

**UNIVERSITY OF THE WESTERN CAPE  
FACULTY OF LAW**

**AN ASSESSMENT OF GHANA'S ANTI-DUMPING  
REGIME IN LINE WITH THE WORLD TRADE  
ORGANISATION ANTI-DUMPING AGREEMENT**

**Mini-thesis submitted in partial fulfilment of the requirement for the  
LLM degree**

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**September 2017**

## **DECLARATION**

I declare that **An assessment of Ghana's anti-dumping regime in line with the World Trade Organisation Anti-Dumping Agreement** is my own work, that it has not been submitted before for any degree or assessment in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

**Signed:**

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**September 2017**

**Signed:**

**Professor Patricia Lenaghan**

**September 2017**

## **DEDICATION**

To Allah Subhanahu Wa-Ta'ala

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## **KEY WORDS**

ADA Compliance

Anti-dumping

Dumping

Ghana

Ghana Trade Policy

Ghana International Trade Commission

Tariff Advisory Board

Trade Remedies

## LIST OF ACRONYMS

ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BTI	Board of Trade and Industries
BTT	Board of Tariffs and Trade
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
ECOWAS	Economic Community of West African States
ERP	Economic Recovery Programme
EU	European Union
GATT	General Agreement on Tariffs and Trade
GITC	Ghana International Trade Commission
GITC ACT	Ghana International Trade Commission Act
IMF	International Monetary Fund
ITAA	International Trade Administration Act
ITAC	International Trade Administration Commission
ITO	International Trade Organisation
LI	Legislative Instrument
MFN	Most-Favoured Nation

PNDCL	Provisional National Defence Council Law
SACU	Southern African Customs Union
SAP	Structural Adjustment Programme
SARS	South African Revenue Service
SIT	Special Import Taxes
TAB	Tariff Advisory Board
TSSP	Trade Sector Support Programme
UK	United Kingdom
US	United States of America
WTO	World Trade Organisation

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# CHAPTER 1

## INTRODUCTION

### 1.1 BACKGROUND TO THE STUDY

The establishment of an anti-dumping regime has become commonplace for many a government that seeks to protect and promote its local industries. One reason which appears to be dominant by its proponents is the need to curb predatory pricing.<sup>1</sup> Another reason given by the proponents of anti-dumping is the need to maintain a level playing field for players in any particular industry.<sup>2</sup> With these reasons and probably many others, anti-dumping legislation began to find its way into present-day trade.

Canada, with its anti-dumping statute of 1904 [An Act to Amend the Customs Tariff 1897, 4 Edw VIII, 1 Canada Statutes 111 (1904)] is credited with the first modern anti-dumping legislation.<sup>3</sup> New Zealand followed in 1905 with the Agricultural Implement Manufacture, Importation and Sale Act 1905, which was primarily meant to protect New Zealand's manufacturers of agricultural implements.<sup>4</sup> The Industries Preservation Act 1906 which Australia enacted was to deal with market monopoly by manufacturers but it also contained provisions on anti-dumping.<sup>5</sup> The first decade of the 20<sup>th</sup> century will thus qualify to be called the introductory decade of anti-dumping legislation.

The first decade legislation had rudimentary provisions on anti-dumping. For example, in the case of Canada, the Act gave a discretion for the anti-dumping duty to be levied administratively<sup>6</sup> and as Horlich puts it, 'the ... law did not require any showing that the exporter had a home-market monopoly, market protection, home market subsidies, intent or

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<sup>1</sup> McGee RW 'Ethical aspects of anti-dumping laws' available at <http://dx.doi.org/10.2139/ssrn.242412> (accessed 23 August 2017).

<sup>2</sup> McGee RW 'Ethical aspects of anti-dumping laws' available at <http://dx.doi.org/10.2139/ssrn.242412> (accessed 23 August 2017).

<sup>3</sup> Deardorff AV & Stern RM 'A centennial of anti-dumping legislation and implementation: Introduction and overview' available at <http://fordschool.umich.edu/rsie/workingpapers/Papers526-550/r538.pdf> (accessed 26 January 2017).

<sup>4</sup> The New Zealand Trade Consortium 'Anti-dumping in New Zealand - A century of protection from "unfair" trade?' *New Zealand Trade Consortium Working Paper no 39* (2005)14.

<sup>5</sup> Duarte LC *Dumping and Anti-Dumping in International Trade: Origins, Legal Nature, and Evolution Developments in Brazil and in the United States* (unpublished LLM thesis, University of Georgia, 1997) 17.

<sup>6</sup> Ciuriak D 'Anti-dumping at 100 years and counting' available at <http://ssrn.com/abstract=2268239> (accessed 27 January 2017).

ability to destroy local industry or ability to recoup any losses incurred while doing so'.<sup>7</sup> The law did not also provide for petition to a neutral arbiter.<sup>8</sup>

The second decade of the 20<sup>th</sup> century witnessed a replication, as well as departure, from the Canadian-type anti-dumping legislation. South Africa, like New Zealand and Australia, introduced anti-dumping legislation in this decade (1914 to be precise<sup>9</sup>) and adopted the Canadian approach.<sup>10</sup> The United States of America (US) came with its anti-dumping legislation in 1916.<sup>11</sup> The US law required a complainant in an anti-dumping case to provide proof to a judge of an intent to destroy that local complainant.<sup>12</sup> But the US could not hold on to its novel move and had to return to the Canadian model with some modification.<sup>13</sup>

This modification came in the US Anti-Dumping Act of 1921 which required that the Treasury Secretary also had to find injury for dumping to hold.<sup>14</sup> Japan also experimented with anti-dumping legislation in the third decade of the 20<sup>th</sup> century with its anti-dumping laws of 1920.<sup>15</sup> The United Kingdom (UK) introduced the Safeguarding of Industries Act 1921<sup>16</sup> as its contribution to the evolution of anti-dumping legislation. The 20<sup>th</sup> century third decade anti-dumping legislation was more fleshed-out than their predecessors. In spite of the US and UK legislation being primarily targeted at the German industry,<sup>17</sup> the UK law still had complex procedures to establish dumping. The process had to go through nine different steps, including the passage of a Resolution by the British House of Commons, before an anti-dumping duty could be imposed.<sup>18</sup>

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<sup>7</sup> Horlich GN *World Trade Organization and International Trade Law: Anti-Dumping, Subsidies and Trade Agreements* (2014) 3.

<sup>8</sup> Horlich GN (2014) 3.

<sup>9</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/ttbd/gad/> (accessed 28 November 2016).

<sup>10</sup> Horlich GN (2014) 3.

<sup>11</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/ttbd/gad/> (accessed 28 November 2016).

<sup>12</sup> Horlich GN (2014) 3.

<sup>13</sup> Horlich GN (2014) 3.

<sup>14</sup> Horlich GN (2014) 4.

<sup>15</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/ttbd/gad/> (accessed 28 November 2016).

<sup>16</sup> Richards PM 'Political primacy in economic laws: A comparison of British and American anti-dumping legislation, 1921' *LSE Working Paper No. 13/93* (1993) 1.

<sup>17</sup> Richards PM (1993) 8-9.

<sup>18</sup> Duarte LC (1997) 19.

It was all this anti-dumping legislation that moved the then League of Nations to undertake a study of dumping in the 1920s.<sup>19</sup> The League, however, was unable to establish any rules on anti-dumping.<sup>20</sup> Universal rules on anti-dumping legislation were therefore non-existent. Every country was left to enact and/or apply anti-dumping laws as they deemed fit. The freedom to enact and/or apply anti-dumping legislation as a country wished was however not to last forever. The US proposed a failed suggestion to regulate anti-dumping legislation globally as talks for the establishment of the International Trade Organisation (ITO) were on-going; but at least succeeded in getting Article VI included in the then General Agreement on Tariffs and Trade (GATT) of 1947.<sup>21</sup>

Canada's 1904 anti-dumping legislation ushered in a new wave of legislation related to international trade. Besides the countries mentioned above, other countries like Vietnam and Guatemala that hardly feature on the world economic radar have followed suit.<sup>22</sup> Vanuatu, Bahrain and Seychelles are among lesser known countries that have notified the Committee on Anti-Dumping Practices (Committee)<sup>23</sup> of the World Trade Organisation (WTO) of anti-dumping legislation and/or regulations they have put in place.<sup>24</sup>

The number of countries that had notified the Committee of their anti-dumping legislation stood at 79 as of October 2016.<sup>25</sup> This is an increase from 57 as of October 1995.<sup>26</sup> Anti-dumping laws have become must-have legislation, but some countries have hardly made use of them beyond notifying the Committee about their existence.<sup>27</sup>

The increase in anti-dumping legislation has been accompanied by an increase in anti-dumping initiations and/or measures. From 1995 when the WTO's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) took effect, anti-dumping initiations by countries increased from 157 to almost 400 in 1999 – five years into the

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<sup>19</sup> Stewart TP quoted by Raslan RAA *Anti-dumping: A Developing Country Perspective* (2008) 4.

<sup>20</sup> Raslan RAA (2008) 4.

<sup>21</sup> Raslan RAA (2008) 4.

<sup>22</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/ttbd/gad/> (accessed 28 November 2016).

<sup>23</sup> This is the WTO Committee that administers its anti-dumping regime.

<sup>24</sup> WTO *Report of the Committee on Anti-Dumping Practices 2016* WTO Doc G/L/1158 G/ADP/23.

<sup>25</sup> WTO *Report of the Committee on Anti-Dumping Practices 2016* WTO Doc G/L/1158 G/ADP/23.

<sup>26</sup> WTO *Report of the Committee on Anti-Dumping Practices 1995* WTO Doc G/L/34.

<sup>27</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/ttbd/gad/> (accessed 28 November 2016).

ADA.<sup>28</sup> Though there was a fall from the 1999 figures, anti-dumping initiations have still been above the 1995 level in all the 20 years after 1995.<sup>29</sup>

There is equally an increase in the imposition of anti-dumping measures<sup>30</sup> by countries. The anti-dumping measures imposed by countries in the first 20 years of the ADA have in most cases been above the 1995 figure of 120.<sup>31</sup> In the early years of the millennium, anti-dumping measures were above 200.<sup>32</sup>

Intensive anti-dumping initiating countries now range from developing to developed ones, as well as to countries in transition.<sup>33</sup> Argentina, Australia, Brazil, the European Union (EU), the US and India have all undertaken more than 300 initiations from January 1995 to June 2016, with India hitting the 818 mark.<sup>34</sup> These Members have together imposed 1 884 anti-dumping measures within the same period.<sup>35</sup> China is by far the biggest target of anti-dumping initiations and measures.<sup>36</sup> Smaller economies, like Armenia, Dominican Republic and Peru, are now active users of anti-dumping measures.<sup>37</sup>

No other measure in the WTO system has kept the dispute resolution mechanism of the WTO busier than measures related to dumping and/or anti-dumping. When disputes at the WTO Dispute Settlement Body (DSB) reached the 500 mark, cases related to anti-dumping numbered 114.<sup>38</sup> Two more anti-dumping cases have since been filed bringing the number of anti-dumping cases to 116 as of December 2016.<sup>39</sup> This represents almost 30 per cent of disputes

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<sup>28</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>29</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>30</sup> See s 2.6.3 of chap 2 for a discussion on anti-dumping measures.

<sup>31</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>32</sup> These are the years: 2000, 2002 and 2003.

<sup>33</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>34</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>35</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>36</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 25 August 2017).

<sup>37</sup> *WTO Report of the Committee on Anti-Dumping Practices 2016* WTO Doc G/L/1158 G/ADP/23.

<sup>38</sup> WTO 'WTO disputes reach 500 mark' available at [https://www.wto.org/english/news\\_e/news15\\_e/ds500rfc\\_10nov15\\_e.htm](https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm) (accessed 20 November 2016).

<sup>39</sup> *European Union - Measures Related to Price Comparison Methodologies* WT/DS516/10 and *United States - Measures Related to Price Comparison Methodologies* WT/DS515/9.

filed with the DSB as of December 2016. The WTO arrangement is made up of many agreements and declarations numbering more than 20.<sup>40</sup> To have anti-dumping cases constituting 30 per cent of the cases before the DSB is a huge proportion.

Article VI(2) of the GATT states that ‘in order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product’.

This provision gives legitimacy to any move a country might make to neutralise the effects of dumping. The move must however follow set criteria; else it will be prone to capriciousness and arbitrariness. That explains the need for the ADA.

This study therefore examines the laws and/or regulations currently in place in Ghana. It particularly pays attention to the workings of the Tariff Advisory Board (TAB) and whether or not its actions are in conformity with WTO rules. The study also analyses the recently-passed Ghana International Trade Commission (GITC) Act, 2016 (Act 926) to see whether it conforms to WTO rules.

## **1.2 STATEMENT OF THE PROBLEM**

Ghana has opted for trade liberalisation for decades now.<sup>41</sup> With liberalisation came a decline especially in the manufacturing sector.<sup>42</sup> Cement manufacturing is one sector that has fared well in spite of liberalisation until recently when the country became much more exposed to cement imports, increasing the pressure on government to introduce anti-dumping measures.<sup>43</sup> The surge in imported products has been attributed to dumping by manufacturers.<sup>44</sup>

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<sup>40</sup> WTO ‘Legal texts: The WTO agreements’ available at [https://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](https://www.wto.org/english/docs_e/legal_e/final_e.htm) (accessed 24 August 2017).

<sup>41</sup> Laryea A & Akuoni S ‘An overview of trade policies and developments in Ghana’ in Ackah C & Aryeetey E (eds) *Globalization, Trade and Poverty in Ghana* (2012) 12-13.

<sup>42</sup> See s 3.4 of chap 3 for a discussion on factors that led to the establishment of the TAB.

<sup>43</sup> Global Cement ‘Ghana manufacturers propose cement anti-dumping duties’ available at <http://www.globalcement.com/news/item/3692-ghana-manufacturers-propose-cement-anti-dumping-duties> (accessed 29 November 2016).

<sup>44</sup> See s 3.4 of chap 3.

That explains why the government has to move away from arbitrary increases in tariffs, to establish the TAB and to enact the GITC Act to take advantage of the remedies available in the global trading system.<sup>45</sup>

### **1.3 SIGNIFICANCE OF THE PROBLEM**

Ghana is a founding Member of the WTO and has undertaken to liberalise trade in conformity with WTO rules. Liberalisation, however, is having a negative impact on certain sectors of the country's economy. It therefore must take measures; measures that will not negate its commitments and obligations under the WTO.

Anti-dumping measures are exceptions to the core principles of the WTO. They attack the principles of most-favoured nation treatment (MFN) and market access among others. Any move therefore by a country that seeks to undermine WTO principles must be studied; else the very foundation of the world trading system will be shaken.

### **1.4 RESEARCH QUESTION**

This study seeks to answer the question whether or not Ghana's anti-dumping regime as it currently stands, meet the requirements of the ADA.

### **1.5 AIMS AND OBJECTIVES OF THE STUDY**

The aim of the study is to critically examine and analyse Ghana's anti-dumping regime vis-à-vis the ADA. The study, it is hoped, will not only help in shaping the laws and regulations of Ghana with regards to anti-dumping but will also inform their application.

The main objectives of the study are as follows:

- a) To examine and analyse the law on anti-dumping as contained in the ADA.
- b) To examine and analyse the laws and regulations on anti-dumping in Ghana.
- c) To examine the compatibility of these laws and regulations with the ADA.
- d) To examine and analyse the laws and regulations on anti-dumping in South Africa.
- e) To examine the compatibility of South African laws and regulations with the ADA.

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<sup>45</sup> See chap 3 generally.

- f) To suggest possible ways/solutions to improve the anti-dumping regime in Ghana.

## 1.6 LITERATURE REVIEW

There are a number of studies on dumping and anti-dumping legislation, but there is a paucity of information in relation to Ghana. In his study 'The development of anti-dumping policy and practice in Ghana from independence to the present', Kufuor<sup>46</sup> argues that Ghana's anti-dumping system started in the 1960s, soon after Ghana's independence. He sees an anti-dumping system in the power the State assumed then in differentiating between locally manufactured goods and imported goods to the extent that the State refused import licences for goods that were manufactured and available locally. He maintains that the Special Import Taxes (SITs) introduced in the 1990s were anti-dumping moves by government though the statute did not say so and the content of the statute contained no provision for calculating dumping margins and injury.

Writing on Nigeria's proposed Anti-Dumping and Countervailing Bill, Ikeagwuchi<sup>47</sup> concluded that Nigeria's model Bill to cater for dumping is not WTO compliant. He identified definitional gaps, incoherence and inconsistencies in the draft Bill as some of the reasons why it cannot stand the WTO test when passed.

Illy<sup>48</sup> who focused on why African countries are not making use of trade remedy measures to protect their industries, identified lack of national legislation as one reason why African countries are less active in the use of trade remedies. He pointed out that lack of capacity is one key factor hampering Africa. Of significant importance is that the capacity is not only lacking when it comes to State institutions, but lacking among industry players.

