44 *McGill Law Journal* 117.

⁴⁹Viner J (1923) 184 also see generally Aggarwal A *The Anti-Dumping Agreement and Developing Countries: An Introduction* (2006) (hereafter Aggarwal A (2006)).

⁵⁰Madar D *Big Steel: Technology, Trade, and Survival in a Global Market* (2009) 68 (hereafter Madar D (2009)) also see generally Aggarwal A (2006).

⁵¹Madar D (2009) 68.

⁵²Dwivedi DN *Managerial Economics* 8ed (1980) 444.

Whilst sporadic dumping is done randomly to relieve stress on the domestic industry, predatory dumping is the exact opposite. With predatory dumping, goods are manufactured for sole purpose of dumping because there is a well-established export policy in place.⁵³ Predatory dumping occurs when goods are sold for less at a loss in order to gain access to a market and drive competitors out of competition.⁵⁴ This type of dumping has a crippling effect on the domestic industry, which in turn affects the consumers by driving out competitors, leaving dumping firms to monopolise the market and increase prices making goods more expensive than they normally would have.⁵⁵ Research notes that predatory dumping is the most harmful type of dumping as it has a double effect of injuring world welfare of importing countries by driving out local producers, resulting in exploitation of consumers.⁵⁶

Lee avers that proving of intent of predatory dumping is difficult on exporters.⁵⁷ One can then observe that although predatory dumping may warrant a higher anti-dumping duty because of its destructive nature, if it is not proved, investigative authorities may not apply such duty. This may lead to partial elimination of the effects caused by predatory dumping, crippling the domestic industry of the importing country. Economists have however highlighted that predatory dumping is unlikely to occur because it is irrational for firms to produce goods made specifically for dumping.⁵⁸

The last type of dumping is known as continuous or sacrificial dumping.⁵⁹ It involves 'the repeated supply of goods at a lower price than the supply cost for a considerable period of time'.⁶⁰ This is sacrificial dumping in the sense that consumers in the domestic industry sacrifice their money by buying goods at a higher price to compensate the lower price abroad. Madar observes that

⁵³Anwar R & Raslan A *Anti-dumping: A developing country perspective* (2009) 13.

⁵⁴Srinivasan R *International Marketing* (2008) 89; Markusen JR *International Trade: Theory and Evidence* (1995) 355.

⁵⁵Chapter Eight Exercises available at http://www.franke.nau.edu/eastwood-j/eco486/hwk-text_exercises/hwch08.htm (accessed 22 March 2017).

⁵⁶Stanbrook C and Bentley P *Dumping and Subsidies: Law and Procedures Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community* (1996) 7.

⁵⁷Lee YS *Safeguard Measures in World Trade: The Legal Analysis* 2ed (2005) 200.

⁵⁸Bolton RA 'Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny' (2011) 29(1) *Berkeley Journal of International Law* 72.

⁵⁹Raju KD *World Trade Organization Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence* (2008) 10.

⁶⁰Koh KM & Hyun JW *Competition Law in the Republic of Korea* (2011) 70.

continuous dumping is both detrimental and to some extent beneficial to domestic industries.⁶¹ A net welfare benefit can be produced through efficient producers that come about through shift in change.⁶²

To sum up, different types of dumping may result in material injury, which adversely affects local industries that receive or have received the dumped imports. When dumping causes injury, domestic industries can benefit from relief in the form of anti-dumping duties to the dumped products.⁶³ Anti-dumping duties instil a balanced position between domestic products and imported products in terms of market competition. Hence, the next section discusses the different schools of thoughts that pertain to the imposition of these anti-dumping duties.

2.3.2 Schools of thoughts on anti-dumping duties

Raju proposes three theories that may at least; explain governments' reactions to dumping. According to these theories, anti-dumping duties are a response to either unfair trade, or special protection or strategic weapon.⁶⁴

Anti-dumping duties are necessary to remedy unfair trade practices. This principle underpins logic behind this principle is that, by levelling the playing field with anti-dumping duties, industries may compete effectively. The remedying of unfair trade practices is also done through creation of market barriers to exporting firms using predatory pricing to drive out competition.⁶⁵ When Canada initiated its first anti-dumping laws in 1904, it intended to protect the 'Canadian steel industry from short-term predatory dumping from the cartelised U.S. steel companies'.⁶⁶ Therefore, they were reacting directly to the unfair trade instigated by companies from USA.

The ADA permits anti-dumping duties to be applied only when all elements mentioned in Article VI of GATT are present.⁶⁷ This supplements the fact that in terms of the ADA there is a

⁶¹Madar D *Big Steel: Technology, Trade, and Survival in a Global Market* (2009) 68.

⁶²OECD *Multifunctionality towards an analytical framework: Towards an analytical framework* (2001) 70.

⁶³Czako J, Human J & Miranda J *A handbook on anti-dumping investigations* (2003) 2.

⁶⁴Raju KD *World Trade Organization Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence* (2008) 7.

⁶⁵Evolutionary Archetypes 'Antidumping at the Intersection Between Free and Fair Trade' available at <http://evolutionary-archetypes.com/en/know-hub/Antidumping-at-the-Intersection-Between-Free-and-Fair-Trade-.15/> (accessed 19 April 2018).

⁶⁶Denton R '(Why) Should Nations Utilize Antidumping Measures?' (1989) 11(1) *Michigan Journal of International Law* 229.

⁶⁷Czako J, Human J & Miranda J *A handbook on anti-dumping investigations* (2003) 2.

qualification for anti-dumping duties to be used as a response to unfair trade practices. Duties may be used as a remedy where there is an introduction of a country's products into that of another 'at less than the normal value of the products, and causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.⁶⁸ Thus, anti-dumping duties are used only as a reaction upon proving all the relevant elements.

Critiques of the theory that anti-dumping duties counter unfair trade aver that they are a form of a protectionist measure.⁶⁹ Finger opines that although anti-dumping regulations are justified under GATT system, if one looks closely at them, they are nothing but protectionist regulations.⁷⁰ Raju, however, views it as special protection rather than a protectionist measure because they protect the domestic industry from unfair competition.⁷¹ Raju further argues that anti-dumping duties are a strategic weapon.⁷² Prusa also avers that anti-dumping measures are usually imposed against members who previously investigated them.⁷³

In support of Raju, Lindsey and Ikenson have argued that, indeed anti-dumping laws serve political interests more than anything else.⁷⁴ They submit that international competition should be subject to 'certain agreed-upon "rules of the game" according to which some sources of competitive advantage – trade barriers, subsidies, and other market distorting governmental policies - are

⁶⁸Article VI of GATT 1994.

⁶⁹Anti-dumping duties are viewed as protectionist because some countries that apply the duties do not want local products to face competition from foreign products hence they apply the duties to drive out competition see generally Cheng LK, Qiu LD & Wong KP 'Anti-Dumping Measures as a Tool of Protectionism: A Mechanism Design Approach' (2001) 34 (3) *The Canadian Journal of Economics / Revue canadienne d'Economie*; Gay P 'Unveiling Protectionism: Anti-Dumping, The GATT, And Suggestions For Reform' (1997) *Dalhousie Journal Of Legal Studies*.

⁷⁰Finger MJ(ed) *Antidumping: How it Works and who Gets Hurt* (1993) 13.

⁷¹In this regard, anti-dumping laws are regarded as a form of short-term protection, which temporarily protects domestic products from international competition. This theory argues that, had it not been for this special protection Member States of the WTO would not have agreed to the reduction of tariffs in the Tokyo and Uruguay rounds of WTO/GATT negotiations.

⁷²Raju KD *World Trade Organization Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence* (2008) 7.

⁷³Prusa TJ 'On the Spread and Impact of Anti-dumping' (2001) 34(3) *Canadian Journal of Economics* 591.

⁷⁴Lindsey B & Ikenson D *Anti-dumping Exposed: The Devilish Details of Unfair Trade Law* (2003) 18 (hereafter Lindsey B & Ikenson D (2003).

deemed as unfair'.⁷⁵ In other words, the principle of legitimacy, rather than efficiency, must guide anti-dumping laws.

The justification by Lindsay and Ikenson is unnecessarily complex because it proposes that even though the motivation of anti-dumping laws might be political, the practical effect is that it in the process the playing field is levelled by denying benefits of unfair advantage.⁷⁶ Smith, Rosendorff and Wruuck also concur with Lindsey and Ikenson, further arguing that where there is leadership change in autocratic rule there is more likely to be administrative protection, which may lead to increased anti-dumping investigation.⁷⁷ This is the opposite for democratic countries because a 'leader accountable to a larger coalition will also have fewer resources to allocate to service a specific industry, and may choose not to pursue the investigation further'.⁷⁸

The school of thought that best reflects on the use of anti-dumping measures in terms of WTO is the one that proposes that anti-dumping duties are necessary to remedy unfair trade.⁷⁹ This is because under WTO, Members cannot impose anti-dumping duties unless the dumping is causing injury and if there is a causal link between dumping and injury.⁸⁰ However, one may argue otherwise contending that anti-dumping duties may be used by Members to serve political interests. They will unlikely be used to punish allies as compared to their use amongst countries, which have no political gains amongst them.

The next sections of this thesis will discuss dumping in the WTO including substantive and procedural requirements for legislating anti-dumping duties and the institutions that deal with anti-dumping disputes in the WTO. The main headings under this section will be determination of dumping, determination of injury, procedural requirements for legislating anti-dumping measures, challenges within WTO anti-dumping rules and WTO dispute settlement.

⁷⁵Lindsey B & Ikenson D (2003) 18.

⁷⁶Lindsey B & Ikenson D (2003) 18.

⁷⁷Smith A, Rosendorff BP & Wruuck P 'Political Change, Domestic Institutions and the Onset of Anti-Dumping Investigations' (2015) New York University and University of Mannheim 3 (hereafter Smith A, Rosendorff BP & Wruuck P (2015)).

⁷⁸Smith A, Rosendorff BP & Wruuck P (2015) 8.

⁷⁹WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2018).

⁸⁰Article VI of GATT.

2.4 WORLD TRADE ORGANISATION TREATMENT OF DUMPING

As discussed under the definition of dumping, the WTO definition of dumping is governed by Article VI of GATT and Article 2.1 of the ADA. These provisions do not prohibit dumping *per se* as private companies usually do dumping.⁸¹ In this vein, it is imperative to note that the ADA does not regulate the actions of companies who engage in dumping; rather its focus is on how governments can or cannot react to dumping through regulating anti-dumping actions.⁸² WTO Members are also not obliged to enact national anti-dumping legislations. However if Members elect to, they must enact these laws in accordance with WTO rules.⁸³ The legal framework that governs the reactions of Governments to dumping is thus Article VI of GATT and the ADA. It is therefore imperative to discuss the determination of dumping as per these WTO instruments. These instruments are highly complex and require a high level of technical expertise in accountancy, economics and law fields.⁸⁴

2.4.1 Determination of Dumping

This part of the Chapter reviews aspects of the dumping determination. It analyses concepts such as normal value and export price. WTO Members should be able to use the correct calculations and principles in determining normal value and export price. These are imperative concepts, since they form the basis for calculating the dumping margin (the percentage of dumped products in monetary value). If incorrect principles and calculations are used, it may compromise the investigation and this may lead to disputes. The next section also addresses the need for comparison of normal value and export price, including the fair comparison requirement. It further addresses the calculation of the dumping margin.

2.4.1.1 Determination of Normal Value

There is need to determine the normal value when determining if a product is dumped. The ADA provides that ‘a product is to be considered as being dumped if it is introduced into the commerce

⁸¹UNCTAD ‘Dispute Settlement: World Trade Organisation’ (2003) 3.

⁸²WTO ‘Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 18 April 2018).

⁸³WTO ‘Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 20 April 2018).

⁸⁴Brink G ‘A nutshell guide to anti-dumping action’ (2008) 271 available at https://repository.up.ac.za/bitstream/handle/2263/8445/Brink_Nutshell%282008%29b.pdf?sequence=1 accessed 28 September 2017)

of another country at less than its normal value...'⁸⁵ Normal value in general terms refers to the price of the product in question, when it is sold in the exporting country market.⁸⁶ Within this context, in *US — Hot-Rolled Steel* the Appellate Body held that the

‘text of Article 2.1 expressly imposes four conditions on sales transactions in order for them to be used to calculate normal value: first, the ‘sale must be “in the ordinary course of trade”’; second, it must be of the “like product”’; third, the product must be “destined for consumption in the exporting country”’; and, fourth, the price must be “comparable”’.⁸⁷

Thus, the failure to meet these four conditions then means that the sales transaction cannot be used to determine normal value.

Starting with the first condition that sales must be in the ‘ordinary course of trade’, the ordinary meaning of this phrase (ordinary course of trade) is not provided for by the ADA.⁸⁸ This implies that one has to look for its interpretation outside the ADA. The agreement does, however, provide for instances where production is not in the ‘ordinary course of trade’. For example, it states that when sales are made at ‘prices that are below per unit (fixed and variable) costs of production plus administrative, selling and general costs, they may be treated as not being in the ordinary course of trade’.⁸⁹ Thus, they may not be used in determining normal value if investigating authorities conclude that the sales were made within an extended period of time and their prices prohibits the recovery of all costs within a ‘reasonable period’ of time.⁹⁰

Interestingly, in *US, Hot-Rolled Steel*, the panel, held that ‘a ‘reasonable period’ must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of ‘reasonableness’, and in a manner that allows for account to be taken of the particular circumstances of each case’.⁹¹ The study therefore submits that there cannot be a concrete measure

⁸⁵Article 2.1 of the ADA. For a commentary on Article 2.1 of the ADA, see Andersen H *EU Dumping Determinations and WTO Law* (2009) 109.

⁸⁶See generally Lester S, Mercurio B & Davies A *World Trade Law: Text, Materials and Commentary* (2012).

⁸⁷*United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan* WT/DS184/AB/R para 165 (hereafter Appellate Body *US — Hot-Rolled Steel*).

⁸⁸Appellate Body *US — Hot-Rolled Steel* [2001] para 165.

⁸⁹Article 2.2.1 of the ADA. For a commentary on Article 2.2.1 of the ADA, see Stoll PT & Koebele M *WTO - Trade Remedies* (2008) 24.

⁹⁰See generally Article 2.2.1 of the ADA.

⁹¹Appellate Body *US — Hot-Rolled Steel* para 165.

of what constitutes reasonableness as it decided on a case-by-case basis, taking all the circumstances in consideration.

The second requirement is that there must be a ‘like’ product. The ADA defines a ‘like product’ ‘as a product which is identical, that is alike in all respects to the product under consideration, or [where such product does not exist], another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration’.⁹² In *US – Softwood Lumber* - the panel held that a ‘like product’ for purposes of the determination of dumping, ‘is the product which is destined for consumption in the exporting country’.⁹³ It is therefore to be compared with the allegedly dumped product, generally referred as the product under consideration in the ADA.⁹⁴ It is submitted that it is important for Members to determine a like product in relation to the ADA as the word may be used differently in other WTO Agreements. In *EC– Asbestos*, the Appellate Body held that

‘in each of the provisions where the term “like products” is used, the term must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears.’⁹⁵

As such, an investigating authority should be aware that the term like product is given specific meaning in Article 2.6 of the ADA, which should be used throughout the Agreement.⁹⁶ This is not the case in other WTO Agreements, as such in anti-dumping investigations ‘like products’ should be given their meaning within the context of dumping.⁹⁷ If meaning is drawn outside the context of dumping, it may affect the basis of selection of companies, which constitute the domestic industry.⁹⁸ This in turn compromises the scope of the investigation, inclusive of determination of injury and causal link.⁹⁹

⁹²Article 2.6 of the ADA.

⁹³*United States – Final Dumping Determination on Softwood Lumber from Canada* WT/DS264/R para 7.152 (hereafter Panel Report *US – Softwood Lumber*).

⁹⁴Panel Report *US – Softwood Lumber* para 7.152.

⁹⁵*European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R para 88 (hereafter Appellate Body *EC– Asbestos*).

⁹⁶Appellate Body *EC– Asbestos* para 88.

⁹⁷Appellate Body *EC– Asbestos* para 88.

⁹⁸ WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

⁹⁹ WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

The third requirement is that the product must be ‘destined for consumption in the exporting country’.¹⁰⁰ Again, Article 2.1 of the ADA does not define what constitutes ‘exporting country’. According to Andersen, clarifications such as the meaning of ‘exporting country’ are important especially where the product at issue is not produced in the country being investigated.¹⁰¹ However, Article 2.5 of the ADA provides relief where an intermediary country produces the goods. It states that if the ‘product is merely transhipped through the exporting country, normal value may be determined on the basis of the price’ of the product in the country of origin, not the exporting country’s price.¹⁰²

The last requirement is that the price must be ‘comparable’. This means that the price used should provide a fair comparison between normal value and export price, as stated in Article 2.4 of the ADA.¹⁰³ Therefore, if sales of transactions are not comparable, the standard method of calculating normal value cannot be used.

Most importantly for sales transactions to be used in the calculation of normal value, all the four requirements should be fulfilled. In some cases, determining normal value in the ordinary course of business is difficult due to lack of sales of such product(s) in the domestic market.¹⁰⁴ In these instances, the ADA provides alternative methods for the determination of normal value. Article 2.2 provides three special circumstances where standard situation of calculating normal value cannot be used and it provides two alternative methods for calculating normal value, namely: third country exports and constructed normal value.¹⁰⁵

The first special situation is when ‘there are no sales of the like product in the ordinary course of trade in the domestic market’¹⁰⁶ which means that the product exported or under investigation is not sold in the exporting country domestic market. The second situation is where the volumes of

¹⁰⁰Appellate Body *US — Hot-Rolled Steel* para 165.

¹⁰¹Andersen H *EU Dumping Determinations and WTO Law* (2009) 106.

¹⁰²WTO ‘Indirect Exports’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 05 May 2017).

¹⁰³Article 2.4 of the ADA requires that when determining dumping a fair comparison should be made between the export price and the normal value.

¹⁰⁴WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2018).

¹⁰⁵United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 9.

¹⁰⁶Article 2.2 of the ADA.

sales are too low¹⁰⁷ in the domestic industry to allow for calculation of normal value.¹⁰⁸ The last situation is when sales in the domestic industry of exporting country do not allow a proper comparison of normal value and export price.¹⁰⁹

In the special situations, the ADA provides that normal value can be calculated using the export price to a third country or constructed normal value.¹¹⁰ The first alternative involves the use of export price to the third country. For example, where Zimbabwe exports steel to South Africa, Zambia and Malawi, and if it dumps the steel in South Africa, normal value can be calculated using the price of steel from Zimbabwe to Zambia only if standard calculation cannot be used.

However, for price of steel to Zambia to be used, Article 2.2 states that Zambia needs to be appropriate.¹¹¹ Andersen submits that the word appropriate in Article 2.2 of the ADA suggests that investigating authorities must consider a number of different countries to ensure that they select the appropriate country.¹¹² Murigi avers that this option is rarely used because there are worries that third country prices may also be dumped.¹¹³ Besides the issue that prices may also be dumped, the Article does not clarify the requirements to qualify as ‘appropriate’ third country. This makes it difficult for Members to rely on third country prices in calculating normal value.

Besides using the price of third country exports, the ADA provides that normal value can be constructed.¹¹⁴ Constructed normal value is when normal value is determined by looking at production, general costs, selling expenses, administrative expenses, and profits of ‘like products’ by the exporting country being investigated.¹¹⁵ These costs should be constructed by actual data

¹⁰⁷Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison’ see Footnote 2 of the ADA.

¹⁰⁸Article 2.2 of the ADA.

¹⁰⁹Article 2.2 of the ADA.

¹¹⁰See generally Article 2.2 of the ADA.

¹¹¹See generally Article 2.2 of the ADA.

¹¹²Andersen H *EU Dumping Determinations and WTO Law* (2009) 146.

¹¹³Murigi WC *The Development of a Successful Antidumping Regime In Kenya* (unpublished LLM thesis, University of the Western Cape, 2013) 13.

¹¹⁴See generally Article 2.2.2 of the ADA.

¹¹⁵See generally Article 2.2.2 of the ADA.

pertaining to production and sales in the ordinary course of trade.¹¹⁶ If that is not possible, the expenses can be calculated based on three possibilities, namely:

- (i) 'the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'.¹¹⁷

In *US – OCTG (Korea)*, the panel held that in order to make a profit determination under Article 2.2.2(i) or to calculate a profit cap under Article 2.2.2(iii) of the ADA, there must be a determination by an investigating authority of which products fall within the 'same general category of products'.¹¹⁸ Although the ADA does not contain a definition of 'same general category of products', the scope must be understood to be broader, not narrower than that of the like product.¹¹⁹ As such, although the definition of 'same general category of products' does include the 'like product', the meaning is broader than that of the 'like product'.¹²⁰

In *Egypt – Matches*, a complaint against Egypt was filed by Pakistan arguing that Egypt breached Articles 2.2, 2.2.1.1, and 2.2.2 of the ADA when it failed to use actual data provided by Khyber or another reasonable method to calculate the Selling, General & Administrative (SG&A) expenses and profits for Khyber.¹²¹ Instead, Egypt had used data from other sources in its construction of the normal value for the Pakistan Company.¹²² Though a request for panel was set, a mutual

¹¹⁶See generally Article 2.2.2 of the ADA.

¹¹⁷See generally Article 2.2.2 (i) (ii) (iii) of the ADA.

¹¹⁸*United States – Anti-dumping measures on certain oil country tubular goods from Korea* WT/DS488/R para 7.63 (hereafter Panel Report *US – OCTG (Korea)*).

¹¹⁹Panel Report *US – OCTG (Korea)* para 7.66 also see *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* WT/DS141/R para 6.60 (hereafter Panel Report *EC – Bed Linen* para 6.60; and *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland* WT/DS122/R para.7.112 (hereafter Panel Report *Thailand – H-Beams*).

¹²⁰Panel Report *US – OCTG (Korea)* para 7.72.

¹²¹*Egypt – Anti-Dumping Duties on Matches from Pakistan* WT/DS327/2 para 14 (hereafter Request for the Establishment of a Panel by Pakistan *Egypt – Matches*).

¹²²*Request for the Establishment of a Panel by Pakistan Egypt – Matches* para 17.

consensus was reached before the panel deliberated on the matter.¹²³ This dispute, however, illustrates that if correct procedures are not used in constructing normal value, the result may be flawed, which in turn will violate provisions in the ADA. Moreover, in most cases where normal value is constructed, it leads to higher anti-dumping duties¹²⁴ in which Members may not always agree on the method used in construction. This leads to disputes.

2.4.1.2 Determination of Export Price

Neither the ADA nor Article VI of GATT defines what export price is.¹²⁵ The ADA provides for construction of export price in circumstances where actual export price cannot be used. Brink states that this shows that the normal process would involve use of the actual export price.¹²⁶ The export price is the price at which the product is sold for export purposes.¹²⁷ However, like with normal value, in some circumstances the actual export price may not be good enough to be used for comparison.¹²⁸

The ADA recognises that there are circumstances where the actual export price cannot be used and in such circumstances, export price should be constructed.¹²⁹ The ADA states that where there is no export price or where concerns of unreliability of export price are raised because there was association or a 'compensatory arrangement between the exporter and the importer or a third party,' export price can be constructed.¹³⁰ Construction may be based on the price at which the imported products are first resold to an independent buyer.¹³¹ If not resold to an independent buyer or in the exact condition as imported, construction may be based on reasonable basis as determined by authorities.¹³²

¹²³See *Egypt — Matches* Notification of Mutually Agreed Solution 29 March 2006.

¹²⁴See generally Vermulst E & Horlick G 'Problems with Dumping and Injury Margin Calculations in Ten User Countries' (2007) 2 (1) *Global Trade and Customs Journal* 2.

¹²⁵Czako J, Human J & Miranda J *A handbook on anti-dumping investigations* (2003) 12.

¹²⁶Brink G *A theoretical framework for South African anti-dumping law* (Unpublished PhD thesis, University of Pretoria 2004) 186.

¹²⁷WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

¹²⁸WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

¹²⁹See generally Article 2.3 of the ADA.

¹³⁰Article 2.3 of the ADA.

¹³¹Article 2.3 of the ADA.

¹³²Article 2.3 of the ADA.

Instances where there are no export prices include but are not limited to where ‘export transaction is an internal transfer, or if the product is exchanged in a barter transaction’.¹³³ It would also include instances where no price has been fixed at the time the product was exported.¹³⁴ Where concerns are raised because there was association or compensation arrangement. The reason for constructing export price is that the transaction price may not be a free market price, as it may have been manipulated for different reasons including that of tax.¹³⁵ Accordingly, there are two preconditions for constructed export price to be used but they exist independently and thus there is no need to fulfil both.¹³⁶

In *US – OCTG (Korea)* the panel held that for investigating authorities to use constructed export price because of association, it should be clear that they have grounds for the view that there is association.¹³⁷ If association does not exist, the export price cannot appear to be unreliable to the investigating authority on basis of association.¹³⁸ The panel held that

‘the use of the terms “appear to the authorities” and “unreliable” in Article 2.3 denotes a situation in which, because of the association at issue, the investigating authority perceives the export price not to be trustworthy’.¹³⁹

This requires the investigating authority to always establish facts properly and evaluate them in a neutral and objective manner.¹⁴⁰

Importantly, this means that Article 2.3 of the ADA does not allow construction of export price by an investigating authority each time there is association; rather they should evaluate facts in an unbiased manner.¹⁴¹ In addition, Article 2.3 does not place any separate requirement on an

¹³³WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

¹³⁴WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

¹³⁵WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

¹³⁶The first precondition is where there is no export price and second one is where the export price that is available is appears unreliable because there was association or a ‘compensatory arrangement between the exporter and the importer or a third party’.

¹³⁷Panel Report *US – OCTG (Korea)* para 7.146.

¹³⁸Panel Report *US – OCTG (Korea)* para 7.146 see also Article 2.1 of the ADA.

¹³⁹Panel Report *US – OCTG (Korea)* para 7.147.

¹⁴⁰Panel Report *US – OCTG (Korea)* para 7.147.

¹⁴¹Panel Report *US – OCTG (Korea)* para 7.148.

investigating authority to make a determination as to the trustworthiness of the export price.¹⁴² It is therefore submitted that an evaluation of Article 2.3 of the ADA is not an evaluation on the reliability of the export price itself, but it evaluates the reliability of the export price where it is may be unreliable because of association.

2.4.1.3 Comparison of Normal Value and Export Price

After the normal value and export price have been determined, the ADA requires that a fair comparison of the two be made.¹⁴³ The requirements for such comparison are that: prices be ‘made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time’.¹⁴⁴ In *Egypt — Steel Rebar*,¹⁴⁵ the panel held that Article 2.4, on face value, requires a fair comparison of export price and normal value which is the calculation of the dumping margin.¹⁴⁶ It held that the ordinary meaning of the provision is concerned with the nature of the comparison of export price and normal value, with emphasis being on fairness comparison rather than what normal value or export price entails.¹⁴⁷ For this reason, the Article’s main emphasis is on fairness rather than a general comparison.

The ADA requires fairness, transparency and participation as key components to trade and as part of that, the investigating authorities have a duty to notify all relevant parties of the information ‘needed to ensure a fair comparison; and may not impose an unreasonable burden of proof on parties’.¹⁴⁸ This information may include issues such as adjustments, allowances, and conversion of currency.¹⁴⁹

In ensuring that prices are comparable, the ADA requires that adjustments be made to either the normal value, or the export price, on merit in order to accommodate differences in product, or circumstances of sale, in both importing and exporting markets.¹⁵⁰ These allowances must be made for ‘differences in conditions and terms of sale, taxation, quantities, physical characteristics, and

¹⁴²Panel Report *US – OCTG (Korea)* para 7.147.

¹⁴³See generally Article 2.4 of the ADA.

¹⁴⁴See generally Article 2.4 of the ADA.

¹⁴⁵Full case citation is *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* WT/DS211/R (hereafter Panel Report *Egypt — Steel Rebar*).

¹⁴⁶Panel Report *Egypt — Steel Rebar* para 7.333.

¹⁴⁷Panel Report *Egypt — Steel Rebar* para 7.333.

¹⁴⁸See generally Article 2.4 of the ADA.

¹⁴⁹WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adb_e/adb_info_e.htm (accessed 07 May 2018).

¹⁵⁰See generally Article 2.4 of the ADA.

other differences demonstrated to affect price comparability'.¹⁵¹ In adjusting, it may happen that there is an overlap of factors; as such, the existing authorities need not duplicate adjustments made already in the same provision.¹⁵²

If price 'comparability has been affected,' the ADA provides specific rules which apply to such a situation.¹⁵³ It requires that either 'normal value be established at a level of trade equivalent to that of the constructed export price', or due 'allowance be made for differences in conditions and terms of sale, taxation, quantities, physical characteristics, and other matters demonstrated to affect price comparability.'¹⁵⁴ In addition, allowances should be made for 'costs, including duties and taxes incurred between the importation of the product and the resale, as well as for profits accruing'.¹⁵⁵

It may happen that currency conversion is required in comparing normal value and export price, so the ADA provides specific rules governing such conversions.¹⁵⁶ It provides that the exchange rate used should be that in effect on the date of sale.¹⁵⁷ If, however, the 'sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange to be used is that of forward sale'.¹⁵⁸

Additionally, exchange rate fluctuations must be ignored, but exporters must be given at least 60 days by authorities to adjust their export prices to so that they may be in harmony with exchange rates during the period of investigation.¹⁵⁹ In *EC — Tube or Pipe Fittings*, the panel held that 'references to "sale", "export sale" and "export prices" in Article 2.4.1 are but a textual indication that the provision refers to currency conversion in connection with the prices of export sales, and should not be construed to conversion occurring when calculation of specific adjustments is made to either the normal value or the export price'.¹⁶⁰

¹⁵¹See generally Article 2.4 of the ADA.

¹⁵²See generally Footnote 7 of the ADA.

¹⁵³WTO 'Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

¹⁵⁴See generally Article 2.4 of the ADA.

¹⁵⁵See generally Article 2.4 of the ADA.

¹⁵⁶See generally Article 2.4.1 of the ADA.

¹⁵⁷Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale Footnote 7 of the ADA.

¹⁵⁸Article 2.4.1 of the ADA.

¹⁵⁹See generally Article 2.4.1 of ADA.

¹⁶⁰*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/R para 7.198 (hereafter Panel Report *EC — Tube or Pipe Fitting*).

The panel held that Article 2.4 imposes a general obligation that a ‘fair comparison be made between export price and normal value, and this obligation informs the other obligations in Article 2’.¹⁶¹ Conversion of currency in Article 2.4.1 is not related to conversions made in order to calculate adjustments under same article since its extension may distort fair comparison.¹⁶² Furthermore, certain situations¹⁶³ ‘where conversion of all currency data as at the date of export sale might therefore distort a fair comparison, investigating authority should only progress as necessary toward the ‘comparison’ referred to in Article 2.4.1 after it has made all essential adjustments’ required.¹⁶⁴

As stated above in *Egypt — Steel Rebar* the panel held that Article 2.4, on its face, ‘requires fair comparison of export price and normal value, which is the calculation of the dumping margin’.¹⁶⁵ The next section of the work will discuss what dumping margin really entails and the methods that are used in calculating dumping margin.

2.4.1.4 Determination of Dumping Margin

The definition of dumping margin has been defined by Czako, Human & Miranda as the ‘extent by which normal value exceeds export price which is expressed as a percentage or as a specific amount’;¹⁶⁶ while Van den Bossche & Zdouc interpreted it as the difference between the export price and the normal value.¹⁶⁷ Czako, Human & Miranda is clear and precise. However, Van den Bossche & Zdouc’s definition is ambiguous because the word ‘difference’ is misplaced, as it does not give a clear understanding of whether one must subtract normal value from export value or vice versa. Therefore, the author adopts Czako, Human & Miranda’s definition because it is precise, however, it also has a shortfall because it does not take into account the adjustments that may have taken place.

Article 2.4.2 provides three methods that should be used in calculating dumping margin; the basic method is the weighted average-to-weighted average that is a ‘comparison of a weighted average

¹⁶¹Panel Report *EC — Tube or Pipe Fitting* para 7.199.

¹⁶²Panel Report *EC — Tube or Pipe Fitting* para 7.199.

¹⁶³An example of such a situation include that of credit and warranty expenses.

¹⁶⁴Panel Report *EC — Tube or Pipe Fitting* para 7.199.

¹⁶⁵Panel Report *Egypt — Steel Rebar* para 7.333.

¹⁶⁶Czako J, Human J & Miranda J (2003) 13.

¹⁶⁷Van den Bossche P & Zdouc W (2013) 690.

normal value with a weighted average of prices of all comparable export transactions'.¹⁶⁸ In *US — Stainless Steel* the panel held that the 'reference in the singular to "a weighted average normal value" simply means that there must be a single weighted average normal value and export price in respect of comparable transactions'.¹⁶⁹ The text does not infer that one is meant to 'compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value'.¹⁷⁰

The second method is the 'transaction-to-transaction method'.¹⁷¹ This involves 'a comparison of normal value and export prices on a transaction-to-transaction basis'.¹⁷² The third method is the 'weighted average-to-transaction' method, which involves a comparison of the weighted average of the normal value to the export prices of individual transactions.¹⁷³ In *US — Washing Machines* the panel held that the 'phrase "individual export transactions" refers to the transactions that fall within the relevant pricing pattern, a more limited universe than the export transactions covered when applying the symmetrical comparison methodologies foreseen in the first sentence of Article 2.4.2'.¹⁷⁴ As a result, even if the next sentence of the methodology states that it is used where patterns differ significantly if one chooses this method, the transaction must fall within a relevant pricing pattern.¹⁷⁵

The ADA provides that the third method should only be used if reasons why differences of 'pattern of export prices which differ significantly among different purchasers, regions or time periods' cannot be accounted for by the first two methods.¹⁷⁶ The panel in *US — Washing Machines* held that 'in order to fulfil the object and purpose of the second sentence of Article 2.4.2, the weighted average-to-transaction comparison methodology allows the investigating authority to zoom in on the evidence of dumping in respect of pattern transactions'.¹⁷⁷ The zooming allows them to ensure

¹⁶⁸See generally Article 2.4.2 of ADA.

¹⁶⁹*United States – Anti-Dumping Measures On Stainless Steel Plate In Coils And Stainless Steel Sheet And Strip From Korea* WT/DS179/R para 6.112 (hereafter Panel Report *US — Stainless Steel*).

¹⁷⁰Panel Report *US — Stainless Steel* para 6.112.

¹⁷¹See generally Article 2.4.2 of the ADA.

¹⁷²See generally Article 2.4.2 of the ADA.

¹⁷³See generally Article 2.4.2 of the ADA.

¹⁷⁴*United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* WT/DS464/R para 7.188 (hereafter Panel Report *US — Washing Machines*).

¹⁷⁵Panel Report *US — Washing Machines* para 7.188.

¹⁷⁶See generally Article 2.4.2 of the ADA.

¹⁷⁷Panel Report *US — Washing Machines* para 7.188.

that evidence is ‘fully reflected in the margin of dumping, rather than being masked through the use of one of the symmetrical comparison methodologies provided for in the first sentence.’¹⁷⁸ Thus, in order to determine dumping margin using the weighted average-to transaction method, the investigating authority must have compared different pattern transactions in order to conclude that they differ significantly.¹⁷⁹

When determining dumping because of the weighted average-to-transaction method, problems used to arise because the provision did not take into account all issues involved when calculating dumping margin.¹⁸⁰ The method of zeroing is one of the methods, which has been utilised in the context of the weighted average-to-transaction method, but it has been under scrutiny and has been branded unfair.¹⁸¹ The USA Department of Commerce (DOC) in its determination of dumping margins used this method.¹⁸²

The DOC would assign a zero value to a transaction where when normal value is less than the price charged in the USA; rather than subtracting the difference from the final dumping margin.¹⁸³ This practice was condemned for artificially inflating ‘dumping margins, increasing both the likelihood that the DOC will find injury and the value of punitive duties that can be assessed on dumped products’.¹⁸⁴ In *US — Washing Machines*, the panel did not agree with the argument submitted by USA supporting zeroing.¹⁸⁵ The panel held that there was ‘no basis to conclude that one (pattern) transaction priced significantly lower than non-pattern transactions might mask evidence of dumping in respect of another (pattern) transaction priced significantly lower than non-pattern transactions’.¹⁸⁶

¹⁷⁸Panel Report *US — Washing Machines* 7.188.

¹⁷⁹See generally Article 2.4.2 of the ADA.

¹⁸⁰Kim BY ‘Understanding “Zeroing” in Anti-Dumping Procedures and Korea’s Negotiation Strategy’ (2004) *Korea Review of International Studies* 89 (hereafter Kim BY (2004)).

¹⁸¹*United States – Anti-Dumping And Countervailing Measures On Large Residential Washers From Korea* WT/DS464/AB/R para 6.10 (hereafter Appellate Body *US — Washing Machines*).

¹⁸²European Union ‘What is Zeroing’ 6 February (2016) 4 available at http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149065.pdf (accessed 10 November 2017).

¹⁸³Markheim D ‘Time to End “Zeroing” in Trade Dumping Calculations’ (2008) available at <http://www.heritage.org/trade/report/time-end-zeroing-trade-dumping-calculations> (accessed 10 November 2017) (hereafter Markheim D (2008)).

¹⁸⁴Markheim D (2008).

¹⁸⁵‘The United States argued that zeroing is needed to ensure that pattern transactions whose export price is above normal value do not mask the evidence of dumping in respect of pattern transactions whose export price is below normal value’ Panel Report *US — Washing Machine* para 151.

¹⁸⁶Panel Report *US — Washing Machines* para 7.191.

The Appellate Body further stated that zeroing has the effect of not only ‘inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value’.¹⁸⁷ Moreover, by zeroing

“individual export transactions” an investigating authority fails to compare all comparable export transactions that form the applicable “universe of export transactions” as required under the second sentence of Article 2.4.2, thus failing to make a “fair comparison” as required by Article 2.4’.¹⁸⁸

The author strongly brands this method as protectionist, which the WTO should never allow as it defeats the purpose of using anti-dumping duties as a response to unfair trade.

The ADA provides for transshipments that mean that although the same methodologies are applied, the normal value is determined in the country of origin, rather than in the country of export. It states that if ‘products are not imported directly from the country of origin but are exported to the importing member from an intermediate country, the price at which the products are sold from the country of export to the importing member shall normally be compared with the comparable price in the country of export’.¹⁸⁹ However, country of origin price may be used for comparison, ‘if, the products are merely transhipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export’.¹⁹⁰

As discussed under the definition of dumping, dumping under WTO is not only a situation of price discrimination,¹⁹¹ thus, determination of dumping is just but an initial step. In addition, to the determination of dumping there is needed to show that the domestic industry is ‘materially injured’, or there is threat of material injury, or material retardation.¹⁹²

2.4.2 Determination of Injury

A determination of injury is amongst the elements that are needed in order to impose anti-dumping measures.¹⁹³ In order to determine injury, it is imperative to establish that a domestic industry exists

¹⁸⁷Appellate Body *US — Washing Machines* para 6.10.

¹⁸⁸Appellate Body *US — Washing Machines* para 6.10.

¹⁸⁹Article 2.5 of the ADA.

¹⁹⁰See generally Article 2.5 of the ADA.

¹⁹¹See generally 2.3 Definition of Dumping.

¹⁹²United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 21.

¹⁹³See generally 2.3 Definition of Dumping.

or there is a retardation of the establishment of an industry. Therefore, the next section will discuss what a ‘like product’ is and what domestic industry entails as both are important elements in anti-dumping investigations. The section will then discuss injury.

2.4.2.1 ‘Like product in the importing country’

The ADA provides that a determination of injury for purposes of Article VI of GATT should be based on ‘positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like product.’¹⁹⁴ As such in order to determine the companies that make up a domestic industry, it is important that a ‘like product’ be determined, as this plays an important role in governing the scope of the anti-dumping investigation, determination of injury and establishing causation.¹⁹⁵ In *US – Softwood Lumber*, the panel held that a ‘like product’ for purposes of injury determination and the determination of domestic industry support for application ‘is a product being produced by the domestic industry allegedly being injured by the dumped product’.¹⁹⁶

Moreover, when an investigating authority determines what a like product as defined in Article 2.6 of the ADA, the product should remain consistent.¹⁹⁷ In *EC – Tube or Pipe Fitting* the panel held that Article 2.6 establishes the like product for the purposes of the entire investigation, this requires an investigating authority to keep the ‘like product’ consistent when determining both dumping and injury.¹⁹⁸ In addition, the panel in *US – Softwood Lumber* emphasised that in both instances it is clear that the starting point can only be the product allegedly being dumped.¹⁹⁹ As such, the product to be compared to it for purposes of the determination of dumping, and the ‘product the producers of which are allegedly being injured by the dumped product, is the “like product” for purposes of the dumping and injury determinations, respectively’.²⁰⁰ The decision

¹⁹⁴Article 3.1 of the ADA.

¹⁹⁵WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

¹⁹⁶Panel Report *US – Softwood Lumber* para 7.142.

¹⁹⁷Panel Report *EC – Tube or Pipe Fitting* para 7.247.

¹⁹⁸Panel Report *EC – Tube or Pipe Fitting* para 7.247.

¹⁹⁹Panel Report *US – Softwood Lumber* para 7.152.

²⁰⁰Panel Report *US – Softwood Lumber* para 7.152.

regarding what constitutes a ‘like product’ is important because it is the basis for determining which of the companies constitute the domestic industry.²⁰¹

2.4.2.2 The ‘domestic industry’

The term ‘domestic industry’ is defined in the ADA as ‘the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products’.²⁰² In *EC – Fasteners (China)*, the panel held that ‘the plain language in Article 4.1 makes it clear that domestic producers of the “like product” are the starting point for the definition of the domestic industry’.²⁰³ As such, the first reference of what constitutes a domestic industry is the producers of the ‘like products’. In *EC – Salmon (Norway)*, the panel held that nothing in the text of Article 4.1 is indicative of the notion that there is any other circumstance in which interpretation of the domestic, from the outset, excludes certain categories of producers of the ‘like product’, other than those set out in that provision.²⁰⁴

The first instance where producers are excluded from the outset definition of domestic industry is based on the fact that producers are related to the ‘exporters or importers under investigation, or if they import the allegedly dumped product’.²⁰⁵ Relationship to exporters or importers only applies if

(a) there is control between the two either directly or indirectly, (b) control is by third party between both parties and such control is either directly or indirectly or (c) if both parties control a third person, and there are grounds which support that the relationship may affect the producers behaviour from producers who are not’.²⁰⁶

Thus, such exclusion is based on the notion that injury analysis may be distorted because producers may be benefiting from the dumping, but despite the exception, exclusion is not mandatory it

²⁰¹WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2018).

²⁰²Article 4.1 of the ADA.

²⁰³*European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/R para 7.218 (hereafter Panel Report *EC – Fasteners (China)*).

²⁰⁴*European Communities – Anti-Dumping Measure on Farmed Salmon from Norway* WT/DS337/R para 7.112 (hereafter Panel Report *EC – Salmon (Norway)*).

²⁰⁵Article 4.1(i) of the ADA.

²⁰⁶See generally Footnote 11 of the ADA.

remains the decision of the importing country authorities to interpret the term domestic industry to mean rest of the producers.²⁰⁷

The second situation that is provided for in the ADA is where consideration of injury is based on producers comprising a 'regional industry'.²⁰⁸ The ADA does not itself use the term 'regional industry' however; the term is derived from the text. The ADA provides that where circumstances are unique concerning production at issue, territory of a member can be split into competitive markets that are two or more and the producers in these markets may be regarded as a separate industry.²⁰⁹ These producers can be regarded as a separate industry if they sell all or most of their product at issue within the boundaries of such market and the demand of the market where they produce is not significantly met by producers located somewhere other than the said territory of product at issue.²¹⁰ In such a case, injury may exist, even if a huge proportion of the completely domestic industry, thus inclusive of producers falling outside the region, is not injured.²¹¹

However, existence of injury to the regional industry is only permissible if two requirements met.²¹² Firstly, dumped imports should be concentrated into the market served by isolated industry, and secondly dumped imports should be causing injury to production in its either entirety or almost entirety of produces produced by producers falling in the boundaries of such a market.²¹³

The ADA provides that if a domestic industry has been given the meaning stipulated in Article 4.1(ii), anti-dumping duties should be limited only on the products in question consigned for final consumption to that area only if constitution permits.²¹⁴ Consequently, it is submitted that the imposition of anti-dumping duties cannot be extended to markets which have not been isolated and where products are not under investigation.

²⁰⁷United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 23.

²⁰⁸WTO 'Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

²⁰⁹See generally Article 4.1(ii) of the ADA.

²¹⁰Article 4.1(ii) of the ADA.

²¹¹Article 4.1(ii) of the ADA.

²¹²Article 4.1(ii) of the ADA.

²¹³Article 4.1(ii) of the ADA.

²¹⁴Article 4.2 of the ADA.

When the constitution of the importing country does not permit the imposition of anti-dumping duties on such grounds, these duties may be imposed by importing country without restrictions that apply to isolation of industry.²¹⁵ Levying without restrictions may only take place if:

‘(a) the exporters have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 8 and adequate assurances in this regard have not been promptly given, and (b) such duties cannot be levied only on products of specific producers which supply the area in question.’²¹⁶

Therefore, if exporters are not given an opportunity, imposition cannot be extended to other markets. The definition of ‘domestic industry’ is important because it is intertwined with the concept of injury; a dumped product may injure a domestic industry.

2.4.2.3 Injury

As discussed before, WTO requires that all three elements be present in order for anti-dumping measures to be enacted and a determination of injury is amongst these elements.²¹⁷ In terms of the ADA, ‘injury’ means three things and they are all injury to a domestic industry. Injury means material injury or threat of material injury, or material retardation.²¹⁸ The ADA does not provide a definition of what material injury, threat to material injury or material retardation is. Article 3 provides guidelines on how to establish material injury or threat of material injury; it has no concrete definition of what each type of injury means.²¹⁹ The next section will discuss the three types of injury namely material injury, threat of material injury and determination of material retardation and how their existence can be established.

2.4.2.3.1 Material injury

Material injury refers to a substantial whole impairment in the situation of a domestic industry.²²⁰ However, the ADA does not define the ‘material’ concept but provides guidelines on what to look

²¹⁵Article 4.2 of the ADA.

²¹⁶Article 4.2 of the ADA.

²¹⁷See generally 2.3 Definition of dumping.

²¹⁸Footnote 9 of the ADA.

²¹⁹Murigi WC (2013) 19.

²²⁰Food and Agriculture Organization of the United Nations ‘Import Surges And Safeguard Provisions With A Particular Focus On Antidumping Measures’ available at <ftp://ftp.fao.org/docrep/fao/010/a1477e/a1477e03.pdf> 222 (accessed 20 May 2018).

at in the determination of material injury.²²¹ In determining what constitutes material injury, the result should be based on positive evidence done through an objective examination of the volume of dumped products, how they affect domestic prices in the market of importing country and their subsequent effect on the domestic industry.²²²

In *Thailand — H-Beams*, the Appellate Body held that the requirement in Article 3.1 that an injury determination be based on ‘positive’ evidence and involve an ‘objective’ examination does not infer that such determination be based only on rationale or facts that were divulged to, or discernible by, the parties involved in the investigation of anti-dumping.²²³ Rather, it permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it.²²⁴ Therefore, even confidential relevant information can be used to determine material injury.²²⁵

Article 3 contains some specific additional factors to be considered in evaluating injury, but is silent on how to assess these factors or weigh them and worse, how the determination of causal link is to be made.²²⁶ The additional factors firstly relate to the volume of the dumped imports, investigating authorities are required to look at whether there has been a substantial increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country.²²⁷

Secondly, the factors are concerned with how dumped products have affected prices. This requires investigating authorities to have a look at whether there has been significant price undercutting because of dumped imports as compared with the price of a like product in the importing country.²²⁸ It also requires it to look at whether the effects of such imports is otherwise to significantly reduce prices or prevent increases of price which would have occurred if not for

²²¹See generally Article 3.1 of the ADA.

²²²See generally Article 3.1 of the ADA and UNCTAD *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 23.

²²³Appellate Body Report *Thailand — H-Beams* para 111.

²²⁴Appellate Body Report *Thailand — H-Beams* para 111.

²²⁵UNCTAD *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 23.

²²⁶WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

²²⁷See generally Article 3.2 of the ADA.

²²⁸ See generally Article 3.2 of the ADA.

imports.²²⁹ The ADA requires that all of these factors be considered collectively as using one or a few of them will not lead to decisive guidance.²³⁰

Besides the factors listed in Article 3.2, the ADA also requires an assessment on the impact of the dumped imports on the domestic industry.²³¹ This examination should include an assessment of all economic factors, which are relevant inclusive of indices affecting the domestic industry.²³² These factors are,

‘actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment’.²³³

Most importantly, just like Article 3.2, Article 3.4 requires that all of these factors be considered collectively as using one or a few of them will not lead to decisive guidance.²³⁴ Moreover, the case of *EC-Bed Linen* held that evaluation of all factors is obligatory.²³⁵ Article 3.2 does not provide any methodology to use when assessing these factors. Most importantly, investigating authorities have to develop analytical methods that can be used in considering these factors.²³⁶

In the paragraphs above it was pointed out that, there is no definition of what ‘material injury’ is in the ADA. Despite this position, there have been numerous definitions of what it is, but the most comprehensive one was tabled during negotiation rules in 2005. The delegations proposed that ‘material injury’ should refer to ‘the state of the domestic industry as demonstrated by an important and measurable deterioration in the operating performance of the domestic industry, based on an

²²⁹See generally Article 3.2 of the ADA.

²³⁰See generally Article 3.2 of the ADA.

²³¹See generally Article 3.4 of the ADA.

²³²See generally Article 3.4 of the ADA.

²³³See generally Article 3.4 of the ADA.

²³⁴See generally Article 3.4 of the ADA.

²³⁵European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India WT/DS141/R para 16 (hereafter Panel Report *EC-Bed Linen*).

²³⁶WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

overall assessment of all relevant economic factors and indices having a bearing on the state of the domestic industry including those enumerated in Article 3.4'.²³⁷

Bolton, however, seems to suggest that the absence of a definition does not necessarily mean that the definition cannot be implied. He mentions that the determination of normal value and export price are the most difficult because after you have determined the two, material injury is inferred because negative pointers in a domestic industry such as price reduction in the market, domestic producer's sales reduction and lower market share can point to injury.²³⁸

On the contrary, Bolton also argues that the failure of Article VI of GATT or the ADA to provide a definition of what material injury entail restricts the effectiveness of the provision as a shield.²³⁹ This is because the ADA gives too much flexibility to an investigating authority to 'determine how to interpret evidence and there is no obligation to the importing country to disclose all of the factors it considered in reaching its conclusion'.²⁴⁰

2.4.2.3.2 Threat of material injury

In some cases, there will not be material injury present but there will be a threat of material injury that may materialise if anti-dumping duties are not imposed, in such a case, the ADA requires the authorities to make a determination of threat of material injury.²⁴¹ Article 3.7 provides that such determination must be founded on facts rather than mere 'allegation, conjecture or remote possibility'.²⁴²

In *Mexico – Corn Syrup: Art 21.5 – US* the Appellate Body held that establishment of facts by investigating authorities should include positive findings of actual events occurring in the period

²³⁷World Trade Organisation 'Second Submission of Proposals on the Determination of Injury' (2005) available at [http://www.meti.go.jp/policy/trade_policy/wto/pdf/negotiation/ad/proposal/GEN38\(FANs%20injury2nd\).pdf](http://www.meti.go.jp/policy/trade_policy/wto/pdf/negotiation/ad/proposal/GEN38(FANs%20injury2nd).pdf) (accessed 19 May 2018). Paper was submitted on behalf of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand.

²³⁸Bolton M 'Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny' (2012) 29 *Berkeley Journal of International Law* 76 (hereafter Bolton M (2012)).

²³⁹Bolton M (2012) 75.

²⁴⁰Bolton M (2012) 75.

²⁴¹See generally Article 3.7 of the ADA.

²⁴²See generally Article 3.7 of the ADA.

of investigation and assumptions linked to such events.²⁴³ The investigating authorities should necessarily make assumptions relating to the ‘occurrence of future events because future events can never be definitively proven by facts’.²⁴⁴

The determination of threat should also stem from the point that the threat is imminent.²⁴⁵ As such, investigating authorities are required to consider factors in Article 3.7 when determining presence of a threat of material injury.²⁴⁶

These factors include:

- (i) ‘a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member’s market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and
- (iv) inventories of the product being investigated’.²⁴⁷

These factors should not be looked at in isolation, neither should a combination of more than two be made.²⁴⁸ They need to be assessed in totality because departing from totality will not give decisive guidance on the fact that material injury will occur if protective action is not put in

²⁴³*Mexico – Anti-Dumping Investigation Of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States) WT/DS132/AB/RW para 85 (hereafter Appellate Body Mexico – Corn Syrup: Art 21.5 – US).*

²⁴⁴Appellate Body *Mexico – Corn Syrup: Art 21.5 – US* para 85.

²⁴⁵See generally Article 3.7 of the ADA.

²⁴⁶See generally Article 3.7 of the ADA.

²⁴⁷Article 3.7 (i) - (iv) of the ADA.

²⁴⁸See generally Article 3.7 of the ADA.

place.²⁴⁹ Besides factors in Article 3.7, in *Mexico – Corn Syrup* the panel held that an analysis of threat of material injury should also include an evaluation of factors listed in Article 3.4.²⁵⁰

2.4.2.3.3 Determination of material retardation

There have been discussions on the first two types of injury but less has been said on material retardation, and it may be because there are fewer cases in which countries have relied on material retardation when imposing anti-dumping duties.²⁵¹ The ADA does not define the concept of material retardation, but despite the non-existence of a definition, it does state that injury also means material retardation of a domestic industry.²⁵² However, Article 3 provides guidelines on the determination of material injury or threat of material injury but is silent on determination of material retardation.²⁵³

Some countries in their national legislation have tried defining material retardation and one of the definitions²⁵⁴ provides that ‘although no material injury or threat of material injury has been caused to a domestic industry; the establishment of a domestic industry has been seriously retarded’.²⁵⁵ Egypt, during the 2006 WTO negotiating rules, acknowledged that the concept of material retardation is closely connected the establishment of an industry but has suggested that it should not only apply to new industries but should also concern domestic industries that are facing a ‘new start’ after being reorganised or have never been developed on a commercial scale.²⁵⁶

Narayanan discusses material retardation in length. He argues that an authority must first look at whether an industry is established in order to make a determination on whether dumped goods are materially retarding an industry.²⁵⁷ This is because the requirement of material retardation is only

²⁴⁹See generally Article 3.7 of the ADA.

²⁵⁰*Mexico – Anti-Dumping Investigation Of High Fructose Corn Syrup (HFCS) from the United States* WT/DS132/R para.7.127 (hereafter Panel Report *Mexico – Corn Syrup*) see also UNCTAD *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 27.

²⁵¹Narayanan P ‘Injury Investigations in "Material Retardation" Antidumping Cases’ (2004) 25 *Northwestern Journal of International Law & Business* 38.

²⁵²Footnote 9 of the ADA.

²⁵³See generally Article 3.1 and Article 3.7 of the ADA.

²⁵⁴This definition is in China’s legislation.

²⁵⁵Article 5 of Rules On Investigations And Determinations Of Industry Injury For Anti-Dumping

²⁵⁶World Trade Organisation Negotiating Group on Rules *Material Retardation Communication from Egypt* (2006) TN/RL/GEN/122 1.

²⁵⁷Narayanan P ‘Injury Investigations in "Material Retardation" Antidumping Cases’ (2004) 25 *Northwestern Journal of International Law & Business* 41

applicable to unestablished industries.²⁵⁸ In the USA, the United States International Trade Commission (USITC)²⁵⁹ has grouped unestablished industries into two distinct groups.²⁶⁰ These are either “embryonic,” which are, industries that have not commenced production, or “nascent,” which are, industries that have commenced production but have not stabilised.²⁶¹ As such, protection under material retardation can only be afforded to industries, which fall within either of the two categories. Further, an embryonic industry should also show ‘substantial commitment to commence production’.²⁶²

In *Morocco-Hot-Rolled Steel (Turkey)*, the Ministère délégué auprès du Ministre de l'Industrie, du Commerce, de l'Investissement et de l'Économie Numérique chargé du Commerce Extérieur (MDCCE) came to a conclusion that an industry was unestablished by applying a five-part test.²⁶³ It looked at,

‘(a) how long the domestic industry had been producing the domestic like product; (b) the market share of the domestic like product; (c) whether the domestic industry's production had been stable; (d) whether the domestic industry had reached profitability/break-even point; and (e) whether the domestic industry constituted a “new” industry’.²⁶⁴

This five-part test should be evaluated, objectively and be based on positive evidence.²⁶⁵ Positive evidence refers to underpinning facts, justifying the determination of injury.²⁶⁶ It is concerned with the quality of the evidence that authorities may depend on when concluding such a determination.²⁶⁷ Moreover, the word “positive”, in particular, means that the evidence must be

²⁵⁸ Footnote 9 of the ADA.

²⁵⁹The United States International Trade Commission (USITC) is the body in charge of anti-dumping investigations in the United States of America.

²⁶⁰ Narayanan P ‘Injury Investigations in "Material Retardation" Antidumping Cases’ (2004) 25 *Northwestern Journal of International Law & Business* 41.

²⁶¹Narayanan P ‘Injury Investigations in "Material Retardation" Antidumping Cases’ (2004) 25 *Northwestern Journal of International Law & Business* 41.

²⁶²Narayanan P ‘Injury Investigations in "Material Retardation" Antidumping Cases’ (2004) 25 *Northwestern Journal of International Law & Business* 41.

²⁶³*Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey* WT/DS513/R para 7.141 (hereafter Panel Report *Morocco-Hot-Rolled Steel (Turkey)*).

²⁶⁴Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.141.

²⁶⁵Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.153.

²⁶⁶ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.154.

²⁶⁷Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.154.

of an affirmative, objective, and verifiable character, and it must be credible'.²⁶⁸ When looking at 'objective examination', it generally relates to the conduct of the investigation.²⁶⁹ This means an injury investigation must

'conform to the dictates of the basic principles of good faith and fundamental fairness, and that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party'.²⁷⁰

Importantly the panel holds the same position with that of the USITC. It avers that 'material retardation of the establishment of the domestic industry' does not only apply to

'cases where the domestic industry had not yet started producing the like product in question, but also to cases where the domestic industry had not yet reached a stable presence on the market'.²⁷¹

Despite guidelines in different national legislation, the WTO has not clarified on the guidelines concerning material retardation. The panel in *Morocco-Hot-Rolled Steel (Turkey)* confirms the position. It held that Article 3.1 does not prescribe a particular methodology that an investigating authority must follow in assessing whether a domestic industry is established.²⁷² As such, an investigating authority enjoys a certain degree of discretion in choosing a methodology that guides its analysis.²⁷³ The exercise of this discretion must nonetheless be within the bounds of the requirements in Article 3.1.²⁷⁴

When exercising such a discretion, an investigating authority may, have to rely on reasonable assumptions or draw inferences.²⁷⁵ Accordingly, these assumptions should be derived 'from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified'.²⁷⁶ When a methodology is premised on unsubstantiated assumptions, it fails to meet the standard of an examination

²⁶⁸ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.154.

²⁶⁹ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.154.

²⁷⁰ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.154.

²⁷¹ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.152.

²⁷² Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155.

²⁷³ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155.

²⁷⁴ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155.

²⁷⁵ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155.

²⁷⁶ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155.

based on positive evidence.²⁷⁷ An assumption does not qualify as properly substantiated when there is no explanation from an investigating authority why it would be appropriate to use it in the analysis.²⁷⁸

The author opines that the issue of material retardation affects mostly developing countries, as they have emerging industries. This may be one of the reasons the issue of material retardation has not been clarified. The WTO based multilateral trading system has been accused of building ‘a legacy of treating developing countries like second class members of a rich men’s exclusive club’.²⁷⁹ As such it may not be unusual for it to fail to address, in many ways, difficulties faced by developing countries.²⁸⁰ Whilst Members have a discretion to determine the guidelines concerning material retardation, the examination of evidence should comply with Article 3.1 of the ADA.²⁸¹ However, for maintenance of WTO standards it is important for WTO to develop guidelines on material retardation.

2.4.3 Causation

After injury is determined it is crucial to establish if there is a causal link between injury and the purported dumping because anti-dumping measures may only be imposed if dumping is the cause of injury in the domestic industry.

Causation is an important element in anti-dumping investigations, and if it cannot be proven, anti-dumping measures cannot be imposed. Article 3.5 of the ADA provides that there must be a demonstration indicating the fact that the injury is caused by the dumped imports when assessing factors in Articles 3.2 and 3.4.²⁸² This causal link should be based on all relevant evidence as examined by investigating authorities.²⁸³ An investigating authority must also have a look at any known factors besides dumped imports that may be concurrently injuring the domestic industry, of which injuries resulting from such factors should not be attributed to dumped imports.²⁸⁴

²⁷⁷ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155

²⁷⁸ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.155.

²⁷⁹ Kwa A ‘Developing Countries Voice Grievances at WTO’ *Focus on the Global South* available at <https://focusweb.org/content/developing-countries-voice-grievances-wto> (accessed 16 September 2018).

²⁸⁰ Kwa A ‘Developing Countries Voice Grievances at WTO’ *Focus on the Global South* available at <https://focusweb.org/content/developing-countries-voice-grievances-wto> (accessed 16 September 2018).

²⁸¹ Panel Report *Morocco-Hot-Rolled Steel (Turkey)* para 7.153.

²⁸² See generally Article 3.5 of the ADA, see also UNCTAD *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 27.

²⁸³ Article 3.5 of the ADA.

²⁸⁴ See generally Article 3.5 of the ADA.

Article 3.5 provides some of the factors²⁸⁵ that are of relevance to establishing a causal link and securing non-attribution.²⁸⁶ On non-attribution, the Appellate Body in *US-Hot-Rolled Steel* held that in ensuring non-attribution investigating authorities are obliged to assess injurious effects of other known factors.²⁸⁷ Thus, they must examine the injurious effect of other factors even if the factors are not the cause between dumped imports and injury.

In *EC — Tube or Pipe Fittings* the Appellate Body goes further and states that for the non-attributed ‘obligation to be triggered, Article 3.5 requires that the factor at issue: (a) be “known” to the investigating authority; (b) be a factor “other than dumped imports”; and (c) be injuring the domestic industry at the same time as the dumped imports’.²⁸⁸ Thus, there are three conditions attached to the provision and all three should be fulfilled. The Appellate Body also mentioned that the ADA does not explicitly state how an investigating authority can become aware of such known factors, or how interested parties, for them to be eligible, must raise such factors.²⁸⁹

Furthermore, the ADA does not ‘expressly state to what degree a factor must be unrelated to the dumped imports, or whether it must be extrinsic to the exporter and the dumped product, in order to constitute a factor “other than the dumped imports”’.²⁹⁰ Despite the ADA not expressly stating these, ‘a factor is either “known” to the investigating authority, or it is not “known”; it cannot be “known” in one stage of the investigation and unknown in a subsequent stage’.²⁹¹ This means that, once a factor is known in one stage of the investigation it remains known and relevant in the subsequent stage.²⁹²

It is important to note that the factors provided in Article 3.5 are a mere illustration and are not mandatory like those provided in Article 3.4.²⁹³ In *Thailand — H-Beams* the panel held that the ‘text

²⁸⁵These factors are ‘the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry’ in Article 3.5 of the ADA.

