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# THE DEVELOPMENT OF A SUCCESSFUL ANTI- DUMPING REGIME IN KENYA

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**Declaration of authorship**

I, CATHERINE MURIGI, hereby declare that this master thesis has been written in partial fulfillment of the Masters in International Trade, Business and Investment Law at the University of the Western Cape. I confirm that this is my own work and has not been submitted for academic credit in any other university or institution. Where works of other authors have been used, complete references have been indicated.

Signed

..........

Catherine Murigi



June 2013

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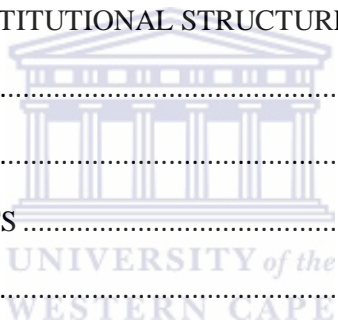


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## Abbreviations and Acronyms

ADA	Anti-Dumping Agreement
ADR	Anti-Dumping Regulations
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
EU	European Union
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ITAA	International Trade Administration Act
ITAC	International Trade Administration Commission
KRA	Kenya Revenue Authority
NEDLAC	National Economic Development Labour Council
SA	South Africa
SACU	Southern African Custom Union
SARS	South African Revenue Service
SUCAM	Sugar Campaign for Change
TRALAC	Trade Law Centre for Southern Africa
USA	United States of America
WTO	World Trade Organisation



# CHAPTER 1

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## INTRODUCTION

### 1.1 The purpose of the study

Trade remedy laws are exceptions to a country's core obligations, when there is proof that domestic injury has taken place, and that they have the effect of restricting imports.<sup>1</sup> Safeguard measures, countervailing duties, and anti-dumping laws traditionally make up the three types of trade remedies. However, a difference exists between the three which should be noted. Anti-dumping and countervailing duties are measures to remedy unfair trade whereas, safeguards are duties imposed in relation to fair trade conditions when there are sudden surges in imports. Imports are generally not bad, they can give consumers access to cheaper, better quality goods, they can provide domestic producers with inputs that may allow them to compete more effectively in world markets and through competition can spur domestic producers to be more efficient.

But sometimes industries need protection to meet unfair competition or more generally to adjust to competition. That is why countries have contingent trade protection. Anti-dumping duties are nonetheless the most preferred trade remedy and therefore mostly used. They are tariffs added to ordinary custom duties that are imposed to counteract alleged 'unfair' pricing behaviour by private firms that injure or threaten to cause material injury to a competing industry in an importing country.<sup>2</sup> When implemented by the importing country, they place both the domestic and foreign producers in the same market on an equal footing, thereby promoting fair trade and enhancing economic growth.<sup>3</sup>

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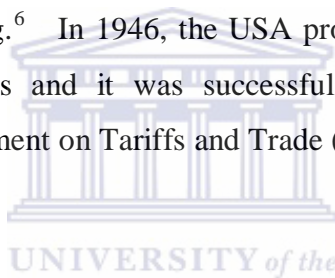
<sup>1</sup> Raslān A *Anti-dumping: A Developing Country Perspective* (2009)4.

<sup>2</sup> Skyes A 'Trade Remedy Laws' available at [http://www.law.uchicago.edu/files/files/240.aos\\_trade-remedy.pdf](http://www.law.uchicago.edu/files/files/240.aos_trade-remedy.pdf) (accessed 17 January 2013).

<sup>3</sup> Denner W *Supporting Regional Integration in East and Southern Africa-Review of Select Issues: Protectionism, Trade Remedies and Safeguards* (2010) 3.

When liberalisation of economies began, many countries intended to exploit the opportunities of free trade while at the same time making no compromises on the welfare of their domestic industries.<sup>4</sup> In the early stages of international trade, however, pressure was exerted by the local industries for protection which resulted in the enactment of anti-dumping (AD) legislation: Canada was the first in 1904, followed by New Zealand, Australia, South Africa and finally the United States of America (USA). Although anti-dumping laws were introduced, they were not equally utilised by all countries. For example, the USA used tariffs mainly to regulate imports, while Australia, South Africa, and Canada used the AD instrument.<sup>5</sup>

An attempt to deal with AD at the international level began in the early 1920s, when the League of Nations began to study dumping and differential prices. It, however, was not able to produce any rules, with respect to dumping.<sup>6</sup> In 1946, the USA proposed the creation of international rules to administer AD measures and it was successful as international provisions were incorporated in the General Agreement on Tariffs and Trade (GATT) in the form of Article (Art) VI.<sup>7</sup>



This Article is the international AD rule. It contains provisions dealing with anti-dumping and anti-subsidy, but those relating to dumping are: the meaning of ‘dumping’, how to offset dumping, and the relationship between anti-dumping and anti-subsidy.<sup>8</sup> One must note, however, that even though Art VI was in existence, there were still some loopholes. It could not answer some very important questions, such, as how to establish ‘dumping’, ‘injury’, or ‘causation’, or any other procedures for that matter. To improve this situation, several Rounds of negotiations were conducted which included: the Kennedy Round (1967), the Tokyo Round (1979) and the Uruguay Round (1994).<sup>9</sup>

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<sup>4</sup> Raju K *World Trade Organisation Agreement on Anti-dumping: A GATT/WT and Indian Legal Jurisprudence* (2008) 2.

<sup>5</sup> Raslān A *Anti-dumping: A Developing Country Perspective* (2009) 3; Raju K *World Trade Organisation Agreement on Anti-dumping: A GATT/WT and Indian Legal Jurisprudence* (2008) 1.

<sup>6</sup> Terrence P *The GATT Uruguay Round: A Negotiating History* (1994) 22.

<sup>7</sup> Raslān A *Anti-dumping: A Developing Country Perspective* (2009) 4.

<sup>8</sup> See Art VI of the GATT 1994.

<sup>9</sup> United Nations Conference on Trade and Development *World Trade Organisation: Anti dumping Measures* (2003)8.

This last Round was the most important and comprehensive as its conclusion led to the creation of the World Trade Organisation (WTO) and the conclusion of a new agreement to implement Art VI. The WTO agreement was called the Anti-Dumping Agreement (ADA).<sup>10</sup>

On a multilateral level, these two instruments make provision for the implementation of AD measures, and their governance of these AD measures at the international level prevents abuse of this instrument to block imports.<sup>11</sup> The ADA provides comprehensive substantive rules on how to determine dumping and lays down procedures on how anti-dumping investigations are to be initiated, and the manner in which they should be conducted and terminated. It is important to note that although the ADA provides the general framework that regulates the use of anti-dumping, Members are free to implement their national anti-dumping policies on condition that their rules are in conformity with the ADA, with any changes in the laws relevant to the Agreement being notified to the WTO;<sup>12</sup> and in addition, the WTO committee on anti-dumping practices must be informed about all the preliminary and final anti-dumping actions, promptly and in detail.<sup>13</sup>

Before 1980, there were only very few countries utilising national anti-dumping laws, commonly known as the 'traditional users'. However, after this period there was a rapid increase and many nations, especially developing ones, began adopting anti-dumping laws since the old users had ceased monopolising protectionism.<sup>14</sup> Although developing countries are using anti-dumping laws to a greater extent now more than ever, so far African countries have not played a major role in this area. Egypt, South Africa, Morocco and recently Mauritius are the only countries with functional anti-dumping mechanisms and have used them to defend their local industries.<sup>15</sup>

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<sup>10</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti dumping Measures* (2003) 9.

<sup>11</sup> Raslān A *Anti-dumping: A Developing Country Perspective* (2009)2.

<sup>12</sup>Denner W *Supporting Regional Integration in East and Southern Africa-Review of Select issues: Protectionism, Trade Remedies and Safeguards* (2010) 5.

<sup>13</sup> See Art16.4 of the ADA.

<sup>14</sup>Zanardi M &Vandenbussche H 'What Explains the Proliferation of Anti-dumping Laws?' available at <http://sites.uclouvain.be/econ/DP/IRES/2007-27.pdf> (accessed 22 May 2013).

<sup>15</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 7 October 2012).

In February 2011, the Kenyan Trade Minister stated that a Bill on the implementation of the WTO agreements on anti-dumping was expected to be tabled in Parliament, and which would protect the local industries which had been forced to shut down due to unfair trade practices.<sup>16</sup> Kenya is one of the developing countries that desires and is in the process of drafting its first anti-dumping legislation, and set up investigating authorities to enable it to be in a position to take measures to offset the material injury caused by dumping to its domestic industry.

The three most affected sub-sectors are wheat, sugar and textiles which have experienced a myriad of problems as a result of dumping. For example, in all these sub-sectors, we find: heavy financial losses have been suffered by the producers, a shift to other activities or loss of jobs by employees, disillusionment, an increase in poverty, and eventual shutting down as a result of huge imports of sub-standard dumped goods.<sup>17</sup> Currently, the only provisions dealing with dumping in Kenya are found in the Customs and Excise Act<sup>18</sup> but they have not been utilised because to a large extent they are not in harmony with the WTO's ADA and therefore to impose anti-dumping measures under these laws will result in a dispute at the WTO. The inadequacy of the framework has hampered the investigation of the dumping of imported goods and its effect on the local producers. This is a deprivation of their rights under the WTO. It is important for Kenya to respect WTO rules, not only to avoid dispute settlement, but because the rules-based system will also protect Kenyan exporters from abuse of trade remedies in other countries.

South Africa is known as one of the traditional and prolific users of anti-dumping laws as well as a strict adherent to the requirements of Art VI and the ADA.<sup>19</sup> It has the following domestic rules that govern anti-dumping: the International Trade Administration Act 71 of 2002 (ITAA), the Customs and Excise Act 91 of 1964, and the Anti-Dumping Regulations (ADR) which are used by the International Trade Administration Commission (ITAC) while carrying out

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<sup>16</sup> [http://www.antidumping/kenya to table bill on WTO rules on antidumping, subsidies-export.by information export support website](http://www.antidumping/kenya%20to%20table%20bill%20on%20WTO%20rules%20on%20antidumping,%20subsidies-export.by%20information%20export%20support%20website) (accessed 25 September 2012).

<sup>17</sup> [http://www.antidumping/kenya to table bill on WTO rules on antidumping, subsidies-export.by information export support website](http://www.antidumping/kenya%20to%20table%20bill%20on%20WTO%20rules%20on%20antidumping,%20subsidies-export.by%20information%20export%20support%20website) (accessed 25 September 2012).

<sup>18</sup> The Customs and Excise Act Cap 472.

<sup>19</sup> Kommerskollegium/National Board of Trade Sweden Report *The Use of Anti-dumping Measures in Brazil, China, India and South Africa Rules, Trends and Causes* (2005)53.

investigations.<sup>20</sup> Due to its adherence to the WTO rules, its anti-dumping experience has been considered a success in its participation in the global trading system.

This study comes at a crucial turning point when Kenya has decided to harmonise its national laws not only with those of the WTO but also of the Common Market for East and Southern Africa (COMESA) and the East African Community (EAC) in order to enable it to enforce its anti-dumping laws.<sup>21</sup> Therefore, this mini-thesis seeks to investigate the concept of dumping under the WTO framework, which will entail looking into both the substantive and procedural provisions and their application to gain an understanding into what is expected from Members who intend using this tool and will be the basis for an anti-dumping regime in Kenya.

An attempt will also be made by this research to examine how South Africa has structured its legal and institutional framework to deal with dumping, its strengths and weaknesses, and what Kenya can learn from SA to ensure effective protection for its industries. The survival of Kenya's domestic industries and producers under the pressures of lowering tariffs and dumping is greatly at stake today, and it will continue; hence the urgent need to devise strategies to defend the remaining local industries and to promote new ones.<sup>22</sup> That said, it is hoped that the parties involved with the drafting of the Kenyan laws will be provided with adequate information necessary for the effective implementation of the anti-dumping rules.

## 1.2 Research questions

The main questions that this thesis seeks to answer are:

- a) What is dumping under the WTO and what are the standards required for the utilisation and implementation of anti-dumping laws by a Member?
- b) Why is Kenya in need of a national anti-dumping framework?

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<sup>20</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>21</sup> [http://www.antidumping/kenya to table bill on WTO rules on antidumping, subsidies-export.by information export support website](http://www.antidumping/kenya%20to%20table%20bill%20on%20WTO%20rules%20on%20antidumping,%20subsidies-export.by%20information%20export%20support%20website) (accessed 25 September 2012).

<sup>22</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 7 October 2012).

- c) What lessons can another developing country in Africa, South Africa, with a successful anti-dumping experience, provide for a potential ‘new user’ like Kenya?
- d) What should Kenya do in order to produce an anti-dumping instrument that is wholly in compliance with its international obligations under the WTO?

### 1.3 Scope and research methodology

There are three trade restrictive measures a government can use: countervailing, safeguard and anti-dumping measures. This thesis only deals with anti-dumping in a market economy since Kenya is a market economy where production is based upon supply and demand unlike in a non-market economy where government intervention is important in the allocation of resources and the determination of prices.<sup>23</sup> China, for example, is a non-market economy.

To delimit the research further, South Africa was used as the comparative case study bearing in mind that there are other countries, like Egypt, with functional anti-dumping regimes. The reasons for making South Africa the country of choice is, first, the fact that it stands out as an experienced country (since 1914) in dealing with dumping issues and it is also the fifth largest user of anti-dumping actions after the United States of America (USA), the European Union (EU), India, and Argentina.<sup>24</sup> Furthermore, its laws and enforcement mechanisms are clear, and transparent which has been made possible by adopting a bottom-up approach in its entire policy making process to ensure that the concerns of both private and public stakeholders are addressed.<sup>25</sup> Lastly, the South African trade remedy mechanism is generally the most functional in Africa.<sup>26</sup>

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<sup>23</sup> The Free Dictionary available at <http://www.thefreedictionary.com/non-market+economy> (accessed 20 May 2013).

<sup>24</sup> Joubert N ‘Managing the Challenges of WTO Participation: The Reform of South Africa’s Anti-Dumping Regime’ available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 25 September 2012).

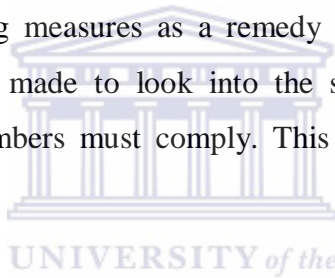
<sup>25</sup> Joubert N ‘Managing the Challenges of WTO Participation: The Reform of South Africa’s Anti-Dumping Regime’ available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 25 September 2012).

<sup>26</sup> Illy O ‘Trade Remedies in Africa: Experience, Challenges, and Prospects’ Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 20 May 2012).

The method employed for this research is both desktop and library based. A wide and thorough review of available literature is made, including primary and secondary sources, and WTO texts, cases, agreements, and regulations governing dumping have been used as key sources. Relevant textbooks, scholarly articles, reports, databases, working papers, domestic case law, and legislation were also consulted. Electronic resources are also widely used for their wealth of information on dumping and anti-dumping in Kenya and South Africa which is not available in the other sources.

#### **1.4 Chapter outline**

This thesis is structured as follows. Chapter 2 is an introduction to the issue of dumping, focusing on the detailed rules of the ADA which set out the conditions under which WTO Members may apply anti-dumping measures as a remedy against injurious dumping in their domestic markets. An attempt is made to look into the substantive as well the procedural provisions with which WTO Members must comply. This lays the foundation for this mini-thesis.



Chapter 3 focuses on the rationales for having a national anti-dumping instrument in Kenya and analyses the country's national anti-dumping framework and its institutions. This partly justifies the relevance of the study and the use of anti-dumping laws. In addition, an insight into the legal frameworks of the EAC and the COMESA, with which Kenya aspires to be in harmony, is provided in this chapter.

Chapter 4 critically analyses the legislative and institutional frameworks of the South African anti-dumping system, the substantive matters and procedures to be followed by interested parties throughout the investigation process, and the reviews available. In addition, there is an examination of some identified problems which restrict the proper effectiveness of this system. This chapter provides the South African approach, from which the Kenyan policy makers can learn as they undertake to draft their own laws.

The fifth and last chapter draws conclusions and provides recommendations for both South Africa and Kenya.

# CHAPTER 2

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## THE INTERNATIONAL REGULATION OF DUMPING UNDER THE WTO: RULES AND PROCEDURES

### 2.1 INTRODUCTION

Dumping is regarded as unfair commercial competitive behaviour in international trade. By the beginning of the 20<sup>th</sup> century, countries, such as, Canada, Great Britain, New Zealand and the USA, formulated and implemented national anti-dumping legislation to counterbalance the injury to their economies caused by foreign dumped products.<sup>27</sup> The implementation of the anti-dumping laws, however, went beyond its reasonable scope and extent and became a method of protecting trade, thus hindering the growth of international business. This crisis led many countries to seek international legislation as a means to bring anti-dumping in line with international trade requirements in order to limit this measure to its reasonable scope.<sup>28</sup>

In 1994, with the inception of the WTO and the Anti-Dumping Agreement (ADA) (negotiated during the Uruguay Round), comprehensive guidelines for countries to implement and administer anti-dumping laws were provided for.<sup>29</sup> First, the ADA, being a multilateral agreement, was part of the single undertaking: it established a common set of basic rules that would apply to all WTO Members and is subject to the enforcement provisions of the WTO Dispute Settlement Understanding (DSU).<sup>30</sup>

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<sup>27</sup> Das S 'Evolution and Political Economy of Trade Protectionism: Anti-dumping and Safeguard Measures' (2005) 17 *IIBM Management Review* 52; Tao M *Dumping and AD Regulations with Specific Reference to the Legal Framework in SA and China* (Unpublished LLM thesis, University of the Free State, 2006) 39.

<sup>28</sup> Denton R 'Why Should Nations Utilize Anti-dumping Measures' (1989) *Journal of International Law* 242-243.

<sup>29</sup> Viktoriia K *Public Interest Consideration in Domestic and International Anti-Dumping Disciplines* (published LLM thesis, World Trade Institute, 2011) 6.

<sup>30</sup> Bown P 'The WTO and Anti-dumping in Developing Countries' (2007) *Working Paper of the World Bank* No: 4014, 7.



Secondly, in comparison to the GATT, the WTO ADA imposed more structure on the evidentiary requirements for a government to implement a new anti-dumping measure, although countries are allowed substantial discretion to implement their own anti-dumping laws consistent with the WTO rules.<sup>31</sup> It is worth remembering that Art VI of the GATT 1947, (which lasted until 1994 when it was replaced by the WTO), already provided very general disciplines which were incrementally developed through the plurilateral Kennedy and Tokyo Rounds agreements before culminating in the WTO agreements.

Since the 1990s many developing and developed countries have adopted anti-dumping legislation and applied anti-dumping measures. For example, South Africa, Brazil, India, Egypt, Argentina, Turkey and Mexico have initiated anti-dumping investigations.<sup>32</sup> Miranda<sup>33</sup> articulates that nowadays as a result of these rules half the total number of anti-dumping cases initiated are by developing countries, some of which employ anti-dumping provisions more actively than most developed countries.

This chapter discusses the global regulation of dumping, in accordance with WTO's Art VI of the GATT 1994 and the ADA. It explains the substantive principles under the ADA (meaning of 'dumping', the determination of dumping, injury and the causal link), the procedures for enacting anti-dumping measures, reviews, as well as the notification requirements to be complied with by Members with national anti-dumping laws.

## 2.2 THE MEANING OF 'DUMPING'

Jacob Viner first introduced and defined the idea of 'dumping' as 'price discrimination between national markets'.<sup>34</sup> According to the ADA, dumping occurs when a producer in one country sells a product at a lower price to a specific export market than the normal value.<sup>35</sup> Normal value can be determined in different ways, but generally it is in relation to the price in the exporter's

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<sup>31</sup> Art 17.6 of the ADA ; Bown P 'The WTO and Anti-dumping in Developing Countries' (2007) *Working paper of the World Bank* No: 4014, 7.

<sup>32</sup> United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003) 46.

<sup>33</sup> Miranda J, Torres R & Ruiz M 'The International Use of Anti-dumping' (1998) *Journal of World Trade* 5.

<sup>34</sup> Viner J *Dumping: A problem in International Trade* (1923) 4.

<sup>35</sup> See Art 2.1 of the ADA.

domestic market.<sup>36</sup> For instance, a two kg packet of chicken wings from country W is exported to country X (which also locally sells chicken wings) for US \$5, while the price of the same wings in country W is US \$10. The main aspect is that the company charges a different price in different markets for the same product, which amounts to price discrimination. It should be noted that for dumping to occur, unlike price discrimination, the market has to be international, between countries.<sup>37</sup>

Is this behaviour outlawed under the WTO? Art VI of the GATT 1994 and the ADA do not prohibit dumping, but condemn that which causes material injury.<sup>38</sup>

*'The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be **condemned** if it 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'.*<sup>39</sup>

The ADA clarifies and expands Art VI, and the two operate together.<sup>40</sup> If dumping injures the local producers of the importing country, its authorities are allowed to take measures to either offset or prevent injurious dumping.<sup>41</sup> Countries are therefore permitted with a clear-cut guideline and rule based mechanism to act in a way that would normally breach the GATT principles of a binding tariff and non-discrimination between trade partners. The GATT only addresses the behaviour of governments, dumping by private companies or non-government organisations cannot be forbidden. Thus private firms have freedom of choice in business.<sup>42</sup>

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<sup>36</sup> See Art 2.2.1 of the ADA.

<sup>37</sup> Li W *Anti-dumping Law of the WTO/GATT and the EC: Gradual Evolution of Anti-dumping Law in Global Econ Integration* (2003)53-54.

<sup>38</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)3.

<sup>39</sup>Art VI: 1 of the GATT 1994.

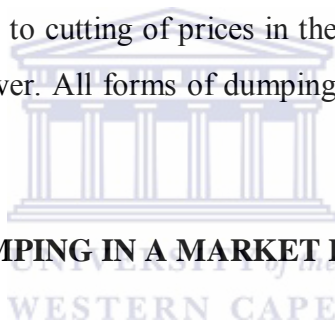
<sup>40</sup> WTO E-Learning available at [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 2 February 2013).

<sup>41</sup>Denner W *Supporting Regional Integration in East and Southern Africa-Review of Select Issues: Protectionism, Trade Remedies and Safeguards* (2010)11; Art VI of the GATT 1994.

<sup>42</sup>Jackson H *The Jurisprudence of GATT and the WTO* (2000) 73.

The GATT 1994 and the ADA Annex 1A cover agreements on trade in goods and thus only relate to dumping of goods. There are currently no rules relating to dumping of services, although a working part of the General Agreement on Trade in Services (GATS) rules has been examining the issue almost since the WTO was created.<sup>43</sup> There are various circumstances in which dumping of goods may take place.<sup>44</sup> For example, sporadic dumping which is seen to be driven by the need to dispose of an excess supply of goods which occurs as a result of, for example, inexperience when pricing the product or demand changes for the product after its production.<sup>45</sup>

Viner<sup>46</sup> maintained that protection through an anti-dumping authority was needed against predatory dumping. In predatory dumping a new firm is motivated to participate in dumping so that it can gain access into a new market, or drive away domestic competitors from the market.<sup>47</sup> ‘Predatory pricing’ therefore refers to cutting of prices in the short term so as to drive rivals out of the market and gain market power. All forms of dumping lead to ‘unfair’ competition which the ADA seeks to address.<sup>48</sup>



### **2.3 DETERMINATION OF DUMPING IN A MARKET ECONOMY**

A national government must investigate and consider substantial evidence before imposing a definitive anti-dumping measure that restricts imports, under the ADA.<sup>49</sup> The importing country’s authorities may impose anti-dumping duties to offset the effects of dumping after meeting the following requirements: proof that actual dumping is occurring, the domestic industry producing a like product suffers material injury or threat thereof, and the injury is the

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<sup>43</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)3.

<sup>44</sup>Bolton M ‘Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny’ (2012) *Berkeley Journal of International Law* vol 29, 72.

<sup>45</sup>Beirwagen V, Rainer M, Hailbronner K ‘Input, Downstream, Upstream, Secondary, Diversionary and Components or Sub-assembly Dumping’ (1988) *Journal of World Trade*, 32 footnote 27.

<sup>46</sup>Viner J *Dumping: A Problem in International Trade* (1923) 7.

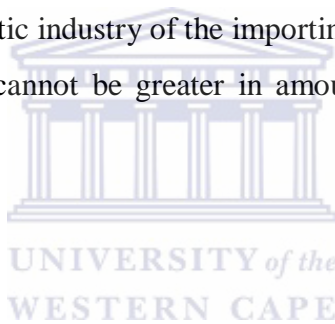
<sup>47</sup> Venkatesh M *Handbook on Anti-dumping* (2001) 9.

<sup>48</sup> Venkatesh M *Handbook on Anti-dumping* (2001) 10.

<sup>49</sup>Bown P ‘The WTO and Anti-dumping in Developing Countries’ (2007) *Working paper of the World Bank* No: 4014 7.

result of dumped products from the specified country (causal link).<sup>50</sup> The means of determining whether dumping has taken place is by providing the importing government's anti-dumping authority with evidence that shows that the export price of the 'like' product is lower than the normal value.<sup>51</sup> This is achieved by determining the like product's export price (market of the importing country) and normal value (market of the exporting country), and comparing them.

For example: if a German export company sold a motorcycle in the Kenyan market for Kshs 2000 but it sold the same thing in Germany for Kshs 5000 this would mean the company is dumping in the Kenyan market. If the price in Germany for the same motorcycle was Kshs 2500, there would be no suggestion that dumping was taking place. In order to offset or prevent dumping Kenya may levy an anti-dumping duty in order to bring the price of the exported product to the level of the 'normal value', or to increase the export price to a level where it ceases to cause injury to the domestic industry of the importing country.<sup>52</sup> It should be noted that this is a strict rule and the duty cannot be greater in amount than the dumping margin with respect to that product.<sup>53</sup>



### 2.3.1 Normal value

Is the 'like product in the domestic market of the exporter' relevant to the determination of dumping in an investigation? Yes, because this product gives the normal value. The ADA typically expresses the normal value as the price of the like product at which the exporter sells the product in his home market.<sup>54</sup> Therefore, from the 'motor cycle' illustration above, the domestic price of the product is 5000 and its exporting price is 2000, the dumping amount is 3000 and the dumping margin is  $3000/2000 \times 100 = 150\%$ .<sup>55</sup>

How can 'normal value' be determined in a case where the product subject to investigation, the motor cycle, is not sold at all in Germany for a given reason or the sales in Germany are not in

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<sup>50</sup> See Art VI (6) (a) of the GATT 1994.

<sup>51</sup> See Art 2.1 of the ADA.

<sup>52</sup> See Art 8.1 of the ADA.

<sup>53</sup> See Art VI (2) of the GATT 1994.

<sup>54</sup> See Art 2.1 of the ADA.