Vinti<sup>49</sup> adds to the debate that Africa lacks capacity to make use of trade remedy measures; but his focus this time is on the South African courts. He posits that lack of capacity in international trade may have been the reason why Africa features less in trade law disputes at the WTO. He

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<sup>46</sup> Kufuor KO 'The development of anti-dumping policy and practices in Ghana from independence to the present' in Prasad PS (ed) *Anti-Dumping Laws: Country Perspectives* (2005).

<sup>47</sup> Ikeagwuchi GA *Implementing Effective Trade Remedy Mechanisms: A Critical Analysis of Nigeria's Anti-Dumping and Countervailing Bill, 2010* (unpublished LLM thesis, University of Pretoria, 2014).

<sup>48</sup> Illy O 'African countries and the challenges of trade remedy mechanisms within the WTO' available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2799553](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2799553) (accessed 25 November 2016).

<sup>49</sup> Vinti C 'A spring without water: The conundrum of anti-dumping duties in South African law' available at <http://journals.assaf.org.za/per/article/view/723/2626> (accessed 13 January 2017).

based his analysis on *Progress Office Machines v the South African Revenue Service*<sup>50</sup> and *Association of Meat Importers v ITAC*.<sup>51</sup> To him the courts may end up interpreting anti-dumping laws as interpreted by litigants, and this will further add to the uncertainty on dumping law.

But Vinti's position is not shared by all. Ndlovu<sup>52</sup> rather suggests that the South African courts have brought certainty to the law on dumping and anti-dumping in the country. Basing his claim on cases, such as *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,<sup>53</sup> Ndlovu came to the conclusion that that case has laid down the law on dumping and anti-dumping in South Africa. He concedes though that *Progress Office Machines v the South African Revenue Service* is an exception.

Brink<sup>54</sup> focused his studies on the injury and causality analysis that an investigative authority of a country must undertake before any anti-dumping duty or measure can be imposed. He came to the conclusion that the South African system does not provide for this, making it prone to actions at the WTO level. He made the observation taking into account the fact that the South African investigative body – the International Trade Administration Commission (ITAC), does not conduct 'a proper comparison' between the subject product and the domestic like product; does not provide proper analysis of injury factors; does not give consideration to the submissions of interested parties; and does not clearly explain the basis upon which it reaches a finding of injury. He recommends reform in these areas if South Africa is to escape suits at the WTO.

In analysing the transformation the South African anti-dumping regime has gone through, Joubert<sup>55</sup> recommends that any country intending to have anti-dumping legislation should as a matter of importance consult with the private sector and other stakeholders. He is of the opinion

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<sup>50</sup> *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA).

<sup>51</sup> *Association of Meat Importers v ITAC* 2013 (4) All SA 253 (SCA).

<sup>52</sup> Ndlovu L 'South Africa and the World Trade Organization Anti-Dumping Agreement: Nineteen years into democracy' available at

[https://www.researchgate.net/publication/264236297\\_South\\_Africa\\_and\\_the\\_World\\_Trade\\_Organization\\_Anti-Dumping\\_Agreement\\_nineteen\\_years\\_into\\_democracy](https://www.researchgate.net/publication/264236297_South_Africa_and_the_World_Trade_Organization_Anti-Dumping_Agreement_nineteen_years_into_democracy) (accessed 28 November 2016).

<sup>53</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (2010) 5 BCLR 457.

<sup>54</sup> Brink G 'X-raying injury findings in South Africa's anti-dumping investigations' (2015) 23 *Afr. J. Int'l & Comp. L.* 144-173.

<sup>55</sup> Joubert N 'The reform of South Africa's anti-dumping regime' available at

[https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm) (accessed 28 November 2016).

that since it is the private sector that is engaged in trade, any move by government that does not involve the private sector is not likely to take private sector concerns into consideration.

In their advice to developing countries, Dorn and Layton<sup>56</sup> asked countries to consider the expense needed to conduct anti-dumping investigations and, for that matter, having an anti-dumping regime. They are of the opinion that balancing the demands of industry and having the foundation right are key if a country is to successfully rollout an anti-dumping regime that complies with the WTO rules.

In his view, Prusa<sup>57</sup> sees the rise in anti-dumping legislation as a growing problem for world trade. He thinks that any measure aimed at reforming anti-dumping within the WTO will be much more difficult to achieve now since there are many more countries making use of anti-dumping measures.

But Prusa is not the only person opposed to anti-dumping. McGee and Yoon<sup>58</sup> have stronger opinions against anti-dumping. They are of the opinion that anti-dumping is unethical since it denies the consumer the right to cheaper products and seeks to benefit only a few and that any reform of anti-dumping will not resolve the unethical nature of anti-dumping save its removal from the world trading system.

Bolton<sup>59</sup> also belongs to those who think there must be reform in the way anti-dumping measures are implemented, albeit to say that his call is for reform in administrative measure at the dispute resolution stage, not necessarily amendment of the text. In what he calls 'heightened scrutiny for anti-dumping cases' Bolton thinks the DSB can explicitly adopt a presumption that all anti-dumping disputes are against the core principle of the WTO. This position will mean there will be little incentive for countries to take disputes to the WTO and will increase the settlement of cases at the consultation stage.

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<sup>56</sup> Dorn JW & Layton DW 'The WTO Anti-Dumping Agreement: A guide for developing countries' available at <http://www.kslaw.com/library/pdf/DornLaytonWTO.pdf> (accessed 30 November 2016).

<sup>57</sup> Prusa TJ 'Anti-dumping: A growing problem in international trade' available at <http://www.nber.org/chapters/c0198.pdf> (accessed 20 October 2016).

<sup>58</sup> McGee RW & Yoon Y 'Anti-dumping laws should be consigned to the history books' *SSRN Working Paper* October 29 (2016).

<sup>59</sup> Bolton RM 'Anti-dumping and distrust: Reducing anti-dumping duties under the WTO through heightened scrutiny' (2011) 29 *Berkeley J. Int'l Law* 66-93.

Another criticism comes from Debapriya and Panda.<sup>60</sup> They see anti-dumping as a system that has evolved from being a soft protectionist policy to one that is now centre stage of global trade, used by both developed and developing countries, and thereby causing a great degree of trade distortion. They see as necessary the need to modify the definitions of dumping and injury, inculcating economic rationality into them. This should be done taking into account the public interest, else any measure will rather be for the protection of local industry.

Three views seem to dominate the literature so far reviewed: those who are indifferent to anti-dumping and see nothing seriously wrong with it; those who think the system as it is, is protectionist and needs reform; and those who think that the system cannot be corrected by reform but should be abolished altogether. This study however seeks to avoid taking a strong opinion on any of these views but rather seeks to look at the law on anti-dumping as contained in the ADA and how the laws of Ghana comply therewith.

## **1.7 METHODOLOGY**

The research methodology adopted is mainly analytical research. This was done using desk and library based research. The study relies on primary sources of information, like judgments and legislation (including constitutions where relevant); on empirical data from the WTO; and on journals and other writings to support its arguments and conclusions.

The study refers to the South African anti-dumping regime in the analysis, due to the fact that Ghana's GITC Act was informed by it.<sup>61</sup> Reference to South Africa is also made because it was an early user of anti-dumping measures and has gathered experience in that regard.<sup>62</sup>

## **1.8 OUTLINE OF THE STUDY**

In addition to this chapter, the study consists of four other chapters. Chapter 2 gives an appraisal of dumping and anti-dumping. It traces the history of anti-dumping legislation both at the national level and at the global level. The chapter focuses its major discussion on the ADA, looking at the ADA's substantive rules – concepts, such as the definition and determination of

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<sup>60</sup> Debapriya A & Panda TK 'Anti-dumping retaliation: A common threat to international trade' *Humanistic Management Network Research Paper Series No 14/16* (2006).

<sup>61</sup> USAID 'Technical assistance for the establishment and capacity building of the Ghana International Trade Commission' available at [http://pdf.usaid.gov/pdf\\_docs/PA00JBZK.pdf](http://pdf.usaid.gov/pdf_docs/PA00JBZK.pdf) (accessed on 30 October 2016).

<sup>62</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/ttbd/gad/> (accessed 28 November 2016).

dumping, normal value, export price, injury and domestic industry; procedural rules – that is, principles on initiation of an investigation and confidentiality; and the anti-dumping measures permissible under the ADA.

Chapter 3 is the heart of the study. It is divided into two parts. The first part discusses the history of domestic industry protection in Ghana. The chapter looks at how Ghana used import substitution as a means of protecting domestic industry until it was forced to liberalise due to the International Monetary Fund (IMF) and World Bank programmes it subscribed to in 1983. Chapter 3 further discusses the measures put in place after 1983 to protect the domestic industry until the TAB. The second part examines the GITC Act, paying much more attention to the sections on anti-dumping. It also assesses the Act's compatibility with the ADA.

In Chapter 4, South Africa's anti-dumping regime is discussed. The chapter traces the history of anti-dumping legislation across the globe and seeks to place South Africa within the history of the evolution of anti-dumping legislation. The chapter discusses the anti-dumping initiations South Africa has undertaken and how these initiations have resulted in it being taken to the WTO dispute settlement mechanism. The South African legislation is also analysed in the light of the ADA.

Chapter 5, the final chapter, contains the conclusions and recommendations. The chapter discusses the entire work and serves as a summary of the work. It gives the conclusions made as far as the research is concerned, and concludes by making some recommendations.

## CHAPTER 2

### DUMPING AND THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (ADA)

#### 2.1 INTRODUCTION

In the world of trade liberalisation, there is the realisation that unfettered liberalisation is not possible. This is because some practices in a liberalised trade environment have been identified as ‘unfair’ and confer benefits on products, making them cheaper than they would ordinarily be.<sup>63</sup> One such practice deemed ‘unfair’ is dumping.<sup>64</sup> Its unfairness has permitted the trading world to sanction a remedy, known as an anti-dumping action or measure, to counteract the undue advantage dumping confers on products.<sup>65</sup>

This chapter discusses dumping, looking at the subject from the earliest times when it was not regulated at the global level. The chapter explains the concept and its categories. It further traces the efforts made at the global level to regulate dumping. It discusses especially the ADA, also known as the Anti-Dumping Agreement which is the current framework for regulating anti-dumping practices across the globe.

#### 2.2 THE EVOLUTION OF THE DEFINITION OF DUMPING

The definition of dumping has evolved over the years; starting with the definition of classical writers in the 1920s, text writers in the 1990s, and the definition of dumping by the World Trade Organisation (WTO) and/or the General Agreement on Tariffs and Trade (GATT).

##### 2.2.1 Classical definition

Early writers defined dumping *simpliciter* as selling a product at a lower price in one national market than in another.<sup>66</sup> Viner who gave this definition did not consider where the product’s price was lower or higher. One can thus, talk of dumping even in the home of the product’s

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<sup>63</sup> Brink G ‘Trade Remedies in the Pacific: An investigation into the advantages and disadvantages of using trade remedies in Pacific Island Countries’ *Research Paper* (2015) 5.

<sup>64</sup> Brink G (2015) 5.

<sup>65</sup> Brink G (2015) 5.

<sup>66</sup> Viner J *Dumping: A Problem in International Trade* (1923) 3.

manufacturing when the price of the product is lower than that charged in foreign markets.<sup>67</sup> Dumping may even occur without taking the country of manufacture into consideration; that is, where a manufacturer sells a product to two or more countries at different prices, dumping could be inferred.<sup>68</sup> Dumping is thus the same as price discrimination between two national markets.<sup>69</sup>

### **2.2.2 Modern definition**

Willig<sup>70</sup> and Matsushita and others<sup>71</sup> defined dumping variously. To Willig, dumping is simply the practice of selling a good for export at a price below that charged for an identical good in the exporting country; thus, price discrimination between national markets.<sup>72</sup> This definition moves away from the classical one and confines dumping only to goods exported, never to goods manufactured in one's home country. The definition also situates dumping in relation to price. It agrees with the classical views as far as price discrimination is concerned but deviates from it when it posited that dumping occurs only if the export price is less.

Matsushita and others understand dumping to mean exporting a product to another country at an unduly low price to drive out competition.<sup>73</sup> This introduces another element which is probably why dumping is a 'problem' in world trade. It suggests that the aim of dumping is to drive out competition. The definition may be problematic because it is suggesting that dumping must not be seen as a problem if it does not drive out competition.

### **2.2.3 World Trade Organisation definition**

A universal definition of dumping is captured in Article VI of the then GATT 1947 (now GATT 1994). Dumping according to the Article occurs when 'products of one country are introduced

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<sup>67</sup> Viner J (1923) 5.

<sup>68</sup> Viner J (1923) 5.

<sup>69</sup> Viner J (1923) 3.

<sup>70</sup> Willig RD 'Economic effects of anti-dumping policy' in Lawrence RZ (ed) *Brookings Trade Forum* (1998) 59.

<sup>71</sup> Matsushita M, Schoenbaun TJ & Mavroidis PC *The World Trade Organization: Law, Practice, and Policy* (2002) 302.

<sup>72</sup> Willig RD (1998) 59.

<sup>73</sup> Matsushita *et al* (2002) 302.

into the commerce of another country at less than the normal value of the products...'.<sup>74</sup> The definition was maintained in the ADA when it states:<sup>75</sup>

For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

Of significant importance in this definition is the phrase- 'normal value'. The definition has circumscribed dumping to that which happens only when there is a lower export price; and not just lower but the 'lowerness' must itself be below the normal value of the product.

To properly appreciate these definitions and why dumping has been given global recognition, a discussion of its categories will help illuminate the reasons why dumping is abhorred in some quarters.

### **2.3 CATEGORIES OF DUMPING**

Dumping has been categorised variously. One however needs to distinguish categorisation from definition. Whereas definition helps one to identify what dumping is, categorisation helps in identifying the class to which a particular dumping strategy belongs. One categorisation puts dumping under two headings: non-monopolising dumping and monopolising dumping.<sup>76</sup> Under the non-monopolistic classification, there is market expansion dumping - which aims purely to secure or explore new markets.<sup>77</sup> There is also cyclical dumping which occurs because there is substantial excess production due to a downturn in demand<sup>78</sup> or market recession,<sup>79</sup> and the firm sees, for instance, that the cost of reducing its workforce and cutting down production capacity is higher than when compared to continuous production.<sup>80</sup> Further, there is state

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<sup>74</sup> Article VI(1) of the GATT 1994.

<sup>75</sup> Article 2.1 of the ADA.

<sup>76</sup> Willig RD (1998) 61.

<sup>77</sup> Willig RD (1998) 61.

<sup>78</sup> Willig RD (1998) 62.

<sup>79</sup> Matsushita *et al* (2002) 303.

<sup>80</sup> Hoekman BM & Kosteci MM *The Political Economy of the World Trading System: The WTO and Beyond* (2009) 437.

trading dumping which firms engage in in order to get access to hard currency, and therefore do not care much about selling at dumped prices as long as they acquire hard currency.<sup>81</sup>

Under monopolistic dumping, there is strategic dumping and predatory pricing dumping.<sup>82</sup> As regards strategic dumping, a two-pronged approach is often adopted: exporting at dumped prices and putting up barriers to protect the exporter's home market.<sup>83</sup> This is normally done by industries that are capital intensive and gives the firms involved the advantage of economies of scale.<sup>84</sup> Strategic dumping is seen by some as forward pricing in the sense that in the initial stages sales of a product are done below cost with the hope that economies of scale will ultimately balance out any loss as and when the product reaches its full cycle.<sup>85</sup> Predatory dumping, however, is carried out by firms with the aim of monopolising the market by selling a product below cost to drive out competition; but will eventually increase prices to a profit level when competitors are driven out.<sup>86</sup> To be able to engage in this, a company must satisfy itself that other firms cannot easily re-enter the market to compete with it.<sup>87</sup> Predatory dumping is also seen as 'malignant' dumping and has been described as the most reprehensible form of dumping.<sup>88</sup>

Writers like Willig have disputed the negative effect of dumping.<sup>89</sup> He is of the opinion that consumers (individuals and firms that rely on dumped products) benefit from the low prices that dumping creates.<sup>90</sup> Nevertheless, the trading world recognises that dumping causes injury to the industry of the importing country and has a remedy for it.

## **2.4 DUMPING REMEDY**

The remedy available for dumping is an anti-dumping duty/measure. Sykes defines an anti-dumping duty or measure as one which is imposed on goods, in addition to the normal customs duties chargeable on goods, in order to counteract certain 'unfair' pricing practices by private firms that injure or threaten to cause 'material injury' to a competing industry in an importing

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<sup>81</sup> Willig RD (1998) 61- 63.

<sup>82</sup> Willig RD (1998) 64-66.

<sup>83</sup> Willig RD (1998) 64.

<sup>84</sup> Willig RD (1998) 64.

<sup>85</sup> Matsushita *et al* (2002) 303.

<sup>86</sup> Matsushita *et al* (2002) 304.

<sup>87</sup> Matsushita *et al* (2002) 304.

<sup>88</sup> Viner J (1923) 26.

<sup>89</sup> Willig RD (1998) 67.