²⁸⁶Van den Bossche P & Zdouc W (2013) 709.

²⁸⁷Appellate Body Report *US-Hot-Rolled Steel* para 223.

²⁸⁸*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/AB/R para 175 (hereafter Appellate Body Report *EC — Tube or Pipe Fitting*).

²⁸⁹Appellate Body Report *EC — Tube or Pipe Fitting* para 176.

²⁹⁰Appellate Body Report *EC — Tube or Pipe Fitting* para 176.

²⁹¹Appellate Body Report *EC — Tube or Pipe Fitting* para 178.

²⁹²Appellate Body Report *EC — Tube or Pipe Fitting* para 178.

²⁹³Van den Bossche P & Zdouc W (2013) 709 see also Panel Report *Thailand — H-Beams* para 7.274.

of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative'.²⁹⁴ One can then observe that although listed factors in Article 3.5 'might be relevant in many cases, and the list contains useful guidance as to the kinds of factors other than imports that might cause injury to the domestic industry, the specific list in Article 3.5 is not itself mandatory'.²⁹⁵

Thus dumping in terms of the WTO is where products of one country are introduced into the importing at a price less than the 'normal value of the products, and causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'.²⁹⁶ Anti-dumping measures may only be imposed if all the elements are fulfilled, that is dumping, injury and causation. The next section discusses the procedures that should be followed in anti-dumping investigations.

2.5 PROCEDURAL REQUIREMENTS FOR LEGISLATING ANTI-DUMPING MEASURES

Anti-dumping investigations are mainly conducted to allow the imposition of anti-dumping measures. The ADA regulates the minimum procedural requirements that members should comply with when enacting anti-dumping measures. For instance, if Zimbabwe were to impose an anti-dumping duty on a country that is dumping products in its domestic industry, it must have complied with the procedure in the ADA. WTO does not necessarily therefore prevent members to create more procedural requirements to supplement those in the ADA. However, additional requirements must be consistent with WTO rules of non-discrimination. The next section discusses these procedural requirements, as they must be complied with in an anti-dumping investigation.

2.5.1 Initiation

The requirements for initiation of investigations are embedded in Article 5 of the ADA. According to this provision, investigations for determining the extent and effect of dumping allegations must be initiated by way of a written application.²⁹⁷ This application must be lodged by the domestic industry alleging dumping or it can be made on its behalf.²⁹⁸ The application should be supported

²⁹⁴Panel Report *Thailand — H-Beams* para 7.274.

²⁹⁵Panel Report *Thailand — H-Beams* para 7.274.

²⁹⁶Article VI.1 of GATT 1994. For a commentary of article VI of GATT, see also Vermulst EA & Graafsma F *WTO Disputes: Anti-dumping, Subsidies and Safeguards* (2002) 418.

²⁹⁷See generally Article 5.1 of the ADA.

²⁹⁸See generally Article 5.1 of the ADA.

by evidence of dumping.²⁹⁹ In addition, the application must also show proof of either ‘material injury’ or ‘threat of material injury’ or ‘material retardation’ and should show a causal linkage between dumped imports and injury.³⁰⁰ Furthermore, the application should also contain other information regarding the ‘product, industry, importers, exporters, and other matters, in written applications for anti-dumping relief’.³⁰¹ Thus, applications based on simple assertion and not evidential support cannot meet initiation requirements, as stipulated by Article 5.2 of the ADA.³⁰²

Furthermore, Members have a duty to examine the accuracy and adequacies of evidence presented before them, and then decide whether such evidence warrants an investigation to commence.³⁰³ In *Mexico — Steel Pipes and Tubes*, Guatemala accused Mexican authorities (Economía) for acting on information without scrutinising whether or not the evidence submitted for investigations was sufficient, accurate and relevant information as prescribed by Article 5.3 of the ADA.³⁰⁴ The panel emphasised that in anti-dumping disputes, matters should be decided on case-by-case basis.³⁰⁵ Although Mexico had acted inconsistently with Article 5.3 of the ADA, the provision did not impose substantive obligations on investigating authorities where assessment of sufficiency of evidence is concerned.³⁰⁶ Therefore, after evaluating, that the evidence submitted is correct and accurate authorities may proceed in initiating an application.³⁰⁷ It is submitted, that the problem in using information that is not accurate is that the basis for initiation of investigation will be incorrect. As such, there is no justification for initiation of an investigation in accordance with Article 5.3 of the ADA.

Before an anti-dumping investigation is initiated, the importing country’s authorities should inform the exporting country of their intention to lodge an initiation, but can only notify them after receiving a properly documented application.³⁰⁸ Moreover, before a decision to initiate an

²⁹⁹Lee SE *World Trade Regulation: International Trade under the WTO Mechanism* (2012) 126.

³⁰⁰See generally Article 5.2 of the ADA.

³⁰¹WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017) also see generally Article 5.2 (i-iv) of ADA.

³⁰²See generally Article 5.2 of the ADA.

³⁰³See generally Article 5.3 of the ADA.

³⁰⁴*Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* WT/DS331/R para 3.1 (i) (hereafter Panel Report *Mexico — Steel Pipes and Tubes*).

³⁰⁵Panel Report *Mexico — Steel Pipes and Tubes* para 7.20.

³⁰⁶Panel Report *Mexico — Steel Pipes and Tubes* para 7.60.

³⁰⁷See generally Article 5.3 of the ADA.

³⁰⁸See generally Article 5.5 of the ADA.

investigation is taken, the importing country should avoid making public the application for the initiation of the investigation.³⁰⁹ As a way of lowering the disruptiveness of anti-dumping investigations, Article 5.10 places a time limit on the investigations.³¹⁰ After initiation, investigations should be finalised within one year.³¹¹ However, in exceptional circumstances time can be extended to a maximum of 18 months.³¹² During anti-dumping investigations, custom clearance procedures should not be hindered.³¹³ Thus, anti-dumping investigations should not cause problems where normal day-to-day custom clearance is concerned.

The ADA regulates grounds for terminating an anti-dumping investigation where there is insufficient evidence of either dumping or injury to support proceeding with an investigation.³¹⁴ Investigations should be terminated if it comes to the attention of concerned authorities that the volume of imports are insignificant or ‘the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible’.³¹⁵ If dumping margin is less than 2 per cent of export price it is considered *de minimis* whilst the volume of dumped imports is considered negligible if it accounts for less than 3 per cent ‘like product’ of the importing country.³¹⁶

2.5.2 Conduct

Once an application for initiation of investigations complies with Article 5 of the ADA, the ADA then prescribes the rules on how the investigation should be conducted.³¹⁷ These include evidence collection and use of sampling techniques.³¹⁸ Article 6.1 requires that interested parties should be informed of the information required by authorities for investigation in question, of which they must be given sufficient opportunity to produce in writing all relevant evidence.³¹⁹ In *Mexico* —

³⁰⁹See generally Article 5.5 of the ADA.

³¹⁰WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

³¹¹See generally Article 5.10 of the ADA.

³¹²See generally Article 5.10 of the ADA.

³¹³See generally Article 5.9 of the ADA.

³¹⁴Article 5.8 of the ADA.

³¹⁵See generally Article 5.8 of the ADA.

³¹⁶See generally Article 5.8 of the ADA.

³¹⁷Article 6 of the ADA.

³¹⁸WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

³¹⁹Article 6.11 of ADA “interested parties” include:

(i ‘an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

Anti-Dumping Measures on Rice, the panel held that Article 6.1 requires an active participation of the investigating authority in the identification of interested parties in order to fulfil the obligation that all interested parties be given notice of the information they need to produce.³²⁰ Thus, the investigating authority needs to actively take part in the process because if it were passive they would be acting inconsistently with Article 6.1.

Exporting producers given questionnaires in anti-dumping investigations are required to respond within 30 days and if there is need for an extension, valid reasons should be submitted.³²¹ Investigating authorities are then required to protect all confidential information acquiesced for purposes of investigations but are also required to produce the information on time to other interested parties taking part in the investigation.³²²

Additionally, during an anti-dumping investigation authorities may be requested to create platforms for interested parties to meet, present and argue their views.³²³ Investigating authorities are obligated to create such platform because all interested parties have rights to defend their interests.³²⁴ It should be noted that setting up of such opportunities require investigating authorities to be conscious of their obligation to preserve confidentiality and convenience to the parties.³²⁵ Moreover, attendance by a party is not an obligation and failure should not amount to prejudice on the interested party's case.³²⁶ When providing justifications, interested parties are also allowed to present other information orally.³²⁷ Hence, Article 6.2 focuses on the power of investigating authorities to set up opportunities where parties involved in the investigation can air their views and at the same time defend their positions.

(ii) the government of the exporting Member; and
(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.
However list does not prevent members from allowing domestic or foreign parties other than those mentioned in the list to be included as interested parties.'

³²⁰*Mexico – Definitive Anti-Dumping Measures on Beef and Rice* WT/DS295/R para 7.192.

³²¹See generally Article 6.1.1 of the ADA.

³²²See generally Article 6.1.2 of the ADA.

³²³See generally Article 6.2 of the ADA.

³²⁴See generally Article 6.2 of the ADA.

³²⁵See generally Article 6.2 of the ADA.

³²⁶See generally Article 6.2 of the ADA.

³²⁷See generally Article 6.2 of the ADA.

Anti-dumping investigations should be transparent.³²⁸ Concerned parties must therefore have time to view all non-confidential information that will be used by the investigating authorities in an anti-dumping investigation.³²⁹ Furthermore, parties must be given time ‘to prepare presentations on the basis of this information that is relevant to the presentation of their cases’.³³⁰ Therefore, if information is not falling in the bracket of confidentiality in Article 6.5, investigating authorities should make such information accessible to interested parties when it is practical to do so.

Where confidential information is concerned, interested parties are required to furnish non-confidential summaries of such confidential information to authorities.³³¹ The details of the summaries should be sufficient to permit a reasonable understanding of the material submitted in confidence.³³² Where such information is not susceptible of summary due to exceptional circumstances, reasons of why summarisation is impossible must be provided.³³³

During the course of an investigation, the ADA requires investigating ‘authorities to satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based’.³³⁴ However, where any interested party refuses authorities access to necessary information, or otherwise does not provide, such information ‘within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available’.³³⁵

Before making a final determination there is need for investigating authorities to ‘inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures’.³³⁶ Parties need to be given an opportunity to defend their interest; as such, the disclosure should be made in sufficient time.³³⁷

³²⁸Van den Bossche P & Zdouc W (2013) 717.

³²⁹See generally Article 6.4 of the ADA.

³³⁰See generally Article 6.4 of the ADA.

³³¹Article 6.5.1 of the ADA.

³³²Article 6.5.1 of the ADA.

³³³Article 6.5.1 of the ADA.

³³⁴Article 6.6 of the ADA.

³³⁵Article 6.8 of the ADA.

³³⁶Article 6.9 of the ADA.

³³⁷Article 6.9 of the ADA.

2.5.3 Imposition of provisional measures

The imposition of provisional anti-dumping measures by a Member may be done after investigating authorities have examined data as prescribed by the ADA. Article 7 of the ADA regulates when provisional measures may be applied, and the form of the provisional measures. They may only be applied if an investigation is initiated in terms of Article 5 and if investigating authorities after an initial positive determination of dumping and injury are of the view that anti-dumping measures are a necessary tool in preventing injury in the domestic industry taking place during the investigation.³³⁸ The imposition of provisional anti-dumping measures to prevent injury directly supports Raju's theory that anti-dumping measures are necessary to remedy unfair trade practices.³³⁹

As provisional anti-dumping measures, a Member may impose a 'provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated' but the amount may not be larger than the interim dumping margin.³⁴⁰ Whether the provisional measure takes form of a security or provisional duty, it can only be imposed after 60 days from the date the investigation was initiated.³⁴¹ Normally, the application of interim measures should not be longer than four months.³⁴² However, it can be six months when authorities agree to a request to extend which is made by exporters indicating a great percentage of trade involved.³⁴³ In addition, if a duty is deemed lower than the dumping margin and sufficient to remove injury, these periods may be six months with normal situation and nine months where exporters request is concerned.³⁴⁴

2.5.4 Price Undertakings

After an initial determination of dumping and injury in the domestic industry, the investigation does not necessarily need to take the route of imposing provisional measures or enacting anti-dumping duties. A price undertaking is an alternative remedy and can only be sought after a preliminary positive determination of dumping, injury and causality.³⁴⁵ Article 8.1 provides that

³³⁸See generally Article 7.1 (i) - (iii) of the ADA.

³³⁹Raju KD (2008) 7.

³⁴⁰See generally Article 7.2 of the ADA.

³⁴¹See generally Article 7.3 of the ADA.

³⁴²See generally Article 7.4 of the ADA.

³⁴³See generally Article 7.4 of the ADA.

³⁴⁴See generally Article 7.4 of the ADA.

³⁴⁵See generally Article 8.2 of the ADA.

anti-dumping investigations may be deferred or terminated without provisional measures or anti-dumping duties being enacted.³⁴⁶ This may happen when investigating authorities on receiving satisfactory voluntary undertakings from any exporter willing to stop exporting at dumped prices, are satisfied that the undertaking has the effect of eliminating injury.³⁴⁷

However, investigating authorities need not accept voluntary offers to revise prices or to stop exporting at dumped prices if their acceptance is considered impractical.³⁴⁸ If however the undertaking is accepted, investigation can still be completed if one or of both exporters and authorities wishes the investigation to be completed.³⁴⁹ Besides a voluntary offer from exporters, price undertakings may be taken when initiated by importing country's authorities if exporters are not forced to accept such offer.³⁵⁰ If exporters do not accept the undertaking, the refusal should not prejudice their case but authorities can make a determination that a threat of injury may develop to material injury if dumping continues.³⁵¹

It is important to note that price increases relating to undertakings should be limited to those that are necessary to eliminate the margin of dumping, and where increases are sufficient to eliminate injury in the domestic industry price increases it is desirable that it be less than the dumping margin.³⁵² If there is no price, undertaking members may sometimes proceed to enact anti-dumping duties.

2.5.5 Imposition, Collection of Anti-Dumping Duties and Retroactivity

Article 9 of the ADA contains rules on enactment and collection of anti-dumping duties. The decision on whether or not to impose anti-dumping duties fall exclusively in the ambit of importing countries' investigating authorities.³⁵³ In *EC-Bed Linen*, the Appellate Body held that the imposition of anti-dumping duties pursuant to Article 9 flows from the determination of dumping, injury and causality as provided in Article 2, 3 and 3.5, respectively.³⁵⁴ However, even if all

³⁴⁶See generally Article 8.1 of the ADA.

³⁴⁷See generally Article 8.1 of the ADA.

³⁴⁸See generally Article 8.3 of the ADA.

³⁴⁹See generally Article 8.4 of the ADA.

³⁵⁰See generally Article 8.5 of the ADA.

³⁵¹See generally Article 8.5 of the ADA.

³⁵²See generally Article 8.1 of the ADA.

³⁵³See generally Article 9.1 of the ADA.

³⁵⁴Appellate Body Report *EC-Bed Linen* para 123.

requirements for the imposition of anti-dumping duties have been fulfilled, the authorities may elect not to impose anti-dumping duties.³⁵⁵

It is therefore clear that WTO does not force members to enact anti-dumping duties; as such, the theory that anti-dumping duties counter unfair trade practices³⁵⁶ cannot be sustained because if they are not imposed, they will not necessarily counter unfair trade because effects of dumping may still be felt. With that in mind, it can be strongly argued that anti-dumping duties can be used as a strategic weapon serving political interests.³⁵⁷ To illustrate this, if South Africa for example dumps its products in Zimbabwe, Zimbabwean authorities may elect not to impose anti-dumping duties because South Africa and Zimbabwe have good international relations. On the other hand, if goods from USA are dumped in Zimbabwe, Zimbabwe may impose anti-dumping duties because it may have a strained relationship with USA. Assuming that the effect of dumping by either countries is similar, anti-dumping duties will not be used to counter unfair trade, but as a strategic weapon or out of spite against USA.

If, however, the importing country's authorities elect to impose anti-dumping duties, they have to do so in accordance with the ADA. The amount of the anti-dumping duty may not exceed the dumping margin or can actually be less than the dumping margin, if such lesser duty is sufficient in eliminating injury in the domestic industry.³⁵⁸

Generally, both provisional anti-dumping measures and final anti-dumping duties may only be applied to products that enter for consumption after the imposition of provisional measures and enactment of anti-dumping duties has been concluded.³⁵⁹ However, the ADA realises that during investigation injury could have taken place, or 'exporters may have taken actions to avoid the imposition of an anti-dumping duty'.³⁶⁰ Anti-dumping duties may then be imposed retroactively in accordance with Article 10 of the ADA to remedy the effect that of dumping that could have taken place during the investigation.

³⁵⁵See generally Article 9.1 of the ADA.

³⁵⁶Raju KD (2008) 7.

³⁵⁷See Raju KD (2008) 7; Lindsey B & Ikenson D (2003) 18.

³⁵⁸See generally Article 9.1 of the ADA.

³⁵⁹WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2015) also see Article 10.1 of ADA.

³⁶⁰WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2015).

2.5.6 Duration and Review of Anti- Dumping Duties

Article 11 provides the rules for duration, termination and review of both anti-dumping duties and price undertakings. Where anti-dumping duties have been imposed, they remain in force up to the time that they would have countered the dumping that caused the injury.³⁶¹ ADA contains four reviews that can be utilised, namely: expiry, interim, new shipper, and judicial.³⁶²

Article 11 regulates expiry review (sunset review) and interim reviews. Where expiry review is concerned, expiry of definitive anti-dumping duties is usually after five years from the date they came in force.³⁶³ However, the duty may remain in force pending an outcome of a review which authorities on their own initiated or

‘upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time preceding the expiry that the expiry of a duty is likely going to lead to continuation or recurrence of dumping and injury’.³⁶⁴

Whilst expiry review is after five years, interim reviews derive from the fact that during the five-year period, authorities of the importing country on their own accord can review definitive anti-dumping duties, or they can review upon request by any interested party who submits affirmative data supporting the need for review.³⁶⁵ The request should however have been made after a reasonable period has passed since the imposition of the definitive anti-dumping duty.³⁶⁶

Interested parties are allowed to request for examination whether the continued imposition of the duty is necessary to offset dumping, or whether the injury is likely to continue or recur if the duty is removed or varied, or both as such the measures may stay in imposed awaiting outcome of review.³⁶⁷ In *Us — Drums*, the panel held that

³⁶¹See generally Article 11.1 of the ADA.

³⁶²Murigi (2013) 28.

³⁶³Article 11.3 of the ADA.

³⁶⁴United Nations Conference on Trade and Development *Training Module on the WTO Agreement on Anti-Dumping* (2004) 36. Also, see generally Article 11.3 of the ADA.

³⁶⁵See generally Article 11.2 of the ADA.

³⁶⁶See generally Article 11.2 of the ADA.

³⁶⁷UNCTAD *Training Module On The WTO Agreement On Anti-Dumping* (2004) 36 also see generally Article 11.2 of the ADA.

‘the mere fact of three years and six months findings of no dumping does not require the investigating authority to, in addition, self-initiate a review of “whether the injury would be likely to continue or recur if the duty were removed or varied”’.³⁶⁸

This means that a request to review by interested parties does not automatically terminate the anti-dumping duty; the importing country’s authority has discretion whether or not to remove duty before outcome.

Article 13 of the ADA regulates judicial review. This type of review is reserved for WTO Members who have adopted anti-dumping legislation. Since Zimbabwe is one such Member, the ADA requires ‘independent judicial, arbitral or administrative tribunals or procedures for the purpose of prompt review of administrative final and review determinations’ to be maintained where anti-dumping legislation is adopted.³⁶⁹

During the investigation period, if a producer has not exported products to the importing country, he may request the importing member’s authorities to calculate margin dumping that is specific to him, because if not he will be subject to the anti-dumping duty rate which was imposed in the original investigation.³⁷⁰

However, the new producer should provide evidence that no relations exist between him and any exporters in their home countries who are under anti-dumping duties on the product.³⁷¹ Unlike interim reviews, new shipper review warrants that anti-dumping duties will not be levied on these producers during review. Appraisal may however be withheld by authorities in the importing country or exporters may provide guarantees that if dumping is determined on the new producers, anti-dumping duties can apply retroactively to the new exporters.³⁷²

2.5.7 Publication of the Notice

Importantly, where procedural requirements for legislating anti-dumping measures is concerned, publication of notices is as important as imposing an anti-dumping duty. Article 12 of the ADA

³⁶⁸*United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (Drams) Of One Megabit or above from Korea* WT/DS99/R para6.59.

³⁶⁹See generally Article 13 of the ADA.

³⁷⁰United Nations Conference on Trade and Development World Trade Organisation: Anti-dumping Measures (2003) 43; See generally Article 9.5 of the ADA.

³⁷¹See generally Article 9.5 of the ADA.

³⁷²Anti-dumping duties may be levied from date of the initiation of the review. See generally Article 9.5 of the ADA.

provides detailed requirements on how investigating authorities should publish public notices for initiation of investigations, initial and final determinations, and price undertakings.³⁷³

Article 12 contains different requirements for publication at different stages of the investigation. Generally, the notice must disclose information that is non-confidential relating to names of parties, product at issue, dumping margin, ‘facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers’.³⁷⁴ Lastly, requirements for publication increase transparency of determinations, and help to demonstrate that investigations are mainly based on fact and solid reasoning rather than unsubstantiated accusations.³⁷⁵

2.6 CHALLENGES WITHIN THE WORLD TRADE ORGANISATION ANTI-DUMPING RULES

Although WTO anti-dumping rules as contained in the ADA shows the efforts of Members to draft the rules in a way that counters unfair trade practices there are still loopholes within the ADA. As mentioned under Section 2.2 negotiations and proposals have been tabled by some WTO Members, which emphasises the need to improve the ADA.³⁷⁶ Many difficulties arise in determining dumping because in some instances the ADA gives the investigating authority too much leeway in determining how a particular principle applies.

Different scholars have written many articles on problems involved in injury margin calculations.³⁷⁷ Therefore, this thesis will not engage further in that discussion as recommendations on the issues have already been tabled. However, it is essential to highlight some other problems

³⁷³WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

³⁷⁴WTO ‘Anti-Dumping: Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017); see generally Article 12 of the ADA.

³⁷⁵Van den Bossche P & Zdouc W (2013) 717.

³⁷⁶An informal group of 15 participants (Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Mexico; Norway; Singapore; Switzerland; Chinese Taipei; Thailand; and Turkey) calling themselves ‘Friends of Anti-Dumping Negotiations’ (FANs) has called for the reform of the current Anti-Dumping Agreement’ see https://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm (accessed 08 April 2018).

³⁷⁷See generally Brink G ‘Dumping and Injury Margin Calculation Methods: Ten Major Problems in South Africa’ (2007) *Global Trade and Customs Journal*; Vermulst E & Horlick G ‘Problems with Dumping and Injury Margin Calculations in Ten User Countries’ (2013). See also Dascalescu FD ‘Threat of Injury in Anti-dumping Investigations: Some Comments on the Current Practice at EU and WTO Level’ (2011) 45 (4) *Journal of World Trade* 877–900; Irwin DA ‘Causing Problems? The WTO Review of Causation and Injury Attribution in U.S. Section 201 Cases’ (2003).

facing the ADA concerning the determination of injury. The ADA leaves many things unexplained which is problematic because it creates loopholes and a gateway for abuse. If one does an analysis of why some cases end up at the Dispute Settlement Body (DSB) where determination of injury is concerned, the main problem relates to interpretation of issues left unexplained by the ADA. In most cases, the complainants argue that the interpretation is unfair.³⁷⁸

Amongst the unexplained issues is what the basic methodological approach to injury analysis is; mostly authorities proceed ‘without care’, relying on simple correlations and some economically disputed methods in establishing causality between dumping and injury.³⁷⁹

Still on the issues of interpretation, the ADA does not define what material injury, threat of material injury and material retardation is. This is problematic because it may lead to different interpretations that may result in uncertainty. WTO prides itself on transparency and where agreements lead to uncertainty, transparency can be compromised. Moreover, as indicated under 2.4.2.3.3 the ADA does not give guidelines in establishing material retardation and this is problematic because it can lead to abuse, due to the complexity of the ADA. Anti-dumping is a complex subject on its own and leaving issues hanging does not help investigating authorities in reaching decisions that are fair and equitable.

Horlick and Vermulst have also identified a number of issues that are abounding in anti-dumping laws – both procedurally and substantively.³⁸⁰ Procedurally, they note that, in practice, parties are deprived of a meaningful way to defend their interests as too much information is classified as confidential in terms of the ADA.³⁸¹ They suggest a possible remedy as being the disclosure of information under a protection order. In the same vein, they also contend that the sunset review clause, pursuant to Article 11.3 of the ADA is not adequately functional, as the expiry of the anti-dumping duty would lead to further injury.

³⁷⁸See generally *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed-Linen from India - Appellate Body Report and Panel Report Pursuant to Article 21.5 of the DSU - Action by the Dispute Settlement Body WT/DS141/19 and WTO ‘Dispute by Agreement’* available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 24 July 2018).

³⁷⁹Sykes AO ‘Trade Remedy Laws’ (2005) *John M. Olin Law & Economics Working Paper No. 240* 41.

³⁸⁰Horlick G & Vermulst E ‘The 10 Major Problems With the Anti-Dumping Instrument: An Attempt at Synthesis’ (2005) 39 *Kluwer Law International* 67-73.

³⁸¹Horlick G & Vermulst E (2005) 68.

Besides issues of interpretation, the ADA also does not adequately address issues of competition and public interest.³⁸² Anti-dumping law and competition law enjoy a special relationship.³⁸³ There are many over-laps between these two specialised areas of the law.³⁸⁴ Despite these links, the study also notes that anti-dumping law does not adequately address competition issues. This is because despite a common origin, these two areas diverge on legal and economic grounds.³⁸⁵ Practices, which are loathed in competition law such as quantitative trade restrictions and price undertaking, are permitted in anti-dumping law.³⁸⁶ Anti-dumping has been labelled the most restricting device post Uruguay round.³⁸⁷ As such, there is a danger that the increase in the use of anti-dumping measures may erode the efforts of trade liberalisation achieved in different multilateral negotiations.³⁸⁸

Resultantly, there have been debates, to broaden the scope of the WTO anti-dumping rules to include competition issues.³⁸⁹ Other advocates have gone as far as calling for the replacement of anti-dumping laws with competition law.³⁹⁰ The study, however, suggests that there is a need to just harmonise some of the competition issues affecting trade law, in this particular instance, anti-dumping. This may minimise cases where anti-dumping measures are used for protectionism rather than remedying unfair trade.

Public interest should be a key consideration in determining any anti-dumping matter because in most anti-dumping cases the issues also affect the public. Sibanda argues that anti-dumping rules

³⁸² See generally Lloyd PH 'Anti-Dumping and Competition Law' in Appleton AE & Plummer MG (ed) *The World Trade Organization: Legal, Economic and Political Analysis* Volume I (2007) (hereafter Lloyd PH (2005)).

³⁸³ See generally Lloyd PH (2005).

³⁸⁴ See generally Lloyd PH (2005).

³⁸⁵ 'Interface Between Anti-dumping and Competition Law' available at

<https://researchersclub.wordpress.com/2013/10/24/interface-between-antidumping-and-competition-law-a-critical-analysis/> (accessed 17 November 2017).

³⁸⁶ Kazemi S & Ramesh D 'Antidumping and Competition Law: A Critique' (2017) 4 (9) *International Journal of Multidisciplinary Research and Development* 218.

³⁸⁷ Tharakan PKM 'The Problem of Anti-Dumping Protection and Developing Country Exports (2000) *World Institute for Development Economics Research Working Papers* No. 198 2 (hereafter Tharakan PKM (2000)).

³⁸⁸ Tharakan PKM (2000) 2.

³⁸⁹ Araoz M 'Why Antidumping Rules Should Include Competition Principles in RTAs' available at

<https://www.pecc.org/resources/trade-and-investment-1/850-why-antidumping-rules-should-include-competition-principles-in-rtas/file> (accessed 30 October 2017); Boscheck R 'Trade, Competition and Anti-Dumping – Breaking the Impasse!' (2000) 35(6) *Intereconomics* 286; Adamantopoulos K & De Notaris D 'The Future of the WTO and the Reform of Anti-Dumping Agreement: A Legal Perspective' (2000) 24 *Fordham International Law Journal* 34; OECD *Trade and Competition Policies for Tomorrow* (1999) 17.

³⁹⁰ 'Interface Between Anti-dumping and Competition Law' available at

<https://researchersclub.wordpress.com/2013/10/24/interface-between-antidumping-and-competition-law-a-critical-analysis/> (accessed 17 November 2017).

should be amended to include public interest considerations when imposing anti-dumping measures.³⁹¹ Public interest should also be considered on whether or not an investigation should be initiated.³⁹² Sibanda notes that, in competition policy, public interest considerations are clearly articulated, however, this has not been the case in anti-dumping laws.³⁹³ However, Sibanda acknowledges that it may not be feasible, in all instances, to factor in the interests of the public, as there may be more appropriate measures to achieve the same objectives.³⁹⁴

The discussion for the inclusion for a mandatory public interest clause in WTO anti-dumping law is not new. In the Uruguay round of negotiations, Members extensively discussed this option.³⁹⁵ The recommendations against its inclusions were largely due to its unintended consequences in some instances, which may have severe implications on the economy.³⁹⁶ To mitigate these effects, it is recommended that a clause be drafted into the ADA which prescribes that, where appropriate, and on a case by case basis, the importing state may consider the interests of the public where the consideration of such interests do not lead to market negatives or absurd results in the national economy. Issues to be considered as being of public interest would include the competitive situation, the interests of consumers or any other economic circumstances of interest.

The next section will discuss the process involved in solving anti-dumping disputes in WTO.

2.7 WORLD TRADE ORGANISATION DISPUTE SETTLEMENT

The central pillar of the WTO is its dispute settlement system.³⁹⁷ A dispute is usually caused by the adoption of trade policy measure by a WTO member state and such a policy measure fails to meet WTO obligations or breaches WTO agreements.³⁹⁸ Instead of taking unilateral action, WTO

³⁹¹Sibanda OS 'Public Interest Considerations in the South African Anti-dumping and Competition Law, Policy, and Practice' (2015) 14(5) *International Business and Economics Research Journal* 735.

³⁹²Section 19 (3) (a-b) of Statutory Instrument 266 of 2002.

³⁹³Sibanda OS (2015) 735.

³⁹⁴Sibanda OS (2015) 735.

³⁹⁵Kotsiubska V *Public Interest Consideration in Domestic and International Antidumping Disciplines* (unpublished Master of International Law and Economics, World Trade Institute 2011) 12.

³⁹⁶Kotsiubska V *Public Interest Consideration in Domestic and International Antidumping Disciplines* (unpublished Master of International Law and Economics, World Trade Institute 2011) 12.

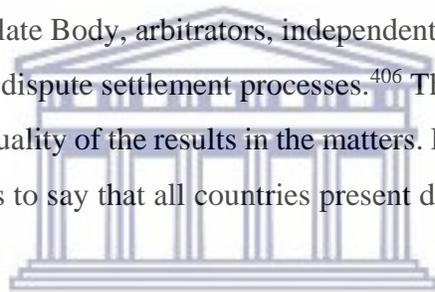
³⁹⁷Shoyer AH 'The First Three Years of WTO Dispute Settlement: Observations and Suggestions WTO Dispute Settlement System' (1998) 1(2) *Journal of International Economic Law* 277. See generally Hoekman B 'The WTO: Functions and Basic Principles' in Hoekman B, Mattoo A and English P (Eds) *Development, Trade, and the WTO: A Handbook* (2002).

³⁹⁸Jackson JH 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation' (1997) 91(1) *American Journal of International Law* 63. Verhoosel G 'The use of investor-state arbitration under

members now use a multilateral system of settling disputes against those who violate trade rules.³⁹⁹

Article 2 of the Dispute Settlement Understanding (DSU) established the Dispute Settlement Body (DSB),⁴⁰⁰ which consists of representatives who act on behalf of all WTO member states.⁴⁰¹ Its main mandate is to have supervisory oversight on WTO dispute settlement process.⁴⁰² In order to effectively achieve its mandate, the DSB must establish panels that adjudicate these dispute cases.⁴⁰³ This also includes the DSB's power to accept or reject findings and reports by other panels and the Appellate Body.⁴⁰⁴ In addition, the DSB has a duty to monitor the implementation of rulings and recommendations, including the power to authorise retaliation when a WTO member state fails to comply with its ruling.⁴⁰⁵

Apart from the DSB, other parties such as the affected parties, third parties to the case, DSB panels, the WTO Secretariat, the Appellate Body, arbitrators, independent experts and several specialised institutions are also involved in dispute settlement processes.⁴⁰⁶ The expertise involved in solving cases warrants excellence and quality of the results in the matters. Decisions according to the DSB are done by consensus, which is to say that all countries present during a dispute settlement must



UNIVERSITY of the
WESTERN CAPE

bilateral investment treaties to seek relief for breaches of WTO law' (2003) 6(2) *Journal of International Economic Law* 493.

³⁹⁹Busch ML & Reinhardt E 'Bargaining in the shadow of the law: Early settlement in GATT/WTO disputes' (2000) 24 (1&2) *Fordham International Law Journal* 158. Mansfield ED & Reinhardt E 'Multilateral determinants of regionalism: The effects of GATT/WTO on the formation of preferential trading arrangements' (2003) 57(4) *International organization* 841.

⁴⁰⁰For some key statistics on the outcomes of the Dispute Settlement Body (DSB), see generally Wilson B 'Compliance by WTO members with adverse WTO dispute settlement rulings: the record to date' (2007) 10(2) *Journal of International Economic Law*.

⁴⁰¹See generally Cameron J and Gray KR 'Principles of international law in the WTO dispute settlement body' (2001) 50(2) *International & Comparative Law Quarterly*.

⁴⁰²Schoenbaum TJ 'WTO dispute settlement: praise and suggestions for reform' (1998) 47(3) *International & Comparative Law Quarterly* 648.

⁴⁰³Jackson JH, Hudec RE & Davis D 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism' in Collins SM & Rodrik D (Eds) *Brookings Trade Forum* (2000) 185.

⁴⁰⁴Ehlermann C 'Experiences from the WTO appellate body' (2003) 38(3) *Texas International Law Journal* 469-488. Davey WJ 'Has the WTO dispute settlement system exceeded its authority? A consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques' (2001) 4(1) *Journal of International Economic Law* 99.

⁴⁰⁵Saleem S *et al Environment for Business: Strictly as per requirements of the Gujarat Technological University* (2010) 125.

⁴⁰⁶WTO 'WTO Bodies involved in the dispute settlement process' available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (accessed 03 March 2018).

agree with the decision.⁴⁰⁷ This implies that if any WTO member that is present at the meeting objects to the passing of a decision, the decision will not be adopted because there will be no consensus.⁴⁰⁸ However, there are three exceptions to the system of consensus where the DSB can act without consensus.⁴⁰⁹ The system of consensus is beneficial to developing countries, such as Zimbabwe, because they can still make decisions even if they do not have a financial muscle.

If Members have an anti-dumping dispute, they need to follow processes of dispute settlement.⁴¹⁰ There are four stages involved in WTO disputes; namely consultation, panel stage, appeal and enforcement.⁴¹¹ Each stage has procedures that have to be adhered to. Importantly this thesis will discuss the panel stage, as it is the most complex amongst the stages due to selection criterion of panelists.⁴¹² It is also important because it is the first stage where WTO makes concrete decisions in the dispute process.

If a consensus cannot be reached in consultation stages, a Member can request the WTO to establish a panel.⁴¹³ In the panel, stage panels are usually composed of three panelists who are nominated by the Secretariat.⁴¹⁴ There are no permanent panelists in the WTO, panels are created for each individual dispute and possible candidates must meet a certain requirement in terms of proficiency and independence regarding the dispute at hand.⁴¹⁵ WTO Members may sometimes propose names of qualified people to be considered as panelists.⁴¹⁶ However, a party to a dispute

⁴⁰⁷Ehlermann CD and Ehrling L 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 8(1) *Journal of International Economic Law* 55.

⁴⁰⁸Bartels L 'The separation of powers in the WTO: How to avoid judicial activism' (2004) 53(4) *International & Comparative Law Quarterly* 863.

⁴⁰⁹For a full discussion on these situations see generally WTO *A Handbook on the WTO Dispute Settlement System* (2017).

⁴¹⁰Triggs G 'Dispute Settlement under the World Trade Organisation: Implications for Developing Countries' (2003) 15(2) *Bond Law Review* 44.

⁴¹¹WTO 'The process — Stages in a typical WTO dispute settlement case' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s1p1_e.htm (accessed 16 March 2018).

⁴¹²For a detailed discussion of these stages, see generally Triggs G 'Dispute Settlement under the World Trade Organisation: Implications for Developing Countries' (2003) 15(2) *Bond Law Review*.

⁴¹³See generally Wethington OL 'Commentary on the Consultation Mechanism under the WTO Dispute Settlement Understanding during Its First Five Years' (2000) 31(3) *Law and Policy in International Business*.

⁴¹⁴For a detailed discussion on operation of panels in dispute settlement, see generally Kingery J 'Commentary: Operation of Dispute Settlement Panels' (2000) 31(3) *Law and Policy in International Business*.

⁴¹⁵See generally Busch ML & Pelc KJ 'Does the WTO need a Permanent Body of Panelists?' (2009) 12(3) *Journal of International Economic Law*. See generally also Davey WJ 'The case for a WTO permanent panel body' (2003) 6(1) *Journal of International Economic Law*.

⁴¹⁶Fontoura Costa JA 'Comparing WTO panelists and ICSID arbitrators: The creation of international legal fields' available at <http://opo.iisj.net/index.php/osls/article/viewFile/63/207> (accessed 16 March 2018).

may not challenge the Secretariat's choice of panelists except for compelling reasons.⁴¹⁷ When a dispute is between a developing country Member and a developed country Member the panel must, upon request by the developing country Member, include at least one panelist from a developing country Member.⁴¹⁸

The panel is required to receive written and oral submissions of the parties involved and then to make findings and conclusions based on the submissions, which will then be presented to the DSB.⁴¹⁹ Its main function is to assist the DSB in discharging its responsibilities.⁴²⁰ Regarding the issue of the burden of proof, it lies with the defending party.⁴²¹ This was confirmed in the *EC — Hormones* the Appellate Body, held that 'the party complained against generally bore the burden of proof that its measures complied with the Agreement, unless they were based on international standards'.⁴²²

Looking at the panel procedure one can say that Article 12.2 of the DSU emphasises the importance of flexibility to obtain high quality panel reports.⁴²³ Parties are given at least two opportunities to provide written submissions because normally two meetings take place amongst the panel and the parties involved.⁴²⁴ Usually the complaining party makes the first submission so that the responding party's submission will contain a response to that previously submitted paper by the complaining party.⁴²⁵ These written submissions are treated as confidential to the extent that only members may disclose what is in the submissions publicly and the stakeholders have no

⁴¹⁷Davey WJ 'The WTO Dispute Settlement Mechanism' available at https://www.peacepalacelibrary.nl/ebooks/files/DAVEY_WTO-Dispute-Settlement-Mechanism.pdf (accessed 16 March 2018).

⁴¹⁸WTO 'Developing countries in WTO dispute settlement' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c11s1p1_e.htm (accessed 16 March 2018).

⁴¹⁹Distefano M 'The WTO Dispute Settlement Understanding Review: What Future for the Appellate Stage?' in Boschiero N *et al* (eds) *International Courts and the Development of International Law* (2003) 701-709.

⁴²⁰Prusa TJ & Rubini L 'United States—Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu all over again' (2013) 12(2) *World Trade Review* 414.

⁴²¹*United States—Use of Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R paras 7 and 19.

⁴²²*EC Measures concerning meat and meat products (Hormones)* WT/DS26/29AB/R para 104.

⁴²³See generally Stewart RB & Sanchez Badin MR 'The World Trade Organization: multiple dimensions of global administrative law' (2011) 9(3-4) *International journal of constitutional law*.

⁴²⁴Trebilcock MJ & Howse R (3ed) *The Regulation of International Trade* (2005) 75.

⁴²⁵Ceva E & Fracasso A 'Seeking mutual understanding: a discourse-theoretical analysis of the WTO Dispute Settlement System' (2010) 9(3) *World Trade Review* 465.

direct access to the submissions that can affect them.⁴²⁶ This in a way falls far short of the transparency and publicity norms that are found in most if not all institutions of the WTO.

Regarding the people that can represent a government before the panels, during the GATT era government officials could come before the panels.⁴²⁷ This was to the detriment of the developing countries which in most cases did not have trade experts therefore this disadvantaged them in pursuing complaints.⁴²⁸ By allowing non-governmental counsel to appear before the panel one can say that this is a positive development since it reduces the control of the process by the governments.

Either party of the dispute can appeal to a panel's decision and in some cases both parties appeal together.⁴²⁹ The appeals must be based on points of law such as legal interpretation therefore the panel cannot reexamine existing evidence or examine new issues.⁴³⁰ Each appeal is heard by three members of a permanent seven-member Appellate Body set up by the DSB and broadly representing the range of WTO membership.⁴³¹

Within 30 days after the ruling of the panel, the losing party must inform the DSB of the steps it intends to take to implement the recommendations and rulings adopted.⁴³² In cases in which immediate compliance cannot be achieved fast, the losing party will be given a reasonable period to adjust and comply with the ruling made by the panel.⁴³³ Compensation and suspension of

⁴²⁶Article 18(2) of the DSU holds that:

‘Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body, which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public’.

See also Marceau G & Hurley M ‘Transparency and public participation in the WTO: Report card on WTO transparency mechanisms’ (2012) 4(1) *Trade, Law and Development* 25.

⁴²⁷Reitz C ‘Enforcement of the general agreement on tariffs and trade’ (1996) 17(2) *University of Pennsylvania Journal of International Economic Law* 582.

⁴²⁸Garcia FJ ‘Trade and inequality: Economic justice and the developing world’ (2000) 21(4) *Michigan Journal of International Law* 977.

⁴²⁹See generally, Chapter 9 in Gutner T *International Organizations in World Politics* (2016).

⁴³⁰Saleem S *Business Environment* (2006) 501; Van Calster G ‘International Trade Agreements’ in Schwabach A and Cockfield AJ (ed) *International Law and Institutions* (2009) 145.

⁴³¹Shukla S *International Business* (2008) 311; WTO *Understanding the WTO* (2008) 57.

⁴³²Trebilcock M, Howse R & Eliason A (4ed) *The Regulation of International Trade* (2013) 209.

⁴³³See generally Peng S ‘How much time is reasonable the arbitral decisions under article 21.3(c) of the DSU’ (2008) 26(1) *Berkeley Journal of International Law*.

concessions are available to the complaining party if the adopted panel is not implemented within a reasonable period.⁴³⁴

Besides the DSB being regarded efficient, it has been accused of lacking transparency and that it is very costly for the developing countries.⁴³⁵ Developing countries often call upon the assistance of the law firms of major developed countries which charge hefty fees in WTO disputes because the former lack trade experts.⁴³⁶ The developing countries would therefore not be as prompt and willing to initiate the dispute settlement process for exercise of their rights, as would a developed country.⁴³⁷ It is therefore submitted, that there is need to level the playing field for the developing countries in the WTO system by enabling them to have a full understanding of their rights and obligations under WTO Agreements.

2.8 CONCLUSION

The main objective of this Chapter was to discuss international framework on anti-dumping. A brief history of anti-dumping legislation in the WTO was discussed and it was highlighted that some countries such as Canada, Australia and South Africa had anti-dumping legislation before GATT 1947. Most importantly, the GATT 1947 rules were modelled on the USA anti-dumping rules. The Chapter also highlighted that there are different definitions on what dumping is; moreover, some of the definitions are not necessarily a true reflection of what dumping is. In general, dumping takes place where there is international price discrimination.⁴³⁸ The problem is price discrimination is not always an unfair trade practice as illustrated by the example of cooking oil in Zimbabwe and Zambia.⁴³⁹

The Chapter also discussed an informal and WTO meaning of dumping. What has been observed from these definitions, particularly the WTO, is that WTO does not prohibit dumping *per se*.

⁴³⁴Trebilcock M, Howse R & Eliason A (4ed) *The Regulation of International Trade* (2013) 210.

⁴³⁵Waqas M 'Why Developing Countries are at Disadvantage Position in WTO Dispute Settlement Mechanism' (2014) 1(2) *International Journal of Social Sciences and Management* 60-63; Kessie E & Addo K 'African Countries and the WTO Negotiations on the Dispute Settlement Understanding' (2008) 1 *Trade Policy Review Volume* 65-91.

⁴³⁶Raghavan C 'The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South' available at <https://www.twn.my/title/tilting.htm> (accessed 17 March 2018).

⁴³⁷WTO's defective dispute settlement process available at <http://www.thehindu.com/2000/07/06/stories/0606000c.htm> (accessed 17 March 2018).

⁴³⁸See 2.3 Definition of Dumping.

⁴³⁹See the example as illustrated in 2.3 Definition of Dumping.

However, WTO regulates dumping that causes injury to the domestic industry. The Chapter has also provided the types of dumping that exist, there are three categories namely sporadic, predatory and continuous. Most importantly, the Chapter highlighted that the categories indicate the severity of dumping and the likelihood of continuation of dumping.⁴⁴⁰

Moreover, there are three main schools of thoughts where anti-dumping duties are concerned. These are that duties are either a response to unfair trade, or a special protection and a strategic weapon. Most importantly, a discussion of substantive and procedural requirements of the WTO relating to dumping as provided under Article VI of GATT and the ADA was undertaken. These rules have been discussed to provide Members with clarity on how the rules work and ensuring that if a member enacts anti-dumping laws the provisions of that legislation should comply with the ADA.

The Chapter discussed both substantive and procedural requirements. It has been discussed that the ADA does not prevent a Member from enacting additional procedures; however, the additional procedures should not deviate from WTO rules. Failure by a member to conform to the ADA may result in judicial review of the administrative action against the member. In addition, it was highlighted that the field of anti-dumping requires specialised skills in accountancy, law and economics.⁴⁴¹ In some cases, Members may not have these skills, which may compromise the investigation leading to disputes.

The Chapter has highlighted some of the challenges within the WTO framework. The main difficulty pointed out is that the ADA leaves many provisions un-interpreted and at most gives the investigating authority power to determine how to apply a particular principle, which may be prone to abuse by Members. It also highlighted that currently anti-dumping rules do not adequately address issues of competition and public interest. It was highlighted that if a balanced approach is not adopted between competition and anti-dumping, there is a danger of eroding the efforts of trade liberalisation.⁴⁴²

⁴⁴⁰See 2.3.1 Types of Dumping.

⁴⁴¹2.4.1 Determination of Dumping.

⁴⁴² 2.6 Challenges within World Trade Organisation Anti-Dumping Rules

The Chapter has also highlighted that the WTO Dispute Settlement Mechanism (DSM) was designed to secure the rule of law within international trade and provide all Members with opportunities to exercise their rights under multilateral trade agreements. The Dispute Settlement process is well developed and efficient. On the other hand, the DSB lacks transparency and costly for the developing countries because they have to hire expertise from expensive law firms in developed countries.⁴⁴³

The next Chapter will look at the use of anti-dumping measures in South Africa. Most importantly, the next Chapter will be discussed for purposes of drawing lessons Zimbabwe can take from the South African experience.



⁴⁴³ 2.7 World Trade Organisation Dispute Settlement

CHAPTER 3
THE USE OF ANTI-DUMPING MEASURES IN SOUTH AFRICA
3.1 INTRODUCTION

South Africa is amongst the earliest users of anti-dumping measures worldwide.¹ As shown earlier in Chapter 2, Canada became the first country to enact anti-dumping laws in 1904.² By mid 1920s, United States of America (USA), South Africa, Australia, France, New Zealand and Great Britain had incorporated anti-dumping rules in their respective national laws.³ This implies that South Africa was amongst the first countries that enacted anti-dumping laws before the General Agreement on Tariffs and Trade (GATT).⁴ The country promulgated its anti-dumping law, in the form of the Customs and Tariffs Act, in 1914.⁵ Despite the enactment of this Act, South Africa only started to apply anti-dumping measures in 1921 when it imposed anti-dumping duties on Australian flour and wheat.⁶ When South Africa imposed these measures, the then Customs Department, now the South African Revenue Service (SARS), was responsible for enacting anti-dumping measures.⁷

The anti-dumping system in South Africa has developed over time since 1921 as evidenced by the amendments that follow the initial laws. From 1921 onwards, the Board on Trade and Industries (BTI) became responsible for investigating dumping and enforcing anti-dumping regulations.⁸ The

¹Zanardi M 'Anti-dumping: What are the Numbers to Discuss at Doha?' (2004) 27(3) *The World Economy* 408.

²See generally 2.2 Brief history of WTO law on dumping. Niels G 'What is antidumping policy really about?' (2000) 14(4) *Journal of economic surveys* 468; Ciuriak Dan 'Anti-dumping at 100 Years and Counting: A Canadian Perspective' (2005) 28(5) *The World Economy* 462.

³See generally 2.2 Brief history of WTO law on dumping. Garcia M & Baker A *Anti-dumping in New Zealand: A century of protection from "unfair" trade?* (2005) 9; Prusa T J 'Anti-dumping: A Growing Problem in International Trade' (2005) 28(5) *The World Economy* 687.

⁴Brink G 'One Hundred Years of Anti-dumping in South Africa' (2015) 49 *Journal of World Trade* 325 (hereafter Brink G (2015)). Anti-dumping rules found their existence way prior the GATT negotiations because Canada, United States of America (USA), South Africa, Australia and France already had anti-dumping rules in their national legislation by mid-1920s. For a detailed discussion, see Zanardi M 'Antidumping: A problem in international trade' (2006) 22(3) *European Journal of Political Economy* 591-617.

⁵Sibanda OS 'An Assessment of WTO Compliance by the South African Anti-Dumping Regime in Respect of the Determination of Causation' (2013) 76(1) *Journal of Contemporary Roman-Dutch Law* 174(hereafter Sibanda OS (201)). Sandrey R *et al* 'Non-tariff measures inhibiting South African exports to China and India. Working Paper 6/2008' (2008) 24.

⁶ Brink G A *Theoretical Framework for Anti-Dumping Legislation in South Africa* (unpublished LLD thesis, University of Pretoria 2004) 46 (hereafter Brink G (2004); see also Vinti C 'A spring without water: the conundrum of anti-dumping duties in South African law' (2016) 19(1) *PER: Potchefstroomse Elektroniese Regsblad* 10.

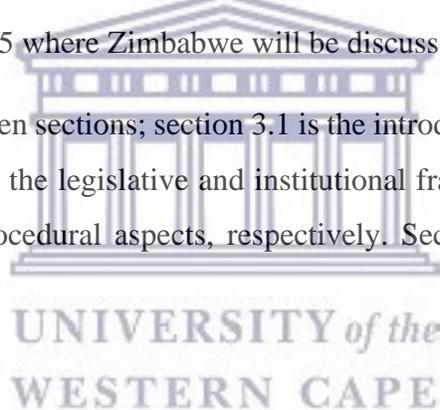
⁷Brink G (2004) 80 see also Joubert N 'Managing the Challenges of WTO Participation: The Reform of South Africa's Anti-Dumping Regime' in Gallagher P, Low P & Stoler AL (eds) *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) 518 (hereafter Joubert N (2005)).

⁸Sibanda OS (2013) 174. Meng T *Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China* (unpublished LLM Thesis, University of the Free State 2006) 19.

Board on Tariffs and Trade (BTT) replaced the BTI in 1992.⁹ The Department of Trade and Industry then established a Directorate of Dumping Investigations.¹⁰ The Directorate of Dumping Investigations conducted ‘anti-dumping and countervailing investigations’ on behalf of the BTT.¹¹ This system was replaced in 2003 when the International Trade Administration Act 71 of 2002 (ITAA) came into force.

Where anti-dumping jurisprudence is concerned in Africa, South Africa provides the best practices Zimbabwe can learn. This is because, amongst other things, it has courts that have had the opportunities to apply anti-dumping regulations and develop anti-dumping jurisprudence.¹² Although the number of anti-dumping investigations has decreased since the enactment of the ITAA, South Africa is still the number one user in Africa.¹³ Also as mentioned in Chapter 1 South Africa is Zimbabwe’s biggest trading partner, accounting for the largest percentage in both import and exports.¹⁴ An examination of how Zimbabwe can learn from South Africa’s anti-dumping regime will be done in Chapter 5 where Zimbabwe will be discussed.

This Chapter is divided into seven sections; section 3.1 is the introduction; section 3.2 provides an overview, section 3.3 discusses the legislative and institutional framework. Sections 3.4 and 3.5 discuss the substantive and procedural aspects, respectively. Section 3.6 looks at reviews and section 3.7 is the conclusion.



⁹Board on Tariffs and Trade Amendment Act 60 of 1992; see also Brink (2004) 20-21; Joubert N (2005) 519.

¹⁰Brink G *Anti-Dumping and Countervailing Investigations in South Africa* (2002) 4-5 (hereafter Brink G (2002)). See also Sibanda OS ‘The South African anti-dumping law: consistency with the GATT Anti-Dumping Code’ (2001) 34(2) *Comparative and International Law Journal of Southern Africa* 243; V. de Lange C ‘2014’s Second Trade Centurion: Dumping’ 19 August 2014 available at <http://www.thesait.org.za/news/187155/2014s-Second-Trade-Centurion-Dumping.htm> (accessed 20 June 2017).

¹¹Brink G (2004) 4-5; Joubert N (2005).

¹²See general discussion in Brink G “South Africa: A complicated, unpredictable, long and costly judicial review system”, in Yilmaz M *Domestic Judicial Review of Trade Remedies* (2013) 247-268; Brink G “Anti-Dumping and Judicial Review in South Africa: A need for Urgent Reform” (2012) 7 (5) *Global Trade and Customs Journal*.

¹³Brink G (2015) 325. See also a discussion of South African case law dealing with the use of anti-dumping laws in Vinti C ‘A spring without water: the conundrum of anti-dumping duties in South African law’ (2016) 19(1) *PER: Potchefstroomse Elektroniese Regsblad*.

¹⁴See generally 1.6 Research Methodology. See also, The Southern Times ‘South Africa still ranks high on Zimbabwe’s trading partners’ list’ available at <https://southernafrican.news/2016/06/29/south-africa-still-ranks-high-on-zimbabwes-trading-partners-list/> (accessed 20 November 2017); Department of Research and Information ‘Economic overview: Recent developments in the global and South African economies (2016) 9.

3.2 OVERVIEW

South Africa was an early anti-dumping user in the world; in addition, it is the largest user of anti-dumping measures in Africa.¹⁵ Its success has been attributed to its amendment of the Board on Tariffs and Trade Act in 1995.¹⁶ These amendments were in harmony with the Implementation of Article VI of GATT 1994 Anti-Dumping Agreement (ADA) because they gave unambiguous meaning to words such as ‘dumping’, ‘export price’, ‘normal value’, and ‘fair comparison’.¹⁷ This has enabled South Africa to achieve compliance with its 1994 GATT obligations. In 2015, Brink observed that South Africa had accounted for more the 1000 investigations and the number has grown since then.¹⁸ Despite these positive attributes, some of South Africa’s trading partners’ raise concerns that these numbers indicate that anti-dumping laws are being used as a protectionist measure.¹⁹ They argue that the highest number do not correlate with fact that South Africa has a small market share globally.²⁰

Dumping has a potential of massive job losses, which in turn affects the standard of living of the people of South Africa.²¹ In 2016, Lovell, the chief executive of the South African Poultry Association, worryingly noted that the poultry industry was expecting job losses amounting to 6000 by the end of that year.²² This is because dumping allows for price undercutting, which may lead to local producers driven out of the market.²³ Although it is not a crime to dump, scholars

¹⁵Brink G (2015) 326.

¹⁶Holden M ‘Antidumping: A reaction to trade liberalisation or ant-competitive?’ (2011) 70(5) *South African Journal of Economics* 924; Edwards L. Anti-Dumping in South Africa: From Proliferation to Moderation (2011) 5 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871948 (accessed 20 June 2017).

¹⁷Sibanda OS (2013) 175.

¹⁸Brink G (2015) 326.

¹⁹Watson W ‘Antidumping Fowls Out: U.S.–South Africa Chicken Dispute Highlights the Need for Global Reform’ 19 October 2015 available at <https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights> (accessed 10 August 2017). See discussion on how protectionism operate by, Tharakan PKM ‘Political Economy and Contingent Protection’ (1995) 105(433) *The Economic Journal* 1550; Hansen WL ‘International Trade Commission and the politics of protectionism’ (1990) 84(2) *American Political Science Review*.

²⁰Hanauer LH *The Interpretation And Application Of Gatt's Article Xxiii To Anti-Dumping Law And Practice*. (unpublished LLD thesis, University Of The Witwatersrand 2016) 225; Evenett S & Fritz J ‘The tide turns? Trade, protectionism, and slowing global growth: 18th Global Trade Alert Report (2015) 94-97. Business Day ‘SA most ‘protectionist’ country when it comes to poultry, says IPC’ available at <https://www.businesslive.co.za/bd/business-and-economy/2017-08-30-sa-most-protectionist-country-when-it-comes-to-poultry-says-ipc/> (accessed 20 November 2017).

²¹Pieterse A ‘Reviewing South African transnational relations’ (2017) 18 (4) *Safundi The Journal of South African and American Studies* 425.

²²Booyesen J ‘SA chicken industry set for huge job losses’ (2016) available at <https://www.iol.co.za/business-report/economy/sa-chicken-industry-set-for-huge-job-losses-2074525> (accessed 18 October 2017).

²³See generally Oin U & Vandenbussche H ‘China–GOES (Article 21.5): Time to Clarify the Standard for Price Suppression and Price Depression in AD/CVD Investigations’ (2017) 16(2) *World Trade Review*.

such as Mitchell argue that the practice is undesirable in international trade; hence the need for WTO to regulate dumping.²⁴ In addition, there are devastating consequences to the end consumer because after other producers lose market share, there is no law that prevents the exporter to increase its prices.²⁵

As South African courts have the opportunity to develop anti-dumping laws, the country has also benefited from scholarly publications on the issue of anti-dumping.²⁶ There are also institutions such as the Trade Law Centre (TRALAC) that develops ‘technical expertise and capacity in trade governance across Africa’, which is situated in South Africa.²⁷ South Africa also benefits from workshops done by WTO that help in technical assistance and capacity building.²⁸ In developing expertise in anti-dumping South Africa has continued to engage and visit for learning purposes and building capacity.²⁹

3.3 THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

3.3.1 Legislative Framework

Anti-dumping regime in South Africa has gone through a number of changes bringing along a better system generally compliant with World Trade Organisation (WTO) laws. Currently anti-dumping in South Africa is mainly dealt with in terms of the ITAA.³⁰ The ITAA repealed the Board on Tariffs and Trade Act, which had been in operation since 1992, in 2003.³¹ However in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* the Constitutional Court³² held that where appropriate the ITAA was to be read in conjunction with the Board of

²⁴Mitchell AD *Legal Principles in WTO Disputes* (2008).

²⁵Falade Obalade TA ‘Analysis of Dumping as a Major Cause of Import and Export Crises’ (2014) 4(5) *International Journal of Humanities and Social Science* 234.

²⁶Throughout the whole Chapter, the author engages with publications written by scholars that have helped in developing the country’s anti-dumping system for instance authors such as Brink G, Sibanda OS, Joubert N, Ndhovu L and Khandeira S.

²⁷See generally <https://www.tralac.org/about.html> (accessed 24 July 2018).

²⁸See generally Doha WTO Ministerial adopted 14 Nov. 2001: Ministerial Declaration para 38 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#cooperation (accessed 12 June 2018). Also see Ikeagwuchi GA *Implementing effective trade remedy mechanisms: A critical analysis of Nigeria’s Anti-Dumping and Countervailing Bill, 2010* (unpublished LLM thesis University of Pretoria 2014) 85.

²⁹Brink G (2004) 692-693.

³⁰Brink G ‘One Hundred Years of Anti-dumping in South Africa’ (2015) 49 *Journal of World Trade* 325 (hereafter Brink G (2015); see generally Khandeira S ‘The determination of injury in South African anti-dumping investigations: recent approaches’ (2016) 49(2) *Comparative and International Law Journal of Southern Africa*.

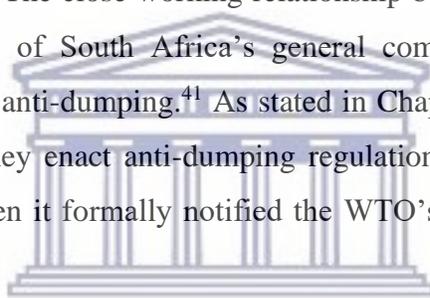
³¹*Association of Meat Importers v ITAC* (769, 770, 771/12) [2013] ZASCA 108 (13 September 2013).

³²South Africa’s constitutional court is the highest court in South Africa.

Tariffs and Trade Act, 1986³³ (BTT Act).³⁴ The reason for that was to close gap, which was created when, a number of the ITAA provisions have not come into operation.³⁵

Apart from it being a national framework, the ITAA is also applicable to the regional block of the Southern African Customs Union (SACU).³⁶ It provides ‘within the framework of the SACU Agreement continued control of import and export of goods and amendment of customs duties: and to provide for matters connected therewith.’³⁷ The ITAA is also the statute that created the International Trade Administration Commission (ITAC); it also provides for functions and regulation of the ITACs procedures.³⁸

More importantly, the ITAC has the duty to carry out anti-dumping investigations.³⁹ In doing so, South Africa promulgated the Anti-Dumping Regulations (ADR 2003) to assist the ITAC in efficiently carrying its duties.⁴⁰ The close working relationship between the ITAA and the ADR 2003 ensures the maintenance of South Africa’s general compliance with the WTO while preserving its best practices on anti-dumping.⁴¹ As stated in Chapter 2, WTO Members have an obligation to notify WTO if they enact anti-dumping regulations.⁴² South Africa fulfilled this obligation in January 2004 when it formally notified the WTO’s Committee on Anti-Dumping



³³Board of Tariffs and Trade Act 107 of 1986.

³⁴*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³⁵*International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.

³⁶Members of the Southern African Customs Union (SACU) are Botswana, Lesotho, Namibia, South Africa, and Swaziland.

³⁷Preamble of the International Trade Administration Act 71 of 2002 (ITAA).

³⁸Section 7 of the ITAA; see also Hanauer LH (2016) 227.

³⁹International Trade Administration Commission ‘An Overview of ITAC’ available at <http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed 06 September 2017). Section 33 of ITAA, Section 2 of the ADR 2003 and part B of the proposed Anti-Dumping Regulations; Ndlovu L ‘South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy’ (2013) 28(2) *Southern African Public Law* 289.

⁴⁰International Trade and Administration Commission ‘An Overview of ITAC’ available at <http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed 06 September 2017). Ndlovu L ‘South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy’ (2013) 28(2) *Southern African Public Law* 287.