<sup>55</sup> Czako J, Human J & Miranda J A *Handbook on Anti-dumping Investigations* (2003)126 ; See Art 2.4.2 of the ADA.

the ordinary course of trade, or are less than five percent of export sales to Kenya (the importing country)?<sup>56</sup> ‘Ordinary course of trade’ is not defined by the ADA; however, the following situations are sales not being in the ordinary course of trade: sales below cost, sales between related parties, liquidation sales, and sales to employees.<sup>57</sup>

Two alternatives are available to calculate the normal value:

- The price charged by the exporter in a third country, e.g. France. With this price, however, there are two conditions to be met: the export price is required to be ‘representative’ and the third country should be ‘appropriate’.<sup>58</sup> Thus the volume of exports to a given third country as against the volume of exports to the importing country is tested.<sup>59</sup> If the volume sold to the third country is very low compared to the volume of exports to the importing Member, they may not select the sales to that third country as a basis for the determination of normal value.<sup>60</sup> Essentially, most Member authorities have rarely relied on export prices to a third country to determine normal value for fear that sales to a third country might also be made at dumped prices; for instance, ball bearings from Japan have been dumped in the European Community, in the USA and Canada.<sup>61</sup>
- The constructed normal value.<sup>62</sup> This is a value, as opposed to a price set by the exporter, requested by the importing Member’s authorities for the purpose of an anti-dumping investigation.<sup>63</sup> It is obtained by adding the cost of production, a reasonable amount for selling, general and administrative costs and profits in order to check whether domestic sales are made below cost.<sup>64</sup> The WTO panel in *Guatemala-Cement II*<sup>65</sup> upheld this

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<sup>56</sup> See Art 2.2 of the ADA and Footnote 2 of the ADA.

<sup>57</sup> See Art 2.2.2(ii) of the ADA.

<sup>58</sup> See Art 2.2 of the ADA.

<sup>59</sup> WTO E-Learning available at [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 2 February 2013).

<sup>60</sup> WTO E-Learning available at [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 2nd February 2013).

<sup>61</sup> Stanbrook C & Bentley P *Dumping and Subsidies: The Law and Procedures Governing the Imposition of Anti-dumping and Countervail Duties in the European Community* (1996)39.

<sup>62</sup> See Art 2.2 of the ADA.

<sup>63</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 2 February 2013).

<sup>64</sup> See Art 2.2 of the ADA.

<sup>65</sup> Panel Report *Guatemala-Cement II* WT/DS156/R, 183.

practice by affirming that an investigative authority can request cost information, even if the applicant does not allege sales below cost. The ADA contains rules on how costs should be calculated.<sup>66</sup> It also establishes a set of rules for the calculation of the selling, general and administrative costs, as well as profits.<sup>67</sup>

### 2.3.2 Export price

In order to find whether dumping occurred or not, the export price must be determined and compared with the normal value. Although the ADA does not define ‘export price’, it is construed to be the price payable for the product being exported from one country to another.<sup>68</sup> This price, which is normally specified in export documentation (e.g. bill of lading), is that of the allegedly dumped goods one of the two elements in a dumping determination.<sup>69</sup>

In certain cases as recognised by the ADA, the export price may not be reliable, for example, where the exporter sells the product to a related importer.<sup>70</sup> Hence, an alternative method of determining an appropriate export price for comparison is needed. The investigating authorities calculate a ‘constructed export price’ which is based on the price at which the imported products are first resold to an independent buyer. Nonetheless, if the imported product is not resold to an independent buyer, or is not resold as imported, the authorities may determine a reasonable basis on which to calculate the export price.<sup>71</sup> It should be noted that Art 2.4 of the ADA, which governs the construction of the export price, authorises specific allowances for the costs, duties and taxes incurred between importation and resale to be made in the construction. This was held by the panel in the *US & Stainless Steel* case stating that Members should permit costs and profits when constructing an export price because a failure will only result in a higher export price and therefore a lower dumping margin.<sup>72</sup>

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<sup>66</sup>See Art 2.2.1.1 of the ADA.

<sup>67</sup>See Art 2.2.2 of the ADA.

<sup>68</sup>See Art 2.1 of the ADA.

<sup>69</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)8.

<sup>70</sup>See Art 2.3 of the ADA.

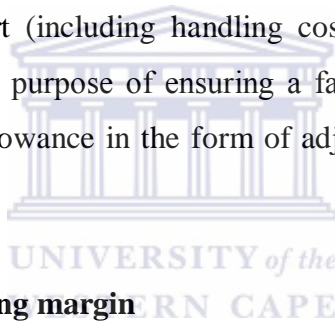
<sup>71</sup>See Art 2.3 of the ADA.

<sup>72</sup>Panel Report *US – Stainless Steel* WT/DS179/R, 6.93-6.94.

### 2.3.3 Fair comparison of normal value and export price

A comparison is necessary in the determination of dumping.<sup>73</sup> The ADA states that the comparison in price shall be made at the same level of trade, which is usually the price of the product at the time it leaves the factory and sales as nearly as possible at the same time.<sup>74</sup> If a comparison is made at different levels of trade, prices may be affected. Accordingly, Art 2.4 provides that costs incurred after that must be deducted by the investigating authority to the extent that they are included in the price. These adjustments in most anti-dumping cases are made depending on each case's facts to make the comparison fairer.<sup>75</sup>

For example, in the *EU- Vietnam Bicycle* case, factors were adjusted, such as: indirect tax, discounts, level of trade, transport (including handling costs) ocean freight, insurance costs, packing and credit costs: 'For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting price comparability'.<sup>76</sup>



### 2.3.4 How to calculate the dumping margin

Due to the fact that dumping is about the price behaviour of individual exporters or producers, each exporter is normally (except in cases where, for example, the numbers are too high and sampling applies) entitled to an individual margin. The ADA normally requires either a comparison of the weighted average normal value to the weighted average of all comparable export prices, or a comparison of the normal value and the export price on a transaction-to-transaction basis.<sup>77</sup> But there is an exception provided to this rule according to Art 2.4.2 where a normal value is compared to prices of individual export transactions if the authorities find a pattern of export prices among different purchasers, regions or time periods to be considerably

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<sup>73</sup>Li W *Anti-dumping Law of the WTO/GATT and the EC: Gradual Evolution of Anti-dumping law in Global Econ Integration* (2003) 40.

<sup>74</sup>Denner W *Supporting Regional Integration in East and Southern Africa-Review of Select Issues: Protectionism, Trade Remedies and Safeguards* (2010) 1; See Art 2.4 of the ADA.

<sup>75</sup>See Art 2.4 of the ADA.

<sup>76</sup>*Council of the European Union* Reg no 1095/2005, 87.

<sup>77</sup>See Art 2.4.2 of the ADA.

different and if an explanation is provided as to why such differences cannot be taken into account correctly by using weighted average-to-weighted average or transaction-to-transaction comparison.<sup>78</sup>

The basic formula for calculating the dumping margin is:<sup>79</sup>

$$\frac{\text{Adjusted Normal Value (ANV)} - \text{Adjusted Export Price (AEP)}}{\text{Adjusted Export Price (AEP)}} \times 100$$

The dumping margin is normally expressed as a percentage of the Adjusted Export Price (AEP). The following example illustrates the calculation:

The Adjusted Normal Value (ANV) is United States Dollars (USD) 10.00 per kilogram and the AEP is USD 8.00 per kilogram. Therefore the dumping margin is  $(10.00 - 8.00) / 8.00 \times 100 = 25\%$ . The product in this case has indeed been dumped.

## 2.4 DETERMINATION OF INJURY AND CAUSAL LINK

Determining the existence of dumping is just the first step. The next step is to make available to the government in an anti-dumping investigation, evidence showing that the domestic industry which produces a like product in the importing country is 'materially injured' or threatened as a result of the dumped imports.<sup>80</sup> The determination of injury plays an important role in deciding whether anti-dumping measures can be imposed or not. That being said, the scope of the 'like product' produced by the 'domestic industry' as well as the state of the domestic industry must be examined.

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<sup>78</sup> See Art 2.4.2 of the ADA.

<sup>79</sup> See Art 2.4.2 of the ADA.

<sup>80</sup> See Art 3.4 of the ADA, United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003) 21.



### 2.4.1 'Like product in the importing country'

This is relevant in an anti-dumping investigation as there can be no injury unless an investigating authority determines whether the domestic industry produces a product alike to the dumped import.<sup>81</sup> According to the ADA the two products are considered alike, where the dumped imported product and the domestic product are identical or where the latter has characteristics closely resembling those of the dumped product.<sup>82</sup> The concept has been loosely interpreted in comparison to the four guiding criteria provided for by the Appellate Body in *EC-Asbestos*<sup>83</sup> to be employed in the determination of a 'like product'. They include i) the properties, nature and quality of the products; ii) the end-users of the products; iii) consumer tastes and habits with reference to the product; and iv) the tariff classification of the products.<sup>84</sup>

This concept however has to be analysed on a case by case basis as was held by the Appellate Body in *Japan-alcoholic beverages*, stating that the idea of 'likeness' stirred the image of an accordion that 'stretches and squeezes in different places'.<sup>85</sup> In an anti-dumping enquiry this means that if the product manufactured and sold by the domestic industry in the importing country is neither identical to nor have characteristics of resemblance with the imported product then there is no domestic industry and no anti-dumping measures can be imposed.

### 2.4.2 The 'domestic industry'

Art 4 of the ADA defines 'domestic industry' to mean 'the domestic producers as a whole of the like products or those of them whose collective output of the products constitutes a major

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<sup>81</sup>[https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 2 February 2013).

<sup>82</sup>See Art 2.6 of the ADA.

<sup>83</sup>*EC- Measures Affecting Asbestos and Asbestos-Containing Products (EC- Asbestos)* WT/DS135/AB/R.

<sup>84</sup>*EC-Asbestos* Appellate Body Report WT/DS135/AB/R, 101.

<sup>85</sup>Raju K *WTO Agreement on Anti-dumping: A GATT/WTO and Indian Legal Jurisprudence* (2008) 41-42; *Japan-Alcoholic Beverages* Appellate Body Report WT/DS8/AB/R.

proportion of the total domestic production of those products'.<sup>86</sup> This principle has two exceptions which are excluded from the definition above: a) Where domestic producers are related to the exporters or importers under investigation. These producers are seen as a threat because they could benefit from dumping and thus may interfere with the injury analysis.<sup>87</sup> b) Domestic producers who are themselves importers of the allegedly dumped product.<sup>88</sup>

In exceptional circumstances it happens that domestic producers in an isolated competitive market produce and sell all or almost their entire produce in that specific market and the demand is not to any significant degree supplied by producers elsewhere in the territory.<sup>89</sup> This is known as a regional industry. Consideration of injury is given to these producers who comprise the regional industry if there is a concentration of dumped imports into the market served by this industry, causing injury to producers of all or almost all of the production within that market.<sup>90</sup>

From the ADA it is clear that only some domestic producers become the 'domestic industry' and the determination of injury will be based on information relating to these producers.<sup>91</sup> The protectionist angle of the domestic industry was portrayed in *New Zealand-Finnish transformers*<sup>92</sup> where the complainant had divided the transformer market into four in order to find dumping and impose anti-dumping duties in an attempt to manipulate the definition of 'domestic industry'.<sup>93</sup> It seemed that the purpose was to increase the chances of finding injury caused by dumped imports to the domestic industry; the panel found this not to be valid.<sup>94</sup>

### 2.4.3 Injury

Injury comprises present material injury, future injury (threat of material injury) and material retardation of the establishment of a domestic industry.<sup>95</sup> None of these types of injury are

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<sup>86</sup> See Art 4.1 of the ADA.

<sup>87</sup> See Art 4.1(i) of the ADA; United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003) 26.

<sup>88</sup> See Art 4.1(i) the ADA.

<sup>89</sup> See Art 4.1(ii) of the ADA.

<sup>90</sup> WTO 'Technical information on Anti-dumping' available at [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm#domestic](http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#domestic) (accessed 21 March 2013).

<sup>91</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 6 February 2013).

<sup>92</sup> GATT Panel Report, *New Zealand-Imports of Electrical Transformers from Finland* BISD 55.

<sup>93</sup> Raju K *WTO Agreement on Anti-dumping: A GATT/WTO and Indian Legal Jurisprudence* (2008) 41-42.

<sup>94</sup> Raju K *WTO Agreement on Anti-dumping: A GATT/WTO and Indian Legal Jurisprudence* (2008) 41-42.

<sup>95</sup> See footnote 9 of Art 3 of the ADA.

defined in the ADA and the investigating authorities are merely directed on what to examine in order to determine whether a domestic industry has suffered material injury or threat.<sup>96</sup>

*‘A determination of injury for purposes of Article VI of GATT 1994 shall 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 products, and (b) the consequent impact of these imports on domestic producers of such products’.*<sup>97</sup>

Bolton<sup>98</sup> criticises the failure of Art VI and the ADA to provide a definition of what constitutes material injury, and states that this omission limits the usefulness of that provision as a shield. He further says that the fact that since injury determinations can only be based on an ‘objective examination’ of ‘positive evidence’, the term gives much leeway to the examining agencies for determining how to interpret evidence, and does not require the importing country to disclose all the factors it considered in reaching its conclusion.<sup>99</sup>

In the determination of injury, as defined by Art 3.1, with respect to the volume of the dumped imports, the investigating authority must consider whether there has been a ‘significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member’.<sup>100</sup> For example, in the case of *EU-Vietnam bicycle* it was found on the basis of statistical information that the volume of bicycles imported from China and Vietnam to the European Union from January 2000 to 31 March 2004 increased from 435 373 units to 2 311 638 units (an increase of 413%).<sup>101</sup>

As far as the effect of the dumped imports on prices is concerned, an investigating authority must consider whether there has been ‘a significant price undercutting by the dumped imports as

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<sup>96</sup>Bown P ‘The WTO and Anti-dumping in Developing Countries’ (2007) *Working paper of the World Bank* No: 4014, 8 footnote 11.

<sup>97</sup> Appellate Body Report, *Thailand-H-Beams*, WT/DS122/AB/R, 107 and 111; Art 3.1 of the ADA.

<sup>98</sup>Bolton M ‘Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny’ (2012) *Berkeley Journal of International Law* vol 29, 76.

<sup>99</sup>Bolton M ‘Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened scrutiny’ (2012) *Berkeley Journal of International Law* vol 29, 76.

<sup>100</sup>See Art 3.2 of the ADA.

<sup>101</sup>*Council of the European Union* Reg no 1095/2005 118.

compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree'.<sup>102</sup> When examining the impact of the dumped imports on the domestic industry, the ADA states that national authorities must evaluate all relevant industry data and economic factors, which include, 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 and ability to raise capital or investments.<sup>103</sup> It should be known well that the evaluation of the above 15 factors is mandatory, as held by the panel in *EC Bed-Linen*.<sup>104</sup>

In the event that the material injury has not physically taken place, i.e it is merely a threat which will materialise unless an anti-dumping action is taken, the investigating authorities are obliged to determine the threat based on facts and not merely on allegation, conjecture or remote possibility.<sup>105</sup> Art 3.7 of the ADA offers special factors to be considered in making a threat determination, based on the fact that any investigation based on threat of material injury will necessarily be hypothetical.<sup>106</sup> These special factors<sup>107</sup> are: an increase in dumped imports; increase in capacity of the exporter; imports entering at prices that will have a significant depressing or suppressing effect; and inventories of the imported product being investigated. The four factors when considered jointly must lead to the conclusion that unless protective measures are taken, material injury will occur.<sup>108</sup> It is of paramount importance to note that while examining the Art 3.7 factors in the determination of a threat of injury, the analysis cannot be solely on the factors listed above. The panel in *Mexico-corn syrup*<sup>109</sup> stated that an analysis of the Art 3.4 factors was required in a case involving threat of injury.

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<sup>102</sup>See Art 3.2 of the ADA.

<sup>103</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)8; Art 3.4 of the ADA.

<sup>104</sup> Panel Report, *EC-Bed Linen*, 167.

<sup>105</sup>See Art 3.7 of the ADA.

<sup>106</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)26.

<sup>107</sup>See Art 3.7 of the ADA.

<sup>108</sup>See Art 3.7 of the ADA.

<sup>109</sup> Panel Report *Mexico-Anti-dumping Investigations of High Fructose Corn Syrup (HFCS) from the United States*127.

#### 2.4.4 The causal link between dumped imports and injury

In an anti-dumping investigation, the causal link between dumped imports and injury must be established. It was earlier seen that this is realised by the evaluation of import volumes and prices and their impact on the domestic industry. This test is also important not only in determining material injury but also indicates whether injury was caused by dumped imports or other factors.<sup>110</sup> The ADA requires that the demonstration of a causal relationship must be based on an examination of all the relevant evidence and any ‘known’ factors other than the dumped imports which are also injuring the domestic industry.<sup>111</sup> It is not specified how particular factors are ‘known’ nor is guidance given on how relevant evidence is to be evaluated, but the panel in *Thailand-H-beams*<sup>112</sup> stipulated that ‘known’ factors ‘...would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation’.<sup>113</sup>

Art 3.5 provides a non-exhaustive list of other factors which could be relevant depending on the facts of each case, and also states that the injury as a result of such other known factors must not be attributed to the dumped imports. Although Art VI of the GATT 1994, and the ADA, require a causal link to be established between the dumping of imports and the injury in the determination of dumping, Willig<sup>114</sup> is of the opinion that it is possible to impose anti-dumping duties where the ‘link between dumping and injury’ is absent, by merely showing a threat of injury. In other words, dumping is usually punished even though the shape and structure of the modern world economy make it particularly difficult to determine whether dumping is taking place and what its effects are.<sup>115</sup>

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<sup>110</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003) 30-31.

<sup>111</sup>See Art 3.5 of the ADA.

<sup>112</sup> Panel Report *Mexico-, Anti-dumping Investigations of High Fructose Corn Syrup (HFCS) from the United States* 126-7.

<sup>113</sup>Panel Report *Mexico-Anti-dumping Investigations of High Fructose Corn Syrup (HFCS) from the United States* 126-7.

<sup>114</sup> Willig R & Lawrence Z (ed) *Economic Effects of Anti-dumping Policy: Brookings Trade Reform* (1998) 2.

<sup>115</sup> Bolton M ‘Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny’ (2012) *Berkeley Journal of International Law* vol 29 12; Willig R & Lawrence Z (ed) *Economic Effects of Anti-dumping Policy: Brookings Trade Reform* (1998) 2.

## 2.5 PROCEDURE FOR ENACTING NATIONAL ANTI-DUMPING DUTIES

Anti-dumping investigations carried out in order to impose an anti-dumping measure (either in the form of an anti-dumping duty or price undertaking) conducted by WTO Members must, at a minimum, comply with the requirements contained in the ADA. WTO Members are free, and in some cases even encouraged by the ADA itself, to establish additional procedural requirements. Below are the procedural obligations that national authorities must comply with throughout the course of an anti-dumping investigation.

### 2.5.1 Pre-initiation and application

Except in special circumstances an investigation will be initiated at the request of the domestic industry by submitting an official complaint to the importing Member's authorities stating that injurious dumping is taking place.<sup>116</sup> This complaint is what is known as the 'application' in the ADA.<sup>117</sup> In the application evidence must be presented with respect to dumping, injury and a causal link.<sup>118</sup> Members are therefore obliged to examine the accuracy and adequacy of the evidence submitted in the application in order to determine whether there is sufficient evidence to justify the initiation of an investigation.<sup>119</sup> In *Guatemala- Cement II*<sup>120</sup> an application was struck down after it was determined that there was a lack of sufficient evidence of dumping and threat of injury to initiate an investigation and was thus inconsistent with Art 5.3 of the ADA.

An application imposes another requirement called 'standing', which must be determined before initiation. 'Standing' means that an application is made by, or on behalf of, the domestic industry of the importing Member.<sup>121</sup> In *US – Seamless Stainless Steel*<sup>122</sup> the panel held that the failure by Members to properly determine standing before initiating an investigation is a serious error

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<sup>116</sup> See Art 5.6 of the ADA.

<sup>117</sup> United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)33.

<sup>118</sup> See Art 5.2 of the ADA.

<sup>119</sup> See Art 5.3 of the ADA.

<sup>120</sup> *Guatemala-Cement II* Appellate Body WT/DS60/AB/R.

<sup>121</sup> See Art 5.1 of the ADA.

<sup>122</sup> Panel Report ADP/47; United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)34.

which cannot be rectified retroactively since it is an essential procedural requirement. Art 5.4 provides the tests to determine standing, which must be met to initiate an investigation:

*‘Supporting domestic producers account for more than 50% of total production of the like product by those expressing opinion (either support or oppose the application);*

*And*

*Supporting domestic producers account for more than 25% of total production’.*

It should be noted that prior to the initiation of the investigation the importing Member’s authorities must notify the government of the exporting Member and avoid publicising the application for the initiation of the investigation.<sup>123</sup> The authorities will in many cases have to consult with various economic actors, before initiating a case, in order, for example, to determine if there is standing.



### **2.5.2 Initiation**

Upon the investigating authority deciding to initiate an investigation, it is required to publish public notices of the commencement.<sup>124</sup> Furthermore, the ADA sets out the content of the notice of initiation. This includes information on inter alia the

*‘name of the exporting country and the product involved, the basis on which dumping is alleged in the application, a summary of the factors on which the allegation of injury is based, the address to which representations by interested parties should be directed and the time-limits allowed to interested parties for making their views known’.*<sup>125</sup>

### **2.5.3 Transmission of the written application**

Foreign producers and their importers are more often than not reluctant to provide each other with individual confidential and sensitive business information. Because of this obvious reason,

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<sup>123</sup>See Art 5.5 of the ADA.

<sup>124</sup>See Art 12.1-12.1.1 of the ADA.

<sup>125</sup>See Art 12.1.1 of the ADA.

the ADA acknowledges the fact of confidentiality. However, it obliges the Members to provide the full non-confidential text of the written application which must be made available upon request, to other interested parties involved.<sup>126</sup> According to the ADA, interested parties are the domestic and foreign producers, exporters and their importers, the government of the exporting country, and representative trade associations; other domestic or foreign parties may also be included as interested parties by the importing country.<sup>127</sup>

#### **2.5.4 Issuing of questionnaire and deadlines**

In an anti-dumping investigation the authorities must give notice of the information they require from exporters and foreign producers.<sup>128</sup> The requests are in the form of questionnaires; exporters and foreign producers must be given a minimum of 30 days to respond to these questionnaires.<sup>129</sup> This 30 day deadline is counted from the date of receipt of the questionnaire.<sup>130</sup> Where the interested party does not provide the requested information as per the deadline, Art 6.8 provides that ‘... preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available’. Just as interested parties have obligations, they also have due process rights which include the opportunity to present evidence in writing,<sup>131</sup> the right of access to the evidence,<sup>132</sup> the right to have a hearing and to meet opposing parties, and the right to disclosure.<sup>133</sup>

Once the deadline has expired and replies to the questionnaires are obtained from the interested parties, they are analysed to decide whether the imported product is exported at a dumped price, whether the local industry has suffered material injury, and if there is a causal link between the injury and the dumped product.<sup>134</sup> It is a requirement of the ADA for all investigating authorities carrying out an inquiry to be certain as to the accuracy of the information supplied by the

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<sup>126</sup>See Art 6.5 of the ADA.

<sup>127</sup>See Art 6.1.1 of the ADA.

<sup>128</sup>See Art 6.1 of the ADA.

<sup>129</sup>See Art 6.1.1 of the ADA; [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 14 February 2013).

<sup>130</sup> See Footnote 15 of Art 6.1.1 of the ADA.

<sup>131</sup> See Art 6.1 of the ADA.

<sup>132</sup> See Art 6.1.2 of the ADA.

<sup>133</sup> See Art 6.2 of the ADA.

<sup>134</sup>See Art 6.10 of the ADA.



interested parties upon which they base their outcomes.<sup>135</sup> Under normal circumstances, investigating officials discharge this obligation differently depending on the availability of resources. For instance, there is a very big difference between investigating authorities in developed and developing countries. In the former they carry out on the spot verifications on the premises of the exporters and domestic industries, while the developing countries, authentication is in the form of sampled documentation from exporters as they cannot afford the fare costs to travel abroad.<sup>136</sup>

### **2.5.5 Provisional anti-dumping measures**

After the data has been analysed, a Member who wishes to impose provisional anti-dumping measures may do so after complying with the rules of the ADA. Provisional anti-dumping measures may only be applied if in an initiated investigation a preliminary affirmation has been made of dumping and injury, and the authorities judge the measures necessary to prevent injury being caused during the investigation.<sup>137</sup> The measures may take the form of a provisional duty or preferably security (cash deposit or bond) equal to the amount of the preliminarily determined dumping margin.<sup>138</sup> With regard to time limits: the said measures may not be applied sooner than 60 days from the date of initiation of the investigation and may not last longer than nine months.<sup>139</sup> The public must be notified of the provisional anti-dumping measures and the notification forwarded to the exporters and interested parties.<sup>140</sup> The notice contains the established dumping margins with a full explanation of the method used to compare the normal and export value, and concerns relevant to the determination of injury.<sup>141</sup>

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<sup>135</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 14 February 2013).

<sup>136</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 14 February 2013).

<sup>137</sup> See Art 7.1 (i-iii) of the ADA.

<sup>138</sup> See Art 7.2 of the ADA.

<sup>139</sup> See Art 7.3 -7.4 of the ADA.

<sup>140</sup> See Art 12.2.1 of the ADA.

<sup>141</sup> See Art 12.2.1 of the ADA.

## 2.5.6 Final determination of anti-dumping measures

Before a final determination is made the investigators are required by the ADA to inform all interested parties of the material facts under consideration which form the basis for the decision to apply definitive measures.<sup>142</sup> Following the disclosure, interested parties must be given the opportunity to submit comments in writing on the findings of the preliminary determination and request hearings where they address issues on which they are in disagreement with the investigating authority's findings and conclusions of law or fact.<sup>143</sup>

The comments of the interested parties are analysed by the investigating authority and thereafter the adoption and publication of the notice imposing the anti-dumping measures, either in the form of price undertakings or anti-dumping duties, takes place.

- **Price undertakings**

In an anti-dumping investigation, proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties in cases where exporters and the authorities of importing Members enter into an undertaking to revise prices or cease exports at dumped prices. The increase in price agreed upon must not be higher than necessary to eliminate the dumping margin.<sup>144</sup>

While price undertakings are often the preferred solution of exporters, the authorities have the discretion to accept or reject the undertakings offered.<sup>145</sup> Although developing countries receive little special and differential treatment under the ADA, a panel held that acceptance of the price undertaking may qualify as a constructive remedy.<sup>146</sup> If the investigating authorities accept the offer, the anti-dumping duties will not be levied as long as the

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<sup>142</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 15 February 2013).

<sup>143</sup> See Art 6.9 of the ADA.

<sup>144</sup> See Art 8.1 of the ADA.

<sup>145</sup> United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)40.

<sup>146</sup> Panel Report in *EC-Bed Linen* 238.

undertaking stays in effect. Should there be a breach, the undertaking falls away and anti-dumping duties may apply immediately.<sup>147</sup>

- **Anti-dumping duties**

Anti-dumping duties can only be imposed where all the requirements for imposition have been met. The decision on whether to impose anti-dumping duties even where all the requirements have been met rests on the Members.<sup>148</sup> Some WTO Members have included a ‘public interest clause’ in their national legislation so that they are able to refrain from imposing duties even where dumping which is causing injury is found.<sup>149</sup> For example, imposition may fail to be applied if it would be disadvantageous to users of the product. An anti-dumping imposed duty must be collected in a non-biased manner and must not exceed the dumping margin.<sup>150</sup> If there is any excess duty paid, the ADA has rules on reimbursement of the importing Members.