<sup>90</sup> Willig RD (1998) 67.

nation.<sup>91</sup> An anti-dumping measure is one of three WTO approved trade remedies available to countries. The other two are safeguards and countervailing measures.<sup>92</sup>

## 2.5 GLOBAL REGULATION OF ANTI-DUMPING LEGISLATION

The surge in anti-dumping legislation across the globe called for a global effort at regulating it. The League of Nations championed that when it commissioned two studies that resulted in two reports: Jacob Viner's Memorandum on Dumping and Dr. Trendelenburg's description of legislation on anti-dumping laws.<sup>93</sup> The second major effort was the incorporation of Article VI in the GATT 1947, largely at the instance of the US.<sup>94</sup> There was also the 1958 GATT Report on Anti-Dumping,<sup>95</sup> and the Kennedy Round Anti-Dumping Code that had serious practical application because the US, which was a major player, did not sign it.<sup>96</sup> South Africa, which was named in the GATT 1958 study as the single largest user of anti-dumping instruments, did not also sign the Kennedy Round Anti-Dumping Code.<sup>97</sup> The Code was revised during the Tokyo Round but challenges in its application led to a re-opening of negotiations on regulating anti-dumping practice during the Uruguay Round.<sup>98</sup>

The ADA was birthed as a result of the Uruguay Round and it is that which regulates anti-dumping practices to date. However, its introduction appears to violate key world trade principles: that is; the most-favoured nation (MFN) principle, and the principle behind bound tariff.<sup>99</sup> This is so because anti-dumping duties legitimise discrimination in terms of tariffs charged on imports, and Members can impose tariffs higher than their bound tariff.

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<sup>91</sup> Sykes AO 'Trade remedy laws' *Chicago John M. Olin Law & Economics Working Paper No. 240* (2d series) (2005) 2.

<sup>92</sup> See Sykes (2005) and Brink G (2015) for a discussion on these remedies.

<sup>93</sup> GATT *Report on Anti-Dumping and Countervailing Duties August, 1958* GMT/77/58.

<sup>94</sup> Raslan RAA *Anti-Dumping: A Developing Country Perspective* (2008) 4.

<sup>95</sup> GATT 'International organization' available at [www.jstor.org/stable/2704360](http://www.jstor.org/stable/2704360) (accessed 20 Feb. 2017).

<sup>96</sup> WTO 'Technical information on anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (accessed 21 Feb. 17).

<sup>97</sup> Joubert N 'The reform of South Africa's anti-dumping regime' available at [https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm) (accessed 05 April 2017).

<sup>98</sup> Krishna R 'Anti-dumping in law and practice' *World Bank Policy Research Working Paper I 823* (1997) 17-8.

<sup>99</sup> Bentley P & Silberston A *Anti-Dumping and Countervailing Action: Limits Imposed by Economic and Legal Theory* (2007) 5.

## **2.6 AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (ADA)**

The ADA is a treaty as it falls within the definition of ‘treaty’ as contained in Article 2 of the Vienna Convention on the Law of Treaties (Vienna Convention) which states that a treaty is an ‘international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.’

In interpreting the ADA therefore, the Vienna Convention, particularly Article 31, shall be useful. This means that the text of the ADA, its preamble<sup>100</sup> and annexes are together seen as a whole in interpretation.

The ADA has three parts. The first part consists of the substantive and procedural rules. The second part deals with the Committee that administers the ADA and dispute resolution under the ADA. The last part more or less sums up the ADA. There are two annexes to the ADA.<sup>101</sup> The following discussion will look at the substantive and procedural rules, dumping remedies and other issues contained in the ADA.

### **2.6.1 Substantive rules**

It is necessary to examine what constitutes dumping in terms of the ADA and Article VI of the GATT 1994 and the circumstances under which a country can legitimately impose an anti-dumping measure, taking into account factors, such as, normal value, injury and domestic industry.

#### **2.6.1.1 Definition and determination of dumping**

An examination of the definition of dumping in Articles VI(1) of GATT 1994 and 2.1 of the ADA identifies what constitutes dumping insofar as the ADA and Article VI are concerned.

1. Dumping occurs when a product of one country is exported for commerce to another country at less than the normal value of the product;-

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<sup>100</sup> It is important to state that the ADA has no preamble.

<sup>101</sup> See another categorisation in: WTO ‘Anti-dumping: Agreement’ available at [https://www.wto.org/english/tratop\\_e/adp\\_e/antidum2\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/antidum2_e.htm) (accessed 06 February 2017).

2. The export price of the product in question is less than the price of the comparable like product sold in the domestic market of the exporting country;- and
3. The sale of the comparable like product in the domestic market of the exporting country must be in the ordinary course of trade.

The Appellate Body<sup>102</sup> held in *US - Zeroing (Japan)*<sup>103</sup> that Article 2.1 of the ADA and Article VI(1) are the definitional provisions of dumping and that the definition above applies throughout the ADA any time dumping is mentioned.

### **2.6.1.2 Normal value**

Normal value has been held in *US - Shrimp (Vietnam)*<sup>104</sup> to be the price of the same product in the exporter's domestic market during a reference period. The normal value is the first factor to consider in determining whether or not there is dumping.

### **2.6.1.3 Other modes of arriving at the normal value**

The ADA permits other methods to be used in arriving at the normal value when such value cannot be ordinarily ascertained. These modes are resorted to in the following circumstances:<sup>105</sup>

1. Where the volume of sales in the home country of the exporter is below five per cent of the volume of sales to the importing country; except where a lower than five per cent volume will provide for proper comparison;-
2. Where there are no sales of the like product in the home market of the exporter;- or
3. Where a particular market situation does not make for proper comparison of prices.

If any of the above factors are present, a Member is permitted to look to exports of the product to an appropriate third country or to construct a normal value taking into account cost of production, and reasonable administrative cost, selling and general costs and profit.<sup>106</sup>

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<sup>102</sup> This functions as the appellate 'court' in the WTO dispute settlement mechanism.

<sup>103</sup> Appellate Body Report *United States – Measures Relating to Zeroing and Sunset Reviews* WT/DS322/AB/R paras 108-110 (*US – Zeroing (Japan)*).

<sup>104</sup> Panel Report *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam* WT/DS404/R para 7.14.

<sup>105</sup> Articles 2.2 & 2.4 of the ADA.

<sup>106</sup> Article 2.2 of the ADA.

There are no sales to a third country in some cases. It is also not always the case that the producer of the product in question has acceptable records. In any of these cases, one is allowed to either rely on export sales to a third country or to construct the cost of production taking into account administrative, selling and general costs and profits using one of four ways:<sup>107</sup>

1. The actual cost incurred by the producer in producing and selling within the domestic market;
2. Where no such information is available, on the basis of the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
3. The weighted average of the cost incurred by third party producers of the like product in the domestic market; and
4. Any other reasonable method which must take note of profits normally realised by producers of like products in the domestic market, provided that the amount of profits so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

The Appellate Body has ruled in *EC – Bed Linen*<sup>108</sup> that the weighted average as used in 3 above cannot be the weighted average for only one exporter in the home market of the producer.<sup>109</sup> It thus means that the weighted average must be constructed by reference to at least two exporters.

#### **2.6.1.4 Export price**

The export price is the transaction price at which the foreign producer sells the product to an importer in the importing country.<sup>110</sup> Where there is no export price or the export price is not reliable, investigating authorities may construct the export price based on:<sup>111</sup>

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<sup>107</sup> Article 2.2.2 of the ADA and its footnote.

<sup>108</sup> Appellate Body Report *European Communities – Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India* WT/DS141/AB/R paras 74-8 (*EC – Bed Linen*).

<sup>109</sup> Appellate Body Report *EC – Bed Linen* paras 74-8.

<sup>110</sup> WTO ‘Technical information on anti-dumping’ available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm#notice](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#notice) (accessed 01 May 2017).

<sup>111</sup> Article 2.3 of the ADA.

- a. The price at which the imported products are first sold to an independent buyer;- or,
- b. A reasonable basis.

It has been noted in *US - Stainless Steel (Korea)*<sup>112</sup> that if the sale to an independent buyer does not give the export price, one can rely on the methodology laid down in Article 2.4 of the ADA to appropriately construct the export price. The wording of Article 2.3 indicates that investigating authorities need to first consider the sale to an independent buyer. It is only when there is no independent buyer that investigating authorities may construct the export price on a reasonable basis.

The determination of whether or not dumping exists involves, amongst other things, a determination of the difference between the export price and the normal value. Article 2.4 therefore emphasises the need to be fair in comparing the export price with the normal value. It adds that the comparison should normally be made at ex-factory level, making due allowance for costs, including taxes and duties, incurred between importation and resale, and for profits. These are the only adjustments permitted according to the Panel<sup>113</sup> in *US - Stainless Steel (Korea)*.<sup>114</sup> The responsibility to be fair according to the Appellate Body in *US – Hot-Rolled Steel*<sup>115</sup> is put on a country’s investigating authority. That does not however mean that interested parties are excluded from ensuring that the process is fair.<sup>116</sup>

### **2.6.1.5 Like product**

The fairness in comparison, which is demanded of investigating authorities by Article 2.4 of the ADA, involves a comparison of like products. A like product, according to Article 2.6 of the ADA, is ‘a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration’.

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<sup>112</sup> Panel Report *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* WT/DS179/R para 6.94 (*US – Stainless Steel (Korea)*).

<sup>113</sup> This functions as the ‘court’ of first instance in the WTO dispute settlement mechanism.

<sup>114</sup> Panel Report *US – Stainless Steel (Korea)* para 6.94.

<sup>115</sup> Appellate Body Report *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WT/DS184/AB/R para 178 (*US – Hot-Rolled Steel*).

<sup>116</sup> Appellate Body *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/AB/R para 488 (*EC – Fasteners (China)*).

The Panel in *US - Softwood Lumber V*<sup>117</sup> explained that a like product must be analysed from two perspectives: from the point of view of the exporting country and from the point of view of the importing country. From the exporting country's perspective, it is the particular product which is being dumped, otherwise referred to as 'product under consideration' in Article 2.6 and other parts of the ADA.<sup>118</sup> However, for purposes of injury determination and determination of domestic industry, like product refers to the product produced by the domestic industry which is allegedly being injured by the dumped import.<sup>119</sup>

#### **2.6.1.6 In the ordinary course of trade**

There is no definition of 'in the ordinary course of trade' in the ADA. There is however mention of sales that are not made in the ordinary course of trade and these are sales that were made at a loss and:<sup>120</sup>

- a. Were made over a period of at least six months;<sup>-121</sup>
- b. Were made in substantial quantities;<sup>-122</sup>and
- c. At prices, which do not provide for the recovery of all costs within a reasonable time.

The above constitute sales that are not made in the ordinary course of trade. Thus, any sales, made for more than six months, made in substantial quantities, and which provide for the recovery of all costs within a reasonable time, are sales in the ordinary course of trade.

#### **2.6.1.7 Injury determination**

'Injury', in the ADA, is interpreted to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry.<sup>123</sup> To determine injury, it is required that an investigating authority bases its determination on positive evidence and an objective examination of:<sup>124</sup>

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<sup>117</sup> Panel Report *United States – Final Dumping Determination on Softwood Lumber from Canada* WT/DS264/R. paras 7.152 - 7.153 (*US – Softwood Lumber V*).

<sup>118</sup> Panel Report *US – Softwood Lumber V* para 7.152.

<sup>119</sup> Panel Report *US – Softwood Lumber V* para 7.152.

<sup>120</sup> Article 2.2.1 of the ADA.

<sup>121</sup> Footnote 4 of the ADA.

<sup>122</sup> Footnote 5 of the ADA.

<sup>123</sup> Footnote 9 of the ADA.

<sup>124</sup> Article 3.1 of the ADA.

- a. The volume of the dumped imports and its effect on prices of like products in the domestic market;- and
- b. The impact of the dumping on domestic producers of the like product.

Positive evidence has been interpreted in *Mexico - Anti-Dumping Measures on Rice*<sup>125</sup> to mean ‘evidence that is relevant and pertinent with respect to the issue to be decided, and that has the characteristics of being inherently reliable and creditworthy’. Thus, an investigating authority is not at liberty to rely on any evidence as far as positive evidence is concerned.

The second factor to consider in injury determination is ‘objective determination’. Quoting with approval the Appellate Body in *US - Hot-Rolled Steel*,<sup>126</sup> the Appellate Body in *Mexico - Anti-Dumping Measures on Rice*<sup>127</sup> said the following:

[A]n "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.

Flowing from the requirements of positive evidence and objective examination, Article 3.2 demands that due consideration be given to whether there is a significant increase in dumped products when determining the volume of such dumped imports. There must also be emphasis on whether there is a significant price undercutting or whether the dumped imports have prevented normal price increase of like products by domestic producers.<sup>128</sup>

In cases where there is dumping by more than one country, the ADA permits an investigating authority to cumulatively assess the effect of dumping if three conditions are satisfied:<sup>129</sup>

- a. The margin of dumping from each country is above the *de minimis* threshold;-
- b. The volume of imports per country is not negligible;- and

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<sup>125</sup> Appellate Body Report *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* WT/DS295/AB/R paras 164-5 (*Mexico – Anti-Dumping Measures on Rice*).

<sup>126</sup> Appellate Body Report *US – Hot-Rolled Steel* para 193.

<sup>127</sup> Appellate Body Report *Mexico – Anti-Dumping Measures on Rice* para 180.

<sup>128</sup> Appellate Body Report *Mexico – Anti-Dumping Measures on Rice* para 180.

<sup>129</sup> Article 3.3 of the ADA.

- c. The competition situation between the dumped products themselves and between the dumped products and domestic like products, warrant cumulative assessment.

These conditions must all be established before an investigating authority can cumulatively assess the effect of dumping by several countries.<sup>130</sup>

The factors to consider in evaluating the impact of dumping on domestic industry have been identified in Article 3.4 to include actual and potential decline in sales, profits, output, market share, productivity and return on investments. Evaluation of all these factors has been held to be mandatory by the Appellate Body in *Thailand - H-Beams*.<sup>131</sup> It stands to reason that an investigating authority has no discretion as to which factor to consider or not to consider from among the 15 factors mentioned in Article 3.4.<sup>132</sup>

Article 3.5 stresses the need for an investigating authority to establish the link between the dumped imports and the injury caused to the domestic industry. The third sentence of the Article states that any known factor that might have injured the domestic industry must also be examined.<sup>133</sup> In *US-Hot Rolled Steel*<sup>134</sup> the Appellate Body noted that examination of known factors is to ensure that investigating authorities do not attribute injuries caused by these known factors to dumped imports.

There are times when assessing the effect on production of the like product in the domestic setting is not practical. Article 3.5 permits assessment of such effect by looking at the narrowest range of products including the like product.

#### **2.6.1.8 Threat of injury**

Threat of material injury is another possibility where an anti-dumping measure could be adopted. By ‘threat’ is not meant mere allegation, conjecture or remote possibility; rather, it is

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<sup>130</sup> Appellate Body Report *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil* WT/DS219/AB/R para 109.

<sup>131</sup> Appellate Body Report *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and Beams from Poland* WT/DS122/AB/R paras 121-5 (*Thailand - H-Beams*).

<sup>132</sup> The 15 factors are: Actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

<sup>133</sup> Article 3.5 of the ADA.

<sup>134</sup> Appellate Body Report *US-Hot Rolled Steel* para 222.

based on facts.<sup>135</sup> Thus, if an investigating authority sees that there is likely going to be a substantial increase in the importation of a product at dumped prices, it can proceed with an investigation.<sup>136</sup> Four criteria, among others, are to be considered in making a determination on whether or not a threat is imminent:<sup>137</sup>

- a. If there is a significant rate of increase of dumped imports which points to a likelihood of more imports;-
- b. If there is a sufficient freely disposable or an imminent, substantial increase in the capacity of the exporter;-
- c. If the prices of imports are likely to increase the desire for more such imports;- and
- d. The inventory of the product under investigation.

The Appellate Body in *US - Softwood Lumber VI (Article 21.5 - Canada)*<sup>138</sup> notes that in determining threats, the factors of positive evidence and objective evaluation of facts as demanded in Article 3.1 still apply; and that any determination based on mere allegation, conjecture or remote possibility is prohibited.

#### **2.6.1.9 Domestic industry**

The ADA equates domestic industry with domestic producers of the like product as a whole or a subset of the domestic producers who represent a major proportion of the domestic industry.<sup>139</sup> The starting point in defining domestic industry as noted in *EC – Salmon (Norway)*<sup>140</sup> is to first identify a like product for the product under investigation. This will then lead authorities to the domestic industry. The Appellate Body in *EC – Fasteners (China)*<sup>141</sup> has noted that if an investigating authority is to rely on domestic producers who are a ‘major proportion’ as permitted by Article 4.1, it should ensure that the percentage is relatively high.

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<sup>135</sup> Article 3.7 of the ADA.

<sup>136</sup> Footnote to Art. 3.7 of the ADA.

<sup>137</sup> Article 3.7 of the ADA.

<sup>138</sup> Appellate Body Report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* WT/DS277/AB/RW para 96.

<sup>139</sup> Article 4.1 of the ADA.

<sup>140</sup> Panel Report Panel Report *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway* WT/DS337/R. para 7.67.