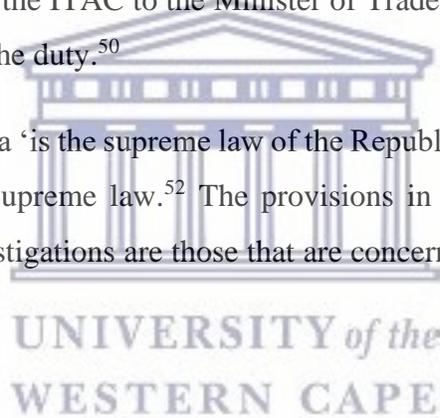
⁴¹It is general compliance because there are articles written about ITAC’s procedures not adhering to the relevant WTO obligations. See Brink G ‘X-Raying Injury Findings in South Africa’s Anti-Dumping Investigations’ (2015) 23 (1) *African Journal of International and Comparative Law*; Brink G ‘New directions by the Panel in Russia—Commercial Vehicles and the implications for South African antidumping investigations’ (2017) 50(3) *Comparative and International Law Journal of Southern Africa* 417-441.

⁴²See generally Chapter 2. See also, Kufuor KO ‘The Growing Problem of Intra-Developing Country Anti-Dumping Actions in World Trade’ in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) 95.

Practices about the ITAA and the ADR 2003.⁴³ The two statutes were defended successfully before WTO in the same year they were notified.⁴⁴ Members have to defend some of their statutes affecting trade in the WTO, as ‘national policies should not discriminate between nationals and foreigners or between foreigners of different origin’.⁴⁵ The WTO makes rules on the way domestic policy objectives can be achieved and as such, there are some instances where limitations on what governments can do in domestic policies are placed.⁴⁶ However, the WTO does not make rules about the domestic policy objectives of Members.⁴⁷

Besides the ITAA and the ADR 2003, the Customs and Excise Act 1964 imposed anti-dumping duties on dumped imports.⁴⁸ The imposition of provisional anti-dumping measures is made at the request of ITAC. This request is done when anti-dumping investigations have been concluded and included in such request is the level and duration of the duty.⁴⁹ However, definitive measures are based on a recommendation by the ITAC to the Minister of Trade who, if he agrees, requests the Minister of Finance to impose the duty.⁵⁰

The Constitution of South Africa ‘is the supreme law of the Republic’.⁵¹ This requires that all laws must be compatible with the supreme law.⁵² The provisions in the Constitution which are of relevance to anti-dumping investigations are those that are concerned with access to information,



⁴³On notification to the WTO in 2004 see WTO Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements – South Africa, G/ADP/N/1/ZAF/2G/SCM/N/1/- ZAF/2 (20 January 2004).

⁴⁴Sibanda OS (2013) 180.

⁴⁵WTO Director-General *WTO Policy Issues For Parliamentarians A Guide To Current Trade Issues For Legislators* 4.

⁴⁶WTO Ministerial Conference *The WTO ...Why It Matters A Guide For Officials, Legislators, Civil Society And All Those Interested In International Trade And Global Governance* (2001)18.

⁴⁷WTO Ministerial Conference *The WTO ...Why It Matters A Guide For Officials, Legislators, Civil Society And All Those Interested In International Trade And Global Governance* (2001)18.

⁴⁸Khanderia S ‘The Compatibility of South African Anti-Dumping Laws with WTO Disciplines’ (2017) 25(3) *African Journal of International and Comparative Law* (hereafter Khanderia S (2017)).

⁴⁹Ndlovu L ‘An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s dumping and anti-dumping Law’ (2010) 5(1) *Journal of International Commercial Law and Technology* 5 (hereafter Ndlovu L (2010) 5). See also, Khanderia S ‘Price Comparisons under the South African Anti-dumping Laws: The Faux Pas Continues?’ (2017) 52(1) *Foreign Trade Review* 30-47.

⁵⁰Ndlovu L (2010) 5.

⁵¹Section 2 of the Constitution; Hoexter C *Administrative Law in South Africa* (2007) 30.

⁵²Davis DM ‘Twenty Years of Constitutional Democracy: A Preliminary Reflection’ (2015) 60 (1) *New York Law School Law Review* 52.

administrative action and those of good public administration.⁵³ These provisions promote transparency, which is amongst the core pillars of anti-dumping investigations at a WTO level.⁵⁴

Other relevant laws are the Promotion of Access to Information Act 2 of 2000 (PAIA), which was enacted as a result of the ‘constitutional right of access to any information held by the State and any information that is held by another person required in exercising or protecting any rights’.⁵⁵ The PAIA is a landmark piece of legislation that provides South African people an opportunity to leave ‘a culture of secrecy and bureaucracy to a culture of transparency and accountability’.⁵⁶ Thus, in anti-dumping investigations the PAIA embed the values of how an investigation should be ‘clothed’.

The Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) is also an important piece of legislation that affects anti-dumping investigations. Section 3 of the PAJA requires that the commission give all relevant parties adequate notice about an administrative action that is proposed.⁵⁷ In addition, all parties should have a reasonable opportunity to make representations, notice of the review mechanism and the right to request reasons.⁵⁸ As stated in Chapter 2, adequate representations and reasonable time to provide evidence are key components in anti-dumping investigations as they help in ensuring that the process is not always abused.⁵⁹ It is important to note that the PAJA only prescribes how powers given to administrators by other statutes should be exercised; it does not provide powers to administrators.⁶⁰

⁵³See Section 32-33 and 195 of the Constitution; see also Brink G (2004) 698-709; Brink G ‘Anti-dumping in South Africa’ (2012) (hereafter, Brink G (A-D in SA 2012) 2-4.

⁵⁴See generally 2.4.1.3 Comparison of Normal Value and Export Price.

⁵⁵Preamble of Promotion of Access To Information Act 2 of 2000 (PAIA).

⁵⁶Mass C ‘Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective’ in Lange C and Wessels J (eds) *The Right to Know – South Africa’s Promotion of Administrative Justice and Access to Information Acts* (2004) 63. See also, Dick AL ‘Power is information: South Africa’s Promotion of Access to Information Act in context’ (2005) 23(1) *Mousaion* 6; Arko-Cobbah A ‘The right of access to information: Opportunities and challenges for civil society and good governance in South Africa’ (2008) 34(2) *IFLA journal* 188.

⁵⁷Section 3 of Promotion of Administrative Justice Act No. 3 of 2000 (PAJA). See also a commentary of section 3 of PAJA in Hoexter C *Administrative Law in South Africa* (2007) 390-397.

⁵⁸See Currie I *et al The Promotion of Administrative Justice Act bench book* (2001) 133-149.

⁵⁹2.5.2 Conduct

⁶⁰ International Trade Administration Commission ‘Trade Remedies’ available at http://www.itac.org.za/upload/Trade_Remedies.pdf (accessed 06 September 2017). Muller G ‘Conceptualising “meaningful engagement” as a deliberative democratic partnership’ (2011) 22(3) *Stellenbosch Law Review* 747.

Although South Africa is a signatory of both GATT and the ADA, these agreements do not form part of its municipal law.⁶¹ However, the Constitution requires that when interpreting, legislation courts should interpret it in a reasonable manner that is consistent with international law rather than in an inconsistent manner.⁶² This entails that an interpretation that favours international law should be adopted, rather than the one, which is against it.⁶³ Therefore, South Africa has an obligation to honour its international obligations (WTO included), including where anti-dumping is concerned, despite the fact that the agreements are not part of municipal law.

Although case law decisions are not legislation in the literal sense, decisions of the courts also give insights on anti-dumping matters. Judicial decisions are one of the fundamental sources of law.⁶⁴ Although the doctrine of *stare decisis* (meaning the court's decision stands) does not strictly apply in anti-dumping rulings, court decisions 'provide insight into whether [in future it] would uphold or strike down a member's procedure'.⁶⁵ Thus, all the above statutes and decisions have a significant role on how investigations should be conducted. As such, the ITAC should be guided by legislature that applies in anti-dumping matter when dealing with an investigation.

3.3.2 Institutional Framework

As noted above, one of mandates of the ITAA is to establish the ITAC. Before it was established, anti-dumping investigations were under the BTT and BTI, which dates back to 1921.⁶⁶ As a result, the establishment of the ITAC sought to streamline, rationalise and modernise an institution with

⁶¹Brink G 'Anti-dumping and China: three major Chinese victories in dispute resolution' (2014) 47(1) *Comparative and International Law Journal of Southern Africa* 9.

⁶²Section 233 of the Constitution. See a detailed analysis on the applicability of international law in South Africa, in Smit L 'The relationship between the access of individuals to WTO law and the socio-economic rights in the South African Constitution' (2007) 40(3) 350-394. Also see generally, Scholtz W & Ferreira G 'The interpretation of section 231 of the South African Constitution: A lost ball in the high weeds!' (2008) 41(2) *The Comparative and International Law Journal of Southern Africa* 324-338.

⁶³Ferreira G & Snyman F 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17 (4) *Potchefstroom Electronic Law Journal* 1478.

⁶⁴Barratt A & Snyman P 'Researching South African Law' Hauser Global Law School Programme available at http://www.nyulawglobal.org/globalex/South_Africa1.html (accessed 30 August 2017).

⁶⁵Brink G 'X-raying injury findings in South Africa's anti-dumping investigations' (2015) available at https://repository.up.ac.za/bitstream/handle/2263/52019/Brink_XRaying_2015.pdf?sequence=1 (accessed 23 November 2017).

⁶⁶Brink (2004) 20; ITAC 'Briefing by ITAC to NEDLAC Trade and Industry Chamber' available at http://agbiz.co.za/uploads/AgbizNews17/170317_NEDLAC_Presentation.pdf (accessed 30 August 2017); Sibanda OS 'An Assessment of WTO Compliance by the South African Anti-Dumping Regime in Respect of the Determination of Causation' (2013) 179.

a history, which goes back to 1921. Its creation was also motivated by the Department of Trade and Industry (DTI) objective to improve its efficiency by isolating its implementation from other functions, as well as fulfilling its purpose.⁶⁷ Although ITAC is independent, it is a Council of Trade and Industry (COTI) partner of the DTI.⁶⁸

The ITAC's jurisdiction is not limited to South Africa but extends regionally to SACU.⁶⁹ The South African Constitution binds the operations and directives of the ITAC, as envisaged by the ITAA.⁷⁰ The ITAA requires the ITAC to perform its duties with impartiality and without fear or favour.⁷¹ This enables the ITAC to fulfil its vision of facilitating a system that is both efficient and effective in the administration of international trade.⁷²

The ITAC has three main divisions, which specifically deal with, firstly, tariff investigations, secondly, import and export control; and lastly, trade remedies, which is also the most relevant in to this Chapter.⁷³ The last division also consists of 'two investigation units with twenty-one investigating officers plus support staff'.⁷⁴ As noted above, the ITAC is responsible for all aspects of investigations from receiving application through to conducting verification visits.⁷⁵ Once investigations are complete, the Minister of Trade makes the final decision, after taking into consideration recommendations from the Commission.⁷⁶ After the final determination, the implementation of the final decision falls under the Minister of Finance.⁷⁷ Within this context, it becomes important to discuss the early processes that take place before the imposition of an anti-dumping duty.

⁶⁷International Trade Administration Commission 'An Overview of ITAC' available at <http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed 06 September 2017).

⁶⁸This places it at the same level as the IDC, the Registrar of Companies and the Competition Commission.

⁶⁹Preamble of the ITAA.

⁷⁰Section 7 (2) (a) (i) of the ITAA see also Feris J 'International Arbitration' (2017) 1-4.

⁷¹Section 7 (3) of the ITAA; see generally the submission by the Association of Meat Importers and Exporters to the Portfolio Committee of Trade and Industry available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/121128amie_0.pdf (accessed 07 September 2017).

⁷²Section 2 of the ITAA see also Tregenna F & Kwaramba M 'A Review of the International Trade Administration Commission's Tariff Investigation Role and Capacity' (2014) 4.

⁷³See generally Brink G (2015).

⁷⁴See generally Brink G (2015).

⁷⁵ITAC 'Briefing by ITAC to NEDLAC Trade and Industry Chamber' available at http://agbiz.co.za/uploads/AgbizNews17/170317_NEDLAC_Presentation.pdf (accessed 30 August 2017).

⁷⁶*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010) para 3.

⁷⁷*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* CCT 59/09 [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010) para 3.

3.4 SUBSTANTIVE PROCEDURES

Dumping in South Africa takes place when goods are exported to South Africa or the Common Customs area of SACU at a price, which is lesser than what the goods are sold for in the exporting country.⁷⁸ When conducting investigations, the ITAC should follow all processes in accordance with the ITAA and the ADR 2003. In order for anti-dumping measures to be imposed, the Commission should have concluded that dumping which has caused injury to a domestic industry has occurred. In order to come to such a determination, the ITAC follows a process. The following section discusses the substantive procedures that are taken into consideration. The section will discuss determination of dumping first and under it the following will be discussed; normal value, export price, fair comparison and dumping. After determination of dumping, the study will then discuss determination of injury.

3.4.1 Determination of dumping

Normal Value

In determining if dumping has taken place, the Commission must ascertain what the normal value of the goods being investigated is. This is because there is a *prima facie* (at first sight) case of dumping if goods are sold below the normal value. The ITAA defines normal value as the ‘comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin’.⁷⁹ In the *ITAC v SATMC and Others*, the court held that if the goods in question were exported into South Africa or SACU at a price lower than the ordinary price in the country of origin, dumping would have taken place.⁸⁰ It is important to note that within SACU, most of the exports are bound for South Africa and South Africa is the main exporter within the region.⁸¹ Hence, as most trade is centred upon South Africa, one can conclude that the notion of domestic industry is still largely centred on South Africa.⁸²

⁷⁸Section 1 of ITAA. Also see discussion in Tao M *Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China* (unpublished LLM thesis, University of the Free State, 2006) 16.

⁷⁹Section 32 (2)(b)(i) of the ITAA.

⁸⁰The *International Trade Administration Commission and Another v SA Tyre Manufacturers Conference (Pty) Ltd and Others* (738/2010) [2011] ZASCA 137 (23 September 2011) para 9.

⁸¹Edwards L & Lawrence R ‘South African Trade Policy and the Future Global Trading Environment’(2012) *South African Institute of International Affairs Occasional Paper No 128* 24.

⁸²Mastara S *Anti - Dumping or Protection: An analysis of competition issues in dumping investigations* (unpublished Mphil Law thesis, University of Cape Town 2015) 21.

In ascertaining what the normal value is, the Commission must first identify what the ‘like product’ is in order to ascertain its price in the ordinary course of business. The ADR 2003 defines a ‘like product’ as a product that is alike in all respects to the product under investigation.⁸³ Thus, a ‘like product’ has identical features with the one being dumped; however, in some cases there is no such product that is identical in all aspects. The regulations provide that in such absence the ITAC can identify a ‘like product’ as one that although not identical, has characteristics closely resembling those of the product being investigated.⁸⁴

In order to identify such a product, the Commission should look at the various factors listed in the ADR 2003.⁸⁵ This is not an exhaustive list since the Commission is given the liberty to add any factor they deem fit.⁸⁶ It can, however, be argued on one hand that giving the Commission so much power can lead to abuse of the processes. On the other hand, having a closed list may also lead the process to be unfair as it prevents analysing various factors that could help in identifying the product in question.

If the exporting country has a ‘like product’, the Commission has to do an ordinary course of trade test. This four-prong test includes the 5 per cent test, related party test, sales at a loss test and lastly government intervention.⁸⁷ This test echoes similarities to the WTO ordinary course of trade test discussed in Chapter 2.⁸⁸ The 5 per cent test looks at whether the volume of total sales in the domestic market account for at least 5 per cent of the volume of total export sales to SACU.⁸⁹ If the answer to this is in affirmative, then the Commission can use the domestic price to calculate normal value.⁹⁰ If the answer is in the negative, the ITAC considers whether sales can still be seen

⁸³Section 1(f) of the ADR 2003.

⁸⁴Section 1(f) of the ADR 2003.

⁸⁵The factors to be considered are ‘(i) The raw materials and other inputs used in producing the products; (ii) The production process; (iii) Physical characteristics and appearance of the product; (iv) The end-use of the product; (v) The substitutability of the product with the product under investigation; (vi) Tariff classification; and/or (vii) Any other factor proven to the satisfaction of the Commission to be relevant.’

⁸⁶See generally Section 1 of the ADR 2003.

⁸⁷ The ITAC ‘Dumping Margin Calculation’ available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 18 September 2017).

⁸⁸See generally 2.4.1.1 Determination of Normal Value.

⁸⁹The ITAC ‘Dumping Margin Calculation’ available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 18 September 2017).

⁹⁰The ITAC ‘Dumping Margin Calculation’ available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 18 September 2017).

as sufficient despite them not amounting to 5 per cent.⁹¹ If not, other forms of calculating normal value can be used.⁹²

Coming to the related party test, it looks at whether sales in the exporting country originate from parties who are related and if inclusion of the related party sales will result in the prices being unreliable.⁹³ This test has nothing to do with the percentage volume of the export sales; it only looks at interference of relations. If the answer is positive, then the Commission is required to use constructed normal value or the export price to a third country.⁹⁴

Besides the related party test, the Commission may also do the sale at a loss test. The Commission compares the cost per unit to selling price per unit (per model).⁹⁵ If more than 20 per cent of the sales are below cost (on a per model basis), the ITAC may disregard them in calculating normal value.⁹⁶ The existence of such sales in the market indicates that sales are not conducted in the ordinary course of trade.⁹⁷

As discussed in Chapter 2, the WTO does not prevent Members from enacting anti-dumping legislation.⁹⁸ Members are at liberty of adding more provisions than those in the ADA, if they do not conflict with principles in the ADA.⁹⁹ One such provision is in the ITAA, which provides that sales may not be in the ordinary course of trade:

‘When the Commission, in evaluating an application concerning dumping, concludes that the normal value of the goods in question is, as a result of government intervention in the exporting country or country of origin, not determined according to free market principles, the Commission

⁹¹The ITAC ‘Dumping Margin Calculation’ available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 18 September 2017).

⁹²The ITAC ‘Dumping Margin Calculation’ available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 18 September 2017).

⁹³World Trade Organisation Committee on Anti-Dumping Practices Working Group on Implementation Article 2.3 – Constructed Export Price (2011) Paper by South Africa *G/ADP/AHG/W/190*.

⁹⁴World Trade Organisation Committee on Anti-Dumping Practices Working Group on Implementation Article 2.3 – Constructed Export Price (2011) Paper by South Africa *G/ADP/AHG/W/190*.

⁹⁵Fillis JB *Assessing the Determination of Constructed Normal Value in the 2000 USA Anti-Dumping Poultry case in South Africa* (unpublished LLM thesis, University of Pretoria 2016).

⁹⁶Section 8(2) (i) of the ADR 2003.

⁹⁷Lindsey B & Ikenson D *Anti-dumping Exposed: The Devilish Details of Unfair Trade Law* (2003)165

⁹⁸See generally 2.4 WTO Treatment of Dumping.

⁹⁹See generally 2.4 WTO Treatment of Dumping.

may apply to those goods a normal value of the goods, established in respect of a third or surrogate country'.¹⁰⁰

In the *ITAC v SATMC and Others*, the court held that this provision requires ITAC to only goods look at from a particular source, not the whole country or even a definite enterprise.¹⁰¹ Moreover, the calculation of normal value from country of origin may only be departed if the ITAC discovers during its investigations 'that the country of origin normal value is not determined according to free market principles as a result of government intervention'.¹⁰² When China assented into the WTO in 2001, it was classified as a non-market economy.¹⁰³ This is an economy where 'the government has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State'.¹⁰⁴

Because of the classification, China's trading partners were allowed, to use a special framework to determine 'whether China's exports are being sold at unfairly low prices'.¹⁰⁵ If that is found to be the case they were permitted to apply additional anti-dumping duties.¹⁰⁶ This provision can no longer be applied to Chinese products.¹⁰⁷ This is because China's 15-year transitional period ended on December 11, 2016.¹⁰⁸ As such, South Africa cannot classify goods from China as goods originating from non-market economy, as it will be in violation of the WTO rules.

The ITAC may depart from using the country of origin in calculating normal value if, in its investigations, it concludes that the 'like product' did not pass the ordinary course of trade test.¹⁰⁹

¹⁰⁰Section 32(4) of the ITAA.

¹⁰¹The *International Trade Administration Commission and Another v SA Tyre Manufacturers Conference (Pty) Ltd and Others* (738/2010) [2011] ZASCA 137 (23 September 2011) para 35.

¹⁰²The *International Trade Administration Commission and Another v SA Tyre Manufacturers Conference (Pty) Ltd and Others* (738/2010) [2011] ZASCA 137 (23 September 2011) para 34.

¹⁰³Trachtman J 'Is China a Non-Market Economy, and Why Does It Matter?' (2017).

¹⁰⁴WTO 'Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

¹⁰⁵Watson W 'It's Time to Dump Nonmarket Economy Treatment' available at <https://www.cato.org/publications/free-trade-bulletin/its-time-dump-nonmarket-economy-treatment> (accessed 12 September 2017).

¹⁰⁶Trachtman J 'Is China a Non-Market Economy, and Why Does It Matter?' (2017).

¹⁰⁷Noël S & Zhou W 'Replacing the Non-Market Economy Methodology: Is the European Union's Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?' (2016) 11(11) *Global Trade and Customs Journal* 561.

¹⁰⁸Watson W 'It's Time to Dump Nonmarket Economy Treatment' available at <https://www.cato.org/publications/free-trade-bulletin/its-time-dump-nonmarket-economy-treatment> (accessed 12 September 2017).

¹⁰⁹The ITAC may depart from using the country of origin in calculating normal value if in its investigations concludes that the 'like product' did not pass the ordinary course of trade test

It is important to highlight that Brink avers that the Commission does not only revert to using alternative methodologies, when there is no or insufficient sales in the ordinary course of trade, but can also use constructed value where information on such prices is unavailable.¹¹⁰ There are two alternatives to calculating normal value. The Commission may use constructed normal value or they may adopt normal value of a surrogate country.¹¹¹ Adoption of a surrogate country only relates to imports from a non-market economy and not in other cases where there are insufficient domestic sales in the ordinary course of trade.¹¹² Both ways will inevitably lead to a higher anti-dumping duty because the calculations amount to higher domestic selling prices making the normal value higher than the export price.¹¹³

The ITAA unlike the ADA provides for the constructed normal value as the primary alternative over the price of the 'like product' exported to an appropriate third or surrogate country.¹¹⁴ When using constructed normal value, the Commission creates a cost of production and they add reasonable costs for administration, selling, general and profit to the goods in the country of origin when they are for domestic consumption.¹¹⁵ This method of calculating the normal value was disputed by India in *South Africa - Pharmaceutical Product*.¹¹⁶

The Indian government requested consultation, alleging that South Africa's definition and calculation of the normal value was flawed and inconsistent with the provisions of the WTO.¹¹⁷ In *US – OCTG (Korea)*, the panel clarified the issue of using constructed normal value.¹¹⁸ It held that:

¹¹⁰Brink G (A-D in SA 2012) 18; see also Section 32(2)(b)(ii) of the ITAA.

¹¹¹Trade Law Chamber in association with Geldenhuys Jourbert Attorneys' Supreme Court of Appeal overturns earlier decision on market economy status' available at <https://tradelawchambers.com/raxo-what-s-on/82-supreme-court-of-appeal-overturns-earlier-decision-on-market-economy-status.html> (accessed 12 September 2017).

¹¹² Brink G (2004) 772.

¹¹³Trade Law Chamber in association with Geldenhuys Jourbert Attorneys' Supreme Court of Appeal overturns earlier decision on market economy status' available at <https://tradelawchambers.com/raxo-what-s-on/82-supreme-court-of-appeal-overturns-earlier-decision-on-market-economy-status.html> (accessed 12 September 2017).

¹¹⁴See generally Section 32(b) (i)(aa) and (bb) of the ITAA.

¹¹⁵Section 32(b) (i)(aa)of the ITAA.

¹¹⁶*South Africa - Anti-dumping Duties on Certain Pharmaceutical Products from India - Request for Consultations by India* WT/DS168/1 G/L/303 G/ADP/D17/1.

¹¹⁷*South Africa - Anti-dumping Duties on Certain Pharmaceutical Products from India - Request for Consultations by India* WT/DS168/1 G/L/303 G/ADP/D17/1.

¹¹⁸United States – Anti-Dumping Measures On Certain Oil Country Tubular Goods From Korea WT/DS488/R (hereafter Panel Report *US – OCTG (Korea)*)

..Identification of low-volume sales acts as a trigger for an investigating authority to use an alternative to the price of those sales for normal value determination but not necessarily to exclude the components of the price pertaining to those sales from that determination. If an investigating authority opts to construct normal value, nothing in Article 2.2 suggests that it is required to, or may, exclude data derived from the rejected low-volume sales from that construction.¹¹⁹

This suggests that the ADA does not require investigating authorities to exclude data from rejected low sales from construction. The author opines that where authorities completely disregard low-volume sales in constructing normal value and uses construction as primary alternative, it is erroneous as in most cases it leads to higher anti-dumping duties.¹²⁰ This in turn acts as protectionism instead of being a direct reaction to counter unfair trade. Accordingly, the study argues that if this method is adopted, in many cases it may lead to market abuse.

The other alternative to calculating normal value is to use ‘the highest comparable price of the like product when exported to an appropriate third or surrogate country,’ provided that price is representative.¹²¹ When choosing an appropriate third country the ITAC uses the methodology prescribed in the ADR 2003 and after that the Commission performs an ordinary course of trade test for the ‘like product’ in the third country.¹²² The Commission has used this alternative when they could not calculate normal value using the primary method.¹²³

When China and India were accused of dumping graphite electrodes for use in furnaces, the ITAC had to use an appropriate third country in finding a prima facie case of dumping.¹²⁴ In the case of China, the domestic selling price was determined using the United States of America (USA) as the appropriate third country.¹²⁵ Whilst for India the highest comparable price was determined based

¹¹⁹ Panel Report *US – OCTG (Korea)* para 7.45.

¹²⁰A typical example of how the methodology used in constructing normal value leads to higher anti-dumping duties can be seen in the USA Anti -Dumping Poultry case of 2000 when South Africa Board constructed the normal value and manipulated costs in order to protect a malfunctioning SA poultry industry.

¹²¹Section 32(b) (i)(bb)of the ITAA.

¹²²See generally Section 8(2) of the ADR 2003.

¹²³See Government Gazette Notice: 37037 of 2013 Notice of initiation of an investigation into the alleged dumping of graphite electrodes for use in furnaces originating in or imported from the People’s Republic of China (China) and India .

¹²⁴Notice of initiation of an investigation into the alleged dumping of graphite electrodes for use in furnaces originating in or imported from the People’s Republic of China (China) and India GN No. 37037 of 22 November 2013.

¹²⁵There were adjustments that were made to accommodate transport and arrive at the net ex-factory normal value. South African Revenue Service (SARS) statistics were used to determine China’s export price. ‘An adjustment for

on the export price from India to Canada.¹²⁶ The author is of the view that using an appropriate third country to calculate normal value is better than using constructed normal value. This is because the Commission will be dealing with figures, which are already in the market rather than coming up with their own figures. However, others may argue that the conditions of sale are different from those in the SACU but this can be rectified in adjustments.

The problem in using a third country is that both the ITAA and the ADR 2003 do not clarify what an appropriate third country is. This may be challenging because although the Commission does an ordinary course of trade test for 'like products' in an appropriate country, the prices may already be dumped. The process may also be abused if the Commission colludes with a third country, especially where anti-dumping laws are used as a political tool. After determining the normal value, the ITAC has to determine the export price and do a fair comparison of the two values.

Export Price

The ITAA defines export price as the actual price paid or 'payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale'.¹²⁷ The Commission, in determining the export price, uses official SARS import statistics.¹²⁸ However, where statistics cannot be depended upon because of its inclusiveness of products not under investigation under the same tariff subheading, they should not be relied on.¹²⁹ In cases where the commission decides to use SARS statistics, there is need to adjust the export price to the net ex-factory level.¹³⁰ This is important because it enables proper comparison with the normal value.¹³¹

freight was made to the f.o.b. import price to calculate the ex-factory export price' see GN No. 37037 of 22 November 2013.

¹²⁶Adjustments were made to accommodate transport and arrive at the net ex-factory normal value. South African Revenue Service (SARS) statistics were used to determine India's export price. 'An adjustment for freight was made to the f.o.b. import price to calculate the ex-factory export price' see GN No. 37037 of 22 November 2013.

¹²⁷Section 32(a) of the ITAA.

¹²⁸The ITAC Report 476: Investigation into the alleged dumping of disodium carbonate (soda ash) originating in or imported from the United States of America (USA): Final Determination.

¹²⁹See Colesky T A *Comparative Study on Customs Tariffs Classification* (unpublished LLD thesis, University Of Pretoria 2014) a clear analysis of what SARS is mandated to do by ITAC is given.

¹³⁰International Trade Administration Commission *Anti-dumping Application Form*

A substantiated adjustment should be made for movement expenses and costs from the f.o.b. to an ex-factory level in the exporting country.

¹³¹See World Trade Organisation South Africa – Anti-Dumping Duties On Frozen Meat Of Fowls From Brazil Request For Consultations By Brazil (2012) WT/DS439/1 G/L/990 G/ADP/D92/1. One of the reasons why Brazil requested consultation was that South Africa failed to make a fair comparison because they did not do necessary adjustments to the export price.

Companies and the Commission can also use solutions such as Stratalyze, which is a database with statistics for any tariff code, and the material can then be used in the application for anti-dumping application to prove a prima facie export price.¹³² However, if the Commission bases its findings on information from a secondary source, it has to do so with caution as that information may not be correct. There is the need to verify the information and where practical, check the information from other independent sources at ‘their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation’.¹³³

In instances where the export price is unavailable or its reliability, for whatever reason, is questioned, the basis for calculating the export price should be founded on the price at which the imported goods are first resold to an independent buyer.¹³⁴ This should also be done where the export price is unreliable, because of arrangements compensatory in nature with respect to the export price between the concerned parties, or where the parties are related.¹³⁵ If the price is unreliable, reasons should be clearly stated and additional information related to costs should be given.

This price will then be ‘constructed backwards by subtracting all relevant costs and profits to arrive at an ex-factory price in the country of origin’.¹³⁶ Essentially, this is the difference between the exporter's ex-factory prices and the first independent resale price. The relevant costs to be subtracted in a constructed export price situation are therefore twofold: firstly, costs incurred in the SACU and secondly, costs incurred in getting the product to the SACU.¹³⁷

In constructing such, evidence should be given that supports the construction; this should include a clear breakdown of the deductions made.¹³⁸ The regulation also gives the Commission authority to construct export price on reasonable basis in a case where product is not resold to an independent

¹³² XA International Trade Advisors ‘Initiating an anti-dumping case’ available at <http://xa.co.za/strategy-for-initiating-an-anti-dumping-case/> (accessed 19 September 2017).

¹³³ ITAC Report 168 Investigation into the alleged dumping of unframed glass mirrors of a thickness of 2 mm to 6 mm originating in or imported from India and Indonesia: Final determination 11.

¹³⁴ Section 32(5) of the ITAA.

¹³⁵ Section 32(6)(b) of the ITAA.

¹³⁶ WTO Committee on Anti-Dumping Practices Working Group on Implementation Article 2.3 – Constructed Export Price (2011) Paper by South Africa *G/ADP/AHG/W/190*.

¹³⁷ WTO Committee on Anti-Dumping Practices Working Group on Implementation Article 2.3 – Constructed Export Price (2011) Paper by South Africa *G/ADP/AHG/W/190*.

¹³⁸ Section 10.2(a) and (b) of the ADR 2003.

buyer or where conditions of sale are different.¹³⁹ This is commendable, as the legislature reasonably foresaw that if such a provision was not included, the Commission was going to face difficulties if faced with such a situation. After the ITAC determines both export price and normal value, there is the need for it to make a fair comparison.

Fair Comparison

As noted in Chapter 2, the ADA requires a fair comparison to be made after determination of normal value and export price.¹⁴⁰ Where normal value and export price are not compared at the same level, it can lead to higher export price making dumping margin much higher than it should be. Both the ITAA and the ADR 2003 requires the Commission to make a 'fair comparison' between the normal value and the export price.¹⁴¹ The Commission is required to make such comparison at the ex-factory level and concerning sales, which belong to the same level of trade.¹⁴² When comparing at same level of trade, the ITAC is required to include delivering, packaging and payment terms.¹⁴³ In *South Africa –Frozen Meat of Fowls*, Brazil requested for consultation alleging that South Africa had failed to make a fair comparison by not bringing normal value and export price at the same level, therefore imposing an unreasonable burden on exporters.¹⁴⁴

When the Commission compares normal value and the export price, it is normally, on a weighted-average- to -weighted- average basis, but in some circumstances it can be done on a transaction-by-transaction basis if so requires.¹⁴⁵ The Commission can compare normal value founded on a weighted average with individual export transactions if it is of the opinion that a pattern of export prices are considerably different amongst different purchasers, regions or time periods.¹⁴⁶ In cases where weighted average-to-transaction is used the Commission has to indicate reasons for such

¹³⁹See generally Section 10.4 of ADR 2003

¹⁴⁰See generally 2.4.1.3 Comparison of Normal Value and Export Price.

¹⁴¹See generally Section 32(3) of the ITAA and Section 11 of the ADR 2003.

¹⁴²Section 11 (3) of the ADR 2003.

¹⁴³Section 11 (4) of the ADR 2003.

¹⁴⁴*South Africa – Anti-Dumping Duties On Frozen Meat Of Fowls From Brazil Request For Consultations By Brazil* WT/DS439/1 G/L/990 G/ADP/D92/1 (hereafter *South Africa –Frozen Meat of Fowls*).

¹⁴⁵Theron N 'Anti-dumping procedures: Lessons for developing countries with special emphasis on the South African experience' in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) 74.

¹⁴⁶See Article 2.4.2 of the ADA.

comparison in all subsequent reports.¹⁴⁷ In *US — Washing Machines*, the panel held that if one chooses this method, the transaction must fall within a relevant pricing pattern.¹⁴⁸

In addition to the export price and the normal value being on a similar basis and level of trade, they should also be on the same level concerning physical characteristics of the product, the quantities sold, and the terms and conditions of sale.¹⁴⁹ However, if the export price and normal value are not on a comparable basis, allowance should be made for any differences.¹⁵⁰ Brink notes that in making such adjustments the Commission needs to be in a place where it can verify the value of the adjustment in the financial documentation provided.¹⁵¹ In support of Brink, the author argues that using information that is verified speaks volume on the integrity of how the investigations are conducted. In *South Africa –Frozen Meat of Fowls*, one of the issues Brazil alleged was South Africa had not verified deductions between normal value and export price.¹⁵² This shows that where information cannot be verified, it will be difficult to have a comparison that is fair and just. Moreover, using unverified information goes against WTO principles of fairness and transparency discussed in Chapter 2.¹⁵³

When making adjustments for differences in physical characteristics, the differences should be clearly stated.¹⁵⁴ Besides, there is the need to quantify the extent that the differences have on the price and cost of production of the product.¹⁵⁵ For taxation, any form of tax that is not part of export sales should be indicated stating conditions why tax is paid, the rate and how it affects normal value.¹⁵⁶ Where the product is exported to SACU at terms of trade that are different, terms

¹⁴⁷Section 11(7) of the ADR 2003 see also, WTO *Dispute Settlement Reports 2003, Volume 6* (2005) 2619.

¹⁴⁸*United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* WT/DS464/R para 7.188.

¹⁴⁹Finger JM ‘Making sense of GATT/WTO provisions allowing for import restrictions’ in Hoekman BM, Mattoo A & English P (eds) *Development, Trade, and the WTO: A Handbook, Volume 1* (2002) 201.

¹⁵⁰Andersen H *EU Dumping Determinations and WTO Law* (2009) 219. New York: Kluwer Law International

¹⁵¹Brink G ‘Farm Frites v International Trade Administration Commission Case 33264/14 GN’ available at <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&ved=0ahUKEwiY2bXxgdLXAhXqJsAKHevjCqwOFghcMAk&url=http%3A%2F%2Fwww.saflii.org%2Fza%2Fjournals%2FDEJUR%2F2015%2F17.rtf&usg=AOvVaw3D0RnikkrxLlotyrVyx79e> (accessed 22 November 2017).

¹⁵²See generally *South Africa –Frozen Meat of Fowl* para 2.

¹⁵³See generally Article 2.4 of the ADA.

¹⁵⁴WTO *Dispute Settlement Reports 2003, Volume 5* (2005) 2189.

¹⁵⁵WTO National Treatment’ available at https://www.wto.org/english/tratop_e/dispu_e/repertory_e/n1_e.htm (accessed 24 November 2017).

¹⁵⁶Hinkelman EG *Dictionary of International Trade: Handbook of the Global Trade Community Includes 21 Key Appendices* (2005) 73.

at which the product is exported, should be indicated.¹⁵⁷ In addition, the effect of how the terms of trade affect price and cost of production should be indicated.¹⁵⁸ Where other differences affect fair comparison all details should be stated and a ‘substantiated estimate of the allowances to be made for each of the differences’.¹⁵⁹

The purpose of having a fair comparison of the normal value and the export price is in the end for the determination of the dumping margin and to ascertain the likeliness of dumping recurring. In the *Notice of initiation of the sunset review of the anti-dumping duty on unframed glass mirrors originating in or imported from Indonesia*, it was laid out that prima facie proof that dumping would continue.¹⁶⁰ The allegation of continuation was founded on the comparison between the normal values and the export prices.¹⁶¹

Dumping margin

Dumping margin is the margin by which the normal value exceeds the export price after allowance has been made for any differences affecting price comparability.¹⁶² Dumping margin is critical in the imposition of anti-dumping duties; it is likely that the greater the margin, the higher the anti-dumping duty. In calculating dumping margins, there are different formulas applied dependent on the product under investigation. Where anti-dumping investigation involves more than one product the Commission needs to determine the margin of dumping separately for products that can be identified by SARS.¹⁶³ If products cannot be identified separately by SARS calculation of dumping margin must be done separately for each product and weighted average margin of dumping must be determined for all products on the ‘basis of the individual export volume of each product’.¹⁶⁴

Brink has engaged in a detailed discussion on the problems South Africa face in the calculation on dumping margins. To summarise the problems, he cites that there is lack of transparency because of no access to information of applicant consultants on how calculations are done and the way

¹⁵⁷ITAC *Anti-dumping Application Form 24*.

¹⁵⁸ITAC *Anti-dumping Application Form 24*.

¹⁵⁹See generally Section 11 of the ADR 2003 also see the ITAC *Anti-dumping Application Form 24-26*.

¹⁶⁰Notice of initiation of the sunset review of the anti-dumping duty on unframed glass mirrors originating in or imported from Indonesia GN No 40621 of 17 February 2017(hereafter GN No 40621 of 17 February 2017)

¹⁶¹GN No 40621 of 17 February 2017.

¹⁶²Part A of ADR 2003.

¹⁶³Section 12 (2) (a) of the ADR 2003.

¹⁶⁴Section 12(2) (b) of the ADR 2003.

adjustments and calculation are done is mostly incorrect and Commission sometimes use unverified information which disadvantages exporters.¹⁶⁵ It can also be submitted that the provision that deal with dumping margin in the ADR 2003 is not comprehensive like that of the ADA; thus, giving investigating authorities so much power in interpreting the legislation. It is then correct to say that although South African anti-dumping regime is developed as evidenced in the way the Legislature clarifies issues of normal value and export price, but there are still problems that need to be addressed such as transparency.

3.4.2 Determination of Injury

In Chapter 2, it was stated that the determination of dumping is an initial step in determining whether a country should enact anti-dumping measures.¹⁶⁶ WTO requires that Members show that their domestic industry is ‘materially injured’ or if there is threat of material injury from the dumped imports.¹⁶⁷ Material injury is such an important element and can be termed cornerstone, without it, no anti-dumping measures can be imposed. In South Africa, the Commission cannot initiate an anti-dumping investigation without having *prima facie* evidence of material injury.¹⁶⁸

The regulation defines material injury to mean three things unless it can be implied otherwise from the context.¹⁶⁹ The three things are the ‘actual material injury, a threat of material injury or that the establishment of a domestic industry is materially retarded.’¹⁷⁰ As in the ADA, South Africa also does not define the word ‘material’ but the Commission is given guidelines on what it should consider in its determination of material injury.¹⁷¹ One can argue that the word material can be inferred from the guidelines to mean harm that is considerable enough to affect the domestic industry.

Actual Material Injury

¹⁶⁵See full discussion in Brink G ‘Dumping and Injury Margin Calculation Methods: Ten Major Problems in South Africa’ (2007) *Global Trade and Customs Journal*.

¹⁶⁶See 2.4.1.1 Determination of Normal Value.

¹⁶⁷See generally Article 3.4 of the ADA.

United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 21.

¹⁶⁸Section 24 of the ADR 2003.

¹⁶⁹Section 1 of the ADR 2003.

¹⁷⁰Section 1 of the ADR 2003.

¹⁷¹See generally Article 3.1 of the ADA.

In determining material injury to the SACU industry, the Commission is required to look at whether there has 'been a significant depression and/or suppression of the SACU industry's price'.¹⁷² This position is similar to that of WTO in Chapter 2.¹⁷³ Price depression is defined as a situation where there is decrease of the price in SACU's industry's ex-factory when the investigation is being conducted.¹⁷⁴ Ex-factory is not defined in the Act but generally, it refers to prices at the factory without any other charges such as delivery and subsequent taxes attached to it.¹⁷⁵ On the other hand, price suppression arises 'where the cost-to-price-ratio of the SACU industry increases, or where the SACU industry sells at a loss during the investigation period or part thereof.'¹⁷⁶

When looking at whether there has been price suppression or depression the Commission is only required to look at information that relates to the 'like' SACU product that is affected by the alleged unfair trade practice.¹⁷⁷ However, where separation is impossible because of the available data, evidence should be based on the narrowest identifiable product group that includes the 'like' SACU product being the subject of the application.¹⁷⁸ Brink points out that the wording used in this section is wrong because the product under investigation is the dumped product but the intention of legislature is clear, it is clear that only the domestic 'like product' is to be considered.¹⁷⁹

An investigation of injury can never be initiated if less than 25 per cent of all producers by volume do not support the application.¹⁸⁰ Furthermore, a preliminary or final determination of injury is made only if all evidence relating to 'a major proportion' of the SACU industry has been considered. The Commission should also consider the factors listed in the regulation to determine

¹⁷²Committee on Anti-Dumping Practices & Committee on Subsidies and Countervailing Measures 'Notification of laws and regulations under Articles 18.5 and 32.6 of the Agreements: South Africa' (2004) 55.

¹⁷³See generally Article 3.2 of ADA.

¹⁷⁴Committee on Anti-Dumping Practices & Committee on Subsidies and Countervailing Measures 'Notification of laws and regulations under Articles 18.5 and 32.6 of the Agreements: South Africa' (2004) 55.

¹⁷⁵Business Directory 'Ex-Factory' available at <http://www.businessdictionary.com/definition/ex-factory.html> (accessed 21 September 2017).

¹⁷⁶Section 1 of the ADR 2003.

¹⁷⁷Ngoma LL *A critical analysis of the use of anti-dumping regulation in Southern African Customs Union (SACU): a case of Botswana* (unpublished thesis, University of Pretoria 2010) 56.

¹⁷⁸Section 13(4) of the ADR 2003.

¹⁷⁹Brink G 'X-raying injury findings in South Africa's anti-dumping investigations' available at https://repository.up.ac.za/bitstream/handle/2263/52019/Brink_XRaying_2015.pdf?sequence=1 (accessed 23 November 2017).

¹⁸⁰Section 7(3) (a) of the ADR 2003.

injury. It should consider whether there have been significant changes in the domestic performance of the SACU industry in respect of the following

‘sales volume; profit and loss; output; market share; productivity; return on investments; capacity utilisation; cash flow inventories; employment; wages; growth; ability to raise capital or investments; and any other relevant factors placed before the Commission.’¹⁸¹

Investigative report and application forms of ITAC ‘provide only the summarised indications to each factor of the injury determination, referring to indexed data such as tables’ the effect is that only data is provided and this fails to meet the ADA criteria of making an evaluation of the facts.¹⁸² Brink avers that whilst the ADA requires that analysis of these factors with regard to its bearing on the state of the industry, the regulations limit the factors to the domestic performance of the industry.¹⁸³

Both the ADR 2003 and the ADA provide that a case of injury cannot be based by only looking at one or several factors.¹⁸⁴ However, Brink is of the opinion that in many investigations there are two factors, which play a critical role in the determination; these are price injury or volume injury.¹⁸⁵ This is because where competition is stiff due to dumped imports, SACU ‘industry can either reduce prices to maintain volumes, thereby decreasing its profit margin, or it can hold prices and lose volumes, thereby also experiencing reduced profit’.¹⁸⁶

The author concurs with Brink because if one looks at factors such as wage cuts or retrenchment due to dumped imports it is mainly dependent upon price injury. If profit margins decrease, it is likely that the employer may not be able to maintain the salaries given to employees when business

¹⁸¹Section 13(2) of the ADR 2003.

¹⁸²Brink G ‘South Africa’ in Nakagawa J *Anti-Dumping Laws and Practices of the New Users* (2007) 221.

¹⁸³Brink G ‘X-raying injury findings in South Africa’s anti-dumping investigations’ available at https://repository.up.ac.za/bitstream/handle/2263/52019/Brink_XRaying_2015.pdf?sequence=1 (accessed 23 November 2017).

¹⁸⁴ See the factors in Section 13(2) of ADR 2003.

¹⁸⁵Brink G ‘A nutshell guide to anti-dumping action’ (2008) available at https://repository.up.ac.za/bitstream/handle/2263/8445/Brink_Nutshell%282008%29b.pdf?sequence=1 accessed 28 September 2017) 263.

¹⁸⁶Brink ‘A nutshell guide to anti-dumping action’ (2008) available at https://repository.up.ac.za/bitstream/handle/2263/8445/Brink_Nutshell%282008%29b.pdf?sequence=1 accessed 28 September 2017) 263.

was at peak.¹⁸⁷ It is important to state that there is no set decision on which factors to use or leave out when determining injury. In addition, it is undeniable that South African researchers and publishers writings on anti-dumping issues in the country has helped in strengthening the anti-dumping systems through highlighting the strengths and shortfalls in the regime.¹⁸⁸

Threat of material injury

Material injury also means threat of material injury as such a threat is suffice in proving a prima facie proof of injury. However a determination of threat of material injury should be based on facts, mere allegations are not enough.¹⁸⁹ In *Threaded Rods*, the ITAC made a preliminary determination on the threat of material injury by looking at all the facts.¹⁹⁰ Amongst them, it looked at the fact that the European Union had enacted anti-dumping duties on Chinese goods, leaving Chinese companies with no option but to look for markets elsewhere.¹⁹¹ The Commission also looked at the fact that a significant increase in the dumped goods would eventually lead to closure of the SACU industry.¹⁹² Thus, the Commission's findings were consistent with WTO rules insofar as known that a country cannot deduce a threat of injury because of a mere allegation.

When considering a threat of material injury the Commission has to look at additional factors from the ones provided Section 13. They have to consider if the dumped imports have significantly increased in the domestic market of the SACU.¹⁹³ When the Commission imposed anti-dumping duties on cement from Pakistan, it held that threat of material injury was present because there was a significant increase in the dumped Pakistan cement in SACU.¹⁹⁴ Mohale held that Pakistan's

¹⁸⁷Ozyasar H 'The Impact of Margin Decrease on Financial Statements' available at <http://smallbusiness.chron.com/impact-margin-decrease-financial-statements-39347.html> accessed 28 September 2017).

¹⁸⁸The Chapter engages with scholarly articles on South Africa and each article has contributed in highlighting strengths and weaknesses of the South African anti-dumping system.

¹⁸⁹Narayanan P 'Injury Investigations in "Material Retardation" Antidumping Cases' (2004)25(1) *Northwestern Journal of International Law and Business* 45.

¹⁹⁰ITAC Report 400: Investigation into the alleged dumping of screw studding (rods threaded throughout) of stainless steel and steel (commonly known as threaded rods) originating in or imported from the People's Republic of China (PRC): Preliminary Determination Report (hereafter *Threaded Rods*).

¹⁹¹*Threaded Rods* 37.

¹⁹²*Threaded Rods* 39; Also see general discussion on effects of dumping in McCarthy C 'African Regional Economic Integration: Is the Paradigm Relevant and Appropriate?' in Herrmann C & Terhechte JP (eds) *European Yearbook of International Economic Law* (2011) 345-368.

¹⁹³Section 14.2(a) of the ADR 2003.

¹⁹⁴Dawn 'South Africa imposes duties on cement' available at <https://www.dawn.com/news/1182231> (accessed 23 November 2017).

exports to its traditional markets were declining and imports from Pakistan into the SACU region increased by over 600% between 2010 and 2013'.¹⁹⁵

In 2013, the Commission initiated anti-dumping investigation on poultry originating from Germany, the Netherlands and the United Kingdom.¹⁹⁶ Southern African Poultry Association in its application indicated that there was a greater probability of increase in volume of alleged dumped imports in future.¹⁹⁷ This was expected due to the fact South Africa had a free trade agreement with the European Union (EU) which meant that the landing costs would have decreased as the import duty was expected to be zero.¹⁹⁸ Therefore, the existence of a free trade agreement did indicate a fact rather than a mere remote possibility of threat.

Besides the increase of dumped imports in the domestic markets, the Commission must also consider other factors. These include whether there has been 'sufficiently freely available, or an imminent substantial increase in, capacity of the exporter'; 'the availability of other export markets to absorb additional export volumes'.¹⁹⁹ It should also look at whether products entering SACU market have prices that will have a substantial 'depressing or suppressing effect on SACU prices; and the exporter's inventories of the product under investigation'.²⁰⁰

Material retardation

The last part of material injury is concerned with material retardation of the establishment of an industry. When proving injury in a case of material retardation the proposed industry should provide the Commission with a comprehensive business plan in order for them to initiate an investigation.²⁰¹ The plan should indicate the establishment of the proposed industry in the absence of dumping.²⁰² In *Grinding Balls China*, an investigation was initiated after the Commission

¹⁹⁵ITAC Staff Reporter 'Stiff anti-dumping duties imposed on Pakistani cement' available at <http://www.itac.org.za/news-headlines/itac-in-the-media/stiff-anti-dumping-duties-imposed-on-pakistani-cement> (accessed 28 September 2017).

¹⁹⁶Astral Foods 'Astral Integrated Annual Report' (2013) 20.

¹⁹⁷Astral Foods 'Astral Integrated Annual Report' (2015) 20.

¹⁹⁸Cronje J 'Anti-dumping investigation on chicken imports from the EU' (2013) available at <https://www.tralac.org/discussions/article/5343-anti-dumping-investigation-on-chicken-imports-from-the-eu.html> (accessed 03 October 2017).

¹⁹⁹Section 14.2(b) of the ADR 2003.

²⁰⁰See generally Section 14(2) of the ADR 2003.

²⁰¹Section 15(1) of the ADR 2003.

²⁰²Section 15(1) of the ADR 2003 see also Barringer WH and Dunn CA 'Antidumping and Countervailing Duties Investigations under the Trade Agreements Act of 1979' (1979) 14 *Journal of International Law & Economics* 7.

‘considered that there was sufficient evidence to show that the subject product was being imported at dumped prices, causing material retardation of the establishment of the SACU industry’.²⁰³ However, the investigation was terminated, as there was no causal link between the dumped imports injury experienced by the applicant.²⁰⁴ The termination of investigation highlights the fact that the subject of material retardation is more complex and perhaps should be relooked at as suggested by Egypt in 2006.²⁰⁵

In Chapter 2, it was stated that many subject of material retardation is not greatly researched and reliance on material retardation to apply anti-dumping duties is scarce.²⁰⁶ The author opined that this may be because the issue of material retardation affects mostly developing countries.²⁰⁷ Interestingly although South Africa has emerging markets, material retardation is not as researched as it can be. The reason for under research may be alluded to inexperience on the issue because the WTO does not provide guidelines for Members to use.

3.4.3 Causal Link

The establishments of a causal link between dumped imports and material injury is very important in anti-dumping investigations.²⁰⁸ Before the Commission recommends imposition of anti-dumping duties, the element of causation should be established. This can be done by looking at all relevant factors.²⁰⁹ The list is not a closed list and the Commission has discretion to add other factors as the regulations clearly state that the factors under section 16 are not limited.²¹⁰

Generally, causation is determined with reference to trends in quantities and prices of the dumped imports together with price undercutting or suppression and depression.²¹¹ Brink makes an analogy

²⁰³Government Gazette Notice: 2844 of 2004 Termination of Investigation Into The Alleged Dumping of forged or Stamped, But Not Further Worked, Grinding Balls and Similar Articles For Mills Originating In Or Imported from the People's Republic Of China (PRC) (hereafter Government Gazette Notice: 2844 of 2004 *Grinding Balls China*).

²⁰⁴Government Gazette Notice: 2844 of 2004 *Grinding Balls China*.

²⁰⁵See generally 2.4.2.3.3 Determination of Material retardation.

²⁰⁶See generally 2.4.2.3.3 Determination of Material retardation.

²⁰⁷See generally 2.4.2.3.3 Determination of Material retardation.

²⁰⁸See discussion on Causality under WTO on 2.4.3 Causality.

²⁰⁹These factors are ‘(a) the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SACU market; (b) the price undercutting experienced by the SACU industry vis-a-vis the imported products; (c) the market share of the dumped imports; (d) the magnitude of the margin of dumping; and (e) the price of un dumped imports available in the market’. See generally Section 16 of the ADR 2003.

²¹⁰See generally Section 16 of the ADR 2003.

²¹¹Guillermo Erasmus & Keith Hendry ‘The Limits of the Use of Anti-Dumping Measures’ available at <http://www.bowmanslaw.com/insights/the-limits-of-the-use-of-anti-dumping-measures/> (accessed 03 October 2017).

between causation and material injury pointing out that in causation, two factors normally provide decisive guidance.²¹² However, analysis of factors where causation is concerned to establish reasons for trends identified.²¹³

As in the ADA, the ADR 2003 also contains a non-attributed provision.²¹⁴ The ITAC is required to give into consideration all the important factors that may have contributed to injury in SACU which are not attributable to dumping.²¹⁵ On the list of factors, it is a positive step that the legislation does list trade restrictive trade practises of competition between the foreign and SACU producers as a non- attributable factor.²¹⁶ This is because in Chapter 2, it was averred that anti-dumping rules should include issues of competition at a WTO level to minimise abuse of anti-dumping laws and protectionism.²¹⁷ If injury is because of such other factors, it may not be linked to dumping, if the interested party gave the information of such factors to the Commission.

3.4.4 Public Interest Considerations

Currently the ADA does not contain provisions on public interest except as provided in Article 6.12 and 9.1 of the ADA. Article 6.12 encourages national governments to give consumers and intermediate users the opportunity 'to provide information relevant to the investigation and the determination of dumping'.²¹⁸ Although this is good, one can strongly suggest that it is not enough to consider public opinion through providing of information only. Imposition of anti-dumping duties on foreign goods can seriously affect the welfare of people in the importing country as such; public interest should also influence how duties are imposed.

It is important to note that Article 9.1 may seem to consider public interest through application of lesser duty however, application is not mandatory.²¹⁹ In the ADR 2003 there is no comprehensive provision for consideration of public interest before enactment of anti-dumping duties.²²⁰ Despite

²¹²The first factor makes a comparison between landed cost of the imported product and ex-factory price of the domestic industry if landed cost is lower causation is likely. The second factor looks at market share loss of domestic industry as a direct result of dumped products.

²¹³See generally Brink G (2015).

²¹⁴See discussion in 2.4.3 Causality.

²¹⁵Section 16 (5) of the ADR 2003.

²¹⁶ Section 16 (5) of the ADR 2003.

²¹⁷See generally 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

²¹⁸Article 6.12 of the ADA.

²¹⁹See generally Article 9.1 of the ADA.

²²⁰Sibanda OS 'Public Interest Considerations in the South African Anti-Dumping and Competition Law, Policy, and Practice' (2015) 14(5) *International Business & Economics Research Journal* 738.

the non-existence of the provision, the issue of public interest has been under discussion by different scholars for a long time and their views are similar.²²¹ In so far as dumping is done by private companies and governments only react where such dumping is materially injuring the domestic industry,²²² the consumer also suffers. Consumers can be negatively and positively affected by dumping and anti-dumping duties. It is therefore of paramount importance that their rights be heard. Generally, public interest refers to the privilege of giving ordinary citizens a voice in matter, which can affect them.²²³

Brink's definition of public interest in anti-dumping investigations includes the assessment that the 'imposition of anti-dumping duties may have on interested parties, being the domestic industry producing the like product, upstream producers of inputs for the domestic industry, the downstream users of the product and consumers'.²²⁴ Although South Africa does not have an express provision on public interest, it can be inferred from some of its reports and conduct that the Commission has considered public interest in reaching some of its decisions.²²⁵

In *Semi-refined paraffin wax (candle wax)*, the Board did not impose anti-dumping duties although the dumping had been found to be injurious to the domestic industry.²²⁶ The imposition would have been detrimental to consumers as price of candles would have risen to around 40 per cent and as a result, the Board held that the requirement of causality was not met.²²⁷ The author also suggests that when South Africa provided the USA with an anti-dumping duty-free quota on chicken imports after being threatened by former President Obama with exclusion from the Africa Growth and Opportunity Act (AGOA), public interest considerations may have played a role.²²⁸ This is

²²¹See generally Sibanda OS (2015); Brink G (2009); Brink G (2005); Moens Paul IA *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada* (1998).

²²²See generally 2.4 World Trade Organisation Treatment Of Dumping.

²²³International Trade Centre *Business Guide to Trade Remedies in Brazil: Anti-dumping, countervailing and safeguard legislation, practices and procedures* (2009) 31.

²²⁴Brink G 'National Interest In Anti-Dumping Investigations' (2009) 126 *South African Law of Journal* 327 Brinks explain that interests which may be considered include competition law through application of lesser duty rule.

²²⁵ See generally Brink G (2015).

²²⁶See generally Brink G (2015).

²²⁷See Board Report 3492 (1994) as stated in Brink G (2015).

²²⁸See generally 2.3.2 Schools of thoughts on anti-dumping duties.

because maintaining higher anti-dumping duties at the expense of being excluded from AGOA would have affected the people of South Africa.²²⁹

3.5 PROCEDURAL REQUIREMENTS

In Chapter 2, procedural requirements that need to be complied with when WTO members are conducting anti-dumping investigations were discussed. It was made clear that WTO member are not prevented from adding procedural requirements in their national legislation that supplement ADA. In South Africa, the ITAA mandates the ITAC to conduct anti-dumping investigations where a *prima facie* case of dumping has been established.²³⁰ During the investigative process, all interested parties should be given reasonable time to respond as required by PAJA. The next section is going to discuss will discuss the procedures the Commission must conform to when handling anti-dumping investigations. There are three legs to this investigation namely pre-initiation, initiation and preliminary phase, and the final investigation phase.

3.5.1 Pre-initiation Phase

An anti-dumping investigation can be initiated by an interested party through a written application by SACU or on behalf of SACU.²³¹ The Commission may also initiate an investigation in the absence of such a written application from an interested party, if it has sufficient evidence of dumping, material injury and causation.²³² An interested party should complete the Commission's relevant application in order to initiate the investigation.²³³

It is the duty of the Commissioner's trade remedies unit to check with SACU industry that that the information submitted for the application is correct and if it is in the required format.²³⁴ If an

²²⁹The access of South Africa to USA markets has created an estimated 62 000 jobs, the economy has extensively benefited from the arrangement. Vehicle exports saw a tremendous growth from zero in 2000 to average around \$1.7 billion per year, the citrus industry has also gained a comparative advantage and as results jobs have been created see Ebrahim S 'SA AGOA benefit in peril? available at <https://www.iol.co.za/business-report/economy/sas-agoa-benefits-in-peril-1941087> (accessed 22 October 2017).

²³⁰See generally Part B Functions of Commission of the ITAA.

²³¹Section 21(1) of the ADR 2003, see also Sibanda OS 'The South African Anti-Dumping Law: consistency with the GATT Anti-Dumping Code' (2001) 34(2) *The Comparative and International Law Journal of Southern Africa* 253.

²³²Section 21(2) of the ADR 2003.

²³³Section 21(2) of the ADR 2003.

²³⁴See generally Brink G '10 Major Problems with the Anti-Dumping Instrument in South Africa' (2005) 39 (1) *Journal of World Trade*.

application is not properly documented the Commission is obliged to return application to applicant.²³⁵

For initiation purposes, the applicant is required to submit all reasonably available information as concerning the normal value of the dumped product.²³⁶ As such, the application is required to submit proof that can be in form of invoices, quotes, international publications or any other reasonable proof.²³⁷ If applicant constructs normal value or uses price of export to a third country because they could not get hold of information on normal value, applicant is required to state its efforts to obtain such price.²³⁸

Though the Commission is required to check that information provided by the applicant is accurate and adequate, deficiencies or inaccuracies should not result in delay of initiation if they do not undermine a *prima facie* establishment case of injurious dumping.²³⁹ This in turn saves time, by avoiding unnecessary delays. Where the Commission comes to a decision that the application by the applicant does not warrant enough merit to initiate investigation, it has to notify the applicant.²⁴⁰ Moreover, it has to provide substantial reasons for its decision for negative merit assessment.²⁴¹

After verifying information and conclusion of a *prima facie* case of injurious dumping the Commission is required to notify the representative of the country of the dumped product that it has received a properly documented application against their product.²⁴² This notification should be done prior to initiation and it should be the only way to publicise the application before the investigation commences.²⁴³ The author strongly supports this as making the issue may lead to an assortment of problems being forwarded, which may be detrimental where the Commission decide not to initiate the investigation. However, once the notice of initiation has been publicised in the

²³⁵Section 21(1) of the ADR 2003 see also Brink G 'A nutshell guide to safeguard action' (2008) 551 available at https://repository.up.ac.za/bitstream/handle/2263/8422/Brink_Nutshell%282008%29c.pdf?sequence=1&isAllowed=y (accessed 24 November 2017).

²³⁶See generally Section 23 of the ADR 2003; Mavroidis PC *et al* (ed) *The Law and Economics of Contingent Protection in the WTO* (2010) 135.

²³⁷Section 23(2) of the ADR 2003.

²³⁸See generally Section 23 of the ADR 2003.

²³⁹Section 25 of the ADR 2003.

²⁴⁰Section 26 (2) of the ADR 2003.

²⁴¹Section 26 (2) of the ADR 2003.

²⁴²Section 27 (1) of the ADR 2003.

²⁴³Section 27 (2) of the ADR 2003.