May an anti-dumping investigator impose a measure which is at a level lower than the dumping margin? Indeed, Art 9.1 encourages, but does not require, Members to apply the ‘lesser duty rule’, under which a duty lower than the dumping margin may be applied if it is sufficient to remove the injury to the domestic industry.<sup>151</sup>

### **2.5.7 Adoption and publication of the notice**

Details about the definitive imposed measures must be published in the Official Gazette or in a separate report.<sup>151</sup> In addition, the authorities of the Members whose products are subject to the final determination and the interested parties must be notified.<sup>152</sup> The definitive measure (price undertaking or anti-dumping duties) must expire within five years from its imposition or ‘from

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<sup>147</sup>See Art 8.6 of the ADA.

<sup>148</sup>See Art 9.1 of the ADA.

<sup>149</sup>United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)40.

<sup>150</sup>See Art 9.2-9.3 of the ADA.

<sup>151</sup>[https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 15 February 2013).

<sup>152</sup>[https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 15 February 2013).

the date of the most recent change of circumstances review, if this review has covered both dumping and injury<sup>153</sup>. The only exception to this five year limit is where an investigating authority carrying out a review investigation prior to the expiration of the measure, finds that the expiry of the measure would lead to either recurrence or continuation of dumping and injury (sunset review).<sup>154</sup>

## 2.6 REVIEWS

There are four types of reviews provided for by the ADA: sunset or expiry review, new shipper review, change of circumstances review, and judicial review.

### 2.6.1 Sunset or expiry review

According to Art 11 of the ADA, the general principle is that anti-dumping measures (duties and price undertakings) must expire within five years from their imposition, unless the domestic industry asks for a review and substantiates it prior to the expiry of the measure, and the investigating authorities establish that the expiry of the duty would likely lead to a continuation or recurrence of dumping and injury. A proper analysis is required for the extension of the anti-dumping measure beyond five years, i.e, the mere possibility of injury and dumping will be considered insufficient. If the authorities find that the anti-dumping duty is not warranted, the measure will automatically terminate.<sup>155</sup> There are certain Members of the WTO that have applied anti-dumping measures for a long time through the use of this review; for example the USA and Canada. The USA applied measures for more than 20 years on polychloroprene rubber from Japan, and Canada for more than 30 years on waterproof rubber footwear from the People's Republic of China.<sup>156</sup>

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<sup>153</sup> See Art 11.3 of the ADA.

<sup>154</sup> See footnote 22 of Art 11.3 of the ADA.

<sup>155</sup> See Art 11.2 of the ADA.

<sup>156</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 15 February 2013).

## 2.6.2 New shipper review

A producer who is a newcomer, i.e, he exported products after the imposition of the anti-dumping measures, may request the importing Member's authorities to calculate a dumping margin specific to him, since if this is not done, he will be subject to the 'other' rate imposed in the original investigation.<sup>157</sup> Under the EU system, exporters or foreign producers who enter the market after the imposition of the anti-dumping duties are the most affected, as they are expected to pay the highest anti-dumping duties imposed. The highest duty is the general rate which applies to any exporter without an individual rate of duty.<sup>158</sup> According to Piontek, this practice portrays a very over-protective edge of the EU anti-dumping system. The situation is worsened by the EU as it does not accept undertakings from the exporters.<sup>159</sup>

Art 9.5 of the ADA provides that new exporters are entitled to individual margins of dumping on condition that they show that they have no relations with any exporters in their home countries subject to anti-dumping duties on the product. During this review no anti-dumping duty shall be levied on these producers. However, the importing Member may withhold appraisalment and/or request assurances that should the review result in a determination of dumping, duties can be levied retroactively to the initiation date of the review.<sup>160</sup>

## 2.6.3 Change of circumstances review

After the imposition of anti-dumping measures, circumstances that led to the imposition of the original measures may change. For example, if the normal value decreases, the dumping margin

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<sup>157</sup> United Nations Conference on Trade and Development *World Trade Organisation: Anti-dumping Measures* (2003)43; See Art 9.5 of the ADA.

<sup>158</sup> Krishna R 'Anti-dumping in Law and Practice' Policy Research Working Paper available at [http://books.google.com/books/.../Antidumping\\_in\\_Law\\_and\\_Practice.htm](http://books.google.com/books/.../Antidumping_in_Law_and_Practice.htm) (accessed 16 February 2013).

<sup>159</sup> Krishna R 'Anti-dumping in Law and Practice' Policy Research Working Paper available at [http://books.google.com/books/.../Antidumping\\_in\\_Law\\_and\\_Practice.htm](http://books.google.com/books/.../Antidumping_in_Law_and_Practice.htm) (accessed 16 February 2013).

<sup>160</sup> See Art 9.5 of the ADA.

will reduce, eventually causing the anti-dumping measure to change.<sup>161</sup> If such a situation takes place, Members are allowed by the ADA to request the authorities to examine if the continued imposition of the duty is essential to offset dumping, whether there is a likelihood of injury recurring if the duty was to be removed or varied.<sup>162</sup> If after review it is determined that dumping is not present any more, the measure should be repealed by the authorities.<sup>163</sup>

#### 2.6.4 Judicial review

Members who adopt anti-dumping legislation are required by Art 13 to maintain judicial, arbitral or administrative tribunals or other procedures, for the purpose of reviewing administrative actions relating to final determinations and reviews of determinations. The tribunals and procedures must be independent of the investigating authorities.<sup>164</sup> Any interested party may request judicial review of certain administrative actions where they feel that the provisions of ADA were not respected. The tribunals conducting judicial review apply their own domestic anti-dumping laws in resolving the disputes, which should be as close as possible to the WTO's provisions, thereby acting as an ancillary to the WTO's dispute system.<sup>165</sup> On the other hand, the domestic judicial review differs from the WTO dispute system in that private bodies can use the former, whereas the latter is only for inter-government disputes. Furthermore, the number of judicial reviews brought to the local tribunals with respect to trade remedies is higher than that of the WTO. This could mean that if the local judicial system is a reliable one, then the WTO also benefits.<sup>166</sup>

Between 1995 and 2011, of all disputes initiated in the WTO, almost 40 % dealt with trade remedies, the majority being anti-dumping.<sup>167</sup> Review in the WTO is subject to the provisions of the Dispute Settlement Understanding which applies to consultations and settlement of disputes. Members who are of the opinion that their rights are being impaired by another importing

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<sup>161</sup> [https://etraining.wto.org/admin/files/Course\\_246/CourseContents/TR-R2-E-Print.pdf](https://etraining.wto.org/admin/files/Course_246/CourseContents/TR-R2-E-Print.pdf) (accessed 15 February 2013).

<sup>162</sup> See Art 11.2 of the ADA.

<sup>163</sup> See Art 11.2 of the ADA.

<sup>164</sup> See Art 13 of the ADA.

<sup>165</sup> Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013)5.

<sup>166</sup> Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013)7.

<sup>167</sup> Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) 6.

Member may request in writing for consultations with the other Member.<sup>168</sup> If no solution has been achieved and there is final action by the administering authorities to levy anti-dumping measures, the matter may be taken to the Dispute Settlement Body.<sup>169</sup> Should the complaining Member succeed in the dispute settlement process, the Member who is not complying will have to bring the measure in harmony with the WTO obligations or negotiate compensation with the aggrieved Member. A failure by the non-compliant Member will lead to the suspension of an equivalent level of concessions granted to it by the aggrieved Member.<sup>170</sup>

It is said that dispute settlement cases dealing with anti-dumping take very long and are very expensive. However, on the contrary, WTO dispute settlement matters proceed much faster than reviews conducted by national courts. No wonder this unique body with compulsory jurisdiction has been identified to be ‘the most successful system for international dispute settlement in the history of the world.’<sup>171</sup> It should be noted that the ADA has very detailed provisions on consultations and the standards of review applicable to panels examining claims under it.<sup>172</sup>

## 2.7 NOTIFICATION REQUIREMENTS OF LAWS AND REGULATIONS

Last but not least, there are notification obligations set by the ADA with respect to representatives from each of the members, also known as the ‘committee’ that must meet not less than twice a year.<sup>173</sup> Members must ensure that their domestic anti-dumping laws are in line with the ADA.<sup>174</sup> Hence, the committee must be notified of the existing domestic anti-dumping laws and regulations, or any changes to previously notified ones.<sup>175</sup> In addition, Members must report all preliminary or final actions taken with respect to anti-dumping measures. Such reports are open for inspection in the secretariat by other Members.<sup>176</sup>

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<sup>168</sup>See Art 17.3 of the ADA.

<sup>169</sup>See Art 17.4 of the ADA.

<sup>170</sup>Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) 3.

<sup>171</sup> Bacchus J ‘Open Doors for Open Trade: Shining Light on WTO Dispute Settlement’ available at [www.worldtradelaw.net/articles/baccusopendoors.pdf](http://www.worldtradelaw.net/articles/baccusopendoors.pdf) (accessed 4 February 2013).

<sup>172</sup>See Art 17 of the ADA.

<sup>173</sup>See Art 16.1 of the ADA.

<sup>174</sup>See Art 18.4 of the ADA.

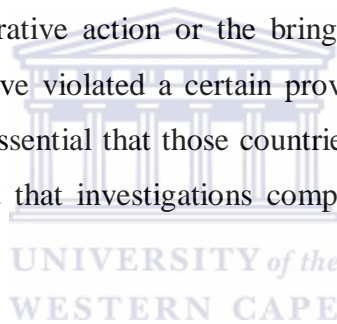
<sup>175</sup>See Art 18.5 of the ADA.

<sup>176</sup>See Art 16.4 of the ADA.

The ADA requires the submission of semi-annual reports of any anti-dumping action taken in the previous six months.<sup>177</sup> As a final point, the committee must be notified of the authorities competent to initiate and conduct anti-dumping investigations as well as of the domestic procedures governing those investigations.<sup>178</sup>

## 2.8 CONCLUSION

In this Chapter the substantive and procedural requirements of the WTO dealing specifically with dumping (Art VI and the ADA) have been discussed to provide clarity of the detailed rules how Members can ensure conformity of their anti-dumping laws with the provisions of the ADA. Although Members are free to establish additional procedural requirements, they should do so with caution. This is so because failure to respect the provisions of the ADA will result in either a judicial review of the administrative action or the bringing of a case to the WTO. If the importing Member is found to have violated a certain provision of the ADA, then the whole measure may fail. It is therefore essential that those countries which either intend to use or are new in the use of this instrument that investigations comply with the strict principles of the ADA.



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<sup>177</sup>See Art 16.4 of the ADA.

<sup>178</sup>See Art 16.5 of the ADA.



# CHAPTER 3:

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## THE NEED FOR ANTI-DUMPING LEGISLATION IN KENYA

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### 3.1 INTRODUCTION

Kenya is among the founding members of the WTO with its accession thereto being completed by December 1994. It is a signatory to all the WTO agreements including Art VI of the General Agreement on Tariffs and Trade (GATT) and the Anti-Dumping Agreement (ADA).<sup>179</sup> Through the WTO it has participated in the multilateral trading system with the objective of achieving effective market access, and supports the WTO's role in strengthening the trading system and promoting a rules based, freer and predictable trading environment through the removal of trade barriers. Kenya has shown commitment to the WTO by tariffing its quantitative trade restrictions, fixed its tariffs against further increases, and reduced them over time. All duties and charges applied have also been fixed and the schedule of commitments on the various products provided.<sup>180</sup> 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 cereals and sugar which have been negatively affected by the increase of imports.

Following the analysis of the international standards for the use of anti-dumping in the previous chapter, it was noted that in certain circumstances countries are free to use the ADA in order to offer protection to import competing industries. Each Member implements their national anti-dumping policies according to the general guidelines specified in the GATT and ADA. Chapter three seeks to prove that although this right is available to all Members, Kenya should be advised to establish and evaluate sufficient reasons as to why it is in need of the instrument. Kenya must be aware of the costs of adopting such a policy and care must be exercised in its decision to have an anti-dumping instrument. Furthermore, anti-dumping as a trade policy has significant impacts

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<sup>179</sup> Odhiambo W, Kamau P & McCormick D 'Kenya's Participation in the WTO: Lessons Learned' available at [http://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case20\\_e.htm](http://www.wto.org/english/res_e/booksp_e/casestudies_e/case20_e.htm) (accessed 22 February 2013).

<sup>180</sup> Nyangito H *Agricultural Trade Reforms in Kenya under the World Trade Organization Framework* (2003) 11.

beyond the duties and measures observed which include potential strategic actions and distortion of market outcomes.<sup>181</sup>

The purpose of this chapter is therefore to explain the basis for anti-dumping laws in Kenya; the economic (looking at the major sectors negatively affected by dumping) and non-economic grounds, the current domestic anti-dumping law of Kenya and its analysis, and lastly the laws of the East African Community (EAC) and Common Market for Eastern and Southern Africa (COMESA).

### 3.2 ECONOMIC RATIONALE: INTERNATIONAL PRICE DISCRIMINATION

Kenya's agricultural sector is dominated by primary production of commodities categorised as export crops (coffee, tea, and horticulture), basic food crops (maize, wheat and rice), and industrial crops (sugar, pyrethrum, cotton).<sup>182</sup> It is a very important sector. First, to the population, as it is their largest employer and 80 per cent thereof depend on it for their livelihood.<sup>183</sup> Secondly, to the economy, as it contributed 24.2 per cent to the Gross Domestic Product in 2012.<sup>184</sup> In 2010 it grew significantly with real growth of 6.5 per cent mainly as a result of the government's intervention through increase of exports and provision of farm inputs.<sup>185</sup> That being said, all has not been well and the sector has experienced a myriad of challenges. For example, some sub-sectors have become a dumping ground for over-produced, subsidised agriculture from the developed countries, and there has been poor legislative and institutional governance to deal with the imminent threat that affects this sector, among others.<sup>186</sup>

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<sup>181</sup> Prusa T & Blonigen B 'Anti-dumping' Working Paper 8398 available at <http://m.nber.org/papers/w8398> (accessed 4 February 2013).

<sup>182</sup> Nyangito H *Agricultural Trade Reforms in Kenya under the World Trade Organization Framework* (2003) 11.

<sup>183</sup> FAO 'Agriculture, Trade and Food Security Issues and Options in the WTO Negotiations from the Perspective of Developing Countries: Kenya' available at <http://www.fao.org/docrep/003/X8731e/x8731e09.htm> (accessed 1 march 2013).

<sup>184</sup> WTO Trade Policy Review –Kenya, 17 October 2012 WT/TPR/G/27 available at [www.wto.org/english/tratop\\_e/tpr\\_e/g271\\_e.doc](http://www.wto.org/english/tratop_e/tpr_e/g271_e.doc) (accessed 2 March 2013).

<sup>185</sup> WTO Trade Policy Review –Kenya, 17 October 2012 WT/TPR/G/27 [www.wto.org/english/tratop\\_e/tpr\\_e/g271\\_e.doc](http://www.wto.org/english/tratop_e/tpr_e/g271_e.doc) (accessed 2 March 2013).

<sup>186</sup> Odhiambo W & Otieno G 'Trade Policy Reforms and Poverty in Kenya: Processes and Outcomes' available at [www.cuts-citee.org/pdf/background-kenya.pdf](http://www.cuts-citee.org/pdf/background-kenya.pdf) (accessed 8 April 2013).

Dumping, which is referred to as selling a product at a lower price in an export market than in the home market, leads to domestic producers in an importing country market being unable to offer such low prices and shutting down businesses, while the exporter maintains a higher price in its home market, thereby compensating for lower export prices.<sup>187</sup> This is international price discrimination which has generally caused devastating effects and ultimately calls for a solution.<sup>188</sup> The agricultural sub- sectors discussed below are highlighted because they are major domestic and export crops which are important to the local producers and yet they are the most affected by trade related problems caused by intermittent dumping. Therefore, anti-dumping laws are necessary to protect these sub- sectors.

### 3.2.1 The wheat sub-sector

Wheat is the second most important cereal grain in Kenya, being self-sufficient in the hard variety and net importing the soft kind.<sup>189</sup> The wheat industry contributes 30 per cent of the cereal Gross Domestic Product and supports about 11.3 per cent of the national population.<sup>190</sup> Over the years this commodity has become economically unsustainable because of the effects of indirect dumping of cheap wheat on the market. In 1992 and 1993, the EU sold wheat in Kenya for 39 per cent and 50 per cent, respectively, cheaper than the price paid to EU farmers. This led to an increase in importation while the Kenyan local price collapsed due to over-supply and weakening of local production.<sup>191</sup> Since 2002, Kenya has been importing cheap wheat flour, which has been manufactured from the EU and the USA wheat, from Egypt and Mauritius. Egypt, which is one of the top destinations for EU wheat and the second largest market for the USA wheat exports,<sup>192</sup> imports the wheat at give- away prices, mills it and re-exports the flour

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<sup>187</sup> Wolfgang M, Khan N & Scharf T *EC and WTO Anti-Dumping Law* (2009) 5-6.

<sup>188</sup> Wolfgang M, Khan N & Scharf T *EC and WTO Anti-Dumping Law* (2009) 5-6.

<sup>189</sup> All about Kenya 'Wheat in Kenya' available at <http://softkenya.com/farming/wheat-in-kenya/> (accessed 7 march 2013).

<sup>190</sup> Gitau R & Mburu S 'The Efficiency and Competitiveness of Wheat Production in Kenya' available at [www.tegemo.org/.../The-Efficiency-and-Competitiveness-of-Wheat-](http://www.tegemo.org/.../The-Efficiency-and-Competitiveness-of-Wheat-) (accessed 7 march 2013).

<sup>191</sup> Mittal A 'Industrial Agriculture: Land Loss, Poverty and Hunger' (2001) *International Forum on Globalization* 2-4.

<sup>192</sup> Voluntary Report Approved by Pomeroy T 'Egypt Grain and Feed Egypt's Wheat Imports MY 2000/2001' available at <http://www.fas.usda.gov/gainfiles/200106/105680869.pdf> (accessed 7 March 2013).

to Kenya.<sup>193</sup> This is price arbitrage, through the re-exportation of the dumped products which in terms of import competition will definitely affect the importers' domestic industry negatively.<sup>194</sup>

There is no doubt that in this case dumping is occurring because the export price into the Kenyan market is less than the cost of production of the product in Egypt, the EU and the USA, plus a reasonable addition for selling, general administration costs and profit.<sup>195</sup> This is also known as the constructed normal value of the product which is one of the options to determine the normal value of a product in order to establish dumping. By selling the products abroad at prices below cost, Egyptian companies are able to force domestic producers out of the market by establishing monopolies which permit them to charge inflated prices without fear of competition.

Material injury caused by the influx of cheap wheat and flour was indeed suffered by Kenyan wheat farmers. In an interview with Action Aid, an international development organisation, Mercy Karanja of the Kenya National Farmers Union said that due to the huge surplus on the market, farmers sold their wheat at very low prices while the millers refused to purchase local wheat since they could not compete with the cheap imported flour.<sup>196</sup> Furthermore, farmers who faced ruin as the wheat prices sank by more than 30 per cent shifted to other activities, like maize and dairy farming, since they could not compete.<sup>197</sup> Obviously, with the low production the reliance on imports increased, causing serious implications for the country's balance of trade and food security.

The then Minister of Trade, the Honourable Mukhisa Kituyi, told the Kenyan farmers that the government would address their concerns by invoking anti-dumping rules against Egypt, whose products were reportedly 600 per cent cheaper than their local equivalents.<sup>198</sup> Dumping in such a

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<sup>193</sup> Soi J 'Farmers: Restore Duty on Egyptian Wheat Flour' *The Nation* 8 February 2000.

<sup>194</sup> Matsushita M & Schoenbaum J *The World Trade Organization – Law, Practice, and Policy* (2006) 399-405.

<sup>195</sup> See Art 2.2 of the ADA; Ritchie M, Wisniewski S & Murphy S *Dumping as a Structural Feature of US Agriculture: Can the WTO Rules Solve the Problem?* (2006) 14.

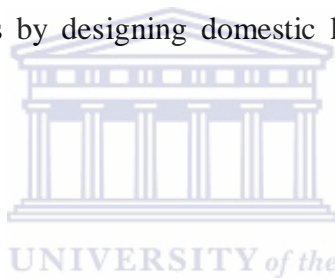
<sup>196</sup> Interview with Action Aid, July 2002 available at <http://thebritishgeographer.weebly.com/managing-sustainable-food-supply.html> (accessed 2 March 2013).

<sup>197</sup> Interview with Action Aid, July 2002 available at <http://thebritishgeographer.weebly.com/managing-sustainable-food-supply.html> (accessed 2 March 2013).

<sup>198</sup> Munaita P 'Kenya to Invoke Anti-dumping Rules against Egypt' *The East African* 31 January 2006.

case via a third country could be difficult to prove especially in cases where there is processing before trans-shipment and where trade data often does not reveal an export's final destination.<sup>199</sup>

The Kenyan government, however, imposed tariffs on Egyptian wheat flour imports in terms of the Common Market for Eastern and Southern Africa (COMESA) framework to which they both adhere.<sup>200</sup> Since then very little has been done probably in fear of another retaliatory action from Egypt, as was seen in 2000 and 2001. Then Kenya placed duties on Egypt's rice and paper sacks, due to suspicions that they were re-exported rather than Egyptian made. What followed was a reprisal in the form of an import duty of 33 per cent on Kenyan tea.<sup>201</sup> The question of the nature and extent of the measures to be put in place to deal with dumping of cheap wheat from the EU and Egypt was raised in the Kenyan Parliament in July 2010.<sup>202</sup> Nothing came of the debate but contradictory statements. It is quite clear from the above instances that it is about time that Kenya protects its local industries by designing domestic legislation that seeks to effectively respond to the practice of dumping.



### 3.2.2 The sugar sub-sector

Sugarcane farming, which takes place in the western and coastal parts of Kenya, is depended upon by approximately five million Kenyans, either directly or indirectly.<sup>203</sup> The factories producing sugar are either completely or partially government owned with only one being entirely privatised.<sup>204</sup> Sugar production was stable between 1963 and 1986, but it has since declined as domestic market share has shrunk after the post-liberalisation period in the face of

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<sup>199</sup> Action aid 'Farm Gate Report: The Developmental Impact of Agricultural Subsidies' available at [www.actionaid.org.uk/doc\\_lib/farmgate\\_report.pdf](http://www.actionaid.org.uk/doc_lib/farmgate_report.pdf) (accessed 27 February 2013).

<sup>200</sup> Munaita P 'Kenya to Invoke Anti-dumping Rule against Egypt' available at <http://allafrica.com/stories/200601310869.html> (accessed 1 March 2013).

<sup>201</sup> Munaita P 'Kenya to Invoke Anti-dumping Rule against Egypt' available at <http://allafrica.com/stories/200601310869.html> (accessed 1 March 2013); Egypt Business Forecast 'Kenyan Firms say They Are Losing Out to Subsidised Egyptian Exports' available at <http://connection.ebscohost.com/c/country-reports/19715481/kenyan-firms-say-they-are-losing-out-subsidised-egyptian-exports> (accessed 15 April 2013).

<sup>202</sup> Kenya National Assembly *Official Record Hansard* (2010) question 253, 16.

<sup>203</sup> The Sugar Industry in Kenya available at <http://www.kenyalink.org/sucam/aboutsucam.html> (accessed 21 February 2013).

<sup>204</sup> The Sugar Industry in Kenya available at <http://www.kenyalink.org/sucam/aboutsucam.html> (accessed 21 February 2013).

cheap international imports.<sup>205</sup> When the government begun liberalising trade in the mid 1990s they did so without adequate care, exposing local producers to more competitive produced imports when it was ill-prepared to deal with the consequences which included an unchecked influx of dumped imported sugar into the local market.<sup>206</sup> That fact among others has caused the industry to run at a loss almost to the point of collapsing.

In 2003, the Kenya Sugar Cane Grower Association lobbied for a ban on the importation of sugar; unfortunately the government could not close its borders due to its commitments in the WTO agreements and mainly for fear of retribution by Egypt.<sup>207</sup> Although there could be no banning of imports, COMESA granted Kenya a year extension to levy duties on sugar to offset the massive inflow of cheap imports from other Members of the bloc.<sup>208</sup> Currently, the total demand for sugar exceeds total production, and imports are the solution to cure the huge consumption deficit.<sup>209</sup> However, as Kenya imports this strategic commodity it seems that it does not come without a trade war as dumping practices have rapidly increased on the African markets. For example, in August 2012, there was a row between Kenya and Uganda over alleged dumping of cheap sugar by the latter into the Kenyan market which prompted the Kenya Revenue Authority (KRA) to introduce cash bonds as a provisional measure to stop dumping of sugar imports transiting through the port of Mombasa to Uganda.<sup>210</sup> The two countries had an agreement the previous year that Uganda would import sugar through the Kenyan port tax-free for six months on condition that the sugar would only be consumed there.<sup>211</sup> If it was re-exported back to Kenya a levy of 100 per cent would be charged by the Kenyan Revenue Authority.<sup>212</sup> Within a period of two months the Revenue Authority's statistics showed that sugar imports to Uganda had not only increased to 50 million kilograms, exceeding the agreed quota for the six months by 40 million kilograms, but that in addition the Ugandan millers were

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<sup>205</sup> Odhiambo W & Otieno G *Trade Policy Reforms and Poverty in Kenya: Processes and Outcomes* (2005)17.

<sup>206</sup> Centre for Governance and Development *Economic Governance Reform in the Sugar Sub-sector* (2005)1-4.

<sup>207</sup> Centre for International Development 'Kenya Summary' available at <http://www.cid.harvard.edu/cidtrade/gov/kenyagov.html> (accessed 25 September 2012).

<sup>208</sup> Centre for International Development 'Kenya Summary' available at <http://www.cid.harvard.edu/cidtrade/gov/kenyagov.html> (accessed 25 September 2012).

<sup>209</sup> The Sugar Industry in Kenya available at <http://www.kenyalink.org/sucam/aboutsucam.html> (accessed 21 February 2013).

<sup>210</sup> Ligami C 'Resolve Sugar Import Dispute' *The East African* 27 October 2012.

<sup>211</sup> Ligami C 'Kenya, Uganda Tussle over Bitter Sugar Levy' *The East African* 27 October 2012.

<sup>212</sup> Ligami C 'Kenya, Uganda Tussle over Bitter Sugar Levy' *The East African* 27 October 2012.

stocking up cheap sugar and re- exporting it to Kenya and other East African countries with lower costs of production being declared (at \$700 per tonne) as opposed to the industrial average levels in these countries (at \$850 per tonne).<sup>213</sup>

The effects of dumping sugar have simultaneously been felt by the farmers and the sugar companies over the years. The sugar companies, that find it very difficult to sell their stock, are discouraged from fetching cane from the farmers who in turn simply leave their sugarcane farms idle and languish in poverty.<sup>214</sup> With this kind of disillusionment the supply drops as nobody is interested in producing a crop that bears no returns.

Although Kenya has taken a protectionists stand<sup>215</sup> on the international trade of sugar by using the COMESA safeguards, the authorities should devise their own workable precedent that will assist in solving dumping disputes in the present and the future, since the safeguard provision which Kenya has relied on for over a decade will be expiring in March 2014 with a very slim chance of being renewed again. It is obvious from the above cases that the developed countries are neither the only ones who are in need of the anti-dumping rules nor the only ones exporting products at a low price, below the cost of production, onto the African markets. African nations are also dumping in each other's countries prompting a need for protection of our markets against all unfair competition by the introduction and implementation of legislation. Clear policies will be of great assistance to Kenya as it seeks to liberalise further in order to achieve economic growth and development in its economy.