<sup>141</sup> Appellate Body Report *EC – Fasteners (China)* para 412.

However, producers and exporters that are related may be excluded from the definition of domestic industry for the purpose of Article 4.1.<sup>142</sup>

It is necessary to note that the ADA stipulates three conditions for applying an anti-dumping measure: such measure can only be applied within the bounds of Article VI of the GATT 1994; there must be investigations; and the investigations must be undertaken in accordance with the following procedures as set out in the ADA.<sup>143</sup> These procedures are discussed next.

## **2.6.2 Procedural rules**

The questions to be answered with regard to procedural rules revolve around investigations, evidence gathering, and imposition and collection of anti-dumping measures and/or duties, among others.

### **2.6.2.1 Initiation of investigation**

The starting point is to ask the question: who is to initiate an investigation and under what circumstance can an investigation be initiated? An investigation can be initiated in one of two ways:

1. Upon a written application by or on behalf of the domestic industry,<sup>144</sup> or
2. By the authorities of a country.<sup>145</sup>

In respect of the above, the ADA requires that there is evidence of dumping, evidence of injury, and evidence of a causal link between the dumping and the injury.<sup>146</sup> In *Mexico - HFCS*<sup>147</sup> it was noted that the requirement does not necessarily require that an application contain an analysis of these three factors; but rather evidence thereof. It should however contain, as held in *Guatemala - Cement II*,<sup>148</sup> ‘sufficient evidence on dumping, injury and causation...’.

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<sup>142</sup> Footnote 11 of the ADA.

<sup>143</sup> Article 1 of the ADA.

<sup>144</sup> See Art 5.1 of the ADA.

<sup>145</sup> Article 5.6 of the ADA.

<sup>146</sup> Article 5.2 of the ADA.

<sup>147</sup> Panel Report *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States* WT/DS132/R para 7.76 (*Mexico - HFCS*).

<sup>148</sup> Panel Report *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R Para 8.35 (*Guatemala – Cement II*).

Investigating authorities however cannot immediately initiate an investigation but are required to satisfy themselves as to the accuracy and adequacy of the evidence, to determine that it is sufficient to justify initiation.<sup>149</sup>

Article 5.4 introduces a critical factor to ensure that any move to initiate an investigation is on behalf of the wider industry and not a negligible few. It provides two criteria: a) at least 50 per cent of the domestic producers that express an opinion must support an application to initiate an investigation, and b) producers who expressly support the application must constitute at least 25 per cent of the domestic producers. In *US - Offset Act (Byrd Amendment)*,<sup>150</sup> the Appellate Body noted that there is no requirement in the Article that warrants an investigating authority examine the motive behind the support of the application; what is required under the Article has to do with the quantity of domestic support and not the quality thereof.

#### **2.6.2.2 Interested parties' right to know and be heard**

The authorities of the exporting country and other interested parties must be notified by the importing country before initiation of an investigation, and thereafter the importing country must issue a public notice.<sup>151</sup> The public notice and publicising of any application made to an investigating authority can however only be done when there is a decision to investigate.<sup>152</sup>

The Panel notes in *US - 1916 Act (EC)*<sup>153</sup> that failure to provide notification to the government of the exporting country is a violation of Article 5.5. The Appellate Body upheld this reasoning when it considered the dispute on appeal.<sup>154</sup> It follows that notification to the government of the exporting country is mandatory.

The public notice, according to Article 12.1, must contain the name and country or countries of origin of the product under investigation, the date of the initiation of the investigation, the basis of the alleged dumping, the basis of the alleged injury, the return address of the

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<sup>149</sup> Panel Report *Guatemala — Cement II* para 8.35.

<sup>150</sup> Appellate Body Report *United States – Continued Dumping and Subsidy Offset Act of 2000* WT/DS217/AB/R, WT/DS234/AB/R para 283 (*US - Offset Act (Byrd Amendment)*).

<sup>151</sup> Article 12.1 of the ADA.

<sup>152</sup> Article 5.5 of the ADA.

<sup>153</sup> Panel Report *United States – Anti-Dumping Act of 1916, Complaint by the European Communities* WT/DS136/R para 6.216 (*US – 1916 Act (EC)*).

<sup>154</sup> Appellate Body Report *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R para 155 (*US – 1916 Act*).

investigating authority, and the time-lines in accordance with which interested parties are to respond.

It was noted in *Argentina - Poultry Anti-Dumping Duties*<sup>155</sup> that the duty to notify and to issue a public notice in terms Article 12.1 are separate duties. An investigating authority can therefore not merely publish a public notice and assume that the publication will suffice for notification.<sup>156</sup>

It is required in Article 12.2 that public notice be given at every stage of the anti-dumping investigation. Notice must be given of a preliminary or final determination- be it positive or negative; acceptance of undertaking; and termination of a definitive anti-dumping duty.<sup>157</sup>

Each of these notices, including imposition of provisional measures, final measures and notice of termination of an investigation, shall be detailed enough and are to be forwarded to the authorities of the exporting country and all other interested parties.<sup>158</sup>

The Appellate Body notes in *Thailand - H-Beams*<sup>159</sup>, that ‘Article 6 (entitled "Evidence") establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties’. In *EC - Bed Linen (Article 21.5 – India)*,<sup>160</sup> the Appellate Body noted that that evidentiary rules in Article 6 of the ADA apply generally to matters of evidence throughout the ADA.

Article 6.1 requires that all interested parties be given ample information concerning an anti-dumping investigation and be given ample time to respond thereto. Exporters and producers of alleged dumped products must be given at least 30 days to respond to any questionnaires sent to them.<sup>161</sup> Except where the information provided by a party is confidential, such information must be made available to other parties.<sup>162</sup> Subject to requirements of confidentiality, exporters,

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<sup>155</sup> Panel Report *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil* WT/DS241/R para 7.133 (*Argentina - Poultry Anti-Dumping Duties*).

<sup>156</sup> Panel Report *Argentina - Poultry Anti-Dumping Duties* para 7.133.

<sup>157</sup> Article 12.2 of the ADA.

<sup>158</sup> See Arts 12.2, 12.2.1 & 12.2.2 of the ADA.

<sup>159</sup> Appellate Body Report *Thailand - H-Beams* para 109.

<sup>160</sup> Appellate Body Report *European Communities – Anti-Dumping Duties on Imports of Cotton Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* WT/DS141/AB/RW para 136.

<sup>161</sup> Article 6.1.1 of the ADA.

<sup>162</sup> Article 6.1.2 of the ADA.

the government of the exporting country and other interested parties are entitled to a copy of the application by the domestic industry as soon as an investigation starts.<sup>163</sup>

An opportunity for interested parties to defend themselves is provided for in Article 6.2. The opportunity is enhanced by Articles 6.3 and 6.4 which require authorities to provide interested parties with timely access to non-confidential information.<sup>164</sup>

### **2.6.2.3 Confidentiality**

Article 6.5 stresses the need to protect confidential information. Two types of information are confidential according to this Article and as explained in *Guatemala - Cement II*:<sup>165</sup> information which is by nature confidential, and information which is provided on a confidential basis.<sup>166</sup> Such confidential information shall not be disclosed without the permission of the party providing it.<sup>167</sup>

However, the ADA has provided an opportunity for interested parties to defend themselves even when there is a confidential information involved. The first is that the party providing confidential information must summarise it for the benefit of interested parties unless such information is not susceptible to summary.<sup>168</sup> The second is that authorities may disregard such information in their analysis unless it is demonstrated that the information is correct.<sup>169</sup>

The ADA permits investigating authorities to carry out investigations in a foreign country following the procedure laid down in its Annex 1. The window to conduct foreign verification has been held by the Panel in *Egypt - Steel Rebar*<sup>170</sup> not to be obligatory. But in all cases investigating authorities must satisfy themselves of the accuracy of the information supplied to them by the interested parties.<sup>171</sup>

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<sup>163</sup> Article 6.1.3 of the ADA.

<sup>164</sup> See Arts 6.3 & 6.4 of the ADA.

<sup>165</sup> Panel Report *Guatemala Cement II* para 8.219.

<sup>166</sup> Panel Report *Guatemala - Cement II* Panel para 8.219.

<sup>167</sup> Article 6.5 of the ADA.

<sup>168</sup> Article 6.5.1 of the ADA.

<sup>169</sup> Article 6.5.2 of the ADA.

<sup>170</sup> Panel Report *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey* WT/DS211/R para 7.327.

<sup>171</sup> Article 6.6 of the ADA.

An investigating authority has the power to make a determination on facts available to it following the requirements of Annex II of the ADA where an interested party does not make information available to it timeously.<sup>172</sup> However, an investigating authority must still consider such information from an interested party even if submitted after the deadlines given.<sup>173</sup> Thus, an investigating authority must operate with some degree of flexibility in expecting information from interested parties.<sup>174</sup>

In *China - Broiler Products*,<sup>175</sup> it was held to be mandatory for an investigating authority to make available to interested parties the facts upon which a determination is based in terms of Article 6.9. This is to enable a party to defend its interest since an investigating authority cannot assume that a party should know the basis for any determination if information is not disclosed to such party.<sup>176</sup>

As a rule, investigating authorities are required to determine an individual margin of dumping for each exporter except where the number of exporters and/or producers and/or types of product is too large.<sup>177</sup> In such a case, authorities are permitted to ‘limit their examination either to a reasonable number of interested parties or products by using samples . . . or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated’.<sup>178</sup> In practice, authorities resort to the largest percentage of exports that can be reasonably investigated.

#### **2.6.2.4 *De minimis* dumping margin and negligible dumped imports**

The ADA, while sanctioning moves to prevent injurious dumping is at the same time against unnecessary anti-dumping measures. It has therefore stipulated certain thresholds:<sup>179</sup>

1. Investigating authorities can on their own terminate any investigation if there is not sufficient evidence of dumping and injury;-

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<sup>172</sup> Article 6.8 of the ADA.

<sup>173</sup> Appellate Body Report *US – Hot-Rolled Steel* para 89.

<sup>174</sup> Appellate Body Report *US – Hot-Rolled Steel* para 84.

<sup>175</sup> Panel Report *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States* WT/DS427/R para 6.10 (*China — Broiler Product*).

<sup>176</sup> Panel Report *China — Broiler Product* para 6.8.

<sup>177</sup> Article 6.10 & Panel Report *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy* WT/DS189/R para 6.89.

<sup>178</sup> Article 6.10 of the ADA.

<sup>179</sup> Article 5.8 of the ADA.

2. Even where there is evidence of dumping and injury, they are required by the ADA to terminate any investigation if the margin of dumping is *de minimis*, that is, if the margin is less than two per cent when expressed as a percentage of the export price;- and
3. Even where there is dumping and injury, the ADA requires investigating authorities to terminate investigation if the volume of dumped imports from one particular country is less than three per cent of total imports, save where countries that individually are below three per cent are collectively above seven per cent.

In *US - DRAMS*<sup>180</sup> the Panel indicated that the *de minimis* threshold of two per cent is applicable only to investigations under Article 5 of the ADA and not to reviews.

In *Mexico - Anti-Dumping Measures on Rice*, the Appellate Body affirmed the Panel's report that the demand of *de minimis* in Article 5.8 is applicable to individual exporters when an investigating authority finds no dumping or finds dumping but within the *de minimis* threshold.<sup>181</sup> Thus, immediately an investigating authority comes to this conclusion, it has to terminate the investigation in respect of those exporters, else it will be in violation of the ADA.<sup>182</sup>

### **2.6.3 Remedies for dumping**

There are three anti-dumping remedies/measures permitted by the ADA. These have been confirmed in *US - 1916 Act*<sup>183</sup> and *US – Offset Act (Byrd Amendment)*<sup>184</sup> to be provisional measures, price undertaking and definitive anti-dumping duties.

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<sup>180</sup> Panel Report *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or above from Korea* WT/DS99/R para 6.86-91 (*US – DRAMS*).

<sup>181</sup> Panel Report *Mexico – Anti-Dumping Measures on Rice* para 208.

<sup>182</sup> Panel Report *Mexico – Anti-Dumping Measures on Rice* para 208.

<sup>183</sup> Appellate Body Report *United States – Anti-Dumping Act of 1916* WT/DS136/AB/R, WT/DS162/AB/R para 119 (*US – 1916 Act*).

<sup>184</sup> Appellate Body Report *US - Offset Act (Byrd Amendment)* para 269.

### 2.6.3.1 Provisional measures

If an investigating authority makes a preliminary finding of dumping, injury and causal link, and there is fear of further injury in the course of the investigation, the authorities may put in place provisional measures to address the situation.<sup>185</sup>

Three modes of provisional measure have been suggested by the ADA: the first is imposition of a duty; the second is security (cash deposit or bond); and the third is withholding of appraisalment.<sup>186</sup> Whichever provisional measure an investigating authority chooses to apply, it cannot be more than, though it can be less than, the provisional duty margin estimated.<sup>187</sup>

Provisional measures cannot be applied earlier than 60 days from the date of initiation of an investigation and they are meant to last for a maximum of four months.<sup>188</sup> However, where a significant percentage of the domestic producers make a request, a provisional measure may last for six months.<sup>189</sup> If however, the provisional duty imposed is less than the provisional dumping margin, the provisional duty can last for nine months<sup>190</sup> The Panel in *Mexico - HFCS*<sup>191</sup> notes that these deadlines are mandatory and a country is not allowed to derogate from them.

Whatever the provisional measure a country chooses to apply, the provisions of Article 9 on the imposition and collection of anti-dumping duties shall apply.<sup>192</sup>

### 2.6.3.2 Price undertakings

An investigating authority may accept price undertakings from exporters under two conditions: the first is if the exporter voluntarily undertakes to revise its prices upward; and the second is an undertaking to cease exports to the country at dumped prices.<sup>193</sup> Where an undertaking is

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<sup>185</sup> Article 7 of the ADA.

<sup>186</sup> Article 7.2 of the ADA.

<sup>187</sup> Article 7.2 of the ADA.

<sup>188</sup> Articles 7.3 & 7.4 of the ADA.

<sup>189</sup> Article 7.4 of ADA of the ADA.

<sup>190</sup> Article 7.4 of the ADA.

<sup>191</sup> Panel Report *Mexico – HFCS* para 82.3.

<sup>192</sup> Article 7.5 of the ADA.

<sup>193</sup> See Art 8.1 of the ADA.

accepted, the investigation may be suspended or terminated except where the exporter giving the undertaking desires that the investigation continue.<sup>194</sup>

However, an undertaking can only be accepted after a preliminary affirmative finding of dumping and injury caused by the dumping.<sup>195</sup>

According to Article 8.3, it is not compulsory for authorities to accept an undertaking. Where an undertaking is not accepted, authorities will, where feasible, furnish the exporter concerned with reasons for the rejection of the undertaking.<sup>196</sup>

### **2.6.3.3 Definitive anti-dumping duties**

Having established that there is dumping and having found that the dumping is actionable within WTO rules, authorities in the importing country reserve the right to impose or not to impose an anti-dumping duty.<sup>197</sup> It is still within their right to impose an anti-dumping duty to cover the full margin of dumping or less. However, it is advised that a duty less than the dumping margin is desirable if that will remove the injury to the domestic producers.<sup>198</sup>

It has been explained in *EU - Footwear (China)*<sup>199</sup> that Article 9.1 does not make it mandatory for a country to impose an anti-dumping duty. Though a lesser duty is desirable, it is not mandatory.<sup>200</sup>

Article 9.2 mandates the collection of anti-dumping duties in a non-discriminatory manner on any product on which an anti-dumping duty has been duly imposed, except for those exporters that have given price undertaking. As far as is practicable, authorities are required to name all the suppliers and/or their countries.<sup>201</sup>

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<sup>194</sup> Article 8.4 of the ADA.

<sup>195</sup> Article 8.2 of the ADA.

<sup>196</sup> See Art 8.2 of the ADA.

<sup>197</sup> Article 9.1 of the ADA.

<sup>198</sup> Article 9.1 of the ADA.

<sup>199</sup> Panel Report *European Union – Anti-Dumping Measures on Certain Footwear from China* WT/DS405/R para 7.924 (*EU - Footwear (China)*).

<sup>200</sup> Panel Report *EU - Footwear (China)* para 7.924.

<sup>201</sup> Article 9.2 of the ADA.

In any case, Article 9.3 fixes any anti-dumping duty at the dumping margin or a lower amount. As pointed out by the Panel in *US - Zeroing (Japan)*,<sup>202</sup> Article 9.3.1 provides guidance in calculating the final liability for payment of anti-dumping duties, while Article 9.3.2 determines the amount of anti-dumping duties that must be refunded under certain circumstances.

Article 9.4 states that where as a result of the number of producers, the investigating authorities limited their investigation to sampled exporters or a percentage of the exporters, the anti-dumping duty to be imposed on the exporters not sampled should not be more than the weighted average margin of those sampled. It also requires authorities to disregard any zero and *de minimis* margins and margins established on the basis of the facts available.<sup>203</sup> Article 9.4, according to *US - Hot-Rolled Steel*, is meant to protect non-sampled exporters from lapses in the information provided by sampled exporters.<sup>204</sup>

If an anti-dumping duty has been imposed in a country, a new exporter of a like product who is unrelated to the exporters subject to the anti-dumping duty may ask for a review of the anti-dumping duty to determine the new exporter's dumping margin, if any.<sup>205</sup>

#### **2.6.3.4 Retroactivity**

Article 10.2 does not permit retroactivity in respect of provisional measures and anti-dumping duties. However, the Article permits retroactive application of an anti-dumping duty to start from the period of provisional measures if there is a final determination of injury.