Government Gazette all known interested parties may be supplied with a non-confidential version of the application.²⁴⁴

3.5.2 Initiation and Preliminary Phase

The initiation phase is provided under Section 28 of the ADR 2003. It prescribes that for investigation to formally commence a notice should be published in the Government Gazette.²⁴⁵ The contents of the notice must include all the three elements of dumping, injury and causality.²⁴⁶ It also should contain evidence of the alleged dumping, together with basis of factors of which injury was concluded.²⁴⁷ Besides these elements, the notice shall also contain names of the applicant, detailed description of dumped product inclusive of the tariff subheading, which applies to the product; and the country or countries under investigation.²⁴⁸ Lastly, the notice should include the expected period for response by interested parties and their addresses to which representations should be directed.²⁴⁹

The publication of notice of initiation in the Government Gazette signifies that all interested parties have received the notice.²⁵⁰ As such, deadline extension based on ignorance of the investigation will not be considered because ignorance does not equal good cause.²⁵¹ However in *S v De Blom*, the court held that the rule ‘ignorance of the law is no excuse’ does not apply without qualification if one can prove that ignorance was reasonable and excusable ignorance may be excused.²⁵² It is also unlikely that the Commission will excuse ignorance of initiation where interested parties were formally notified of the application received in terms of Section 27 (1) of the ADR 2003.

The preliminary investigation commences when relevant questionnaires are sent to importers, exporters and foreign producers.²⁵³ Importantly, parties are deemed to be in receipt of

²⁴⁴Section 27 (3) of the ADR 2003.

²⁴⁵Section 28 of the ADR 2003.

²⁴⁶Section 28 (2) of the ADR 2003.

²⁴⁷ITAC *Anti-dumping Application Form 26*.

²⁴⁸See generally Section 28 (2) of the ADR 2003.

²⁴⁹Czako J, Human J and Miranda J *A Handbook on Anti-Dumping Investigations* (2003) 339.

²⁵⁰Where it is practical the Commission should inform all known interested parties of the initiation of the investigation and give them all relevant documentation with regard to the investigation.

²⁵¹Section 28 (4) of the ADR 2003.

²⁵²See generally *S v De Blom* 1977 (3) SA.513 (A).

²⁵³Section 29 of the ADR 2003.

questionnaires 7 days after the dispatch by the Commission.²⁵⁴ When responding to the Commission the parties are required to use the relevant Commission questionnaires and such response must be done within 30 days of receipt.²⁵⁵ The Commission's trade remedies unit should receive the responses before 15h00 on the date indicated in the letters accompanying the questionnaires.²⁵⁶ Where parties were not directly informed of the investigation, a response should be tendered 40 days from the date of the initiation in the Government Gazette.²⁵⁷ It is important to note that where no other agreement with the Commission exists all submissions must be in both hard and electronic copy and failure may result in deficient in accordance with Section 31.²⁵⁸

In the event that exporters do not co-operate in the investigations within the specified deadlines, the Commission may use available facts and request that provisional anti-dumping duties be imposed immediately.²⁵⁹ However, where some exporters cooperate whilst others do not the Commission may make findings using the best information available, this can only be for non-cooperating exporter's producer or producers.²⁶⁰ The Commission may choose to separate cooperating from non-cooperating exporters to speed up proceedings.²⁶¹

The imposition of provisional measures can only be done 60 days after initiation of an investigation of which the normal period for imposition is six months.²⁶² However, on request by any interested exporter provisional payments validity may be extended to nine months.²⁶³

The Commission is required to make a preliminary report on its investigations and the non-confidential report must be accessible within 'seven days of the publication of its preliminary finding'.²⁶⁴ It is important to note that after the preliminary report is released a price undertaking can be entered into with an exporter. If the price undertaking is satisfactory investigation may be suspended or terminated thus there will not be a need to apply definite anti-dumping duties.²⁶⁵ The

²⁵⁴Section 29 (2) of the ADR 2003.

²⁵⁵Section 29 (3) of the ADR 2003.

²⁵⁶Section 29 (3) of ADR 2003.

²⁵⁷Section 29 (4) of the ADR 2003.

²⁵⁸See generally Brink G (2015).

²⁵⁹Murigi WC (2013) 70.

²⁶⁰Section 32 (2) of the ADR 2003, see also Brink G (2008) 266.

²⁶¹Section 32 (3) of the ADR 2003.

²⁶²Section 33 (1) of the ADR 2003.

²⁶³Section 33 (3) of the ADR 2003.

²⁶⁴Section 34 of the ADR 2003.

²⁶⁵Section 39 (1) of the ADR 2003.

ITAC has never accepted price undertakings maybe because of the administrative burden in administering such undertakings.²⁶⁶ In cases where an undertaking is violated, the Commission may immediately request SARS to impose provisional anti-dumping duties.²⁶⁷

3.5.3 Final Phase

The final stage commences after publication of the preliminary report. After the preliminary report is published, interested parties are given 14 days to comment in writing on the report;²⁶⁸ extension may be allowed on good cause.²⁶⁹ If parties want to bring new information after the preliminary report they can only do so in terms of Section 35(5). This section applies to parties who corrected their deficiencies before the deadline of 14 days. They are therefore deemed cooperating and as such, their information will be considered in the Commission's final finding.²⁷⁰ The Commission may be requested to extend the validity of a provisional measure to 9 months in its consideration of new information where deficiencies were not addressed within the deadline²⁷¹

The imposition of definite anti-dumping duties by the Minister of Finance only takes place after the Commission makes a final report.²⁷² They remain in place for a period of five years 'unless otherwise specified or unless reviewed prior to the lapse of the five year period.'²⁷³ They may also be imposed with a retroactive effect.²⁷⁴ The use of anti-dumping duties has helped to increase 'manufacturing output, and recapture the domestic market'.²⁷⁵ In the case of PFG Building Glass 88 per cent of jobs were retained and manufacturing output was increased.²⁷⁶ The ITAC reckons this would have not been possible if anti-dumping duties had not been imposed. Maytex and Sheraton (textile companies) have also immensely benefited from anti-dumping duties imposed on foreign textiles as they also retained jobs and increased output.²⁷⁷

²⁶⁶Section 39 (1) of the ADR 2003.

²⁶⁷Section 39 (4) of the ADR 2003.

²⁶⁸Section 35 (1) of the ADR 2003.

²⁶⁹Section 35 (2) of the ADR 2003.

²⁷⁰Section 35 (5) of the ADR 2003.

²⁷¹Section 36 (1) of the ADR 2003.

²⁷²See generally Section 56 of the Customs and Excise Act.

²⁷³Section 38 (1) of the ADR 2003.

²⁷⁴See generally Brink G (A-D in SA 2012).

²⁷⁵ITAC Annual Report 2015-2016 26.

²⁷⁶ITAC Annual Report 2015-2016 27.

²⁷⁷ITAC Annual Report 2015-2016 27.

In cases where both elements for imposition of anti-dumping duties are present, the Commission can choose to impose lesser duty. Lesser duty is defined as the ‘provisional payment or anti-dumping duty imposed at the lesser of the margin of dumping or the margin of injury, and which is deemed to be sufficient to remove the injury caused by the dumping’.²⁷⁸ This provision is similar to Article 9 of the ADA, and like in the ADA, application of lesser duty is optional in South Africa. Brazil, Hong Kong, China, India and Japan have called for amendment of Article 9 of the ADA, requesting that application be mandatory.²⁷⁹ The members proposed that ADA should provide several core disciplines, which deal with the establishment and maintenance of the lesser duty, for reasons of ensuring orderly application to the compulsory application of the rule.²⁸⁰

The shortfall in both the ADA and the ADR 2003 is that neither regulations specify how to calculate the lesser duty. Brazil and friends in their proposal to amendment of Article 9 of the ADA, mentioned that ‘methodologies for calculating the injury margin, procedural requirements, and guidance regarding the extent to which rule applies in reviews, should be clearly stated’.²⁸¹

Abdelwahab points out outcomes where lesser duty is applied.²⁸² She avers that application of the rule improves the welfare of consumers as compared to the adoption of full dumping margins. It also helps to lessen the impacts of misrepresentations, which are created when full anti-dumping duties are imposed.²⁸³ South Africa only considers imposition of lesser duty where both the exporter and importer responded fully.²⁸⁴ It is therefore submitted that South Africa should be commended for including a provision for lesser duty in its legislation. This is so because in many of its investigations the Commission has recommended a lesser duty be applied.²⁸⁵ This strongly suggests that anti-dumping duties are being used as response to unfair trade rather than a

²⁷⁸See generally Section 1 of the ADR.

²⁷⁹Proposals on the Mandatory Application of the Lesser Duty Rule TN/RL/GEN/99.

²⁸⁰Proposals on the Mandatory Application of the Lesser Duty Rule TN/RL/GEN/99.

²⁸¹Proposals on the Mandatory Application of the Lesser Duty Rule TN/RL/GEN/99.

²⁸²Abdelwahab N ‘Are there Positive Impacts for Adopting Lesser Duty Rule in Anti-dumping Investigations’ (2016) available at <https://ideas.repec.org/p/ekd/009007/9599.html> (accessed 23 November 2017).

²⁸³Abdelwahab N ‘Are there Positive Impacts for Adopting Lesser Duty Rule in Anti-dumping Investigations’ (2016) available at <https://ideas.repec.org/p/ekd/009007/9599.html> (accessed 23 November 2017).

²⁸⁴Section 17 of the ADR 2003; see also ITAC Report 476: Investigation Into The Alleged Dumping Of Disodium Carbonate (Soda Ash) Originating In Or Imported From The United States Of America (USA): Final Determination Report .

²⁸⁵Theron N ‘Anti-dumping procedures: Lessons for developing countries with special emphasis on the South African experience’ in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) 77.

protectionist measure promoting anti-competitive behaviour.²⁸⁶ However, the application is optional and is dependent on the Commission, which is similar to Article 9 of the ADA. In the above paragraphs, the study mentioned that there have been calls at a WTO level to make the rule mandatory.

3.6 REVIEWS

Re-evaluation of anti-dumping duties is essential because duties are not meant to be permanent, but should be put in place they to counter the dumping that caused the injury.²⁸⁷ The ADR 2003 prescribes procedure that parties should follow in order to utilise the different reviews that are available. The types of reviews that may be used are interim reviews, sunset reviews, anti-circumvention reviews, new shipper reviews and judicial reviews as discussed more fully below.

In order for any of the above reviews to be initiated, a notice should be published in the Government Gazette.²⁸⁸ The notice should contain all the necessary information such as identity of applicant, product to be reviewed, investigation periods for both dumping and injury, anti-dumping measures that are in force, review scope and basic information on review basis.²⁸⁹ Besides these requirements, initiation of sunset reviews has additional requirements that also apply, which will be referred to later.²⁹⁰

Once a review is initiated, the Commission is required to notify and supply the government concerned and interested parties with all the relevant non-confidential information.²⁹¹ It is essential for applicants to apply for a review that applies to their circumstances.

Interim reviews

Interim reviews are also referred to as change of circumstance review due to their nature. The Commission can only initiate them if circumstances of an applicant have changed significantly.²⁹² Cases where importers, exporters or foreign producers are willing to provide information, which

²⁸⁶See discussion on 2.3.2 Schools of thought on anti-dumping duties.

²⁸⁷See generally Article 11.1 of the ADA.

²⁸⁸Section 41 (1) of the ADR 2003.

²⁸⁹See generally Section 41(1) of the ADR 2003.

²⁹⁰Section 41 (2) of the ADR 2003.

²⁹¹See generally Section 40 of the ADR 2003.

²⁹²Section 45 (1) of the ADR 2003 see also Brink G (A-D in SA 2012) 38-40.

they failed to co-operate previously, do not qualify as significant change.²⁹³ Therefore, these parties cannot bring an application for interim reviews just on their current willingness to provide information previously withheld. The application for interim reviews cannot normally be considered before 12 months lapse from the date of publication of final findings of the original investigation.²⁹⁴ It can also not be considered before 12 months from a previous review.²⁹⁵

The procedure for interim reviews is governed by Section 46 and consists of a single investigation phase,²⁹⁶ subject to interested parties being informed of essential facts considered by Commission.²⁹⁷ The Commission may verify any information submitted by interested parties for purposes of interim reviews if it deems it necessary.²⁹⁸ As such, there is no prohibition from applying for both an interim and sunset review for purposes of expanding or limiting the scope of ‘application or level of any anti-dumping duties’.²⁹⁹

When an interim review is conducted, an anti-dumping duty may either remain in place, decrease or increase depending on the circumstances of each case.³⁰⁰

Sunset reviews

Section 53 of the ADR 2003 prescribes that enacted anti-dumping duties remains in force for a period ‘not exceeding 5 years from the imposition or the last review thereof’.³⁰¹ The Commission needs to publish a notice in the Government Gazette 6 months before the five-year period ends, showing that an anti-dumping duty will lapse on a specific date unless a sunset review is initiated.³⁰² If there is need for anti-dumping, duties to continue after the five-year period, a sunset review should be initiated before the end of an anti-dumping duty. If a sunset review is initiated the anti-dumping duty remains operational until the finalisation of the sunset review.³⁰³

²⁹³Section 45 (2) of ADR 2003.

²⁹⁴Section 44 of the ADR 2003.

²⁹⁵Section 44 of the ADR 2003.

²⁹⁶This means ITAC proceeds to make a final determination and will not make a preliminary determination see Brink G (A-D in SA 2012) 38.

²⁹⁷See generally Section 46 and 43 of the ADR 2003.

²⁹⁸Section 46 (2) of the ADR 2003.

²⁹⁹Section 45 (3) of the ADR 2003.

³⁰⁰See a discussion on interim reviews by Brink G (A-D in SA 2012) 38-40.

³⁰¹Section 53 (1) of the ADR 2003; Brink G (2004) 921.

³⁰²Section 54 (1) of the ADR 2003.

³⁰³Section 53 (2) of the ADR 2003.

When a notice for lapse of anti-dumping duty is published, the Commission must inform interested parties of the imminent lapse of the anti-dumping duties.³⁰⁴ If interested parties want to request a sunset review, they have 30 days from the publication of the notice to do so.³⁰⁵ When a SACU industry wants the anti-dumping duty to continue, it must hand in a proper application to the Commission, containing the necessary information.³⁰⁶ The information must be able to prove a *prima facie* case that there is likelihood of continuation or a recurrence of injurious dumping if the anti-dumping duty is removed.³⁰⁷

If the Commission decides to initiate a sunset review, a notice should be published in the Government Gazette in accordance with Section 41; such publication should be done before an anti-dumping duty lapse.³⁰⁸ Such notice shall contain all the information as contemplated in section 41.

The issue of what constitutes five years has been brought before the Constitutional Court and there is a landmark ruling on sunset reviews.³⁰⁹ Although the case is landmark in South Africa, to other Members of the WTO it may be persuasive and not binding, because it constitutes foreign law rather than international obligations. The background of the landmark case before the court summarises as follows, the ITAC conducted an investigation in 2000 after SCAW South Africa (Pty) Ltd (SCAW) made an application for anti-dumping duties to be imposed on stranded wire, rope and cables originating in or imported from China, Germany, India, Korea, Spain and the United Kingdom. Anti-dumping duties were then imposed in 2002, United Kingdom. Bridon International Limited (Bridon) was found to be dumping its products and as a result an anti-dumping duty of 42, 1% was imposed.³¹⁰ Bridon applied for interim reviews in 2006, and the ITAC decided that the anti-dumping duty should be maintained as there were no change of circumstances, and duties were to expire on the 28th of August 2007.³¹¹

³⁰⁴These are the interested parties recognised in the original investigation or last review of the dumped product.

³⁰⁵Section 54 (3) of the ADR 2003.

³⁰⁶Section 54 (4) of the ADR 2003.

³⁰⁷Section 54(4) of the ADR 2003.

³⁰⁸Section 54(5) of ADR 2003.

³⁰⁹ The Constitutional Court is the highest court in South Africa, its decisions are binding on all lower courts.

³¹⁰*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³¹¹ ITAC Report 236: Interim review of the anti-dumping duties on stranded wire ropes of iron or steel, not electrically insulated, originating in or imported from Bridon International Ltd in the United Kingdom: Final determination.

More than 6 months before the 28th of August 2007, interested parties were informed about their right to apply for sunset reviews of which failure would result in lapsing of the anti-dumping duty.³¹² SCAW took heed and submitted an application for sunset reviews. The ITAC, after investigations, held that anti-dumping duties should be increased in some cases, whilst those imposed against Bridon were to be removed.³¹³ SCAW then sought an interdict to the effect of preventing the Commission from recommending its decision of removing duties against Bridon to the Minister of Finance.³¹⁴ The interdict was granted and it was to remain in force pending the finalisation of a review instituted by SCAW.³¹⁵

The ITAC sought an appeal in the constitutional court before it had finalised the review by SCAW. The court set aside the interdict and held that the ‘interdict improperly breached the doctrine of separation of powers which is an integral part of our Constitution’.³¹⁶ The order had an effect of overlapping into the powers of the national executive function without appropriate justification.³¹⁷ Most importantly, the court held that the interdict extended the lifespan of anti-dumping duties beyond what the legislation allows.³¹⁸

It held that dumping duties were only to remain in place for five years after date of imposition, reviews are to be finalised in 18 months.³¹⁹ It is important to note that South Africa may not be consistent with the WTO when it comes to the finalisation of reviews within 18 months because the ADA in Article 11.4 prescribes that reviews need to be finalised within 12 months of the date of initiation of the review. In *South Africa – Certain paper*, Indonesia challenged the fact that an anti-dumping duty remained in place whilst a sunset review had been ongoing for nearly 3 years.³²⁰

³¹²See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.

³¹³Trade Law Chambers ‘Constitutional Court trumps anti dumping practices’ available at <https://www.tradelawchambers.com/raxo-what-s-on/63-constitutional-court-trumps-anti-dumping-practices.html> (accessed 30 October 2017).

³¹⁴See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³¹⁵See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³¹⁶*International Trade Administration Commission v SCAW South Africa (Pty) Ltd* para 110

³¹⁷Trade Law Chambers ‘Constitutional Court trumps anti dumping practices’ available at <https://www.tradelawchambers.com/raxo-what-s-on/63-constitutional-court-trumps-anti-dumping-practices.html> (accessed 30 October 2017).

³¹⁸See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.

³¹⁹See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*.

³²⁰*South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper* Request for Consultations by Indonesia WT/DS374/1 2.

SA then promptly withdrew the measure and importers could ‘obtain refunds of any anti-dumping duties paid after 27 November 2003’.³²¹

In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* it was held that if a matter is referred for judicial reviews, the delays in the court systems might extend duties beyond the prescribed lifespan.³²² In addition, the lapsing of an existing duty should not be stopped because of a pending court case, as this would result in extension of anti-dumping duties beyond what the law permits.³²³ It held that a ‘court should be slow to override mandatory legislative provisions buttressed by international obligations’.³²⁴ Thus, even if South Africa did not adopt the ADA in its national legislation, it respects international law and interprets cases in line with international principles.

Circumvention reviews

Another review provided by the ADR 2003 is the circumvention reviews. Circumvention refers to situations where payment of anti-dumping duty is avoided through structuring the transaction in a manner that avoids payment.³²⁵ Anti-dumping measures are increasingly being used and many exporters may look for ways to bypass them.³²⁶ The ADA contains no provisions on circumvention. In South Africa, there are different scenarios where circumvention is outright illegal and in such situations, a complaint should be lodged with SARS.³²⁷ In situations where it is not outright illegal, South Africa protects itself extensively through Section 60 of the ADR 2003.

³²¹*South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper* Communication from Indonesia WT/DS374/2.

³²²See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³²³See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³²⁴See generally *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

³²⁵European Commission ‘Reviews’ (2013) available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151019.pdf (accessed 30 October 2017).

³²⁶Theron N ‘Anti-Dumping Procedures: Lessons for Developing Countries with Special Emphasis on South African Experience’ in Debroy B & Chakraborty D (eds) *Anti-dumping: Global Abuse of a Trade Policy Instrument* (2007) 81.

³²⁷‘Situations where circumvention is outright illegal are where companies change their tariff code, which is associated with a dumped product just to circumvent payment of duty.’ ‘Companies can also fraudulently lower the value of the goods for duty purposes or change the declaration of origin of the goods, whilst the real origin remains the same.’ see generally Liu K ‘Anti-dumping Duty Circumvention through Trade Re-routing: Evidence from Chinese Exporters’ (2016).

The section lists different scenarios where circumvention takes places.³²⁸ The regulation specifies that both situations may amount to circumvention but if one is present it will be enough to prove circumvention.

The different types of circumventions are: country hopping, minor modifications of the products; improper declarations of the value, origin, nature or origin of the product; assembly operations in a third country or within the SACU; and absorbing the duty.³²⁹ If any of these activities are present a domestic industry may request an anti-circumvention review.³³⁰ An investigation should be conducted where a request for anti-circumvention is lodged with SARS under Section 60 (2) (a) of the ADR; however, this request does not prohibit the ITAC from taking anti-dumping action provided that information on the ITAC's disposal warrants such action.³³¹

Injury information needs not to be updated if the anti-circumvention complaint is submitted to the Commission before or within one year of the Commission's publication of its final determination.³³² The final recommendations where circumvention has taken place may result in the anti-dumping duties being increased in order to compensate absorption. Scope of anti-dumping duties may also be extended to 'apply to parts, components or substitute like products, new models and the like.'³³³ The Commission may also extend

'anti-dumping duties, at the required level, to the supplier in the country from which the product is exported subsequent to the imposition of the original provisional payments or anti-dumping duties or the initiation of the original investigation, including to parts, components or substitute like products, new models and the like'.³³⁴

³²⁸Circumvention is deemed to takes place where there is a

'change in the pattern of trade between third countries and South Africa or the common customs area of the Southern African Customs Union; (i) which results from a practice, process or work; (ii) for which there is no or insufficient cause or economic justification other than the imposition of the anti-dumping duty'

Circumvention also takes where '(b) remedial effects of the anti-dumping measure are being undermined in terms of the volumes or prices of the products under investigation; (c) dumping can be found in relation to normal values previously established for the like or similar product' See Section 60 (1) of the ADR 2003.

³²⁹See generally Section 60 of ADR 2003.

³³⁰ See generally Section 60 of ADR 2003.

³³¹Section 60 (3) of the ADR 2003.

³³²See generally Section 60 of the ADR 2003.

³³³Section 63 of the ADR 2003.

³³⁴Section 63 of the ADR 2003.

Murigi has questioned the consistence of South Africa's rules relating to anti-circumvention with the ADA because there is no provision that allows Members to impose the circumvention.³³⁵ It is however argued, that it does not mean that rules are inconsistent with the WTO because the ADA does not provide for them. The ADA does not prevent enactment of provisions that supplement it; however, the WTO should look into amending the ADA to include provisions of circumvention to allow uniform application of the rules.

New shipper reviews

New shipper reviews are available only to those exporters that did not export to SACU during the original investigation period.³³⁶ The request for this review can only be considered after definitive anti-dumping duties have been imposed.³³⁷ Sufficient information that proves that the exporter applying for the reviews is and was not related to any exporter whom anti-dumping duties were applied needs to be submitted.³³⁸ The new exporter should provide the ITAC with enough information on normal value, export price and any other information deemed necessary by the Commission and should submit such information in the correct format.³³⁹ If the exporter had not exported any products to SACU during the period under review, it should also provide the Commission with the required information in the prescribed format.³⁴⁰

On initiation of a new shipper review, there is a simultaneous withdrawal of the anti-dumping duty.³⁴¹ The SARS Commissioner may be requested by the ITAC to impose provisional payments at the same level as the anti-dumping duties con-currently when the anti-dumping duty is withdrawn.³⁴² This payment is valid for the whole period of the review.³⁴³ The dumping margin of the exporter will be deemed as the difference between the export price to South Africa and normal value.³⁴⁴ Where export price cannot be established, the Commission has discretion either to use

³³⁵Murigi WC *The Development of a Successful Antidumping Regime In Kenya* (unpublished LLM thesis, University of the Western Cape 2013) 76.

³³⁶Section 48 (1) of the ADR 2003.

³³⁷Section 48 (2) of the ADR 2003.

³³⁸Section 48 (2) of the ADR 2003.

³³⁹Section 49 (1) of the ADR 2003.

³⁴⁰Section 49 (2) of the ADR 2003.

³⁴¹Section 50 (1) of the ADR 2003.

³⁴²Section 50 (2) of the ADR 2003.

³⁴³Section 50 (2) of the ADR 2003.

³⁴⁴Section 52 (a) of the ADR 2003.

new shipper's export price to an appropriate third country or any other reasonable basis.³⁴⁵ When the review procedure is concluded, the final anti-dumping duty imposed may be equal to an anti-dumping duty or lower than the margin of dumping if dumping is proved.³⁴⁶ If no dumping is found, the Commission must recommend that the provisional payment be terminated.³⁴⁷

Judicial reviews

Where judicial reviews are concerned, they are available to interested parties where they wish to challenge preliminary or final decisions made by the Commission.³⁴⁸ These decisions may only be taken on review if the Commission held decisions, which were contrary to the provisions of the ITAA or the ADR 2003.³⁴⁹ The complaining party should prove prejudice because of the Commission's conduct and the prejudice should not be able to be remedied by the Commission's future final decision.³⁵⁰

Judicial reviews takes place after ITAC's final recommendations have been made.³⁵¹ A 30-day notice should be given before interested parties file for judicial review. Unsurprisingly anti-dumping judicial reviews are not a special case scenario. Judicial reviews should be lodged using correct court rules and channels.³⁵² The Pretoria High Court has jurisdiction over anti-dumping matters because the ITAC is located in Pretoria.³⁵³ Where parties are not satisfied with ruling of the High Court they can apply for leave to appeal, and if granted they may appeal their matter in the Supreme Court of Appeal.³⁵⁴ However, if constitutional matters are involved, the matter can be taken to the Constitutional Court.³⁵⁵ Courts in South Africa have been refereed to have a vibrant

³⁴⁵Section 51 (3) of the ADR 2003.

³⁴⁶Section 52 (a) of the ADR 2003.

³⁴⁷Section 52(b) of the ADR.

³⁴⁸Section 64 (1) of the ADR 2003.

³⁴⁹Section 64 (1) of the ADR 2003.

³⁵⁰Section 64 (1) (a) of the ADR 2003.

³⁵¹Section 64 (1) (b) of the ADR 2003.

³⁵²Brink G 'South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System' in Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) 253.

³⁵³See Discussion on Courts in South Africa available at <http://www.justice.gov.za/about/sa-courts.html> (accessed 25 July 2018).

³⁵⁴See Discussion on Courts in South Africa available at <http://www.justice.gov.za/about/sa-courts.html> (accessed 25 July 2018).

³⁵⁵See Discussion on Courts in South Africa available at <http://www.justice.gov.za/about/sa-courts.html> (accessed 25 July 2018).

understanding and active participation in trade related matters, which contributes in the development of the anti-dumping regime.³⁵⁶

3.7 CONCLUSION

This Chapter highlighted that South Africa is the largest anti-dumping user in Africa. Its anti-dumping jurisprudence is established and its laws have gone through a process of transition since 1914. The Chapter also demonstrated that substantive and procedural requirements as contained in the ITAA and the ADR 2003 are more clear and reliable. The ADR 2003 clarifies on issues that the ADA does not explain, clear guidelines on what to look at and how to analyse injury in domestic industries is given. Importantly, South African courts have made a landmark ruling in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*, concerning sunset reviews helping in strengthening its anti-dumping jurisprudence.

Although the Chapter discussed that the current legislation in the country does not have a mandatory public interest clause, which is ideal for anti-dumping laws, the Commission has applied the principle in some of its decisions.³⁵⁷ South Africa has made provision for lesser duty, which highlights its efforts in using anti-dumping laws as a response to unfair trade rather than using them as a form of protectionism, which is against WTO pillars.³⁵⁸

South Africa's anti-dumping experience cannot be separated from the effectiveness of the ITAC and function of a competent judicial system. The Chapter also showed that the ITAC has a clear mandate on how to conduct anti-dumping investigations and the country has invested in developing expertise in anti-dumping matters. It was highlighted that in 2016 the poultry industry indicated that they were to experience job losses because of dumping.³⁵⁹ The country has in the textile industries benefited from application of anti-dumping duties. It was discussed that textile companies Maytex and Sheraton boosted their capacities because of application of anti-dumping duties.³⁶⁰ This shows that anti-dumping measures protect the domestic industries from unfair trade.

³⁵⁶Ikeagwuchi GA *Implementing effective trade remedy mechanisms: A critical analysis of Nigeria's Anti-Dumping and Countervailing Bill, 2010* (unpublished LLM thesis University of Pretoria 2014) 82.

³⁵⁷See generally 3.4.4 Public Interest Considerations where *Semi-refined paraffin wax (candle wax)* and the poultry situation with President Obama were discussed.

³⁵⁸See generally 3.5.3 Final phase.

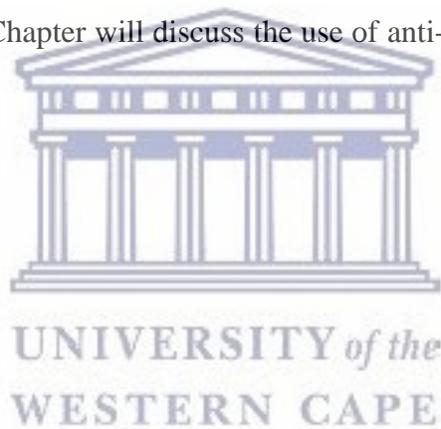
³⁵⁹See generally 3.2 Overview.

³⁶⁰See generally 3.5.3 Final Phase.

Moreover, their application boosts capacity and job creation helping to improve the welfare of the people of South Africa.

Despite these positive attributes, there still are shortfalls in its anti-dumping regime as highlighted in the Chapter. The Chapter highlighted that although South African national anti-dumping laws largely resemble those of the ADA, the country has been criticised in the way they construct their normal value as it leads to irregularities and higher anti-dumping duties. Also worrying is the fact that the Commission has never accepted any undertaking that makes one question the motive for application of anti-dumping duties. There are also shortfalls in the way dumping margin calculations are done, as there is no transparency, because some documents are not accessible to people who need them. The ADR 2003 is also inconsistent with the WTO because it prescribes that reviews need to be finalised in 18 months and the ADA provides 12 months.

Bearing this in mind, the next Chapter will discuss the use of anti-dumping laws in the European Union EU).



CHAPTER 4

THE USE OF ANTI-DUMPING MEASURES IN THE EUROPEAN UNION

4.1 INTRODUCTION

Anti-dumping legislation has existed in the European Union (EU) since 1968 when the community merely codified the 1967 Kennedy rules.¹ When compared to other players such as the United States of America (USA) and Australia, the EU was a late player in enacting anti-dumping regulations.² It has however continuously replaced the 1968 anti-dumping legislation, with each amendment bringing important changes.³ Since becoming a user of anti-dumping measures, there has been a steady increase on the number of anti-dumping members applied to the non-EU countries.⁴

The EU has been a Member of the World Trade Organisation (WTO) since 1 January 1995.⁵ As such, in the evolution of anti-dumping framework, the EU has always made clear its intention to abide by WTO anti-dumping rules.⁶ However, there have been accusations levelled against the EU Commission of monopolising information in anti-dumping investigations; thereby, inviting leaks and abuse.⁷ This suggests the fact that even successful organisations that intend to comply with the WTO framework may also have loopholes in the way they handle anti-dumping investigations.

Despite the loopholes, there have been great efforts made in developing the anti-dumping regime in the EU. It has benefited from scholarly publications in developing its anti-dumping regime, which is similar to South Africa in Chapter 3.⁸ The EU courts have also had vast opportunities in

¹Great Britain Board of Trade *The Kennedy Round of Trade Negotiations, 1964-67* 1967 5; the Kennedy rules were negotiated during the Kennedy Round which was the sixth round of negotiations under the General Agreement on Tariffs and Trade (GATT) and took place between 1964 and 1967.

²See generally Brief History of World Trade Organisation.

³These Regulations will be discussed in 4.3.1 Legislative Framework.

⁴The relationship of China and EU mostly has been put under a microscope. Members and scholars have started conversations that seek to re-evaluate EU's free trade policies citing that it is making EU prone to dumping. See Lopez J 'With protectionism on the rise the EU struggles with free trade principles' in ICIS Duty and Regulatory Bulletin (2017).

⁵WTO 'Member Information: The European Union and the WTO' available at

https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (accessed 12 October 2018).

⁶Luo Y *Anti-dumping in the WTO, the EU, and China: The Rise of Legalisation in the Trade Regime and Its Consequences* (2010) 107 (hereafter Luo Y (2010)).

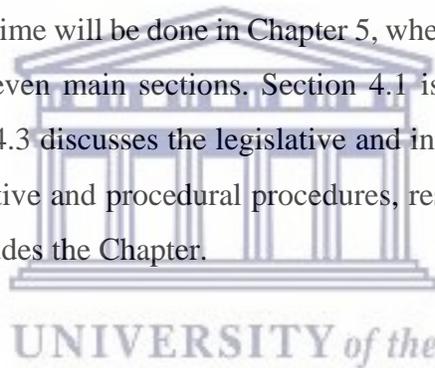
⁷Luo Y (2010) 119.

⁸Authors such as Davis L 'Ten years of anti-dumping in the EU: economic and political targeting' (2009) *ECIPE Working Paper • No. 02/2009* 6, Jackson JH & Vermulst EA, *Antidumping Law and Practice, A Comparative Study* (1989), Luo Y *Anti-dumping in the WTO, the EU, and China: The Rise of Legalisation in the Trade Regime and Its Consequences* (2010), Van Bael I & Bellis JF *EU Anti-Dumping and Other Trade Defence Instruments* (2011) have all written books and peer reviewed articles on EU anti-dumping regulation.

interpreting anti-dumping laws therefore clarifying on issues and paving way for reform in anti-dumping.⁹

Zimbabwe initiated its anti-dumping legislation decades after the EU had already put in place anti-dumping regulations.¹⁰ Thus, Zimbabwe can draw lessons since the EU has vast experience in utilising anti-dumping measures. In addition, the connection between Zimbabwe and the EU was discussed in Chapter 1.¹¹ It was highlighted that the EU used to be the major export destination for Zimbabwe, accounting for two-thirds of total exports.¹² In addition, the EU has been cited as a respondent in 15 WTO anti-dumping cases.¹³ Thus, it becomes important to investigate how countries that allegedly dump products protect their own domestic industries.

Within this context, this Chapter discusses the use of anti-dumping measures in the EU, with the aim of drawing lessons that Zimbabwe can learn. An examination of how Zimbabwe can learn from the EU's anti-dumping regime will be done in Chapter 5, where Zimbabwe will be discussed. This Chapter is divided into seven main sections. Section 4.1 is this introduction. Section 4.2 provides an overview. Section 4.3 discusses the legislative and institutional framework. Sections 4.4 and 4.5 discuss the substantive and procedural procedures, respectively. Section 4.6 looks at reviews. The last section concludes the Chapter.



4.2 OVERVIEW

Currently, the EU anti-dumping regulation, Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries

⁹See anti-dumping cases heard by the Court of Justice available at

<http://curia.europa.eu/juris/documents.jsf?pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=145932> (accessed 25 May 2018).

¹⁰Currently the European Union (EU) has 28 member countries that have pledged full support to the Union together with their citizens. Amongst the 28 the United Kingdom (UK) held a referendum to exit the EU and it was successful. The exit process has not been finalised as such all rights and obligations continue to fully apply to UK, as it is still a full member of the EU. See European Commission *The European Union Explained: How the European Union Works, Your guide to the EU institutions* (2013) 3-38.

¹¹See generally 1.6 Research Methodology.

¹²Zimbabwe National Trade Policy 2012-16.

¹³WTO 'Dispute Settlement: The Disputes; Disputes by agreement (as cited in request for consultations) available at https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (accessed 12 October 2018).

not members of the European Union (Regulation (EU) 2016/1036), regulates the procedure for the imposition of anti-dumping duties.

The EU has exclusive competence in terms of Article 3 of the Treaty on the Functioning of the European Union (TFEU).¹⁴ Exclusive competence means that only the EU can act.¹⁵ It is, however, important to highlight that in most policy areas where the EU can act, ‘the European Commission is also empowered to submit a proposal for a legal act’.¹⁶ There are exceptions to this, where common foreign and security policy is concerned, the Commission does not hold such power.¹⁷ The European Commission is the executive branch of the union, guided by the Treaty on the Functioning of the European Union (TFEU), which gives it power to enforce the treaty, implement and execute all duties as specified by the treaty.¹⁸

The EU

‘applies uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies’.¹⁹

As such, anti-dumping measures can only be imposed against non-EU Members.²⁰ This is because in the Union, uniform rules with regard to tariff rates apply.²¹ In addition, individual Members do not have the jurisdiction to apply anti-dumping measures against non-Members and amongst

¹⁴Article 3 of the TFEU states that

‘1. The Union shall have exclusive competence in the following areas:

- (a) customs union;
- (b) the establishing of the competition rules necessary for the functioning of the internal market;
- (c) monetary policy for the Member States whose currency is the euro;
- (d) the conservation of marine biological resources under the common fisheries policy;
- (e) common commercial policy.

2. The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope’.

¹⁵European Commission ‘European Citizens Initiative’ available at <http://ec.europa.eu/citizens-initiative/public/competences/faq#q1> (accessed 12 October 2018).

¹⁶European Commission ‘European Citizens Initiative’ available at <http://ec.europa.eu/citizens-initiative/public/competences/faq#q1> (accessed 12 October 2018).

¹⁷European Commission ‘European Citizens Initiative’ available at <http://ec.europa.eu/citizens-initiative/public/competences/faq#q1> (accessed 12 October 2018).

¹⁸Saurombe A ‘The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis’ (2013) 7 *Law Democracy & Development* 467.

¹⁹Article 133 of the Treaty on the European Union as amended by The Treaty of Nice.

²⁰See generally Regulation (EU) 2016/1036.

²¹Article 133 of the Treaty on the European Union as amended by The Treaty of Nice.

themselves.²² This is because anti-dumping rules exclusively fall within the competence of the EU.²³

When it comes to application of anti-dumping measures, the EU mainly, enact anti-dumping measures to products originating from mostly Asian countries, including China.²⁴ In this regard, China has urged the EU to comply with WTO rules when conducting anti-dumping investigations.²⁵ This mainly concerns viewing China as a non-market economy, ignoring China's 15-year transitional period, which ended on December 11, 2016.²⁶ Despite these calls, the EU continues to tighten its laws against Chinese products.²⁷ China has declared the move as a protectionist measure meant to reduce exports from its country.²⁸ The EU counter argues that any amendment to its regulation does not target specific countries, but to protect the interests of the Community at large.²⁹

Currently there are 170 WTO cases on anti-dumping against the EU or some of its Member States.³⁰ This is minimal compared to over 199 investigations from 2003 against non-EU Members.³¹ Specifically in the first half of 2018, there have been '97 provisional and definitive anti-dumping measures (which were subsequently extended in 29 cases).'³² Such statistics show



²²Davis L 'Ten years of anti-dumping in the EU: economic and political targeting' (2009) *ECIPE Working Paper • No. 02/2009* 6 (hereafter Davies L (2009)).

²³Article 3 of the TFEU.

²⁴Davis L (2009) 6.

²⁵Scimia A 'Trumpian Europe toughens anti-dumping rules against China' (2017) available at <http://www.atimes.com/trumpian-europe-toughens-anti-dumping-rules-china/> (accessed 09 November 2017).

²⁶See discussion on how China's products should not be subjected to this methodology in 3.4.1 Determination of dumping: *Normal Value*

²⁷Scimia A 'Trumpian Europe toughens anti-dumping rules against China' (2017) available at <http://www.atimes.com/trumpian-europe-toughens-anti-dumping-rules-china/> (accessed 09 November 2017).

²⁸Scimia A 'Trumpian Europe toughens anti-dumping rules against China' (2017) available at <http://www.atimes.com/trumpian-europe-toughens-anti-dumping-rules-china/> (accessed 09 November 2017).

²⁹Scimia A 'Trumpian Europe toughens anti-dumping rules against China' (2017) available at <http://www.atimes.com/trumpian-europe-toughens-anti-dumping-rules-china/> (accessed 09 November 2017).

³⁰European Commission 'Cases' available at <http://trade.ec.europa.eu/actions-against-eu-exporters/cases/index.cfm> (accessed 13 October 2018).

³¹For statistics before 2003 see European Commission 'Investigations' available at <http://trade.ec.europa.eu/tidi/completed.cfm> accessed 13 October 2018).

³²European Commission *Anti-Dumping, Anti-Subsidy, Safeguard Statistics Covering the First 6 Months of 2018* (2018).

that the EU has vast experience in the use of anti-dumping measures. This cannot be separated from its trade defence system, which was recently modernised by Regulation (EU) 2018/825.³³

4.3 THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

4.3.1 Legislative Framework

The EU's key anti-dumping legislation, regulating the procedure for the imposition of anti-dumping duties, is Regulation (EU) 2016/1036.³⁴ This legislation is based on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 (Anti-Dumping Agreement (ADA) as specified in Section 3.³⁵ As such, interpretation that is consistent with the ADA should be adopted in investigations.³⁶ This position differs slightly with that of South Africa, discussed in Chapter 3.³⁷ In South Africa, neither the GATT nor the ADA form part of its municipal law.³⁸ However, South Africa's Constitution³⁹ requires that when interpreting legislation, courts should interpret it in a reasonable manner that is consistent with international law rather than in an inconsistent manner.³⁹ Thus where its anti-dumping's legislation is also concerned, interpretation that favours the GATT and the ADA, should be adopted.⁴⁰ This position is similar to that of the EU.

The roots of Regulation (EU) 2016/1036 trace back from Regulation 459/68 of 5 April 1968, which protected Members against dumping from non-Members of the European Community.⁴¹ Despite



³³Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 amends Regulation (EU) 2016/1036 on Protection against Dumped Imports from Countries not Members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union.

³⁴Regulation (EU) 2016/1036 should be read together with the amendment namely Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 (Regulation (EU) 2017/2321).

³⁵See Section 3 of Regulation (EU) 2016/1036.

³⁶See generally Regulation (EU) 2016/1036.

³⁷See 3.3.1 Legislative Framework.

³⁸Brink G 'Anti-dumping and China: three major Chinese victories in dispute resolution' (2014) 47(1) *Comparative and International Law Journal of Southern Africa* 9.

³⁹Section 233 of the Constitution. See a detailed analysis on the applicability of international law in South Africa, in Smit L 'The relationship between the access of individuals to WTO law and the socio-economic rights in the South African Constitution' (2007) 40(3) 350-394. Also see generally, Scholtz W & Ferreira G 'The interpretation of section 231 of the South African Constitution: A lost ball in the high weeds!' (2008) 41(2) *The Comparative and International Law Journal of Southern Africa* 324-338.

⁴⁰Ferreira G & Snyman F 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17 (4) *Potchefstroom Electronic Law Journal* 1478.

⁴¹See generally Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries, which are not members of the European Economic Community.

this, the EU continuously amends and/or repeals the Regulation so that it reflects the changing interests within the Community.⁴² For instance, Regulation 459/68 of 1979 improved much on determination of injury and tried to solve problems with previous regulations.⁴³ The 1984 Regulation also improved much on production costs calculation and ordinary course of trade treatment of sales.⁴⁴

In 1987, there were other amendments made on products of companies associated with an exporter subject to the duties.⁴⁵ In 1988, Regulation 2433/88 was born which had many changes on discounts, anti-absorption duty and treatment of trading companies among others. The EU also amended Regulation 2433/88 in 1994.⁴⁶ This trend has continued to date, which is commendable because trade issues keep changing every time, and amending the law to accommodate these changes is necessary. Regulation (EU) 2016/1036 repealed Council Regulation (EC) No 1225/2009 and, with it, brought amongst others, a new way of calculating the margin of dumping for imports from countries outside the region on the basis of 'significant market distortions'.⁴⁷

As the basic the EU regulation on anti-dumping measures, Regulation (EU) 2016/1036 provides all the rules and regulations followed by the EU in anti-dumping investigations. In this piece of legislation, there are set rules written down on the determination of dumping.⁴⁸ It also provides rules on initiation, procedural rules, imposition of duties, duration as well as review of anti-dumping measures and confidential treatment of information concerning anti-dumping investigations.⁴⁹ The current legislation has changed the decision process when compared to its predecessors.⁵⁰

⁴²For example, each regulation reflects the amendments it brings.

⁴³Sheng Z *EU Anti-Dumping Policy: A study in the CTV Case* (unpublished Master of European Affairs, Lund University 2004) 62.

⁴⁴See generally Regulation 2176/84, 1984 and Council Regulation (EEC) No 1058/86 of 8 April 1986 imposing a definitive anti-dumping duty on imports of certain electronic scales originating in Japan.

⁴⁵See generally Regulation 1761/87.

⁴⁶Wim K *Facing the Challenge: The Lisbon Strategy for Growth and Enlargement: Report of the High Level Group* (2004) 17.

⁴⁷Bridges 'EU Institutions Sign Off on Draft Changes to Anti-Dumping Legislation' (2017) Bridges Volume 21 - Number 3.

⁴⁸See generally Article 2 of Regulation (EU) 2016/1036.

⁴⁹See generally Regulation (EU) 2016/1036.

⁵⁰The Commission is now solely responsible for decision making in anti-dumping matters which was not always the case as it used to share some of this responsibility with the European Council see Cornelis J & Graafsma F 'Commission Proposal for Certain Targeted Amendments to the Basic Anti-Dumping and Anti-Subsidy

It is also important to highlight that Regulation (EU) 2017/2321 and Regulation (EU) 2018/825 have amended Regulation (EU) 2016/1036. The former significantly changes the methodology for calculating anti-dumping duties.⁵¹ On the other hand, the latter,

‘aims to modernise EU’s anti-dumping and anti-subsidy rules to reflect current global economic challenges and (ii) create an expedited, simple framework for anti-dumping and anti-subsidy investigations.’⁵²

The enactment of Regulation (EU) 2018/825 is not shocking even though it was enacted barely six months after Regulation (EU) 2017/2321.⁵³ This is because in September 2017, President of the European Commission, Jean-Claude Juncker was quoted as follows: ‘let me say once and for all: we are not naïve free traders. Europe must always defend its strategic interests.’⁵⁴ This gave the impression that the EU is now more ‘focused on ensuring that international trade is fair, undistorted and balanced’.⁵⁵ It is submitted that the continual EU’s amendments of anti-dumping legislation is a positive welcome. This is because there is always a need to regulate the changing aspects of cross border trade.⁵⁶

The next section discusses institutions involved in anti-dumping investigations.

4.3.2 Institutional Framework

Previously in Section 4.2, it was held that the European Commission is the executive branch of the union.⁵⁷ It is also the key institution in anti-dumping matters. The European Commission promotes

Regulations’ (2017) available at <https://thelawreviews.co.uk/edition/the-international-trade-law-review-edition-3/1148535/european-union> (accessed 15 October 2017).

⁵¹Sidley ‘European Union Introduces Additional Reforms to Anti-Dumping and Anti-Subsidy Rules’ (2018) available at <https://www.lexology.com/library/detail.aspx?g=b81d240c-288b-4c82-a210-fd2d8ef59595> (accessed 13 October 2018).

⁵²Sidley ‘European Union Introduces Additional Reforms to Anti-Dumping and Anti-Subsidy Rules’ (2018) available at <https://www.lexology.com/library/detail.aspx?g=b81d240c-288b-4c82-a210-fd2d8ef59595> (accessed 13 October 2018).

⁵³Sidley ‘European Union Introduces Additional Reforms to Anti-Dumping and Anti-Subsidy Rules’ (2018) available at <https://www.lexology.com/library/detail.aspx?g=b81d240c-288b-4c82-a210-fd2d8ef59595> (accessed 13 October 2018).

⁵⁴European Commission - Press release *The State of the Union 2017: Catching the wind in our sails* (2017).

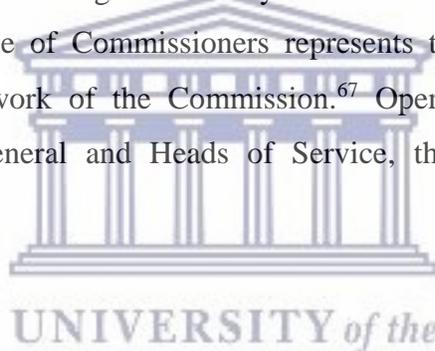
⁵⁵Ruessmann L& Beck J ‘Trade & Customs: European Union’ (2018) available at <https://gettingthedealthrough.com/area/51/jurisdiction/10/trade-customs-european-union/> accessed 13 October 2018).

⁵⁶Singh G *Subsidies in the Context of the WTO's Free Trade System: A Legal and Economic Analysis* (2017) 220.

⁵⁷Saurombe A ‘The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis’ (2013) 7 *Law Democracy & Development* 467.

the general interest of the EU and makes appropriate decisions to that end.⁵⁸ It also ensures enforcement of the Treaties and ‘oversees the application of Union law under the control of the Court of Justice’.⁵⁹ In addition, it ‘exercises coordinating, executive and management functions, executes the budget and manages programmes’.⁶⁰ There are twenty-eight Members of the Commission, one from each Member State.⁶¹ This was not always the case, previously, the European Commission comprised of Member representatives from mostly bigger states.⁶² It had a composition of twenty members, two from each bigger states and one from each smaller states.⁶³ This was the case until May 2004 when the Treaty of Nice was signed.⁶⁴

The governance system of the European Commission is unique.⁶⁵ There is a clear division of political and administrative oversight structures as well as clear defined lines of responsibility and financial accountability.⁶⁶ It can be argued that the clear definitions of responsibilities help to promote predictability through avoiding unnecessary misunderstandings caused by blurred lines of responsibilities. The College of Commissioners represents the head of this style and are responsible for the political work of the Commission.⁶⁷ Operational implementation is the responsibility of Directors General and Heads of Service, thus leading the administrative structure.⁶⁸



⁵⁸European Commission *Communication to the Commission from President Juncker and First Vice-President Timmermans: Governance in the European Commission* (2017) 3.

⁵⁹European Commission *Communication to the Commission from President Juncker and First Vice-President Timmermans: Governance in the European Commission* (2017) 3.

⁶⁰European Commission *Communication to the Commission from President Juncker and First Vice-President Timmermans: Governance in the European Commission* (2017) 3.

⁶¹See generally Article 245 of the TFEU.

⁶²See generally Article 294 of the TFEU. The bigger states were UK, Spain, Italy, Germany and France.

⁶³See generally Article 294 of the TFEU.

⁶⁴Praha SP ‘Decision-making process after the Treaty of Nice’ (2002) available at <https://www.epravo.cz/top/clanky/decision-making-process-after-the-treaty-of-nice-20271.html> (accessed 10 September 2017).

⁶⁵European Commission *Communication to the Commission from President Juncker and First Vice-President Timmermans: Governance in the European Commission* (2017) 3.

⁶⁶European Commission *Communication to the Commission from President Juncker and First Vice-President Timmermans: Governance in the European Commission* (2017) 3.

⁶⁷European Commission ‘Political Work’ available at https://ec.europa.eu/info/about-european-commission/organisational-structure/political-leadership_en (accessed 10 September 2017).

⁶⁸European Commission ‘Political Work’ available at https://ec.europa.eu/info/about-european-commission/organisational-structure/political-leadership_en (accessed 10 September 2017).

‘As a result, the term ‘European Commission’ is used to denote both the institution – the College - formed by the Members of the Commission, and its administration managed by the Directors-General of its departments (and heads of other administrative structures such as services, offices and executive agencies)’.

A President who is indirectly elected by the European Parliament via the ‘Spitzenkandidat’ (leading candidate) process heads the European Commission.⁶⁹ The election is made after the European Commission receives proposals from the European Council.⁷⁰ The leading candidate process’ was adopted in 2014 as a way of creating at least a veneer of democracy, and to push back against critics accusing Brussels of being controlled by unelected bureaucrats’.⁷¹ Currently the sitting President is Jean-Claude Juncker who took office on 1 November 2014.⁷² The President makes the final decision on the roles of Commissioners and their policy areas.⁷³ He is responsible for changing incompetent or reshuffling Commissioners during their office terms.⁷⁴ He can also request a Commissioner to resign provided there are sufficient reasons for him to do so.⁷⁵ The relevant Commissioner for purposes of this study is the one responsible for trade who currently is Cecilia Malmström.⁷⁶

The College is responsible for establishing the organisational structure of the Commission.⁷⁷ This is composed of a number of Directorates-General and equivalent departments making a single administrative service.⁷⁸ Different Directorate-Generals represent different policy areas, relevant to this study, the Directorate-General of Trade deals with trade policies only.⁷⁹ Currently the

⁶⁹Herszenhorn DM & Baume M ‘Commission’s Spitzenkandidat process at risk: EU leaders clash over rulebook for the 2019 presidential race’ available at <https://www.politico.eu/article/spitzenkandidat-jean-claude-juncker-race-with-no-rules-eu-leaders-brace-for-clash-over-2019-elections/> (accessed 14 October 2018) see also Article 17 of the Treaty on European Union, as amended by the Treaty of Lisbon.

⁷⁰EU Affairs ‘How the president of the European Commission gets elected’ available at <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20140711STO52254/how-the-president-of-the-european-commission-gets-elected> (accessed 15 November 2017).

⁷¹Herszenhorn DM & Baume M ‘Commission’s Spitzenkandidat process at risk: EU leaders clash over rulebook for the 2019 presidential race’ available at <https://www.politico.eu/article/spitzenkandidat-jean-claude-juncker-race-with-no-rules-eu-leaders-brace-for-clash-over-2019-elections/> (accessed 14 October 2018).

⁷²His term: began in November 2014 and ends in October 2019 see European Union ‘EU Presidents – who does what?’ available at https://europa.eu/european-union/about-eu/presidents_en#european-commission-president-%E2%80%93-jean-claude-juncker (accessed 13 October 2018).

⁷³Sabathil G, Joos K & Kessler B *The European Commission: An Essential Guide to the Institution, the Procedures and the Policies* (2008) 47.

⁷⁴Muntean A M ‘The European Parliament’s Political Legitimacy and the Commission’s “Misleading Management”: Towards a “Parliamentarian” European Union?’ (2000) 4(4) *European Integration online Papers* available at <http://eiop.or.at/eiop/pdf/2000-005.pdf> (accessed 22 April 2018).

⁷⁵See generally Stamenova S *The Latest Eu-Commission President Elections and the Role of the European Parliament* (2018).

⁷⁶European Commission ‘Cecilia Malmström’s team’ available at https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/team_en (accessed 15 November 2017).

⁷⁷Hix S & Høyland B *The political system of the European Union* 3ed (2011) 36 (hereafter Hix S & Høyland B (2011)).

⁷⁸Hix S & Høyland B (2011) 36.

⁷⁹Mandelson P & European Commissioner for Trade *Handbook for Trade Sustainability Impact Assessment* (2006) 6-61.

Director General of the Directorate-General of Trade is Jean-Luc Demarty with anti-dumping falling under the responsibility of the Deputy Director General Sandra Gallina.⁸⁰

The Trade Directorate is responsible for all anti-dumping investigations that are conducted by the EU.⁸¹ It controls all substantive elements in a unitary system such as dumping, injury, causation and public interest.⁸² Thus, the European Commission has the authority to initiate and terminate anti-dumping investigations, as well as taking measures where possible.⁸³ These measures include imposition of anti-dumping duties to offset injurious dumping and accepting undertakings.⁸⁴ The European Commission can only initiate anti-dumping investigation without a written application where it has enough evidence of dumping, injury and causality.⁸⁵ It also deals with all administration issues in anti-dumping matters.⁸⁶

4.4 SUBSTANTIVE PROCEDURES

As South Africa in Chapter 3, the EU has Regulation (EU) 2016/1036, which contains the substantive elements that the Commission should adhere to when conducting investigations. As previously stated, the current legislation has changed the decision process when compared to its predecessors. The main improvement of Regulation (EU) 2016/1036 has to do with decision-making, which is now the sole responsibility of the Commission.⁸⁷ The Regulation applies to products which are dumped by non- EU countries.⁸⁸ The most notable changes are contained in Regulation (EU) 2018/825, which amends Regulation (EU) 2016/1036. The amendment

⁸⁰European Commission ‘Directorate-General Trade’ available at https://ec.europa.eu/info/departments/trade_en (accessed 15 October 2018).

⁸¹European Commission ‘Directorate-General Trade’ available at https://ec.europa.eu/info/departments/trade_en (accessed 15 October 2018).

⁸²Kotsiubka V *Public Interest Consideration in Domestic and International Antidumping Disciplines* (unpublished Master of International Law and Economics ,World Trade Institute 2011) 23.

⁸³European Commission ‘Anti-dumping’ available at <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping> (accessed 15 November 2017).

⁸⁴European Commission ‘Anti-dumping’ available at <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping> (accessed 15 November 2017).

⁸⁵Article 5 .6 of Regulation (EU) 2016/1036.

⁸⁶See generally Steele K (ed.) *Antidumping Under the WTO: A Comparative Review* (1996) see also Vermulst E ‘Adopting and Implementing Anti-Dumping Laws – Some Suggestions for Developing Countries (1997) 31 (2) *Journal of World Trade* 5.

⁸⁷Cornelis J & Graafsma F ‘Commission Proposal for Certain Targeted Amendments to the Basic Anti-Dumping and Anti-Subsidy Regulations’ (2017) available at <https://thelawreviews.co.uk/edition/the-international-trade-law-review-edition-3/1148535/european-union> (accessed 15 October 2017).

⁸⁸See full title of Regulation (EU) 2016/1036.

modernises anti-dumping rules, making it relent to the EU as it is modelled on efficiently defending EU industries from unfair trade practices.⁸⁹

Regulation (EU) 2016/1036 is modelled on the requirements of the WTO regulations, which are drawn from the ADA.⁹⁰ This leads to the conclusion that since ADA forms the basis for the EU regulations, there are generally three conditions to fulfil for dumping to exist. For example, the products under investigation should have been dumped and the dumping should have caused or threaten to cause material injury to the EU industry.⁹¹ There must also be a causal link between dumping and the injury experience by the industry.⁹²

Apart from the three conditions, the EU has an additional requirement to consider before imposing an anti-dumping measure. The Commission must also establish that the imposition of measures is in the 'Union's interest'.⁹³ As observed in Chapter 2, the WTO prescribes minimum requirements that Members should follow in anti-dumping investigations. However, the WTO does not prohibit Members from adding their own requirements, but they should be compliant with WTO principle.⁹⁴ The subsequent section discusses the substantive procedures that the Commission must take into consideration when determining dumping by the non-EU countries.

4.4.1 Determination of dumping

Normal Value

The WTO Members must investigate and come up with substantial evidence to prove that dumping of a certain product occurred before they can impose anti-dumping measures on the dumped products.⁹⁵ This investigation must also take place in every trade integration union, especially in

⁸⁹European Commission 'EU trade defence: stronger and more effective rules enter into force' (2018) available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1859> (accessed 15 October 2018).

⁹⁰Section 2 of Regulation (EU) 2016/1036.

⁹¹See generally 2.4 WTO Treatment of Dumping.

⁹²Nedumpara J *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (2016) 224 see also Lowenfeld AF *International Economic Law* (2008) 287.

⁹³Finger JM 'Reform' in Finger JM & Artis NT (eds) *Antidumping: How it Works and who Gets Hurt* (1993) 71.

⁹⁴See generally 2.4 WTO Treatment of Dumping.

⁹⁵Venkatesh M. *A Handbook on Anti-dumping* (2001) 12.

the EU as it is a member of the WTO in own right.⁹⁶ In the EU, dumping takes place when a product is sold in the EU at a price below what the producer country sells it in its country.⁹⁷

Regulation (EU) 2016/1036 defines dumping to be a situation where a ‘product’s export price to the Union is less than a comparable price for a like product, in the ordinary course of trade, as established for the exporting country’.⁹⁸ This means dumping takes place when the normal value is less than the export price to the Union.⁹⁹ Normal value refers to the price paid or payable, on the dumped product when it is being sold in the exporting country to independent consumers in the ordinary course of trade.¹⁰⁰ This calculation of normal value is regarded as the standard method where there are ‘like products’ in the exporting country.¹⁰¹

In *Goldstar Co. Ltd v Council of the European Communities*, the court held that the term ordinary course of trade is a ‘concept which relates to the nature of sales themselves’.¹⁰² Its formulation aims to disregard sales whose conditions do not correspond to the ordinary course of trade, particularly where prices are below production costs or where there is compensatory arrangement.¹⁰³ Sales can be in the ordinary course of trade if value sales of the ‘like product’ constitute more than 5 per cent of the sales volume of the product under investigation.¹⁰⁴ If sales are less than 5 per cent they can be considered, if prices charged are considered representative for the market concerned.¹⁰⁵ In addition, sales below 5 per cent can be sufficient if they allow for comparison.¹⁰⁶

Selling products at a price lower than the normal value may seem as if the lowering of prices is beneficial to consumers, but it causes injury to the producers of like products in the EU.¹⁰⁷ As

⁹⁶WTO ‘Member Information: The European Union and the WTO’ available at https://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm (accessed 12 October 2018).

⁹⁷European Commission ‘Investigations’ (2013) 1.

⁹⁸Article 1.2 of Regulation (EU) 2016/1036.

⁹⁹Article 1.2 of Regulation (EU) 2016/1036.

¹⁰⁰Article 2.1 of Regulation (EU) 2016/1036.

¹⁰¹Moens G & Trone J *Commercial Law of the European Union* (2010) 160 also see discussion in Chapter 2 of what constitutes like products at 2.4.2.1 ‘Like product in the importing country’.

¹⁰²*Goldstar Co. Ltd v Council of the European Communities* Case C-105/90 para 2.

¹⁰³*Goldstar Co. Ltd v Council of the European Communities* Case C-105/90 para 2.

¹⁰⁴Article 2.2 of Regulation (EU) 2016/1036.

¹⁰⁵Article 2.2 of Regulation (EU) 2016/1036.

¹⁰⁶Article 2.2 of Regulation (EU) 2016/1036.

¹⁰⁷See generally 2.3.1 Types of Dumping also see generally *Wood pulp, Osakeyhtiö and ors v Commission of the European Communities*, Final judgment, 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85,

highlighted in Chapter 3, in 2016, South African poultry industry was expecting job losses as the local producers failed to fairly compete with dumped imports.¹⁰⁸ As discussed in Chapter 2, most firms that dump products in export markets do so in order to drive out other players in the same market.¹⁰⁹ Although this may be the case, the WTO does not need governments to prove the type of dumping taking place because any type of dumping will suffice.¹¹⁰ After driving out competitors, either the remaining firms will enjoy monopoly power or they will gain a higher market share.¹¹¹ When firms gain greater market share and/or monopoly power, the company can then start to increase prices and gain high profits.¹¹²

It is important for every country, union, or integration to lay down clear rules in its anti-dumping regulations in terms of calculation of normal value. This helps in investigations, as consistency is encouraged. It also minimises cases of discrimination by investigators, as they have adhere to certain stipulated rules.

When calculating normal value, it is desirable to indicate the method used in calculating such and the methods used to calculate sub elements such as selling, general and administrative costs and the profit margin that should be included in such value.¹¹³ Regulation (EU) 2016/1036 explains these issues in details as discussed below. It provides alternative methods to use when sales are not considered to be in the ordinary course of trade. The alternative is provided for scenarios when sales of ‘like products’ are insufficient or where comparison is not possible because of a ‘particular market situation’.¹¹⁴ In these circumstances, one should calculate normal value based on the cost

129/85, (1988) ECR 5193, ILEC 035 (CJEU 1988), 27th September 1988, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ].

¹⁰⁸ See generally 3.2 Overview.

¹⁰⁹ See generally 2.3.1 Types of Dumping.

¹¹⁰ See generally 2.3.1 Types of Dumping.