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<sup>213</sup>Muthoki M 'Board Starts Probe on Illegal Sugar Imports from Uganda and Tanzania' available at <http://www.nation.co.ke/business/news/Board-starts-probe-on-illegal-sugar-imports/-/1006/1652638/-/salnekz/-/index.html> (accessed 2 March 2013); Ligami C 'Kenya, Uganda Tussle over Bitter Sugar Import Levy' available at <http://www.theeastafrican.co.ke/news/Kenya--Uganda-tussle-over-bitter-sugar-import-levy/-/2558/1604724/-/evm2xg/-/index.html> (accessed 2March2013).

<sup>214</sup>Wanyande P 'Management Politics in Kenya's Sugar Industry: Towards an Effective Framework' (2001) *African Journal in Political Science Vol. 6* No. 1,123-140.

<sup>215</sup> Muthoki M 'Board Starts Probe on Illegal Sugar Imports from Uganda and Tanzania' *The Nation* 22January 2013.

### 3.2.3 The textile sub-sector

Since 1970 the textile sub-sector has been a key part of the manufacturing sector in Kenya.<sup>216</sup> The industry at that time employed more than 200,000 small-scale farmers, which constituted a third of its labour force, and enjoyed government protection by imposing 100 percent duty on imported goods, the largest contributor to its success.<sup>217</sup>

The triumph was shortlived because in the 1980s its challenges began as a result of the government's removal of its support, leading to a massive increase in the dumping of cheap imported used clothes commonly known as 'mitumba' from Europe and the USA.<sup>218</sup> Since then the thriving sector significantly stopped growing as it could not compete any longer. Recently cheap foreign brands have entered the market from South East Asia showing an increase of imported clothing from the previous year.<sup>219</sup> The flooding of the market with cheap imports caused the demand and purchasing power for local clothing to decrease. An interesting effect of dumping on the producers is that the local industries have begun imitating the foreign brands, giving up on maintaining originality perhaps so that they can remain in business.<sup>220</sup>

According to current reports the industry now only employs less than 20,000 workers.<sup>221</sup> As of March 2012, the government spent a large amount of money to revive the textile industry. The

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<sup>216</sup>Omolo J, Jauch H & Merz R *The Textiles and Clothing Industry in Kenya; The Future of the Textile and Clothing Industry in Sub-Saharan Africa* (2006) 52.

<sup>217</sup>Mburu S 'Cotton under the Cosh: Kenya's Once-Thriving Textile Industry is under Intense Pressure from Trade Reforms in the US, Which are Squeezing it Out of the Market, and a Shortage of Raw Materials. In the Face of Increased Competition from the East, Is the Answer for Kenya's Exporters to Diversify into Other Products?' *African Business* 1 February 2011.

<sup>218</sup>Mburu S 'Cotton under the Cosh: Kenya's Once-Thriving Textile Industry is under Intense Pressure from Trade Reforms in the US, Which are Squeezing it Out of the Market, and a Shortage of Raw Materials. In the Face of Increased Competition from the East, Is the Answer for Kenya's Exporters to Diversify into Other Products?' *African Business* 1 February 2011

41 Textile Organisation 'Kenya: Import of Cheap Textile Products Bankrupting Manufacturers' available at <http://kenya.textilenews.org/> (accessed 28 February 2013).

<sup>220</sup> Textile Organisation 'Kenya: Import of Cheap Textile Products Bankrupting Manufacturers' available at <http://kenya.textilenews.org/> (accessed 28 February 2013).

<sup>221</sup> Mwangi M 'Textile Industry set for Sh1.8bn State Revival Plan' *Business daily* 1 March 2012 available at <http://www.businessdailyafrica.com/Textile-industry-set-for-Sh1-8bn-state-revival-plan/-/539546/1357354/-/7hf8maz/-/index.html> (accessed 14 March 2013).



Kenya Revenue Authority even went ahead to increase the import duty in order to cut down on the influx of imports,<sup>222</sup> but what Kenya really needs is to re-structure its anti-dumping policy to deal with this practice because the duties are applied on a case by case basis, which is not a reliable method.

### 3.3 NON-ECONOMIC RATIONALE

To have a government policy like the anti-dumping law is not only motivated by economic concerns, social wellbeing is also an important factor.<sup>223</sup> The cost that the members of the community have to pay when domestic production is distorted by low priced imports is normally quite high, and more often than not the results are an impairment of their welfare as social beings.<sup>224</sup>

Those affected include producers, who are left defenceless and cannot produce anymore, and workers, who lose their jobs once industries downsize their operations, close or relocate. Eventually workers are not in a position to purchase goods and services because they lack incomes. Consumers are also not left out, to the extent that in the long run they are affected. How is this possible? In the short run, dumping is seen to be beneficial for the consumer as she is able to buy the same product at a cheaper imported price in comparison to the local price.<sup>225</sup> However, in the long run, what happens when there is no constant long-term supply of the dumped product or the exporter establishes a monopoly and prices are hiked with the supply decreasing?<sup>226</sup> The consumers suffer a loss eventually.

In Kenya most of the communities depend on wheat and sugar as their sources of livelihood, which means that it is necessary to protect the domestic industry from unfair competition and in turn prevent a drastic alteration of the communities' nature.<sup>227</sup> An anti-dumping enquiry under

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<sup>222</sup>Textile Organisation 'Kenya: Import of Cheap Textile Products Bankrupting Manufacturers' available at <http://kenya.textilenews.org/> (accessed 28 February 2013).

<sup>223</sup>Le Clerc-Marc J 'Reforming Anti-dumping Law: Balancing the Interests of Consumers and Domestic Industries' (1999) 44 *McGill Law Journal* 119.

<sup>224</sup>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.

<sup>225</sup> Pindyck R & Rubinfeld D *Microeconomics* (2012) 43.

<sup>226</sup> Viner J *Dumping: A Problem in International Trade* (1923) 30-31.

<sup>227</sup> Le Clerc-Marc J 'Reforming Anti-dumping Law: Balancing the Interests of Consumers and Domestic Industries' (1999) 44 *McGill Law Journal* 111.

the WTO requires proof of material threat/injury/retardation caused by dumping to the domestic industry.<sup>228</sup> When industries suffer, people at large also suffer. It is evident from the cases of trade in wheat flour, sugar and textiles that there are detrimental impacts on production and markets.<sup>229</sup> Among others, farmers face great difficulty in selling their produce on the local market because of the volumes of cheap imports forcing them to cut their produce by half.<sup>230</sup> The community in turn suffers too when its food supplies become vulnerable to price increases which its members cannot afford.<sup>231</sup>

From the above it seems that the two rationales are related. If the economy is hurt, then the people are also affected. Therefore, for fairness and the wellbeing of the Kenyan people, it is important for the government when designing an anti-dumping framework to do so bearing in mind the community and how it is affected by the unfair practices. This should also initiate legislation not because of economic concerns.

### 3.4 CURRENT ANTI-DUMPING REGULATION IN KENYA

The Customs and Excise Department of the Kenya Revenue Authority (KRA) facilitates trade, collects trade statistics, deals with dumping complains, and offers protection against the entry or exit of illicit goods.<sup>232</sup> It works in conjunction with other ministries, including Agriculture, Trade and Industry, and Finance, in trade policy formulation and implementation. The Customs and Excise Department is headed by a Commissioner who ensures the administration of the Customs and Excise Act.<sup>233</sup> The Customs and Excise Act Cap 472 provides rules on the management, control, accountability and collection of revenue. With respect to dumping the Customs and Excise Act's s125 and 126 are the only provisions on dumping in Kenya.<sup>234</sup>

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<sup>228</sup> See Art 3 of the ADA.

<sup>229</sup> Action aid 'Farm Gate Report: The Developmental Impact of Agricultural Subsidies' available at [www.actionaid.org.uk/doc/lib/farmgate\\_report.pdf](http://www.actionaid.org.uk/doc/lib/farmgate_report.pdf) (accessed 27 February 2013).

<sup>230</sup> Action aid 'Farm Gate Report: The Developmental Impact of Agricultural Subsidies' available at [www.actionaid.org.uk/doc/lib/farmgate\\_report.pdf](http://www.actionaid.org.uk/doc/lib/farmgate_report.pdf) (accessed 27 February 2013).

<sup>231</sup> Action aid 'Farm Gate Report: The Developmental Impact of Agricultural Subsidies' available at [www.actionaid.org.uk/doc/lib/farmgate\\_report.pdf](http://www.actionaid.org.uk/doc/lib/farmgate_report.pdf) (accessed 27 February 2013).

<sup>232</sup> Mosoti V& Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007)339.

<sup>233</sup> See s3 (1) of the Customs and Excise Act.

<sup>234</sup> See s3 (1) of the Customs and Excise Act.

Apart from what these two provisions provide, there are no further details stipulated with regard to dumping. According to s126 (1), imports are considered to have been dumped in Kenya if the export price of the goods is less than the comparable price in the ordinary course of trade in the exporting country, and as a consequence cause material injury or retardation of the local industry.

Different from other Acts, the 'export price' is given a different name, 'price payable', which means 'payment made or to be made by a buyer to or for the benefit of a seller of imported goods which are subject to custom valuation'.<sup>235</sup> With respect to the 'normal value', it is not defined per se, although from the definition of 'dumping' according to the Customs and Excise Act, it is the price in the exporter's home country. Assume that the dumped product was not sold in the exporter's home country, or it was not sold in the ordinary course of trade: how then does one determine the export price and how will a successful comparison be made? And does it mean that the export price stated by the foreign producer will always be relied on since Kenya has no alternatives to establish this price? For the purposes of anti-dumping investigations in Kenya, it is clear that the legislation does not provide any of the other methods of establishing the 'export price' and the 'normal value' made available by the WTO's ADA.

The comparison between the export price and the normal value must be 'fair'. To ensure this, differences affecting the comparison between the two prices, should be adjusted. Those provided for in the Customs and Excise Act relate to packing charges, transport, and any levy, duty or tax.<sup>236</sup> In situations where there are other differences affecting price comparability, such as, where the comparison requires currency conversion,<sup>237</sup> and differences in the terms and conditions of sale, how will a 'fair' comparison be achieved when there are no established rules on how to do this? In addition to proving dumping, the Customs and Excise Act requires two other criteria to be met before imposing definitive anti-dumping measures, that is, material injury and causation.<sup>238</sup>

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<sup>235</sup> See s2 of the Customs and Excise Act.

<sup>236</sup> See s127 (1) of the Customs and Excise Act.

<sup>237</sup> Mosoti V& Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007)217.

<sup>238</sup> See s126 (1) of the Customs and Excise Act.

The determination of material injury according to the ADA shall be based on positive evidence, an objective examination, and verifiable evidence<sup>239</sup> which must be provided in writing or orally, if it will subsequently be reproduced in writing.<sup>240</sup> In *Argentina-Ceramic tiles*, the investigating officers were allowed to make this determination on the basis of ‘facts available’ on condition that that requirement was clearly and specifically stated by the investigating authorities.<sup>241</sup>

According to the Customs and Excise Act, injury is merely defined as ‘material injury, threat of material injury or material retardation.’<sup>242</sup> There is no guideline on how to establish or what constitutes material injury, giving the impression that the officer in charge has the leeway to determine what amounts to injury. Seeing that there are no rules on this issue, using the ‘facts available’ will also not be possible because that too was neither clearly nor specifically declared.

The Customs and Excise Act also fails to show how to establish the last requirement- causation, despite it being an essential requirement. Simply because a domestic industry claims to have complied with the legal criteria to establish dumping, it is not enough to impose anti-dumping duties. Procedures must be followed to confirm the allegations. Normally anti-dumping disputes begin when a domestic industry gathers support, also known as ‘standing’, to request a dumping investigation.<sup>243</sup>

In Kenya, anti-dumping actions are dealt with at a national level by the Permanent Secretary at the Ministry of Finance. Since the Customs and Excise Act does not define ‘standing’, any industry affected by dumping is required to contact the Minister with sufficient evidence of the nature and source of the dumped products and the material injury suffered by the local industry as a result of dumping.<sup>244</sup> An ad hoc advisory committee comprised of ten people and established by the Minister in the Government Gazette carries out investigations on the supposed

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<sup>239</sup> Bolton M ‘Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny’ (2012) *Berkeley Journal of International Law* vol 29, 75.

<sup>240</sup> See Art 6(3) of the ADA.

<sup>241</sup> *Argentina- Definitive Anti-dumping on Imports of Ceramic Floor tiles from Italy* WT/DS189/R.

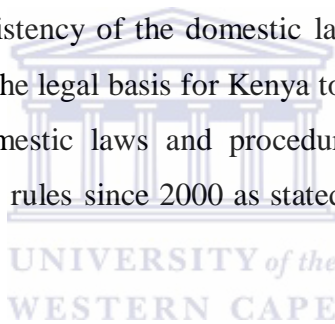
<sup>242</sup> See s126(2) of the Customs and Excise Act.

<sup>243</sup> Bolton M ‘Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny’ (2012) *Berkeley Journal of International Law* vol 29, 76.

<sup>244</sup> Mosoti V & Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007)343.

practices and reports the findings to the Minister.<sup>245</sup> The Minister who lays down the procedure to be followed in the performance of the investigation may impose the necessary provisional measures after 60 days of the investigation commencing to protect any industry that is threatened by dumping in Kenya.<sup>246</sup> When he is satisfied with the findings of the committee that the products were dumped he may impose an anti-dumping duty (which shall not exceed the dumping margin) in addition to any other duty for the time being chargeable on the respective goods.<sup>247</sup> The given order shall among others specify the import's country of origin, the goods charged with the duty, and the organisation or person associated with the production of the goods.<sup>248</sup> A notice of the imposed duty is then issued in the Government Gazette by the Attorney-General's chambers.<sup>249</sup>

The ADA which allows members to utilise national laws, regulations and procedures requires a notification to the WTO and consistency of the domestic laws with the ADA.<sup>250</sup> Although the Customs and Excise Act provides the legal basis for Kenya to take anti-dumping measures and it has notified the WTO of its domestic laws and procedures,<sup>251</sup> it has not yet amended its legislation to conform to the WTO rules since 2000 as stated in the WTO Trade Policy Review of that year.<sup>252</sup>



### **3.4.1 An analysis of the Customs and Excise Act**

An examination of the provisions on anti-dumping under the Customs and Excise Act shows that although it sets out some important elements with respect to anti-dumping, very little detail is either provided or clearly stated in comparison to the ADA, COMESA and East African Community (EAC) provisions examined below. The Kenyan legislation is outdated, non-consolidated and insufficient to adequately deal with the issues arising from reducing tariffs and

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<sup>245</sup> See s125 (1) of the Customs and Excise Act.

<sup>246</sup> See s125 (2) of the Customs and Excise Act.

<sup>247</sup> See s125 (2) of the Customs and Excise Act.

<sup>248</sup> See s125 (3) of the Customs and Excise Act.

<sup>249</sup> WTO document G/ADP/N/1/KEN/1-G/SCM/N/1/KEN/1, 22 May 1996; Mosoti V& Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007) 343.

<sup>250</sup> See Art 18.4-18.5 of the ADA.

<sup>251</sup> WTO Trade Policy Review –Kenya, 3 January 2000 WT/TPR/S/64.

<sup>252</sup> WTO Trade Policy Review –Kenya, 3 January 2000 WT/TPR/S/64.

the results of liberalising trade which has increased the need for anti-dumping measures.<sup>253</sup> Moreover, it does not comply with the WTO's substantive and procedural requirements. Meanwhile it takes advantage of the exceptions allowed to developing countries with respect to constructive remedies under Art 15 of the ADA. Harmonisation with EAC and COMESA laws is also absent. The challenges that the sub-sectors described in 3.2.1-3.2.3 experienced and continue to experience speak for themselves as to the need for an adequate legal and institutional framework in Kenya.

In terms of detail, the Customs and Excise Act omits key elements: it does not clearly specify how to determine normal values and the export price, or how to alternatively achieve these prices through different methods; there is also no definition of or a clear guideline to establish the domestic industry, material injury, and causation. Policy questions, such as, public interest and lesser duty clauses, have been left out as well. As was seen in the previous chapter, anti-dumping investigations require detailed analyses, capable and responsible authorities, as well as clear procedures to be followed by the investigating officers.

The Customs and Excise Act above, does not establish any authority to conduct investigations, and an informal committee is established by the Minister to investigate a particular dumping case. Comprehensive procedural rules to be followed while investigating alleged dumping are also missing. The only provision present is the one that gives the Minister the authority to lay down the investigative procedure and appoint officials to carry out the determinations. Yet to this day the officials have not been appointed.<sup>254</sup> In light of the said provision, the wide discretion of the Minister regarding the procedure can be quite problematic as he could be subject to political influence when dealing with a dumping allegation, making the procedure suspicious and opaque.

Other procedural laws provided for in the WTO's ADA that have been omitted are those regarding 'standing', applications to initiate an investigation, time limits, due process and procedural rights, confidential and non-confidential information, evidence, interested parties,

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<sup>253</sup> Mosoti V & Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007) 220.

<sup>254</sup> Katasi G 'The Inadequacy of Kenya's Anti-dumping Law, Regulations and Administrative Procedures under the WTO/GATT 1994 Framework available at <http://erepository.uonbi.ac.ke:8080/handle/123456789/4555> (accessed 12 March 2013).

public notices, and the different reviews.<sup>255</sup> In terms of the ADA, an anti-dumping measure can only be applied in the circumstances provided for by Art VI, pursuant to investigations commenced in accordance to the ADA.<sup>256</sup> Therefore, after comparing the Customs and Excise Act with the ADA, it can be noted that there is a significant disparity between the two texts. With respect to clarity, the legislation provides that all complaints are to be presented to the Permanent Secretary in the Ministry of Finance, but in practice from the Ugandan and the Chinese clothing experiences in the agricultural sub-sectors, the Kenya Revenue Authority gives the impression that it is in charge. It is not quite clear from whom an interested party should seek assistance.

For that reason it is necessary to create a comprehensive framework that is clearly definitive of the procedures to be carried out, the functions of the authorities, and the available remedies, so that interested parties, such as, local producers, suspected exporters, investors, employees and consumers, will not only have confidence in such a system where policies are transparent but there will also be a reduction in disputes over unclear procedures. Sections 125 and 126 of the Customs and Excise Act are the only provisions dealing with dumping, and additionally, subsidies as well. The two sections have been muddled together causing them to appear crowded, thus creating an unnecessary disorder for the user. A user of the legislation is required to keep going back to find the sections that refer to dumping among the provisions relating to subsidies. Moreover, this also dilutes the model provided by the ADA which is exclusively for dumping.<sup>257</sup>

Why has Kenya not utilised its Customs and Excise Act to deal with some of the problems that have been ongoing for almost a decade? The Customs and Excise Act is to a great extent in conflict with what the ADA and Art VI provide, and thus in using it to impose anti-dumping measures under its arrangement, Kenya faces a threat of a dispute in the WTO. In addition, the rules are complex in nature and the high costs involved as well as the technical difficulties of pursuing investigations further complicate matters.<sup>258</sup>

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<sup>255</sup> Mosoti V& Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007)220.

<sup>256</sup> See Art 1 of the ADA.

<sup>257</sup> Katasi G 'The Inadequacy of Kenya's Anti-dumping Law, Regulations and Administrative Procedures under the WTO/GATT 1994 Framework available at <http://erepository.uonbi.ac.ke:8080/handle/123456789/4555> (accessed 12 March 2013).

<sup>258</sup> Solutions for Dealing with Import Surges and Dumping available at [http://aprodev.eu/files.../807\\_technical\\_interpretation\\_policy\\_paper\\_final.pdf](http://aprodev.eu/files.../807_technical_interpretation_policy_paper_final.pdf) (accessed 25 April 2013).

Although anti-dumping laws in Kenya have never been used, its commitments made at the multilateral level have to be implemented through reform of its domestic law and institutions. Its existing framework must be changed, and new laws drafted together with proper administrative procedures.

### **3.5 DOMESTIC LEGAL FRAMEWORKS IN THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA) AND THE EAST AFRICAN COMMUNITY (EAC)**

In 2011 at a conference held in Nairobi the Trade Minister, Chirau Ali Mwakwere, said that an anti-dumping Bill was expected to be tabled in parliament, which was not only compatible with the WTO disciplines but also with the regional trade blocs, the EAC and the COMESA, to enable Kenya to be integrated into the multilateral system with proper means to enforce anti-dumping laws.<sup>259</sup> It is therefore important to briefly look at the laws and procedures of the two blocs, to both of which Kenya belongs, as permitted by Art XXIV of the GATT 1994 and the Enabling Clause, to form preferential regimes, and to determine if they have been incorporated into the Kenyan domestic law. It should be noted, however, that since the regulations of the COMESA and the EAC have common anti-dumping regulations and procedures, a repetition thereof will be avoided.

- **The East African Community (EAC)**

The Customs Union, which is composed of Kenya (which became a member in 2005), Uganda, Tanzania, Burundi and Rwanda, has a legal framework which consists of the Treaty for its establishment, the Customs Union Protocol and the Customs Management Act 2004.<sup>260</sup> This legal structure ensures that there is uniformity among partner states and governs trade areas, such as, anti-dumping, subsidies and dispute settlement, among others.<sup>261</sup>

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<sup>259</sup>Kenya Broadcasting Corporation 'Kenya Government to Table Bill on WTO rules on Anti-dumping, Subsidies' available at <http://export.by/en/?act=news&mode=view&id=2925> (accessed 7 February 2013).

<sup>260</sup> Mosoti V& Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007)329.

<sup>261</sup> Mosoti V& Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007) 329.



The Protocol gives the guidelines for the determination of dumping, which include the calculation and comparison of the normal and export prices, injury, and carrying out investigations, which are all similar to the WTO's ADA.<sup>262</sup> Should alleged dumping be found to be in existence, the Protocol provides in Annex IV that anti-dumping measures, which include price undertakings, provisional measures and collection of anti-dumping duties, may be imposed on the exporter.<sup>263</sup> The EAC rules are somewhat unique in that the partner states are required to co-operate with one another in the detection and investigation of dumping, and the imposition of anti-dumping measures.<sup>264</sup>

The Customs Union which provides for a nine member committee on trade remedies will only begin operations to handle anti-dumping this year (2013).<sup>265</sup> It has the authority to initiate investigations through the investigating authorities of the partner states, to recommend provisional measures where necessary, and to offer advice and issue public notices. It also administers and manages the dispute settlement system.<sup>266</sup> Similar to the ADA, interested parties are notified of the initiation of an investigation and questionnaires are used in investigations.<sup>267</sup>

Kenya has integrated s117 of the East African Community Customs and Management Act (EACMA) of 2004 into its law.<sup>268</sup> The EACMA has a limitation in that it only applies to dumping within the EAC; thus it does not offer protection against goods dumped from other parts of the world. Section 117 states that any goods that enter the territory of Kenya in contravention of the conditions of importation will be liable for duty from the date of importation, and any security required by the officers during entry must be paid and will be discharged upon payment of the duty.<sup>269</sup> As was stated earlier the Kenya Revenue Authority deals with dumping issues in Kenya and is the user of this provision when collecting duties.

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<sup>262</sup> See Annex IV: Reg 7-9 and 20 of the EAC Anti-dumping Regulations.

<sup>263</sup> See Annex IV: Reg 12-14 of the EAC Anti-dumping Regulations.

<sup>264</sup> See Art 20 of the Protocol on the Establishment of the East African Custom Union.

<sup>265</sup> Denner W 'Trade Policy Review of the EAC' available at <http://www.tralac.org/2012/11/28/trade-policy-review-of-the-east-african-community/> (accessed 10 March 2013).

<sup>266</sup> See Art 24 of the Protocol on the Establishment of the East African Custom Union.

<sup>267</sup> See Annex IV: Reg 11 of the EAC Anti-dumping Regulations.

<sup>268</sup> Katasi G 'The Inadequacy of Kenya's Anti-dumping Law, Regulations and Administrative Procedures under the WTO/GATT 1994 Framework' available at <http://erepository.uonbi.ac.ke:8080/handle/123456789/4555> (accessed 12 March 2013).

<sup>269</sup> See s117 (5) of the East African Community Customs and Management Act.

While reg 5 of the Customs Protocol provides for party states with national anti-dumping legislation to harmonise them with the provisions of the regulations, Kenya has not clearly complied with this requirement. To some extent one is left to wonder whether Kenya really has legislation because the present Customs and Excise Act is too weak to combat anti-dumping issues effectively. This piece of legislation needs a complete revision and not merely a few amendments here and there. The domestic legislation of the EAC can be criticised based on the fact that its Committee on Trade Remedies which is involved in the handling of anti-dumping and subsidies matters is only expected to begin operations in 2013.<sup>270</sup> This begs the question as to what would have happened if the party states wanted to impose anti-dumping duties using the EAC regulations.

- **The Common Market for Eastern and Southern Africa (COMESA)**

Under the COMESA framework there are sufficient guidelines on the implementation of anti-dumping as a trade remedy against unfair trade practices. Article 51 of the COMESA Treaty prohibits dumped imports from one member state into another as well as those from third countries into a member state, and allows the imposition of anti-dumping duties (not greater in amount than the dumping margin) where material injury has been caused by dumping to an established industry in the territory of another member state.<sup>271</sup> An important difference to take note of is that, while the WTO condemns the act of dumping and only has jurisdiction over its Members, COMESA on the other hand prohibits the practice and may levy an anti-dumping duty against a non member state (third country).<sup>272</sup>

Articles 51.1-51.4 provides for the determination of dumping and the procedures to be followed which are parallel to those of the ADA.<sup>273</sup> In addition it also states that before initiation of the first action by a member state it must have established its procedure for taking action and identified a competent authority to carry out investigations of the conditions preceding the anti-

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<sup>270</sup>Denner W 'Trade Policy Review of The EAC' available at <http://www.tralac.org/2012/11/28/trade-policy-review-of-the-east-african-community/> (accessed 10 March 2013).

<sup>271</sup> See Arts 51.1, 51.3 & 51.5 of the COMESA Treaty.

<sup>272</sup> See Art 2 of the COMESA Treaty.

<sup>273</sup> Denner W *Supporting Regional Integration in East and Southern Africa-Review of Select Issues: Protectionism, Trade Remedies and Safe guards* (2010) 23; See Arts 51.1-51.4 of the COMESA Treaty.

dumping action.<sup>274</sup> This means that, similar to the ADA, it allows its member states to utilise municipal laws. Co-operation during the detection and investigation, and the imposition of the anti-dumping measures, is required of the member states, a provision common to the EAC.<sup>275</sup>

Kenya has neither utilised the COMESA anti-dumping rules nor included them in its domestic legislation. However, looking at the EAC and the COMESA legislations discussed above, Kenya would be in a better position utilising the COMESA intra-regional anti-dumping rules temporarily to protect local industries from the import surges before finalising the anti-dumping Bill which is still being deliberated. This is because the COMESA rules provide broader cover in terms of third countries, unlike the EAC which only covers dumping within the Customs Union subjecting foreign complaints to the application of the WTO's ADA.<sup>276</sup>

### 3.6 CONCLUSION

To ensure and enhance national and international fair competition for Kenyan products it is important for the Kenyan Government to restructure its anti-dumping policy. The reformation of domestic anti-dumping regulations is now both a global and a developing country's issue- to assist countries to improve their international competitiveness. From the discussion above, it is evident that Kenya lacks clear laws to deal with dumping and this failure has resulted in very adverse effects.