It has been emphasised in *Mexico - HFCS*<sup>206</sup> that the window of retroactive application in Article 10.2 is not automatic and cannot be applied in all situations where there is a provisional measure. Reading Articles 10.2 and 10.4 together, it becomes clear that the conditions set out in 10.2 are mandatory and must be fulfilled before there can be retroactive application of final anti-dumping duties.<sup>207</sup>

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<sup>202</sup> Panel Report *US - Zeroing (Japan)* para 7.198.

<sup>203</sup> UNCTAD *Training Module on the Anti-Dumping Agreement* (2006) 34.

<sup>204</sup> Appellate Body Report *US - Hot-Rolled Steel* para 123.

<sup>205</sup> Article 9.5 of the ADA.

<sup>206</sup> Panel Report *Mexico - HFCS* paras 7.188-7.191.

<sup>207</sup> Panel Report *Mexico - HFCS* paras 7.188-7.191.

The rule on retroactive application of a duty does not apply to findings of threat of injury, unless it is shown that material injury or material retardation would have occurred but for the imposition of the provisional measure.<sup>208</sup> Cash deposits made under provisional measures are to be refunded when there is a negative final determination, or lesser definitive anti-dumping duty, or where there is only a threat of injury and material retardation.<sup>209</sup> Any bonds shall be released under any of these conditions.<sup>210</sup>

There is another window for retroactive application of definitive anti-dumping duties in Article 10.6. It is on products imported at dumped prices within 90 days before the application of provisional measures.<sup>211</sup> Authorities must determine that:<sup>212</sup>

- i. There is a history of dumping which caused injury and the importer has knowledge thereof - the knowledge here is either actual or constructive;- and
- ii. The injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances is likely to seriously undermine any remedial measure by the time a definitive anti-dumping duty is applied.

Once the conditions of Article 10.6 are fulfilled, the ADA permits retroactive collection of anti-dumping duties to a date 90 days prior to the imposition of provisional measures, but products imported prior to the initiation of the investigation do not fall under Article 10.6.<sup>213</sup>

### **2.6.3.5 Duration and review of anti-dumping duties and price undertakings**

The ADA is clear that an anti-dumping duty shall last only for the period necessary to counteract injurious dumping.<sup>214</sup> In order to ascertain if injury is occurring, authorities may *suo moto* review the duty or review it upon application by interested parties.<sup>215</sup> If the review finds that anti-dumping duty is no longer necessary, it shall be terminated forthwith.<sup>216</sup>

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<sup>208</sup> Article 10.4 of the ADA.

<sup>209</sup> Articles 10.3, 10.4 & 10.5 of the ADA.

<sup>210</sup> Articles 10.3, 10.4, & 10.5 of the ADA.

<sup>211</sup> See Art 10.6 of the ADA.

<sup>212</sup> Article 10.6 of the ADA.

<sup>213</sup> Articles 10.6-10.8 of the ADA.

<sup>214</sup> Article 11.1 of the ADA.

<sup>215</sup> Article 11.2 of the ADA

<sup>216</sup> See Art 11.2 of the ADA.

In any event, Article 11.3 grants a five-year duration for any anti-dumping duty from the date of its imposition or the date of its review, provided the review considered both dumping and injury, unless there is reason to believe, upon review, that dumping and injury will continue. In that case, the anti-dumping duty may be maintained for another five years.<sup>217</sup>

The Panel in *US - DRAMS*<sup>218</sup> noted that both review procedures in Articles 11.2 and 11.3 could follow the same pattern since there is nothing in Article 11 that provided to the contrary.

## **2.6.4 Other issues**

There are issues which the trading world finds necessary in any anti-dumping regime and are important in world trade.

### **2.6.4.1 Judicial review**

A country with anti-dumping legislation is required to maintain a judicial structure separate from the investigating authority to promptly review the actions of the investigating authority.<sup>219</sup> It follows that the name to be given to such a body is not relevant. What is needed is its capacity and independence.<sup>220</sup>

### **2.6.4.2 Special and differential treatment**

A special and differential treatment provision for developing countries is contained in Article 15 of the ADA.<sup>221</sup> This Article expresses the wish that developed countries will take the situation of developing countries into account when adopting an anti-dumping measure. It requires ‘constructive’ remedies to be explored before applying an anti-dumping duty against a developing country.<sup>222</sup> However, it does not provide any guidance on what such constructive

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<sup>217</sup> Article 11.3 of the ADA.

<sup>218</sup> Panel Report *US — DRAMS* para 6.48.

<sup>219</sup> Article 13 of the ADA.

<sup>220</sup> Article 13 of the ADA.

<sup>221</sup> Special and differential treatment refers to the provisions in WTO agreements which give developing countries special rights. See WTO ‘Special and differential treatment provisions’ available at [https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm), (accessed 14 August 2016).

<sup>222</sup> Article 15 of the ADA.

remedies would be. In *EC - Bed Linen* the Panel noted that the application of the lesser duty rule could be viewed as a constructive remedy.<sup>223</sup>

#### **2.6.4.3 Committee on Anti-Dumping Practices (Committee)**

Article 16.1 establishes the Committee made up of representatives from Members. It meets twice a year and carries out the functions assigned to it by the ADA; but more importantly, it is a consultation forum for Members as far as the ADA is concerned.<sup>224</sup>

Members are required to immediately report to the Committee, any anti-dumping actions they have taken, be it preliminary or final.<sup>225</sup> A semi-annual report of anti-dumping actions taken is also required to be submitted to the Committee.<sup>226</sup>

It is required that the notifications and reports should indicate the competent authorities in charge of anti-dumping actions in a Member country and the domestic procedures for initiation and investigation.<sup>227</sup>

Members are required also to constantly update the Committee of any amendments made to their anti-dumping laws.<sup>228</sup>

#### **2.6.4.4 Dispute resolution**

The Dispute Settlement Understanding (DSU) governs any conflict that arises from the implementation of the ADA except where there is a contrary provision in the ADA.<sup>229</sup> Any dispute that arises is required first to be addressed through consultation.<sup>230</sup> As noted in case law,<sup>231</sup> the Article did not distinguish between disputes; it therefore means that all disputes that arise within the context of the ADA are subject to the DSU except where otherwise provided.

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<sup>223</sup> Panel Report *EC - Bed Linen* para. 6.229.

<sup>224</sup> Article 16.1 of the ADA.

<sup>225</sup> Article 16.2 of the ADA.

<sup>226</sup> Article 16.4 of the ADA.

<sup>227</sup> Article 16.5 of the ADA.

<sup>228</sup> See Art 18.6 of the ADA.

<sup>229</sup> Article 17.1 of the ADA.

<sup>230</sup> Articles 17.1, 17.2, & 17.3 of the ADA.

<sup>231</sup> Appellate Body *US — 1916 Act* paras 64-65 & 68.

If consultations fail, Article 17.4 stipulates three factors that will trigger resort to the Dispute Settlement Body (DSB):

1. Where authorities of the importing country have taken measures to impose an anti-dumping duty;-
2. Where authorities have decided to accept a price undertaking;- or,
3. Where authorities have put in place a provisional measure which a Member feels is contrary to the ADA.

The Appellate Body in *Guatemala – Cement I*<sup>232</sup> noted that the reference to the DSU and certain exceptions made in the ADA did not mean that the two Agreements operate separately in disputes concerning the ADA. In their view, the two Agreements rather offer ‘a comprehensive, integrated dispute settlement system...’.<sup>233</sup>

### 2.6.5 Observations

It is observed from the discussion above that dumping is not objectionable *per se* within the WTO framework unless it causes or threatens to cause material injury to a local industry or materially retards the establishment of a local industry.<sup>234</sup>

## 2.7 CONCLUSION

In summing up, it must be reiterated that as far as the WTO and the ADA are concerned, dumping occurs only when a product is introduced into the commerce of another country at less than its normal value; that is, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.<sup>235</sup>

However, dumping is not objectionable *per se* within the WTO framework unless it causes injury,<sup>236</sup> which is defined to mean material injury to a domestic industry, threat of material

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<sup>232</sup> Appellate Body Report *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R paras 65-66 (*Guatemala – Cement I*).

<sup>233</sup> Appellate Body Report *Guatemala – Cement I* paras 65-66.

<sup>234</sup> Articles VI of the GATT 1994 & 2 of the ADA.

<sup>235</sup> Articles VI(I) of the GATT & 2 of ADA.

<sup>236</sup> See Arts VI of the GATT and 2 of the ADA.

injury to a domestic industry, or material retardation of the establishment of such an industry.<sup>237</sup> If injury occurs, dumping then becomes actionable and an importing country is permitted, following due process, to put in place anti-dumping measures, including duties, to counteract the effects of dumping. This is so notwithstanding the fact that a measure, such as anti-dumping duties, may violate WTO principles of MFN and bound tariffs.

The next chapter examines how well Ghana's legislation on anti-dumping conforms to the ADA. Ghana is a Member of the WTO and signatory to all WTO agreements save for Plurilateral Trade Agreements.<sup>238</sup> The GATT 1994 and the ADA are therefore binding on Ghana. It can therefore legislate on anti-dumping but the legislation must conform to the ADA else it is exposing itself to actions before the DSB.

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<sup>237</sup> Footnote 9 of the ADA.

<sup>238</sup> These are part of the WTO covered agreements but Members have the option to subscribe or not to subscribe to them. They are the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement. But the International Dairy Agreement, and International Bovine Meat Agreement have since been terminated. See WTO 'WTO legal texts' available at [https://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#civil](https://www.wto.org/english/docs_e/legal_e/legal_e.htm#civil) (accessed 28 March 2017).

## CHAPTER 3

### GHANA'S ANTI-DUMPING REGIME AND THE AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994 (ADA)

#### 3.1 INTRODUCTION

The story of whether Ghana has had an anti-dumping regime is a 'no' and a 'yes' one. A 'no' one because since Ghana joined the then General Agreement on Tariffs and Trade (GATT) in 1957<sup>239</sup> until the GATT ceased in 1994, Ghana had never notified the GATT Secretariat about any anti-dumping legislation and/or measure it had adopted. Since its participation in the founding of the World Trade Organisation (WTO), which took effect in 1995, Ghana has yet to notify the Committee on Anti-Dumping Practices (Committee) of the WTO of any legislation and/or measure it had introduced on dumping.<sup>240</sup> That is how far the 'no' story goes. The yes story probably goes further.

Ghana, before enacting the Ghana International Trade Commission (GITC) Act 2016 (Act 926), has had and still has laws and policies that operated as though they were anti-dumping or other trade remedy tools. Among these laws and policies was the import substitution system the government embarked upon immediately after independence.<sup>241</sup> Tariffs and taxes on imported goods and an import licence system were introduced.<sup>242</sup> These measures were deployed as though they were anti-dumping and other trade remedy tools.

This chapter discusses the domestic industry protective tools that appeared to be anti-dumping measures from the earliest times since independence before the promulgation of the GITC Act. This Act will also be explored and its compatibility with the international instrument on anti-dumping practice examined.

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<sup>239</sup> Ghana joined the GATT in 1957 and it is a founding Member of the WTO; see WTO 'Member information: Ghana and the WTO' available at [https://www.wto.org/english/thewto\\_e/countries\\_e/ghana\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/ghana_e.htm) (accessed 20 April 2017).

<sup>240</sup> Ghana's latest notification to the WTO; WTO Committee on Anti-Dumping Practices *Notification under Articles 16.4 and 16.5 G/ADP/N/193/GHA*. See also WTO Committee on Anti-Dumping Practices *Notification of laws and regulations under Article 18.5 of the Agreement G/ADP/N/1/GHA/1*.

<sup>241</sup> Ackah C, Adjasi C & Turkson F 'Scoping study on the evolution of industry in Ghana' *UNU-WIDER Working Paper* (2014) 1.

<sup>242</sup> Leith JK *Foreign Trade Regimes and Economic Development: Ghana* (1974) 58.

The chapter ends, first, by making some observations about Act 926 and suggesting ways of improving it. It then sums up the whole chapter, and lays the ground for the discussion in chapter 4 which will focus on anti-dumping in South Africa. The history of domestic industry protection in Ghana follows below.

### **3.2 HISTORY OF DOMESTIC INDUSTRY PROTECTION**

At independence<sup>243</sup> the country found its economy designed to primarily export raw cocoa and other materials to Britain and other industrialised countries with its large hinterland population living a subsistence life or working to provide labour for the export arrangement.<sup>244</sup> Ghana had two options: to maintain the status quo and not disturb its economic foundation, or to chart its own course as an independent country. It chose the latter.

A number of policies and/or laws were therefore pursued. There were balance of payments challenges by 1961, largely due to the fall in cocoa prices and the reliance on imports.<sup>245</sup> Import licences were introduced, and there were regulations on foreign exchange- all in a bid to re-shape Ghana's foreign trade.<sup>246</sup>

The government embarked on extensive industrialisation, laced with import substitution to develop the industrial sector of Ghana.<sup>247</sup> The aim was dual: to reduce dependence on Britain for finished goods, and to develop local industries.<sup>248</sup> Government investment in manufacturing was huge as it aimed to produce consumables locally and to reduce reliance on imports.<sup>249</sup> State enterprises emerged forcefully in an economy that hitherto had predominantly private individuals in manufacture.<sup>250</sup> A five-sector economy eventually evolved.<sup>251</sup>

- a) State enterprises;-
- b) Foreign private interests;-
- c) Joint state-foreign private interests;-

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<sup>243</sup> Ghana attained its independence from British colonial rule on 6 March 1957 but became a Republic on 1 July 1960.

<sup>244</sup> Seidman AW *Ghana's Development Experience* (1978) 11.

<sup>245</sup> Seidman AW (1978) 101.

<sup>246</sup> Seidman AW (1978) 101.

<sup>247</sup> Ackah *et al* (2014) 1.

<sup>248</sup> Ackah *et al* (2014) 1.

<sup>249</sup> Ackah *et al* (2014) 1.

<sup>250</sup> Seidman AW (1978) 200-5.

<sup>251</sup> Fosu AK & Aryeetey E 'Ghana's post-independence economic growth: 1960-2000' in Aryeetey E & Kanbur R (eds.) *The Economy of Ghana: Analytical Perspectives on Stability, Growth & Poverty* (2008) 69.

- d) Co-operatives;- and
- e) Small-scale Ghanaian private enterprises.

These measures meant there would be more local products to compete with imported ones. The necessary moves needed to be made. The then Minister in-Charge of Industries mooted in Parliament that Ghana would exercise its sovereign power ‘carefully and wisely’ to protect its industry from dumping.<sup>252</sup> Purchase tax and import duties were raised on goods the government considered were luxury goods.<sup>253</sup>

These measures combined meant that the domestic industry was protected from foreign like products in three ways: tariffs or duties, taxes (both direct and indirect), and an import licence system.<sup>254</sup> The protective tools were used randomly.<sup>255</sup> It is argued that the randomness of these measures gave policymakers a free hand to apply any trade remedy they deemed fit as and when and in whatever form they deemed fit.

The controls and/or protection were carried over to the period when the then government introduced the seven-year development plan.<sup>256</sup> Industrialisation and diversification of the economy from mainly export of raw materials were key to the plan.<sup>257</sup> So also was aligning the industrial sector and trade to those of other African countries.<sup>258</sup> More trade pacts were signed but this time with other African countries and the Eastern Bloc.<sup>259</sup>

A sharp slump in cocoa prices in the mid-1960s dislocated the economy and that meant that many more industry protective measures needed to be introduced.<sup>260</sup> State owned enterprises remained in the years that there were changes of government.<sup>261</sup> That further meant that the protection afforded industry would continue.

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<sup>252</sup> Ghana’s Minister of Industries in a 1962 parliamentary debate. Quoted by Kufuor KO ‘The development of anti-dumping policy and practices in Ghana from independence to the present *Anti-dumping Laws: Country Perspectives* (2005) 132.

<sup>253</sup> Seidman AW (1978) 109.

<sup>254</sup> Leith JK (1974) 58.

<sup>255</sup> Leith JK (1974) 77.

<sup>256</sup> This was in 1963-4. See Office on the Planning Commission *Ghana Seven-Year Development Plan* (1964) ch 5.

<sup>257</sup> *Ghana Seven-Year Development Plan* (1964) 93.

<sup>258</sup> *Ghana Seven-Year Development Plan* (1964) 93.

<sup>259</sup> Leith JK & Söderling L ‘Ghana: Long term growth, atrophy, and recovery’ *A Report for the OECD Development Centre Project* (2003) 20.

<sup>260</sup> Kolavalli S & Vigneri M ‘Cocoa in Ghana: Shaping the success of an economy’ in Punam C & Angwafo M (eds) *Yes, Africa Can: Success Stories from a Dynamic Continent* (2011).