¹¹¹ This type of dumping is called predatory dumping. It is the most common type of dumping and has dire consequences to the domestic industry of the country products are being dumped see Howse R *The World Trading System: Administered protection* (1998) 126.

¹¹² This proves that the initial lowering of prices by firms who will be seeking to drive out competitors is not beneficial to consumers, but it is facade used to monopolise the market; see generally 2.3.1 Types of Dumping.

¹¹³ Section 5 of Regulation (EU) 2016/1036.

¹¹⁴ The wording particular market situation is deemed to exist ‘when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements’ ;see Article 2 (3) Regulation (EU) 2016/1036.

of production in the country of origin inclusive of all related costs because of export prices, in an appropriate third country in the ordinary course of trade, provided prices are representative.¹¹⁵

Sales in the appropriate third country may be disregarded in the calculation of normal value if they are below unit production costs.¹¹⁶ In addition, there is also need to prove that the sales were made within an extended period in significant quantities and recovery of costs cannot be achieved within a reasonable period because of their prices.¹¹⁷ An ‘extended period’ normally refers to one year, but it cannot be less than six months.¹¹⁸ The European Commission should draw evidence of costs for the party that is under investigation from records kept by the party, only if they reasonably reflect related costs of production and sale.¹¹⁹ The keeping of these records should be in accordance with the generally accepted accounting principles of the country concerned.¹²⁰ This provision is similar to Article 2.2.1.1 of the ADA. In *EU — Biodiesel* the panel held that:

‘Article 2.2.1.1 calls for an assessment of whether the costs set out in a producer's records correspond – within acceptable limits – in an accurate and reliable manner, to all the actual costs incurred by the particular producer or exporter for the product under consideration’.¹²¹

In the EU, if these conditions were not met, costs will be adjusted or calculated using costs of other producers belonging to the same country, and if not available, calculations will be based on evidence submitted on the proper allocation of costs, if the method has been used historically.¹²² If such a method is absent, an annual turnover will get preference but it will not be used when it is already used in productions costs.¹²³

Besides the method above, Regulation (EU) 2017/2321 amended Regulation (EU) 2016/1036 to include a new methodology of calculation where there are significant distortions. These are:

¹¹⁵Article 2.3 of Regulation (EU) 2016/1036.

¹¹⁶Article 2.4 of Regulation (EU) 2016/1036.

¹¹⁷Sales are regarded significant when it is established that ‘the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20 % of sales being used to determine normal value’ see Article 2.4 of Regulation (EU) 2016/1036.

¹¹⁸Article 2.4 of Regulation (EU) 2016/1036.

¹¹⁹Article 2.5 of Regulation (EU) 2016/1036.

¹²⁰Article 2.5 of Regulation (EU) 2016/1036.

¹²¹*European Union – Anti-Dumping Measures on Biodiesel from Argentina* WT/DS473/R para 7.247 (hereafter Panel Report *EU — Biodiesel*).

¹²²Article 2.5 of Regulation (EU) 2016/1036.

¹²³Article 2.5 of Regulation (EU) 2016/1036.

‘distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention’.¹²⁴

When evaluating the existence of significant distortions, regard shall be had, among other things, to the potential impact of one or more of elements listed in Regulation (EU) 2017/2321.¹²⁵

If significant distortions exist, ‘normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks, subject to the following rules’.¹²⁶ In the construction, the Commission may use these sources:

‘— corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available; where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection; — if it considers appropriate, undistorted international prices, costs, or benchmarks; or — domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence, including in the framework of the provisions on interested parties in point’.¹²⁷

The study submits that the use of the word may indicate that list is non-exhaustive; as such, the Commission may use other sources not listed in the regulation. Van Bael and Bellis have observed that this new provision largely places ‘the burden of proof on the exporting producers, who must establish that their domestic prices and costs are undistorted’.¹²⁸ This study agrees with this observation because the regulation states that domestic costs may be used ‘only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate

¹²⁴Article 2.6a (b) of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹²⁵The elements are ‘the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; — state presence in firms allowing the state to interfere with respect to prices or costs; — public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; — the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; — wage costs being distorted; — access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state’; see Article 6a.b of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹²⁶Article 2.6a of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹²⁷Article 2.6a of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹²⁸Van Bael & Bellis *The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules* (2017) 4.

evidence'.¹²⁹ The study further observes that the Commission may know of such undistorted costs if they receive evidence from exporting producers. This practically shifts the burden of proof.

The above observations have led Van Bael and Bellis to aver that, although EU has formally ended for the calculation of normal value, based on the difference between market and non-market economies, there is not much difference.¹³⁰ It appears that the added provision of 'significant distortions' is 'designed to target China and other countries which the EU previously qualified as non-market economies'.¹³¹ Tietje and Sacher further argue that this new methodology violates Articles 2.2.1.1 and 2.2 of the ADA as well as Article VI.1 (b) (ii) of GATT.¹³² In *EU — Biodiesel*, Argentina argued that the EU had acted inconsistently with Article 2.2.1.1 and, because of this inconsistency, with Article 2.2 of the ADA and with Article VI.1 (b) (ii) of GATT.¹³³ This is because in its determination of the costs of the main raw material in the production of biodiesel, soybean oil and soybeans, EU had failed to calculate 'cost of production of the product under investigation on the basis of the records kept by the producers'.¹³⁴

The panel held that the reason given by EU that the domestic prices of the main raw material used by biodiesel producers in Argentina were 'artificially lower than the international prices due to the distortion created by the Argentine export tax system' was not legally sufficient under Article 2.2.1.1 of the ADA.¹³⁵ Therefore, the European Commission erred in concluding that the producers' records in Argentina 'did not reasonably reflect the costs associated with the production and sale of biodiesel'.¹³⁶ The study submits that it also supports the argument by Tietje and Sacher who opines that the new methodology violates Articles 2.2.1.1 and 2.2 of the ADA. This is because of the decision of the panel in *EU — Biodiesel*, the provision of Article 2.6a of Regulation (EU)

¹²⁹Article 2.6a of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹³⁰Van Bael & Bellis *The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules* (2017) 5.

¹³¹Van Bael & Bellis *The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules* (2017) 5.

¹³²Tietje C & Sacher V 'The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?' (2018) *European Yearbook of International Economic Law - Special Issue on "The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges"* 17.

¹³³Panel Report *EU — Biodiesel* para 7.185.

¹³⁴Panel Report *EU — Biodiesel* para 7.185.

¹³⁵Panel Report *EU — Biodiesel* para 7.248.

¹³⁶Panel Report *EU — Biodiesel* para 7.248.

2016/1036 as amended is similar to what the panel said was not legally sufficient in accordance with Article 2.2.1.1.

Before Regulation (EU) 2016/1036 replaced Council Regulation (EC) No 1225/2009, EU had categorised China as a non-market economy.¹³⁷ This placed a burden on exporters to prove that they operated under set market conditions, and if not proven the European Commission used an ‘analogue country methodology on the basis of the price or constructed normal value in a market economy third country’.¹³⁸ The consequences of this were exaggerated dumping margins and higher anti-dumping duties.¹³⁹

Regulation (EU) 2016/1036 realises that China’s protocol of accession to the WTO expired in 2016 December, which means it cannot be classified non-market economy.¹⁴⁰ However, the EU laws continue to violate the WTO laws as far as China is concerned because the transitional provisions state that pre-existing measures stay in force at least until first review, in spite of the changes in legislation.¹⁴¹ In Chapter 3, it was suggested that South Africa can no longer classify China as non-market economy as doing so violates the WTO rules.¹⁴²

In the case of imports from Azerbaijan, Belarus, Kazakhstan, North Korea, Turkmenistan Uzbekistan, which are not Members of the WTO, at the date of initiation of the investigation, a different set of rules apply when calculating normal value.¹⁴³ The distinction means that different rules apply for WTO Member and non-Members. The Commission should determine normal value:

¹³⁷Noël S & Zhou W ‘Replacing the Non-Market Economy Methodology: Is the European Union’s Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?’ (2016) 11(11) *Global Trade and Customs Law* 559.

¹³⁸Noël S & Zhou W ‘Replacing the Non-Market Economy Methodology: Is the European Union’s Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?’ (2016) 11(11) *Global Trade and Customs Law* 559.

¹³⁹Stoler AL ‘Treatment of China as a Non-Market Economy: Implications for Antidumping and Countervailing Measures and Impact on Chinese Company Operations in the WTO Framework’ (2003) Presentation to Forum on WTO System & Protectionism: Challenges China Faces After WTO Accession Shanghai WTO Affairs Consultation Centre December 1-2, 2003.

¹⁴⁰ Article 2.6a of Regulation (EU) 2016/1036.

¹⁴¹Section 9 of Regulation (EU) 2017/2321; see also Tietje C & Sacher V ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ (2018) *European Yearbook of International Economic Law - Special Issue on "The Future of Trade Defence Instruments: Global Policy Trends and Legal Challenges"* 17

¹⁴²See generally 3.4.1 Determination of dumping: *Normal Value*

¹⁴³Article 2.7 of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

‘on the basis of the price or constructed value in an appropriate representative country, or the price from such a third country to other countries, including the Union, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin’.¹⁴⁴

When selecting an appropriate representative country, the Commission should do it in a reasonable manner, and due account should be ‘taken of any reliable information made available at the time of selection, and in particular of cooperation by at least one exporter and producer in that country.’¹⁴⁵ If there is a country that qualifies as an appropriate representative country, ‘preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection’, as well as account of time limits.¹⁴⁶ If permissible, an ‘appropriate representative country which is subject to the same investigation [will] be used’.¹⁴⁷ After its initiation of the country envisaged, the Commission should promptly inform parties to the investigation and give 10 days for the concerned parties to comment.¹⁴⁸

Export Price

When it comes to the determination of export price, the EU explicitly defines export price. It defines export price as the price that is ‘actually paid or payable for the product when sold for export from the exporting country to the Union’.¹⁴⁹ This definition enables the European Commission to arrive at the correct costs, without including unnecessary adjustments, which should be excluded in the standard calculation of export price. However, the actual definition has shortfalls, as it does not take into consideration taxes applied to the products, which must be adjusted. The export price can be found in documents such as individual invoiced transactions, offers, salesmen reports, or statistics for imports from the country concerned.¹⁵⁰ The export price should be adjusted to ex-factory level prices to allow fair comparison.¹⁵¹

¹⁴⁴Article 2.7 of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹⁴⁵Article 2.7 of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹⁴⁶Article 2.7 of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹⁴⁷Article 2.7 of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹⁴⁸Article 2.7 of Regulation (EU) 2016/1036 as amended by Regulation (EU) 2017/2321.

¹⁴⁹Article 2.8 of Regulation (EU) 2016/1036.

¹⁵⁰European Commission *Guide on How to Draft an Anti-dumping Complaint* (2016) 12.

¹⁵¹Molyneux CG ‘Establishing the Rules of the Game: Domestic Structures and Unfair Trade Instruments’ in Snyder (ed) *Regional and Global Regulation of International Trade* (2002) Hart Publishing: North America 123

In cases where there are compensatory agreements or no export prices, or unreliable export prices, the construction method shall determine export price.¹⁵² The constructed price will be the amount which products are charged to an independent buyer when they are first resold or the price at which they were resold in the same condition in which they were imported.¹⁵³ In these instances, it is important to consider proper adjustments of taxes and all costs such as transportation costs in order to come up with an accurate export price at the Community frontier level.¹⁵⁴ All costs that were borne by the importer and paid by a party inside or outside EU such as transport, handling, loading and other costs must accordingly be adjusted.¹⁵⁵

Fair Comparison

After determination of both export price and normal value, the European Commission has to make a fair comparison of the two amounts.¹⁵⁶ Thus, determination of export price and normal value should have been done using the same method to allow comparison, which is what the WTO also requires. A fair comparison of export price and normal value should be done by taking into account factors which affect comparability, for sales made at the same level of trade, as closely as possible, and at the same time.¹⁵⁷ In order to have a fair comparison of the two, they must have been calculated using the same method and the commonly used method is the ex-factory prices method.¹⁵⁸

If values are not comparable, factors that are likely to affect prices should be taken into consideration and adjusted accordingly.¹⁵⁹ Adjustments can be made on the following; physical characteristics, import charges and indirect taxes, discounts, rebates and quantities, level of trade, transport, insurance, handling, loading and ancillary costs, packing, credit, after-sales costs and currency conversions.¹⁶⁰ Adjustments can also be made on all factors that affect prices that were

¹⁵²Article 2.9 of Regulation (EU) 2016/1036.

¹⁵³Article 2.9 of Regulation (EU) 2016/1036.

¹⁵⁴Article 2.9 of Regulation (EU) 2016/1036.

¹⁵⁵Article 2.9 of Regulation (EU) 2016/1036.

¹⁵⁶Article 2.10 of Regulation (EU) 2016/1036.

¹⁵⁷Article 2.10 of Regulation (EU) 2016/1036.

¹⁵⁸Lestrade E 'Market Protection in Europe and Anti-Dumping Law' (2007) 4.

¹⁵⁹Article 2.10 of Regulation (EU) 2016/1036.

¹⁶⁰See generally Article 2.10 (a-j) of Regulation (EU) 2016/1036.

not mentioned in the regulation if they affect the price comparability and if customers are paying different prices on the domestic market because of the difference in such factors.¹⁶¹

Dumping Margin

After the comparison is complete, the European Commission has to determine the margin of dumping.¹⁶² Dumping margin indicates the magnitude at which the dumping is taking place. By definition, dumping margin is the difference between the export price and the normal value.¹⁶³ In cases where dumping margins differ, calculation may be done using an average price basis called a weighted average dumping margin.¹⁶⁴ If the complaint concerns more than one country, the dumping margin must be calculated for all countries concerned individually.¹⁶⁵ The calculation of dumping margin is subject to the provisions of fair comparison; thus, calculations of dumping should be done with the method of comparison used in mind.

Normally dumping margins should be established based on a comparison of a weighted average-to-weighted average of normal value and export prices, or by a comparison of the individual amounts on a transaction-to-transaction basis.¹⁶⁶ However, the standard calculations may be disregarded if export prices patterns from different regions purchasers or period are significantly different, a weighted average normal value will be compared to prices of all individual export transactions.¹⁶⁷ This method should also be used if the first two methods of calculating dumping margin do not reflect the full degree of dumping taking place.¹⁶⁸ This is correct insofar as the third method is concerned. As noted in Chapter 2, the panel in *US — Washing Machines* held that the ‘phrase “individual export transactions” refers to the transactions that fall within the relevant pricing pattern, a more limited universe than the export transactions covered when applying the symmetrical comparison methodologies foreseen in the first sentence of Article 2.4.2’.¹⁶⁹

¹⁶¹Article 2.10 (k) of Regulation (EU) 2016/1036.

¹⁶²Article 2.11 of Regulation (EU) 2016/1036.

¹⁶³Article 2.12 of Regulation (EU) 2016/1036.

¹⁶⁴Article 2.11 of Regulation (EU) 2016/1036.

¹⁶⁵European Commission *Guide on How to Draft an Anti-dumping Complaint* (2016) 13.

¹⁶⁶Article 2.11 of Regulation (EU) 2016/1036.

¹⁶⁷Article 2.11 of Regulation (EU) 2016/1036.

¹⁶⁸Article 2.11 of Regulation (EU) 2016/1036.

¹⁶⁹See generally 2.4.1.4 Determination of Dumping Margin; see also *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea* WT/DS464/R para 7.188 (hereafter Panel Report *US — Washing Machines*).

To sum up, the determination of dumping in the EU includes determining normal value and export price, making a fair comparison and calculating dumping margin

4.4.2 Determination of Injury

Anti-dumping measures will not be imposed only on evidence of dumping.¹⁷⁰ There should also be injury that has been made to the domestic industry.¹⁷¹ The European Commission handles both investigations of dumping and injury. Although the Commission allows any interested party to submit evidence of injury in support of certain anti-dumping measures, it faces allegations of complicating the process of submitting the papers.¹⁷² The definition of injury in Regulation (EU) 2016/1036 is identical to the one given in the ADA. The term injury refers to material injury, threat of material injury to the EU industry or material retardation of the creation of such an industry.¹⁷³ The unfairness of dumping is because of the injury that dumping causes or threatens to cause to the local producers of the 'like product' in the importing country.¹⁷⁴

Material Injury

When determining injury the Commission objectively examines all the positive evidence on the volume of dumped imports inclusive of the effect of dumped imports on prices of like products in the EU.¹⁷⁵ The Commission also determines consequences of imports on things such as domestic producer sales and profits, output, market share or employment among others.¹⁷⁶ Where volume of imports is concerned, the Commission gives into consideration whether or not the increase in dumped imports is absolute or relative when compared to production or consumption in the EU.¹⁷⁷

When it comes to the effect of the dumped imports on prices, the Commission considers either price undercutting or price depression.¹⁷⁸ The Commission considers whether there has been a price undercutting by the dumped imports as compared with the price of a like product in the

¹⁷⁰See generally Article 1.1 of Regulation (EU) 2016/1036.

¹⁷¹See generally Article 1.1 of Regulation (EU) 2016/1036.

¹⁷²See generally Newman S 'Observations on the European Union Anti-Dumping Regulation' 2007 *Global Trade and Customs Journal* 87-93.

¹⁷³Article 3 (1) of Regulation (EU) 2016/1036.

¹⁷⁴International Trade Centre 'Anti-dumping proceedings: Guidelines for Importers and Exporters' (1997) 6 ITC/249/3/97-II-TP.

¹⁷⁵Article 3.2 (a) of Regulation (EU) 2016/1036.

¹⁷⁶Article 3.3 of Regulation (EU) 2016/1036.

¹⁷⁷Article 3.3 of Regulation (EU) 2016/1036.

¹⁷⁸Article 3.3 of Regulation (EU) 2016/1036.

EU.¹⁷⁹ This position is similar to that of South Africa discussed in Chapter 3.¹⁸⁰ Consideration will also be made where there was an intention to depress prices or an intention to prevent price increases.¹⁸¹ Most importantly decisive guidance is not necessarily based on one or more of these factors.¹⁸²

In case *2016/C 62/07 concerning imports of certain lightweight thermal paper originating in South Korea*, evidence was produced that imports under investigation had increased overall in absolute terms and their market share.¹⁸³ *Prima facie* evidence given by the complainant showed that the volume and the prices of the investigated product, among other consequences had a negative impact in the EU industry affecting quantities sold, level of prices charged and the market share of the EU.¹⁸⁴ This adversely affected the overall performance, ‘financial situation and the employment situation of the Union industry’.¹⁸⁵

In case *2014/C 461/16 concerning imports of silico-manganese from India*, enough evidence was if the imports have increased in absolute terms and the product had gained market share.¹⁸⁶ The quantity of the product increased and the price being charged had a negative effect on the volumes being sold by the EU industries causing a decrease in the performance, financial situation and employment in the EU.¹⁸⁷ The analysis of injury in these cases indicates that the Commission is not reliant on one or more factors to determine injury; instead, it considers all facts collectively.

Hindley argues that the Commission relies mostly on price undercutting when it determines injury.¹⁸⁸ In his argument, he avers that in a typical investigation, the Commission attempts to

¹⁷⁹Article 3.3 of Regulation (EU) 2016/1036.

¹⁸⁰See generally 3.3.2 Determination of Material Injury

¹⁸¹Article 3.3 of Regulation (EU) 2016/1036.

¹⁸²Article 3.3 of Regulation (EU) 2016/1036.

¹⁸³European Commission 2016/C 62/07: Notice of initiation of an anti-dumping proceeding concerning imports of certain lightweight thermal paper originating in South Korea.

¹⁸⁴European Commission 2016/C 62/07: Notice of initiation of an anti-dumping proceeding concerning imports of certain lightweight thermal paper originating in South Korea.

¹⁸⁵European Commission 2016/C 62/07: Notice of initiation of an anti-dumping proceeding concerning imports of certain lightweight thermal paper originating in South Korea.

¹⁸⁶European Commission 2014/C 461/16: Notice of initiation of an anti-dumping proceeding concerning imports of silico-manganese originating in India.

¹⁸⁷European Commission 2014/C 461/16: Notice of initiation of an anti-dumping proceeding concerning imports of silico-manganese originating in India

¹⁸⁸ Hindley B ‘Cause-Of-Injury Analysis in European Antidumping Actions’ (2009) *Ecipe Working Paper* • No. 05/2009 3 (hereafter Hindley B (2009)).

show that injury facing the EU industry and the onset of dumping and price undercutting are simultaneous.¹⁸⁹ This is problematic because the notion of price undercutting as used by the European Commission implies that identical products sell at different prices in the same market which is possible, ‘but it is not a state of affairs to be merely assumed’.¹⁹⁰ Thus, despite the Regulation stating that not one or more factors should be relied on in determining injury, the Commission may not be strictly adhering to this.

In a case in which the product under investigation is from two different countries, their effects will be assessed simultaneously only if their dumping margin is more than prescribed quantities or the volume of imports acceptable.¹⁹¹ In addition,

‘a cumulative assessment of the effects of the imports [should be] appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Union product’.¹⁹²

Regulation (EU) 2016/1036 provides factors, which the Commission should examine in its assessment of injury caused by dumped imports.¹⁹³ These indices and factors are economic and have a bearing on the state of the industry.¹⁹⁴ In *EC-Bed Linen*, the panel held that evaluation of all factors is obligatory.¹⁹⁵ This list is not exhaustive but importantly the study commends EU in that the Commission is required to consider factors that an ‘industry is still in the process of recovering from the effects of past dumping or subsidisation’.¹⁹⁶ This correlates with the argument given in Chapter 2 that anti-dumping measures seek to level the harm caused by dumped imports

¹⁸⁹Hindley B (2009) 3.

¹⁹⁰Hindley B (2009)4.

¹⁹¹Article 3.4 (a) of Regulation (EU) 2016/1036.

¹⁹²Article 3.4 (b) of Regulation (EU) 2016/1036.

¹⁹³Article 3.5 of Regulation (EU) 2016/1036.

¹⁹⁴Article 3.5 of Regulation (EU) 2016/1036 states that:

The examination of the impact of the dumped imports on the Union industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation; the magnitude of the actual margin of dumping; actual and potential decline in sales, profits, output, market share, productivity, return on investments and utilisation of capacity; factors affecting Union prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

¹⁹⁵European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India WT/DS141/R para 16 (hereafter Panel Report *EC-Bed Linen*).

¹⁹⁶Article 3.5 of Regulation (EU) 2016/1036.

and should stay in place until the time the industry has recovered from injury.¹⁹⁷ One must also note that in reaching its decision, the Commission could use any one or more of the factors.¹⁹⁸

Threat of material injury

Besides material injury, injury also means threat of material injury. A threat of injury occurs when actual material injury is not present but where factors listed in the Regulation indicate that dumped have a potential to injure the domestic industry.¹⁹⁹ A threat of material injury should be supported by evidence that shows that there was an intention to cause injury and not just an allegation.²⁰⁰ A determination of threat of material injury may be based on different factors amongst them whether there is likelihood of increased imports due to an increase in dumped imports, or

‘whether there is sufficient freely disposable capacity on the part of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Union, account being taken of the availability of other export markets to absorb any additional exports’.²⁰¹

Other factors to consider are that imports priced at a level that can depress price or prevent price increases of like products in the domestic market or that stocks are sufficient to cause dumping.²⁰² One of the above factors might not be sufficient to support that there is a threat of injury but the summation of the factors can lead to a conclusion that there is a threat of injury and that unless protective action is taken, material injury will occur.²⁰³ Even if the quantity of product is minimal, it can be to suffice cause material injury.²⁰⁴ The percentage at which the commission assumes that

¹⁹⁷See generally 2.3.2 Schools of thoughts on anti-dumping duties.

¹⁹⁸Article 3.5 of Regulation (EU) 2016/1036.

¹⁹⁹These factors are listed in Article 3.9 and include looking at

‘(a) a significant rate of increase of dumped imports into the Union market indicating the likelihood of substantially increased imports; (b) whether there is sufficient freely disposable capacity on the part of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the Union, account being taken of the availability of other export markets to absorb any additional exports; (c) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; (d) inventories of the product being investigated’.

²⁰⁰Article 3.9 of Regulation (EU) 2016/1036.

²⁰¹Article 3.9 (a) and (b) of Regulation (EU) 2016/1036.

²⁰²Article 3.9 of Regulation (EU) 2016/1036.

²⁰³Article 3.9 of Regulation (EU) 2016/1036.

²⁰⁴Article 5.7 of Regulation (EU) 2016/1036.

imports do not cause injury due to low volumes is when the market share is 1 per cent or below unless if the joint countries contribute 3 per cent to the Union consumption.²⁰⁵ For individual exporters, dumping margins are regarded as invalid when they are below 2 per cent.²⁰⁶

In joined cases *C-186/14 P AND C-193/14 P*, the court dismissed the allegation made by the parties that the General Court²⁰⁷ had erred in law by giving credit to the concept of ‘vulnerability’ an independent meaning and importance that the words do not have.²⁰⁸ The parties argued that the words are not mentioned in the legislation as a condition for finding a threat of injury.²⁰⁹ The appeal court dismissed the arguments stating that although the General court used the words it ‘did not regard the vulnerability of the EU industry as a condition enabling a threat of injury to be found’.²¹⁰ However, it was necessary to know the present situation of industry which allows the EU institutions to determine whether the ‘imminent increase in future dumped imports will cause material injury to the EU industry if no trade defence measure is taken’.²¹¹ Thus, evidence should show an imminent threat not just a remote possibility.²¹²

Material Retardation

The study observes that, Regulation (EU) 2016/1036 does not have a comprehensive provision on material retardation. This may be attributed to the fact that most industries in the EU are developed and material retardation is applicable to industries that cannot be established because of dumped imports.²¹³ In Chapter 3, the study opined that it is unusual that although South Africa has emerging markets, material retardation is not as researched as it can be.²¹⁴ It was suggested that under

²⁰⁵Article 5.7 of Regulation (EU) 2016/1036.

²⁰⁶Article 5.7 of Regulation (EU) 2016/1036.

²⁰⁷The General Court is a division court of the Court of Justice of the European Union (CJEU).

It ‘rules on actions for annulment brought by individuals, companies and, in some cases, EU governments. In practice, this means that this court deals mainly with competition law, State aid, trade, agriculture, trade marks’ see European Union ‘Court of Justice of the European Union (CJEU) available at https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en (accessed 15 October 2018).

²⁰⁸Judgment of 7. 4. 2016 — Joined Cases *C-186/14 P AND C-193/14 P Arcelormittal Tubular Products Ostrava and Others v Hueib Xinyegang Steel* para 21 (hereafter *Joined Cases C-186/14 P AND C-193/14 P*).

²⁰⁹Joined Cases *C-186/14 P AND C-193/14 P* para 21.

²¹⁰Joined Cases *C-186/14 P AND C-193/14 P* para 30.

²¹¹Joined Cases *C-186/14 P AND C-193/14 P* para 31.

²¹²Joined Cases *C-186/14 P AND C-193/14 P* para 31

²¹³See Article 3 of the ADA also see discussion in 2.4.2.3.3 Determination of material retardation.

²¹⁴See generally 3.4.2 Determination of Injury: Material Retardation.

research might be a result of the WTO not providing enough guidance on the matter.²¹⁵ As such, WTO rules should be amended to provide guidance on the matter.²¹⁶

4.4.3 Causal Link

In the EU, an anti-dumping duty cannot be imposed unless the dumped product whose release for free circulation in the Union causes injury.²¹⁷ As such, dumping should be cause of the injury to the Union. The Regulation states that it must be demonstrated ‘that the volume of the dumped imports and the effect of the dumped imports on prices in the Union market for like products’ is causing injury to the Union.²¹⁸ This requires an analysis of factors in Article 3.5 of Regulation (EU) 2016/1036.²¹⁹

Regulation (EU) 2016/1036 also has a non-attributable clause such as the one in the ADA.²²⁰ All known factors, which are not caused by the dumped imports but are simultaneously causing injury, should be examined in order to exclude the possibility of attaching injury to dumped imports.²²¹ In *EU – Fatty Alcohols (Indonesia)*, the panel held that the EU did not err in its investigations when it found that ‘access to raw materials’ did not constitute a ‘known factor’.²²² Access to raw materials was ‘simply an aspect of the conditions of competition that may be reflected in price differences between the imported products from Indonesia and domestic products’.²²³

Regulation (EU) 2016/103, however lists, ‘competition between, third country and Union producers’ as a ‘known factor’.²²⁴ The *EU – Fatty Alcohols (Indonesia)* illustrates that in anti-dumping disputes, the matter are decided on case-by-case basis and there in precedence.²²⁵ The

²¹⁵See generally 3.4.2 Determination of Injury: Material Retardation.

²¹⁶ See generally 2.4.2.3.3 Determination of material retardation.

²¹⁷See generally Article 1.1 of Regulation (EU) 2016/1036.

²¹⁸Article 5.6 of Regulation (EU) 2016/1036.

²¹⁹The examination includes an

‘evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation; the magnitude of the actual margin of dumping; actual and potential decline in sales, profits, output, market share, productivity, return on investments and utilisation of capacity; factors affecting Union prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments’. See Article 5.6 of Regulation (EU) 2016/1036.

²²⁰See generally Article 3.4 of the ADA.

²²¹Article 3.7 of Regulation (EU) 2016/1036.

²²²*European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/R para 7.199 (hereafter Panel Report *EU – Fatty Alcohols (Indonesia)*).

²²³Panel Report *EU – Fatty Alcohols (Indonesia)* para 7.197.

²²⁴Article 3.7 of Regulation (EU) 2016/1036.

²²⁵See generally Panel Report *EU – Fatty Alcohols (Indonesia)*.

study observes that although Regulation (EU) 2016/103 list competition as a ‘known a factor’ in *EU – Fatty Alcohols (Indonesia)* it was not considered as; known factor. It is submitted that the inclusion of competition as a ‘known factor’ in Regulation (EU) 2016/103 is commendable. As discussed in Chapter 3 South Africa also lists competition as a ‘known factor’ which is positive.²²⁶ In Chapter 2, the study argued that anti-dumping rules should include issues of competition at a WTO level to minimise abuse of anti-dumping laws and protectionism.²²⁷

4.4.4 Community Interest

Besides the requirements of dumping, injury and causation, the EU has a fourth requirement, which must be met before anti-dumping measures are imposed.²²⁸ The fourth requirement is community interest; imposing of anti-dumping measures should not be against community interest.²²⁹ In other regulations, countries and regional agreements consider the interests of the competing parties but the EU considers also the interests of the community at large.²³⁰ This includes the likely effects of consumers in the community as well as industries beyond just the competing industry.²³¹ There are only six rejects done so far since the establishment of the EU because of failure to meet community interest.²³²

Article 21 of Regulation (EU) 2016/1036 is comprehensive and clear on what the European Commission should consider when weighing community interest.²³³ Before Regulation (EU) 2016/1036 was amended, it referred to authorities as being responsible for deciding whether imposition of measures will be in EU’s interest.²³⁴ This has recently changed to Commission because the European Commission is now the sole authority involved in anti-dumping

²²⁶3.4.3 Causal Link.

²²⁷See generally 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

²²⁸Article 21 of Regulation (EU) 2016/1036.

²²⁹Article 21 of Regulation (EU) 2016/1036; see also 3.4.4 Public interest Considerations, in the section the author discussed that the ADA does not have a public interest clause, South Africa’s regulations also do not contain public interest clauses but the issue of community interest has been inferred in some of the cases which include the *Semi-refined paraffin wax (candle wax)* and the dumped chicken from USA.

²³⁰Rovegno L & Vandebussche H ‘A comparative analysis of EU Antidumping rules and application’ (2011) *IRES Discussion papers* ; 2011023 4.

²³¹ Wellhausen M ‘The Community Interest Test in Antidumping Proceedings of the European Union’ (2001) 16(4) *American University International Law Review* 1030

²³² Rovegno L & Vandebussche H ‘A comparative analysis of EU Antidumping rules and application’ (2011) *IRES Discussion papers* ; 2011023

²³³See generally Article 21 of Regulation (EU) 2016/1036 and the amendment in Article 1.13 of Regulation (EU) 2018/825 (hereafter Regulation (EU) 2016/1036 as amended).

²³⁴Article 21.2 of Regulation (EU) 2016/1036 as amended.

investigations.²³⁵ The study avers that this change is important as it clearly defines which authority has power to decide on the issue of Union interest. Previously the European Council was responsible for imposing anti-dumping measures after recommendations from the Commission.²³⁶

All parties including consumers are given a chance within specified time to provide information after a notice of initiation of the anti-dumping investigation have been published.²³⁷ Regulation (EU) 2018/825 has provided for additional interested parties who are eligible to submit information to the European Commission.²³⁸ These parties are Union producers and trade unions.²³⁹ This is a positive development because Union producers form part of the Union industry²⁴⁰ and trade unions represent a major proportion of the working class.²⁴¹ Information provided by one party is also available to other parties involved so that they can respond.²⁴² After examining the information if the European Commission is of the opinion that measures, as determined based on the dumping and injury found, is against community interest, the measures should not be applied.²⁴³

EU's addition of community interest is a good addition to anti-dumping rules. In Chapter 3, the study held that although South Africa does not have a public interest provision in its legislation, the International Trade Administration Commission (ITAC) has considered it in some cases.²⁴⁴ Though this is commendable, in Chapter 2, it was held that it is important to have a mandatory public interest clause to create a balancing approach.²⁴⁵

In determining the elements of dumping, injury and community interest the European Commission European Commission should adhere to correct procedures. The next section discusses the procedural requirements in an anti-dumping investigation.

²³⁵European Commission 'Directorate-General Trade' available at https://ec.europa.eu/info/departments/trade_en (accessed 15 October 2018).

²³⁶ Rovegno L & Vandebussche H *A comparative analysis of EU Antidumping Rules and Application* (2011) IRES, *Université Catholique de Louvain Discussion Paper 2011-23* 3 (hereafter Rovegno L & Vandebussche H (2011)).

²³⁷Article 21.2 of Regulation (EU) 2016/1036 as amended.

²³⁸Article 21.2 of Regulation (EU) 2016/1036 as amended.

²³⁹Article 21.2 of Regulation (EU) 2016/1036 as amended.

²⁴⁰ Article 4.1 of Regulation (EU) 2016/1036 as amended.

²⁴¹See Statistics on worker participation in trade unions on Worker Participation-EU 'Trade Unions' available at <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Trade-Unions2> (accessed 15 October 2018).

²⁴²Article 21.2 of Regulation (EU) 2016/1036 as amended.

²⁴³Article 21.1 of Regulation (EU) 2016/1036.

²⁴⁴See generally 3.4.4 Public Interest Considerations.

²⁴⁵See generally 2.6 Challenges within WTO anti-dumping rules.

4.5 PROCEDURAL REQUIREMENTS

4.5.1 Initiation of Proceedings

Generally, investigations in the EU are initiated through a written complaint.²⁴⁶ An individual or legal person or association that does not hold legal personality but acts on behalf of the European Industry can write this complaint.²⁴⁷ In addition, complaints may now

‘also be submitted jointly by the Union industry, or by any natural or legal person or any association not having legal personality acting on behalf thereof, and trade unions, or be supported by trade unions’.²⁴⁸

This broadening of the parties that are eligible to submit written complaint can be argued to be positive development. This is because it gives parties who may have previously been affected by dumping a right to act which they did not previously had. However, the European Commission may have to increase its staff capacity to cope with increase in cases that may come with such. This has to be done bearing in mind that there is now a duty on the ‘Commission to facilitate access to the trade defence instrument for diverse and fragmented industry sectors ...through a dedicated SME Helpdesk’.²⁴⁹

There are two ways to submit the complaint: firstly, submitting to a member state that can later submit it to the European Commission and secondly, submitting directly to the Commission.²⁵⁰ Once the European Commission has received the complaint, it sends a copy of the complaint to all EU Members.²⁵¹ Officially, the complaint is lodged on the next official day after receipt is issued by the Commission or after delivery of registered mail.²⁵² The European Commission is required to give Member states information concerning their analysis of the grievance usually within 21 days of the date of lodging with it.²⁵³

In the absence of a written complaint, the Regulation requires member states to immediately submit evidence of resultant injury to the EU industry and dumping to the European Commission

²⁴⁶Article 5.1 of Regulation (EU) 2016/1036 as amended.

²⁴⁷Article 5.1 of Regulation (EU) 2016/1036 as amended.

²⁴⁸Article 5.1 of Regulation (EU) 2016/1036 as amended.

²⁴⁹Article 5.1 of Regulation (EU) 2016/1036 as amended.

²⁵⁰Article 5.1 of Regulation (EU) 2016/1036 as amended.

²⁵¹Article 5.1 of Regulation (EU) 2016/1036 as amended.

²⁵²Article 5.1 of Regulation (EU) 2016/1036

²⁵³Article 5.9 of Regulation (EU) 2016/1036

if such evidence exists.²⁵⁴ Moreover, the European Commission can initiate an investigation in the absence of a written complaint if there is sufficient evidence of all the three elements of dumping, once the need to initiate is determined member states should be given information on the investigation.²⁵⁵

When submitting the complaint, it should contain evidence of dumped product, injury caused and a causal link between dumped imports and suspected injury.²⁵⁶ In addition, the complaint should also contain all information concerning identity of the complainant and all related information such as normal value, export price, volume of and value of EU production of the like product accounted by the producers.²⁵⁷ Other related information includes a clear description of the dumped product, its origins, the names of the exporter and their identities or person importing the like product under investigation.²⁵⁸

On receipt on all required information, the European Commission should investigate its accuracy and adequacy in order to determine if evidence is sufficient to warrant an initiation.²⁵⁹ This thorough examination of evidence can limit the potential of initiating an investigation that will waste time and resources due to its lack of sufficient evidence.²⁶⁰ A complaint, which is supported by less than 25%, cannot be initiated, because it lacks sufficient producers supporting the application.²⁶¹ It can be suggested that in the context of the EU, the less number of producers supporting the complaint may be indicative of the fact that the complaint is against community interest.

Additionally, if dumped products are from countries whose imports represent a market share of below 1 per cent, investigation cannot be initiated unless put together the countries account for 3 per cent or more of the EU consumption.²⁶² If the European Commission determines that evidence is sufficient to start proceedings, initiation must be done through publishing of a notice in the

²⁵⁴ Article 5.1 of Regulation (EU) 2016/1036.

²⁵⁵ Article 5.6 of Regulation (EU) 2016/1036.

²⁵⁶ Article 5.2 of Regulation (EU) 2016/1036.

²⁵⁷ See generally Article 5.2 of Regulation (EU) 2016/1036.

²⁵⁸ Article 5.2 (b) of Regulation (EU) 2016/1036.

²⁵⁹ Article 5.3 of Regulation (EU) 2016/1036.

²⁶⁰ Article 5.4 of Regulation (EU) 2016/1036.

²⁶¹ Article 5.4 of Regulation (EU) 2016/1036.

²⁶² Article 5.7 of Regulation (EU) 2016/1036.

Official Journal of the European Union within 45 days from the date of lodging.²⁶³ The notice should contain the product under investigation and countries concerned.²⁶⁴ It should also summarise all submitted information, and should indicate information that should be given to the European Commission.²⁶⁵ The notice should clearly indicate date where parties can air their views and whether such views will be taken into account.²⁶⁶ Similar to South Africa, the EU discourages the publicising of information before the initiation of an investigation; however, a government of the exporting country receives a notice of pending initiation.²⁶⁷

4.5.2 Investigative Process

After initiation, an investigation at EU level, coordinated by the European Commission acting in co-operation with Member States, begins.²⁶⁸ An investigation covers issues concerning dumping and injury at the same time.²⁶⁹ The European Commission sends questionnaires to different parties and they have 30 days from the day of receipt to respond.²⁷⁰ However, an exception to the rule is that the European Commission can grant an extension if the concerned party or parties provide valid reasons for requesting such extension.²⁷¹ During the investigation, the Commission can request information from Member States and they should take necessary steps to comply with such request.²⁷² When the Member States requests information, which is of general interest, the European Commission can honour that request by providing information that is not confidential.²⁷³

Member States should conduct necessary checks and inspections, amongst different stakeholders upon request by the European Commission.²⁷⁴ They should also carry out investigations where third countries have given their consent.²⁷⁵ The European Commission will task its officials to help

²⁶³ Article 5.9 of Regulation (EU) 2016/1036.

²⁶⁴ Article 5.10 of Regulation (EU) 2016/1036.

²⁶⁵ Article 5.10 of Regulation (EU) 2016/1036.

²⁶⁶ Article 5.10 of Regulation (EU) 2016/1036.

²⁶⁷ Article 5.5 of Regulation (EU) 2016/1036, see also 3.5.1 Pre-initiation phase

²⁶⁸ Article 6.1 of Regulation (EU) 2016/1036.

²⁶⁹ Article 6.1 of Regulation (EU) 2016/1036

²⁷⁰ The valid reasons provided are dependent on circumstances by requesting member hence there is no set conditions, which determine what is due cause see Article 6.2 of Regulation (EU) 2016/1036.

²⁷¹ The valid reasons provided are dependent on circumstances by requesting member hence there is no set conditions, which determine what is due cause see Article 6.2 of Regulation (EU) 2016/1036.

²⁷² Article 6.4 of Regulation (EU) 2016/1036.

²⁷³ Article 6.4 of Regulation (EU) 2016/1036.

²⁷⁴ Article 6.4 of Regulation (EU) 2016/1036.

²⁷⁵ Article 6.4 of Regulation (EU) 2016/1036.

the EU Members in carrying out their duties.²⁷⁶ The study submits that this is a good practice because people with expertise in dumping will conduct the investigations and it may minimise the chance of procedural errors.

During the investigation, all interested parties who have been identified in accordance with Article 5.10 are given chance to are given chances to present their views in front of each other.²⁷⁷ This is only done upon a request; however, failure to attend such meetings should not be prejudicial to any party.²⁷⁸ If the opportunity to hold meetings is presented, the European Commission takes much cognisance in matters of preserving confidential material.²⁷⁹ It is important to note that investigations done pursuant to Article 5.9 must be concluded within one year and within 14 months of initiation, for those done in pursuant to Article 8 and Article 9.²⁸⁰

The EU has been criticised about its policy on confidentiality in conducting its anti-dumping investigations as discussed below.

4.5.3 Confidentiality

Since the companies involved in an anti-dumping investigation are competitors, confidentiality is of paramount importance to them and other parties thereof.²⁸¹ As such, exchange of confidential information may breach aspects of competition law. Information provided to the European Commission is strictly confidential and may be reviewed to other parties only as a summary.²⁸² The Commission can release confidential information only if authorised by the suppliers of such information.²⁸³ These summaries are not ideal in terms of WTO and was criticised in *EC Iron and*

²⁷⁶Article 6.4 of Regulation (EU) 2016/1036.

²⁷⁷Article 6.5 of Regulation (EU) 2016/1036.

²⁷⁸Article 6.5 of Regulation (EU) 2016/1036.

²⁷⁹Article 6.6 of Regulation (EU) 2016/1036.

²⁸⁰Article 6.9 of Regulation (EU) 2016/1036 as amended.

²⁸¹Norton Rose Fulbright 'An introduction to anti-dumping and other EU trade law measures' available at <http://www.nortonrosefulbright.com/knowledge/publications/26849/an-introduction-to-anti-dumping-and-other-eu-trade-law-measures> (accessed 18 February 2018).

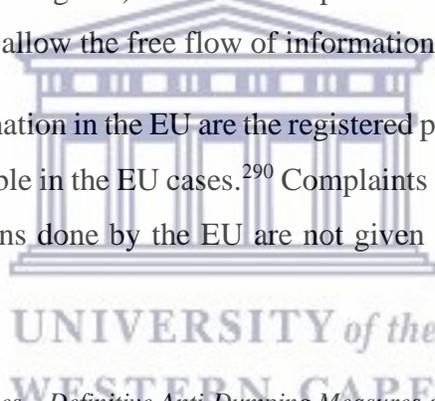
²⁸²Article 6.3 of Regulation (EU) 2016/1036.

²⁸³Article 19.5 of Regulation (EU) 2016/1036; see also Norton Rose Fulbright 'An introduction to anti-dumping and other EU trade law measures' (2016) available at <http://www.nortonrosefulbright.com/knowledge/publications/26849/an-introduction-to-anti-dumping-and-other-eu-trade-law-measures> (accessed 18 February 2018).

Steel Fasteners (China) where it held that the EU had failed to give reasons on why the summary could not be provided.²⁸⁴ Thus, issues of access to information may prejudice exporters.

The most confidential information is one concerning the pricing, shipments and identity of purchasers and this information is not available to everyone after being collected by government agencies who conduct the investigations.²⁸⁵ Different anti-dumping laws have different regulations in terms of the information that can be distributed. In South Africa, although confidentiality should be observed, there is a limitation to its application.²⁸⁶ South Africa's Promotion of Access to Information Act 2 of 2000 (PAIA), was enacted to give effect to a constitutional right of access to any information which promotes 'a culture of secrecy and bureaucracy to a culture of transparency and accountability'.²⁸⁷ Under the EU, pertinent data is made available only to those who are investigating the matter whereas under US law, legal counsel can have access if they wish to (exclude the parties being investigated).²⁸⁸ The European Commission has the most strict confidentiality rules that do not allow the free flow of information between parties.²⁸⁹

The parties that are given information in the EU are the registered parties only, making confidential information less publicly available in the EU cases.²⁹⁰ Complaints are not revealed until initiations begin.²⁹¹ In addition, calculations done by the EU are not given to everyone and the soft wares



²⁸⁴See generally *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/R.

²⁸⁵Article 19.1 of Regulation (EU) 2016/1036; see also Blonigen BA & Prusa TJ 'Antidumping' (2001) 35.

²⁸⁶See generally 3.3.1 Legislative Framework.

²⁸⁷Mass C 'Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective' in Lange C and Wessels J (eds) *The Right to Know – South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) 63. See also, Dick AL 'Power is information: South Africa's Promotion of Access to Information Act in context' (2005) 23(1) *Mousaion* 6; Arko-Cobbah A 'The right of access to information: Opportunities and challenges for civil society and good governance in South Africa' (2008) 34(2) *IFLA journal* 188.

²⁸⁸Blonigen BA & Prusa TJ 'Antidumping' (2001) 35.

²⁸⁹Foreign Trade Association 'Achieving Transparency in EU's Anti-dumping regime' available at <http://www.amfori.org/sites/default/files/FTA%20Statement%20-%20Achieving%20transparency%20in%20the%20EU%27s%20anti-dumping%20regime.pdf> (accessed 01 August 2018).

²⁹⁰Foreign Trade Association 'Achieving Transparency in EU's Anti-dumping regime' available at <http://www.amfori.org/sites/default/files/FTA%20Statement%20-%20Achieving%20transparency%20in%20the%20EU%27s%20anti-dumping%20regime.pdf> (accessed 01 August 2018). Boscheck R 'Trade, Competition and Anti-Dumping – Breaking the Impasse!?' (2000) 35(6) *Intereconomics* 282–287.

²⁹¹Article 19.6 of Regulation (EU) 2016/1036.

used are complex.²⁹² In a case where data has been provided in the capacity of an individual person or employee, it is not treated as confidential as provide for by Article 16 of the Data Protection Act.²⁹³ It also restricts individuals from using data for personal use or household activities.²⁹⁴ Personal data maybe used when there has been an authority granted by the controller of the software used in EU.²⁹⁵

4.5.4 Provisional Measures, Undertakings, Termination without Measures and Imposition of Definitive Duties

In Chapter 2, it was stated that when it comes to anti-dumping measures the school of thought that best reflects WTO is the one that proposes that anti-dumping measures are necessary to remedy unfair trade.²⁹⁶ The EU legislation holds similar sentiments when it comes to the imposition of anti-dumping duties. This is because the legislation tries to create balance between general competition issues and unfair trade practices.²⁹⁷

Provisional measures

In the EU, provisional anti-dumping duties may only be imposed if four conditions are met. The imposition is dependent upon initiation in pursuant to Article 5; adequate time for interested parties to respond after notice in accordance to Article 5.10; initial positive determination of dumping and injury; and imposition should be in the community interest for prevention of injury.²⁹⁸ Imposition can only be done 60 days after initiation but not later than seven months from the initiation.²⁹⁹ This shortens the period from previous nine months making the system more transparent.³⁰⁰

²⁹²Hambrey J & Blandford D *An introduction to Anti-dumping law of EU and US as it applies to seafood Course Handbook*, (2010) Hambrey Consulting Training course organised by POSMA with support from Danida (FSPS).

²⁹³Data Protection Directive, Article 3.2 second indent.

²⁹⁴Norton Rose 'An Introduction to Dumping and other EU Trade Law Measures' (2016) available at <http://www.nortonrosefulbright.com/knowledge/publications/26849/an-introduction-to-anti-dumping-and-other-eu-trade-law-measures> Norton Rose Fulbright 'An introduction to anti-dumping and other EU trade law measures' (2016) (accessed 18 February 2018).

²⁹⁵See generally Hambrey J & Blandford D *An introduction to Anti-dumping law of EU and US as it applies to seafood Course Handbook*, (2010) Hambrey Consulting Training course organised by POSMA with support from Danida (FSPS).

²⁹⁶See generally 2.3.2 Schools of thoughts on anti-dumping duties.

²⁹⁷See generally Article 3.7 of Regulation (EU) 2016/1036.

²⁹⁸Article 7.1 of Regulation (EU) 2016/1036 as amended.

²⁹⁹Article 7.1 of Regulation (EU) 2016/1036 as amended.

³⁰⁰ European Commission 'EU trade defence: stronger and more effective rules enter into force' (2018) available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1859> (accessed 15 October 2018).

Because anti-dumping measures remedy unfair trade, the amount of the provisional anti-dumping duty must not be more than the initially established dumping margin.³⁰¹ The EU has a mandatory lesser duty rule provision, which states that provisional duties must be less than the margin if the duty is sufficient to eradicate injury.³⁰² In addition when examining lesser duty, the Commission should ‘take into account whether there are distortions on raw materials with regard to the product concerned’.³⁰³ This leads to the suggestion that in this case EU’s anti-dumping system is a bit advanced than that of South Africa because it does not only look at final products in isolation as prices of raw materials may also be dumped. Also in South Africa, lesser duty is optional.³⁰⁴ This is so despite the benefits of its application in lessening the impacts of misrepresentations that are created when full anti-dumping duties are imposed.³⁰⁵

In the EU, a guarantee should accompany provisional duties for purposes of releasing the products for free circulation in the EU.³⁰⁶ Importantly adoption of provisional measures is done in accordance to Regulation (EU) No 182/2011.³⁰⁷ The duration for provisional duties is six months but an extension of three months may be given, making it nine months in total.³⁰⁸ However, imposition for nine months may only be done ‘where exporters representing a significant percentage of the trade involved so request or do not object upon notification by the Commission’.³⁰⁹

Undertakings

Besides provisional anti-dumping duties, undertakings may also be made where a provisional affirmative determination of dumping and injury has been made.³¹⁰ The Commission, following the advisory procedure in Article 15.2, may accept undertakings submitted by exporters if satisfied

³⁰¹Article 7.2 of Regulation (EU) 2016/1036.

³⁰²Article 7.2 of Regulation (EU) 2016/1036.

³⁰³Article 7.2 (a) of Regulation (EU) 2016/1036 as amended.

³⁰⁴See generally 3.5.3 Final Phase.

³⁰⁵Abdelwahab N ‘Are there Positive Impacts for Adopting Lesser Duty Rule in Anti-dumping Investigations’ (2016) available at <https://ideas.repec.org/p/ekd/009007/9599.html> (accessed 23 November 2017).

³⁰⁶Article 7.3 of Regulation (EU) 2016/1036.

³⁰⁷Article 7.4 of Regulation (EU) 2016/1036; Regulation (EU) No 182/2011 lays down the ‘rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers’ see Preamble of the Regulation.

³⁰⁸Article 7.6 of Regulation (EU) 2016/1036.

³⁰⁹Article 7.6 of Regulation (EU) 2016/1036.

³¹⁰Article 8.1 of Regulation (EU) 2016/1036 as amended.

that the undertakings will eliminate the injurious effect.³¹¹ Undertakings are voluntary offers made by any exporter to stop exporting product at dumped prices or revise its prices to acceptable amounts.³¹² Importantly, the Commission can suggest undertakings to exporters of which refusal to accept such an undertaking will not be prejudicial to the exporter.³¹³ In the event that an undertaking is accepted and in force, the European Commission cannot apply provisional or definitive anti-dumping duties on the same products which undertakings were accepted.³¹⁴

The Commission can reject an undertaking submitted by any exporter if it is of the opinion that the offer is impractical because of different reasons such as general policy and where there is large number of exporters.³¹⁵ If such offer is rejected, reasons for refusal may be given and the exporter may be given a chance to comment, importantly definite measures will set out reasons for refusal.³¹⁶ This suggests that even though it is within the discretion of Commission to provide reasons, if reasons are not given it will not be prejudicial since they will later be laid out in the definitive measures.

Investigations terminate upon acceptance of undertakings, as envisaged by Article 15.3.³¹⁷ Normally, an investigation of dumping and injury also concludes when a negative determination of dumping or injury is made leading to automatic lapse of an undertaking.³¹⁸ However, undertakings may be maintained if the negative determination is because of the undertaking.³¹⁹ Undertakings will continue where a positive determination is made.³²⁰

Termination without measures and Imposition of definitive duties

Anti-dumping investigations can be terminated without measures where termination is not against community interest following withdrawal of a complaint.³²¹ This is interesting as ADA is silent on the issue of continuing with an investigation after the withdrawal of a complaint. Prusa notes that

³¹¹Article 8.1 of Regulation (EU) 2016/1036 as amended.

³¹²Article 8.1 of Regulation (EU) 2016/1036 as amended.

³¹³Article 8.2 of Regulation (EU) 2016/1036

³¹⁴Article 8.1 of Regulation (EU) 2016/1036.

³¹⁵Article 8.3 of Regulation (EU) 2016/1036 as amended.

³¹⁶Article 8.3 of Regulation (EU) 2016/1036 as amended.

³¹⁷Article 8.5 of Regulation (EU) 2016/1036.

³¹⁸Article 8.6 of Regulation (EU) 2016/1036.

³¹⁹Article 8.6 of Regulation (EU) 2016/1036.

³²⁰Article 8.6 of Regulation (EU) 2016/1036.

³²¹Article 9.1 of Regulation (EU) 2016/1036

withdrawal of an anti-dumping petition is not evident of failure of the case but rather comes about because of out of court settlement in the form of either a price undertaking or a quantity restriction.³²² It may, however, be argued that the Commission continues with the investigation because withdrawal will lead to further injury of the domestic industry as such it is important to continue with the investigation. This is because Prusa's argument does not hold where investigations continue after complaint is withdrawn, continuation paints a picture that a settlement was not reached.

Investigation in the EU can also terminate without measures where dumping margin is less than 2 per cent, expressed as a percentage of the export price; this position is the same of with what WTO requires.³²³

Where investigations conclude that the evidence shows that dumping and injury took place, it is possible to impose definitive anti-dumping duties if it is in the interest of the community.³²⁴ This imposition should be no later than one month before expiring of provisional duties where they are in force.³²⁵ The amount of the duty is non-discriminatory on imports without undertakings and is determined on a case-by-case basis.³²⁶ Similar to the WTO, the EU regulation encourages that a lesser duty be imposed where that lesser duty is sufficient to eliminate injury.³²⁷

4.6 REVIEWS

After imposition of anti-dumping duties, they remain applicable up to the time that it counters the dumping causing injury.³²⁸ Generally anti-dumping measures, whether duties or undertakings expire after five years from their date of imposition or five years from conclusion of most recent review covering dumping and injury.³²⁹

³²²Prusa TJ 'Why are so many antidumping petitions withdrawn?' (1992) 33(1-2) *Journal of International Economics* 5.

³²³Article 9.3 of Regulation (EU) 2016/1036 as amended also see Article 5.8 of ADA.

³²⁴Article 9.4 of Regulation (EU) 2016/1036 as amended.

³²⁵Article 9.4 of Regulation (EU) 2016/1036 as amended.

³²⁶Article 9.5 of Regulation (EU) 2016/1036.

³²⁷Article 9.4 of Regulation (EU) 2016/1036 also see Article 9.1 of ADA.

³²⁸Article 11.1 of Regulation (EU) 2016/1036.

³²⁹Article 11.2 of Regulation (EU) 2016/1036.

Chapter 2 identified a number of reviews that can be utilised, dependent on the circumstances, after the imposition of anti-dumping duties.³³⁰ These reviews are expiry, interim, anti-absorption reviews and new shipper.³³¹ The reviews discussed in Chapter 2 are similar to those provided by the EU except for anti-circumvention reviews as such the study will engage in the ones' not provided for by the WTO.³³² The EU, just like South Africa in Chapter 3, provides for anti-circumvention reviews.³³³ The trend of anti-circumvention in national and regional anti-dumping legislation seems to justify the authors call for the WTO to regulate circumvention at multilateral level in order to create uniform guidelines.³³⁴

Anti-dumping duties already imposed in pursuant to Regulation (EU) 2016/1036 can also be applied to like products imports from third countries that are modified to circumvent measures.³³⁵ The author suggests that this provision is not compliant with the WTO because the WTO advocates for transparency and procedural fairness. The extension of measures already in place to third countries without initiating an independent investigation to determine the dumping and injury seems unfair to the study because the injury caused by these products may differ from that cause by the original products. Hence, for them to be subjected to the same duty where dumping margin may be different is unjustified.

Anti- circumvention reviews can be initiated after a year lapsed from the date of extension of the measures, any such review shall be conducted in accordance with the provisions of Article 11.5 and this review will be deemed interim.³³⁶ It is important to state that all reviews should be in accordance to the procedures of Regulation (EU) 2016/1036 and mostly these are compatible with the WTO except for anti-circumvention as discussed above.

4.7 CONCLUSION

This Chapter highlighted that the EU is a leading anti-dumping user with jurisprudence that has continued to change dynamically since inception of first anti-dumping laws. It demonstrated that

³³⁰2.5.6 Duration and Review of Anti-dumping Duties.

³³¹See generally 2.5.6 Duration and Review of Anti-dumping Duties.

³³²2.5.6 Duration and Review of Anti-dumping Duties.

³³³See generally 3.6 Reviews.

³³⁴See generally 3.6 Reviews.

³³⁵Article 13.1 of Regulation (EU) 2016/1036.

³³⁶Article 13.4 of Regulation (EU) 2016/1036.

Regulation (EU) 2016/1036 has brought about changes, which are more clear and reliable. Amongst the changes there are more clear rules with regards to calculating dumping margin for imports from countries outside the region on the basis of ‘significant market distortions’. The Chapter highlighted that the EU anti-dumping laws are modelled from the WTO but where substantive requirements are concerned, the EU considers community interest as integral in anti-dumping investigations. In addition, the EU regulations have clear definitions of export price, which promotes consistency.

It is undeniable that the backbone of the EU’s success in anti-dumping experience is its effective and functioning institutional structure. It has been shown that all the EU structures have clear mandate on their duties when conducting anti-dumping investigations and imposing anti-dumping measures. The EU invests in developing expertise and when investigations are conducted by the EU Members the European Commission send its experienced team to help with investigations.

Although the Chapter highlighted that the EU’s anti-dumping laws are similar to those of ADA and compatible in most provisions some provisions are inconsistent with the WTO anti-dumping rules. The Chapter highlighted that China’s protocol of accession to the WTO expired in 2016 December and although Regulation (EU) 2016/1036 bought with it changes meant to streamline the previous position on China. There is still a burden for China and other non-market countries to prove in writing that market conditions exist for them to have the benefit of using the standard calculation of normal value until at least the first review. This leads to discrimination and protectionism both of which the WTO does not permit.

The Union has also been criticised in the way they handle issues of confidentiality. It has also been accused of complicating paperwork to an already complex subject. The author also highlighted that the provisions on anti-circumvention are in part not compatible to WTO as they are procedurally unfair. With this in mind, the next Chapter will discuss anti-dumping laws in Zimbabwe.

CHAPTER 5

THE NEED FOR A SOUND ANTI-DUMPING FRAMEWORK IN ZIMBABWE

5.1 INTRODUCTION

Anti-dumping laws are important instruments in trade reform.¹ They are also the most invoked amongst trade law remedies.² There are different schools of thoughts that may explain a government's reactions to dumping.³ Among these, the school of thought that best reflects on the use of anti-dumping measures in terms of the World Trade Organisation (WTO) is the one that proposes that anti-dumping measures are a necessary tool in remedying unfair trade.⁴ In Chapter 3, the use of anti-dumping duties in South Africa helped increase the 'manufacturing output, and recapture the domestic market' in the 2015-2016 financial year.⁵ In the European Union (EU), anti-dumping legislation has been modernised to reflect current global economic challenges.⁶ For this reason, an effective anti-dumping regime requires anti-dumping laws that are clear, as dumping is a complex subject.⁷

The Implementation of Article VI of General Agreement on Tariffs and Trade (GATT) 1994 (Anti-Dumping Agreement (ADA)) does not regulate the behaviour of private companies involved in dumping rather its focus is when governments can take action against anti-dumping behaviour.⁸ This explains why Members of the WTO are under no obligation to enact anti-dumping legislation but if a member chooses to promulgate anti-dumping legislation, the laws should be in accordance with the WTO rules.⁹ Zimbabwe has been a Member of WTO since 1995; hence, its anti-dumping laws should comply with the WTO.¹⁰ The International Council of Chemical Associations argues

¹Miranda J 'Should Anti-dumping Laws be dumped' (1997) *Law and Policy in International Business* 264 (hereafter Miranda J (1997)).

²Trebilcock MJ *Advanced Introduction to International Trade Law* (2015) 61 (hereafter Trebilcock MJ (2015)).

³See discussion in 2.3.2 Schools of thoughts on anti-dumping duties.

⁴WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2016); see also 2.3.2 Schools of thoughts on anti-dumping duties, 3.5.3 Final Phase and 4.5.4 Provisional measures, Undertakings, Termination without Measures and Imposition of Definitive Duties.

⁵ITAC Annual Report 2015-2016 26; see discussion in 3.5.3 Final phase.

⁶Sidley 'European Union Introduces Additional Reforms to Anti-Dumping and Anti-Subsidy Rules' (2018) available at <https://www.lexology.com/library/detail.aspx?g=b81d240c-288b-4c82-a210-fd2d8ef59595> (accessed 13 October 2018) see also 4.2 Overview.

⁷See generally 2.4 WTO Treatment of Dumping.

⁸See generally 2.4 WTO Treatment of Dumping.

⁹WTO 'Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 20 April 2016).

¹⁰It is also a founding Member of the General Agreement on Tariffs and Trade (GATT) and a signatory to all the WTO agreements including Article VI of GATT and the Anti-Dumping Agreement (ADA).

that one of the major challenges of the anti-dumping framework has been the fact that WTO members into domestic laws have not accurately transposed it.¹¹ In its view, this raises issues and legal uncertainties that influence trade.¹² In addition, during the process of transposing, some issues are not clarified which leads to shortfalls in such legislations. This is the case for Zimbabwe; its legislation has a number of shortfalls both procedurally and substantially.