It is therefore important for Kenya to join other developing countries in the introduction of legislation compatible with the WTO, and, for regional harmony, the COMESA and the EAC, in order to be able to use measures to contain the harmful effects of its imports now and in the future.

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<sup>274</sup> Denner W *Supporting Regional Integration in East and Southern Africa-Review of Select Issues: Protectionism, Trade Remedies and Safe guards* (2010) 4.

<sup>275</sup> See Art 54(1) of the COMESA Treaty.

<sup>276</sup> See Art 54(2) of the COMESA Treaty; Annex IV: Reg 4 of the EAC Anti-dumping Regulations.

# CHAPTER 4

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## A CASE STUDY ON THE USE OF ANTI-DUMPING MEASURES IN SOUTH AFRICA

### 4.1 INTRODUCTION

On the African continent, South Africa (SA) not only has the most developed and diversified economy but is also historically the main user of the anti-dumping laws in defence of its domestic industries, accounting for 75 per cent of anti-dumping initiations and more than 70 per cent of applied measures between 1995 and 2011.<sup>277</sup> Its industrial sector, which was founded in the late 19<sup>th</sup> century,<sup>278</sup> has replaced agriculture as the major driver of economic activity, and due to that and other factors it has focused its investigations and duties on some imported ‘like products’, for example, plastic and rubber (17%), chemicals (14%), and base metals (27%), in order to protect its domestic industries, with its biggest targets being the EU, China, India, South Korea and Taiwan.<sup>279</sup>

Developed countries have traditionally been the major users of trade remedies including anti-dumping. Only in 1914, after New Zealand and Australia in 1905 and 1906, respectively, did South Africa enact its own anti-dumping laws and seven years later it imposed its first anti-dumping duty on flour from Australia.<sup>280</sup> Pre-1914 South Africa had no law to control dumping. It related with other countries on the basis of the political and economic ideas of the colonial powers, that is, the Dutch and later the British.<sup>281</sup>

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<sup>277</sup> Illy O ‘Trade Remedies in Africa: Experience, Challenges, and Prospects’ Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 7 October 2012).

<sup>278</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005) 49.

<sup>279</sup> Illy O ‘Trade Remedies in Africa: Experience, Challenges, and Prospects’ Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 7 October 2012).

<sup>280</sup> Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 12 December 2012).

<sup>281</sup> Smit P, Dams J, Mostert J, Oosthuizen G, Van der Vyver V & Van Gass W *Economics: A Southern African perspective* (1996) 455.

In 1914 the Customs and Tariffs Act was enacted as South Africa's first anti-dumping law, followed by the establishment of the Board of Trade and Industry in 1923 which was responsible for investigating dumping and enforcing anti-dumping regulations.<sup>282</sup>

The Board of Trade and Industry was later replaced by the Board on Tariffs and Trade in September 1986, and in 1992 a directorate to deal with dumping issues was formed within the Trade and Industry Department to assist the Board in conducting dumping and countervailing investigations.<sup>283</sup> It can be noted that after 1992 anti-dumping duties escalated in comparison to all other previous years. For example, in 1993-2003, SA as an exporter faced 34 anti-dumping measures while it applied 108, expressing a ratio of 0:31, and making it the fifth largest anti-dumping user after the USA, the EU, India and Argentina.<sup>284</sup> The success of South Africa's domestic anti-dumping laws can be attributed to being in harmony with the ADA, a transition which began way back in 1995 when the Board on Tariffs and Trade Act<sup>285</sup> was amended to include the definitions of 'dumping', 'export price', 'normal value', 'fair comparison', and incorporated clearer procedures to achieve harmonisation with the ADA. The WTO's ADA requires that Members who wish to apply anti-dumping measures can only do so in terms of the provisions of Art VI of the GATT 1994, and after investigations initiated and conducted according to the Agreement.<sup>286</sup> According to Petersen, the new guidelines set the limit of SA's anti-dumping law and the Act refurbished it in order for the country to achieve compliance with its GATT obligations.<sup>287</sup>

As required by the ADA Art 18.5, SA in 1995 notified the WTO of the Board on Tariffs and Trade Act and the applicable provisions of the Customs Act as its national anti-dumping

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<sup>282</sup> See s4 of the Board of Trade and Industry Amendment Act 1992.

<sup>283</sup> Joubert N 'Managing the Challenges of WTO Participation: The Reform of South Africa's Anti-Dumping Regime' available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 25 September 2012).

<sup>284</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005)55; Edwards L 'Anti-dumping in South Africa: From Proliferation to Moderation' available at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_id=1871948](http://papers.ssrn.com/so13/papers.cfm?abstract_id=1871948) (accessed 7 December 2012).

<sup>285</sup> See Board on Tariffs and Trade Amendment Act 39 of 1995.

<sup>286</sup> See Art 1 of the ADA.

<sup>287</sup> Petersen C 'Africa's Dumping Grounds: South Africa's Struggle against Unfair Trade' (1996) *Boston University International Law Journal* 394.

legislation.<sup>288</sup> The Board on Tariffs and Trade Act was later repealed in 2003 by the International Trade Administration Act (ITAA). Anti-Dumping Regulations (ADR) made under s59, were to guide the International Trade Administration Commission (ITAC) while carrying out anti-dumping investigations, and as a consequence maintain compliance with the WTO.<sup>289</sup>

The ADR provide for substantive and procedural anti-dumping requirements. It should be noted that, although South Africa is a contracting and founding Member of the WTO, interestingly, all the WTO Agreements including the ADA and Article VI do not form part of SA's law because the Agreements have only been ratified by parliament but not been promulgated as municipal law.<sup>290</sup> This means that no rights can be derived from these Agreements. Nevertheless, the South African Constitution<sup>291</sup> which is the supreme law of the land states that when a court or tribunal is interpreting any legislation, it must prefer any reasonable interpretation of legislation that is consistent with international law.<sup>292</sup>

In recent years anti-dumping practices have not only become very widespread, but WTO Members from developing countries have also joined the trend of adopting anti-dumping legislation. Some are now the most frequent users of anti-dumping legislation, for example, India, Egypt, Brazil, and Turkey, while others have become major targets, like China.<sup>293</sup>

Therefore, as anti-dumping practices become even more popular as a trade instrument, and new Members, like Kenya, are in the process of drafting national anti-dumping laws, it is necessary to look at the experience of an African developing country, like South Africa, that has successfully applied anti-dumping measures in recent years, and draw some lessons on how to improve anti-

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<sup>288</sup> WTO Report 'South Africa Notification' G/ADP/N/1/ZAF/1; G/SCM/N/1/ZAF/1/ available at [http://www.wto.org/english/thewto\\_e/countries\\_e/south\\_africa\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm) (accessed 17 December 2012).

<sup>289</sup> See s7 of the ITA Act; Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 12 December 2012).

<sup>290</sup> Ndlovu L 'An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's Dumping and Anti-dumping Law' (2010) *Journal of International Commercial Law and Technology* Vol. 5, Issue 1 32.

<sup>291</sup> See the Constitution of the Republic of South Africa, 1996.

<sup>292</sup> See s233 of the Constitution Act 1996.

<sup>293</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007) 69.

dumping policies to be more consistent with WTO regulations, and how to effectively defend itself in case it is targeted and anti-dumping investigations are initiated.<sup>294</sup>

This chapter will attempt to examine the legislative and institutional framework of the South African anti-dumping system, its substantive content, the procedures to be followed by interested parties as well as the ITAC throughout the investigation process, the reviews available, and lastly some general identified problems which restrict the proper effectiveness of this system.

## 4.2 THE LEGISLATIVE AND INSTITUTIONAL STRUCTURE

### 4.2.1 Legislative structure

The key anti-dumping legislation in South Africa is the ITAA<sup>295</sup> which replaced the Boards on Tariffs and Trade Act.<sup>296</sup> Its adoption by parliament as law was preceded by a series of joint briefings, public hearings by the parliamentary Committee on Trade and Industry and the Economic Affairs Select Committee to explain the basis of the Act to the stakeholders as well as address any of their concerns, and submissions made on behalf of the private sector and organised labour.<sup>297</sup> The consultations between government and stakeholders enhanced and made effective the whole policy making process. The ITAA provides for the formation of the ITAC, the specialised agency responsible for anti-dumping investigations<sup>298</sup>; the definitions of ‘dumping’,<sup>299</sup> ‘normal value’,<sup>300</sup> and ‘export price’;<sup>301</sup> the management of confidential information;<sup>302</sup> and how applications can be submitted to the ITAC and considered.<sup>303</sup> In addition, the substantive and procedural rules are made available in the ADR.

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<sup>294</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007) 70.

<sup>295</sup> See International Trade Administration Act 71 of 2002.

<sup>296</sup> See Board on Tariffs and Trade Act 107 of 1986.

<sup>297</sup> Joubert N ‘Managing the Challenges of WTO Participation: The Reform of South Africa’s Anti-Dumping Regime’ available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 25 September 2012).

<sup>298</sup> See s16 of the ITA Act.

<sup>299</sup> See s 1(2) of the ITA Act.

<sup>300</sup> See s 32(2) (b) of the ITA Act.

<sup>301</sup> See s 32(2) (a) of the ITA Act.

<sup>302</sup> See s 33-37 of the ITA Act.

The Customs and Excise Act is also important in dumping and anti-dumping matters because it imposes anti-dumping duties in the form of provisional payments in terms of chapter VI<sup>304</sup> at the request of the ITAC, and definitive measures at the request of the Ministry of Trade and Industry at a level and for a period stated in such request.<sup>305</sup>

Apart from ITAA and the Customs and Excise Act, there are also several other pieces of legislation that have a connection with how anti-dumping is regulated in South Africa.<sup>306</sup> First is the supreme law of the country, the Constitution,<sup>307</sup> with which all laws must comply, as well as other Acts that complement the rights it grants.<sup>308</sup> With respect to anti-dumping, the important sections are those that assure individuals of their right to ‘reasonable and fair procedures’ during administration actions<sup>309</sup> (also referred to in the Promotion of Administration of Justice Act (PAJA)<sup>310</sup> and access to any information held by the state under certain circumstances<sup>311</sup> (also referred to in the Promotion of Access to Information Act (PAIA).<sup>312</sup> Secondly, there is the right to written reasons where an individual’s rights have been greatly affected by an administrative action.<sup>313</sup> Lastly, the requirement of the courts to interpret municipal laws in accordance with International Law.<sup>314</sup>

In the *Brenco* case,<sup>315</sup> the Supreme Court emphasised the importance of interpreting national laws in line with international law with respect to anti-dumping when it held that the point was not that the investigating authority was obliged to comply as a matter of law with the

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<sup>303</sup> See s26 of the ITA Act; Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 12 December 2012).

<sup>304</sup> See the Customs and Excise Act 91 of 1964.

<sup>305</sup> Ndlovu L ‘An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa’s Dumping and Anti-dumping Law’ (2010) *Journal of International Commercial Law and Technology* Vol. 5, Issue 1 5.

<sup>306</sup> Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>307</sup> See the Constitution Act 108 of 1996.

<sup>308</sup> Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>309</sup> See s 33 of the Constitution.

<sup>310</sup> See the Promotion of Administration of Justice Act 3 of 2000.

<sup>311</sup> See s 32(c) of the Constitution.

<sup>312</sup> See the Promotion of Access to Information Act 2 of 2000.

<sup>313</sup> See s 33(2) of the Constitution.

<sup>314</sup> See s231 and s233 of the Constitution.

<sup>315</sup> *Chairman of the Board on Tariffs and Trade v Brenco* 2001(4) SA 511 (SCA); Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 13 December 2012).



International Agreements-Tokyo code 1979 and the ADA, but that international practice was of some help in assessing the fairness of the investigating authority in conducting anti-dumping investigations.<sup>316</sup>

#### 4.2.2 Institutional structure

In 1995 the body responsible for anti-dumping investigations was established under the Board on Tariffs and Trade Act<sup>317</sup> and existed until 2003 when the Act was revoked and responsibility shifted to the ITAC. The ITAA<sup>318</sup> established an independent body to regulate and govern international trade instruments, a move motivated by the Department of Trade and Industry, to improve its efficiency by isolating implementation from other functions, as well as fulfilling its purpose.<sup>319</sup> The ITAC is a juristic person with authority throughout SA, is subject only to the Constitution, the law and any trade policy statement or directive issued by the Minister in terms of the ITAA, and is expected to perform its duties in an impartial manner without fear, favour or unfairness.<sup>320</sup>

The ITAC has been mandated to investigate and evaluate dumping in SA and the jurisdictions of the Southern Africa Customs Union (SACU) whose Members are South Africa, Botswana, Lesotho, Namibia and Swaziland. It has also been appointed to act as the regional trade remedy investigating authority for the Custom Union as it awaits a regional body to be formed.<sup>321</sup> Although the market concerned in an investigation conducted by the ITAC is the SACU one, anti-dumping investigations are in actual fact concerned with the SA market seeking protection because of its dominance in the Custom Union.<sup>322</sup>

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<sup>316</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>317</sup> See s39 of the Board on Tariffs and Trade Act.

<sup>318</sup> See the International Trade Act 71 of 2002.

<sup>319</sup> See s2 of the ITA Act; Tao M *Dumping and Anti-Dumping Regulations with Specific Reference to the Legal Framework in South Africa and China* ( Unpublished LLM thesis, University of the Free State, 2006) 53.

<sup>320</sup> See s7 of the ITA Act.

<sup>321</sup> See s16 of the ITA Act; Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 7 October 2012).

<sup>322</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005) 59.

It should be noted that SA and not the SACU reports investigations to the WTO even if the market protection involves the Union, because the SACU is not a WTO Member ; nor likely to be, only the individual SACU Member states are.<sup>323</sup> This differs from the EU whose Commission speaks for all its member states in that customs union.

The ITAC is directed by a full-time chief commissioner, assisted by a full-time deputy chief commissioner and between two and ten other part-or full-time commissioners (currently they are six)<sup>324</sup> who are suitably qualified in economics, accounting, law, commerce, agriculture, industry or public affairs.<sup>325</sup> The ITAC has a division responsible for trade remedies, including anti-dumping,<sup>326</sup> which is headed and accounted for by the two directorates with a team of investigators, which they appoint, and other support staff to investigate dumping, analyse any injury and establish a causal link.<sup>327</sup> The functions of the ITAC and those of the investigators differ in that the latter carry out the anti-dumping investigations and submit reports to the commissioners who are obliged by law to take decisions in meetings.<sup>328</sup> While the ITAA requires members of the ITAC to be holders of the above-listed qualifications, Brink conversely is of the opinion that this requirement has not been fulfilled by the investigating officers, stating that presently there is only one skilled accountant and none are lawyers or has experience outside the civil service.<sup>329</sup>

Since the ITAC is fully responsible for all investigations, if it makes a finding that dumping is causing material injury; it can make a request to the commissioner of the revenue authority, the South African Revenue Service (SARS), to impose a provisional payment for the period and for

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<sup>323</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005)59.

<sup>324</sup> Yilmaz M& Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 250.

<sup>325</sup> See s 8 and 9 of the ITA Act.

<sup>326</sup> See s16 of the ITA Act.

<sup>327</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>328</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005)58.

<sup>329</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 15 December 2012).

an amount requested.<sup>330</sup> After affirmation of a final determination by the ITAC, it makes a recommendation for the imposition of an anti-dumping duty to the Minister of Trade and Industry who then requests the Minister of Finance to impose the appropriate anti-dumping duty.<sup>331</sup> After all is said and done, the final recommendations should be made to the SACU tariff board which makes a suggestion to the Custom Union council of Ministers.<sup>332</sup>

As of 2013, the Tariff board had not been formed, and therefore the ITAC continues to have the authority to deal with anti-dumping issues on behalf of the Custom Union.<sup>333</sup>

### 4.3 THE SUBSTANTIVE ASPECTS

The ITAA and its ADR generally follow the provisions of the ADA because of SA's membership of the WTO, although there are several procedural rules which will be discussed that are stricter than those in the WTO's ADA, while others are not in full compliance there with.<sup>334</sup> Under South African law, an anti-dumping action cannot take place unless it is shown that goods are exported into the country or the SACU region at a price that is less than the normal value<sup>335</sup> - which is the selling price in the exporting country,<sup>336</sup> and that as a consequence material injury is caused to the domestic industries due to the dumping and not other external factors.

#### 4.3.1 Export Price

The determination of the export price is normally the first thing to be done in an anti-dumping investigation. This is based on the fact that since the exported product is the one being

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<sup>330</sup> See s57A (1) of the Customs and Excise Act ; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 257.

<sup>331</sup> See s55 (2) and 56(1) of the Customs and Excise Act.

<sup>332</sup> See s57A (1) of the Customs and Excise Act ; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 257.

<sup>333</sup> Edwards L 'Anti-dumping in South Africa: From Proliferation to Moderation' available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1871948](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1871948) (accessed 7 December 2012).

<sup>334</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 15 December 2012).

<sup>335</sup> See s1(2) of the ITA Act.

<sup>336</sup> See s32(2) (a) of the ITA Act.

investigated, then all evaluations should be made of this product and its price.<sup>337</sup> Brink is of the opinion that in practice SA's ITAC conversely determines the normal value first and then the export price in an investigation.<sup>338</sup> The ITAA defines the 'export price' as the 'price actually paid or payable for goods sold for export, net of all taxes discounts and rebates actually granted and directly related to that sale'.<sup>339</sup> If there is no export price, or where there appears to be an association or compensatory arrangement between the exporter or foreign manufacturer and the importer in respect of the export price (sale between related parties), or where the export price paid or payable is unreliable,<sup>340</sup> then the export price must be constructed on the basis of the price at which the imports are first re-sold to an independent buyer, if appropriate, or on a reasonable basis.<sup>341</sup> From this constructed export price on the basis of the price at which the imports are first re-sold to an independent buyer, deductions must be made of actual or allocated costs incurred between the exporter's ex-factory price and the first independent re-sale price and any reasonable profit.<sup>342</sup>



#### 4.3.2 Normal value

The 'normal value' is calculated upon the export price being determined. According to the ITAA this value is defined as the 'comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or the country of origin or in the absence of information on a price contemplated above then the normal price can be determined either on the basis of:

a) the cost of production of the goods in the country of origin when destined for domestic consumption, plus a reasonable addition for selling, general and administrative costs and for profit; or

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<sup>337</sup> See s57A (1) of the Customs and Excise Act ; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 257-8.

<sup>338</sup> See s57A (1) of the Customs and Excise Act ; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 258.

<sup>339</sup> See s32(2) of the ITA Act.

<sup>340</sup> See s32(6) of the ITA Act.

<sup>341</sup> See s32(5) (6) of the ITA Act.

<sup>342</sup> See the ADR 1 & 10.3.

b) the highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.<sup>343</sup> The ADR provide for the determination of the above selling, general and administration costs and profit where the normal value is constructed.<sup>344</sup> From the definition provided it can be simply said that the normal value in terms of SA law can either be obtained on the basis of domestic sales in the exporting country or through a constructed value.

A constructed normal price usually causes problems to arise. According to Vermulst, this method was once used by the traditional users of anti-dumping to inflate the dumping margin, but that in real dumping scenarios the margins would be adequately high without a need to falsely inflate them.<sup>345</sup> This is completely the opposite of the position in SA where through experience it has been seen that constructed normal values result in no or lower margins despite clear provisions on its construction in the ADR.<sup>346</sup> Nonetheless, the constructed normal price has been used by the ITAC in a number of cases, for example, *the Picks, Shovels and Spades, Rakes and Forks Originating from the Peoples Republic of China*, where the normal value was constructed using costs in SACU as the ITAC was of the opinion that the costs of production in China and of the SACU industries were similar.<sup>347</sup>

For countries which have non-market economies, like Russia and China, the ITAC provides for the use of a normal value in a third or surrogate country as seen in (b) above, to establish the normal value of goods.<sup>348</sup> In the case of *ITAC v SATMC* the Supreme Court found that the ITAC did not have to conduct an investigation into whether foreign manufacturers from countries like China operated under market conditions even if the domestic industry had submitted such

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<sup>343</sup> See s32(2) (b) of the ITA Act.

<sup>344</sup> See the ADR 8.12 & 8.13.

<sup>345</sup> Vermulst E 'Adopting and Implementing Anti-dumping Laws' (1997) *Journal of World Trade* vol 31(2) 18; Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007)72.

<sup>346</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>347</sup> ITAC 'General Notice 245' available at [www.itac.org.za/docs/Notice%20245%20of%202007.pdf](http://www.itac.org.za/docs/Notice%20245%20of%202007.pdf) (accessed 14 December 2012).

<sup>348</sup> See s 32(4) of the ITA Act.

information.<sup>349</sup> One question though: if there is no third country or surrogate country available, what happens then?

### 4.3.3 Fair comparison

The ITAC is required by the ITAA and the ADR to make a 'fair comparison' between the normal value and the export price.<sup>350</sup> It entails make proper adjustments so that a comparison between the two prices can be made, which includes differences in the conditions and terms of sale, differences in taxation, and other differences affecting price comparability.<sup>351</sup> Additional guidelines with respect to fair comparison are provided for but not limited in the ADR. They include: conditions and terms of trade,<sup>352</sup> taxation,<sup>353</sup> levels of trade,<sup>354</sup> physical characteristics,<sup>355</sup> and quantities.<sup>356</sup>

Practically, according to Brink several problems have been experienced due to the ITAC's inconsistency when making the adjustments. He cites the *Tyres- China*<sup>357</sup> investigation, where the ITAC granted adjustments for differences in advertising costs, general costs and administration costs, but refused to do the same in the following investigations; as well as the ITAC's continued failure to make adjustments for bank charges incurred by an exporter in conversion of his currency to the Rand.<sup>358</sup>

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<sup>349</sup> *ITAC V SATMC* 2011 ZASCA 137 ; Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>350</sup> See s32(3) of the ITA Act; ADR 11.

<sup>351</sup> See s32(3) of the ITA Act.

<sup>352</sup> See the ADR 11.1(a).

<sup>353</sup> See the ADR 11.1(b).

<sup>354</sup> See the ADR 11.1(c).

<sup>355</sup> See the ADR 11.1(d).

<sup>356</sup> See the ADR 11.1(e).

<sup>357</sup> *ITAC V SA Tyre Manufacturer's Conference* ZASCA 137.

<sup>358</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

#### 4.3.4 Margin of dumping

In the legislation, the ‘margin of dumping’ is defined as ‘the extent to which the normal value is higher than the export price, after adjustments have been made for comparative purposes’.<sup>359</sup> This is the determination used where only one product is under investigation.<sup>360</sup> In cases where there are different models of the same product in SA, the determination of the dumping margin can be a difficult issue. An example of such is ‘bed linen’ which may be made up of fitted sheets, flat sheets, duvet covers etc.<sup>361</sup> In such scenarios all the models are deemed to be the product under investigation, nevertheless a normal value, export price and the margin of dumping is determined separately for each model including the model within the model, for example, the king size, queen and double sheets. The margins will then be weighted to determine a single margin applicable to each product under investigation.<sup>362</sup> SARS has previously imposed separate duties on various bed linen models notwithstanding a weighted average margin for each model; hence a weighted average of dumping was determined for all sheets, another for duvets and pillow cases.<sup>363</sup> This is in contrast to *EC- Bed Linen*<sup>364</sup> where the WTO Appellate Body held that in respect of a product under investigation as defined by the investigating authorities, only a single margin of dumping may be determined in respect to that product.<sup>365</sup> In this case it should be ‘bed linen’, not the different types of sheets, like king size etc.

#### 4.3.5 Material injury

In order to impose an anti-dumping duty the investigating authorities determine the second leg, which is actual material injury, a threat, or a material retardation to the domestic industry

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<sup>359</sup> See the ADR 1-definitions.

<sup>360</sup> See the ADR 12.1.

<sup>361</sup> Brink G ‘Determining the Weighted Average Margin of Dumping’ TRALAC Working Paper available at <http://www.tralac.org/2011/05/11/determining-the-weighted-average-margin-of-dumping/> (accessed 3 January 2013).

<sup>362</sup> See the ADR 12.2 (b)(ii) ; Brink G ‘Determining the Weighted Average Margin of Dumping’ TRALAC Working Paper available at <http://www.tralac.org/2011/05/11/determining-the-weighted-average-margin-of-dumping/> (accessed 3 January 2013).

<sup>363</sup> Brink G ‘Determining the Weighted Average Margin of Dumping’ TRALAC Working Paper available at <http://www.tralac.org/2011/05/11/determining-the-weighted-average-margin-of-dumping/> (accessed 3 January 2013).

<sup>364</sup> *EC-Bed Linen* WT/DS141/AB/R par 51-53.

<sup>365</sup> *EC-Bed Linen* WT/DS141/AB/R par 51-53.

producing a like product to the imported goods.<sup>366</sup> In the ITAA there is no reference to material injury<sup>367</sup> which was previously required by the Customs and Excise Act.<sup>368</sup> However, the ADR provide that in the determination of material injury the ITAC shall consider whether there has been significant suppression/depression in SACU prices or change in the domestic performance of the SACU industry in respect to the following injury factors: 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 investment, and any other factors placed before the ITAC that are relevant.<sup>369</sup>

The ADR does not particularly require an establishment of injury to the domestic industry before imposing anti-dumping measures (which has been the case since 1992) but it implies that the ITAC must consider injury through the 13 factors listed above.<sup>370</sup> The ITAC's investigation reports 'provide only the summarised indications to each item of the injury determination, referring to indexed data such as tables' which result in merely listing and providing data that do not meet the ADA requirements of making an evaluation of the facts.<sup>371</sup> In the *WTO Egypt-Steel Rebar case*,<sup>372</sup> the Panel held that an investigating authority must not only gather data but must also analyse and interpret it concerning any factor in Art 3.4-which deals with determination of the impact of dumped products on the local industries.

While no one of the factors listed above is considered superior to the other, but are regarded as mere guiding factors, according to the ITAC three factors could play a decisive role in the determination of injury.<sup>373</sup> These factors are: price suppression which occurs when there is an increase in the cost to price ratio of the SACU industry or where the industry sells at a loss

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<sup>366</sup> See the ADR 13&14.

<sup>367</sup> Brink G 'Determining the Weighted Average Margin of Dumping' TRALAC Working Paper available at <http://www.tralac.org/2011/05/11/determining-the-weighted-average-margin-of-dumping/> (accessed 3 January 2013).

<sup>368</sup> See s82(1) of the Customs and Excise Act 35 of 1994; Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 December 2012).

<sup>369</sup> See the ADR 13.

<sup>370</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 15 December 2012).

<sup>371</sup> Junji N & Brink G *Anti-dumping Laws and Practices of the New Users* (2007) 221.

<sup>372</sup> WTO Panel Report *Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey* WT/DS211/R.

<sup>373</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 263.



during the investigation period;<sup>374</sup> profit; and price depression which occurs where the ‘SACU industry’s ex factory selling price decreases during the investigation period’.<sup>375</sup> The Board on Tariffs and Trade, which was replaced by the ITAC, held in the case of *Rhône Poulenc v Chairman of the Board*<sup>376</sup> that price undercutting, price depression and decline in profits were the major determinants of injury in an anti-dumping investigation.