<sup>261</sup> Leith JK & Söderling L (2000) 28.

The import licence system which basically controlled imports into the country continued till around the 1980s.<sup>262</sup> The policy of using tariffs and taxes also did not abate. The Prices and Incomes Board and the Special Surcharge on Imported Goods Decree were all introduced at one point in time.<sup>263</sup> These were meant to raise revenue but it is argued that their presence sometimes made government use them as trade remedy tools.<sup>264</sup>

The protection afforded domestic industry could not continue, at least in the same form and manner that it had started. Economic shocks had taken the country to the International Monetary Fund (IMF) and the World Bank in 1983 for bailout.<sup>265</sup> An Economic Recovery Programme (ERP) and Structural Adjustment Programme (SAP) were embarked upon in 1983 under IMF/World Bank guidance.<sup>266</sup> Key to the ERP and SAP package was a trade policy that demanded tariff adjustments, import liberalisation, deregulation of the domestic market and prices, and liberalisation of foreign exchange.<sup>267</sup>

Tariffs were not only reviewed downwards but were also simplified.<sup>268</sup> Domestic industry protection was now more uniform than before though there were still some sort of controls as far as imports were concerned.<sup>269</sup>

The import licence regime which functioned as an import control mechanism was reviewed and simplified.<sup>270</sup> Importers were categorised into classes and those in category 'A' could not only import, but were also qualified to bid for foreign exchange.<sup>271</sup> This strengthened the capacity of importers to import more foreign goods into the country.

The liberalisation of foreign exchange was rather gradual. The Exchange Control Act, 1961 (Act 71), was amended with the enactment of The Exchange Control (Amendment) Law, 1986 (PNDCL 149), in order to ease restrictions on access to foreign exchange. By 1992, the Bank

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<sup>262</sup> Bhasin V 'The impact of the elimination of trade taxes on poverty and income distribution in Ghana' in Ackah C & Aryeetey E (eds) *Globalization, Trade and Poverty in Ghana* (2012) 122.

<sup>263</sup> Kufuor KO (2005) 135-8.

<sup>264</sup> Kufuor KO (2005) 138.

<sup>265</sup> Ackah C, Aryeetey E & Morrissey O 'Trade, trade policy and total factor productivity: The case of Ghanaian manufacturing firms' in Ackah C & Aryeetey E (eds) *Globalization, Trade and Poverty in Ghana* (2012) 101-3.

<sup>266</sup> Laryea A & Akuoni S 'An overview of trade policies and developments in Ghana' in Ackah C & Aryeetey E (eds) *Globalization, Trade and Poverty in Ghana* (2012) 12-13.

<sup>267</sup> Laryea A & Akuoni S (2012) 12.

<sup>268</sup> Laryea A & Akuoni S (2012) 13.

<sup>269</sup> Laryea A & Akuoni S (2012) 13.

<sup>270</sup> Laryea A & Akuoni S (2012) 13.

<sup>271</sup> Laryea A & Akuoni S (2012) 13.

of Ghana<sup>272</sup> had institutionalised a market based system of monetary management.<sup>273</sup> Access to foreign exchange was eased further by the market based system and access to foreign exchange now depended largely on fiscal policies based on market forces.

Two important pieces of legislation related to foreign exchange and banking regulation came to cement the gains made at liberalisation of foreign exchange. The first was the Bank of Ghana Act, 2002 (Act 612), and the second was the Foreign Exchange Act, 2006 (Act 723). The former made the Central Bank independent in the discharge of its duties which included monetary policy.<sup>274</sup> The latter Act, did not only repeal the Exchange Control Act and its amendments, but also named the Central Bank as the body in charge of foreign exchange trade, including the licensing of foreign exchange traders.<sup>275</sup> These measures meant that traders who required foreign currency did not have to jump over the hurdles that were there before. The protection afforded domestic industry took a different turn in the 1990s.

### **3.3 DOMESTIC INDUSTRY PROTECTION AFTER 1990**

The 1990s saw what one would call a direct move towards the use of trade remedies available to countries. The Export and Import Act, 1995 (Act 503), was enacted. The purpose was ‘to revise the law relating to external trade and to provide conditions for the optimum development and efficient conduct of Ghana’s export and import trade’. It is no coincidence that the Act was enacted in the same year that the WTO Agreements including the ADA, came into force.

Sections 12 and 13 of the Act empower the Minister of Trade to use legislative instruments to restrict or prohibit the importation of any goods. These provisions added to the ‘law’ on anti-dumping<sup>276</sup> and were invoked any time the pressure on government for anti-dumping measures intensified.<sup>277</sup>

Special imports taxes were also a feature of the 1990s and the early new millennium. They were described by the WTO as Ghana’s main trade policy instrument.<sup>278</sup> They gave

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<sup>272</sup> This is the Central Bank.

<sup>273</sup> See Bank of Ghana ‘The development of the monetary policy frameworks in Ghana’ available at <https://www.bog.gov.gh/monetary-policy/monetary-policy-process-in-ghana> (accessed 10 April 2017).

<sup>274</sup> Sections 3 & 4, Bank of Ghana Act, 2002 (Act 612).

<sup>275</sup> Section 35, Foreign Exchange Act, 2006 (Act 723).

<sup>276</sup> Though it is submitted that they could rather be used more as safeguard than anti-dumping measures.

<sup>277</sup> See the discussion in s 3.5.

<sup>278</sup> WTO ‘Trade Policy Reviews: First press release, Secretariat and Government summaries- Ghana February 2001’ available at [https://www.wto.org/english/tratop\\_e/tp157\\_e.htm](https://www.wto.org/english/tratop_e/tp157_e.htm) (accessed 10 April 2017).

government the leeway to raise taxes on selected goods to, among other reasons, protect the domestic industry from ‘unfair trading practices’ by foreign traders.<sup>279</sup>

Another feature of the special import taxes was that they were introduced as temporary measures, hence taking everything into account, the WTO came to the conclusion that they appear to be used as trade remedy measures.<sup>280</sup> Some WTO Members queried the taxes as *de facto* anti-dumping measures that did not comply with the ADA.<sup>281</sup> These taxes were however repealed in 2002 following pressure from Ghana’s development partners, especially the IMF.<sup>282</sup>

However, there was the introduction of what appeared to be a special import tax specifically on rice and poultry as an amendment to Ghana’s legislation on customs as a result of agitation by the domestic industry.<sup>283</sup> The amendment was duly passed by Ghana’s Parliament and assented to by the President but was not put into effect, and was repealed in 2003.<sup>284</sup>

The repeal of the laws on special import taxes created a vacuum and left industry with no specific law to protect it. There was also no direct governmental body that domestic industry could turn to in order to make their grievances known. This led to the establishment of a board on tariffs, to advise government on anti-dumping and other trade contingency measures.<sup>285</sup>

### **3.4 TARIFF ADVISORY BOARD (TAB)**

The TAB was established at a time when pressure from industry became too much for the government to handle. Foremost among these were the Ghanaian cement industry,<sup>286</sup> steel

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<sup>279</sup> WTO ‘Trade Policy Reviews: First press release, Secretariat and Government summaries- Ghana February 2001’ available at [https://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 April 2017).

<sup>280</sup> WTO ‘Trade Policy Reviews: First press release, Secretariat and Government summaries- Ghana February 2001’ available at [https://www.wto.org/english/tratop\\_e/tpr\\_e/tp157\\_e.htm](https://www.wto.org/english/tratop_e/tpr_e/tp157_e.htm) (accessed 10 April 2017).

<sup>281</sup> Ayine DM ‘Managing trade liberalisation: Legal system deficiencies and the political economy of contingency protection in Ghana’ (2004) 48 (2) *Journal of African Law* 207 233.

<sup>282</sup> Ayine DM (2004) 207 231.

<sup>283</sup> See Ayine DM (2004) 207 231-2.

<sup>284</sup> Ayine DM (2004) 207 231-2.

<sup>285</sup> Ministry of Trade and Industry ‘Trade Sector Support Programme’ available at <http://moti.gov.gh/sites/default/files/content/documents/files/Trade%20Sector%20Support%20Programme.pdf> (accessed 20 April 2017).

<sup>286</sup> Ameer S ‘Ghana: Government to establish anti-dumping trade commission’ available at <http://allafrica.com/stories/200904270869.html> (accessed 20 April 2017).

industry<sup>287</sup> and poultry industry.<sup>288</sup> The poultry industry even sued the government in 2004, to force it to collect the special import tax it had imposed on poultry and rice.<sup>289</sup>

February 2005 saw, the launch of the Ghana Trade Policy with seven thematic areas.<sup>290</sup> In the prescriptions of the Trade Policy was the use of tariffs to check unfair trade practices and protect local industry.<sup>291</sup>

An addendum to the Trade Policy, the Trade Sector Support Programme (TSSP) was formulated to operationalise the implementation of the Ghana Trade Policy.<sup>292</sup> The TSSP envisaged the establishment of a TAB.<sup>293</sup> In-built in the functions of the TAB was to advise on trade contingency measures.<sup>294</sup> The structure of the TAB did not come with the TSSP. This probably explains why the TAB took more time to be fashioned.<sup>295</sup>

The memorandum on the establishment of the TAB was not submitted for consideration until June 2009.<sup>296</sup> In July 2009, government gave approval for the TAB to be established but it was in September 2009 that it was officially established.<sup>297</sup> The TAB thus becomes Ghana's first and official body in charge of dumping and other trade remedy issues.

The functions of the TAB was to have 'a diversified mandate involving the provision of technical advice on tariff and other trade-related policy and the undertaking of trade remedy

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<sup>287</sup> Hester SB *Technical Assistance for the Establishment and Capacity Building of the Ghana International Trade Commission* (2010) 6.

<sup>288</sup> Ayine DM (2004) 207 231-2 and Issah M 'Right to food of tomato and poultry farmers: Report of an investigative mission to Ghana' available at <http://germanwatch.org/handel/ffm-ghana.pdf> (accessed 08 April 2017).

<sup>289</sup> *The Republic v The Commissioner, Customs Excise & Preventive Service; Ex Parte – Ghana National Association of Poultry Farmers ((Ghanapf)* Suit No. BMISC 508/2004.

<sup>290</sup> Ministry of Trade and Industry *Ghana Trade Policy* (2005) v.

<sup>291</sup> Ministry of Trade and Industry (2005) 9.

<sup>292</sup> Ministry of Trade and Industry 'Trade Sector Support Programme' available at <http://moti.gov.gh/sites/default/files/content/documents/files/Trade%20Sector%20Support%20Programme.pdf> (accessed 20 April 2017).

<sup>293</sup> Ministry of Trade and Industry 'Trade Sector Support Programme' available at <http://moti.gov.gh/sites/default/files/content/documents/files/Trade%20Sector%20Support%20Programme.pdf> (accessed 20 April 2017).

<sup>294</sup> Ministry of Trade and Industry 'Trade Sector Support Programme' available at <http://moti.gov.gh/sites/default/files/content/documents/files/Trade%20Sector%20Support%20Programme.pdf> (accessed 20 April 2017).

<sup>295</sup> The TAB was established four years after the TSSP was launched.

<sup>296</sup> Ministry of Trade and Industry *Memorandum: Establishment of a Tariff Advisory Board/ Ghana International Trade Commission* (2009) 1.

<sup>297</sup> Letter OP/CA 11 dated 29 July, 2009 from the Office of the President, quoted in Ministry of Trade and Industry *Memorandum on the Establishment of a Ghana International Trade Commission (GITC)* (2014) 2.

investigations that is, investigations into petitions concerning dumping, subsidies as well as the adoption of safe guard measures'.<sup>298</sup> Petitions were indeed filed.

The first petition to the TAB came from the domestic steel industry and their only call was the imposition of anti-dumping duty on imported Chinese aluminium products.<sup>299</sup> By December 2010, the TAB had received petitions from the Ghana Printers and Converters Association, Association of Manufacturers of Alcoholic and Non-Alcoholic Products, Ghana Textile Manufacturing Company, Wellamp Company Limited, and Wienco Ghana Limited.<sup>300</sup> The petition that made a difference was the petition from the domestic cement manufacturers.<sup>301</sup>

The TAB did not have legislative backing because it was established as a division of the Ministry of Trade.<sup>302</sup> It therefore does not have the power to enforce but rather to make recommendation to the sector minister for Legislative Instruments (LIs) related to tariffs and trade and trade contingency measures.<sup>303</sup> A number of such recommendations were made and LIs passed, but the most profound is the Export and Import (Restrictions on Importation of Portland Cement) Regulations, 2016 (LI 2240).

### **3.5 EXPORT AND IMPORT (RESTRICTIONS ON IMPORTATION OF PORTLAND CEMENT) REGULATIONS, 2016 (LI 2240)**

As noted earlier, the TAB was established at a time when Ghana had liberalised and repealed most of the laws that gave it the opportunity to levy anti-dumping duties and/or countervailing measures through the back door.<sup>304</sup> The available law which could somewhat serve the purpose of trade remedies is the Export and Import Act 1995. This Act is the progenitor of LI 2240. As the LI itself says, it was enacted by virtue of the 'power conferred on the Minister responsible for Trade by sections 12 and 13(a) of the Export and Import Act 1995, (Act 503)'.

The official announcement that preceded LI 2240 stated inter alia;

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<sup>298</sup> Ministry of Trade and Industry (2009) 11-2.

<sup>299</sup> Nathan Associates *Ghana International Trade Commission Support* (2012) 2.

<sup>300</sup> Hester SB (2010) 7-8.

<sup>301</sup> Daily Graphic 'Local cement manufacturers petition Tariff Advisory Board over importation of cement' available at <http://www.graphic.com.gh/business/business-news/local-cement-manufacturers-petition-tariff-advisory-board-over-importation-of-cement.html> (accessed 10 April 2017).

<sup>302</sup> Hester SB (2010) 2.

<sup>303</sup> Ministry of Trade and Industry (2009) 8.

<sup>304</sup> Example of such repealed law was the Exchange Control Act.

In recent months, there have been claims... from different interest groups in the cement import and distribution sector. The claims have revolved around alleged low-priced dumping of imported cement.<sup>305</sup>

Regulations 2 and 3 of the LI read together reveal that the LI was meant to be a trade remedy tool intended to regulate Ghana's international trade in Portland cement but not to derogate from the country's commitment under the WTO.

A Monitoring Committee to be established under the LI was, among other things to examine and advise the Minister responsible for trade on the pricing of imported cement-<sup>306</sup> thus the Committee was effectively establishing the normal value of imported cement.

### **3.6 CUSTOMS ACT, 2015 (ACT 891)**

The existing law on customs contains provisions that have the semblance of anti-dumping laws. Section 68 of the Customs Act, permits the authorities to re-value, for purposes of customs duties, goods whose value cannot be determined on the basis of the transaction value.<sup>307</sup>

One mode of constructing the value of such imported goods is to look at the price of identical or similar imported goods, the price at which such goods or identical/similar goods 'are sold within the country in the greatest aggregate quantity to persons not related to the seller' taking into consideration all costs including profits and general expenses.<sup>308</sup> This provision is similar to Article 2 of the ADA relating to the construction of normal value. It is however doubtful whether the provisions of the Customs Act qualify to substitute for an anti-dumping law.

### **3.7 ASSESSMENT OF LAWS BEFORE THE GHANA INTERNATIONAL TRADE COMMISSION ACT, 2016 (ACT 926)**

Deducing from the discussion so far, any recommendation that the TAB makes could be implemented on the basis of two main pieces of legislation: the Export and Import Act and the

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<sup>305</sup> Ministry of Trade and Industry 'Public notice of intended executive action aimed at protecting the local cement industry from cheap imports' available at <http://moti.gov.gh/press-release/1457964094/public-notice-of-intended-executive-action-aimed-at-protecting-the-local> (accessed 08 April 2017).

<sup>306</sup> Regulation 4(1) of LI 2240.

<sup>307</sup> The Act defined 'transaction value' as sales between unrelated buyers and sellers of identical or similar goods for export from the country of origin- s 67(9).

<sup>308</sup> Section 68(1) of the Customs Act.

Customs Act. There is also subsidiary legislation (LI 2240) which focuses mainly on cement importation.

In terms of procedure, the legislation does not fulfil the ADA requirement of initial application and determination, preliminary investigation, preliminary imposition of anti-dumping measures, final determination, imposition of definitive anti-dumping duties, and other procedural requirements like confidentiality.

Analysis of the laws vis-à-vis the ADA reveals some shortcomings in the laws and that they fall short of the requirements of the ADA. The rules on what constitutes domestic industry, like product, normal value, constructed normal value, material injury and causality, are technically missing in the legislation. More appropriate and ADA compliant legislation is needed if Ghana really needs to establish an anti-dumping regime that can withstand any claim before the Dispute Settlement Body (DSB) of the WTO.

### **3.8 GHANA INTERNATIONAL TRADE COMMISSION ACT, 2016 (ACT 926)**

The Ghana International Trade Commission Act is Ghana's first and most direct Act on anti-dumping and other trade remedies. The Act can however not be analysed in isolation since it is meant to operate in a legal system. The Ghana legal system is one that recognises the supremacy of the Constitution.<sup>309</sup> Inferences would be made from the Constitution and other legislation if necessary.