There has been no dedicated peer-reviewed literature that focuses on assessing Zimbabwe's anti-dumping laws and plugging the leaks concerning such trade distortions. As such, most sources that used in this Chapter are not peer reviewed secondary sources. With the aid of these sources, this Chapter seeks to determine the need for reform in order to develop a sound anti-dumping framework, which is the foundation for effective regulation. To achieve this, the Chapter first looks at the current anti-dumping laws. The Chapter also refers to South Africa and the EU discussed in Chapters 3 and 4, respectively, as cases of best practice for anti-dumping law. The study cannot be comparative in the traditional sense because both South Africa and the EU have developed anti-dumping systems and Zimbabwe does not.¹³

In looking at the current anti-dumping laws in Zimbabwe, the Chapter also provides an overview on anti-dumping matters in Zimbabwe. It discusses the legislative and institutional frameworks that deal with anti-dumping. Additionally, the Chapter will discuss the substantive and procedural requirements to meet when enacting anti-dumping duties. Finally, the Chapter will discuss economic and non-economic reasons for further development of the anti-dumping system before concluding the Chapter.

5.2 OVERVIEW

Though anti-dumping measures remedy unfair trade practises, Zimbabwe has never investigated any dumping allegation despite calls by different stakeholders to investigate such.¹⁴ For example, Capri, Willowvale Mazda Motor Industries, Quest Motors, Olivine, National Foods are some of

¹¹International Association of Chemical Associations 'Anti-Dumping in the Framework of a new WTO Round' 2001 *Position Statement 2*.

¹²International Association of Chemical Associations (2015) 2.

¹³For a discussion of what a comparative entails see generally Boele-Woelki, K. (2009) 'What comparative family should entail'" in Boele-Woelki, K. (ed.) *Debates in family law around the globe at the dawn of the 21st Century* (2009) 3- 36.

¹⁴Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012.

the local companies, which are calling for the enforcement of the laws, but their calls remain unheeded.¹⁵ The Competition and Tariff Commission (CTC) has cited that some allegations referred to it for investigation do not technically involve dumping.¹⁶ However, in 2012 a case involving Dunlop Zimbabwe (Pvt) Limited was carried forward into the year and it involved allegations that motor vehicle tyres from the Far East were being dumped.¹⁷ Despite the case being carried to 2012, Dunlop Zimbabwe (Pvt) Limited did not fill nor submit an anti-dumping application form to initiate investigations.¹⁸ In 2013 the CTC handled a complaint by Kind Brands (Pvt) Limited on dumping of imported shoe polish on the local market.¹⁹ The CTC closed the case due to lack of interest by the company, because of its failure to furnish the required information needed to pursue an investigation.²⁰

Scholars such as Marongwe have identified some of the reasons that are driving the dumping of goods in Zimbabwe and suggest applying higher tariffs or quantitative restrictions to curtail the problem.²¹ In addition, Maravanyika has identified the dumping of particularly Chinese goods in Zimbabwe as a form of new colonisation.²² He further averred that Zimbabwe was failing to use the WTO agreements to protect its markets.²³ It is important to note that Maravanyika's assertions, though relevant, focused on the political school of thought of colonisation omitting the trade law aspects of dumping, which are the most important issues to consider. In light of this, Mugano notes that 'in order to curtail the influx of certain goods which are threatening the survival of local industry, government must consider a mix of safeguard measures under the WTO rules'.²⁴ This requires Zimbabwe to use either anti-dumping measures or countervailing measures or safeguards depended on the circumstances of each case.

Trade remedies are not only an important tool in domestic industries, but also in progressing intra-African trade and regional integration. The International Trade Administration Commission

¹⁵Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012.

¹⁶See generally CTC Annual Report 2012.

¹⁷CTC Annual Report 2012 63.

¹⁸CTC Annual Report 2012 63.

¹⁹ See generally CTC Annual Report 2013.

²⁰ See generally CTC Annual Report 2013.

²¹Marongwe M 'Zim Needs Law to Curb Cheap Good Influx' *Newsday* 16 May 2003.

²²Marawanyika M 'Zimbabwe under new colonialism' *The Standard* 16 May 2003.

²³Marawanyika M 'Zimbabwe under new colonialism' *The Standard* 16 May 2003.

²⁴Mugano G 'Time to Tighten Screws on Dumping' *The Herald* 31 October 2013.

(ITAC) plays such role in the Southern African Customs Union (SACU).²⁵ Another example is that of the Common Market for Eastern and Southern Africa (COMESA), East African Community (EAC) and Southern African Development Community (SADC) Tripartite Free Trade Area (TFTA) and African Continental Free Trade Area (ACFTA) were flexible trade remedies inclusion has been amongst challenging issues in negotiation.²⁶ This is because of the opposing arguments that flexible trade remedies are essential in helping African countries effectively implement them, whilst the other argument propose that the ‘real issue is about domestic capacity’.²⁷ Both arguments are important in anti-dumping laws because, as a complex subject, there is need for flexible rules and in order to investigate the domestic industry should have the capacity to avoid non-compliance with the WTO laws.

5.3 THE LEGISLATIVE AND INSTITUTIONAL FRAMEWORK

5.3.1 Legislative Framework

The main anti-dumping regulation in Zimbabwe is the Competition (Anti-Dumping and Countervailing Duty) (Investigation) Regulations, 2002 (Statutory Instrument 266 of 2002).²⁸ This legislation covers both unfair trade practices, namely: countervailing measures and anti-dumping measures. Dealing with both countervailing measures and anti-dumping measures in the same regulation is problematic. For instance, some provisions are not clear if they deal with anti-dumping or countervailing measures. For this reason, there is need to enact separate legislation that specifically deal with anti-dumping measures on one hand and countervailing measures, on the other hand. Besides Statutory Instrument 266 of 2002, dumping is also defined in the Customs and Exercise Act of 2014 and the Competition Act (Chapter 14:28).

Statutory Instrument 266 of 2002 is the relevant legislation applicable to this study because it contains both substantive and procedural requirements for enacting anti-dumping measures. Before 2002, there was no legislation, which laid down how to conduct investigations. This meant Zimbabwe was unable to investigate dumping issues and if there were any, as the Parliament had not yet passed such requirements.

²⁵See discussion in 3.3.1 Legislative Framework, Members of the Southern African Customs Union (SACU) are Botswana, Lesotho, Namibia, South Africa, and Swaziland.

²⁶Erasmus G ‘New era in African trade arrangements’ *The Herald* 06 September 2017.

²⁷Erasmus G ‘New era in African trade arrangements’ *The Herald* 06 September 2017.

²⁸This regulation will be referred to as Statutory Instrument 266 of 2002 in this research.

Besides Statutory Instrument 266 of 2002, the Constitution of Zimbabwe ‘is the supreme law of the country’.²⁹ This means that any ‘law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency’.³⁰ The provisions in the Constitution, which are relevant to anti-dumping investigations, are those that are concerned with access to information, right to administrative action and those of good public administration and leadership.³¹ These provisions promote transparency, which is one of the core pillars of anti-dumping investigations at the WTO level.³²

Apart from the Statutory Instrument 266 of 2002 and the Constitution of Zimbabwe, the Administrative Justice Act (Chapter 10:28) (AJA) is also applicable to anti-dumping investigations.³³ For example, Section 3 of the AJA requires an administrative authority to give all relevant parties adequate notice about the nature and purpose of an administrative action proposed.³⁴ In addition, all parties should be given a reasonable opportunity to make adequate representations and adequate notice of the review mechanism or any right.³⁵ The word ‘adequate’ denotes that information provided should be enough to the extent that it fosters meaningful representations.³⁶

The AJA also prescribes that an administrative authority should act within time bounds of the law or, within a reasonable period, where there is no specified time, and supply written reasons where an action has been taken.³⁷ This legislation is similar to South Africa’s Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) as both legislations deal with processes for administrative procedures.³⁸ Adequate representations and reasonable time to provide evidence are

²⁹Section 2 (1) of the Constitution of Zimbabwe Amendment Act 20 of 2013 (hereafter Zimbabwean Constitution).

³⁰Section 2 (1) of the Zimbabwean Constitution.

³¹See Section 62; 68 and 194-198 of the Zimbabwean Constitution.

³²See generally 2.4.1.3 Comparison of Normal Value and Export Price see also 3.2.1 Legislative Framework and 4.2.1 Legislative Framework.

³³ Administrative Justice Act 12 of 2004 (hereafter AJA).

³⁴Section 3 (2) (a-) of the AJA See also a commentary of AJA in Feltoe G *A guide to administrative Law in Zimbabwe* (2012) (hereafter Feltoe G (2012) An “administrative authority” is defined as

‘any person who is— (a) an officer, employee, member, committee, council, or board of the State or a local authority or parastatal; or (b) an committee, or board appointed by or in terms of any enactment; or (c) a Minister or Deputy Minister of the State; or (d) any other person or body authorised by any enactment to exercise or perform any administrative power or duty; and who has the lawful authority to carry out the administrative action concerned’ see Section 2 (1) of AJA .

³⁵Section 3 (2) (a-) of the AJA.

³⁶Feltoe G (2012) 24.

³⁷See generally Section 2 of the AJA.

³⁸ See generally Section 3.3.1 Legislative Framework

key components in anti-dumping investigations at the WTO level.³⁹ This is because they help to protect the process from abuse.⁴⁰

The next section will discuss the institutional framework, substantive requirements of dumping and the procedure that should be followed when enacting anti-dumping measures.

5.3.2 Institutional Framework

The autonomous statutory body, which implements, enforces Zimbabwe's competition policy and law as well as execute the trade tariffs policy of the country is the CTC.⁴¹ The Commission is comprised of a merger of the former Industry and Trade Competition of Zimbabwe and the Tariff Commission.⁴² Although the commission is an independent body, it falls under the Ministry of Industry, Commerce and Enterprise Development.⁴³ The existence of competition policy and tariffs policy under one division is peculiar to Zimbabwe as far as statutory co-existence is concerned because there is no any other jurisdiction known for having such a practice.⁴⁴

The co-existence has the potential of causing serious conflicting policy objectives.⁴⁵ This is because the role of competition law and policy is to promote effective competition in markets by assessing the level of competition in a market, and regulating rules, which limit anti-competitive market conduct.⁴⁶ Trade tariffs in the CTC are however 'geared towards protectionism which may operationally be reduced into barriers to entry', which seems to be in direct conflict with competition policy that promotes effective free market.⁴⁷ The study recommends that the two policies should not be housed under one division, but should rather be governed by different independent Commissions.

³⁹*Mexico – Definitive Anti-Dumping Measures On Beef And Rice* WT/DS295/R para 7.192; also see generally Article 6 of the ADA

⁴⁰2.5.2 Conduct.

⁴¹CTC was established through Competition Act (Chapter 14:28) see Section 4.

⁴²Kobso M 'Briefing Note On The Zimbabwe Competition And Tariff Commission (CTC)' available at http://www.academia.edu/25268944/BRIEFING_NOTE_ON_THE_ZIMBABWE_COMPETITION_AND_TARRIFF_COMMISSION_CTC (accessed 26 August 2016)

⁴³Competition and Tariff Commission' 'Frequently Asked Questions' available <http://www.competition.co.zw/faqs/99-faq-s> (accessed 26 August 2016)

⁴⁴United Nations Conference on Trade and Development (UNCTAD) *Voluntary Peer Review Of Competition Law And Policy: Zimbabwe* (2012) 20.

⁴⁵UNCTAD *Voluntary Peer Review Of Competition Law And Policy: Zimbabwe* (2012) 20.

⁴⁶UNCTAD *The role of competition policy in promoting economic development: The appropriate design and effectiveness of competition law and policy* (2010) 3.

⁴⁷UNCTAD *Voluntary Peer Review Of Competition Law And Policy: Zimbabwe* (2012) 20.

Previously in Chapter 2, it was stated that there are many over-laps between anti-dumping law and competition law.⁴⁸ The challenge, however, is that despite these links, the WTO anti-dumping rules do not adequately address competition issues.⁴⁹ The author concurs with the review done by the United Nations Conference on Trade and Development (UNCTAD) that the co-existence of tariffs and competition in the CTC may cause conflicting policy objective because the two are divergent. However, as suggested in Chapter 2, it is necessary for competition issues that affect anti-dumping law to be harmonised so as not to perpetuate anti-dumping measures being used for protectionism rather than remedying unfair trade.⁵⁰

The CTC has a mandate to ‘undertake investigations and make reports to the Minister of Industry, Commerce and Enterprise Development relating to tariff charges, unfair trade practices and the provision of assistance or protection to local industry’.⁵¹ Anti-dumping investigations fall within the scope of the CTC and thorough investigations should be done in accordance with the WTO rules and Statutory Instrument of 266 of 2002.⁵²

The CTC is composed of four divisions, namely competition, tariffs, legal and corporate services and finally finance and administration services.⁵³ It has two principal arms comprising of the Board of Commissioners as the adjudicative arm and the Directorate as the investigative arm.⁵⁴ The Minister of Industry and Trade appoints members of the Commission on a part-time basis and on a three-year fixed term, in consultation with the President.⁵⁵ The Commissioners are appointed ‘for their ability and experience in industry, commerce or administration or their professional qualifications or their suitability’.⁵⁶ Appointment of the Commissioners requires the Minister to ensure that all interested stakeholders are represented.⁵⁷ The Directorate is comprised of full-time

⁴⁸See generally 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

⁴⁹See generally 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

⁵⁰See generally 2.3.2 Schools of thoughts on anti-dumping duties; see also 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

⁵¹Section 5 (g) of the Competition Act (*Chapter 14:28*).

⁵² Section 14(1) of Statutory Instrument 266 of 2002, also see Competition and Tariff Commission’ ‘Frequently Asked Questions’ available at <http://www.competition.co.zw/faqs/99-faq-s> (accessed 26 August 2016).

⁵³See generally Competition and Tariff Commission website available www.competition.co.zw

⁵⁴Kububa A ‘Overview Of Competition Policy And Law In Zimbabwe’ (2009) Third Annual Competition Commission, Competition Tribunal And Mandela Institute Conference On Competition Law, Economics And Policy In South Africa 5(hereafter Kubuda A (2009)).

⁵⁵Section 8 of the Competition Act (*Chapter 14:28*).

⁵⁶Kububa A (2009) 6.

⁵⁷Kububa A (2009) 6.

professionals, most of whom have qualifications in economics, law, accounting and business administration.⁵⁸

When it comes to the investigation of unfair trade practices, the CTC has a team of investigators falling under the Directorate who, *inter alia*, investigate dumping, analyse any injury and establish causal links. The team carries out the anti-dumping investigations and makes a prima facie case before submitting reports to the commissioner who has the jurisdiction to take decisions in meetings and make final decisions.⁵⁹

Mugano raises an important point that empowering statutory instruments of the CTC (Statutory Instrument 266 of 2002) do not capacitate the investigating authority to make a determination on whether the unfair practices are caused by dumping and subsidised imports and suggests that more power be given to the investigating authority.⁶⁰ However, Mugano omits to investigate the nature and scope of the powers that must be given to the investigating authority. As such, the study suggests that, the extent of powers should be clearly defined to provide clarification on what can or not be done as well as limit scope of abuse of powers.

In its 2011 report to WTO, Zimbabwe stated that the CTC does not have institutional capacity to use the trade remedy measures.⁶¹ This is unfortunate because, in Chapters 3 and 4, the author discussed the fact that the success in implementing anti-dumping laws and conducting fruitful investigations cannot be separated from institutions capacity to effectively conduct anti-dumping investigations.⁶² Moreover, South Africa and the European Union (EU) have no overlap of functions between general competition matters and trade related matters.⁶³ Therefore, it is

⁵⁸Section 6(2) of the Competition Act [Chapter 14:28].

⁵⁹UNCTAD *Voluntary Peer Review Of Competition Law And Policy: Zimbabwe Overview* (2012) 10.

⁶⁰Mugano G 'Time to Tighten Screws on Dumping' *The Herald* 31 October 2013.

⁶¹WTO 'Trade Policy Review Report by Zimbabwe' *WT/TPR/G/252* 14 September 2011.

⁶²See generally 3.2.2 Institutional Framework & 4.2.2 Institutions.

⁶³In the case of South Africa the International Trade Administration Commission (ITAC) deals with customs tariffs, trade remedies and import and export control whilst the Competition Commission South Africa is a statutory body constituted in terms of the Competition Act 89 of 1998 to 'investigate, control and evaluate restrictive business practices, abuse of dominant positions and mergers in order to achieve equity and efficiency in the South African economy' see <http://www.compcom.co.za/who-are-we/>.

In the EU the European Commission has the capacity to deal with anti-dumping matters in the union, it holds authority to 'initiate and terminate anti-dumping investigations, as well as taking measures where possible' In addition general competition matters and trade related matters also do not fall under same Directorates and their powers are not drawn from the same legislation see European Commission 'Anti-dumping' available at <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping> (accessed 15 November 2017) ;see generally 4.2.2 Institutional Framework.

submitted that the lack of capacity and overlap of functions undermines the CTC's ability to perform effectively.

Despite promises in Zimbabwe National Trade Policy 2012-16 for capacitation and strengthening of the CTC for it to be able to establish the existence of unfair 'trade practices caused by dumping and subsidised imports, with a view to initiating anti-dumping action as well as instituting countervailing measures', nothing has been done.⁶⁴ Zimbabwe can take lessons from South Africa, as discussed in Chapter 3, and invest in growing technical expertise through research organisations such as Trade Law Centre (TRALAC) as well as send delegates to other jurisdictions and the WTO to learn on anti-dumping rules.⁶⁵ The WTO 'assistance activities aims to help developing countries [such as Zimbabwe] take full advantage of the multilateral trading system'.⁶⁶ Developing countries are provided with technical assistance and training in trade related matters to enhance effective participation in global trade.⁶⁷

5.4 SUBSTANTIVE PROCEDURES

As observed earlier, Zimbabwe is a Member of the WTO, and its anti-dumping provisions should be WTO compliant. In Chapter 2, the author discussed that under the WTO rules anti-dumping, measures may be imposed only if dumping, injury and causation have been determined.⁶⁸ These are the substantive elements in an anti-dumping investigation and are drawn from the definition of dumping. In Zimbabwe, dumping takes place where the export price of the product under investigation is less than normal value,⁶⁹ and consequently, there is material prejudice or potential prejudice to the domestic industry.⁷⁰

Therefore, in determining dumping, the Commission must follow all the substantive procedures in accordance with Statutory Instrument 266 of 2002. The next section discusses the substantive procedures that are taken into consideration.

⁶⁴Zimbabwe National Trade Policy 2012-16 23.

⁶⁵See generally 3.1 Introduction.

⁶⁶WTO 'WTO technical assistance and training' available at https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (accessed 16 October 2018).

⁶⁷WTO 'WTO technical assistance and training' available at https://www.wto.org/english/tratop_e/devel_e/teccop_e/tct_e.htm (accessed 16 October 2018).

⁶⁸2.4 WTO Treatment Of Dumping.

⁶⁹Section 14(1) (a) of Statutory Instrument 266 of 2002.

⁷⁰Section 14(1) (b) of Statutory Instrument 266 of 2002.

5.4.1 Determination of dumping

Normal Value

In any anti-dumping investigation, normal value plays a critical role in determining if a product has been dumped.⁷¹ This is because a *prima facie* case of dumping can be established if a product under investigation is sold below the normal value. Statutory Instrument 266 of 2002 defines normal value as the comparable price of the product under investigation that is ‘actually paid or payable in the ordinary course of trade for like products sold for consumption in the domestic market of the exporting country’.⁷² Hence, this provision imposes conditions on sales transactions that should be fulfilled before they can be used in calculating normal value. This position is similar to that of the WTO as discussed in Chapter 2.⁷³ It was discussed that in *US — Hot-Rolled Steel* the Appellate Body held that the

‘text of Article 2.1 expressly imposes four conditions on sales transactions in order for them to be used to calculate normal value: first, the ‘sale must be “in the ordinary course of trade”; second, it must be of the “like product”; third, the product must be “destined for consumption in the exporting country”; and, fourth, the price must be “comparable”’.⁷⁴

Statutory Instrument 266 of 2002 does not define the phrase ‘ordinary course of trade’ as such the Commission may to look for its interpretation outside the Act. In the EU, the court in *Goldstar Co. Ltd v Council of the European Communities* held that the term ordinary course of trade is a ‘concept which relates to the nature of sales themselves’.⁷⁵ Despite the fact that there is no definition of the phrase ‘ordinary course of trade’, Statutory Instrument 266 of 2002 does provide for instances where production is not in the ‘ordinary course of trade’. It states that sales of ‘like products’ in the domestic market of the exporting country

⁷¹See generally Article 2.1 of the ADA. For a commentary on Article 2.1 of the ADA, see Andersen H *EU Dumping Determinations and WTO Law* (2009) 109; see discussions of normal value in South Africa and EU in 3.3.1 Determination of dumping and 4.3.1 Determination of dumping respectively.

⁷²Section 15(1) of Statutory Instrument 266 of 2002.

⁷³See generally 2.4.1.1 Determination of Normal Value.

⁷⁴*United States – Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan* WT/DS184/AB/R para 165 (hereafter Appellate Body *US — Hot-Rolled Steel*); see also 2.4.1.1 Determination of Normal Value and Article 2.1 of the ADA.

⁷⁵*Goldstar Co. Ltd v Council of the European Communities* Case C-105/90 para 2; see also 4.4.1 Determination of Dumping.

‘may be treated as not being in the ‘ordinary course of trade’ by reason of price and may be disregarded in determining normal value only if the Minister determines that such sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable period of time.’⁷⁶

This means sales may not be in the ‘ordinary course of trade’ due to price when prices are below per unit cost of production.⁷⁷ The cost of production should ‘be computed on the basis of all fixed and variable costs of manufacturing for sale in the exporting country plus a reasonable amount for selling, administrative and other general expenses’.⁷⁸ The problem with these sales is that they may only be disregarded upon determination of the Minister that they were made within an extended period.⁷⁹ This means that the CTC has no capacity to disregard sales, and as result, it should rely on the Minister to disregard sales, which are below cost of production. This makes one question the independence of the Commission because the Minister is actively involved in the investigation and the Commission has no capacity whatsoever in this regard.⁸⁰

When it comes to the definition of what a reasonable period, Zimbabwean courts have not had the opportunity to interpret the phrase in the context of anti-dumping. However, in Chapter 2 it was held that the panel in *US — Hot-Rolled Steel* held that

‘a ‘reasonable period’ must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of ‘reasonableness’, and in a manner that allows for account to be taken of the particular circumstances of each case’.⁸¹

As such, there is no concrete measure of what constitutes reasonableness and the Minister has to decide on a case-by-case basis taking all the circumstances in consideration.

For sale transactions to be considered for normal value they must be of a ‘like product’.⁸² A ‘like product’ is any product ‘which the Minister determines as being identical in all respects to the subject products or any products which the Minister determines to have characteristics closely

⁷⁶Section 15 (4) of Statutory Instrument 266 of 2002.

⁷⁷Section 15 (4) of Statutory Instrument 266 of 2002.

⁷⁸Section 15 (5) of Statutory Instrument 266 of 2002.

⁷⁹Section 15 (4) of Statutory Instrument 266 of 2002, this is the Ministry of Industry, Commerce and Enterprise Development.

⁸⁰See generally 5.2.1 Institutional Framework where it was mentioned that the CTC is an independent body.

⁸¹Appellate Body *US — Hot-Rolled Steel* para 165; see also 2.4.1.1 Determination of Normal Value.

⁸²Section 15 (4) of Statutory Instrument 266 of 2002.

resembling those of the subject products'.⁸³ This means that the CTC also has no capacity to determine what a 'like product' is as it is the duty of the Minister to make such a determination. One can then argue that although Statutory Instrument 266 of 2002 supposedly gives the CTC power to conduct investigations, it actually lacks capacity. This is because important elements in an anti-dumping investigation fall exclusively under the determination of the Minister.⁸⁴

In addition, the definition of 'like product' in Statutory Instrument 266 of 2002 also relates to countervailing measures because the regulation contains both anti-dumping measures and countervailing measures. This is problematic because, in *Korea — Alcoholic Beverages*, the Appellate Body specifically indicated that the term 'like product' might have different meanings in different agreements.⁸⁵ Although both anti-dumping measure and countervailing measures are unfair trade remedies, they both apply under different circumstances. Chapter 2 mentioned that in international trade, anti-dumping measures might be imposed when dumping takes place and an allegation of subsidies may warrant countervailing measures.⁸⁶

Sale transactions should also be comparable and consumed in the domestic market of the exporting country for them to be considered for normal value.⁸⁷ This means that sales should allow for fair comparison according to Section 17 Statutory Instrument 266 of 2002. Where exporting country is concerned, it is defined as:

'(a) the country of export of the subject products; or (b) where the subject products are not exported directly to Zimbabwe but are transhipped without substantial transformation through an intermediate country, the country of origin of the subject products'.⁸⁸

⁸³Section 2 of Statutory Instrument 266 of 2002.

⁸⁴See discussion in 3.4.1 Determination of dumping and 4.4.1 where it shows that the respective Commissions in South Africa and EU have full capacity to conduct anti-dumping investigations, which includes determination of all elements, involved in an anti-dumping investigation.

⁸⁵*Korea – Taxes On Alcoholic Beverages* WT/DS75/AB/R para 117

⁸⁶See generally 2.1 Introduction. The WTO defines a subsidy as 'any financial benefit provided by a government which gives an unfair advantage to a specific industry, business or even individual' The WTO lists five types of subsidies. See WTO 'Agreement on subsidies and countervailing measures' available at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (accessed 27 May 2017). For a detailed analysis of the remedies, see Erixon F 'Anti-dumping in the European Union' in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) 128-130.

⁸⁷Section 15 (4) of Statutory Instrument 266 of 2002.

⁸⁸Section 2 of Statutory Instrument 266 of 2002.

If sales are disregarded because they are not in ‘the ordinary course of trade, normal value may be determined on the basis of ‘(a) the remaining sales in the domestic market made at a price which is not less than the cost of production, provided that such remaining sales are in sufficient quantities’.

Sufficient volume, for purposes of determining a normal value is when such remaining sales constitute 5 per cent or more of the sales volume of the product in Zimbabwe.⁸⁹

Where there are no sales in the ordinary course of trade or where the volume of sales is low to the extent that a proper comparison cannot be achieved Statutory Instrument 266 of 2002 provides alternatives in the calculation of normal value.⁹⁰

The alternatives include the use of a comparable price when the product under investigation is exported to a third country, if price is representative and the use of constructed value that takes into account production costs and a reasonable amount of profits of products in question.⁹¹ Zimbabwe provides for use of appropriate third country as first alternative as opposed to construction of normal value because construction always leads to higher anti-dumping duties.⁹² However, there is danger in using prices of products when exported to third countries is that they may also be dumped.⁹³ In addition, Statutory Instrument 266 of 2002 does not define what an appropriate third country is which as discussed in Chapter 2 is problematic because it provides a gap that can be abused by an investigating authority.⁹⁴ Statutory Instrument 266 of 2002 was enacted after the ADA and it is unfortunate that the legislator also left provisions unexplained perpetuating issues of misinterpretation.

Statutory Instrument 266 of 2002 provides conditions where sales exported to a third country may not qualify to be used in calculating normal value. If sales are below per unit cost of production they may be disregarded because of price provided that the ‘Minister determines that such sales

⁸⁹CTC: Application Form for The Imposition Of Anti-Dumping Duties 12.

⁹⁰Section 15(1) of Statutory Instrument 266 of 2002.

⁹¹Section 15(2) (a) and (b) of Statutory Instrument 266 of 2002.

⁹²South Africa in Chapter 3 has been criticised for using constructed normal value as first alternative See *South Africa - Anti-dumping Duties on Certain Pharmaceutical Products from India - Request for Consultations by India* also see 3.4.1 Determination of dumping.

⁹³Murigi WC *The Development of a Successful Antidumping Regime In Kenya* (unpublished LLM thesis, University of the Western Cape 2013) 13.

⁹⁴See generally Section 2.2 of the ADA and the discussion on using prices of a third country in 2.4.1.1 Determination of Normal Value.

are made within an extended period... within a reasonable period of time'.⁹⁵ The problem is that the CTC does not have capacity to make such a determination although it is the investigative authority, and this is still the same as when the normal way of calculating normal value is used.

Where some sales to a third country are excluded based on Section 15 (4) the remaining sales may still be used. This can be done where the 'remaining sales in the third country market [are] made at a price which is not less than the cost of production, [and] are in sufficient quantities'.⁹⁶

When using constructed normal value, Statutory Instrument 266 of 2002 provides that constructed value should take into account production costs and a reasonable amount of profits of products in question.⁹⁷ No further guidance is given on how to calculate the costs. The CTC anti-dumping application form does provide some guidance, however the form is not a statute therefore not binding. Moreover, it clearly states that 'the cost build-up format is only a guideline to indicate the level of detail required by the Commission'.⁹⁸ Although South Africa has been criticised in the way they calculate normal value, the Anti-Dumping Regulations (ADR 2003) is clear on what costs the procedure the Commission should use when calculating normal value.⁹⁹ It is submitted that, where there is detailed procedures of calculating normal, it promotes transparency and minimises disputes that may arise because of using a different set of procedure for each case.

Statutory Instrument 266 of 2002 also provides that when calculating the normal value of the product in question where it originates from a non-market economy country, the normal value should be established in a prescribed manner.¹⁰⁰ The regulation does not provide any information besides the definition of non-market economy. A non-market economy is defined as an economy of a foreign country of 'which the government has a complete or substantially complete monopoly of its trade and where domestic prices are fixed by the government of the foreign country'.¹⁰¹ The use of non-market economy methodology is permitted under GATT where a strict comparison is

⁹⁵Section 15 (4) of Statutory Instrument 266 of 2002.

⁹⁶Section 15 (6) (b) of Statutory Instrument 266 of 2002.

⁹⁷Section 15 (2) (b) of Statutory Instrument 266 of 2002.

⁹⁸CTC: Application Form For The Imposition Of Anti-Dumping Duties 13.

⁹⁹See Section 8 (9) to 8 (13) of ADR 2003 see also alternative See *South Africa - Anti-dumping Duties on Certain Pharmaceutical Products from India - Request for Consultations by India* also see 3.3.1 Determination of dumping.

¹⁰⁰Section 18 of Statutory Instrument 266 of 2002.

¹⁰¹Section 2 of Statutory Instrument 266 of 2002.

impossible and importing countries can exercise discretion on how to calculate normal value from non-market economies.¹⁰²

Although Statutory Instrument 266 of 2002 does not provide information on how to calculate normal value where a non-market economy is concerned, the CTC application form does. The problem is that it is not binding. In addition, the form does not mention who has the authority to determine such. It may be argued that the Minister has such authority because he is the one that can determine what a 'like product' is and which sales can be disregarded in calculating normal value.¹⁰³ Thus, when it comes to a non-market economy the Minister should:

'nominate a third or surrogate country and a producer of the like product in that country for the purpose of determination of a normal value for the product allegedly dumped. The third country should have an industry at a similar level of development as that in the exporting country. If more than one country is subject to the current application, the information of that country may be used as the third or surrogate country.'¹⁰⁴

Watson argues that there is no justification for the use of non-market methodology because it results in 'unpredictable and unrealistically high antidumping duties' which is against principles of the WTO.¹⁰⁵ Products from China were once subjected to this method because, in 2001 when China became a member of the WTO, it agreed that the other WTO members would use this method in cases of dumping for a transitional period of 15 years and this ended on December 11, 2016.¹⁰⁶ In Chapter 3, the study highlighted that South can no longer use the non-market methodology on products from China as doing so violates WTO rules.¹⁰⁷ In Chapter 4, it was discussed that although Regulation (EU) 2016/1036 was amended to recognise the end of China's transitional period the EU may still be violating the WTO laws because the regulation still applies to Chinese products initiated before amendment at least until first review.¹⁰⁸ This means that they may still be violating the WTO laws because the burden of proof is still on Chinese producers to

¹⁰²GATT, Annex I, Ad Article VI para 2.

¹⁰³See Section 2 and Section 15(4) of Statutory Instrument 266 of 2002.

¹⁰⁴CTC: Application Form for the Imposition of Anti-Dumping Duties 14.

¹⁰⁵Watson WK 'It's Time to Dump Nonmarket Economy Treatment' (2016) *Cato Institute's Herbert A. Stiefel Center For Trade Policy Studies Free Trade Bulletin No. 65* 1 (hereafter Watson WK (2016))

¹⁰⁶Watson WK (2016) 1.

¹⁰⁷See generally 3.4.1 Determination of Dumping.

¹⁰⁸Article 2 (7) of Regulation (EU) 2016/1036 s; see also 4.3.1 Determination of dumping.

prove that products were under market conditions.¹⁰⁹ As such, it is critical for the CTC to observe such rules non-compliance with the WTO rules.

Export Price

Export price is defined in Statutory Instrument 266 of 2002 as ‘the price actually paid or payable for the subject products’.¹¹⁰ The Act provides no further guidance on how to calculate export price. The CTC application form, however, provides that there different ways that can be used to calculate export price.¹¹¹ The most favourable way is to use a direct ex-factory price for the purpose of export.¹¹² However, if such price of each known exporter is inaccessible or unavailable; ‘the export price can be calculated from cost and freight (C & F) prices of the dumped product by deducting total expenses incurred from the port of importation in Zimbabwe to the factory gate’.¹¹³

Statutory Instrument 266 of 2002 recognises that in some cases there is no export price, or there may be an agreement between the importer and the exporter which may amount to the export price being unreliable.¹¹⁴ In such scenarios, the export price will have to be constructed using the price at which product in question is first ‘resold to an independent buyer or not resold in the condition imported, on any reasonable basis’.¹¹⁵ If the export price is constructed, the investigating authority needs to include all sustained costs between importation and resale.¹¹⁶ The Act provides no further guidance on how to construct export price.

Fair Comparison

When both the normal value and export price have been determined, Statutory Instrument 266 of 2002 requires that the CTC make a fair comparison of the two values.¹¹⁷ In the comparison, due allowance should be made whilst considering merits for each case and differences which affect the comparison.¹¹⁸ The comparison should ‘be made at the same level of trade, normally at the ex-

¹⁰⁹See generally Miranda J ‘Interpreting Paragraph 15 of China’s Protocol of Accession’ (2014) 9 (3) *Global Trade and Customs Journal*.

¹¹⁰Section 16(1) of Statutory Instrument 266 of 2002.

¹¹¹CTC: Application Form for the Imposition of Anti-Dumping Duties 14.

¹¹²CTC: Application Form for the Imposition of Anti-Dumping Duties 14.

¹¹³CTC: Application Form for the Imposition of Anti-Dumping Duties 14-15.

¹¹⁴Section 16(2) of Statutory Instrument 266 of 2002.

¹¹⁵Section 16(2) of Statutory Instrument 266 of 2002.

¹¹⁶See generally Section 16 (2) and Section 16 (3) of Statutory Instrument 266 of 2002.

¹¹⁷Section 17(1) of Statutory Instrument 266 of 2002.

¹¹⁸Section 17(1) of Statutory Instrument 266 of 2002.

factory level, and in respect of sales made at, as nearly as possible, the same time'.¹¹⁹ Unfortunately, Statutory Instrument 266 of 2002 only provides for one method of comparison that is the weighted average-to-weighted average basis.¹²⁰ The problem in this is that some transactions cannot be compared on a weighted average-to-weighted average basis and comparing them using such method may lead to a comparison, which is not fair, and this is against the WTO rules. Zimbabwe can take lessons from the EU which provides for different methods of comparison.¹²¹

Dumping Margin

After comparing the normal value and export price, it is paramount for dumping margin to be established as it indicates the level of anti-dumping duty that can be applied. The dumping margin must be determined by comparing product export price with normal value in the importing country.¹²² Evidence should clearly support that the export price is lower than normal price.¹²³ The margin of dumping is defined as the 'amount by which the normal value of the subject products exceeds the export price'.¹²⁴ Dumping margin is established upon 'comparing average normal value and weighted average price of all export transactions of the subject products'.¹²⁵ This method is known as average-to-average method in the ADA.¹²⁶

It is important to note that, unlike ADA, the Statutory Instrument 266 of 2002 does not provide for other methods that can be used in determining the dumping margin.¹²⁷ The CTC can only use any one of these methods where they are provided for in other regulations.¹²⁸ The problem arises where other methods under 'average-to-transaction method' are not provided in any regulation because methodologies in the ADA are only guidelines.¹²⁹ This means that any other method that allows

¹¹⁹Section 17(2) of Statutory Instrument 266 of 2002.

¹²⁰Section 17(3) of Statutory Instrument 266 of 2002; South Africa in Section 11 of ADR 2003 provides for other methods of comparison and although EU does not provide a basis for comparison, it allows investigators to use a comparison that is fair on products involved see Article 2(10) of Regulation (EU) 2016/1036.

¹²¹See generally 4.4.1 Determination of Dumping.

¹²²See generally Article 2.1 of the ADA.

¹²³See generally Article 2.1 of the ADA.

¹²⁴Section 2 of Statutory Instrument 266 of 2002.

¹²⁵Section 17(3) of Statutory Instrument 266 of 2002.

¹²⁶See generally Article 2.4.2 of the ADA.

¹²⁷The ADA provides for other methods that can be used in determining dumping margin; these are the transaction-to-transaction method and the average-to-transaction method. See generally Article 2.4.2 of the ADA and see discussion on all three methods as provided in 2.4.1.4 Determination of Dumping Margin.

¹²⁸Section 17(3) of Statutory Instrument 266 of 2002.

¹²⁹Kim BY 'Understanding "Zeroing" in Anti-Dumping Procedures and Korea's Negotiation Strategy' (2004) *Korea Review of International Studies* 89 (hereafter Kim BY (2004)).

for fair comparison which can be used in determining dumping margin may not be used if it is not provided for in any regulation. This limits the CTC's capacity to determine dumping margin on the basis of a fair comparison.

Determination of dumping alone is not adequate to warrant application for anti-dumping measures, injury and causality should also be determined.

5.4.2 Determination of injury

In Chapter 2, the author discussed that injury is an important element in anti-dumping investigations because the WTO does regulate or prohibit dumping *per se* but if such dumping causes injury, it becomes an unfair trade practice.¹³⁰ This means anti-dumping measures may be imposed.¹³¹ Statutory Instrument 266 of 2002 does not use the term injury but instead it uses the word prejudice to explain the same concept. It states that the Minister of finance may impose an anti-dumping duty on products under investigation,¹³² upon a recommendation from the Minister, on the evidence furnished by the Commission after concluding an investigation where he determines:

- ‘...and (b) that prejudice or potential prejudice to any domestic industry is occasioned in either of one of the following ways—
- (i) the subject products are, through the effects of dumping, causing or threatening to cause material prejudice to the domestic industry in Zimbabwe producing like products;
 - (ii) the subject products are, through the effects of dumping, materially impeding the establishment of the domestic industry producing like products in Zimbabwe’.¹³³

The wording of this provision seems to suggest that prejudice or potential prejudice takes place in either two ways. Firstly, where prejudice or potential prejudice actually cause or threaten to cause prejudice to Zimbabwe's domestic industry and secondly, where it materially impedes the establishment of a domestic industry, which produces ‘like products’ in Zimbabwe.¹³⁴ The intention of the legislature is not clear; and it is confusing and deviates from the WTO standards.

¹³⁰See generally 2.8 Conclusion.

¹³¹See generally 2.4 WTO Treatment of dumping.

¹³²Section 14 (1) of Statutory Instrument 266 of 2002.

¹³³Section 14 (b) (i-ii) of Statutory Instrument 266 of 2002.

¹³⁴Section 14 (b) (i-ii) of Statutory Instrument 266 of 2002.

When it comes to the WTO anti-dumping rules injury refers to material injury or threat of material injury, or material retardation.¹³⁵ This is the same position for South Africa and EU.¹³⁶

In Zimbabwe, it seems as if the word prejudice and potential prejudice means material prejudice, threat of material prejudice and material retardation. Brink emphasises that in order to understand anti-dumping action, it is important to understand anti-dumping terminology.¹³⁷ In addition, it was discussed in Chapter 2 that anti-dumping is highly complex and require a high level of technical expertise in accountancy, economics and law fields.¹³⁸

Therefore, it is important for the legislature to draft clear anti-dumping rules that do not create questions on which standard to follow. Zimbabwe's provision on prejudice raises questions on which standard the CTC should use when conducting investigations. For example, should they look at prejudice or potential prejudice? How do they determine potential prejudice of material prejudice, threat of material prejudice and material retardation? Does potential prejudice of actual material prejudice exist?

In addition to these questions, the Statutory Instrument 266 of 2002 does not define 'material prejudice'. Furthermore, there is no guidance on the evidence that the CTC should look at in the determination of prejudice or potential prejudice. The failure to give further guidance on the evidence required creates loopholes in the system, which may lead to abuse. This is because there are no uniform rules that apply and evidence which may point to injury may be ignored leading to further injury of the domestic industry.

In Chapters 3 and 4, South Africa and EU's legislation respectively provides elements that investigating authorities should look at in order to ascertain if injury has taken place.¹³⁹ This helps their investigating authorities when examining evidence, as they are guided on what exactly to

¹³⁵2.4.2.3 Injury see also WTO 'Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2016).

¹³⁶See generally 3.3.2 Determination of Injury and 4.3.2 Determination of Injury.

¹³⁷Brink G 'A nutshell guide to anti-dumping action' (2008) 257.

¹³⁸ See generally 2.4 WTO Treatment of Dumping, see also Brink G 'A nutshell guide to anti-dumping action' (2008) 271 available at

https://repository.up.ac.za/bitstream/handle/2263/8445/Brink_Nutshell%282008%29b.pdf?sequence=1 accessed 28 September 2017)

¹³⁹See generally 3.3.2 Determination of Injury and 4.3.2 Determination of Injury.

look for in order to assess the extent of the material injury.¹⁴⁰ Lee opines that nations need to untighten the laws that the WTO previously tightened in its ADA.¹⁴¹ This means that there is need for Members to simplify provisions, which are complex under the WTO. Zimbabwe, therefore, needs to explain these factors in order to simplify its provisions.

When it comes to the determination of a threat of material prejudice, Statutory Instrument 266 of 2002 is also silent on what evidence the investigating authorities should look at before concluding that products have threatened to cause material prejudice. The WTO prescribes that a determination of threat of material injury must be founded on facts rather than mere allegation, conjecture or remote possibility.¹⁴² It also provides guidelines on what to look at in Article 3.7 of the ADA. Moreover, in *Mexico – Corn Syrup* the panel held that an analysis of threat of material injury should also include an evaluation of factors listed in Article 3.4.¹⁴³

Factors in Article 3.4 relate to material injury and in Zimbabwe the Act does not list any of such factors where material prejudice is concerned. A lack of clear guidelines on which evidence to look at when determining a threat of material prejudice may lead the CTC to determine the threat on the basis of remote possibility rather than facts. Although the WTO provides guidelines in Article 3.7 that the CTC may use, some may not necessarily apply in Zimbabwean context hence the legislature should have formulated guidelines that are specific to Zimbabwean context.

It is important to highlight that there some guidelines in the forms that are filled by applicants but these forms refer to injury not prejudice or material prejudice. This may not necessarily mean the same thing although the concept is similar as discussed by the author in the above paragraphs. The forms states that the CTC must look at whether or not there has been significant;

‘depression and/or suppression of the Zimbabwean industry’s prices by considering injury in respect of the following potential injury factors sales volume; profit and loss; output; market share; productivity; return on investments; capacity utilisation; cash flow; inventories; employment;

¹⁴⁰See generally Section 13(2) of the ADR 2003 and Article 3 (2) (a) of Regulation (EU) 2016/1036 as discussed in 3.3.2 Determination of Injury and 4.3.2 Determination of Injury.

¹⁴¹Lee SE *World Trade Regulation: International Trade under the WTO Mechanism* (2012) 12.

¹⁴²See generally Article 3.7 of ADA.

¹⁴³*Mexico – Anti-Dumping Investigation Of High Fructose Corn Syrup (HFCS) from the United States* WT/DS132/R para.7.127 (hereafter Panel Report *Mexico – Corn Syrup*) see also UNCTAD *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) 27

wages; growth; ability to raise capital or investments; and any other relevant factors placed before it'.¹⁴⁴

Although these guidelines are a clear indication of what evidence the investigating authorities should look at when assessing prejudice, they are not binding, as they are not in Zimbabwe's anti-dumping regulation. This means that there is no obligation on investigating authorities to use them.

Prejudice or potential prejudice may also be caused where 'the subject products are, through the effects of dumping, materially impeding the establishment of the domestic industry producing like products in Zimbabwe.'¹⁴⁵ Thus, if products under investigation are impeding the creation of a domestic industry that produces like products it would be found to be causing prejudice. This concept is similar to that of material retardation provided in the ADA, but the ADA does not provide the definition of what it is, and unlike in other types of injury, it also does not provide guidelines.¹⁴⁶ In Chapter 2, 3 and 4 it was discussed that the concept of material retardation deals with a non-existent industry, which has not been able to be established because of dumped imports.¹⁴⁷

The concept of domestic industry when determining prejudice or potential prejudice is crucial to understand. Statutory Instrument 266 of 2002 clearly states that the prejudice or potential prejudice should be to a domestic industry that produces like products.¹⁴⁸ In other words, if there is no domestic industry that produces like products, then one cannot conclude that dumping is causing prejudice. A domestic industry is defined as 'domestic producers of like products; or the domestic producers whose collective output of like products constitute a major proportion of the total domestic production of those products'.¹⁴⁹ Producers with agreements with exporters or importers or importers/exporters themselves are excluded from the domestic industry because inclusion may

¹⁴⁴CTC: Application Form For The Imposition Of Anti-Dumping Duties available at <http://www.competition.co.zw/complaints/forms/Dumping%20form%20PART%202.pdf> (accessed 02 October 2016).

¹⁴⁵See generally Section 14 (1) (b) (ii) of Statutory Instrument 266 of 2002.

¹⁴⁶See generally Article 3.1 and Article 3.7 of ADA.

¹⁴⁷2.4.2.3.3 Determination of material retardation, 3.3.2 Determination of Injury and 4.3.2 Determination of Injury.

¹⁴⁸Section 14 of Statutory Instrument 266 of 2002.

¹⁴⁹See Section 2 Statutory Instrument 266 of 2002.

cause distortion.¹⁵⁰ The definition of what constitute a domestic industry is important in limiting the scope of the investigation.¹⁵¹

However in most cases, it is rare for domestic producers to serve a domestic industry without other countries within the region having a market share in that domestic industry. The WTO recognises that injury may take place in such circumstances¹⁵² but Zimbabwe is silent. Those producers who come and supply in times of shortages are said to be in the same regional industry with the domestic company.¹⁵³ Thus, they must be given consideration when determining injury, if the market is saturated with imports in this industry in such a way that it is causing injury to the production within that market.¹⁵⁴ It is unfortunate that Statutory Instrument 266 of 2002 is silent because producers from outside Zimbabwe are not protected despite the fact that they may provide relief in times of shortage.

After a determination of dumping and prejudice, there is need to show that prejudice of potential is caused by dumping because anti-dumping measures can only be applied if prejudice is caused by dumping.

5.4.3 Causal Link

Causation is an important element in an anti-dumping investigation, and the CTC should be satisfied that dumping is the cause of prejudice to the domestic industry.¹⁵⁵ There is no further guidance on how the CTC should be satisfied of causation. Causation should be 'based on an examination of all relevant evidence before the Commission'.¹⁵⁶ No further guidelines are given on what is meant by relevant evidence. If one infers the meaning from Article 3.5 of ADA there is need to analyse the effects of dumping, as set forth in Article 3.2 and 3.4 in order to determine causation. The problem is that, as previously discussed Statutory Instrument 266 of 2002, is silent

¹⁵⁰Section 2 Statutory Instrument 266 of 2002.

¹⁵¹ WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 16 October 2018).

¹⁵²WTO 'Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2016).

¹⁵³See generally Article 4 (ii) of ADA.

¹⁵⁴See generally Article 4 (ii) of ADA.

¹⁵⁵Section 14 (3) (b) of Statutory Instrument 266 of 2002; see also Mavroidis PC *The Regulation of International Trade: The WTO Agreements on Trade in Goods* (2016) 109

¹⁵⁶Section 14 (3) (b) of Statutory Instrument 266 of 2002.

on these factors and the gap keep building up and this may compromise an entire investigation.¹⁵⁷ As such it is submitted that these factors be clearly defined in the legislation.

Statutory Instrument 266 of 2002 also requires that the CTC examine other known factors other than the product under investigation which may be concurrently injuring the domestic industry because for anti-dumping duties to be imposed injury should only be caused by the dumped product.¹⁵⁸ Statutory Instrument 266 of 2002 gives no further guidance on the factors that the CTC should look at.¹⁵⁹ This places a huge responsibility on investigating authorities and considering the fact that there is lack of technical expertise and capacity as discussed under Institutional framework, the outcome of a fair investigation may be compromised.¹⁶⁰ One may however look at the WTO jurisprudence for guidance. As previously discussed in Chapter 2, the Appellate Body in *US-Hot-Rolled Steel* held that in ensuring non-attribution investigating authorities are obliged to assess injurious effects of other known factors.¹⁶¹

Furthermore, in *EC — Tube or Pipe Fittings* the Appellate Body stated that for the non-attributed ‘obligation to be triggered, Article 3.5 of the ADA requires that the factor at issue: (a) be “known” to the investigating authority; (b) be a factor “other than dumped imports”; and (c) be injuring the domestic industry at the same time as the dumped imports’.¹⁶²

Thus, not only is there any obligation on the CTC to assess injurious effects of other known factors but all the three elements should be fulfilled for this obligation to be triggered.

5.5 PROCEDURAL REQUIREMENTS

When conducting an anti-dumping investigation the CTC should follow the procedures prescribed in Statutory Instrument 266 of 2002. In Chapter 2, it was discussed that the ADA prescribes only minimum procedural requirements that the WTO members should follow when anti-dumping measures are being enacted. It does not prohibit members from adding more procedural

¹⁵⁷See generally 5.3.2 Determination of Injury.

¹⁵⁸Section 14 (3) (c) of Statutory Instrument 266 of 2002.

¹⁵⁹See generally Article 3.5 of ADA on factors that can be looked at, it is important that the factors listed are not a closed list but a mere guideline.

¹⁶⁰See discussion in 5.2.1 Institutional Framework.

¹⁶¹Appellate Body Report *US-Hot-Rolled Steel* para 223.

¹⁶²*European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/AB/R para 175 (hereafter Appellate Body Report *EC — Tube or Pipe Fitting*).

requirements to supplement those in the ADA, but the procedure should always be fair and transparent.¹⁶³ The next section discusses procedural requirements that the CTC should follow when conducting an anti-dumping investigation as prescribed in Statutory Instrument 266 of 2002.

5.5.1 Initiation

In Zimbabwe, anti-dumping investigations are initiated when a written petition is submitted to the CTC requesting that dumping investigations be conducted on dumped imports already in the country or on products likely to be imported in the country.¹⁶⁴ The application for anti-dumping investigations can be done by an individual person on his own accord or on behalf of a domestic industry that produces like products.¹⁶⁵ The request should be in a form which Minister may prescribe.¹⁶⁶

This means the format of the application is left to the determination of the Minister, which is problematic. For example, it can create unnecessary and cumbersome processes to the people wanting to initiate an anti-dumping investigation. In addition, the fact that only the Minister determines the format of the application form is also a breeding ground for uncertainty. The ADA is clear on what should be included in an anti-dumping application in order to ensure that fairness and transparency are maintained at all times.¹⁶⁷ Thus, the lack of Statutory Instrument 266 of 2002 to outline what should be included in the application may lead to unfairness.

Moreover, Section 19 (1) states that investigations may be conducted on products likely to be imported. This position is difficult to understand. This is because the definition of dumping only speaks of products that have already been imported. Article VI of GATT defines dumping as a situation when ‘products of one country are introduced into the commerce of another country at less than the normal value of the products, and causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry’.¹⁶⁸ As such, it will be difficult to conduct investigations based on a likely import. The

¹⁶³See generally 2.5 Procedural Requirements For Legislating Anti-Dumping Measures.

¹⁶⁴Section 19 (1) of Statutory Instrument 266 of 2002.

¹⁶⁵Section 19 (1) of Statutory Instrument 266 of 2002.

¹⁶⁶Section 19 (2) of Statutory Instrument 266 of 2002.

¹⁶⁷See generally Article 5.2 (i-iv) of the ADA, also see on 2.5.1 Initiation.

¹⁶⁸Article VI of GATT 1994.

study opines that this position is against the WTO rules and violates notions of transparency and unfairness.

The application for anti-dumping investigations should contain enough evidence to support that the normal value of the product in question is less than the export price and as a result there is prejudice or potential prejudice to the Zimbabwean domestic industry.¹⁶⁹ It should also contain any other 'evidence that may be relevant or reasonably required by the Minister or the Commission'.¹⁷⁰ This provision suggests that the Minister or the CTC have the capacity to request any information that they deem relevant or reasonable.

The problem with the above provision is that it gives the Minister the power to conduct anti-dumping investigations that are independent of the CTC. The CTC is the independent board, which has the sole mandate to conduct anti-dumping investigation, and yet Section 19 (2) legally allows the Minister to perform the mandate bestowed upon the CTC. This compromises the independence of the CTC since the Minister is the head of the ministry, which decides whether anti-dumping measures may be imposed after the CTC has concluded the investigation.

Section 19 (2) further poses questions, such as: which position should the CTC take where it differs from the Minister? Can the CTC ignore the request of the Minister for additional information, if it views it unnecessary? Does this have any effect on the outcome of the investigations? These questions are difficult to answer because Statutory Instrument 266 of 2002 is silent on who has the final say when conducting anti-dumping investigations. Does the Minister override the decisions of the CTC during an investigation? Is there any recourse for the party that may be prejudiced by the decision of the Minister? As such, there is need to clarify the capacity of the Minister and the CTC during anti-dumping investigations.

Once the CTC receives a written application, it will review the complaint within a prescribed period.¹⁷¹ No further information is given on who determines the time period that the CTC should finalise the review of the application. When review an application the CTC is required to ascertain whether there is sufficient evidence to initiate the investigation process and if the investigation is

¹⁶⁹Section 19 (2) of Statutory Instrument 266 of 2002.

¹⁷⁰Section 19 (2) of Statutory Instrument 266 of 2002.

¹⁷¹Section 19 (3) of Statutory Instrument 266 of 2002.

in the interest of the public.¹⁷² Thus, an application which has sufficient evidence but which is not in the interest of public is likely to fail the threshold. The wording of Section 19 (3) (a) means that both conditions should be fulfilled.

In Zimbabwe, public interest plays a critical role because the CTC does not initiate an investigation, which is against public interest.¹⁷³ This position is different from that EU since public interest only comes into play when deciding whether or not anti-dumping measures should be imposed.¹⁷⁴ South Africa does not have a public interest clause but public interest considerations play an important role in its anti-dumping investigations.¹⁷⁵ In the ADA, Article 9.1 may seem to take public interest into consideration through application of lesser duty; however, application is not mandatory.¹⁷⁶ Unlike the ADA however, Zimbabwe's provision is mandatory and progressive. Public interest is essential in anti-dumping investigations because it promotes principles of fairness and due process.¹⁷⁷ It is submitted that it balances competing rights creating an environment where healthy competition flourishes. As such, not initiating an investigation because of public interest should be commendable.

If the CTC determines that the evidence to support the application is not enough to warrant initiation of the investigation, and when the investigation is not in the public interest, the Commission has to let the person who initiated the investigation aware that the application did not pass the threshold for the investigation to continue.¹⁷⁸ The notification should be made as soon as it is practicable.¹⁷⁹ However, on account that the CTC has enough evidence to initiate investigations, it has to notify appropriate stakeholders and publish a notice of initiating the investigation in the Gazette.¹⁸⁰ It is important to note that under special circumstances the CTC

¹⁷²See Section 19 (3) (a-b) of Statutory Instrument 266 of 2002.

¹⁷³Section 19 (4) of Statutory Instrument 266 of 2002.

¹⁷⁴See generally 4.4.4 Community Interest, see also Article 21 of Regulation (EU) 2016/1036; see also 3.4.4 Public interest Considerations, in the section the author discussed that the ADA does not have a public interest clause, South Africa's regulations also do not contain public interest clauses but the issue of community interest has been inferred in some of the cases which include the *Semi-refined paraffin wax (candle wax)* and the dumped chicken from USA.

¹⁷⁵See discussion in 3.4.4 Public Interest Considerations.

¹⁷⁶See generally Article 9.1 of the ADA.

¹⁷⁷*Kotsiubaska V Public Interest Consideration in Domestic and International Antidumping Disciplines* (unpublished Master of International Law and Economics ,World Trade Institute 2011) 10.

¹⁷⁸Section 19 (4) of Statutory Instrument 266 of 2002.

¹⁷⁹Section 19 (4) of Statutory Instrument 266 of 2002.

¹⁸⁰Section 19 (5) of Statutory Instrument 266 of 2002.

may itself initiate investigations without an application being done by an interested party.¹⁸¹ In such circumstances, it has to check all the requirements needed in order to initiate the investigations and has also to notify all the interested parties.¹⁸² Besides the requirements in Section 19 (2) and (6) of Statutory Instrument 266 of 2002, the CTC cannot initiate an investigation unless they determine the degree of support or opposition to the petition that has been approved.¹⁸³

It is required that the collective output of local domestic producers opposing or supporting the application should be more than 50 per cent of production of the like product produced by that percentage of the domestic industry.¹⁸⁴ Secondly, not less than 25 per cent of the fifty per cent should be supporting the petition.¹⁸⁵ Statistical sampling techniques can also be used to determine the percentage that supported for and against the petition in order to determine whether the investigations should continue.¹⁸⁶ When investigations are completed, the CTC may apply provisional anti-dumping measures.

5.5.2 Provisional measures and final determination of dumping and prejudice

The CTC is required to make a preliminary determination in order to see if a dumping margin exists; the amount of such a margin and if the products under investigation are causing injury to the domestic industry in Zimbabwe.¹⁸⁷ A dumping margin dumping ‘means the amount by which the normal value of the subject products exceeds the export price’. This means for the CTC to make a preliminary determination of dumping margin, it should first determine what the normal value and export price is. Section 21 also requires the CTC to make a preliminary determination of injury. The requirements of injury in Section 21 are different from those listed in Section 14 (1). As previously discussed Section 14 (1) requires the CTC to make a determination of prejudice or potential prejudice

‘...and (b) that prejudice or potential prejudice to any domestic industry is occasioned in either of one of the following ways—

¹⁸¹Section 19 (6) of Statutory Instrument 266 of 2002.

¹⁸²Section 19 (7) of Statutory Instrument 266 of 2002.

¹⁸³Section 19 (8) of Statutory Instrument 266 of 2002.

¹⁸⁴Section 19 (8) (a) of Statutory Instrument 266 of 2002.

¹⁸⁵Section 19 (8) (b) of Statutory Instrument 266 of 2002.

¹⁸⁶Statistical sampling should only be used where industries are fragmented and as result, there is an exceptionally large number of producers. See Section See section 19 (9) of Statutory Instrument 266 of 2002.

¹⁸⁷Section 21 of Statutory Instrument 266 of 2002.

- (i) the subject products are, through the effects of dumping, causing or threatening to cause material prejudice to the domestic industry in Zimbabwe producing like products;
- (ii) the subject products are, through the effects of dumping, materially impeding the establishment of the domestic industry producing like products in Zimbabwe'.¹⁸⁸

On the other hand, Section 21 states that injury may be actual material injury, threat of material injury and material retardation. As such, there is discrepancy between Section 21 and 14 because the latter talks about prejudice or potential prejudice and the former refer to injury. As such there is need to clarify which of the two standards should the Commission use in make a determination of injury.

When the preliminary determination of dumping margin and injury yields a negative outcome, the CTC must give reasons for such a determination in a notice published in the Government Gazette.¹⁸⁹ It may also end the investigation upon such negative determination.¹⁹⁰ The use of the word may in Section 21 give the impression that the even though the evidence is insufficient to justify the investigation to continue the CTC has an option to continue or to abandon. However, there is really no option to continue where evidence is insufficient.¹⁹¹ The ADA states that investigations should be 'terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case'.¹⁹²

Where a determination is made in the affirmative, an anti-dumping investigation should continue and a notice needs to be published in the Government Gazette stating the reasons for such a determination, and initial measures applicable.¹⁹³ Upon the publication of the notice in positive determination, the Minister may recommend application of provisional anti-dumping measures.¹⁹⁴ This may be done if he is of the opinion such measures are necessary to prevent prejudice of the domestic industry during the investigation period.¹⁹⁵

¹⁸⁸Section 14 (b) (i-ii) of Statutory Instrument 266 of 2002.

¹⁸⁹Section 21(2) of Statutory Instrument 266 of 2002.

¹⁹⁰Section 21(2) of Statutory Instrument 266 of 2002.

¹⁹¹See generally Article 5.8 of the ADA.

¹⁹²Article 5.8 of the ADA.

¹⁹³See Section 22 (3) of the Statutory Instrument 266 of 2002

¹⁹⁴Section 22 (1) of Statutory Instrument 266 of 2002.

¹⁹⁵Section 22 (1) of Statutory Instrument 266 of 2002.

If provisional measures are applied, they can only be imposed 60 days after the investigation was initiated.¹⁹⁶ These measures may either be a provisional anti-dumping-duty or a ‘security equal to the amount of the estimated dumping margin’.¹⁹⁷ Provisional measures can only be imposed up to such a period as may be prescribed and cannot exceed the prescribed period.¹⁹⁸ The problem in this is that the prescribed period is not regulated in the Statutory Instrument 266 of 2002 which leads to uncertainty. There is also no mention of who has the mandate to prescribe the time periods provisional anti-dumping may remain in place.

Where final determination of dumping and injury is concerned, the CTC is required to make a final determination of dumping and prejudice within a period which may be prescribed.¹⁹⁹ This provision is clouded with uncertainty because there is no mention of who prescribes the time period and also there is no mention of the actual time period. It also makes one question the existence of Section 18 which prescribes the duration of anti-dumping investigations. Section 23 and 18 may be read together, which means that a final determination should be made within eighteen months in accordance with Section 18. However, the wording in Section 23 points out to the fact that a final determination of dumping and injury may be prescribed somewhere else.

Furthermore, Section 23 refers to a final determination of prejudice, which is similar to Section 21, which refers to injury, but Section 14 (1) refers to prejudice or potential prejudice. This means that there are two different standards that are used when the CTC determines injury. The one is Section 14 and the other in Section 21 and 23. It is submitted that such discrepancy may compromise the investigation and leads to unfairness and application of anti-dumping measures in an arbitrary manner. As ‘anti-dumping measures are an exception to the rule of most-favoured-nation treatment; utmost care [should] be taken in invoking them’.²⁰⁰

If a final determination is negative investigations should be terminated, the CTC must also advise the Minister in writing to terminate provisional measures and refund duty paid.²⁰¹ Besides the Minister refunding the provisional duty, the Commissioner of Customs and Excise must also

¹⁹⁶Section 22 (2) of Statutory Instrument 266 of 2002.

¹⁹⁷Section 22 (3) of Statutory Instrument 266 of 2002.

¹⁹⁸Section 22 (4) of Statutory Instrument 266 of 2002.

¹⁹⁹See generally Section 23 of the Statutory Instrument 266 of 2002.

²⁰⁰See generally Chapter 5 Anti-dumping Measures available at <http://www.meti.go.jp/english/report/downloadfiles/gCT9905e.pdf> (accessed 26 July 2018).