#### 4.3.6 Causation

Some countries, like New Zealand and Turkey, do not distinguish clearly in their anti-dumping laws between injury determination and causation.<sup>377</sup> In SA, these are plainly separate, and causation is the last factor to be proven as the ADR require. It must be established that material injury is caused by the dumped imports, before any anti-dumping measures are imposed.<sup>378</sup> In addition several factors shall be considered by the ITAC when determining a causal link between material injury and dumping. These are: the change in volume of dumped imports, price undercutting, market share of dumped imports, the magnitude of the margin of dumping, and the price of un-dumped imports in the market.<sup>379</sup> The ITAC is allowed to consider other factors in the determination of causality only in instances where an interested party has submitted those other factors or where the ITAC on its own has identified those factors.<sup>380</sup>

#### 4.3.7 Lesser duty rule

The ADA, in Art 9 states that it is desirable that the duty be less than the dumping margin if such lesser duty would be enough to remove the injury to the domestic industry.<sup>381</sup> From the word ‘desirable’ it means that the provision is not mandatory and it does not specify how to calculate the lesser duty. Therefore countries are free to choose whether and how to implement the lesser

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<sup>374</sup> See the ADR 1.

<sup>375</sup> See the ADR 1.

<sup>376</sup> *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* 1998/6589 37(T).

<sup>377</sup> Theron N *Anti-Dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007) 75.

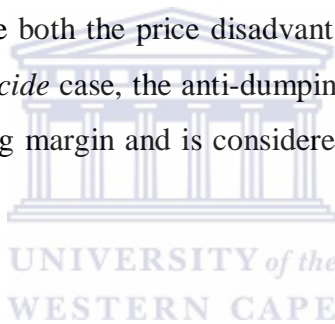
<sup>378</sup> See the ADR 16.4.

<sup>379</sup> See the ADR 16.1.

<sup>380</sup> See the ADR 16.5.

<sup>381</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007)77.

duty. In South Africa, the ADR defines ‘lesser duty’ as the provisional payment or anti-dumping duty imposed at the ‘lesser of the margin of dumping or margin of injury’ which is sufficient to remove the injury caused by dumping.<sup>382</sup> Formally the ITAC is under no mandatory obligation to apply this rule where the importer and exporter have co-operated in an investigation; however, in practice it does.<sup>383</sup> South Africa has used the lesser duty rule in almost all investigations carried out by it. For example, in the *Circuit-Breakers from France, Spain, Italy and Japan*, where the Board on Tariffs and Trade stated that in enormously high dumping margins of products, imposing the anti-dumping margin would be punitive and would price the parties’ products out of the market rather than level the playing field as was the intended result of imposing a final duty.<sup>384</sup> Also in the case of *Insecticide containing aldicarb imported from the USA* there was a huge difference between the dumping margin of 99.3 per cent and the final duty established on the lesser duty rule of 11.5 per cent (based on price disadvantage).<sup>385</sup> The practice in South Africa is thus to calculate both the price disadvantage as well as the dumping margin and as demonstrated by the *insecticide* case, the anti-dumping duty based on price disadvantage is normally lower than the dumping margin and is considered sufficient to remove the injury or level the playing field.<sup>386</sup>



#### 4.3.8 Public interest

Although the ITAC in 2006 published proposed draft amendments, including the public interest provisions to the ADR,<sup>387</sup> promulgation has not yet taken place and South African law still does not provide for a public interest clause. However, when determining injury the impact of the duty on the local industry, but not to the consumers and the downstream users, is considered.<sup>388</sup>

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<sup>382</sup> See the ADR 1-Definitions.

<sup>383</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005)62.

<sup>384</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007)77.

<sup>385</sup> Board on Tariffs and Trade: Final Determination Report No 3789 *Investigation into the alleged dumping of an insecticide containing Aldicarb originating in and imported from the United States of America*.

<sup>386</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007)78.

<sup>387</sup> Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 15 December 2012).

<sup>388</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007)79.

As stated in section 4.4.2 below in *Paper Board*,<sup>389</sup> it seems that the ITAC used this clause without specifically naming it<sup>390</sup> when it failed to impose provisional payments despite affirmatively finding injurious dumping, because the downstream users would be affected. Vermulst recommends that the developing world should have a public interest clause as it would provide a ‘safety valve if the anti-dumping action, for whatever reason seems undesirable’.<sup>391</sup> This means that, should countries not need impose a duty in the future, they will have a provision for that.

Before the controversial case involving *imported whole and boneless chicken cuts from Brazil* was concluded, there were various arguments against the imposition of anti-dumping duties on the imported chicken. The Brazilian Poultry Association (UBABEF) indicated that the duties were purely of a political nature and that the protection offered to the inefficient local producers by South Africa would be to the disadvantage of consumers in the SACU who would otherwise have benefited from the cheaper imported protein.<sup>392</sup> The UBABEF further added that South Africa imported 16 per cent of the poultry products it consumes, of which 73 per cent came from Brazil, and are used as inputs in SA retail products where many South Africans are employed to work with the Brazilian meat products across the value chain; therefore a rapid decrease in imported poultry products may disrupt rather than boost the local industry.<sup>393</sup> The general manager of local importer Britos Foods was also of the view that the imposition of the anti-dumping duties was ridiculous and should not be implemented, based on the fact that imported chicken made up less than 15 per cent of the total consumption in SA and that the biggest losers would be the domestic consumers who would be subject to the actions of domestic producers.<sup>394</sup>

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<sup>389</sup> See ITAC Report 152: *Investigation into the alleged dumping of paper and paperboard with a mass of 180g/m<sup>2</sup> or more, but not exceeding 550 g/m<sup>2</sup>, coated on one side with kaolin clay, commonly known as “white liner” or “grey backed paperboard”, originating in or imported from the Republic of Korea.*

<sup>390</sup> Brink G ‘Anti-dumping in South Africa’ available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 15 December 2012).

<sup>391</sup> Vermulst E ‘Adopting and Implementing Anti-dumping Laws’ (1997) *Journal of World Trade* vol 31(2) 20.

<sup>392</sup> Viljoen W ‘Anti-dumping Duty on Chicken from Brazil’ available at <http://www.tralac.org/2012/02/15/anti-dumping-duty-on-chicken-from-brazil> (accessed 12 April 2013).

<sup>393</sup> European Lawyers ‘Brazilian Poultry Exporters Challenge South African Anti-dumping Measures’ (2012) *Fratini vergano* issue No 4 2.

<sup>394</sup> Viljoen W ‘Anti-dumping Duty on Chicken from Brazil’ available at <http://www.tralac.org/2012/02/15/anti-dumping-duty-on-chicken-from-brazil> (accessed 12 April 2013).

## 4.4 THE PROCEDURAL ASPECTS

In this section the detailed procedure of how anti-dumping investigations and reviews are carried out in South Africa will be discussed, as required by the ADA. The ITAA gives the ITAC the mandate to investigate and make an evaluation in response to an application made to them with regard to dumping in the territory or in the SACU.<sup>395</sup> Throughout the process interested parties are given adequate notices and chances to make comments on this administrative process as required by the PAJA and the Constitution.<sup>396</sup>

The anti-dumping investigation is comprised of three phases: the pre-initiation phase, the initiation and preliminary phase, and the final phase.<sup>397</sup>

### 4.4.1 The pre-initiation phase

All investigations arise from the acceptance of a written application by or on behalf of the relevant domestic industry, although the ITAC may initiate an investigation without receiving an application from an interested party.<sup>398</sup> At any stage, a domestic industry may make a written anti-dumping application to the ITAC.<sup>399</sup> This means that at least 25 per cent of the domestic producers by production volume support the application and in addition at least 50 per cent by production volume of those producers that express an opinion are in support of the application.<sup>400</sup> To begin with, the applicant is required to properly submit information that is reasonably available including information relating to the product, dumping, material injury and causality.<sup>401</sup>

The ITAC proceeds to verify the information provided to determine if it is accurate and adequate,<sup>402</sup> and a merit submission is written by the investigating officers for consideration by the Commissioners if there is sufficient information to establish a prima facie case that material

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<sup>395</sup> See s16(1) (a) of the ITA Act.

<sup>396</sup> See s3(2) (b) of PAJA & s32(c) of the Constitution.

<sup>397</sup> Junji N& Brink G *Anti-dumping Laws and Practices of the New Users* (2007)211.

<sup>398</sup> See the ADR 3.1 & 3.3.

<sup>399</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 265.

<sup>400</sup> See the ADR 7.3 (a) (b.)

<sup>401</sup> See the ADR22&26.

<sup>402</sup> See the ADR 25.

injury to the industry is being caused by dumping.<sup>403</sup> If the ITAC finds that the application has merit, it will inform the representatives of the countries to be investigated of its decision before the initiation notice.<sup>404</sup> However, if the application is found to be without merit, it is terminated and the applicant is informed with a set of reasons for the rejection.<sup>405</sup> The applicant may be granted an oral hearing, upon a request to discuss the reasons for the rejection.<sup>406</sup>

#### 4.4.2 The initiation and preliminary phase

Upon the anti-dumping investigation being formally initiated by publishing a notice in the *Government Gazette*, (generally published on a Friday, unless the day falls on a public holiday in which case it is published on the last working day prior to the holiday),<sup>407</sup> the ITAC informs all known interested parties and supplies them with a copy of the notice, and questionnaires to be completed.<sup>408</sup> According to Junji & Brink, the ITAC has developed standardised questionnaires and no adjustments are made to them to address individual cases or different types of products.<sup>409</sup>

The parties have 37 days from the date of receiving the questionnaires to complete and submit their responses,<sup>410</sup> and 40 days from the date of publication of the notice, for those that were not directly informed of the investigation by the ITAC.<sup>411</sup> An extension of 14 days is possible, but only granted for a good reason and is applicable only to those parties that the ITAC allows.<sup>412</sup>

Once the submissions by the interested parties (exporter and importer) have been received, the ITAC examines them for any deficiencies and sends a letter to the specific party setting out all the deficiencies, which include a failure to submit any relevant information, an omission to provide proper non-confidential versions of submissions, and failure to submit responses in both

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<sup>403</sup> See the ADR 26.

<sup>404</sup> See the ADR 27.

<sup>405</sup> See the ADR 26.2.

<sup>406</sup> See the ADR 26.3.

<sup>407</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 29 January 2013).

<sup>408</sup> See the ADR 28.1 & 28.3.

<sup>409</sup> Junji N & Brink G *Anti-dumping Laws and Practices of the New Users* (2007) 211.

<sup>410</sup> See the ADR 29.2 & 29.3.

<sup>411</sup> See the ADR 29.4.

<sup>412</sup> See the ADR 30; Brink G *Anti-dumping and Countervailing Investigations in South Africa: A Practitioner's Guide to the Practice and Procedures of the Board on Tariffs and Trade* (2002) 192.

hard and soft copies.<sup>413</sup> These have to be rectified within seven days from the date of receiving the letter, failing which the application will not be considered for the preliminary stage.<sup>414</sup> Should a producer or an exporter fail to co-operate with the ITAC, it may request the imposition of a provisional payment within 200 days from the initiation, based on the facts available.<sup>415</sup>

Where parties have co-operated the ITAC carries out the verification process, beginning with the importer and then the exporter, to determine the accuracy and completeness of the information submitted.<sup>416</sup> From time to time, the verification process can be turned around, to begin with the exporter as was seen in *the Sunset Review on Door Locks from China* in 2007.<sup>417</sup> A confidential verification report indicating all the confirmed information is issued to the specific party; meanwhile the non-confidential information is placed on the public file by the ITAC prior to its preliminary determination, and interested parties have seven days to respond to the report.<sup>418</sup> According to Brink, most of these verification reports are pointless in practice because they only indicate that certain sales and costs were verified without substantiating how the process was conducted or documents submitted.<sup>419</sup> He cites the exporter verification letters on the public file of the *Tyre (China)* investigation, as an example of the meaninglessness of these verifications, adding that the reports for several different exporters in the same investigation will be the same save for the adjustments claimed.<sup>420</sup>

The investigating officers make a submission to the Commissioners for the preliminary determination, where the directorate makes a decision on whether provisional payments should be imposed.<sup>421</sup> If an affirmative preliminary finding is made by establishing that the dumping is causing material injury, the ITAC will make a request to the SARS to impose a provisional

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<sup>413</sup> See the ADR 31.

<sup>414</sup> See the ADR 31.2& 31.3.

<sup>415</sup> Board Report 4044 Garlic (China); See the ADR 32; <sup>415</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 29 January 2013).

<sup>416</sup> See the ADR 18.1&2.

<sup>417</sup> ITAC Report No.247-Final determination of the Sunset Review of Anti-dumping on Door Locks and Handles Originating in or Imported from the People's Republic of China ; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 266.

<sup>418</sup> See the ADR 19.1, 19.2&19.3.

<sup>419</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 266.

<sup>420</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 1 March 2013).

<sup>421</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 266.

payment for six months amounting to the margin of dumping or the margin of injury, whichever is lower.<sup>422</sup>

In the preliminary investigation of *Brazilian chicken*, the ITAC found that the South African Poultry Association, whose members were the domestic producers of whole chicken and boneless cuts, had experienced material injury caused by dumping, based on price undercutting, a decrease in market share, and growth.<sup>423</sup> Supported by this finding, the SARS commissioner imposed provisional duties for 26 weeks which amounted to the dumping margin of 62.3 per cent for whole chicken and 53.12 per cent for boneless cuts.<sup>424</sup> The findings of the ITAC in *Brazilian Chicken* were different from those in the *Paper Board Case* despite there being injurious dumping and the ADR providing for provisional duties to be imposed if affirmative findings of dumping and material injury are found. The ITAC was of the opinion that the imposition of the provisional payments before verification would affect the downstream paper products industry. This case raised a lot of questions about the ITAC's practice and decision, for not requesting the imposition of provisional payments despite injurious dumping being found and in spite of the downstream industry not having made any submissions.<sup>425</sup>

It should be noted that where the ITAC makes an affirmative preliminary determination, it can accept a price undertaking upon this finding and if such undertaking will eliminate injury to the domestic industry.<sup>426</sup> It may refuse this undertaking where the exporters are too many or for general policy reasons.<sup>427</sup> Up to this date the ITAC has not yet accepted a price undertaking. Conversely, if the ITAC makes a negative preliminary finding, it will publish a notice in the *Government Gazette* indicating that finding and issue a preliminary report to interested parties

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<sup>422</sup> See the ADR 33.2 & s57A of the Customs and Excise Act 91 of 1964.

<sup>423</sup> Viljoen W 'Anti-dumping Duty on Chicken from Brazil' available at <http://www.tralac.org/2012/02/15/anti-dumping-duty-on-chicken-from-brazil> (accessed 12 April 2013).

<sup>424</sup> Viljoen W 'Anti-dumping Duty on Chicken from Brazil' available at <http://www.tralac.org/2012/02/15/anti-dumping-duty-on-chicken-from-brazil> (accessed 12 April 2013).

<sup>425</sup> See ITAC Report 152: *Investigation into the alleged dumping of paper and paperboard with a mass of 180g/m<sup>2</sup> or more, but not exceeding 550 g/m<sup>2</sup>, coated on one side with kaolin clay, commonly known as "white liner" or "grey backed paperboard", originating in or imported from the Republic of Korea.*

<sup>426</sup> See the ADR 39.1.

<sup>427</sup> See the ADR 39.3.

within seven days after publication; however, it will not terminate the investigation.<sup>428</sup> Due to the fact that the ITAC verifies questionnaire responses before preliminary, then the failure to terminate the investigation despite a negative finding is a violation of the WTO's ADA, which requires the immediate termination of an investigation where there is a finding that there is a lack of sufficient grounds of either dumping or injury to continue with the investigation.<sup>429</sup>

#### 4.4.3 The final phase

In *Brenco*,<sup>430</sup> the Board on Tariffs and Trade referred to this phase as the final stage where all parties are allowed to give their comments on a provisional report of the Board and submission of further evidence, either in writing or orally, is allowed.

According to reg 35 of the ADR, all interested parties are granted 14 days from the date of the preliminary report being made available to comment in writing. An extension may be given to a party who makes a motivated request in writing to the ITAC at least seven days prior to the deadline for comments.<sup>431</sup> Parties may not submit new information in normal circumstances; however, in certain circumstances the ITAC allows new information.<sup>432</sup> For example, where parties that submitted deficient responses have addressed those deficiencies prior to the deadline for comment on the preliminary report.<sup>433</sup> If new information is accepted by the ITAC, it will make verification before dealing with the essential facts determination.<sup>434</sup>

The ITAC informs all interested parties of the essential facts to be considered and they have seven days to make comments with the possibility of an extension for good cause.<sup>435</sup> The ITAC is further obliged to take into consideration all relevant comments in its final finding.<sup>436</sup> The

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<sup>135</sup> See the ADR 34.1; Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 1 March 2013).

<sup>429</sup> See Art 5.8 of the ADA.

<sup>430</sup> *Chairman v Brenco* 2001 (4) SA 511 (SCA) 526I.

<sup>431</sup> See the ADR 35.2&35.3.

<sup>432</sup> See the ADR 35.4.

<sup>433</sup> See the ADR 35.5 & 35.1.

<sup>434</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 4 March 2013).

<sup>435</sup> See the ADR 37.1, 37.2, 37.3.

<sup>436</sup> See the ADR 37.4.



investigating officers prepare a final submission to the directorate after receiving the comments on the essential facts which is the rationale for the final determination.<sup>437</sup> A final determination is made to the Ministry of Trade and Industry through the office of the director general and the deputy minister, and which is in the form of a recommendation. If the Minister accepts the recommendation that definitive duties be imposed, he will request the Minister of Finance to impose those duties, and he then instructs the SARS to implement them.<sup>438</sup> On the other hand, the accepted recommendation could be negative. In either event, once the final determination is made it must be published in the *Government Gazette* and the interested parties are issued with the final report by the ITAC. This will mean a termination of the investigation.<sup>439</sup> The anti-dumping duties will remain in force for a period not exceeding five years from the date of imposition or the last review.<sup>440</sup>

## 4.5 REVIEWS

Parties may utilise the various types of review provided, after following certain procedures, for a re-evaluation of anti-dumping duties. There are: interim reviews (changed circumstances), sunset reviews, anti-circumvention reviews, new shipper reviews, and judicial reviews, all of which must be initiated through the *Government Gazette*.<sup>441</sup>

### 4.5.1 Interim reviews (changed circumstances)

Any interested party may request this kind of review at least a year after the imposition of anti-dumping duties and the publication thereof, to determine whether the duties can be decreased, increased or withdrawn.<sup>442</sup> Initiation by the ITAC will only take place where the party can prove a significant change in circumstance, save for a party who did not co-operate during the original investigation and is now willing to co-operate.<sup>443</sup>

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<sup>437</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 267.

<sup>438</sup> See s56 of the Customs and Excise Act.

<sup>439</sup> Brink G 'A Nutshell Guide to Anti-Dumping Action' (2008) *Lexis Nexis* vol 5 267.

<sup>440</sup> See the ADR 53.1.

<sup>441</sup> See the ADR 41.

<sup>442</sup> See the ADR 44.

<sup>443</sup> See the ADR 45.1&45.2.

The process for an interim review is like that of an original investigation, only that there is no preliminary determination, and parties receive 14 days to make comments on the essential facts, rather than seven.<sup>444</sup> The ITAC's final determination as a recommendation to the minister may result in an increase, decrease, abandonment or continuation of the existing anti-dumping duty.<sup>445</sup> Note worthy that in South Africa, since the ADR became law, only five interim reviews have been conducted.<sup>446</sup>

#### 4.5.2 Sunset reviews

South Africa initiated its first sunset review in December 1999, a few days before the duties lapsed in terms of the ADA, and by 2007 it had conducted at least 64 sunset reviews of anti-dumping duties.<sup>447</sup> The domestic industry must request the initiation of a sunset review as this review is not self-initiative.<sup>448</sup> Its purpose is to ensure that anti-dumping measures stay in place only as long as they are necessary to counter the injurious effects of dumping.<sup>449</sup> In SA, definitive anti-dumping duties remain in place for a period of five years unless it is established that dumping and material injury will continue taking place if the duties lapse.<sup>450</sup> If it happens that a sunset review has been initiated before the anti-dumping duty expires, such duty remains in force until the review has been finalised.<sup>451</sup>

The ITAC had established an interpretation of the five year period to be counted from the day of the publication of the notice imposing the definitive measure (similar to the position in the USA, the EU and India).<sup>452</sup> However, in September of 2007 the issues of interpretation of the five year period as well as anti-dumping duties applied retrospectively were dealt with in *Progress office*

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<sup>444</sup> See the ADR 46& 43.2; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 268.

<sup>445</sup> See ADR 47.

<sup>446</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 14 March 2013).

<sup>447</sup> Brink G 'Sunset Reviews in South Africa: New Direction Given by the High Court' TRALAC Trade Brief No.7 available at <http://www.tralac.org/2008/05/21/sunset-reviews-in-south-africa-new-direction-given-by-the-high-court/> (accessed 19 March 2013).

<sup>448</sup> See the ADR 54.4 and 57.2.

<sup>449</sup> See Art 11.3 of the ADA.

<sup>450</sup> See the ADR 53.1.

<sup>451</sup> See the ADR 53.2.

<sup>452</sup> Brink G *A Theoretical Framework for South African Anti-dumping Law* (2004) 921.

*machines v SARS*<sup>453</sup> and a finding different to that of the ITAC was made. The SCA held that since legislation provided that anti-dumping duties could not be imposed for more than five years, if duties were imposed with retrospective effect, the five years should be counted from the retrospective date of application of the duties and not from the date of publication of the notice imposing such duties.<sup>454</sup> This meant that the maximum duration of anti-dumping duties was five years from the date of application and not from the date of imposition.

The SCA's decision has been criticised as being erroneous, for two reasons, although it cannot be appealed unless it is taken to the Constitutional Court on a constitutional ground.<sup>455</sup> First, is the fact that the court in its interpretation of the legislation, disregarded that which was consistent with international law as required by s233 of the Constitution. Despite hearing that in the USA and the EU the five year period is determined in accordance with the ADA, the court still made its decision differently. Secondly, according to the ADR<sup>456</sup> definitive duties remain in place for five years from the date of publication of the ITAC's final determination; meaning that the five years are counted from the date the notice is published in spite of the duty being imposed with retrospective effect.<sup>457</sup> This decision could have negative effects on the domestic industry, in the sense that all anti-dumping duties currently in place that follow earlier sunset reviews, would have to be revoked with retrospective effect, thereby denying the domestic industries protection against unfair trade.<sup>458</sup> The ITAC now follows the SCA's decision when initiating sunset reviews.

How is a sunset review initiated? According to the ADR, the ITAC is required to publish a notice in the *Government Gazette* for each individual anti-dumping duty six months before it lapses.<sup>459</sup>

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<sup>453</sup> *Progress Office Machines CC v South African Revenue Service and others* (2007) SA 118 (SCA).

<sup>454</sup> Brink G 'Sunset Reviews in South Africa: How Long is Five Years?' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/21/sunset-reviews-in-south-africa-how-long-is-five-years/> (accessed 10 April 2013).

<sup>455</sup> Brink G 'Sunset Reviews in South Africa: How Long is Five Years?' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/21/sunset-reviews-in-south-africa-how-long-is-five-years/> (accessed 10 April 2013).

<sup>456</sup> See the ADR 38.1.

<sup>457</sup> Brink G 'Sunset Reviews in South Africa: How Long is Five Years?' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/21/sunset-reviews-in-south-africa-how-long-is-five-years/> (accessed 10 April 2013).

<sup>458</sup> Brink G 'Sunset Reviews in South Africa: How Long is Five Years?' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/21/sunset-reviews-in-south-africa-how-long-is-five-years/> (accessed 10 April 2013).

<sup>459</sup> See the ADR 54.1.

In practice however, in May-June of each year the ITAC publishes a record of all anti-dumping duties that are due to expire the following year.<sup>460</sup> This is a breach of the provisions of the ADR.

After publication, the ITAC will directly inform interested parties, known from the original investigation, of the publication.<sup>461</sup> The domestic industry has 30 days to indicate whether it will oppose the duties being withdrawn (request a sunset review). Such indication is followed by submission of a proper application with the necessary information to establish a factual case that the removal of the anti-dumping duty will lead to the recurrence of injurious dumping.<sup>462</sup> On the other hand, if the industry does not give a response or if it indicates that the duties are not required, the anti-dumping duties will terminate on the date stated in the published notice.<sup>463</sup>

Once the sunset review has been initiated the exporters have to submit all information in the required format to enable the ITAC to make a finding on dumping. Exporters, foreign producers and importers are not precluded from providing any other information they deem important.<sup>464</sup> The local industry may also be required to provide any information required by ITAC.<sup>465</sup> If the ITAC makes a positive finding, that is, that both dumping and material injury will recur if the duty is removed, then the anti-dumping duty will stay in place, though it can be amended. Should the finding be negative, the duties will be withdrawn.<sup>466</sup>

What happens in instances where after the imposition of anti-dumping duties the exporters or foreign producers stop exporting in the SACU market, leading to the absence of the export price and consequently an inability to establish if dumping is likely to recur? The absence of the export price means zero determination of dumping. In such cases the ITAC would require exporters to submit all export sales to all destinations, and then it uses that information to determine the

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<sup>460</sup>; Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 18 March 2013).

<sup>461</sup> See the ADR 54.2.

<sup>462</sup> See the ADR 54.3&57.2.

<sup>463</sup> See the ADR 58.1.

<sup>464</sup> See the ADR 57.3&57.4.

<sup>465</sup> See the ADR 57.4.

<sup>466</sup> See the ADR 59.

export price through a third country, or uses the average export price.<sup>467</sup> This practice was however changed by the High Court's decision in *Carbon Black-Egypt Sunset Review* where the

ITAC's methodology used to determine the likelihood of a recurrence of dumping was found to be flawed because it lacked rationality and the final determination had been made without considering relevant information.<sup>468</sup> The court in this case further stated that the ITAC could not apply average dumping margins for exports to all countries but must investigate the countries into which exports were dumped so as to establish if the factors that led to dumping in those particular countries would also be present in the SACU.<sup>469</sup> The effect of this decision on the domestic industries is the provision of better protection as the chances of the ITAC finding a continuing, or recurrence of, dumping if anti-dumping duties are removed, will be increased.<sup>470</sup>

A sunset review should be concluded within 12 months after the initiation of the review.<sup>471</sup> The ITAC can take more time than stipulated and because of that it has been criticised for not adhering to the timing and procedure, as was seen in *ITAC v SCAW South Africa (pty) Ltd*<sup>472</sup> where the ITAC finalised the case 17 months later (524 days) in spite of the WTO requiring a year.<sup>473</sup> Despite time being a very important factor in an anti-dumping case, the ITAC takes very long to finalise its investigations, the longest in comparison with other major anti-dumping users: Australia and New Zealand take less than 180 days.<sup>474</sup> In the same case, the Constitutional Court held that the High Court had erred in its decision to allow the imposition of a temporary interdict

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<sup>467</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 270.

<sup>468</sup> Brink G 'Sunset Reviews in South Africa: New Direction by the High Court' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/26/the-sunset-reviews-in-South-Africa-new-direction-given-by-the-high-court> (accessed 10 April 2013).