The Act is divided into 10 parts with 54 sections dealing with various aspects of trade remedies. This discussion below will however focus on the parts and sections that are of general application and those that apply specifically to dumping and anti-dumping. Thus the discussion will start with the institutional structure under the Act and then delve into substantive rules, procedural rules, remedies for dumping in the Act and other issues of relevance to anti-dumping administration.

#### **3.8.1 Institutional structure, objectives and functions**

The Act establishes the Ghana International Trade Commission (GITC or Commission) as a body corporate with perpetual succession.<sup>310</sup> The GITC shall be independent in the

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<sup>309</sup> Article 2 of the Constitution, 1992.

<sup>310</sup> Section 1 of Act 926.

performance of its duties and is subject only to law.<sup>311</sup> However, the Commission may rely on a ministerial directive on policy but not when it is adjudicating a matter before it or it is involved in a suit at the court.<sup>312</sup>

The provisions establishing the GITC as a body corporate and as an independent body are a plus for the GITC Act, as a reading of Articles 16.4 and 16.5 of the ADA, does not suggest that a national authority in charge of trade remedies be a body corporate and be independent.

The Commission is governed by a five-member board that must have a retired Superior Court judge or a person qualified to be a Superior Court judge as chairperson.<sup>313</sup> Besides academic qualification and experience of legal practice,<sup>314</sup> one needs to be a person of ‘high moral character and proven integrity’ to be appointed as a member of any of the three superior courts of Ghana.<sup>315</sup> This provision gives more credence to the Commission and increases its legitimacy.

Among the objectives of the GITC is to ‘protect the domestic market from the impact of unfair trade practices in the course of international trade’<sup>316</sup> and to ensure Ghana’s compliance with international trade rules and regulations.<sup>317</sup> In furtherance of the objectives, the Commission is to be guided by the Marrakech Agreement of the WTO and the general principles of international trade.<sup>318</sup>

The Secretariat of the Commission is to be headed by an executive secretary and the GITC has power to determine the number of divisions and departments needed to execute its mandate.<sup>319</sup> Among its functions is to investigate dumping complaints<sup>320</sup> brought before it and to impose provisional measures<sup>321</sup> or an anti-dumping duty if investigations prove to be positive.<sup>322</sup> The

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<sup>311</sup> Section 4 of Act 926.

<sup>312</sup> Section 5 Act 926.

<sup>313</sup> Section 6(1).

<sup>314</sup> A person must have been at least 10 years at the Bar to qualify for appointment to the lowest superior court, the High Court- see Art 139 (4) of the Constitution, 1992.

<sup>315</sup> The Superior Courts of Ghana are: the High Court, the Court of Appeal and the Supreme Court- see Art 126 (1) of the Constitution, 1992.

<sup>316</sup> Section 2(1)(d) of the GITC Act.

<sup>317</sup> Section 2(1)(a) of Act 926.

<sup>318</sup> Section 2(1) of Act 926.

<sup>319</sup> Section 13 of Act 926.

<sup>320</sup> Section 3(1)(g) of Act 926.

<sup>321</sup> Section 22(4)(b) of Act 926.

<sup>322</sup> Section 31 of Act 926.

Customs Division of the Ghana Revenue Authority is however the body in charge of the collection of any duty imposed by the Commission.<sup>323</sup>

Thus far, there is nothing untoward as far as the institutional structure, objectives and functions of the GITC and the ADA are concerned. The Commission, however, cannot but act within the law which includes the substantive law to which the next section is devoted.

### **3.8.2 Substantive law**

The substance of the law and the meaning given to the concepts related to dumping and anti-dumping, such as, definition of dumping, normal value, export price, like product and injury, are the subject of discussion under substantive rules.

#### **3.8.2.1 Definition and determination of dumping**

There are two provisions in the Act as to what constitutes dumping: section 54 which is the interpretation section of the Act and section 31 which empowers the Commission to impose an anti-dumping duty. The interpretation section defines ‘dumping’ as ‘the introduction of a product into the commerce of another country at less than its normal product value in the ordinary course of trade, for the like product when destined for consumption in the exporting country.’

The definition is basically a repetition of that under Article VI of the GATT 1994 and the ADA as discussed in chapter 2. Concepts, such as, normal value, in the ordinary course of trade and export price, have been repeated in the definition.

To arrive at dumping, the GITC is to be guided by whether or not the export price of a product is less than its normal value and if the export price is less, whether or not the dumping is causing or threatening to cause material injury to a domestic producer or the domestic industry producing a like or directly competitive product or the dumping is likely to retard the establishment of a domestic industry.<sup>324</sup>

Causality must thus be established to make dumping actionable in the context of Ghana. The Act, in defining dumping and the injury it might cause to a domestic producer and the domestic industry, uses the word ‘and’ to link dumping and injury. The word ‘and’ has been interpreted

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<sup>323</sup> Section 47(4) of Act 926.

<sup>324</sup> Section 31(1) of the Act.

in *Republic v Yebbi & Avalifo*<sup>325</sup> to be a conjunctive word. This means that dumping in the context of Ghana becomes only actionable if it causes injury. This requirement fulfils the causality test in the ADA and Article VI of the GATT.

A reading of Articles 2.1 of the ADA and VI(1) of the GATT shows that Act 926 largely captured the definitions therein save for who is injured. This will be discussed later under injury determination. The starting point of dumping determination is the determination of the normal value.

### 3.8.2.2 Normal Value

‘Normal value’ has been used in the Act twice and both times in section 31. There is also the use of the phrase ‘normal product value’ in the definition of dumping.<sup>326</sup> A look at the Act indicates that the normal value of a product is normally the price charged for the product in the home country of the exporter.<sup>327</sup>

The ADA permits other methods to be used in arriving at the normal value when such value cannot be ordinarily ascertained.<sup>328</sup>

1. Where the volume of sales in the home country of the exporter is below five per cent of the volume of sales to the importing country; except where a lower than five per cent volume will provide for proper comparison;
2. Where there are no sales of the like product in the home market of the exporter in the ordinary course of trade; or
3. Where a particular market situation does not make for proper comparison of prices.

In any of these situations, the ADA permits an investigating authority to look to exports of the product to an appropriate third country or to construct a normal value taking into account cost of production, and reasonable administrative costs, selling and general costs, and profit.<sup>329</sup>

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<sup>325</sup> *Republic v Yebbi & Avalifo* [2000] SCGLR 149 @ 159.

<sup>326</sup> Section 54 of Act 926.

<sup>327</sup> Section 31(1)(a) of Act 926.

<sup>328</sup> Articles 2.2 & 2.4 of the ADA.

<sup>329</sup> Article 2.2 of the ADA.

Act 926, however, does not provide for other ways of arriving at the normal value as explained above; making the definition of normal value in the Act too narrow. This omission might not be a difficulty insofar as the ADA is concerned. The domestic industry, however, will not benefit fully from the remedy the ADA seeks to provide if the legislation remains the way it is. This is so because the Act assumes that there is always a sale of the dumped product in the ordinary course of trade in the exporter's domestic market.<sup>330</sup> Thus, if Ghana's domestic market is presented with a situation where there is no such sale in the domestic market of the exporter, the GITC will have no means of arriving at the normal value.

The normal value of a product is always compared with the export price to enable investigating authorities to determine if there is any difference between the normal value and the export price.

### **3.8.2.3 Export price**

The GITC Act defines export price as the sale price for goods adjusted by the deduction of the following:<sup>331</sup>

- a) The costs, charges and expenses incurred in preparing the goods for shipment to Ghana that are additional to those costs, charges and expenses generally incurred on the sale of like goods for use in the country of export; or
- b) A duty or tax paid by an exporter and other costs, charges or expenses for the transportation of the goods, or for shipment from the country of export to Ghana.

The Commission can only impose an anti-dumping duty on a product after it has determined that the export price is less than the normal value of the product in the exporting country.<sup>332</sup>

There is no mention in the Act of sale to an independent third party in determining the export price. However, looking at the text of Articles 2.3 and 2.4 of the ADA and the interpretation rendered in *US - Stainless Steel (Korea)*,<sup>333</sup> sale to an independent party should be resorted to first if there is no transaction price. The definition of export price in Act 926 limits the choices

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<sup>330</sup> See how 'dumping' is defined in s 54 and the use of 'normal value' in the section.

<sup>331</sup> Section 54 of Act 926.

<sup>332</sup> Section 31(1)(a) of Act 926.

<sup>333</sup> Panel Report *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R paras 6.90–6.91.

available to the Commission. Perhaps a determination of like product as captured in the Act will make the issues clearer.

#### **3.8.2.4 Like product**

The GITC Act sees like product from two angles:<sup>334</sup>

1. It is a product identical in all respects to the product under investigation;- or
2. It is a product having similar characteristics to the product under investigation.

For purposes of domestic industry, products that satisfy any one of the above determinants qualify to be termed like products.<sup>335</sup> The ADA mentions the above determinants in Article 2.6 but provides for the second determinant to be resorted to only when the first is absent. The GITC Act did not prioritise.

As noted in *US - Softwood Lumber V*,<sup>336</sup> when it comes to injury determination and determination of domestic industry, like product refers to the product produced by the domestic industry which is allegedly being injured by the dumped import.<sup>337</sup> The way the GITC Act treated injury is therefore important because that is how one can know which product is injured.

#### **3.8.2.5 Injury determination**

First, injury as defined in the Act includes material injury to the domestic industry.<sup>338</sup> The Commission has been empowered in the Act to impose an anti-dumping duty in cases of dumping ‘causing or threatening to cause *material injury*<sup>339</sup> to a domestic producer or the domestic industry producing a like or directly competitive product or is likely to retard the establishment of a domestic industry’.<sup>340</sup>

All that the Act requires the Commission to do before imposing such a duty is to establish, after investigation, ‘the existence, degree and effect’ of dumping; and whether there is ‘sufficient

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<sup>334</sup> Section 54 of Act 926.

<sup>335</sup> Section 54 of Act 926; read the definitions of ‘domestic industry’ and ‘like product’ together.

<sup>336</sup> Panel Report *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, paras 7.152 - 7.153 (*US – Softwood Lumber V*).

<sup>337</sup> Panel Report *US – Softwood Lumber V* para 7.152.

<sup>338</sup> Section 54 of Act 926.

<sup>339</sup> Emphasis added.

<sup>340</sup> Section 31(1)(b) of Act 926.

evidence of dumping, material injury and a causal link between the product that is being dumped and the alleged material injury.<sup>341</sup>

The ADA, in Article 3.5, stresses the need for investigating authorities to establish the link between dumped imports and the material injury such imports cause to the domestic industry. Thus far, Act 926 has fulfilled the ADA requirement.<sup>342</sup> There is no further direction in the Act on what is meant by ‘degree’ and ‘effect’. There is also no further indication in the Act on how to measure material injury to a domestic producer or domestic industry.

The Act is silent on the requirement of injury as laid down in Article 3 of the ADA. In determining injury to the domestic industry, Article 3.1 requires an investigating authority to examine the volume of the dumped imports and the impact the imports is having on domestic producers. There are 15 factors to first consider in assessing the impact of dumping on domestic industry.<sup>343</sup>

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

It is mandatory to first evaluate these factors in order to assess the extent of injury to the domestic industry, as held by the Appellate Body in *Thailand-H-Beams*.<sup>344</sup> These factors being mandatory means that the Act must provide for them else it will be in violation of the ADA. There is no mention of these factors in the Ghana Act. What constitutes material injury, and how to know if there is material injury have not been mentioned in the Act. Any injury, however, is only actionable if it is injury to the domestic industry; the Act’s treatment of what constitutes domestic industry is discussed next.

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<sup>341</sup> Section 32(b) of Act 926.

<sup>342</sup> See especially s 32(b) of Act 926.

<sup>343</sup> Article 3.4 of the ADA.

<sup>344</sup> Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and Beams from Poland*, WT/DS122/AB/R para 121-125.

### 3.8.2.6 Domestic Industry

The GITC Act defines domestic industry to include:<sup>345</sup>

- a) Domestic producers as a whole of like products;
- b) Domestic producers whose collective production of like products constitutes a major proportion of the total domestic production of the like products; and
- c) The category of domestic producers who are not connected to an exporter or importer of dumping or subsidised products.

The definition above is in accordance with Article 4.1 of the ADA but falls short of circumscribing what is meant by domestic industry. First, the definition uses the word 'includes'; this means that the list is not a closed one. Secondly, the definition indicates no percentage. The guide here is the advice of the Appellate Body in *EC- Fasteners (China)*<sup>346</sup> to investigating authorities when it says:

The absence of a specific proportion does not mean, however, that any percentage, no matter how low, could automatically qualify as "a major proportion". Rather, the context in which the term "a major proportion" is situated indicates that "a major proportion" should be properly understood as a relatively high proportion of the total domestic production.

When it comes to making an application to an investigating authority, Article 5.4 of the ADA requires 50 per cent or more of those domestic producers that express an opinion to support the application to initiate an investigation. The Article further adds that domestic producers who expressly support an application to initiate an investigation must constitute at least 25 percent. These limits are not in the GITC Act.

The definition of domestic industry as contained in Act 926 might pass the test of Article 4.1 of the ADA but might be problematic when it comes to initiation of an investigation when Article 5.4 of the ADA becomes applicable. Further, the fact that the list is an open one is itself problematic.

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<sup>345</sup> Section 54 of Act 926.

<sup>346</sup> Appellate Body Report *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/AB/R para 412.

The substantive law can only be established following laid down procedures. A country's investigating authority is required to follow these procedures in order to achieve the ends of the law.

### **3.8.3 Procedural law**

The law lays down some procedures to follow in carrying out investigations. These include: initiation of investigation and conduct of proceedings; interested parties' right to know and be heard; and confidentiality.

#### **3.8.3.1 Initiation of investigation and conduct of proceedings**

Three classes of persons are clothed with authority to propel an investigation.<sup>347</sup>

- a. A domestic producer of a like or directly competitive product;-
- b. The domestic industry of a like or directly competitive product;- and
- c. The Commission itself; except that in the case of the Commission, it must first have sufficient evidence of dumping, material injury and a causal link between the product being dumped and the injury.

The ADA provides for two strata of requirements in filing an application for the initiation of an investigation into issues of dumping.<sup>348</sup> The first indicates what must be contained in an application; the second is who must be behind the application.<sup>349</sup>

With regards to what must be contained in an application for an investigation, the ADA demands that an application contains evidence of dumping, injury and a causal link between dumping and injury.<sup>350</sup> An investigating authority is required to satisfy itself of these requirements before commencing an investigation. That is the decision in *Mexico - Steel Pipes and Tubes*<sup>351</sup> when the Panel examined the provisions of Articles 5.2 and 5.3 of the ADA.

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<sup>347</sup> Sections 32 & 22.

<sup>348</sup> Article 5 of the ADA.

<sup>349</sup> Article 5.2 of the ADA.

<sup>350</sup> Article 5.2 of the ADA.

<sup>351</sup> Panel Report *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* WT/DS331/R para. 7.21.

When it comes to who must be behind the application, the ADA requires that at least 50 per cent of the domestic producers express an opinion in support of the application, and that at least 25 per cent of the domestic producers must expressly support the application before an investigating authority can initiate an investigation.<sup>352</sup> It is instructive to note that the word used in asking for these thresholds is ‘shall’. It is argued that it is mandatory that those behind the application to initiate an investigation fulfil the percentage thresholds in Article 5.4.

Act 926 seems to have absolved a local producer and the domestic industry from the requirement of furnishing the Commission in its application, with evidence of dumping, injury and a causal link between the dumping and the injury as demanded by Articles 5.2 and 5.3 of the ADA. It rather made that a requirement if the Commission wishes *suo moto* to initiate an investigation.<sup>353</sup>

The GITC Act empowers the Commission to suspend an investigation for want of merit or insufficient evidence.<sup>354</sup> It is doubtful if this can fulfil the requirements of Articles 5.2 and 5.3 of the ADA. This doubt is expressed because the word used in the section is ‘may’. The Interpretation Act of Ghana, Act 792, states that the use of ‘may’ in an enactment shall be construed as permissive and empowering and not mandatory.<sup>355</sup> Another reservation is the fact that the power to discontinue is given in a provision other than the one dealing with an application for the initiation of an investigation.<sup>356</sup>

The Ghana Act is also silent on the mandatory requirement of the percentage of the domestic industry that should express an opinion in support of the application; and the percentage of domestic producers that should actually support an application to initiate an investigation into a dumping allegation. The permission given to ‘a domestic producer’<sup>357</sup> to file a complaint without any limitation of the size of the producer gives the impression that the draftsman intended to do away with the percentage requirement in Article 5.4 of the ADA. This presents a challenge should Ghana appear before the DSB.

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<sup>352</sup> Article 5.4 of the ADA.

<sup>353</sup> Section 32 of Act 926.

<sup>354</sup> Section 41(3) of Act 926.

<sup>355</sup> Section 46, Interpretation Act, 2009 (Act 792).