²⁰¹Section 23 (2) of the Statutory Instrument 266 of 2002.

release any security required for such after which the CTC is required to publish a notice in the Government Gazette stating reasons for the negative determination.²⁰² It is submitted that this promotes transparency as one is able to publicly access such reasons.

Where a final determination is positive, a notice needs to be published in the Government Gazette stating the reasons for such determination, duties to be applied and products which have to pay the duties.²⁰³ The CTC has to then advise the Minister to recommend imposition of duties according to the dumping margins determined on the product investigated imported into the country when the publication of the final determination was done or anytime thereafter.²⁰⁴ Where provisional measures were applied, anti-dumping duties will be imposed if the Minister agrees with the CTC that material prejudice exists or a threat of prejudice would have materialised if the provisional measures were not applied.²⁰⁵

Where the provisional duty and amount guaranteed in security is lower than the anti-dumping duty, 'only the amount equal to the provisional duty or the security given shall be imposed'.²⁰⁶ In cases where, the provisional duty and the amount of security in the provisional measures, is more than the anti-dumping duty, the amount of anti-dumping duty will be imposed in full.²⁰⁷ The excess amount from the provisional anti-dumping duty which had been paid should be reimbursed or security amount given should be released.²⁰⁸ When no duties are imposed on products that had provisional measures, the Minister will pay back the provisional duty paid and release security for the provisional measures raised.²⁰⁹ There is no provision for application for lesser duty if it is enough to eliminate injury like in the case of South Africa and EU.²¹⁰

Anti-dumping duties may also be applied retrospectively on 'subject products imported into Zimbabwe 90 days prior to the application of provisional measures, but in no case earlier than the date of the initiation of the investigation', provided that the dumping caused or is threatening to

²⁰²Section 23 (2) (b) and (c) of the Statutory Instrument 266 of 2002.

²⁰³See generally Section 22 (3) (a) (i-iii) of Statutory Instrument 266 of 2002.

²⁰⁴Section 23(3) (b) of Statutory Instrument 266 of 2002.

²⁰⁵See generally Section 23 (b) of Statutory Instrument 266 of 2002

²⁰⁶Section 23(6) (a) of Statutory Instrument 266 of 2002.

²⁰⁷Section 23(6) (b) of Statutory Instrument 266 of 2002.

²⁰⁸Section 23(6) (b) of Statutory Instrument 266 of 2002.

²⁰⁹Section 23(6) of Statutory Instrument 266 of 2002.

²¹⁰See generally 3.4.3 Final phase and 4.4.4 Provisional measures, Undertakings and Termination without measures.

cause prejudice.²¹¹ In considering an application of final anti-dumping measures, public interest plays a pivotal role. It is one of the factors the Minister needs to consider when determining whether to accept the recommendation of the Commission or not in terms of the application of duties and the amount.²¹² Thus, if public interest does not permit the imposition of such final anti-dumping measures for whatever reason the Minister may elect not to apply them. The public interest procedure is not available in the ADA but WTO does not prevent members from adding more procedures as long as they are not discriminatory.

5.5.3 Duration, termination and suspension

The duration of anti-dumping investigations in Zimbabwe is one year unless there are special circumstances and not later than eighteen months after the initiation phase.²¹³ Investigations may however be terminated when an individual who made the application withdraw his application or if the CTC comes to the conclusion that there is a need to terminate the investigation for purposes of public interest.²¹⁴ An immediate termination can be done when the CTC has determined that dumping margin is *de minimis* or if injury is negligible.²¹⁵

If a termination occurs before provisional determination of dumping, the CTC should publish a notice to such effect and the notice should contain reasons for termination²¹⁶ However, if termination occurs after the preliminary determination, the CTC are to advise the Minister to make a request that any provisional measures applied to be terminated and a refund of the provisional duties paid.²¹⁷ The CTC should also make aware the Commissioner of Customs and Excise to release any security which was given under provisional measures.²¹⁸ Reasons for the terminations will also be made available through the publication of a notice.²¹⁹

²¹¹See generally Section 23 (7) of Statutory Instrument 266 of 2002.

²¹²Section 23(4) of Statutory Instrument 266 of 2002.

²¹³See Section 20 (1) of Statutory Instrument 266 of 2002.

²¹⁴See generally Section 24 of Statutory Instrument 266 of 2002.

²¹⁵Dumping margin is considered negligible if the margin is less than 2% of the export price; and the volume of imports of the products in question will be regarded as negligible if they account for less than 3% of imports of the like products into Zimbabwe, unless the products in question from countries which individually account for less than 3% of imports of the like products in Zimbabwe together account for more than 7%. See generally Section 24 (3) (a) and (b) of Statutory Instrument 266 of 2002.

²¹⁶Section 24 (5) (a) of Statutory Instrument 266 of 2002.

²¹⁷Section 24 (5) (a) of Statutory Instrument 266 of 2002.

²¹⁸Section 24 (5) (b) of Statutory Instrument 266 of 2002.

²¹⁹Section 24 (5) (b) of Statutory Instrument 266 of 2002.

Suspension of anti-dumping investigations may take place where the Minister approves of any undertaking adequate to the CTC which is given by the investigated company provided that such undertaking remedies reasons which led to the initiation.²²⁰ However, before any suspension is approved the Minister must determine if such undertaking will remove dumping margin or the effect of injury caused by the product in question,²²¹ if monitoring can be done efficiently,²²² and if it is in the interest of the public.²²³ If there is a satisfaction of all the elements the investigation will be suspended on approval by the Minister.²²⁴ Provisional measure applied under Section 22 may also be suspended and the refund should be given where anti-dumping duty was given and release of security is mandated where it was given.²²⁵ Lastly, reasons for suspension must be furnished in a published notice.²²⁶ It is also important to note that where there is a material violation of price undertakings the investigation may be resumed.²²⁷

5.6 REVIEWS

In Zimbabwe no anti-dumping duties can be applied on goods that were imported five years after the notice has been published (notice of final determination) unless when the Minister has already determined the review basis that the termination can lead to a recurrence of dumping.²²⁸ This means anti-dumping duties remain valid for five years unless reviewed.

Anti-dumping measures may be reviewed by the Minister upon receipt of certain information prescribed in Statutory Instrument 266 of 2002.²²⁹ The review, however, can only be done after the prescribed period of the anti-dumping measure has passed. A review can be prompted where there is a substantial change in dumping margin, or where refund of an anti-dumping duty is appropriate.²³⁰ Reviews can also take place when it is determined that there is no longer need to impose an anti-dumping duty, when an undertaking is not relevant anymore and where there is

²²⁰Section 25 (1) of Statutory Instrument 266 of 2002.

²²¹Section 25 (2) (a) of Statutory Instrument 266 of 2002.

²²²Section 25 (2) (b) of Statutory Instrument 266 of 2002.

²²³Section 25 (2) (c) of Statutory Instrument 266 of 2002.

²²⁴Section 25 (3) (a) of Statutory Instrument 266 of 2002.

²²⁵Section 25 (3) (b) of Statutory Instrument 266 of 2002.

²²⁶Section 25 (3) (c) of Statutory Instrument 266 of 2002.

²²⁷See generally Section 25 (8) of Statutory Instrument 266 of 2002.

²²⁸See generally Section 26 (7) of Statutory Instrument 266 of 2002.

²²⁹See generally Section 26 (1) (a-f) of Statutory Instrument 266 of 2002.

²³⁰See generally Section 26 of Statutory Instrument 266 of 2002.

need for modification.²³¹ An anti-dumping duty should also be reviewed where prescribed time period of application of duty has lapsed but the prejudice to the domestic industry is not yet remedied.²³² Where exporters did not export the products in question during investigation an expedited review is required, the Minister should request the CTC to conduct such review if the review is in the public interest or if ADA requires that the review be conducted.²³³

The problem with Section 26 is that for a review to be conducted, it is the Minister that gives the CTC permission to conduct one. The Minister determines this upon receipt of information prescribes in Section 26. In Chapter 2, it was stated that Lindsey and Ikenson have argued that, indeed anti-dumping laws serve political interests more than anything else as they are prone to distorting governmental policies which are deemed as unfair.²³⁴ There are no checks and balances for the system in Section 26 and it perpetuates anti-dumping measures being used as political tool rather than creating a levelled playing field through remedying of an unfair trade practise. This is because the Minister may decide not to request a review by the CTC purely on political bases. It is therefore submitted that the issues of review should be relooked and the CTC should be able to conduct a review upon receipt of information as contained in the anti-dumping rules at a WTO level. The Minister should not be the one to decide because this takes away the capacity of the CTC, as it can only conduct a review on the Minister's call.

Regrettably, Statutory Instrument 266 of 2002 states that the CTC should only conduct the review if it is in the public interest or if the ADA requires that a review be done. This creates confusion because the other section requires that reviews take place only after the prescribed period has lapsed and upon request by the Minister but under the ADA, interim reviews can be made before the prescribed period ends if circumstances allow.²³⁵ In addition, under the ADA, the investigating authority does not need to conduct a request upon request by a Minister, but can initiate on its own accord 'upon request by any interested party which submits positive information substantiating the need for a review'.²³⁶

²³¹See generally Section 26 of Statutory Instrument 266 of 2002.

²³²See generally Section 26 (7) of Statutory Instrument 266 of 2002.

²³³See generally Section 26 of Statutory Instrument 266 of 2002.

²³⁴Lindsey B & Ikenson D *Anti-dumping Exposed: The Devilish Details of Unfair Trade Law* (2003) 18; see generally 2.3.2 Schools of thoughts on anti-dumping measures.

²³⁵See discussion on reviews at 2.5.6 Duration, Termination, and Review of Anti- Dumping Duties.

²³⁶See generally Article 11.2 of the ADA.

If the CTC conducts a review it is required to publish a notice of the initiation of a review, and interested parties should be given an opportunity to comment.²³⁷ Any review conducted in terms of Section 26 should be finalised within such period as may be prescribed.²³⁸ However, this prescribed period cannot be more than 12 months because according to the ADA, reviews should be concluded within 12 months of the date of initiation of the review.²³⁹ Upon completion of a review, the Commission should ‘publish a final determination in the review stating the reasons therefor’.²⁴⁰ This final determination shall apply to subject ‘products imported on or after the date of publication of the final determination in the review’.²⁴¹ This, however, does not apply to a review which was initiated based on ‘a refund of an anti-dumping duty is appropriate’ and when ‘an expedited review is required for exporters or producers who did not export the subject products to Zimbabwe during the period of investigation’.²⁴²

In Chapter 2, it was discussed that Article 13 of the ADA requires Members who have adopted anti-dumping legislation to conduct a judicial review.²⁴³ Zimbabwe complies with this section and, interested parties have the right to review in the Administrative Court against positive determinations and final reviews.²⁴⁴ Applications are, however, only allowed to be made within thirty days of the determinations.²⁴⁵ The decision of the court will either mean that it will agree with the CTC or it may send back the matter to the CTC for reconsideration.²⁴⁶ The Minister is obliged to implement whatever decision the court will take on the review.²⁴⁷

The notable shortfall in Statutory Instrument 266 of 2002 when it comes to reviews is that the Act does not prescribe what information is required from parties involved in the review process. There is no transparency and also there is no clarity on the procedure of the reviews. Both South Africa and EU provisions are clear on these issues and embeds the WTO principle of transparency.²⁴⁸ To

²³⁷Section 26 (1) (f) of Statutory Instrument 266 of 2002.

²³⁸Section 26 (4) of Statutory Instrument 266 of 2002.

²³⁹Article 11.4 of the ADA.

²⁴⁰Section 26 (5) of Statutory Instrument 266 of 2002.

²⁴¹Section 26 (6) of Statutory Instrument 266 of 2002.

²⁴²Section 26 (5) of Statutory Instrument 266 of 2002.

²⁴³See generally 2.5.6 Duration and Review of Anti-Dumping Duties.

²⁴⁴Section 27 (1) (a) (b) of Statutory Instrument 266 of 2002.

²⁴⁵These determinations include where a notice of positive or negative final determination has been made in terms of section 23 or from the date of the final review occasioned by subsection (5) of section 26.

²⁴⁶Section 27(3) of Statutory Instrument 266 of 2002.

²⁴⁷Section 27(4) of Statutory Instrument 266 of 2002.

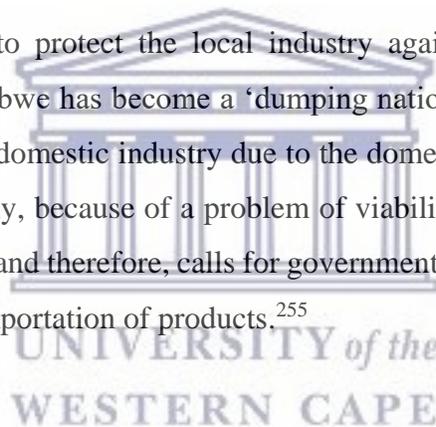
²⁴⁸See generally 3.5 Reviews and 4.5 Reviews.

this end, Zimbabwe should consider reforming this and clearly prescribing the information needed when one is applying for a review.

5.7 ECONOMIC AND NON-ECONOMIC REASONS FOR CREATING AN EFFECTIVE ANTI-DUMPING REGIME

Members of the WTO have had their ability to raise tariffs on imports limited because one of GATT's aims is to eliminate tariffs.²⁴⁹ After joining the WTO, Zimbabwe lowered its tariffs and removed trade barriers as a way of promoting free trade but this has been characterised by reversals, as tariffs are a source of revenue.²⁵⁰ However, 'as a result of lowering the fixed tariffs and consequently experiencing an increased exposure to market instability there have been concerns over inadequate domestic market protection particularly for poultry and textiles which have been negatively affected by the increase of imports'.²⁵¹

Anti-dumping laws are there to protect the local industry against any unfair trade practices particularly dumping.²⁵² Zimbabwe has become a 'dumping nation' for most rich nations in this world.²⁵³ This has crippled the domestic industry due to the domestic industry failing to compete with the imports.²⁵⁴ Additionally, because of a problem of viability, the local industry has failed to produce products for export, and therefore, calls for government action on dumping and placing more strict conditions on the importation of products.²⁵⁵



²⁴⁹Ruhl KJ 'Antidumping in the Aggregate [Preliminary and Incomplete]' (2012) *New York University Stern School of Business 2*

²⁵⁰Hurungo JT 'Trade Policy Review: Zimbabwe' (2007) *Tralac 25* also see Chitiga M, Kandiero T & Mabugu R 'Computable general equilibrium micro-simulation analysis of the impact of trade policies on poverty in Zimbabwe' (2005) *University of Pretoria Department of Economics Working Paper Series 2007-15 6*.

²⁵¹Kububa A 'Overview Of Competition Policy And Law In Zimbabwe' (2009) Third Annual Competition Commission, Competition Tribunal And Mandela Institute Conference On Competition Law, Economics And Policy In South Africa 18 (hereafter Kubuda A (2009))

²⁵²See generally 2.1 Introduction also see Zanardi M 'Antidumping: A problem in international trade' (2006) 22(3) *European Journal of Political Economy* 591-617.

²⁵³The then vice president of the country alleged this when he made his opening speech at the Zimbabwe International Trade Fair's International Business Conference see VOA 'Mnangagwa says government worried as Zimbabwe is now a dumping ground for imports' in *New Zimbabwe Newspaper* 27/04/2016 available at www.newzimbabwe.com/news-28933-VP+Zim+a+dumping+ground+for+imports/news.aspx (accessed 1 September 2016). Zimbabwe has been spending more money on imports than export and this has caused a trade deficit and some countries have been allegedly dumping these imports.

²⁵⁴Shava T 'Imports crippling local industries' (2016) available at <http://nehandaradio.com/2016/04/28/99819/> (accessed 26 September 2016 (hereafter Shava T (2016)).

²⁵⁵Shava T (2016).

Zimbabwe has never applied any anti-dumping measures, but whenever the local industry is threatened by imports, Zimbabwe reacts by imposing restrictions on the imports or placing a ban on imports.²⁵⁶ Amongst the reasons to justify ban on imports is that a surge of imports cripples the domestic industry.²⁵⁷ At many times, these restrictions are red tapes put in place to protect non-competitive local industries²⁵⁸ rather, Zimbabwe should thoroughly investigate if the imports are a result of unfair trade practices and raise tariffs accordingly. Although it is not always bad practice to limit imports where there is a material injury to the domestic industry, it is against the WTO rules to limit imports simply because the local industry is not competitive enough to produce goods favourable to the consumer.²⁵⁹ Thus, instead of applying safeguard measures every time the local industry is not competitive with international markets, Zimbabwe should consider making use of anti-dumping regulations if there is worry that imports are being dumped.

In Chapter 1, it was held that the CTC had its first trade tariffs workshop on the 18th of August 2018.²⁶⁰ The role of anti-dumping measures in reindustrialisation was emphasised.²⁶¹ It was held that anti-dumping measures should be applied to remedy the injurious dumping on Zimbabwe's local industries.²⁶² This would in turn help the economy to grow through capacity increase, because local producers would be able to compete with external producers at a fair level.²⁶³

There have been other efforts made to promote local industries to be competitive through encouraging consumers to consume Zimbabwe's produced products. The Buy Zimbabwe Initiative is the most important one; it is a programme that tries to promote the consumption of locally

²⁵⁶An example of one of the statutes enacted to ban imports is Statutory Instrument (SI) 64 of 2016 that restricted the importation of different products in a bid to protect local industries.

²⁵⁷Marawanyika G 'Zimbabwe: SA imports ban 'a safeguard measure' (2016) available at <http://www.iol.co.za/business/news/zimbabwe-sa-imports-ban-a-safeguard-measure-2050140> (accessed 01 September 2016).

²⁵⁸Cronje JB 'How will SA respond to Zimbabwe's import restrictions?' available at <https://www.tralac.org/discussions/article/10216-how-will-sa-respond-to-zimbabwe-s-import-restrictions.html> (accessed 01 September 2016).

²⁵⁹Ouintal G 'Pretoria challenges Zimbabwe import ban' (2016) available at <http://www.bdlive.co.za/business/trade/2016/07/11/pretoria-challenges-zimbabwe-import-ban> (accessed 01 September 2016).

²⁶⁰See generally 1.3 Research Problem and Objectives, see also CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

²⁶¹This was a live recording; see generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

²⁶²This was a live recording; see generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

²⁶³This was a live recording; see generally CTC Zimbabwe available at <https://twitter.com/ctczimbabwe?lang=en> (accessed 25 October 2018).

produced Zimbabwean goods in order to revive the local industry.²⁶⁴ However, a paradigm shift is needed before consumers start to redevelop their thirst for locally manufactured goods and services as the reputation has been badly injured.²⁶⁵ The government has so far supported the Buy Zimbabwe Initiative and invested in the Buy Zimbabwe Campaign by forcing state-owned enterprises to give priority to local manufacturers when procuring.²⁶⁶

The government is also trying to support the initiative by enacting policies geared towards resuscitation of manufacturing industries. Through Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) the government is prioritising the manufacturing sector where it is committed to revive distressed and closed companies through ‘increasing capacity utilisation to optimum levels, generating employment and substituting imports as well as building a sustainable basis for export led growth’.²⁶⁷ The Buy Zimbabwe initiative plays a central role in the implementation of ZimAsset as it is one of the organisations that have been urging the government to impose anti-dumping regulations.²⁶⁸

Zimbabwe mainly relies on the production of primary goods and services due to failure to widely industrialise, which results in the failure to beneficiate primary products into valuable products.²⁶⁹ As such, Zimbabwe’s imports are mainly finished products.²⁷⁰ Anti-dumping regulations are, therefore, important in safeguarding the domestic industry against unfair trade practices as most finished goods from Zimbabwe are imports.

²⁶⁴Chiweza D *Out of the Rabble: Ending the Global Economic Crisis by Understanding the Zimbabwean Experience* (2013) 80.

²⁶⁵Chiweza avers that consumers will always choose a better product on the shelves even if the product is import ,hence there is need for Zimbabwean products to be competitive enough for consumers to opt for them see Chiweza(2013) 81.

²⁶⁶Zimbabwe National Trade Policy 2012-16 25.

²⁶⁷Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) “Towards an Empowered Society and a Growing Economy” OCTOBER 2013- DECEMBER 2018 3.18

²⁶⁸See generally 1.5 Benefits Of The Study

²⁶⁹Bongani Ngwenya, a senior lecturer at Solusi University’s Postgraduate School of Business is quoted in Newsday saying that it is high time that ‘policy makers should consider the importance using foreign investment to convert raw materials into finished products within the country’ in order to address structural problems and also counter falling global prices. See also ZimAsset, this economic blueprint has prioritised amongst many things increased Foreign Direct Investment (FDI); establishment of special economic zones and effective implementation of value addition policies and strategies in order to realise ‘value addition and beneficiation in productive sectors such as mining, agriculture and manufacturing’.

²⁷⁰Morrissey O & Filatotchev I *Globalisation and Trade: Implications for Exports from Marginalised Economies* (2001) 108. Also see generally Table 2.1 Quarterly Bulletin Of External Trade Statistics available at <http://www.zimstat.co.zw/sites/default/files/img/publications/Trade/Otr42014.pdf>

Zimbabwe largest trading partner is South Africa with exports worth USD 2.25 billion, and a USD 2.15 billion for imports.²⁷¹ Zimbabwe also exports goods worth USD 267 million to Mozambique, USD 116 million to United Arab Emirates, USD 72 million to Zambia and Belgium accounts for USD 45 million.²⁷² South Africa replaced the European Union (EU), which, in the past, was the major exporting destination for Zimbabwe with two-thirds of total exports.²⁷³ Zimbabwe also imports from Mozambique, China, Zambia, India and Singapore with Singapore accounting for more imports at the end of 2017.²⁷⁴ As a result of import surplus, it is of great importance that Zimbabwe should review its anti-dumping regulations. This is so because if any of the imported goods are being dumped it will seriously affect the already struggling domestic industry.

There are cases where dumping has been alleged and amongst them is the poultry and manufacturing sector. Zimbabwe has a well-established poultry industry that excelled fairly well in 2009 to 2011 seasons despite the hardships the country was going through.²⁷⁵ The biggest market in the sub-sector is that of broiler meat and eggs.²⁷⁶ Despite having a larger share in the market, the first quarter of 2016 saw the industry recording a loss in large scale abattoirs.²⁷⁷ The records indicate that a total of 1,5 million slaughtered birds and 2,480mt dressed broiler meat per month was recorded which is 14 per cent and 13 per cent lower respectively when compared to the first quarter of 2015.²⁷⁸

Although the industry is still performing, it has faced many challenges, including corruption, flooding of dumped and cheaper imports, and the cash crisis. Corruption is said to be churning out

²⁷¹Global Edge ‘Zimbabwe: Trade Statistics’ available at <https://globaledge.msu.edu/countries/zimbabwe/tradestats> (accessed 20 July 2018); these figures are based on the 2016 to 2017 financial year see generally Zimbabwe National Statistics at <http://www.zimstat.co.zw/> for a full analysis.

²⁷²Global Edge ‘Zimbabwe: Trade Statistics’ available at <https://globaledge.msu.edu/countries/zimbabwe/tradestats> (accessed 20 July 2018).

²⁷³Global Edge ‘Zimbabwe: Trade Statistics’ available at <https://globaledge.msu.edu/countries/zimbabwe/tradestats> (accessed 20 July 2018).

²⁷⁴Timeslive ‘Of the imports into Zimbabwe in the first quarter of 2016, 35.8% came from South Africa, Singapore accounted for 24.7%, China 9.5%, and Zambia 5%’ available at <http://www.timeslive.co.za/sundaytimes/business/2016/07/17/Harare-firm-on-import-ban---for-now>

²⁷⁵Zengeni T ‘The Competitiveness and Performance of the Zimbabwe Poultry Industry’ (2013) available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/55b8733ae4b036c899c6fd4d/1438151482303/Tatenda+Zengeni_Competitiveness+of+the+Zimbabwe+Poultry+industry.pdf (accessed 26 September 2016).

²⁷⁶Field A ‘Poultry By-Product Dumping into Zimbabwe an issue’ (2012) available at <https://justandrewinzimbabwe.wordpress.com/2012/02/22> (accessed 1 September 2016)(hereafter Field A (2012)).

²⁷⁷The Source ‘Poultry industry produces 17mln day old chicks in Q1’ (2016) available at <http://source.co.zw/2016/06/poultry-industry-produces-17mln-day-old-chicks-in-q1/> (accessed 22 September 2016).

²⁷⁸The Source ‘Poultry industry produces 17mln day old chicks in Q1’ (2016) available at <http://source.co.zw/2016/06/poultry-industry-produces-17mln-day-old-chicks-in-q1/> (accessed 22 September 2016).

cheaper imports into Zimbabwe, the imports of which, are not paying the requisite duty.²⁷⁹ These imports find their way from countries such as Brazil at very low prices of less than a dollar per kilogram.²⁸⁰ In 2010, 17 000 tonnes of dressed poultry meat are said to have entered the country²⁸¹ and only 13 000 tonnes of the 17 000 are said to have come through approval from Veterinary permits.²⁸² Moreover, in the first six months of 2014, the South African Revenue Service (SARS) recorded that an approximate of 2000 tonnes of chickens was imported, but this is not reflected on Zimbabwe National Statistics Agency (ZIMSTATS) fuelling allegations that a total of \$3 million was lost in uncollected revenue.²⁸³

Most countries use genetically modified organisms (GMO) varieties of maize and soya to feed chicken and as a result the price of poultry relatively low than Zimbabwe.²⁸⁴ Leading producers of poultry meat such as Brazil and United States have landed their jets in southern Africa, where they are supplying meat at nearly half the cost of production in their domestic countries.²⁸⁵ In 2012, Zimbabwe increased the import duty of imported chicken to \$1.50, as means of reducing dumped poultry meat from South Africa and Brazil.²⁸⁶ However, this did not do much to help the collapsing industry, as there is still a surge of poultry due to among other things corruption in the issuing of permit licences.²⁸⁷ Thus, because of lack of strict import controls, the grey trade has become a threat to the consumers and local industry which calls for a level playing field through anti-dumping duties.

In the manufacturing industry Zimbabwe has a very small electrical appliances industry which sells household electrical goods and industrial goods. As a result electrical appliances

²⁷⁹Gumbo L ‘Stop the rot at border posts’ *The Herald* 26 August 2016; Dewa T ‘More than 150 immigration officers transferred amid reports of corruption’ 21 September 2016 <http://nehandaradio.com/2016/09/21/150-immigration-officers-transferred-amid-reports-corruption/> (accessed 22 September 2016).

²⁸⁰Field A (2012).

²⁸¹Field A (2012).

²⁸²These chicken cuts are said to be coming from South America (Brazil and Mexico) see Field A (2012).

²⁸³The Herald ‘Chicken imports threaten poultry industry’ *The Herald* 1 October 2014.

²⁸⁴Zimbabwe has placed a ban on the importation of GMO maize, which in turn means chicken feed in Zimbabwe is more expensive than in the countries that use GMO.

²⁸⁵This can lead to dumping as defined by Article VI of GATT if there is material injury, a threat of injury and material retardation in the domestic industry of the importing country.

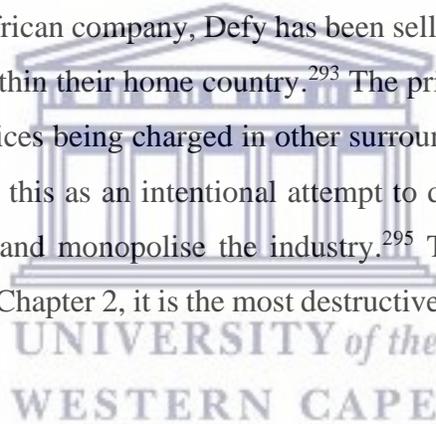
²⁸⁶New Zimbabwe ‘Poultry prices down 23 pct, industry facing collapse due to cheap imports, association’ (2015) available at <http://www.newzimbabwe.com/business-23639-Cheap+imports+%E2%80%98collapse%E2%80%99+poultry+industry/business.aspx> (accessed 26 September 2006) (hereafter New Zimbabwe (2015)).

²⁸⁷See generally New Zimbabwe (2015).

manufacturers in Zimbabwe are not able to supply the Zimbabwean market and they contribute less than 10% of the household goods required in the Zimbabwean market.²⁸⁸ Most of the electrical appliances are, therefore, imported from countries such as Singapore, China, Dubai, South Africa and Botswana.²⁸⁹ Inputs for local production are also imported from surrounding countries; about 80% of inputs are taken outside Zimbabwe.²⁹⁰

Since Zimbabwean manufacturers import a significant amount of their inputs, they lag behind in terms of technological advancement as they lack the technical know-how to produce the parts.²⁹¹ This reduces their competitiveness on the international markets. Internationally they do not have a comparative advantage and the face firm competition where quality and pricing is concerned.²⁹²

Be that as it may, the electrical appliances industry is among the various industries that have alleged dumping issues in Zimbabwe. A local refrigerator company called Capri once alleged dumping stating that a South African company, Defy has been selling refrigerators at lower prices than what they are produced within their home country.²⁹³ The price being charged in Zimbabwe was far much lower than the prices being charged in other surrounding countries such as Zambia and Mozambique.²⁹⁴ Capri saw this as an intentional attempt to destroy the Zimbabwean brand, build a strong brand of Defy, and monopolise the industry.²⁹⁵ This type of dumping is called predatory and was discussed in Chapter 2, it is the most destructive as it drives out local producers out of business.²⁹⁶



²⁸⁸Konje P 'Household Electrical Goods Zimbabwe' (2011) available at http://www.zimtrade.co.zw/IMG/pdf/household_electrical_goods.pdf 6 (accessed 01 September 2016) (hereafter Konje P (2011)).

²⁸⁹Konje P (2011) 7.

²⁹⁰Zimbabwean raw materials account for about 20% and as result the sectors' contribution to GDP, employment, and economic growth is insignificant.

²⁹¹Konje P (2011) 6.

²⁹²Konje P (2011) 6.

²⁹³Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012 available at <http://www.herald.co.zw/lets-enforce-dumping-laws/> (accessed 03 March 2016).

²⁹⁴Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012 available at <http://www.herald.co.zw/lets-enforce-dumping-laws/> (accessed 03 March 2016).

²⁹⁵Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012 available at <http://www.herald.co.zw/lets-enforce-dumping-laws/> (accessed 03 March 2016).

²⁹⁶2.3.1 Types of Dumping.

Strengthening and applying anti-dumping laws in Zimbabwe is a decision that does not affect only the economy but has implications for the welfare and social well-being of the broader society.²⁹⁷ Members of the community usually suffer when domestic production ceases and imported cheap products takeover.²⁹⁸ The results of imports might be positive in the first place, however, reduced prices have long-term effects that are not in the interest of the community.²⁹⁹

There are a number of authors who have attributed the collapse of local industries in various African countries to trade and dumping.³⁰⁰ Most companies closed shop due to the influx of these dumped products in Zimbabwe.³⁰¹ Brooks and Simon believe that there are a number of other factors like trade liberalisation, economic challenges, and cheaper new imports from Asia which are also at play.³⁰² Dumping affects the society since companies may close, employees become unemployed and start suffering making the society live below the poverty datum line. Therefore, creating an effective anti-dumping regime and using anti-dumping laws does not only remedy unfair trade practices, it also promotes a good standard of living for the community. This is because if industries are operating at optimum capacity, many people will be employed and in turn better their lives.

5.8 CONCLUSION

This Chapter discussed that anti-dumping measures are meant to remedy unfair trade practises, and there has been calls by different stakeholders to investigate dumping in Zimbabwe.³⁰³ These stakeholders include ‘Capri, Willowvale Mazda Motor Industries, Quest Motors, Olivine, National Foods amongst other performing local companies’ which have expressed that anti-dumping laws

²⁹⁷Le Clerc-Marc J ‘Reforming Anti-dumping Law: Balancing the Interests of Consumers and Domestic Industries’ (1999) 44 *McGill Law Journal* 119.

²⁹⁸In Malawi, companies have closed due to the flood of imports of which some of them were dumped Kandiero T ‘Malawi in the multilateral trading system’ in Gallagher P, Low A & Stoler L (eds) *Managing the Challenges of WTO Participation: 45 Case Studies* 328.

²⁹⁹Hutton S & Trebilcock M ‘An Empirical Study of the Application of Canadian Anti-dumping Laws: A Search for Normative Rationales’ (1990) *Journal of World Trade* 123.

³⁰⁰Baden S & Barber C The impact of the second-hand clothing trade on developing countries (2005). Oxfam Int; Manwa, L, Ndamba, G, and Manwa, L ‘A gendered dress code and how it influences the choice of dress by women in Zimbabwe’ (2010) 2(6) *Journal of African Studies and Development* 144-149.

³⁰¹David Whitehead Textiles was once the largest supplier of the country's fabric, but was forced to close in 2016, dumping of clothes was amongst the reasons why the company closed; it could not compete with the cheaper imports.

³⁰²Brooks A & Simon D ‘Unravelling the Relationships between Used-Clothing Imports and the Decline of African Clothing Industries’ (2012) 43(6) *Development and Change* 1265-1290.

³⁰³Muganda RG ‘Lets enforce dumping laws’ *The Herald* 27 September 2012.

should be enforced but their call has not been heeded.³⁰⁴ This Chapter also discussed that in Zimbabwe anti-dumping measures are regulated in Statutory Instrument 266 of 2002. There are also important statutes which are of relevance to anti-dumping investigations namely the Constitution and the AJA.³⁰⁵

Where institutional framework is concerned it was discussed that anti-dumping investigations fall within the scope of the CTC. The CTC was established through the Competition Act. The Chapter discussed that the existence of competition policy and tariffs policy under one division is peculiar to Zimbabwe as there is no any other jurisdiction known for having such a practice.³⁰⁶ It was discussed that this has the potential of posing serious conflicting policy objective.³⁰⁷ It was held that investigating officers lacks institutional capacity to conduct anti-dumping investigations because important elements are left to the determination of the Minister.³⁰⁸ In addition, the CTC is also plagued by other challenges that include a lack of skills and expertise in the CTC and a reluctance of the private sector to pursue cases.

When it comes to substantive provision most provisions in Statutory Instrument 266 of 2002 are not clear and the Act leaves many things unregulated creating gaps for abuse. For example, it was discussed that Statutory Instrument 266 of 2002 that when it comes to the construction of normal value the Act does not give further guidance is given on how to calculate the costs.³⁰⁹ Moreover, when it comes to the determination of both dumping and injury the Minister is the one that has to determine what a like product is. This is despite the fact that the mandate to conduct anti-dumping investigations is supposedly that of the CTC.

When it comes to the determination of injury the provisions of Statutory Instrument 266 of 2002 are not clear as well. The Act refers to prejudice or potential prejudice meaning three things namely actual material prejudice, threat of material prejudice and material retardation. This is different from the WTO, South Africa and EU.³¹⁰ Under these three, injury means actual material injury,

³⁰⁴Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012.

³⁰⁵See generally 5.2.1 Legislative Framework.

³⁰⁶United Nations Conference on Trade and Development (UNCTAD) *Voluntary Peer Review Of Competition Law And Policy: Zimbabwe* (2012) 20.

³⁰⁷See generally 5.2.2 Institutional Framework.

³⁰⁸See generally the discussion on 5.3.1 Determination of Dumping; 5.3.2 Determination of Injury and 5.5 Reviews.

³⁰⁹See generally 5.4.1 Determination of Dumping.

³¹⁰See generally 5.4.2 Determination of Injury.

threat of material injury and material retardation. No further guidance is provided is given on prejudice or potential prejudice in Statutory Instrument 266 of 2002. Importantly the study one of the questions raised was how does the CTC determine potential prejudice of material prejudice, threat of material prejudice and material retardation? It was discussed that Zimbabwe may take lessons from the way South Africa and EU's legislation are crafted.

It should, however, be commended that the regulation in Zimbabwe contains a 'public interest' clause because, at many times, it is not the government itself that is affected by dumping but the general populace.

When it comes to procedural requirements, there are many gaps in the provisions of Statutory Instrument 266 of 2002. For example, the application form should be in a way, which the Minister may prescribe.³¹¹ This means that the format of the application is left to the determination of the Minister. This is problematic as it creates unnecessary and cumbersome processes.³¹² In addition, there are no set periods of when things like final determination should be concluded upon.³¹³ Moreover, Statutory Instrument 266 of 2002 does not specify the period for application of provisional measures.³¹⁴

The impact of anti-dumping is felt seriously by every economy, and therefore, there is a need for Zimbabwe to protect local industries from unfair competition from imports. Some Zimbabwean industries such as poultry and manufacturing industry have alleged dumping but unfortunately no investigation has been conducted. Earlier on, the study showed that industries have recorded losses because of alleged dumping with the poultry industry being the most affected.³¹⁵ Therefore, there is need to amend the current legislation and develop it to a standard that can address and protect Zimbabwe's domestic industry from injurious dumping. This will help in creating competitive industries, helping Zimbabwe to be a global play with comparative advantage in the ACFTA.

The next Chapter concludes the thesis; it discusses the findings and gives recommendations for Zimbabwe.

³¹¹Section 19 (2) of Statutory Instrument 266 of 2002.

³¹²See generally 5.5.1 Initiation

³¹³5.3.3 Duration, termination and suspension.

³¹⁴See generally 5.5.2 Provisional measures and final determination of dumping and prejudice.

³¹⁵See generally 5.7 Economic and Non-Economic Reasons For Creating An Effective Anti-Dumping Regime.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS FOR CREATING AN EFFECTIVE ANTI-DUMPING REGIME IN ZIMBABWE

6.1 INTRODUCTION

When dealing with dumping as a factor affecting macro-economic stability and hindering the growth of local industries, it is best to look at how it should be regulated.¹ A sound framework provides a foundation for effective regulation of dumping.² This in turn provides for anti-dumping measures to be utilised optimally in providing a levelled playing field between exporters and the domestic industry producers of like products.³ 1947 anti-dumping rules in the World Trade Organisation, have been supplemented through additions to Article VI during the 1967 Kennedy round and then by the Anti-Dumping Code during the 1973–1979 Tokyo negotiations.⁴ South Africa and the European Union (EU) have also amended their rules to reflect the changes in the international trading trends.⁵ Although, it cannot be said that there exists a national anti-dumping law that is flawless both South Africa and EU have made considerable efforts in trying to provide sound frameworks that paves way for effective regulation. On the other hand, Zimbabwe still lags behind.⁶ For this reason, there has been massive lobbying to strengthen and enforce anti-dumping laws in the country, in order to protect the domestic industry from dumped goods.⁷

6.1.1 Main Research Question

The main question for this thesis was whether there was a need for assessing Zimbabwe's national anti-dumping framework.⁸ It was stated that the Zimbabwe's anti-dumping regulations have problems both substantively and procedurally that need to be addressed to enable creation for a sound anti-dumping system, providing a platform for development of a healthy and competitive market.⁹

¹See generally 1.2 Background to the Study.

² Payments Association of South Africa 'Legal & Regulatory Framework' available at <http://www.pasa.org.za/national-payment-system/legal-regulatory-framework> (accessed 19 February 2019).

³ Dorn JW & Layton DW 'The WTO Anti-Dumping Agreement: A Guide For Developing Countries' in The World Bank *Legal Aspects of International Trade* (2001) 189.

⁴ 2.2 Brief History of World Trade Organisation rules on dumping.

⁵ See generally 3.3.1 Legislative Framework and 4.3.1 Legislative Framework.

⁶See generally 1.3 Research Problem and Objectives.

⁷See generally 1.3 Research Problem and Objectives.

⁸1.4 Research Questions.

⁹1.4 Research Questions.

6.1.2 Ancillary Research Questions

In support of the main question, the study engaged in the following sub-questions:

- a) How is dumping defined under the provisions of the WTO and what are the procedures for the use and implementation of anti-dumping rules by a Member?
- b) What are some of the problems in anti-dumping rules at the WTO level?
- c) How is dumping regulated under the provisions of South Africa: is it in compliance with international obligations under the WTO?
- d) How is dumping regulated under the provisions of EU: is it in compliance with international obligations under the WTO?
- e) How is dumping regulated under Zimbabwe's national anti-dumping framework: is it in compliance with international obligations under the WTO?
- f) What lessons can Zimbabwe learn from the EU and South Africa, who have successful anti-dumping experience?¹⁰

6.1.3 Chapters Summary

6.1.3.1 Chapter 1

Chapter 1 introduced the concept of dumping; it provided an overview of the background to the study, the significance of the study, and the methodology.¹¹ The Chapter also expressed the problem that exist, which led to the formulation of the main and ancillary research questions.¹² These questions were ultimately addressed in the different Chapters as summarised below.

6.1.3.2 Chapter 2

Chapter 2 went on to discuss the international anti-dumping framework within the context of the WTO.¹³ This was with reference to ancillary research question and b. Special reference was made on the relevant provisions of General Agreement on Tariffs and Trade (GATT) and Implementation of Article VI of GATT (Anti-Dumping Agreement (ADA)).¹⁴ The Chapter discussed substantive and procedural requirements for enacting anti-dumping measures as

¹⁰1.4 Research Questions.

¹¹See generally 1.2 Background to the Study, 1.5 Aim of the Study and 1.6 Research Methodology.

¹²1.4 Research Questions.

¹³See generally 2.4 World Trade Organisation Treatment of Dumping.

¹⁴See generally 2.4 World Trade Organisation Treatment of Dumping.

provided for in the ADA.¹⁵ Whilst discussing substantive and procedural requirements, the Chapter also discussed some of the problems in anti-dumping rules at the WTO level.¹⁶

When requirements of the WTO were evaluated in Chapter 2 what was indicated was not only what the requirements of Article VI of GATT and the ADA are, but also the Chapter showed how several provisions have been interpreted in terms of the WTO jurisprudence.¹⁷ This guides the WTO Members on how to interpret their own provisions. It was discussed that under the WTO anti-dumping measures may only be imposed where dumping causes injury.¹⁸

Amongst the shortcomings discussed in the WTO rules is that currently the rules do not adequately address competition issues and there is no public interest clause despite the fact that in most cases products are sold to the public.¹⁹ The author suggested that competition issues be harmonised with anti-dumping rules in order to create a balance between competition and anti-dumping.²⁰ As for public interest clause, the author suggested that a clause be drafted into ADA which prescribes that, 'where appropriate, and on a case by case basis, the importing state may consider the interests of the public where the consideration of such interests do not lead to market negatives or absurd results in the national economy'.²¹ Moreover, issues to be considered, as 'being of public interest would include the competitive situation, the interests of consumers or any other economic circumstances of interest'.²² Public interest should be considered on initiating an investigation and on application of anti-dumping measures.²³

6.1.3.3 Chapter 3

With reference to ancillary research question c and f, Chapter 3 discussed what South Africa is doing in order to regulate the injurious dumping of goods into its domestic markets. It assessed

¹⁵ See generally 2.4 World Trade Organisation Treatment of Dumping and 2.5 Procedural Requirements for Legislating Anti-Dumping Measures.

¹⁶ See generally 2.6 Challenges within the World Trade Organisation Anti-Dumping Rules.

¹⁷ 2.4 WTO Treatment of Dumping.

¹⁸ See generally 2.4 WTO Treatment of Dumping.

¹⁹ 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

²⁰ 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

²¹ 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

²² 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

²³ 2.6 Challenges within World Trade Organisation Anti- Dumping Rules.

South Africa's legislative framework as the best African practice with the aim of drawing lessons for Zimbabwe in Chapter 5.²⁴

The study indicated that South Africa is the largest user of anti-dumping measures in Africa.²⁵ Its jurisprudence has developed over time with technical expertise built through platforms such as Trade Law Centre (TRALAC) and workshops done by the WTO.²⁶ Zimbabwe can take lessons from South Africa in this regard, and invest in growing technical expertise through research organisations as well as sending its delegates to other jurisdictions and the WTO to learn on anti-dumping rules.²⁷ It was discussed that the International Trade Administration Act 71 of 2002 (ITAA) and the Anti-Dumping Regulations (ADR 2003) provide clearer rules that help the Commission function effectively in conducting anti-dumping investigations.²⁸ Provisions which relate to injury are amongst the clearer rules and Zimbabwe can learn from that.²⁹

It was held that, although South Africa does not have a mandatory public interest rule, it can be inferred from some of its Commission reports and conduct that public interest has been considered in reaching some of its decisions.³⁰ These decisions are concerned with whether or not to apply anti-dumping measures or to initiate investigations.³¹

South Africa's anti-dumping legislation does generally comply with the ADA with regards to some of its provisions does comply with the WTO provisions but it has been criticised in the way it constructs its normal value.³² South Africa uses this method as the first primary alternative to normal value and this always leads to higher anti-dumping duties prejudicing exporters.³³ Brink has also criticised the way dumping margins are calculated pointing out that there is lack of transparency on how calculations are done and highlighting that in some situations the Commission uses unverified evidence disadvantaging exporters.³⁴ The study also observed that

²⁴See generally 1.7 Chapter Outline.

²⁵3.1 Introduction.

²⁶3.1 Introduction.

²⁷See generally 5.3.2 Institutional Framework.

²⁸See generally 3.4.1 Determination of Dumping; 3.4.2 Determination of Injury and 3.5 Procedural Requirements.

²⁹See generally 3.4.2 Determination of Injury.

³⁰See generally 3.4.4 Public Interest Considerations.

³¹See generally 3.4.4 Public Interest Considerations.

³²See generally 3.4.1 Determination of Dumping.

³³See generally 3.4.1 Determination of Dumping.

³⁴See generally 3.4.1 Determination of Dumping.

South Africa has been criticised for using unverified information, which goes against WTO principles of fairness and transparency discussed in Chapter 2.³⁵

6.1.3.4 Chapter 4

Chapter 4 discussed anti-dumping laws in the EU with reference to ancillary research questions d and f. The Chapter discussed how the laws have been used to regulate the injurious dumping in the EU. The aim was to also draw lessons for Zimbabwe in Chapter 5.³⁶

Chapter 4 discussed that the EU's anti-dumping regulation, Regulation (EU) 2016/1036 closely followed the wording of the ADA.³⁷ The Regulation has made great efforts to explain normal value; export price; and how to calculate dumping margin.³⁸ The EU has comprehensive provisions on fair comparison and injury, Zimbabwe may take lessons from that.³⁹

Despite the positive attributes, research has accused the EU of using anti-dumping rules as a trade protective measure in cases of calculating normal value where significant distortions exist.⁴⁰ The author also observed that although Regulation (EU) 2016/1036 was amended to recognise the end of China's transitional period the EU may still be violating WTO rules. This is because the amendment indirectly targets companies from China who still need to prove that their products were produced under undistorted conditions.⁴¹ This, by implication, means that the EU is violating WTO laws because the burden of proof is still on Chinese producers to prove that costs are undistorted.⁴² The EU has also been criticised for limiting access to information and lack of transparency because of its confidentiality provisions.⁴³

6.1.3.5 Chapter 5

Chapter 5 was a discussion based on the main research questions together with ancillary question f. The Chapter looked at how dumping is defined in Zimbabwe.⁴⁴ What do the substantive and

³⁵See generally 3.4.1 Determination of Dumping.

³⁶See generally 1.7 Chapter Outline.

³⁷See generally 4.4 Substantive Procedures.

³⁸See generally 4.4 Substantive Procedures

³⁹ 4.4.1 Determination of Dumping; 4.4.2 Determination of Injury.

⁴⁰4.4.1 Determination of Dumping.

⁴¹See generally 4.4.1 Determination of Dumping.

⁴²See generally 4.4.1 Determination of Dumping.

⁴³4.5.3 Confidentiality.

⁴⁴See generally 1.7 Chapter Outline.

procedural requirements of the anti-dumping provision entail?⁴⁵ Are the provisions in compliance with WTO? What lessons can Zimbabwe learn from SA and EU?⁴⁶

In the analysis of Zimbabwean anti-dumping system and through analyses of the WTO substantive and procedural requirements using South Africa and the EU anti-dumping systems as best practices, it was found that the hypothesis was correct in stating that Zimbabwean anti-dumping system required a major overhaul.

Several shortcomings were highlighted in Zimbabwe's anti-dumping regulation; thereby, confirming the need for substantial changes.⁴⁷ Some of these problems include the fact that the Competition and Tariff Commission (CTC) lacks the capacity to make a determination on whether the unfair practices are caused by dumping in terms of Statutory Instrument 266 of 2002.⁴⁸ Moreover, the Minister is charged with making a final decision in the determination of important elements in anti-dumping investigations, which arguably creates cumbersome processes prone to abuse.⁴⁹ In addition, the Chapter held that the co-existence of competition policy and tariffs policy under the CTC has the potential of posing serious conflicting policy objective.⁵⁰

Chapter 5 also discussed that where injury is concerned Zimbabwe may take lessons from South Africa and EU whose regulations contain clear rules on how to determine injury.⁵¹ It was held that Zimbabwe's provisions when it comes to injury are confusing. This is because the regulation talks about prejudice or potential prejudice meaning actual material prejudice; threatening to cause prejudice to Zimbabwe's domestic industry and material retardation.⁵² The regulation provides no further guidance on how to determine such.⁵³ In addition, there are instances where the Act contradicts itself, leaving difficult questions in the mind of a reader, and as a result, there is need to simplify the Act.⁵⁴ The study also observed that although Statutory Instrument 266 of 2002 is

⁴⁵See generally 1.7 Chapter Outline.

⁴⁶See generally 1.7 Chapter Outline.

⁴⁷See generally 5.8 Conclusion.

⁴⁸See generally 5.3.2 Institutional Framework.

⁴⁹See generally 5.4.1 Determination of Dumping.

⁵⁰See generally 5.3.2 Institutional Framework.

⁵¹5.4.2 Determination of Injury.

⁵²See generally 5.4.2 Determination of Injury.

⁵³See generally 5.4.2 Determination of Injury.

⁵⁴See generally 5.5.1 Initiation and 5.6 Reviews.

the main regulation for anti-dumping, a number of its provisions are silent on what the Commission is required to do.⁵⁵

Based on the problems identified in Chapter 5, it is suggested, that Zimbabwe address problems that are in the current regulation to enable creation of a sound anti-dumping framework paving way for effective regulation.⁵⁶ Zimbabwe should amend the current legislation and the investigating officers should be given capacity to determine whether or not dumping has taken place.⁵⁷

6.2 RECOMMENDATIONS

6.2.1 Anti-Dumping Authority

In order for Zimbabwe to ensure that local industries are protected from injurious dumping, it is important for the government to restructure its anti-dumping policy and the structure and powers of the CTC where dumping is concerned. There is need to establish a separate Commission that deals with tariffs only and thus separate competition policy and tariffs policy. A legislation that gives the Commission its mandate should be promulgated. The Commission may take the name of International Trade Tariff Commission (ITTC). It is recommended that the Commission should be an independent body but will fall under the Ministry of Industry, Commerce and Enterprise Development.

As such, the study recommends the functions of the Commission be clearly written and specified (regulated) in the instrument. As an independent body, the Commission should have the capacity to determine dumping, injury and causality without intervention from the Minister. This requires the Commission to determine all aspects of the three elements, and this must be done in its capacity as an independent body.

The Minister should not have power to determine anything where anti-dumping investigations are concerned as this may compromise the independence of the Commission. The Minister should only be involved upon the conclusion of investigations where the Commission requests the

⁵⁵See generally 5.4.1 Determination of Dumping; 5.4.2 Determination of Injury and 5.5 Procedural Requirements.

⁵⁶See generally 1.4 Research Questions.

⁵⁷See generally 5.3.2 Institutional Framework.

Minister to impose provisional measures as in the case of South Africa. The Minister should also step in where definitive measures concerned where the Commission recommends that he requests the Minister of Finance to impose the duty. The Minister should not be the one to determine if a review is necessary as this creates bureaucracy. This should be the mandate of the Commission and legislation should be clear in this regard.

6.2.2 Legislation

In all the Chapters, it was made clear that anti-dumping investigations are complex and protracted and therefore there is need to simplify the process where possible. It is clear that Statutory Instrument 266 of 2002 is lacking in different provisions and is not clear on so many issues. These include the lack of time frames within which provisional anti-dumping measures remain in place and when reviews should, unclear provisions on dumping margin and injury. Also the fact that countervailing measures and anti-dumping measures are in one regulation creates more confusion to an already complex subject. If Zimbabwe implements the current rules as they are, it may lead to irregularities and the domestic industry may not be protected from the injurious dumping it is currently faced with. Although lessons may be taken from South Africa and EU but the legislator should always be aware of market environments of the two and should discern what exactly to incorporate bearing in mind that it should relate to Zimbabwean market.

It is proposed that a separate legislation dealing with only anti-dumping issues be enacted. The structure of the separate legislation may be in the following format:

Part 1: Definitions

Part 2: Scope and functions including limitations of the CTC in relation to anti-dumping investigations

Part 3: Substance

A: Determination of Dumping

- (i) Normal Value
- (ii) Export Price
- (iii) Comparison

(iv) Margin of dumping

B: Determination of Injury

C: Causality

Part 4: Investigation proceedings and time frames

(i) Initiation procedures

(ii) Investigation

(iii) Provisional Measures

(iv) Undertakings

(v) Termination without measures and Imposition of definitive duties

Part 5: Duration, Reviews and Refunds

Part 6 General Issues such as currency conversion, oral hearings, confidentiality etc

6.2.3 Issues to be addressed

Normal Value

Chapter 5 identified a number of issues that need to be addressed in Zimbabwe's anti-dumping legislation to create an effective anti-dumping regime. When determining normal value, the Commission should consider sale transactions of a 'like product'.⁵⁸ Currently, a 'like product' is any product 'which the Minister determines as being identical in all respects to the subject products or any products which the Minister determines to have characteristics closely resembling those of the subject products'.⁵⁹ It is recommended that the Commission should have the capacity to determine such, because the Minister does not have capacity to conduct investigations.

Another problem identified in Chapter 5 is that sale transactions may only be disregarded as not being in the 'ordinary course of trade' for reason of price upon determination of the Minister.⁶⁰

⁵⁸See generally 5.4.1 Determination of Dumping.

⁵⁹Section 2 of Statutory Instrument 266 of 2002.

⁶⁰See generally 5.4.1 Determination of dumping.

This may be done if such ‘sales are made within an extended period of time in substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable period of time.’⁶¹ Again, this provision empowers the Minister to be actively involved in the investigation, which compromises the capacity and independence of the Commission. As such, it is recommended that the Minister should not have such power but it should be the mandate of the Commission.

When constructing normal value, it was held that Statutory Instrument 266 of 2002 does not give further guidance on how to calculate the costs.⁶² However, the CTC anti-dumping application form does provide some guidance, but the form is not a statute or delegated legislation. As such, the guidance in the forms should be included in the legislation, if not they are considered *ultra vires*. This will minimise abuse that may happen if the process is subjective.

Chapter 5 also identified that currently when it comes to methods of comparison Statutory Instrument 266 of 2002 only provides for one method.⁶³ This is problematic as some situations the weighted average-to-weighted average method will not allow for fair comparison.⁶⁴ Thus, Zimbabwe may take lessons from Regulation (EU) 2016/1036 and amend its legislation. This provision will give the Commission capacity to use any allowed method in terms of the WTO that allows for fair comparison. The amendment may read as follows:

‘The comparison under subsection (1) shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at, as nearly as possible, the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis, due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

- a) Physical characteristics

⁶¹Section 15 (4) of Statutory Instrument 266 of 2002.

⁶²See generally 5.4.1 Determination of Dumping.

⁶³See generally 5.4.1 Determination of Dumping.

⁶⁴See generally 5.4.1 Determination of Dumping.

- b) Import charges and indirect taxes
- c) Discounts, rebates and quantities
- d) Level of trade
- e) Transport, insurance, handling, loading and ancillary costs
- f) Packing
- g) Credit
- h) Commissions
- i) Other factors other than above if it is demonstrated that they affect price comparability as required under this paragraph, in particular if customers consistently pay different prices on the domestic market because of the difference in such factors'.⁶⁵

When it comes to dumping margin it was stated that Zimbabwe fails to recognise that there are instances where the weighted average-to-weighted average method cannot be used.⁶⁶ As such this should be amended to reflect WTO methods. The amended part may read:

Subject to subsections (1) and (2), the existence of the margin of dumping shall, unless otherwise provided by regulations, normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions of the subject products and where comparison was not made on average -to- average method dumping margin should be determined accordingly either on transaction -to-transaction method' 'and the average-to-transaction method' or any other made used by the Commission when comparing.⁶⁷

Injury

The other problem that was identified is concerned with determination of injury; the author stated that the use of prejudice and potential prejudice is confusing and it would also be ideal for the legislator to provide factors that can be looked at when determining injury in the actual Act not just on the forms.⁶⁸ This is because the forms are not binding. As such the new provision may read:

- 1) In determining material injury to Zimbabwe the Commission shall consider whether there has been a significant depression and/or suppression of Zimbabwe industry's prices

⁶⁵Adopted from Regulation (EU) 2016/1036.

⁶⁶See generally 5.4.1 Determination of dumping.

⁶⁷Adopted from Article 2.4.2 of the ADA.

⁶⁸See generally 5.4.2 Determination of injury.

- 2) In its determination of material injury the Commission shall further consider whether there have been significant changes in the domestic performance of Zimbabwe industry in respect of the following potential injury factors:
 - a) Sales volume;
 - b) Profit and loss;
 - c) Output
 - d) Market share;
 - e) Productivity;
 - f) Return of investments;
 - g) Capacity utilisation;
 - h) Cash flow;
 - i) Inventories;
 - j) Employment;
 - k) Wages and salaries
 - l) Growth;
 - m) Ability to raise capital or investments;
 - n) and any other relevant factors placed before the Commission
- 3) The Zimbabwean industry should provide additional information as required by the Commission at any stage during an investigation.⁶⁹

When it comes to threat of material injury, the Statutory Instrument 266 of 2002 is silent on how to determine threat of material injury.⁷⁰ It was highlighted that in order to understand an anti-dumping action, it is important to understand anti-dumping terminology.⁷¹ As such, the anti-dumping legislation should contain a provision on how to determine a threat of material injury. The new provision may read as the following:

- 1) A determination of threat of material injury shall be based on facts and not merely on allegation, speculation or remote possibility. The change in circumstances which would create a situation in which dumping would cause material injury must be clearly foreseen and imminent.
- 2) In considering a threat of material injury the Commission shall, in addition to the factors indicated under consideration of material injury, and where relevant information is available, consider such factors as:

⁶⁹Adopted from ADR 2003.

⁷⁰See generally 5.3.2 Determination of injury.

⁷¹See generally 5.3.2 Determination of injury.

- a) any significant increase of allegedly dumped imports into the local market indicating the likelihood of substantially increased importation.
 - a. whether the products concerned enter the country at prices that will have a significant depressing or suppressing effect on local prices and are likely to increase demand for further imports.
 - b. the exporters' inventories of the product being investigated.
 - c. availability of other markets that can absorb the free capacity of the exporter.
 - d. state of the economy of the country of origin/export and its influence on the operations of the manufacturers/exporters.
 - e. any other information relevant to your allegation that the infliction of material injury is imminent⁷²

Causal Link

When it comes to causality, the study suggested in Chapter 5 that anti-dumping legislation in Zimbabwe should include factors to be considered when determining causality.⁷³ This is because not giving guidelines places a huge responsibility on investigating authorities.⁷⁴ In addition, there is lack of technical expertise and capacity it may lead to irregularities.⁷⁵ For this reason, the new provision may read as follows:

For purposes of this section

- (a) The Commission must be satisfied that any causal relationship between the subject products and the injury to the domestic industry shall be based on an examination of all relevant evidence before the Commission these include but is not limited to
 - (i) the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the Zimbabwean market;
 - (ii) the price undercutting experienced by the Zimbabwean industry vis-a-vis the imported products;
 - (iii) the market share of the dumped imports;
 - (iv) the magnitude of the margin of dumping; and
 - (v) the price of undumped imports available in the market⁷⁶

⁷²Adopted from CTC Anti-dumping Application Form.

⁷³See generally 5.4.3 Causal Link.

⁷⁴ See generally 5.4.3 Causal Link.

⁷⁵See generally 5.4.3 Causal Link.

⁷⁶Adopted from ADR 2003.

- (b) The Commission shall also examine any known factors other than the subject products, which at the same time are injuring the domestic industry. These factors include but are not limited to:
- (i) the volume and prices of imports not sold at dumped prices;
 - (ii) contraction in demand or changes in the patterns of consumption;
 - (iii) trade restrictive trade practices of and competition between the foreign and Zimbabwe's producers;
 - (iv) developments in technology;
 - (v) other factors affecting Zimbabwe's prices; the industry's export performance; and
 - (vi) the productivity of Zimbabwe's industry.⁷⁷

Other Issues

The author also suggested that Zimbabwe's anti-dumping legislation should include the following in order to promote transparency and minimise potential abuse by officials. Anti-dumping legislation should also look to address the following:

- i) The Act should add what information is required for submission when one is applying for a review.⁷⁸ This should be done to promote transparency. In addition it is recommended that the reviews should be conducted upon determination of the Commission as prescribed in the legislation and the Minister should not have the capacity to give the Commission permission to conduct one.
- ii) The Act should define what is meant by the phrase 'ordinary course of trade'.⁷⁹
- iii) The Act should address the procedure of the Reviews because currently it is silent.⁸⁰
- iv) The Act should include a detailed provision on calculation of normal value.⁸¹
- v) The Act should include appropriate time frames indicated in which reviews should be finalised because having no time frames may prejudice exporters as CTC will not be mandated to conclude reviews in a reasonable time frame.⁸² It is recommended that the time frame should be 12 months or less in accordance with WTO rules.

⁷⁷Adopted from ADR 2003

⁷⁸See generally 5.6 Reviews.

⁷⁹See generally 5.4.1 Determination of Dumping.

⁸⁰See generally 5.6 Reviews.

⁸¹Lesson learnt from the EU in 4.4.1 Determination of Dumping.

⁸²5.5.3 Duration, Termination and Suspension

- vi) The Act should prescribe the maximum period that provisional measures should be applied to prevent uncertainty.⁸³
- vii) The Act should expand on the factors taken from EU when making a comparison and define them in accordance with Zimbabwean context.
- viii) The Act should include a time frame of when final determination of dumping and injury should be concluded rather than stating that within a period which may be prescribed as this creates uncertainty.⁸⁴
- ix) The Act should contain a provision for application for lesser duty if it is enough to eliminate injury like in the case of South Africa and EU.⁸⁵ This is because under the WTO anti-dumping measures are necessary to remedy unfair trade. As such if a lesser can eliminate the injurious dumping, it may be better to apply a lesser duty and allow a competitive market.
- x) The Act should define or put guidelines in place of how to identify an appropriate third country to avoid issues of misinterpretation.⁸⁶

6.3 FINAL REMARKS

Zimbabwe's current anti-dumping system needs an overhaul in order to pave way for an effective anti-dumping regime. As such, there is need for a new legislation that deals with only anti-dumping issues. Whilst the current legislation does comply with the requirements of Article VI of GATT and the ADA in some of its provisions; most provisions lack transparency. As such a separate legislation will help in creating certainty in the market place, and this will enhance transparency in the Zimbabwean anti-dumping system. In addition a number of changes should be addressed in order to meet Zimbabwe's specific needs and protect the domestic industry from the current injurious dumping it is facing. Although Zimbabwe can draw lessons from the South African and EU experiences, the lawmakers should take heed of what to incorporate bearing in mind that markets are different.