<sup>469</sup> Brink G 'Sunset Reviews in South Africa: New Direction by the High Court' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/26/the-sunset-reviews-in-South-Africa-new-direction-given-by-the-high-court> (accessed 10 April 2013).

<sup>470</sup> Brink G 'Sunset Reviews in South Africa: New Direction by the High Court' TRALAC Trade Brief available at <http://www.tralac.org/2008/05/26/the-sunset-reviews-in-South-Africa-new-direction-given-by-the-high-court> (accessed 10 April 2013).

<sup>471</sup> See Art 11.4 of the ADA.

<sup>472</sup> *ITAC v SCAW SA (pty) Ltd* (2010) CCT 59/09 ZACC.

<sup>473</sup> Mail & Guardian 'The South African Tyre Manufacturers Conference has Levelled Some Stinging Criticisms at ITAC Following its Protracted Anti-dumping Struggle' available at <http://mg.co.za/article/2011-10-06-criticisms-of-itac> (accessed 10 April 2013).

<sup>474</sup> Mail & Guardian 'The South African Tyre Manufacturers Conference has Levelled Some Stinging Criticisms at ITAC Following its Protracted Anti-dumping Struggle' available at <http://mg.co.za/article/2011-10-06-criticisms-of-itac> (accessed 10 April 2013).

which stopped sunset reviews from being completed, and in addition led to the anti-dumping duties imposed by the ITAC to remain in force until a judicial review had been completed regardless of how long it took.<sup>475</sup> The Constitutional Court added in its finding that the extension of the duration of anti-dumping duties was inappropriate and against international and domestic law, and that if the practice was allowed, interested parties would suffer and trade relations would be damaged.<sup>476</sup>

### 4.5.3 Anti-circumvention reviews

Due to the fact that anti-dumping measures are becoming more popular, methods to circumvent them are also increasing. Circumvention generally means ‘an attempt by parties subject to anti-dumping duties to avoid paying the duties by “formally” moving outside the range of the anti-dumping duties order while “substantially” engaging in the same commercial activities as before’.<sup>477</sup> It is not always an easy task to distinguish circumvention from a company shifting operations for legitimate reasons, for example, where a company transfers its production to the export market because costs are lower, even though the transfer involves products that were subject to an anti-dumping duty. Failure of a proper distinction could have adverse effects on investment and could lead to trade being distorted.<sup>478</sup> The EU and the USA were the first to enact legislative provisions to prevent circumvention since they considered any behaviour of circumventing an anti-dumping duty as transformed dumping, and that it weakened the corrective effect of the anti-dumping duty in the importing country.<sup>479</sup> Meanwhile Japan, which was the first to be subject to an anti-circumvention duty by the EU, together with Korea, saw the

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<sup>475</sup> Viljoen W ‘Anti-dumping: The Constitutional Court Ruling Regarding the International Trade Administration Commission versus SCAW South Africa (Pty) Ltd’ available at <http://www.tralac.org/2010/03/17/anti-dumping-the-constitutional-court-ruling-regarding-the-international-trade-administration-commission-versus-scaw-south-africa-pty-ltd/> (accessed 10 April 2013).

<sup>476</sup> Viljoen W ‘Anti-dumping: The Constitutional Court Ruling Regarding the International Trade Administration Commission versus SCAW South Africa (Pty) Ltd’ available at <http://www.tralac.org/2010/03/17/anti-dumping-the-constitutional-court-ruling-regarding-the-international-trade-administration-commission-versus-scaw-south-africa-pty-ltd/> (accessed 10 April 2013).

<sup>477</sup> Anti-Dumping Measures available at <http://www.meti.go.jp/english/report/data/gCT9905e.html> (accessed 12 April 2013).

<sup>478</sup> Anti-Dumping Measures available at <http://www.meti.go.jp/english/report/data/gCT9905e.html> (accessed 12 April 2013).

<sup>479</sup> Krishna R ‘Anti-dumping in Law and Practice’ Policy Research Working Paper available at [http://books.google.com/books/.../Antidumping\\_in\\_Law\\_and\\_Practice.htm](http://books.google.com/books/.../Antidumping_in_Law_and_Practice.htm) (accessed 11 April 2013).

measure as an example of trade protectionism and distortion.<sup>480</sup> Due to these differences in points of view during the Uruguay Round, an agreement with reference to circumvention could not be reached, and in the Marrakesh Ministerial Declaration, the ministers acknowledged that fact. As a result the WTO's ADA does not provide for such measures and countries have unilaterally adopted their own anti-circumvention provisions.<sup>481</sup>

In South Africa anti-circumvention rules are provided for in the ADR, with only four reviews being conducted since these came into force.<sup>482</sup> According to the ADR, circumvention is defined as

- a) *'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;*
- 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 products'.*<sup>483</sup>

The ADR differentiates between the various types of circumventions: minor modifications of the product, assembly operations in a third country or within the SACU, absorbing the duty, country hopping, and declaring products under a different tariff.<sup>484</sup> A domestic industry may request an anti-circumvention review in respect of any or all of these activities by the exporter for the purposes of circumventing the duty. This particular review contains a unique provision in that,

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<sup>480</sup> Tao M *Dumping and Anti-Dumping Regulations with Specific Reference to the Legal Framework in South Africa and China* (Unpublished LLM thesis, University of the Free State, 2006) 127.

<sup>481</sup> Vermulst E 'The Anti-dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-dumping laws become a Problem in International trade?' (1989) *Michigan Journal of International Law* 775-776.

<sup>482</sup> See the ADR 60-63; Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 20 March 2013).

<sup>483</sup> See the ADR 60.1.

<sup>484</sup> See the ADR 60.2.

unlike the case in all the other reviews, the domestic industry is not required to submit new injury or dumping information if it makes an application within a year of the publication of the final determination in the original case.<sup>485</sup> If the ITAC finds that circumvention has taken place, three recommendations may be made: increasing anti-dumping duties to compensate for absorbing duties; extending the scope of the duties to apply to parts, components or substitute like products; and lastly, 'extending 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'.<sup>486</sup>

In the light of the failure of the Ministers in the Uruguay round to reach a multilateral agreement to deal with circumvention, what can be implied from the South African rules relating to anti-circumvention? These rules are inconsistent with the WTO's ADA for two reasons: first, there is no provision that allows Members to impose the circumvention and anti-circumvention measures or duties on products which have not been fully investigated and found to have been dumped and causing injury.<sup>487</sup> In terms of Art18.1 of the ADA, Members are forbidden from taking any action against dumping unless they act according to the Agreement, in which case SA is not complying with this requirement because it is acting outside what the ADA provides. In addition, since an anti-circumvention action amounts to imposing a duty without investigating injury and dumping, this is not in line with Art VI of the GATT 1994 which provides that for anti-dumping duties to be imposed a finding of injury and dumping with respect to a like product from the exporting country must be made. The findings in anti-circumvention measures do not represent the required standard for determining dumping required by the WTO.<sup>488</sup> Therefore, could anti-circumvention laws be said to be the result of an independent adaptation, by countries, like South Africa, and not founded on the ADA?

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<sup>485</sup> See the ADR 62.2; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 270.

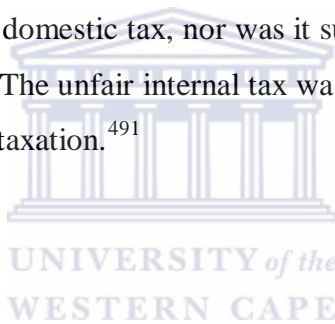
<sup>486</sup> See the ADR63.

<sup>487</sup> Komuro N 'EC Anti-dumping Measures against Japanese products' Paper Presented for the Third ECSA World Conference available at [www.ecsanet.org/conferences/escaworld3/komuro.htm](http://www.ecsanet.org/conferences/escaworld3/komuro.htm) (accessed 11 April 2013); Tao M *Dumping and Anti-Dumping Regulations with Specific Reference to the Legal Framework in South Africa and China* (Unpublished LLM thesis, University of the Free State, 2006) 140.

<sup>488</sup> Komuro N 'EC Anti-dumping Measures against Japanese products' Paper Presented for the Third ECSA World Conference available at [www.ecsanet.org/conferences/escaworld3/komuro.htm](http://www.ecsanet.org/conferences/escaworld3/komuro.htm) (accessed 11 April 2013).



Secondly, the duty violates the principle of national treatment with respect to internal taxation and regulation.<sup>489</sup> For example, as a form of circumventing, the foreign producers export 'like products' which are to be assembled in the SACU market, and as a consequence anti-circumvention measures are applied to expand the scope of an existing anti-dumping duty to include the like product which is being assembled in the importing Members territory, then this is a violation of the national treatment principle. Art III (2) of the GATT stipulates that products of any Member imported into the territory of another Member shall not be subject directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products, so as to afford protection to domestic products. These were also the findings of the GATT Panel in the case of the EU imposing anti-circumvention duties on *Japanese parts and components*.<sup>490</sup> The Panel held that the anti-circumvention duty on products assembled within the EU by Japanese companies was neither supposed to be an import tax but a domestic tax, nor was it supposed to be discriminatory, being only imposed on those companies. The unfair internal tax was a violation of Art III (2) - national treatment with respect to domestic taxation.<sup>491</sup>



#### 4.5.4 New shipper reviews

A foreign producer who did not export to the SACU market during the original investigation and whose country has been subjected to anti-dumping duties may want to export its products to South Africa with an individual duty rate. According to reg 48, he is entitled to request a new shipper review. Definitive anti-dumping duties have to be imposed before the ITAC can consider a request for a new shipper review.<sup>492</sup> The exporter bears the burden of providing satisfactory information that proves that his company is not and was not related to any other party that had earlier on exported to, and had duties applied by, South Africa.<sup>493</sup> In addition, he has to submit information relating to normal value and export price to show that no dumping will take place, or

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<sup>489</sup> Raj B 'Rethinking Anti-dumping Law' (1996) *Journal of International law and Economics* vol 29 114.

<sup>490</sup> Krishna R 'Anti-dumping in Law and Practice' Policy Research Working Paper available at [http://books.google.com/books/.../Antidumping\\_in\\_Law\\_and\\_Practice.htm](http://books.google.com/books/.../Antidumping_in_Law_and_Practice.htm) (accessed 11 April 2013).

<sup>491</sup> Anti-Dumping Measures available at <http://www.meti.go.jp/english/report/data/gCT9905e.html> (accessed 12 April 2013).

<sup>492</sup> See the ADR 48.3.

<sup>493</sup> See the ADR 48.2.

that the margin of dumping will be lower in comparison to the duty in place.<sup>494</sup> The exporter's margin of dumping will be established as the difference between the export price to SA and normal value, with the new shipper's export price to a third country being used where an export price to SA cannot be determined.<sup>495</sup> If dumping is found to exist, the ITAC will not acknowledge an application indicating a lesser dumping rate than the anti-dumping duty level in place, and will maintain the existing duty.<sup>496</sup>

If the ITAC accepts the exporter's application, it will request the SARS Commissioner through the Minister of Trade and Industry and Minister of Finance to impose a provisional payment that remains in force pending the review's finalisation, and to withdraw the anti-dumping duties that were imposed on the exporter.<sup>497</sup> The reason for the provisional payment is to ensure that if dumping is found and a definitive duty is imposed, it can be applied with retrospective effect to the date of withdrawing the duty.<sup>498</sup>



#### 4.5.5 Judicial reviews

If a person is affected by a decision made by the ITAC, he may apply to a High Court for a review, and the court may make an order for payment of costs against a party or any other person who represents a party, in accordance with the law and fairness.<sup>499</sup> In addition to the ITAA, the interested party has a right to have the decision reviewed under the Promotion of Administrative Justice Act (PAJA)<sup>500</sup> on the basis that a decision made in terms of the ADR is an administrative action, in which the aggrieved party is entitled to a lawful, reasonable and fair procedure.<sup>501</sup>

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<sup>494</sup> See the ADR 49.1; Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 270.

<sup>495</sup> See the ADR 51.3.

<sup>496</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 10 April 2013).

<sup>497</sup> See the ADR 50.2.

<sup>498</sup> Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) *Lexis Nexis* vol 5 270.

<sup>499</sup> See s46(1) (2) of ITA Act.

<sup>500</sup> See PAJA 3 of 2000.

<sup>501</sup> Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005) 60.

In South Africa there is no difference between the judicial review of trade remedies, which include anti-dumping, and that of other government actions.<sup>502</sup> The High Court has jurisdiction over all legal actions with the Small Claims Courts dealing with minor matters. If a party is granted leave to appeal a High Court decision, it may do so in the Supreme Court of Appeal. However, all constitutional matters are heard in the Constitutional Court. The High Court sitting in Pretoria is where all the ITAC decisions are lodged as that is where it is situated.<sup>503</sup> The anti-dumping judicial reviews are conducted under South African domestic law, viz, the ITAA, the ADR, and Chapter VI of the Customs and Excise Act.<sup>504</sup> However, it should be noted that s231 and s233 of the Constitution require courts to interpret national legislation in line with international law.

The ITAC's preliminary decisions, procedures and final determinations may be taken on review if it can be shown that the ITAC has violated the ITAA or the ADR, its conduct has caused serious prejudice to the aggrieved party and the prejudice cannot be undone by the ITAC's final determination.<sup>505</sup> Any interested party must give the ITAC at least 30 days notice prior to filing any judicial review.<sup>506</sup> Any decision made by the ITAC may be varied to give effect to the ruling of a dispute panel or appellate body under the WTO's dispute settlement mechanism, provided the affected interested parties are consulted with respect to any proposed variations.<sup>507</sup> Judicial review in South Africa tends to be very expensive as regards to legal fees, with the costs to the applicants and the ITAC each exceeding US\$ 500 000 (R4 900 000-with an exchange rate of Rand 9.8=1\$), although there are no court fees except for a diminutive stamp duty.<sup>508</sup> Generally only a few cases have been subjected to judicial review, with all except *Ranbaxy*<sup>509</sup>

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<sup>502</sup> Yilmaz M & Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 253.

<sup>503</sup> Yilmaz M & Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 253.

<sup>504</sup> Yilmaz M & Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 254.

<sup>505</sup> See the ADR 64.1.

<sup>506</sup> See the ADR 64.2.

<sup>507</sup> See the ADR 64.3-63.4.

<sup>508</sup> Yilmaz M & Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 260.

<sup>509</sup> *Ranbaxy Limited v Chairman, Board on Tariffs and Trade*, Unreported Case 659/98 T ; Yilmaz M & Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 266.

being lodged by the domestic industry. Apart from the cost issue, there is also the problem of access to relevant information in comparison to the WTO dispute settlement proceedings.<sup>510</sup>

## **4.6 WHAT ARE THE MAIN PROBLEMS GENERALLY WITH THE ANTI-DUMPING TOOL IN SA?**

Although some inconsistencies and problems specific to the South African anti-dumping laws have been highlighted in the discussion above, it is helpful to give a brief overview of those and other difficulties. They are classified as procedural issues, substantive issues, and others. This is a general view and not a closed list as there could be other problems which are not discussed in this thesis.

### **4.6.1 Procedural issues**

Various procedural concerns have been raised over the manner in which investigations are initiated and conducted by the agency responsible to carry out anti-dumping investigations in South Africa (the ITAC), and how it establishes contact with interested parties during an investigation. One case in particular is the recent *Brazilian Chicken* case, where provisional duties were imposed on Brazil's imported whole and bone cuts chicken, following a finding of dumping and material injury to the SACU industry. The Brazilian Poultry Association was not content with the ITAC's decision and indicated that it would request its Government to approach the WTO concerning the decision to impose anti-dumping duties.<sup>511</sup> According to the Association, the ITAC findings were flawed, they violated the international organisation's rules on anti-dumping, and they had various technical defects.<sup>512</sup> It based its claims on the fact that the ITAC disregarded the information provided by three of the four Brazilian firms included in the agency's inquiry and deemed the companies unco-operative. In addition six of the eight importers were deemed to have provided deficient information, as stated by the ITAC, and thus

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<sup>510</sup> Yilmaz M & Brink G *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members-South Africa, A Complicated, Unpredictable, Long and Costly Judicial Review System* (2013) 266.

<sup>511</sup> USDA 'South Africa Sets Anti-dumping Duties' available at <http://www.worldpoultry.net/Broilers/Markets--Trade/2012/3/South-Africa-sets-anti-dumping-duties-WP010128W/> (accessed 13 April 2013).

<sup>512</sup> Viljoen W 'Anti-dumping Duty on Chicken from Brazil' available at <http://www.tralac.org/2012/02/15/anti-dumping-duty-on-chicken-from-brazil> (accessed 13 April 2013).

not considered.<sup>513</sup> This was a breach of the evidentiary requirement found in Art 6.2 of the ADA, which states that throughout the anti-dumping investigation all interested parties shall have full opportunity for the defence of their interests. In *Guatemala-Cement II* and *Egypt-Steel Rabar*, respectively, the WTO Panel interpreted the above provision as being a ‘fundamental due process provision’ and that it created an obligation on the investigating authorities to provide interested parties with opportunities to defend their interests.<sup>514</sup> The question therefore arises, whether South Africa provided enough opportunities to the Brazilian companies to be said to have respected this process?

The same concerns were also raised by the Association of Meat Importers and Exporters (AMIE) before South Africa’s Parliamentary Committee on Trade and Industry, in connection with its experience with the ITAC’s investigation into the alleged dumping of poultry from Brazil.<sup>515</sup> It raised the irregularities on the ITAC’s part in observing and implementing its internal processes in accordance with both domestic and international legal obligations. For that reason it felt that the ITAC’s conduct had led to a decline in the quality of the reports issued.<sup>516</sup> The height of inconsistency was finally reached when the ITAC published a notice in the Government Gazette on its decision not to impose definitive duties on Brazilian chicken, meaning that the interim duties had to terminate.<sup>517</sup> This was despite its recommendation to the Trade and Industry Minister, Rob Davies, that the duties should be imposed. The manner in which the ITAC conducted itself, according to Cronjé, questions the agency’s capacity to execute its legislative directive. He adds that how the ITAC conducts itself will affect South Africa’s honour as a trading partner, and the failure to harmonise itself with its domestic and international obligations will lead to an increase in the disputes against it in the WTO.<sup>518</sup>

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<sup>513</sup> European Lawyers ‘Brazilian Poultry Exporters Challenge South African Anti-dumping Measures’ (2012) *Fratini Vergano* issue No 4 3.

<sup>514</sup> European Lawyers ‘Brazilian poultry Exporters Challenge South African Anti-dumping Measures’ (2012) *Fratini vergano* issue No 4 2.

<sup>515</sup> Cronjé JB ‘Concerns over ITAC Trade Remedy Investigations’ available at <http://www.tralac.org/2013/03/13/concerns-over-itac-trade-remedies-investigations/> (accessed 13 April 2013).

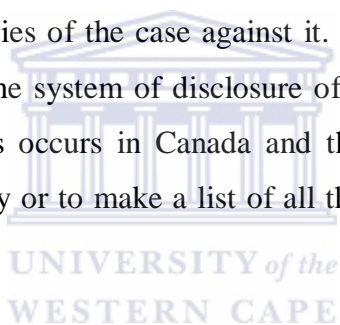
<sup>516</sup> Cronjé JB ‘Concerns over ITAC Trade Remedy Investigations’ available at <http://www.tralac.org/2013/03/13/concerns-over-itac-trade-remedies-investigations/> (accessed 13 April 2013).

<sup>517</sup> Cronjé JB ‘South Africa Rejects Anti-dumping Duties on Brazilian Chicken: The Story Continues’ available at <http://www.tralac.org/2013/01/16/south-africa-rejects-anti-dumping-duties-on-brazilian-chicken-the-story-continues/> (accessed 14 April 2013).

<sup>518</sup> Cronjé JB ‘Concerns over ITAC Trade Remedy Investigations’ available at <http://www.tralac.org/2013/03/13/concerns-over-itac-trade-remedies-investigations/> (accessed 13 April 2013).

The AMIE's advocate agreed with Cronjé, saying that the ITAC lacked transparency and called its reports 'scant and deficient'.<sup>519</sup>

Non-disclosure of confidential information:<sup>520</sup> The ITAA states that any interested party may claim confidentiality, supported by reasons for such a claim and a 'written abstract' of the information in a non-confidential form.<sup>521</sup> Information which is confidential by its nature is distinguished from information otherwise claimed to be confidential.<sup>522</sup> Although the ITAC is required to make a determination from the information with which it is provided, whether or not the information is in the real sense confidential, in practice the ITAC treats too much information as confidential, and as a consequence interested parties are not in a position to defend themselves adequately. An example is the case of *Rhône Poulenc*<sup>523</sup> where the High Court ruled that the applicant should have been supplied with more information by the ITAC, to enable it to be in a position to know all the complexities of the case against it. The solution, according to Horlick and Vermulst, would be to shift the system of disclosure of confidential information under an administrative protective order, as occurs in Canada and the USA, which is more effective, despite it being complex and costly or to make a list of all the information that ought not to be treated as confidential.<sup>524</sup>



The ITAC fail to disclose the essential facts that they consider which form the basis of making a decision whether to apply definitive measures as is provided for in reg 37. This process is deemed to be insufficient by interested parties, considering that this is their chance to comment on the decisions and findings of the investigating authorities before the final determination is made.<sup>525</sup> Another issue is that the judicial review process which is used by interested parties, who are not satisfied with the ITAC's determination, ceases to have meaning in South Africa.

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<sup>519</sup> Ensor L 'ITAC Defends Itself over Handling of Chicken Dumping' ' *Business Day BD-live* 29 November 2012 15.

<sup>520</sup> Vermulst E & Horlick G '10 Major Problems with the AD instrument: An Attempt at Synthesis' *Journal of World Trade* (2005) 39(1) 67-73.

<sup>521</sup> See s33 of the ITA Act.

<sup>522</sup> See s33(1) of the ITA Act.

<sup>523</sup> *Rhône Poulenc v Chairman of the Board on Tariffs and Trade* 1998/6589 (T).

<sup>524</sup> Vermulst E & Horlick G '10 Major Problems with the AD Instrument: An Attempt at Synthesis' *Journal of World Trade* (2005) 39(1) 67-73.

<sup>525</sup> Vermulst E & Horlick G '10 Major Problems with the AD Instrument: An Attempt at Synthesis' *Journal of World Trade* (2005) 39(1) 67-73.

The local courts are reluctant to double-check the ITAC's decisions and the process, if done, is very slow.<sup>526</sup> Brink concurs with this point as he says that most decisions against the ITAC have been sent back to it for reconsideration, yet the courts do not need to refer the matter back to the ITAC as they are required by the Constitution to make an order that is just an equitable.<sup>527</sup>

Lastly, the circumvention and anti-circumvention provisions provided for in the ADR are inconsistent with the WTO ADA, and this is a problem. There are no rules or a multilateral agreement dealing with circumvention. If there is no permission given to Members to apply this measure, is that not a contravention in itself? Art 1 of the ADA clearly forbids a Member from taking action against another Member that is dumping, if it is in conflict with the ADA. The situation would be different if all Members had uniform rules on circumvention, provided for by the WTO.

#### 4.6.2 Substantive issues

There are problems with respect to constructed normal values as a basis for determining normal value when they cannot be based on the domestic sales. In SA this construction is deemed to be too artificial and discretionary<sup>528</sup> based on the fact that it gives negative or very low dumping margins and the ITAC reports do not contain details on how these constructed values were arrived at. In turn, this makes it very hard to know which sub-provisions of the ADR were used.<sup>529</sup> As was stated above in 4.3.3, when establishing fair comparison, the ITAC fails to take into consideration all the necessary factors to assist in the making of proper adjustments. This is one of the major concerns Brazil intended to raise at the WTO in its case against South Africa's imposition of anti-dumping duties on its chicken. It complained that the ITAC when comparing prices did not take into account the 16.5 per cent tax rate on poultry in the domestic Brazilian

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<sup>526</sup> Vermulst E & Horlick G '10 Major Problems with the AD Instrument: An Attempt at Synthesis' *Journal of World Trade* (2005) 39(1) 67-73.

<sup>527</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 23 March 2013).

<sup>528</sup> Vermulst E & Horlick G '10 Major Problems with the AD Instrument: An Attempt at Synthesis' *Journal of World Trade* (2005) 39(1) 67-73.

<sup>529</sup> Brink G 'Anti-dumping in South Africa' available at <http://www.tralac.org/2012/07/25/anti-dumping-in-south-africa/> (accessed 23 March 2013).

market, although the exported product is not taxed.<sup>530</sup> Both Art 2.4 of the ADA and s32 (3) of the ITAA require the investigating officers to make due allowance for factors affecting price comparability between the export price and the normal value. These factors are: differences in the conditions and terms of sale, differences in taxation, and other differences affecting price comparability.<sup>531</sup> The factor in this case was the different levels of taxation. In *US-Lumber V*, the WTO Panel was also in agreement with the provisions above when it held that investigating authorities must make price adjustments in cases where differences have been shown to affect price comparability.<sup>532</sup>

#### 4.6.3 Other issues

The South African data set is made up of incomplete or missing data. It lacks dates when the preliminary anti-dumping duties came into effect, and when the anti-dumping measures were revoked (where applicable), and both preliminary and final outcomes as well as hard copies of some HS codes are missing. Information relating to some industries is also said to be left out in the government reports.<sup>533</sup> The ITAC was accused of using incorrect statistics in *Brazil Chicken* which amounted to misrepresentation. The claims of huge volumes of imported poultry products and injury suffered by the local industry were untrue, based on the statistics given.<sup>534</sup> It is alleged that the real figures of the whole and bone cuts, from Brazil, as a percentage of domestic consumption was 1.5 in 2011. The ITAC ignored all communication from the Brazilian industry as well as its Government concerning the wrong and incomplete information which it used in coming to its conclusions.<sup>535</sup> This conduct could shake confidence in the system as accountability would be difficult without the correct data to substantiate the decisions made.

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<sup>530</sup> USDA 'South Africa Sets Anti-dumping Duties' available at <http://www.worldpoultry.net/Broilers/Markets--Trade/2012/3/South-Africa-sets-anti-dumping-duties-WP010128W/> (accessed 15 April 2013).

<sup>531</sup> See the ADA & the ITA Act.

<sup>532</sup> European Lawyers 'Brazilian Poultry Exporters Challenge South African Anti-dumping Measures' (2012) *Fratini Vergano* issue No 4 2.

<sup>533</sup> Bown C 'Global Anti-dumping Database Version 1.0' World Bank Policy Research Paper 3737 (2005) available at [http://www.brandeis.edu/~cbown/global\\_ad/](http://www.brandeis.edu/~cbown/global_ad/) (accessed 7 December 2012).

<sup>534</sup> Wolpert D 'Dumping the Facts' available at <http://www.amiesa.co.za/news/12-newsflash/100-dumping-the-facts.html> (accessed 14 April 2013).

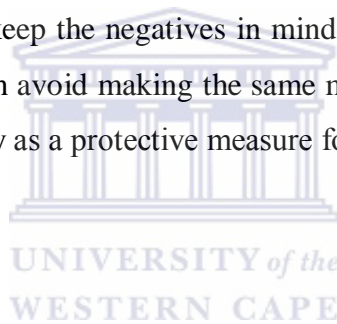
<sup>535</sup> Wolpert D 'Dumping the Facts' available at <http://www.amiesa.co.za/news/12-newsflash/100-dumping-the-facts.html> (accessed 14 April 2013).



## 4.7 CONCLUSION

South Africa is an established user of anti-dumping provisions whose laws have gone through a process of transition since 1914. The enactment of the ITAA and the ADR has made SA's anti-dumping laws and procedures more clear and reliable. The success of its anti-dumping experience in the African continent has clearly shown other WTO Members that national anti-dumping laws should resemble those of Art VI.

That has not been the only lesson; there are also some problems and inconsistencies with the ADA and the ADR that have been highlighted. More often than not, what is provided for in the law is not what is put into practice. Kenya's policy makers should not only pay attention to the positives of this regime, but also keep the negatives in mind in the formation of their own anti-dumping instrument. Thus they can avoid making the same mistakes and in the end use this tool for the right reasons and not merely as a protective measure for Kenya's local industries.



# CHAPTER 5

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## CONCLUSION AND RECOMMENDATIONS

### 5.1 CONCLUSION

In the Middle Ages the term ‘dumping’ was used to mean the act of discarding something unwanted, but at the beginning of the 20<sup>th</sup> century it began being used in international trade. It was then used to illustrate the behaviour of producers of one country that sold goods in another country at exceptionally low prices.<sup>536</sup> The WTO rules govern the use of anti-dumping measures by national authorities; nonetheless there are differences in countries’ readiness to use these duties, in their procedures, and their rules. As a result of these variations some countries are able to protect their industries to a greater extent than others.<sup>537</sup> Even so, since the adoption of the first anti-dumping law in 1904, it cannot be said that there exists a national anti-dumping law that is impeccable. This thesis examined the WTO’s ADA which sets the standard for Members that wish to impose anti-dumping measures as well as the national anti-dumping legal and institutional frameworks of Kenya and South Africa. The goal of this mini-thesis was to examine what is internationally required in an anti-dumping inquiry as well as provide an insight into the municipal laws and institutions of South Africa which are considered as experienced and effective, and which serve as a good example of an African developing country that has succeeded by adhering to the WTO rules. The reality is that Kenya’s agricultural sub sectors have continuously been affected by dumping and its current municipal laws are too weak to adequately provide relief. This situation can be remedied by use of an effective anti-dumping discipline, which prompted the Kenyan government into making the decision to amend its current laws.

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<sup>536</sup> Beseler J& William A *Anti-dumping and Anti-subsidy Law: The European Communities* (1986) 41.

<sup>537</sup> Young L& Wainio J ‘The Anti-dumping Negotiations: Proposals, Positions and Anti-dumping Profiles’ (2005) *Estey Centre Journal of International Law and Trade Policy* volume 6, 7.

An examination of how South Africa has dealt with this unfair practice serves as a motivator and provides lessons for Kenya as it endeavours to amend its anti-dumping laws in order to achieve compliance with the WTO requirements and consequently fulfil its international obligations. Furthermore, from the said experience it is apparent that these laws should be as simple as possible and mirror those of the ADA.

The research identified that if a country decides to have an anti-dumping system that will successfully protect its domestic industries from injury caused by dumping, WTO consistency is paramount not only in the making of the law but also in its actual implementation. The purpose of this last chapter is therefore to discuss some suitable suggestions to ensure that Kenya achieves total compliance and at the same time be in a position to stimulate economic development. Furthermore, with regard to some challenging issues of the SA anti-dumping rules highlighted in Chapter 4, some suggestions will also be made for South Africa.

## **5.2 RECOMMENDATIONS FOR KENYA**

With the creation and effective coming into law of Kenya's anti-dumping laws, it will be amongst other new developing countries that have implemented the anti-dumping laws, and eventually a new user thereof in the international dumping field. However, to create and impose the anti-dumping remedy Kenya must ensure that it has a strategy to achieve this purpose, which includes the following:

### **5.2.1 Existence of a national legislative framework**

This is one of the basic requirements for an anti-dumping action. For the local producers to be in a position to file for protection there must be comprehensive national laws setting out the conditions and the process.<sup>538</sup> Without this framework it would be impossible to carry out an investigation to determine the effects of dumping. In accordance with the ADA, Members will only apply anti-dumping measures under the provisions of Art VI of the GATT 1994, and only

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<sup>538</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 1 May 2013).

after investigations are initiated and carried out in accordance to the requirements of the ADA.<sup>539</sup> Therefore, as the ADA provides, the Kenyan municipal law should establish exhaustive rules to determine dumping (calculation of normal values and export prices, adjustments to make normal values and export prices comparable, and calculation of the dumping margin) as well as a standard to determine that dumped imports cause injury to the local industry.<sup>540</sup>

An administrative procedure must also be created which will be followed at the commencement and during the conduct of the investigations. Time periods must also be set within which to carry out the investigation and for the implementation and duration of these measures.<sup>541</sup> Kenya is advised to use the ADA as a model and also look at other countries' systems, like that of South Africa, when drafting its own provisions. Input into the drafting of the legislation from experts, such as, lawyers and academics, both local and foreign, will be of great importance. For example, when South Africa was drafting its anti-dumping regulations it requested contributions and support from several lawyers from Canada, the USA and New Zealand in addition to those from the Republic.<sup>542</sup> Furthermore, in the creation of the legislation and before its adoption it would be advisable to have proper consultations between the government and private stakeholders from various sectors, and a free flow of information between them to ensure that all issues concerning them are addressed. Joubert states that the dialogue between the stakeholders should focus on issues that will affect the whole country and its economy rather than only on micro-issues. He points out that South Africa put a number of frameworks in place during the process of enacting its anti-dumping law: for example the National Economic Development and Labour Council (NEDLAC), the primary vehicle for social discussions and negotiation between the government, business and community organisations and trade unions on issues of social, development and economic policies;<sup>543</sup> and public hearings.

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<sup>539</sup> See Art 1 of the ADA.

<sup>540</sup> Aggarwal A 'Anti-dumping Law and Practice: An Indian Perspective' available at <http://www.icrier.org/pdf/antidump.pdf> (accessed 2 May 2013).

<sup>541</sup> Joubert N 'Managing the Challenges of WTO Participation: The Reform of South Africa's Anti-dumping Regime' available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 30 April 2013).

<sup>542</sup> Joubert N 'Managing the Challenges of WTO Participation: The Reform of South Africa's Anti-dumping Regime' available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 1 May 2013).

<sup>543</sup> NEDLAC available at <http://www.nedlac.org.za> (accessed 4 May 2013).

He adds that the establishment of such an opportunity was important as all spheres of society were involved in the decision making process since policy making cannot be achieved in vacuum.<sup>544</sup>

As Kenya is in the process of amending its laws, it is important for the legislators to keep in mind the reasons for the development of its anti-dumping system. Besides international price discrimination, the welfare of its people is also paramount. This concern includes consumers and industrial users. Thus, some issues which may affect their interests and influence the investigating authorities in the imposition of anti-dumping measures should be dealt with. These are matters relating to big policy questions, such as, the lesser duty rule and the public interest rule, which are substantive provisions found in the ADA, and are discretionary in their application by Members. This thesis supports the idea of including mandatory public interest and lesser duty clauses in the Kenyan national anti-dumping laws.

#### **5.2.1.1 Public interest rule:**

At the outset, one needs to consider this question: is the application of an anti-dumping measure always in the best interests of the consumers, domestic producers and importers who use an imported product as an input for their products? What happens if it is not? Some countries apply a public interest test before imposing anti-dumping measures. An example is Canada which has adopted a public interest clause and has a very detailed legal framework and practice on this issue. In its infamous *Baby Food* case the Canadian International Trade Tribunal made a recommendation to the Minister of Finance to reduce the duty by two-thirds so as to mitigate the consequences for low income families and concerns over child health and welfare.<sup>545</sup> On the contrary, South Africa has drafted public interest provisions but promulgation has not yet taken place. During the Uruguay and the Doha Rounds WTO Members tried to negotiate a mandatory public interest clause in the ADA but failed to do so.

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<sup>544</sup> Joubert N 'Managing the Challenges of WTO Participation: The Reform of South Africa's Anti-Dumping Regime' available at [http://www.wto.org/English/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm#remedies](http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies) (accessed 5 May 2013).

<sup>545</sup> 'Certain Prepared Baby Food Originating in or Exported from the United States of America' available at [http://www.citt.gc.ca/dumping/inquirie/findings/archive\\_nq97002\\_e.asp](http://www.citt.gc.ca/dumping/inquirie/findings/archive_nq97002_e.asp) (accessed 7 May 2013).

Thus, currently under the ADA there is neither an obligation on authorities to take public interest into account nor a prohibition of its consideration during an investigation.<sup>546</sup> The public interest clause generally means that before the anti-dumping measure is imposed, due consideration is given to its impact on groups other than the domestic producers in the society and the country as a whole. Some authors argue against this clause stating that it would add to the uncertainty of the proceedings and administrative difficulties, and would result in an increase in the costs of investigation both to the government and the parties.<sup>547</sup> Krishna concurs with regard to the cost factor, and adds that it is also time consuming.<sup>548</sup> Notwithstanding the opposition, this thesis addresses the rationale for proposing a mandatory public interest clause in Kenya's anti-dumping laws. An anti-dumping law's purpose is to protect the domestic industry from injury caused by imports of dumped goods. However, even though a local industry is harmed by alleged dumped imports, other parties benefit from them, such as, downstream import-using industries and consumers, thereby causing a conflict of interest to arise between the latter and the former. An anti-dumping law without a public interest clause falls short in not taking into account these conflicting interests.<sup>549</sup> If a positive finding of dumping and injury is made, the anti-dumping remedies for the local producers follow automatically without considering the consequences for other parties. This is not reasonable policy making. A public interest provision in a national anti-dumping regime could therefore serve as a means of access to socio-economic justice for adversely affected parties, and as a way of balancing producer interest with that of the consumer.<sup>550</sup>

In addition, anti-dumping practices may have undesirable effects on the national economy and impose a number of costs on the domestic economy by affecting the importing country's price structure and creating difficulty for industries to obtain the supplies needed. The aim of the public interest clause in such a case is to ensure that investigating officers consider anti-dumping

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<sup>546</sup> Viktoriia K *Public Interest Consideration in Domestic and International Anti-dumping Disciplines* (Published LLM thesis, World Trade Institute, 2011) 4-5.

<sup>547</sup> Banks G *The Anti-dumping Experience of a GATT- Fearing Country* (1993) 46.

<sup>548</sup> Krishna R 'Anti-dumping in Law and Practice' Policy Research Working Paper available at [http://books.google.com/books/.../Antidumping\\_in\\_Law\\_and\\_Practice.htm](http://books.google.com/books/.../Antidumping_in_Law_and_Practice.htm) (accessed 7 May 2013).

<sup>549</sup> Aggarwal A 'The WTO Anti-dumping Agreement: Possible Reform Through The inclusion of a Public Interest Clause' available at <http://hdl.handle.net/123456789/21349> (accessed 10 May 2013).

<sup>550</sup> Aggarwal A 'The WTO Anti-dumping Agreement: Possible Reform Through The inclusion of a Public Interest Clause' available at <http://hdl.handle.net/123456789/21349> (accessed 10 May 2013).

complaints in a wider context, taking into account the interests of the domestic industries as well as the costs of the anti-dumping interventions to the national economy. Lastly, adding a public interest clause will impose due restraint in the application of the anti-dumping measures. These restrictions are important because the impact of the measures is likely to spread with increases in trade volume and direct investment, particularly in developing countries. For that reason, increasing the power of multiple stakeholders to affect the outcome of anti-dumping proceedings may lead to some discipline over the application of these laws.<sup>551</sup> In view of the above, it would be wise for Kenya's domestic anti-dumping law to oblige the investigating officials to evaluate whether the application of the duties is in the interests of the public.

### **5.2.1.2 Lesser duty rule:**

The ADA provides that the decision whether, or not to impose an anti-dumping duty even if all the requirements for dumping and injury have been met, as well as regards the amount thereof, is to be made by the investigating authorities of the importing country. It however adds that it is desirable that the imposition of the duty be less than the margin if such duty would be sufficient to remove the injury caused to the local industry.<sup>552</sup> The ADA uses the word 'desirable', which means that its application is optional for Members, and not words like 'must' and 'shall'. The EU and South Africa, as was seen in the previous Chapter, have made the application of the lesser duty rule mandatory. The rule is often referred to as the soft option to ensure public interest because to some extent it eases the harm caused to consumers by the imposition of anti-dumping duties. By applying this rule, the downstream parties negatively affected by these measures gain from the lesser duty because it lessens the burden of any price increase borne by the market participants.<sup>553</sup> Although the public interest rule tackles a wider range of public interest matters, the lesser duty rule is also important because in some way it partially reduces the negative results of anti-dumping measures.

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<sup>551</sup> Aggarwal A 'The WTO Anti-dumping Agreement: Possible Reform Through The inclusion of a Public Interest Clause' available at <http://hdl.handle.net/123456789/21349> (accessed 10 May 2013).

<sup>552</sup> See Art 9.1 of the ADA.

<sup>553</sup> Aggarwal A 'The WTO Anti-dumping Agreement: Possible Reform Through The inclusion of a Public Interest Clause' available at <http://hdl.handle.net/123456789/21349> (accessed 10 May 2013).

Hence, Kenya would be advised to simultaneously apply both the lesser duty rule and the public interest clause, because such an approach portrays its seriousness to secure public interest concerns while applying its anti-dumping tool.<sup>554</sup>

### 5.2.2 Existence of an institutional structure and setting up investigating authorities

Who will the interested parties go to if they want to file an allegation of dumping and where will they go in search of a remedy? The Kenyan government should ensure that an institutional body responsible for managing anti-dumping cases is put in place. The only two countries in Africa with fully-fledged institutions are South Africa and Egypt.<sup>555</sup> South Africa has the ITAC which is the agency in charge of carrying out investigations in the Republic and on behalf of SACU. The organisation will be a juristic person. Investigating officers must be trained. Kenya, in comparison to South Africa has not had many industrial sectors and sub-sectors being affected by dumping, thereby necessitating frequent use of the anti-dumping tool. For that reason, this research would recommend a special group of investigators who would be employed only when a case is filed or when necessary, rather than a permanent team; this will also save costs and resources. This is the same approach adopted by Mauritius.<sup>556</sup> According to Vermulst, because developing countries lack expertise and manpower, their application of anti-dumping laws is hindered.<sup>557</sup> Anti-dumping investigations involve several different areas of professional activity; therefore people from different fields will be required. At least, for daily administration, these disciplines, among others, should be represented: law, economics and accountancy.<sup>558</sup> South Africa's ITAC requires its Commissioners to have qualified in economics, accounting, law, commerce, agriculture and industry or public affairs.<sup>559</sup>

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<sup>554</sup> Viktoriia K *Public Interest Consideration in Domestic and International Anti-dumping Disciplines* (Published LLM thesis, World Trade Institute, 2011) 48.

<sup>555</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 2 May 2013).

<sup>556</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 2 May 2013).

<sup>557</sup> Vermulst E 'Adopting and Implementing Anti: dumping Laws: Some Suggestions for Developing Countries' (1997) *Journal of World Trade* 7.

<sup>558</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007) 70.

<sup>559</sup> See s8 and 9 of the ITA Act.



Arrangements should also be made with regards to the housing and maintaining of the investigating officers and their directors. This includes the offices where they will be situated, stationery and equipment, salaries and wages etc.

Similar to the involvement in the drafting of the legislation, while carrying out their duties it would be wise for the authorities to involve the private sector in decision making to ensure that the anti-dumping mechanism is not entirely government controlled. This ensures that fairness, honesty and reasonableness are applied. As in many other African countries, political corruption is a problem in Kenya, which hinders the administration and enforcement of various laws. For example, in the sugar sub-sector, one of its problems with respect to dumping is contributed by corrupt custom officials who allow powerful personalities in the government to import sugar duty-free and sell it at a cheaper price than the locally produced product.<sup>560</sup> Those government officials are neither reported nor prosecuted. But, are the revenue authorities not under government control? Adding the responsibility of overseeing the application of this trade remedy to the same custom officials who violate simple custom rules will be a disaster, the more so if they continue being solely in charge.<sup>561</sup> An institution which is privately and publicly co-ordinated will be of great relevance to ensure the proper enforcement of the national anti-dumping law.

Lastly, an independent judiciary or tribunal is a paramount requirement, and it should be ensured that it not only exists, but also functions well enough to be in a position to hear and adjudicate dumping matters freely and fairly. Parties who are not satisfied with the findings of, or the procedure followed by, the investigating authorities should have an opportunity to appeal to a court of law. As required by the ADA, each Member whose national legislation contains anti-dumping provisions shall maintain judicial or administrative procedures for review purposes. Moreover, these procedures should be independent of the investigating officials in charge of the determination or review in question.<sup>562</sup>

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<sup>560</sup> Wanyande P 'Management Politics in Kenya's Sugar Industry: Towards an Effective Framework' (2001) *African Journal in Political Science* Vol. 6 No. 1,132.

<sup>561</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 30 April 2013).

<sup>562</sup> See Art 13 of the ADA.

### 5.2.3 Secure financial and legal resources

Resources will be required for the legislative process, training and maintaining the investigating officials and other members of staff, as well as the entire process of carrying out investigations either on the spot or through the best information available. Since an anti-dumping case involves a trial, legal resources should also be provided for. These include institutional, financial and human capacity. Cases can require fees in hundreds, thousands or millions of dollars although in developing countries the figures are much lower, maybe in the thousands.<sup>563</sup> Putting in place an anti-dumping regime can be very expensive and sometimes the government simply cannot afford it. Therefore, Kenya is advised to seek technical assistance to establish this instrument. The WTO secretariat provides technical assistance to developing countries, mainly by building the necessary institutions and training of different kinds so that they can operate successfully in the multilateral trading system. The training sessions include seminars and workshops held in the Member countries or in Geneva. Funding for the training comes from the WTO's budget, voluntary contributions from other Members, cost sharing either by countries involved or with an international organisation.<sup>564</sup> The World Bank Group is also another source of financial and technical assistance to developing countries for projects involving, amongst others, trade, development and agriculture.<sup>565</sup>

### 5.2.4 Creating awareness

Government officials and their departments<sup>566</sup> are not the only ones who need the knowledge and understanding of substantive and procedural aspects of anti-dumping: local industries (public and privately owned) should also be included. Local producers have to be made aware and have a good knowledge of the law and the process involved in filing a case. It would be wise for the legislation to be adopted with a plan to create awareness amongst the business community and the public on anti-dumping laws and procedures.

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<sup>563</sup> Bolton M 'Anti-dumping and Distrust: Reducing Anti-dumping Duties under the WTO through Heightened Scrutiny' (2012) *Berkeley Journal of International Law* vol 29, 80.

<sup>564</sup> The WTO *Understanding the WTO* (2008) 93.

<sup>565</sup> Bown C (ed) *The Great Recession and Import Protection: The Role of Temporary Trade Barriers* (2011) 5.

<sup>566</sup> Solutions for Dealing with Import Surges and Dumping available at [http://aprodev.eu/files.../807\\_technical\\_interpretation\\_policy\\_paper\\_final.pdf](http://aprodev.eu/files.../807_technical_interpretation_policy_paper_final.pdf) (accessed 29 April 2013).

Kenya can follow what Mauritius has done by including and implementing a capacity building programme for the private and public institutions in its anti-dumping system.<sup>567</sup>

### 5.2.5 Political and economic factors

More often than not a framework which acts as a policy tool that can be relied on is considered as the most important factor. However, this is not always true based on the idea that it is pointless to have a rule that cannot be implemented. Therefore, implementation of the new laws will be equally as important. Political and economic factors generally limit many countries in the use of policies including anti-dumping. Since countries rely on each other in more than one way, this could potentially influence their decision to apply a trade remedy action against their trading partners, particularly if they are dependent on them in terms of investment, aid or export.<sup>568</sup>

The Egyptian case depicts a country like Kenya being reluctant to use any measures, including the COMESA trade remedies, to protect its wheat industry against Egypt's cheap imports. Before this incident, Kenya had imposed tariffs on Egyptian rice, resulting in a vengeful act by Egypt removing Kenyan tea from its list of preferential goods and the imposition of a 35 per cent import tariff.<sup>569</sup> It seems that it was difficult for Kenya to do anything that would affect its links with Egypt and put its number one export destination for Kenyan tea in jeopardy. Being in such a tight spot is not easy; however Kenya has to find ways to solve this predicament by standing firm and perhaps finding a middle ground by negotiating.

Truth is, in International trade countries will always depend on each other, and it is important to look at issues in a broader perspective (trade relations) rather than one-sidedly. In addition, it should be remembered that anti-dumping measures seek to protect local industries of the importing country and not to punish the act of dumping. An anti-dumping duty more often than

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<sup>567</sup> Validation Seminar on Trade Remedy Investigations available at [http://www.gov.mu/portal/site/cso?content\\_id=9680e435f8fbc210VgnVCM1000000a04a8c0RCRD](http://www.gov.mu/portal/site/cso?content_id=9680e435f8fbc210VgnVCM1000000a04a8c0RCRD) (accessed 3 May 2013).

<sup>568</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 5 May 2013).

<sup>569</sup> All Africa 'Kenya: Egypt Bars 500 Million Shillings worth of Kenyan Tea' available at <http://allafrica.com/stories/200007180301.html> (accessed 4 May 2013).

not reduces the number of, or drives away, exporters as a result of high duties.<sup>570</sup> Therefore, a price undertaking would be a way to deal with this issue instead of duties because it has a greater chance of still keeping the exporters coming into the market as well as maintaining a balance in the relations between Members. The dumping companies can on their own offer price undertakings or the importing country authorities may suggest them. The firms agree to either raise their prices or stop exporting at dumped prices and in return duties will not be imposed.<sup>571</sup>

### **5.2.6 Alternatives to the anti-dumping laws: intra- regional rules and the increase of general tariffs**

While awaiting the introduction of the new anti-dumping rules, Kenya can adopt the intra-regional anti-dumping rules of the COMESA which appear to be identical to the WTO's ADA. In comparison to the EAC rules, the COMESA provides a broader cover in terms of third parties who are suspected of this unfair practice.<sup>572</sup>

Another alternative would be for Kenya to increase the general tariffs within the WTO limits, if it has flexibility in this respect. Since the GATT was founded in 1947, applied tariffs have been dramatically reduced across the world. However, with reference to developing countries the difference between the bound tariffs and actually applied tariffs remains high. In Africa, 75-80 per cent of tariffs lines are not bound, meaning that most tariffs could be raised without violating the WTO rules.<sup>573</sup> In response to the dumping practice, the Department of Trade and Industry can encourage companies in strategic industries to apply for tariff increases to protect them from cheap imports. South Africa has recently increased the general tariffs on chicken imports in response to dumping of chicken from Brazil instead of imposing anti-dumping duties.<sup>574</sup> This tariff rise has been used by other countries in Africa as an alternative to trade remedies.

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<sup>570</sup> Oudsten D 'Undertaking in EEC Anti-dumping Law' (1989) *Florida International Law Journal* 329.

<sup>571</sup> Tao M *Dumping and AD Regulations with Specific Reference to the Legal Framework in SA and China* (Unpublished LLM thesis, University of the Free State, (2006) 99.

<sup>572</sup> See Art 54(2) of the COMESA Treaty.

<sup>573</sup> Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' Working Paper available at <http://ebookbrowse.com/illy-trade-remedies-in-africa-pdf-d370532454> (accessed 7 May 2013).

<sup>574</sup> The East African 'BRICS Chicken Coming Home to Roost?' available at <http://www.Theeastafrican.co.ke/news/Brics-Chickens-coming-home-to-roost/-/2558/1669954/-/view/printVersion/-/ojekhr/-/index.html> (accessed 8 May 2013).

### 5.3 RECOMMENDATIONS FOR SOUTH AFRICA

South Africa has been an old user of anti-dumping legislation and is an example to other countries. However, its anti-dumping regulations, just like those of the EU or the US, are not perfect. This research discussed some of the problems of its anti-dumping laws and compared them to those of the WTO's ADA. To a large extent they are in harmony with the ADA, although there is still some development to be achieved, as shown in this mini-thesis, such as, the public interest clause and the issue of confidentiality. As regards the public interest provision, similar to the recommendations for Kenya, SA should be urged to promulgate this clause so as to have a 'safety valve'<sup>575</sup> in case it does not want to impose an anti-dumping measure, since it is not always desirable to impose duties.

Confidentiality is a problem expressed by many interested parties. In South Africa the ITAA allows parties to claim confidentiality on condition that they submit non-confidential summaries of all the sensitive information. The ITAC then has to determine if the information is confidential in the true sense. The problem arises in practice as the ITAC treats too much information as confidential; consequently the interested parties are sometimes not in a position to defend themselves adequately. This research recommends that SA look into the systems of the USA and Canada which are considered efficient, though complicated, in this regard. The information submitted by one party can be accessed by the attorneys of the other party on condition that they do not disclose the information to their clients. However, they may use it to double-check the accuracy of the information and the use thereof.<sup>576</sup>

Most of the other issues relate to practice: what is provided for in the legislation is by-passed by the investigating authorities. These include irregularities in relation to the following: when establishing fair comparison appropriate due allowances should be made as required by the regulations; upholding the evidentiary rights of interested parties during an investigation; updating data sets; and ensuring that all information concerning preliminary and final outcomes

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<sup>575</sup> Vermulst E 'Adopting and Implementing Anti-dumping Laws' (1997) *Journal of World Trade* vol 31(2) 20.

<sup>576</sup> Theron N *Anti-dumping: A Global Abuse of Trade Policy Instrument-AD Procedures & Lessons for Developing Countries with Special Emphasis on South African Experience* (2007)79.

are provided for. By addressing these concerns, its anti-dumping laws will be more transparent and reliable in future. A refined anti-dumping instrument will assist South Africa's industries to improve their competitiveness and at the same time make sure that exporters do not view the country as a dumping ground.<sup>577</sup>

## 5.4 FINAL THOUGHTS

The purpose of this mini-thesis was to examine the WTO rules and ADA and their application, as well as to analyse the anti-dumping legal and institutional frameworks in South Africa and Kenya. With that purpose in mind, the thesis showed that Kenya's legal framework is unclear, weak, and in violation of the ADA, whereas its institutional framework is almost non-existent. South Africa which has had a long history of the use of anti-dumping laws was used as an example for Kenya to provide lessons as it endeavours to develop its own regime. From its experience it has shown the importances of having these laws resemble those of Art VI of the GATT 1994 and the significance of having an administrating agency to implement and ensure that the measures are fulfilled to achieve success. In addition, to a small extent this thesis also pointed out some problem areas of the South African system, to which Kenya should pay attention to learn from and to avoid making similar errors.

Under liberalisation and unfair trade practices, anti-dumping laws are important to Kenya for protection of its domestic industries and the economy at large. However, clear procedures must be established to improve transparency and predictability, and to show compliance with the rule of law, to prevent legal battles in the WTO. The motivation of having this tool should go hand in hand with the recommendations provided by this mini-thesis to assist in the actualisation of the goal to develop the current anti-dumping laws.

Word count: 37,407.

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<sup>577</sup> Christian P 'African Dumping Grounds: South Africa's Struggle against Unfair Trade' (1996) *Boston University International Law Journal* 376.

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