⁸³5.5.2 Provisional Measures and Final Determination of Dumping and Prejudice.

⁸⁴5.5.2 Provisional Measures and Final Determination of Dumping and Prejudice.

⁸⁵5.5.2 Provisional Measures and Final Determination of Dumping and Prejudice.

⁸⁶5.4.1 Determination of Dumping.

BIBLIOGRAPHY

BOOKS

Aggarwal A *The Anti-Dumping Agreement and Developing Countries: An Introduction* (2007) Oxford: Oxford University Press.

Andersen H *EU Dumping Determinations and WTO Law* (2009) New York: Kluwer Law International.

Anwar R & Raslan A *Anti-dumping: A developing country perspective* (2009) New York: Kluwer Law International.

Aswathappa K *International Business* (2015) New Delhi: McGraw Hill Education Private Limited.

Bovard J *The Fair Trade Fund: How Congress Pillages the Consumer and Decimates American Competitiveness* (2016) New York: St. Martin's Press.

Bown CP *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (2010) Washington: Brookings Institution Press.

Brink G *Anti-Dumping and Countervailing Investigations in South Africa* (2002) Pretoria: Gosh Trading.

Carbaugh R *International Economics* 12ed (2008) Mason: Cengage Learning.

Chiweza D *Out of the Rabble: Ending the Global Economic Crisis by Understanding the Zimbabwean Experience* (2013) Bloomington: iUniverse.

Cohn T *Global Political Economy* (2015) New York: Routledge.

Corbett R, Jacobs F & Shackleton M *The European Parliament* 8ed (2011) London: John Harper Publishing.

Currie I *et al The Promotion of Administrative Justice Act bench book* (2001) Cape Town: Siber Ink.

- Czako J, Human J & Miranda J *A handbook on anti-dumping investigations* (2003) Cambridge: Cambridge University Press.
- Dale R *Anti-dumping Law in a Liberal Trade Order* (1980) Berlin: Springer.
- Dwivedi DN *Managerial Economics* 8ed (1980) New Delhi: Vikas Publishing House.
- Feltoe G *A guide to administrative Law in Zimbabwe* (2012) Harare: Legal Resources Foundation.
- Finger MJ (ed) *Antidumping: How it Works and who Gets Hurt* (1993) Michigan: University of Michigan Press.
- Gottheil F *Principles of Microeconomics* (2013) Boston: Cengage Learning.
- Gutner T *International Organizations in World Politics* (2016) California: CQ Press.
- Hartley TC *The Foundations of European Union Law: An introduction to the Constitutional and Administrative Law of the European Union* 8ed (2014) Oxford: Oxford University Press.
- Hinkelman EG *Dictionary of International Trade: Handbook of the Global Trade Community Includes 21 Key Appendices* (2005) California: World Trade Press.
- Hix S & Høyland B *The political system of the European Union* 3ed (2011) Basingstoke: Palgrave Macmillan.
- Hoexter C *Administrative Law in South Africa* (2007) Cape Town: Juta and Company Ltd.
- Howse R *The World Trading System: Administered protection* (1998) New York: Routledge.
- Jackson JH & Vermulst EA, *Antidumping Law and Practice, A Comparative Study* (1989) Michigan: University of Michigan Press.
- Jensen LC & Hønneland G *Handbook of the Politics of the Arctic* (2015) Cheltenham: Edward Elgar Publishing.
- Koh KM & Hyun JW *Competition Law in the Republic of Korea* (2011) Texas: Kluwer Law International.

Lee SE *World Trade Regulation: International Trade under the WTO Mechanism* (2012) New York: Springer.

Lee YS *Safeguard Measures in World Trade: The Legal Analysis* 2ed (2005) Texas: Kluwer Law International.

Lester S, Mercurio B & Davies A *World Trade Law: Text, Materials and Commentary* (2012) Oxford: Bloomsbury Publishing.

Lindsey B & Ikenson D *Anti-dumping Exposed: The Devilish Details of Unfair Trade Law* (2003) Washington: Cato Institute.

Lowenfeld AF *International Economic Law* (2008) Oxford: Oxford University Press.

Luo Y *Anti-dumping in the WTO, the EU, and China: The Rise of Legalisation in the Trade Regime and Its Consequences* (2010) Texas: Kluwer Law International.

Madar D *Big Steel: Technology, Trade, and Survival in a Global Market* (2009) Vancouver: UBC Press.

Markusen JR *International Trade: Theory and Evidence* (1995) New Delhi: McGraw Hill Education Private Limited.

Mastel G *Antidumping Laws and the U.S. Economy* (2016) New York: Routledge.

Mavroidis PC *et al* (ed) *The Law and Economics of Contingent Protection in the WTO* (2010) Cheltenham: Edward Elgar Publishing.

Mavroidis PC *The Regulation of International Trade: The WTO Agreements on Trade in Goods* (2016) Cambridge: MIT Press.

McMahon J *The WTO Agreement on Agriculture: A Commentary* (2006) Oxford: Oxford University Press.

Mitchell AD *Legal Principles in WTO Disputes* (2008) Oxford: Oxford University Press.

Moens G & Trone J *Commercial Law of the European Union* (2010) New York: Springer.

Moens PIA *Public Interest Issues in International and Domestic Anti-Dumping Law: The WTO, European Communities and Canada* (1998) Geneva: Graduate Institute of International Studies.

Morrissey O & Filatotchev I *Globalisation and Trade: Implications for Exports from Marginalised Economies* (2001) London: Frank Cass Publishers.

Nedumpara J *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (2016) New York: Springer.

OECD *Multifunctionality towards an analytical framework: Towards an analytical framework* (2001) Paris: OECD Publishing.

Paul J *International Marketing: Text and Cases* (2008) New Delhi: Tata McGraw-Hill Publishing Company Limited.

Pomfret R *International Trade: Theory, Evidence and Policy* (2016) Singapore: World Scientific Publishing Company.

Raju KD *World Trade Organisation Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence* (2008)

Raju KD *World Trade Organization Agreement on Anti-dumping: A GATT/WTO and Indian Jurisprudence* (2008) Texas: Kluwer Law International.

Sabathil G, Joos K & Kessler B *The European Commission: an Essential Guide to the Institution, the procedures and the policies* (2008) London: Kogan Page Publishers.

Saleem S *Business Environment* (2006) New Delhi: Pearson.

Saleem S *et al Environment for Business: Strictly as per requirements of the Gujarat Technological University* (2010) New Delhi: Pearson.

Shore S *Building Europe: The Cultural Politics of European Integration* (2013) New York: Routledge.

Shukla S *International Business* (2008) New Delhi: Excel Books.

Singh G *Subsidies in the Context of the WTO's Free Trade System: A Legal and Economic Analysis* (2017) Switzerland: Springer International

Snyder F *The EU, the WTO and China: Legal Pluralism and International Trade Regulation* (2010) Oxford: Hart Publishing.

Srinivasan R *International Marketing* (2008) New Delhi: PHI Learning Pvt. Ltd.

Stamenova S *The Latest EU-Commission President Elections and the role of the European Parliament* (2018) Munich: GRIN Verlag.

Stanbrook C and Bentley P *Dumping and Subsidies: Law and Procedures Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community* (1996) The Hague: Kluwer.

Steele K (ed.) *Antidumping Under the WTO: A Comparative Review* (1996) Texas: Kluwer Law International.

Stoll PT & Koebele M *WTO - Trade Remedies* (2008) Leiden: Martinus Nijhoff Publishers.

Stoll PT & Schorkopf F *WTO: World Economic Order, World Trade Law* (2006) Leiden: Martinus Nijhoff Publishers.

Trebilcock M, Howse R & Eliason A (4ed) *The Regulation of International Trade* (2013)

Trebilcock MJ *Advanced Introduction to International Trade Law* (2015) Cheltenham: Edward Elgar Publishing.

Trebilcock MJ *Advanced Introduction to International Trade Law* (2015) New York: Routledge.

Trebilcock MJ and Howse R (3ed) *The Regulation of International Trade* (2005) New York: Routledge.

United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement: World Trade Organisation* (2003) UNCTAD: United Nations.

United Nations Conference on Trade and Development (UNCTAD) *Training Module on the WTO Agreement on Anti-Dumping* (2004) UNCTAD: United Nations.

United Nations Conference on Trade and Development (UNCTAD) *Voluntary Peer Review of Competition Law and Policy: Zimbabwe Overview* (2012) UNCTAD: United Nations.

United Nations Conference on Trade and Development (UNCTAD) *Voluntary Peer Review of Competition Law and Policy: Zimbabwe* (2012) UNCTAD: United Nations.

United Nations Conference on Trade and Development (UNCTAD) *Dispute Settlement in International Trade: Anti-Dumping Measures* (2003) UNCTAD: United Nations.

Van Bael I & Bellis JF *EU Anti-Dumping and Other Trade Defence Instruments* (2011) Texas: Kluwer Law International.

Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organization* 3ed (2013) Cambridge: Cambridge University Press.

Van den Bossche P *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2005) Cambridge: Cambridge University Press.

Venkatesh M A *Handbook on Anti-dumping* (2001) The Coimbatore District Small Industries Association-CODISSIA.

Vermulst EA & Graafsma F *WTO Disputes: Anti-dumping, Subsidies and Safeguards* (2002) London: Cameron May Limited.

Viner J *Dumping: A problem in International Trade* (1923) Chicago: University of Chicago Press.

WTO *Dispute Settlement Reports 2003, Volume 5* (2005) Geneva: WTO.

WTO *Dispute Settlement Reports 2003, Volume 6* (2005) Geneva: WTO.

WTO *Understanding the WTO* (2008) Geneva: WTO.

WTO *Understanding the WTO* 5ed (2015) Geneva: WTO.

CHAPTERS IN BOOKS

Boele-Woelki K 'What comparative family should entail' in Boele-Woelki K (ed.) *Debates in family law around the globe at the dawn of the 21st Century* (2009) Antwerp: Intersentia.

Brink G 'South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System' in Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) Cambridge: Cambridge University Press.

Brink G 'South Africa' in Nakagawa J *Anti-Dumping Laws and Practices of the New Users* (2007) London: Cameron May Limited.

Distefano M 'The WTO Dispute Settlement Understanding Review: What Future for the Appellate Stage?' in Boschiero N *et al* (eds) *International Courts and the Development of International Law* (2003) New York: Springer.

Erixon F 'Anti-dumping in the European Union' in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) New Delhi: Academic Foundation.

Finger JM 'Making sense of GATT/WTO provisions allowing for import restrictions' in Hoekman BM, Mattoo A & English P (eds) *Development, Trade, and the WTO: A Handbook, Volume 1* (2002) Washington, DC: World Bank Publications.

Finger JM 'Reform' in Finger JM & Artis NT (eds) *Antidumping: How it Works and who Gets Hurt* (1993) Michigan: University of Michigan Press.

Hoekman B 'The WTO: Functions and Basic Principles' in Hoekman B, Mattoo A and English P (Eds) *Development, Trade, and the WTO: A Handbook* (2002) Washington, DC: World Bank Publications.

Jackson JH, Hudec RE & Davis D 'The Role and Effectiveness of the WTO Dispute Settlement Mechanism' in Collins SM & Rodrik D (Eds) *Brookings Trade Forum* (2000) Washington, DC: Brookings Institution Press.

Joubert N 'Managing the Challenges of WTO Participation: The Reform of South Africa's Anti-Dumping Regime' in Gallagher P, Low P & Stoler AL (eds) *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) Cambridge: Cambridge University Press.

Kandiero T 'Malawi in the multilateral trading system' in Gallagher P, Low A & Stoler L (eds) *Managing the Challenges of WTO Participation: 45 Case Studies*. Cambridge: Cambridge University Press.

Kufuor KO 'The Growing Problem of Intra-Developing Country Anti-Dumping Actions in World Trade' in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) New Delhi: Academic Foundation.

Lloyd PH 'Anti-Dumping and Competition Law' in Appleton AE & Plummer MG (ed) *The World Trade Organization: Legal, Economic and Political Analysis* Volume I (2007) New York: Springer.

Mass C 'Section 4 of the AJA and Procedural Fairness in Administrative Action Affecting the Public: A Comparative Perspective' in Lange C and Wessels J (eds) *The Right to Know – South Africa's Promotion of Administrative Justice and Access to Information Acts* (2004) Cape Town: Siber Ink.

McCarthy C 'African Regional Economic Integration: Is the Paradigm Relevant and Appropriate?' in Herrmann C & Terhechte JP (eds) *European Yearbook of International Economic Law* (2011) New York: Springer.

Molyneux CG 'Establishing the Rules of the Game: Domestic Structures and Unfair Trade Instruments' in Snyder (ed) *Regional and Global Regulation of International Trade* (2002) London: Hart Publishing.

Storey VA & Richard B 'Europe 2020: Will Higher Education in the European Union be a catalyst for a more dynamic prosperous economy?' in Wang VC (ed) *International Education and the Next-Generation Workforce: Competition in the Global Economy: Competition in the Global Economy* (2013) Pennsylvania: IGI Global.

Theron N 'Anti-dumping procedures: Lessons for developing countries with special emphasis on the South African experience' in Debroy B and Chakraborty D (eds) *Anti-dumping: global abuse of a trade policy instrument* (2007) New Delhi: Academic Foundation.

Van Calster G 'International Trade Agreements' in Schwabach A and Cockfield AJ (ed) *International Law and Institutions* (2009) Oxford: Eolss Publishers.

JOURNAL ARTICLES

Adamantopoulos K & De Notaris D 'The Future of the WTO and the Reform of Anti-Dumping Agreement: A Legal Perspective' (2000) 24 *Fordham International Law Journal* 30-61.

Alamri MA 'A Conceptual Framework: "Dumping" And "Anti-Dumping" In The International And Regional Legal Systems' (2017) 5 (1) *Global Journal of Politics and Law Research* 26-45.

Arko-Cobbah A 'The right of access to information: Opportunities and challenges for civil society and good governance in South Africa' (2008) 34(2) *IFLA journal* 180-191.

Barringer WH and Dunn CA 'Antidumping and Countervailing Duties Investigations under the Trade Agreements Act of 1979' (1979) 14 *Journal of International Law & Economics* 1-38.

Bartels L 'The separation of powers in the WTO: How to avoid judicial activism' (2004) 53(4) *International & Comparative Law Quarterly* 861-895.

Bolton RA 'Anti-Dumping and Distrust: Reducing Anti-Dumping Duties under the W.T.O. through Heightened Scrutiny' (2011) 29(1) *Berkeley Journal of International Law* 66-93.

Boscheck R 'Trade, Competition and Anti-Dumping – Breaking the Impasse!?' (2000) 35(6) *Intereconomics* 282–287.

Bown CP and McCulloch R 'US–Japan and US–China trade conflict: Export growth, reciprocity, and the international trading system' (2009) 20(6) *Journal of Asian Economics* 669-687.

Brink G '10 Major Problems with the Anti-Dumping Instrument in South Africa' (2005) 39 (1) *Journal of World Trade* 147–157.

Brink G 'Anti-dumping and China: three major Chinese victories in dispute resolution' (2014) 47(1) *Comparative and International Law Journal of Southern Africa* 1-37.

Brink G 'Anti-Dumping and Judicial Review in South Africa: A need for Urgent Reform' (2012) 7(5) *Global Trade and Customs Journal* 275–282.

Brink G 'Dumping and Injury Margin Calculation Methods: Ten Major Problems in South Africa' (2007) *Global Trade and Customs Journal* 59–65.

Brink G 'National Interest in Anti-Dumping Investigations' (2009) 126 *South African Law of Journal* 316 – 359.

Brink G 'New directions by the Panel in Russia—Commercial Vehicles and the implications for South African antidumping investigations' (2017) 50(3) *Comparative and International Law Journal of Southern Africa* 417-441.

Brink G 'One Hundred Years of Anti-dumping in South Africa' (2015) 49 *Journal of World Trade* 325–350.

Brink G 'X-Raying Injury Findings in South Africa's Anti-Dumping Investigations' (2015) 23 (1) *African Journal of International and Comparative Law* 144-173.

Brink G "South Africa: A complicated, unpredictable, long and costly judicial review system", in Yilmaz M *Domestic Judicial Review of Trade Remedies* (2013) 247-268.

Brooks A & Simon D 'Unravelling the Relationships between Used-Clothing Imports and the Decline of African Clothing Industries' (2012) 43(6) *Development and Change* 1265-1290.

Busch ML & Pelc KJ 'Does the WTO need a Permanent Body of Panelists?' (2009) 12(3) *Journal of International Economic Law* 579-594.

Busch ML & Reinhardt E 'Bargaining in the shadow of the law: Early settlement in GATT/WTO disputes' (2000) 24(1&2) *Fordham International Law Journal* 158-172.

Cameron J & Gray KR 'Principles of international law in the WTO dispute settlement body' (2001) 50(2) *International & Comparative Law Quarterly* 248-298.

Ceva E & Fracasso A 'Seeking mutual understanding: a discourse-theoretical analysis of the WTO Dispute Settlement System' (2010) 9(3) *World Trade Review* 457-485.

Cheng LK, Qiu LD & Wong KP 'Anti-Dumping Measures as a Tool of Protectionism: A Mechanism Design Approach' (2001) 34 (3) *The Canadian Journal of Economics / Revue canadienne d'Economique* 639-660.

Ciuriak Dan 'Anti-dumping at 100 Years and Counting: A Canadian Perspective' (2005) 28(5) *The World Economy* 641-649.

Dascalescu FD 'Threat of Injury in Anti-dumping Investigations: Some Comments on the Current Practice at EU and WTO Level' (2011) 45 (4) *Journal of World Trade* 877–900.

Davey WJ 'Has the WTO dispute settlement system exceeded its authority? A consideration of deference shown by the system to member government decisions and its use of issue-avoidance techniques' (2001) 4(1) *Journal of International Economic Law* 79-110.

Davey WJ 'The case for a WTO permanent panel body' (2003) 6(1) *Journal of International Economic Law* 177-186.

Davis DM 'Twenty Years of Constitutional Democracy: A Preliminary Reflection' (2015) 60 (1) *New York Law School Law Review* 39-56.

Denton R '(Why) Should Nations Utilize Antidumping Measures?' (1989) 11(1) *Michigan Journal of International Law* 224-272.

Dick AL 'Power is information: South Africa's Promotion of Access to Information Act in context' (2005) 23(1) *Mousaion* 1-18.

Ehlermann C 'Experiences from the WTO appellate body' (2003) 38(3) *Texas International Law Journal* 469-488.

Ehlermann CD and Ehring L 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?' (2005) 8(1) *Journal of International Economic Law* 51-75.

Ehrenhaft PD 'Protection against International Price Discrimination: United States Countervailing and Antidumping Duties' (1958) 58(1) *Columbia Law Review* 44–76.

Falade Obalade TA 'Analysis of Dumping as a Major Cause of Import and Export Crises' (2014) 4(5) *International Journal of Humanities and Social Science* 233-239.

Ferreira G& Snyman F 'The Incorporation of Public International Law into Municipal Law and Regional Law against the Background of the Dichotomy between Monism and Dualism' (2014) 17 (4) *Potchefstroom Electronic Law Journal* 1472-1497

Franchino F 'Delegation and Constraints in the National Execution of the EC Policies: a Longitudinal and Qualitative Analysis' (2001) 24 (4) *Western European Politics* 169-192.

Garcia FJ 'Trade and inequality: Economic justice and the developing world' (2000) 21(4) *Michigan Journal of International Law* 975-1050.

Gay P 'Unveiling Protectionism: Anti-Dumping, The GATT, And Suggestions For Reform' (1997) *Dalhousie Journal Of Legal Studies* 51-76.

Hansen WL 'International Trade Commission and the politics of protectionism' (1990) 84(2) *American Political Science Review* 21-46.

Hoekman BM and Mavroidis PC 'Dumping, antidumping and antitrust' (1996) 30 *Journal of World Trade* 27-52.

Holden M 'Antidumping: A reaction to trade liberalisation or ant-competitive/' (2011) 70(5) *South African Journal of Economics* 912-931.

Horlick G & Vermulst E 'The 10 Major Problems With the Anti-Dumping Instrument: An Attempt at Synthesis' (2005) 39 *Kluwer Law International* 67-73.

Hutton S & Trebilcock M 'An Empirical Study of the Application of Canadian Anti-dumping Laws: A Search for Normative Rationales' (1990) *Journal of World Trade* 123-146.

Irwin DA 'Causing problems? The WTO review of causation and injury attribution in US Section 201 cases' (2003) 2(3) *World Trade Review* 297-325.

Jackson JH 'The WTO Dispute Settlement Understanding-Misunderstandings on the Nature of Legal Obligation' (1997) 91(1) *American Journal of International Law* 60-64.

Johnson TE 'The Retroactive Application of the Antidumping Act of 1921' (1979) 1(1) *Northwestern Journal of International Law & Business* 262-283.

Kessie E & Addo K 'African Countries and the WTO Negotiations on the Dispute Settlement Understanding' (2008) 1 *Trade Policy Review Volume* 65-91.

Khanderia S 'Price Comparisons under the South African Anti-dumping Laws: The Faux Pas Continues?' (2017) 52(1) *Foreign Trade Review* 30-47.

Khanderia S 'The compatibility of South African anti-dumping laws with WTO disciplines' (2017) 25(3) *African Journal of International and Comparative Law* 347-370.

Khanderia S 'The determination of injury in South African anti-dumping investigations: recent approaches' (2016) 49(2) *Comparative and International Law Journal of Southern Africa* 247-281.

Kim BY 'Understanding "Zeroing" in Anti-Dumping Procedures and Korea's Negotiation Strategy' (2004) *Korea Review of International Studies* 85-111.

Kingery J 'Commentary: Operation of Dispute Settlement Panels' (2000) 31(3) *Law and Policy in International Business* 675-676.

Leclerc JM 'Reforming Anti-Dumping Law: Balancing the Interests of Consumers and Domestic Industries' (1999) 44 *McGill Law Journal* 111-140.

Mansfield ED & Reinhardt E 'Multilateral determinants of regionalism: The effects of GATT/WTO on the formation of preferential trading arrangements' (2003) 57(4) *International organization* 829-862.

Marceau G & Hurley M 'Transparency and public participation in the WTO: Report card on WTO transparency mechanisms' (2012) 4(1) *Trade, Law and Development* 19-44.

Mayurama W 'Preferential Trade Arrangements and the Erosion of the WTO's MFN Principle' (2010) 46(2) *Stanford Journal of International Law* 177-198.

Miranda J 'Interpreting Paragraph 15 of China's Protocol of Accession' (2014) 9 (3) *Global Trade and Customs Journal* 94-103.

Miranda J 'Should Anti-dumping Laws be dumped' (1997) 28(1) *Law and Policy in International Business* 255-288.

Muller G 'Conceptualising "meaningful engagement" as a deliberative democratic partnership' (2011) 22(3) *Stellenbosch Law Review* 742-758.

Narayanan P ‘Injury Investigations in "Material Retardation" Antidumping Cases’ (2004) 25 *Northwestern Journal of International Law & Business* 37-68.

Ndlovu L ‘An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s dumping and anti-dumping Law’ (2010) 5(1) *Journal of International Commercial Law and Technology* 29-40.

Ndlovu L ‘South Africa and the World Trade Organization Anti-Dumping Agreement nineteen years into democracy’ (2013) 28(2) *Southern African Public Law* 279-307.

Newman S ‘Observations on the European Union Anti-Dumping Regulation’ 2007 *Global Trade and Customs Journal* 87–93.

Niels G ‘What is antidumping policy really about?’ (2000) 14(4) *Journal of economic surveys* 467-492.

Noël S & Zhou W ‘Replacing the Non-Market Economy Methodology: Is the European Union’s Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?’ (2016) 11 (11-12) *Global Trade and Customs Law* 559-567.

Noël S & Zhou W ‘Replacing the Non-Market Economy Methodology: Is the European Union’s Alternative Approach Justified Under the World Trade Organization Anti-Dumping Agreement?’ (2016) 11(11) *Global Trade and Customs Journal* 559-567.

Oin U & Vandenbussche H ‘China–GOES (Article 21.5): Time to Clarify the Standard for Price Suppression and Price Depression in AD/CVD Investigations’ (2017) 16(2) *World Trade Review* 203-226.

Oxfam Int; Manwa. L, Ndamba, G, and Manwa, L ‘A gendered dress code and how it influences the choice of dress by women in Zimbabwe’ (2010) 2(6) *Journal of African Studies and Development* 144-149.

Peng S ‘How much time is reasonable the arbitral decisions under article 21.3(c) of the DSU’ (2008) 26(1) *Berkeley Journal of International Law* 323-351.

Pieterse A 'Reviewing South African transnational relations' (2017) 18(4) *Safundi The Journal of South African and American Studies* 424-428.

Prusa TJ & Rubini L 'United States–Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It's déjà vu all over again' (2013) 12(2) *World Trade Review* 409-425.

Prusa TJ 'Anti-dumping: A Growing Problem in International Trade' (2005) 28(5) *The World Economy* 683-700.

Prusa TJ 'On the Spread and Impact of Anti-dumping' (2001) 34(3) *Canadian Journal of Economics* 591-611.

Prusa TJ 'Why are so many antidumping petitions withdrawn?' (1992) 33 (1-2) *Journal of International Economics* 1-20.

Reitz C 'Enforcement of the general agreement on tariffs and trade' (1996) 17(2) *University of Pennsylvania Journal of International Economic Law* 555-604.

Riesenfeld SA 'The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment' (1971) 65(3) *American Journal of International Law* 548-550.

Saurombe A 'The European Union as a model for regional integration in the Southern African Development Community: A selective institutional comparative analysis' (2013) 7 *Law Democracy & Development* 457-476.

Schoenbaum TJ 'WTO dispute settlement: praise and suggestions for reform' (1998) 47(3) *International & Comparative Law Quarterly* 647-658.

Scholtz W & Ferreira G 'The interpretation of section 231 of the South African Constitution: A lost ball in the high weeds!' (2008) 41(2) *The Comparative and International Law Journal of Southern Africa* 324-338.

Senden L 'Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?' (2005) 9(1) *Electronic Journal of Comparative Law* 1-27.

Shoyer AH 'The First Three Years of WTO Dispute Settlement: Observations and Suggestions WTO Dispute Settlement System' (1998) 1(2) *Journal of International Economic Law* 277-302.

Sibanda OS 'An Assessment of WTO Compliance by the South African Anti-Dumping Regime in Respect of the Determination of Causation' (2013) 76(1) *Journal of Contemporary Roman-Dutch Law* 173-196.

Sibanda OS 'Are anti-dumping measures in multilateral trade justifiable or not? A call for an academic debate in Africa' (2003) 44(2) *Codicillus* 86-91.

Sibanda OS 'Public Interest Considerations in the South African Anti-dumping and Competition Law, Policy, and Practice' (2015) 14(5) *International Business and Economics Research Journal* 735-744.

Sibanda OS 'The South African anti-dumping law: consistency with the GATT Anti-Dumping Code' (2001) 34(2) *Comparative and International Law Journal of Southern Africa*

Smit L 'The relationship between the access of individuals to WTO law and the socio-economic rights in the South African Constitution' (2007) 40(3) *Comparative and International Law Journal of Southern Africa* 350-394.

Snyder F 'The Origins of the 'Nonmarket Economy': Ideas, Pluralism & Power in EC Anti-dumping Law about China' (2001) 7(4) *European Law Journal* 369-424.

Stewart RB & Sanchez Badin MR 'The World Trade Organization: multiple dimensions of global administrative law' (2011) 9(3-4) *International journal of constitutional law* 556-586.

Tallberg J 'Bargaining power in the European Council' (2008) 46(3) *Journal of Common Market Studies* 685-708.

Tharakan PKM 'Political Economy and Contingent Protection' (1995) 105(433) *The Economic Journal* 1550-1564.

Triggs G 'Dispute Settlement under the World Trade Organisation: Implications for Developing Countries' (2003) 15(2) *Bond Law Review* 44-77.

Vermulst E & Horlick G 'Problems with Dumping and Injury Margin Calculations in Ten User Countries' (2007) 2(1) *Global Trade and Customs Journal* 493-506.

Vermulst E 'Adopting and Implementing Anti-Dumping Laws – Some Suggestions for Developing Countries (1997) 31(2) *Journal of World Trade* 5-23.

Viner J 'Dumping as a Method of Competition in International Trade II' (1923) 1(2) *The University Journal of Business* 182-190.

Vinti C 'A spring without water: the conundrum of anti-dumping duties in South African law' (2016) 19(1) *PER: Potchefstroomse Elektroniese Regsblad* 1-25.

Waqas M 'Why Developing Countries are at Disadvantage Position in WTO Dispute Settlement Mechanism' (2014) 1(2) *International Journal of Social Sciences and Management* 60-63.

Wellhausen M 'The Community Interest Test in Antidumping Proceedings of the European Union' (2001) 16(4) *American University International Law Review* 1027-1082.

Wethington OL 'Commentary on the Consultation Mechanism under the WTO Dispute Settlement Understanding during Its First Five Years' (2000) 31(3) *Law and Policy in International Business* 583-590.

Wilson B 'Compliance by WTO members with adverse WTO dispute settlement rulings: the record to date' (2007) 10(2) *Journal of International Economic Law* 397-403.

Zanardi M 'Antidumping: A problem in international trade' (2006) 22(3) *European Journal of Political Economy* 591-617.

Zanardi M 'Anti-dumping: What are the Numbers to Discuss at Doha?' (2004) 27(3) *The World Economy* 403-433.

INTERNET SOURCES

Abdelwahab N 'Are there Positive Impacts for Adopting Lesser Duty Rule in Anti-dumping Investigations' (2016) available at <file:///C:/Users/user/Downloads/abdelwahab.ECOMOD2016-1.pdf> (accessed 23 November 2017).

Anti-dumping, countervailing measures and safeguards' available at <http://dfat.gov.au/trade/topics/pages/anti-dumping-and-safeguards.aspx> (accessed 01 April 2018).

Araoz M 'Why Antidumping Rules Should Include Competition Principles in RTAs' available at <https://www.pecc.org/resources/trade-and-investment-1/850-why-antidumping-rules-should-include-competition-principles-in-rtas/file> (accessed 30 October 2017).

Association of Meat Importers and Exporters to the Portfolio Committee of Trade and Industry available at http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/121128amie_0.pdf (accessed 07 September 2017).

Australian Government Department of Foreign Affairs and Trade 'Trade remedies:

available at <http://www.bowmanslaw.com/insights/the-limits-of-the-use-of-anti-dumping-measures/> (accessed 03 October 2017).

Barratt A & Snyman P 'Researching South African Law' Hauser Global Law School Programme available at http://www.nyulawglobal.org/globalex/South_Africa1.html (accessed 30 August 2017).

Booyesen J 'SA chicken industry set for huge job losses' (2016) available at <https://www.iol.co.za/business-report/economy/sa-chicken-industry-set-for-huge-job-losses-2074525> (accessed 18 October 2017).

Brink G 'A nutshell guide to anti-dumping action' (2008) available at https://repository.up.ac.za/bitstream/handle/2263/8445/Brink_Nutshell%282008%29b.pdf?sequence=1 accessed 28 September 2017)

Brink G 'Farm Frites v International Trade Administration Commission Case 33264/14 GN' available at <https://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=10&cad=rja&uact=8&ved=0ahUKEwiY2bXxgdLXAhXqJsAKHevjCqwOFghcMAk&url=http%3A%2F%2Fwww.saflii.org%2Fza%2Fjournals%2FDEJURE%2F2015%2F17.rtf&usq=AOvVaw3D0RnikkrxLlotyrVyx79e> (accessed 22 November 2017).

Brink G 'X-raying injury findings in South Africa's anti-dumping investigations' available at https://repository.up.ac.za/bitstream/handle/2263/52019/Brink_XRaying_2015.pdf?sequence=1 (accessed 23 November 2017).

Business Day 'SA most 'protectionist' country when it comes to poultry, says IPC' available at <https://www.businesslive.co.za/bd/business-and-economy/2017-08-30-sa-most-protectionist-country-when-it-comes-to-poultry-says-ipc/> (accessed 20 November 2017).

Business Directory 'Ex-Factory' available at <http://www.businessdictionary.com/definition/ex-factory.html> (accessed 21 September 2017).

Business Report 'Zimbabwe: SA imports ban 'a safeguard measure' available at <http://www.iol.co.za/business/news/zimbabwe-sa-imports-ban-a-safeguard-measure-2050140> (accessed 01 September 2018).

Chapter 5 Anti-dumping Measures available at <http://www.meti.go.jp/english/report/downloadfiles/gCT9905e.pdf> (accessed 26 July 2018).

Chapter Eight Exercises available at http://www.franke.nau.edu/eastwood-j/eco486/hwk-text_exercises/hwch08.htm (accessed 22 March 2017).

Competition and Tariff Commission' 'Frequently Asked Questions' available at <http://www.competition.co.zw/faqs/99-faq-s> (accessed 26 August 2018).

Competition and Tariff Commission' 'Frequently Asked Questions' available at <http://www.competition.co.zw/faqs/99-faq-s> (accessed 26 August 2018).

Court of Justice available at <http://curia.europa.eu/juris/documents.jsf?pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=145932> (accessed 25 May 2018).

Courts in South Africa available at <http://www.justice.gov.za/about/sa-courts.html> (accessed 25 July 2018).

Cronje J ‘Anti-dumping investigation on chicken imports from the EU’ (2013) available at <https://www.tralac.org/discussions/article/5343-anti-dumping-investigation-on-chicken-imports-from-the-eu.html> (accessed 03 October 2017).

Cronje JB ‘How will SA respond to Zimbabwe’s import restrictions?’ available at <https://www.tralac.org/discussions/article/10216-how-will-sa-respond-to-zimbabwe-s-import-restrictions.html> (accessed 01 September 2018).

CTC: Application Form For The Imposition Of Anti-Dumping Duties available at <http://www.competition.co.zw/complaints/forms/Dumping%20form%20PART%202.pdf> (accessed 02 October 2018).

CTI Reviews *Microeconomics: Economics, Microeconomics* 5ed (2015) available at <https://books.google.co.za/books?id=qz7MAwAAQBAJ&printsec=frontcover#v=onepage&q&f=false> (accessed 08 April 2018).

Davey WJ ‘The WTO Dispute Settlement Mechanism’ available at https://www.peacepalacelibrary.nl/ebooks/files/DAVEY_WTO-Dispute-Settlement-Mechanism.pdf (accessed 16 March 2018).

Dawn ‘South Africa imposes duties on cement’ available at <https://www.dawn.com/news/1182231> (accessed 23 November 2017).

Doha WTO Ministerial adopted 14 Nov. 2001: Ministerial Declaration para 38 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#cooperation (accessed 12 June 2018).

Ebrahim S ‘SA AGOA benefit in peril?’ available at <https://www.iol.co.za/business-report/economy/sas-agoa-benefits-in-peril-1941087> (accessed 22 October 2017).

Edwards L. *Anti-Dumping in South Africa: From Proliferation to Moderation* (2011) 5 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871948 (accessed 20 June 2017).

EU Affairs ‘How the president of the European Commission gets elected’ available at <http://www.europarl.europa.eu/news/en/headlines/eu-affairs/20140711STO52254/how-the-president-of-the-european-commission-gets-elected> (accessed 15 November 2017).

European Commission ‘Anti-dumping’ available at <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping> (accessed 15 November 2017).

European Commission ‘Anti-dumping’ available at <http://ec.europa.eu/trade/policy/accessing-markets/trade-defence/actions-against-imports-into-the-eu/anti-dumping> (accessed 15 November 2017).

European Commission ‘Reviews’ (2013) available at http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151019.pdf (accessed 30 October 2017).

European Union ‘European Council’ available at https://europa.eu/european-union/about-eu/institutions-bodies/european-council_en (accessed 15 November 2017).

European Union ‘What is Zeroing’ 6 February (2016) 4 available at http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149065.pdf (accessed 10 November 2017).

Evolutionary Archetypes ‘Antidumping at the Intersection between Free and Fair Trade’ available at <http://evolutionary-archetypes.com/en/know-hub/Antidumping-at-the-Intersection-Between-Free-and-Fair-Trade-.15/> (accessed 19 April 2018).

Field A ‘Poultry By-Product Dumping into Zimbabwe an issue’(2012) available at <https://justandrewinzimbabwe.wordpress.com/2012/02/22> (accessed 1 September 2018).

Fontoura Costa JA ‘Comparing WTO panelists and ICSID arbitrators: The creation of international legal fields’ available at <http://opo.iisj.net/index.php/osls/article/viewFile/63/207> (accessed 16 March 2018).

Food and Agriculture Organization of the United Nations ‘Import Surges And Safeguard Provisions With A Particular Focus On Antidumping Measures’ available at <ftp://ftp.fao.org/docrep/fao/010/a1477e/a1477e03.pdf> 222 (accessed 20 May 2016).

Foreign Trade Association ‘Achieving Transparency in EU’s Anti-dumping regime’ available at <http://www.amfori.org/sites/default/files/FTA%20Statement%20->

[%20Achieving%20transparency%20in%20the%20EU%27s%20anti-dumping%20regime.pdf](#)
(accessed 01 August 2018).

Global Edge ‘Zimbabwe: Trade Statistics’ available at
<https://globaledge.msu.edu/countries/zimbabwe/tradestats> (accessed 20 July 2018).

Glosbe Dictionary ‘Sub-standard’ available at <https://glosbe.com/en/en/substandard%20product>
(accessed 16 September 2017).

Government of India: Ministry of Commerce and Industry ‘Anti-Dumping & Anti-subsidy measures: FAQs’ available at http://commerce.nic.in/traderemedies/ad_measures_3.asp
(accessed 08 March 2017).

Guillermo Erasmus & Keith Hendry ‘The Limits of the Use of Anti-Dumping Measures’ available at <https://www.bowmanslaw.com/insights/the-limits-of-the-use-of-anti-dumping-measures/> (accessed 18 March 2017).

Gumbo L ‘Stop the rot at border posts’ *The Herald* 26 August 2016; Dewa T ‘More than 150 immigration officers transferred amid reports of corruption’ 21 September 2016
<http://nehandaradio.com/2016/09/21/150-immigration-officers-transferred-amid-reports-corruption/> (accessed 22 September 2018).

ICAZ ‘The Future of the Manufacturing Sector’ available at
<https://www.icaaz.org.zw/iMISDocs/manufacture.pdf> (accessed 16 September 2017).

Interface Between Anti-dumping and Competition Law’ available at
<https://researchersclub.wordpress.com/2013/10/24/interface-between-antidumping-and-competition-law-a-critical-analysis/> (accessed 17 November 2017).

International Trade Administration Commission ‘An Overview of ITAC’ available at
<http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed 06 September 2017).

International Trade Administration Commission ‘Trade Remedies’ available at
http://www.itac.org.za/upload/Trade_Remedies.pdf (accessed 06 September 2017).

ITAC ‘Briefing by ITAC to NEDLAC Trade and Industry Chamber’ available at http://agbiz.co.za/uploads/AgbizNews17/170317_NEDLAC_Presentation.pdf (accessed 30 August 2017).

ITAC ‘Stiff anti-dumping duties imposed on Pakistani cement’ available at <http://www.itac.org.za/news-headlines/itac-in-the-media/stiff-anti-dumping-duties-imposed-on-pakistani-cement> (accessed 28 September 2017).

Kobsy M ‘Briefing Note On The Zimbabwe Competition And Tariff Commission (CTC)’ available at [http://www.academia.edu/25268944/BRIEFING_NOTE_ON_THE_ZIMBABWE_COMPETITION AND TARRIFF COMISSION CTC](http://www.academia.edu/25268944/BRIEFING_NOTE_ON_THE_ZIMBABWE_COMPETITION_AND_TARRIFF_COMISSION_CTC) (accessed 26 August 2018).

Konje P ‘Household Electrical Goods Zimbabwe’ (2011) available at http://www.zimtrade.co.zw/IMG/pdf/household_electrical_goods.pdf 6 (accessed 01 September 2016)

Korea Fair Trade Commission ‘Unfair Trade Practices’ available at http://eng.ftc.go.kr/policyarea/competitionpolicy_practices.jsp?pageId=0201 (accessed 07 April 2016).

Marawanyika G ‘Zimbabwe: SA imports ban ‘a safeguard measure’ (2016) available at

Markheim D ‘Time to End "Zeroing" in Trade Dumping Calculations’ (2008) available at <http://www.heritage.org/trade/report/time-end-zeroing-trade-dumping-calculations> (accessed 10 November 2017).

Muganda RG ‘Lets enforce dumping laws’ *The Herald* 27 September 2012 available at <http://www.herald.co.zw/lets-enforce-dumping-laws/> (accessed 03 March 2016).

Muntean A M ‘The European Parliament’s Political Legitimacy and the Commission’s “Misleading Management”: Towards a “Parliamentarian” European Union?’ (2000) 4(4) *European Integration online Papers* available at <http://eiop.or.at/eiop/pdf/2000-005.pdf> (accessed 22 April 2018).

New Zimbabwe ‘Poultry prices down 23 pct, industry facing collapse due to cheap imports, association’ (2015) available at <http://www.newzimbabwe.com/business-23639-Cheap+imports+%E2%80%98collapse%E2%80%99+poultry+industry/business.aspx> (accessed 26 September 2018).

Norton Rose Fulbright ‘An introduction to anti-dumping and other EU trade law measures’ available at <http://www.nortonrosefulbright.com/knowledge/publications/26849/an-introduction-to-anti-dumping-and-other-eu-trade-law-measures> (accessed 18 February 2018).

Ouintal G ‘Pretoria challenges Zimbabwe import ban’ (2016) available at <http://www.bdlive.co.za/business/trade/2016/07/11/pretoria-challenges-zimbabwe-import-ban> (accessed 01 September 2018).

Ozyasar H ‘The Impact of Margin Decrease on Financial Statements’ available at <http://smallbusiness.chron.com/impact-margin-decrease-financial-statements-39347.html> accessed 28 September 2017).

Praha SP ‘Decision-making process after the Treaty of Nice’ (2002) available at <https://www.epravo.cz/top/clanky/decision-making-process-after-the-treaty-of-nice-20271.html> (accessed 10 September 2017).

Raghavan C ‘The World Trade Organization and its Dispute Settlement System: Tilting the balance against the South’ available at <https://www.twn.my/title/tilting.htm> (accessed 17 March 2018).

Researcher club ‘Interface Between Anti-dumping and Competition Law’ available at <https://researchersclub.wordpress.com/2013/10/24/interface-between-antidumping-and-competition-law-a-critical-analysis/> (accessed 17 November 2017).

Scimia A ‘Trumpian Europe toughens anti-dumping rules against China’ (2017) available at <http://www.atimes.com/trumpian-europe-toughens-anti-dumping-rules-china/> (accessed 09 November 2017).

Shava T ‘Imports crippling local industries’ (2016) available at <http://nehandaradio.com/2016/04/28/99819/> (accessed 26 September 2018).

South African Government 'Trade and Industry on anti-dumping duties imposed on imported frozen chicken portions' 2 March 2015 available at <http://www.gov.za/speeches/anti-dumping-duties-imposed-frozen-chicken-portions-imported-germany-netherlands-and-united> (accessed 08 March 2017).

The European Commission 'The Uruguay Round' available at http://europa.eu/rapid/press-release_MEMO-94-24_en.htm (accessed 29 October 2017).

The European Council 'European Council' available at <http://www.consilium.europa.eu/en/european-council/> (accessed 15 November 2017).

The ITAC 'Dumping Margin Calculation' available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 18 September 2017).

The source 'Poultry industry produces 17mln day old chicks in Q1' available at <http://source.co.zw/2016/06/poultry-industry-produces-17mln-day-old-chicks-in-q1/> (accessed 22 September 2018).

The Southern Times 'South Africa still ranks high on Zimbabwe's trading partners' list' available at <https://southernafrican.news/2016/06/29/south-africa-still-ranks-high-on-zimbabwes-trading-partners-list/> (accessed 20 November 2017).

Trade Law Chamber in association with Geldenhuys Jourbert Attorneys' Supreme Court of Appeal overturns earlier decision on market economy status' available at <https://tradelawchambers.com/raxo-what-s-on/82-supreme-court-of-appeal-overturms-earlier-decision-on-market-economy-status.html> (accessed 12 September 2017).

Trade Law Chambers 'Constitutional Court trumps anti-dumping practices' available at <https://www.tradelawchambers.com/raxo-what-s-on/63-constitutional-court-trumps-anti-dumping-practices.html> (accessed 30 October 2017).

V. de Lange C '2014's Second Trade Centurion: Dumping' 19 August 2014 available at <http://www.thesait.org.za/news/187155/2014s-Second-Trade-Centurion-Dumping.htm> (accessed 20 June 2017).

VOA 'Mnangagwa says government worried as Zimbabwe is now a dumping ground for imports' in New Zimbabwe Newspaper 27/04/2016 available at www.newzimbabwe.com/news-28933-VP+Zim+a+dumping+ground+for+imports/news.aspx (accessed 1 September 2018).

Watson W 'Antidumping Fowls Out: U.S.–South Africa Chicken Dispute Highlights the Need for Global Reform' 19 October 2015 available at <https://www.cato.org/publications/free-trade-bulletin/antidumping-fowls-out-us-south-africa-chicken-dispute-highlights> (accessed 10 August 2017).

Watson W 'It's Time to Dump Nonmarket Economy Treatment' available at <https://www.cato.org/publications/free-trade-bulletin/its-time-dump-nonmarket-economy-treatment> (accessed 12 September 2017).

World Health Organisation 'Trade, foreign policy, diplomacy and health' available at <http://www.who.int/trade/glossary/story018/en/> (accessed 08 April 2018).

WTO 'Agreement on subsidies and countervailing measures' available at https://www.wto.org/english/docs_e/legal_e/24-scm.pdf (accessed 27 May 2017).

WTO 'Anti-Dumping: Technical Information on anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 08 April 2017).

WTO 'Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 18 April 2018).

WTO 'Developing countries in WTO dispute settlement' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c11s1p1_e.htm (accessed 16 March 2018).

WTO 'Dispute Settlement: The Disputes Chronological list of disputes cases' available at https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm (accessed 09 August 2018).

WTO 'Indirect Exports' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 05 May 2017).

WTO ‘Rules’ available at https://www.wto.org/english/tratop_e/dda_e/status_e/rules_e.htm (accessed 08 April 2018).

WTO ‘Second Submission of Proposals on the Determination of Injury’ (2005) available at [http://www.meti.go.jp/policy/trade_policy/wto/pdf/negotiation/ad/proposal/GEN38\(FANs%20injury2nd\).pdf](http://www.meti.go.jp/policy/trade_policy/wto/pdf/negotiation/ad/proposal/GEN38(FANs%20injury2nd).pdf) (accessed 19 May 2018).

WTO ‘Technical Information on anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 07 May 2018).

WTO ‘The process — Stages in a typical WTO dispute settlement case’ available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm (accessed 16 March 2018).

WTO ‘Understanding the WTO: The Agreement’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed 25 September 2017).

WTO ‘WTO Bodies involved in the dispute settlement process’ available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm (accessed 03 March 2018).

WTO National Treatment’ available at https://www.wto.org/english/tratop_e/dispu_e/repertory_e/n1_e.htm (accessed 24 November 2017).

WTO's defective dispute settlement process available at <http://www.thehindu.com/2000/07/06/stories/0606000c.htm> (accessed 17 March 2018).

XA International Trade Advisors ‘Initiating an anti-dumping case’ available at <http://xa.co.za/strategy-for-initiating-an-anti-dumping-case/> (accessed 19 September 2017).

Zengeni T ‘The Competitiveness and Performance of the Zimbabwe Poultry Industry’ (2013) available at <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/55b8733ae4b036c899c6fd4>

[d/1438151482303/Tatenda+Zengeni_Competitiveness+of+the+Zimbabwe+Poultry+industry.pdf](http://1438151482303/Tatenda+Zengeni_Competitiveness+of+the+Zimbabwe+Poultry+industry.pdf)
(accessed 26 September 2018).

THESES

Brink G A *theoretical framework for South African anti-dumping law* (unpublished PhD thesis, University of Pretoria 2004).

Colesky T A *Comparative Study on Customs Tariffs Classification* (unpublished LLD thesis, University Of Pretoria 2014) .

Fillis JB *Assessing the Determination of Constructed Normal Value in the 2000 USA Anti-Dumping Poultry case in South Africa* (unpublished LLM thesis, University of Pretoria 2016).

Hanauer LH *The Interpretation And Application Of Gatt's Article Xxiii To Anti-Dumping Law And Practice*. (unpublished LLD thesis, University of the Witwatersrand 2016).

Ikeagwuchi GA *Implementing effective trade remedy mechanisms: A critical analysis of Nigeria's Anti-Dumping and Countervailing Bill, 2010* (unpublished LLM thesis, University of Pretoria 2014).

Kotsiubka V *Public Interest Consideration in Domestic and International Antidumping Disciplines* (unpublished Master of International Law and Economics, World Trade Institute 2011).

Mastara S *Anti - Dumping or Protection: An analysis of competition issues in dumping investigations* (unpublished Mphil Law thesis, University of Cape Town 2015).

Meng T 'Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China' (2006) (unpublished LLM Thesis, University of the Free State).

Murigi WC *The Development of a Successful Antidumping Regime In Kenya* (unpublished LLM thesis, University of the Western Cape 2013).

Ngoma LL 'A critical analysis of the use of anti-dumping regulation in Southern African Customs Union (SACU): a case of Botswana' (2010) (unpublished LLM thesis, University of Pretoria).

Sheng Z *EU Anti-Dumping Policy: A study in the CTV Case* (unpublished Master of European Affairs, Lund University 2004).

Tao M *Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China* (unpublished LLM thesis, University of the Free State, 2006).

WTO CASE LAW

Egypt – Anti-Dumping Duties on Matches from Pakistan WT/DS327/2

Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey WT/DS211/R

European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India WT/DS141/R

European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India WT/DS141/R

European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil WT/DS219/AB/R

European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil WT/DS219/R

European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil WT/DS219/AB/R

European Communities – Anti-Dumping Measure on Farmed Salmon from Norway WT/DS337/R

European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China WT/DS397/R

European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China WT/DS397/R.

European Union – Anti-Dumping Measures on Biodiesel from Argentina WT/DS473/R

European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia, WT/DS442/R

Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala WT/DS331/R

Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Recourse to Article 21.5 of the DSU by the United States) WT/DS132/AB/RW

Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States WT/DS132/R

Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States WT/DS132/R

Mexico – Definitive Anti-Dumping Measures on Beef and Rice WT/DS295/R

Mexico – Definitive Anti-Dumping Measures on Beef and Rice WT/DS295/R

South Africa – Anti-Dumping Duties On Frozen Meat Of Fowls From Brazil Request For Consultations By Brazil WT/DS439/1 G/L/990 G/ADP/D92/1

Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland WT/DS122/R

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea WT/DS464/R

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea WT/DS464/AB/R

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea WT/DS464/R

United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea WT/DS464/R

United States – Anti-Dumping Duty On Dynamic Random Access Memory Semiconductors (Drams) Of One Megabit Or Above From Korea WT/DS99/R

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan
WT/DS184/AB/R

United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan
WT/DS184/AB/R

United States – Anti-dumping measures on certain oil country tubular goods from Korea
WT/DS488/R

United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea
WT/DS488/R

United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea WT/DS179/R

United States – Final Dumping Determination on Softwood Lumber from Canada WT/DS264/R

United States–Use of Zeroing in Anti-Dumping Measures Involving Products from Korea, WT/DS402/R

EUROPEAN UNION CASE LAW

Goldstar Co. Ltd v Council of the European Communities Case C-105/90

Judgment of 7. 4. 2016 — Joined Cases C-186/14 P AND C-193/14 P *Arcelormittal Tubular Products Ostrava and Others v Hueib Xinyegang Steel*

Wood pulp, Osakeyhtiö and ors v Commission of the European Communities, Final judgment, 89/85, 104/85, 114/85, 116/85, 117/85, 125/85, 126/85, 127/85, 128/85, 129/85, (1988) ECR 5193, ILEC 035 (CJEU 1988), 27th September 1988, Court of Justice of the European Union [CJEU]; European Court of Justice [ECJ].

EUROPEAN UNION DELEGATED LEGISLATION

European Commission 2016/C 62/07: Notice of initiation of an anti-dumping proceeding concerning imports of certain lightweight thermal paper originating in South Korea.

European Commission 2014/C 461/16: Notice of initiation of an anti-dumping proceeding concerning imports of silico-manganese originating in India.

SOUTH AFRICAN CASE LAW

Association of Meat Importers v ITAC (769, 770, 771/12) [2013] ZASCA 108 (13 September 2013).

International Trade Administration Commission v SCAW South Africa (Pty) Ltd (CCT 59/09) [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) (9 March 2010).

S v De Blom 1977 (3) SA.513 (A).

The International Trade Administration Commission and Another v SA Tyre Manufacturers Conference (Pty) Ltd and Others (738/2010) [2011] ZASCA 137 (23 September 2011)

SOUTH AFRICA DELAGATED LEGISLATION

Government Gazette Notice: 2844 of 2004 Termination of Investigation into the Alleged Dumping of forged or Stamped, But Not Further Worked, Grinding Balls and Similar Articles for Mills Originating in or Imported from the People's Republic of China (PRC)

Government Gazette Notice: 37037 of 2013 Notice of initiation of an investigation into the alleged dumping of graphite electrodes for use in furnaces originating in or imported from the People's Republic of China (China) and India.

Government Gazette Notice: 40621 of 2017 Notice of initiation of the sunset review of the anti-dumping duty on unframed glass mirrors originating in or imported from Indonesia GN No

The ITAC Report 168 Investigation into the alleged dumping of unframed glass mirrors of a thickness of 2 mm to 6 mm originating in or imported from India and Indonesia: Final determination

The ITAC Report 236: Interim review of the anti-dumping duties on stranded wire ropes of iron or steel, not electrically insulated, originating in or imported from Bridon International Ltd in the United Kingdom: Final determination.

The ITAC Report 400: Investigation into the alleged dumping of screw studding (rods threaded throughout) of stainless steel and steel (commonly known as threaded rods) originating in or imported from the People's Republic of China (PRC): Preliminary Determination Report

The ITAC Report 476: Investigation into the Alleged Dumping Of Disodium Carbonate (Soda Ash) Originating In or Imported From the United States of America (USA): Final Determination Report.

The ITAC Report 476: Investigation into the alleged dumping of disodium carbonate (soda ash) originating in or imported from the United States of America (USA): Final Determination.

NEWSPAPER ARTICLES

Erasmus G 'New era in African trade arrangements' *The Herald* 06 September 2017.

Kachembere J & Majaka N 'Car duty goes up, bale imports banned' *Daily News* 30 July 2015.

Marawanyika M 'Zimbabwe under new colonialism' *The Standard* 16 May 2003.

Marongwe M 'Zim Needs Law to Curb Cheap Good Influx' *Newsday* 16 May 2003.

Muganda RG 'Lets enforce dumping laws' *The Herald* 27 September 2012.

Mugano G 'Time to Tighten Screws on Dumping' *The Herald* 31 October 2013.

Ndlovu R 'Harare firm on import ban-for now' *Times Live* 17 July 2016

The Herald 'Chicken imports threaten poultry industry' *The Herald* 1 October 2014.

WORKING PAPERS

Brink G 'Anti-dumping in South Africa' (2012) *Tralac Working Paper No. DIZWP07* 1-72.

Cernat L & Laird S 'North, South, East, and West: What's best? Modern RTAs and their Implications for the Stability of Trade Policy' (2003) *Credit Working Paper No. 03/11*. 1-47.

Chitiga M, Kandiero T & Mabugu R 'Computable general equilibrium micro-simulation analysis of the impact of trade policies on poverty in Zimbabwe' (2005) *University of Pretoria Department of Economics Working Paper Series 2007-15* 6.

Davis L 'Ten years of anti-dumping in the EU: economic and political targeting' (2009) *ECIPE Working Paper • No. 02/2009* 6

Froning D 'The Benefits of Free Trade: A Guide For Policymakers' (2000) *Center for International Trade and Economics* No. 1391

Garcia M & Baker A 'Anti-dumping in New Zealand: A century of protection from "unfair" trade?' (2005) *New Zealand Trade Consortium Working Paper* 1-85.

Hindley B 'Cause-Of-Injury Analysis in European Antidumping Actions' (2009) *Ecipe Working Paper • No. 05/2009* 3

Rovegno L & Vandebussche H 'A comparative analysis of EU Antidumping rules and application' (2011) *IRES Discussion papers; 2011023* 4.

Sandrey R *et al* 'Non-tariff measures inhibiting South African exports to China and India. Working Paper 6/2008' (2008) 24

Skyles AO 'Trade Remedy Laws' (2005) John M. Olin Law & Economics Working Paper No. 240.

Tregenna F & Kwaramba M 'A Review of the International Trade Administration Commission's Tariff Investigation Role and Capacity' (2014) 1-62.

POLICY DOCUMENTS AND LEGISLATION

Administrative Justice Act 12 of 2004.

Agreement on Implementation of Article VI of GATT usually referred to in many circles as the Anti-dumping Agreement.

Anti-Dumping and Countervailing Duty) (Investigation) Regulations, 2002.

Anti-Dumping Regulations.

Board of Tariffs and Trade Act 107 of 1986.

Board on Tariffs and Trade Amendment Act 60 of 1992

Competition Act [*Chapter 14:28*].

Constitution of Zimbabwe Amendment Act 20 of 2013

Council Regulation (EEC) No 1058/86

European Commission Treaty.

European Community Treaty.

General Agreement on Tariffs and Trade.

International Trade Administration Act 71 of 2002.

Promotion of Access to Information Act 2 of 2000.

Promotion of Administrative Justice Act No. 3 of 2000.

Regulation (EEC) No 459/68.

Regulation (EU) 2016/1036.

Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union.

Regulation (EU) 2017/2321.

Regulation (EU) No 182/2011

Regulation 1761/87.

Regulation 2176/84.

Treaty on the Function of the European Union.

Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZimAsset) “Towards an Empowered Society and a Growing Economy” OCTOBER 2013- DECEMBER 2018.

Zimbabwe National Trade Policy 2012-16.

OTHER DOCUMENTS



Astral Foods 'Astral Integrated Annual Report' (2013) 1-158.

Baden S & Barber C The impact of the second-hand clothing trade on developing countries (2005) 1-37.

Blonigen BA & Prusa TJ 'Antidumping' (2001) 1-44.

Bridges 'EU Institutions Sign Off on Draft Changes to Anti-Dumping Legislation' (2017) 1-21.

Committee on Anti-Dumping Practices & Committee on Subsidies and Countervailing Measures 'Notification of laws and regulations under Articles 18.5 and 32.6 of the Agreements: South Africa' (2004) 55.

Competition and Tariff Commission Annual Report 2012

Department of Research and Information 'Economic overview: Recent developments in the global and South African economies (2017) 1-12.

Edwards L & Lawrence R 'South African Trade Policy and the Future Global Trading Environment' (2012) 1-42.

Egypt — Matches Notification of Mutually Agreed Solution 29 March 2006.

European Commission - Press release *The State of the Union 2017: Catching the wind in our sails* (2017).

European Commission *Anti-Dumping, Anti-Subsidy, Safeguard Statistics Covering The First 6 Months Of 2018* (2018).

European Commission *Communication to the Commission from President Juncker and First Vice-President Timmermans: Governance in the European Commission* (2017)

European Commission *Guide on How to Draft an Anti-dumping Complaint* (2016) 1-67.

European Commission *The European Union Explained: How the European Union Works, Your guide to the EU institutions* (2013) 1-44.

European Commissioner for Trade *Handbook for Trade Sustainability Impact Assessment* (2006) 1-31.

European Parliament *Co-decision and Conciliation: A guide to how the European Parliament co-legislates under the ordinary legislative procedure* (2014) 1-64.

Evenett S & Fritz J 'The tide turns? Trade, protectionism, and slowing global growth: 18th Global Trade Alert Report' (2015) 1-114.

Great Britain Board of Trade *The Kennedy Round of Trade Negotiations, 1964-67* 1967

Hambrey J & Blandford D 'An introduction to Anti-dumping law of EU and US as it applies to seafood Course Handbook' (2010) 1-68.

Hurungo JT 'Trade Policy Review: Zimbabwe' (2007) *Tralac* 1-37.

International Trade Administration Commission Annual Report 2015-2016

International Trade Centre 'Anti-dumping proceedings: Guidelines for Importers and Exporters' (1997) 1-36.

Kububa A 'Overview of Competition Policy and Law in Zimbabwe' (2009) 1-20.

Lestrade E 'Market Protection in Europe and Anti-Dumping Law' (2007) 1-9.

Liu K & Shi H 'Anti-dumping Duty Circumvention through Trade Re-routing: Evidence from Chinese Exporters' (2016) 1-36.

Makochekanwa J & Kambarami P 'Zimbabwe's Experience with Trade Liberalisation' (2012) 245 *African Economic Research Consortium* 1-36.

Proposals on the Mandatory Application of the Lesser Duty Rule TN/RL/GEN/99.

Ruhl KJ 'Antidumping in the Aggregate [Preliminary and Incomplete]' (2012) *New York University Stern School of Business* 1-25.

Smith A, Rosendorff BP & Wruuck P 'Political Change, Domestic Institutions and the Onset of Anti-Dumping Investigations' (2015) 1-32

South Africa - Anti-dumping Duties on Certain Pharmaceutical Products from India - Request for Consultations by India WT/DS168/1 G/L/303 G/ADP/D17/1.

South Africa – Anti-Dumping Measures on Uncoated Woodfree Paper Request for Consultations by Indonesia WT/DS374/1

Stoler AL ‘Treatment of China as a Non-Market Economy: Implications for Antidumping and Countervailing Measures and Impact on Chinese Company Operations in the WTO Framework’ (2003) 1-9.

Tekere M ‘Trade Liberalisation under Structural Economic Adjustment – Impact on Social Welfare in Zimbabwe’ (2001) 1-43.

The ITAC Anti-dumping Application Form.

Tietje C & Sacher V ‘The New Anti-Dumping Methodology of the European Union – A Breach of WTO-Law?’ (2018) 1-25.

Van Bael & Bellis ‘The new EU anti-dumping methodology and other upcoming changes to the EU anti - dumping rules’ (2017) 1-7.

Wim K ‘Facing the Challenge: The Lisbon Strategy for Growth and Enlargement: Report of the High Level Group’ (2004) 1-55.

World Trade Organisation Committee on Anti-Dumping Practices Working Group on Implementation Article 2.3 – Constructed Export Price (2011) Paper by South Africa *G/ADP/AHG/W/190*.

World Trade Organisation Negotiating Group on Rules *Material Retardation Communication from Egypt* (2006) TN/RL/GEN/122 1.

World Trade Organisation South Africa – Anti-Dumping Duties On Frozen Meat Of Fowls From Brazil Request For Consultations By Brazil (2012) WT/DS439/1 G/L/990 G/ADP/D92/1.

WTO Committee on Anti-Dumping Practices Working Group on Implementation Article 2.3 – Constructed Export Price (2011) Paper by South Africa *G/ADP/AHG/W/190*.

WTO Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements –
South Africa, G/ADP/N/1/ZAF/2G/SCM/N/1/- ZAF/2 (20 January 2004).



UNIVERSITY *of the*
WESTERN CAPE