<sup>356</sup> See s 41(3).

<sup>357</sup> Section 32 of Act 926.

The ADA is silent on how a Member's investigating authority may conduct its proceedings. The GITC Act has catered for that.<sup>358</sup> All proceedings of the Commission are to be held in public except where a party requests a private hearing.<sup>359</sup> This enables a party who has confidential information to disclose, to do so without fear of a third party hearing such information.

The GITC has sweeping powers in the conduct of its investigations and hearings including subpoenaing a witness and issuing summons.<sup>360</sup> It has power to compel a person to provide it with any information be it oral or documentary relevant to its investigation or hearing.<sup>361</sup> These powers could be exercised by examining a witness under oath.<sup>362</sup>

These powers, it is argued, make the Commission a quasi-judicial body in the performance of its functions. If these powers are juxtaposed with the independence of the Commission as stated above, they give the Commission more legitimacy in the eyes of interested parties and the public. These interested parties however, have a right to defend their interest.

### **3.8.3.2 Interested parties' right to know and be heard**

The Appellate Body in *US - Oil Country Tubular Goods Sunset Reviews*<sup>363</sup> notes in relation to Article 6 of the ADA<sup>364</sup> that the right to be heard and the right to defend 'require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be "ample" and "full"...'. These rights and more are guaranteed in the GITC Act.

The GITC is required by the Act to conduct investigations before it can impose any import measure including anti-dumping duties.<sup>365</sup> In conducting investigations, the 'Commission shall provide full opportunity to all interested parties to defend their interests'.<sup>366</sup>

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<sup>358</sup> Sections 41& 42 of Act 926.

<sup>359</sup> Sections 42(1) & (2) of Act 926.

<sup>360</sup> Sections 41& 42 of Act 926.

<sup>361</sup> Sections 41& 42 of Act 926.

<sup>362</sup> Sections 41& 42 of Act 926.

<sup>363</sup> Appellate Body Report *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* WT/DS268/AB/R paras 241–242.

<sup>364</sup> The Appellate Body emphasised on Arts 6.2 & 6.3.

<sup>365</sup> Sections 22 & 23 of Act 926.

<sup>366</sup> Sections 22 & 23 of Act 926.

Another opportunity which the Act affords parties, though that is not explicit in the ADA, is the right to be represented by a lawyer. Act 926 provides for this in section 42(3). This further guarantees a party's right to be heard and defend themselves as contained in the ADA. Thus far, the requirement of the ADA is fulfilled.

The GITC Act is silent on notification to the authorities of the exporting country though the ADA has made that mandatory.<sup>367</sup> The Act is also silent on notifying interested parties at every stage of the proceedings as required by the ADA.<sup>368</sup> However, given the fact that every opportunity has been given to interested parties to defend their interest, not having an explicit provision in the Act should not be fatal as that could be read into the Act. Though notifying the government of the exporting country is mandatory according to Article 5.5 of the ADA, not having it in legislation should not be fatal because other ways could be used in effecting such notice.<sup>369</sup>

Issues of confidentiality however place a limit on which information interested parties are entitled to know, and an Act meant to protect the interests of all must provide for how to handle such issues.

### **3.8.3.3 Confidentiality**

The Act provides an opportunity for a party who wishes to have their information treated confidentially to do so.<sup>370</sup> The party may either designate such information as confidential or request the Commission to treat the information as confidential.<sup>371</sup>

The Commission can only disclose confidential information with the consent of the party who provided the information, or in four situations:<sup>372</sup>

- a. To an officer of the Commission who is directly involved in the matter that requires confidentiality;-
- b. To an officer who is in charge of records;-

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<sup>367</sup> Article 12 of the ADA.

<sup>368</sup> Article 12.2 of the ADA.

<sup>369</sup> One way is through diplomatic communication.

<sup>370</sup> Section 48 of Act 926.

<sup>371</sup> Section 48(1) of Act 926.

<sup>372</sup> Section 48(2) & (3) of Act 926.

- c. To a party who is under a business information protective order;-and
- d. Under order of the Court.

The provisions on confidentiality are in accordance with the requirements of the ADA save that the Act does not make room for a non-confidential summary of confidential information to be given to an interested party as contained in Article 6 of the ADA. It is argued that this is not fatal to the defence of interested parties since they can still have access to such confidential information under a business information protective order provided for in the Act.<sup>373</sup>

Having gone through these procedures, and having established that there is dumping, and that the dumping is causing injury to Ghana's industry, the Act permits the imposition of dumping remedies in order to offset the effects of dumping.

### **3.8.4 Dumping remedies**

The GITC Act provides for some of the remedies/ measures held to be legal by the Appellate Body in *US - 1916 Act*<sup>374</sup> and *US – Offset Act (Byrd Amendment)*.<sup>375</sup> These measure are: provisional measures, price undertakings, and definitive anti-dumping duties.

#### **3.8.4.1 Provisional measures and price undertakings**

The ADA has made three types of provisional measures permissible: the imposition of duty; security (cash deposit or bond); and withholding of appraisement.<sup>376</sup> These may only be imposed after a preliminary finding of dumping, injury and a causal link between the dumping and the injury.<sup>377</sup> If this causal link is established, there must be fear of further injury being caused to the domestic industry in the course of the investigation before a provisional measure can be imposed.<sup>378</sup>

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<sup>373</sup> Section 48(2) & (3) of Act 926.

<sup>374</sup> Appellate Body Report *United States – Anti-Dumping Act of 1916* WT/DS136/AB/RWT/DS162/AB/R para 119.

<sup>375</sup> Appellate Body Report *United States – Continued Dumping and Subsidy Offset Act of 2000* WT/DS217/AB/R,WT/DS234/AB/R para 269.

<sup>376</sup> Article 7.2 of the ADA.

<sup>377</sup> Article 7 of the ADA.

<sup>378</sup> Article 7 of the ADA.

The Act made room for the imposition of a provisional anti-dumping duty but did not spell out the circumstances under which such a duty could be imposed.<sup>379</sup> The Act has also not categorised the various provisional measures there are and when and how each can be imposed.

There is no mention of price undertaking in the GITC Act. In the ADA an investigating authority may accept price undertaking from an exporter if the exporter voluntarily undertakes to revise their prices upward<sup>380</sup> and when they undertake to cease exports at dumped prices.<sup>381</sup> Further, an undertaking can only be accepted after a preliminary affirmative finding of dumping and injury caused by the dumping.<sup>382</sup> The Act is silent on price undertakings, let alone of the circumstances under which price undertakings may be accepted.

However, it is argued that provisional and price undertaking measures permitted in the ADA can still be taken care of under ‘special import measures’<sup>383</sup> in Act 926. Section 54 interpreted special import measures to include anti-dumping duties. The list is not a closed one since the section uses the word ‘include’. Further, in exercising the power to impose a special import measure, the ‘Commission shall have regard to the agreements of the World Trade Organisation’.<sup>384</sup> This gives the Commission the latitude to look for an appropriate measure in the ADA to impose in any given situation.

It is doubtful, though, that the Act’s demand that the Commission carry out an investigation before imposing a special import measure<sup>385</sup> can substitute for the ADA’s demand for a preliminary investigation. This is so because section 23 that imposes the demand did not elaborate further on what is meant by ‘investigation’ and how far such investigation should go.

#### **3.8.4.2 Definitive anti-dumping duties**

The GITC Act empowers the Commission to impose a definitive anti-dumping duty after a final determination of dumping, injury and a link between dumping and injury.<sup>386</sup> The duty

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<sup>379</sup> Section 22(4) of Act 926.

<sup>380</sup> Article 8.1 of the ADA.

<sup>381</sup> Article 8.1 of the ADA.

<sup>382</sup> Article 8.2 of the ADA.

<sup>383</sup> This term had been used variously in the Act but s 54 interpreted it to include countervailing duties, anti-dumping duties, safeguard measures and tariff adjustments.

<sup>384</sup> Section 22(5) of Act 926.

<sup>385</sup> Section 23(1) of Act 926.

<sup>386</sup> Section 31(1) of Act 926.

however ‘shall be of an amount equal to the margin of dumping being the difference between the normal value of dumped imports and their export price’. The mandatory nature of the amount of definitive anti-dumping duty to be imposed is worrying since the ADA recommends a lower duty if that will cure the injury<sup>387</sup> though it is acknowledged that imposing a lower duty is not mandatory.<sup>388</sup>

There is the fear that a domestic industry might not benefit fully from a definitive anti-dumping duty which the Commission imposes. This is so because the Act provides for duration of five years or less, for any definitive anti-dumping duty imposed.<sup>389</sup> The ADA provides for more than five years duration of a definitive anti-dumping duty if it is established after review that dumping and injury to domestic industry will continue.<sup>390</sup> This opportunity is not contained in Act 926.

Any action the GITC takes is subject to review. This is probably meant to ensure that the interests of the various parties are appropriately catered for by these reviews.

### **3.8.5 Reviews**

Two types of review have been provided for under the Act: review by the Commission itself and review by a High Court.<sup>391</sup>

The Commission is empowered to review its own findings and determination in relation to anti-dumping duties and other special import measures.<sup>392</sup> It is not clear from the Act if interested parties can apply to the Commission for review of the Commission’s decisions. This is so because the only opportunity given to interested parties to apply to the Commission for a review, is dealt with under review of customs tariffs.<sup>393</sup> Anti-dumping duty is not treated as a

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<sup>387</sup> Article 9.1 of the ADA.

<sup>388</sup> Panel Report *European Union – Anti-Dumping Measures on Certain Footwear from China* WT/DS405/R para. 7.924.

<sup>389</sup> Section 33.

<sup>390</sup> Article 11 of the ADA.

<sup>391</sup> A High Court is a Superior Court under the Constitution of Ghana. It is presided over by a judge who was a member of the Bar for no less than ten years and who must be a person of high moral character and proven integrity; Art 139(4) of the Constitution 1992.

<sup>392</sup> Sections 22(4)(c) & 54 for definition of special import measures.

<sup>393</sup> Section 34 of Act 926.

tariff in the Act. That is why it is thought that when it comes to dumping and anti-dumping, it is only the Commission that can review its own decisions.

Section 43 of the GITC Act gives an opportunity to any person who does not agree with any decision of the Commission to apply to the High Court for review. Causes of action are derivable from four main actions of the Commission. A person can seek a review of an order; ruling; recommendation; or final determination of the Commission.<sup>394</sup> A person has six months to apply for any review of the action of the Commission.<sup>395</sup>

Perhaps the independence of the judiciary in Ghana can rival any judicial independence in any part of the world. This is so because judicial independence in Ghana is constitutionally guaranteed and no person or organ can interfere with it.<sup>396</sup> Such an independent body is what the ADA demands,<sup>397</sup> and the GITC Act has fulfilled it. This leads one to make some observations in addition to the observations made under the various headings.

### **3.9 OBSERVATIONS AND OPPORTUNITY TO IMPROVE THE TEXT OF THE LAW**

Various observations were made in the discussion above but some need to be singled out because of their primacy. The Act sees the producer of a ‘like or directly competitive product’ as part of the domestic industry.<sup>398</sup> This is troubling because the phrase ‘like or directly competitive product’ is not known to the ADA. It is a phrase known to the Agreement on Safeguards where it is serious injury that gives rise to a cause of action.<sup>399</sup> The ADA, on the other hand, is meant to tackle ‘material injury’ and thus only allows producers of ‘like products’ to be considered part of the domestic industry.<sup>400</sup> There is therefore the need for the phrase ‘like or directly competitive product’ to be interpreted to mean like product, or be completely amended.

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<sup>394</sup> Section 43.

<sup>395</sup> Section 43.

<sup>396</sup> Articles 125 & 127 of the Constitution 1992.

<sup>397</sup> Article 13 of the ADA.

<sup>398</sup> Sections 22, 31 & 32 read together.

<sup>399</sup> Article XIX of the GATT 1994 and Arts 2 & 4 of the Agreement on Safeguards.

<sup>400</sup> Article 3 of the ADA.

Another observation has to do with the regional grouping of which Ghana is a Member - the Economic Community of West African States (ECOWAS).<sup>401</sup> The Act is silent on ECOWAS. This is worrying because ECOWAS already has a legal framework on anti-dumping.<sup>402</sup>

The observations above, it is suggested, do not need amendment of the Act for it to be streamlined. There is an opportunity in section 52 of the Act for an LI to be issued to, among other things, prescribe the manner for the imposition of anti-dumping duties; regulate the conduct of its investigations; regulate the procedures of the Commission; prescribe procedures of the Commission; and provide for any other matter for the effective implementation of the Act. These concerns need to be taken on board for an LI to be drafted and promulgated.

### 3.10 CONCLUSION

Ghana has evolved in its bid to protect its domestic industry from imported goods. Protection of domestic industry after independence came in the form of import substitution.<sup>403</sup> There was also protection through taxes, tariffs and an import licences system.<sup>404</sup> The country also introduced the Prices and Incomes Board and the Special Surcharge on Imported Goods Decree at one point primarily to raise revenue, but which operated as though they were anti-dumping measures.<sup>405</sup> In 1983, however, Ghana began the liberalisation of its economy and foreign trade under the guidance of the IMF and the World Bank.<sup>406</sup>

The demands of the IMF and World Bank liberalisation programmes made domestic industry protection measures assume a more structured form. The import licensing regime, the tariffs and taxes on imported goods, and restrictions on foreign currency access were all liberalised.<sup>407</sup> More legislation and policies were formulated. One of these is the establishment of the TAB to undertake trade remedy investigations and handle dumping petitions, among others.<sup>408</sup> This

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<sup>401</sup> ECOWAS 'Member States' available at <http://www.ecowas.int/member-states/> (accessed 13 June 2017).

<sup>402</sup> ECOWAS *Defense measures to be imposed on imports which are dumped from non-Member States of the Economic Community of West African States* C/REG.6/6/13 (June 2013).

<sup>403</sup> Ackah C Adjasi C & Turkson F (2001) 1.

<sup>404</sup> Leith JK (1974) 77.

<sup>405</sup> Kufuor KO (2005) 135-8.

<sup>406</sup> Laryea A & Akuoni S (2012) 12.

<sup>407</sup> Laryea A & Akuoni S (2012) 12.

<sup>408</sup> Ministry of Trade and Industry (2014) 12.

makes the TAB the first official body established to handle anti-dumping and other trade remedy issues.

The GITC Act and the establishment of the GITC are, however, the most ADA compliant legislation and institution to be established in Ghana. Issues of what constitutes dumping, domestic industry, normal value and material injury have been discussed under the Act. Some observations were raised with regard to compatibility of some provisions of the Act with the ADA, but the fact that the Act provides for LI<sup>409</sup> means the Act and its content can pass the test of the ADA subject to LI being enacted to deal with the observations raised.

The next chapter will look at the anti-dumping regime of South Africa which is a pacesetter in anti-dumping in Africa and among the few countries to introduce anti-dumping legislation in the early 20<sup>th</sup> century.<sup>410</sup>

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<sup>409</sup> Section 52 of Act 926.

<sup>410</sup> South Africa introduced its first anti-dumping legislation in 1914.

## CHAPTER 4

### RESTATEMENT OF SOUTH AFRICAN ANTI-DUMPING LEGISLATION

#### 4.1 INTRODUCTION

It is generally agreed that Canada is the country to be credited with institutionalising anti-dumping legislation in 1904.<sup>411</sup> The pioneering role of Canada inspired other countries to follow suit in the decade after 1904.<sup>412</sup> South Africa is one such country. The history of South African anti-dumping legislation, therefore, is part of the history of anti-dumping legislation across the globe. As such, any meaningful discussion on anti-dumping legislation will be incomplete without mention of South Africa. Its anti-dumping legislation precedes that of the United States (US),<sup>413</sup> the United Kingdom (UK),<sup>414</sup> Japan,<sup>415</sup> India,<sup>416</sup> and many established implementers of modern day anti-dumping measures.<sup>417</sup>

This chapter takes a historical journey into the South African anti-dumping regime by looking at the various laws that governed anti-dumping practices in South Africa. It seeks to examine anti-dumping initiations and/or measures that have been imposed by South Africa. The various challenges to the actions of the South African investigating authority in the initiation and imposition of anti-dumping measures especially at the Dispute Settlement Body (DSB) of the World Trade Organisation (WTO) are examined.

The current anti-dumping regime is examined and its compatibility with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA) and Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 analysed.

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<sup>411</sup> Deardorff AV & Stern RM 'A centennial of anti-dumping legislation and implementation: Introduction and overview' available at <http://fordschool.umich.edu/rsie/workingpapers/Papers526-550/r538.pdf> (accessed 26 January 2017).

<sup>412</sup> New Zealand's legislation was in 1905, Australia's was in 1906. See The New Zealand Trade Consortium 'Anti-dumping in New Zealand - A century of protection from "unfair" trade?' *Working Paper 39 (2005)* 14 and Duarte LC *Dumping and Anti-Dumping in International Trade: Origins, Legal Nature, and Evolution Developments in Brazil and in the United States* (unpublished LLM thesis, University of Georgia, 1997) 17.

<sup>413</sup> The US law dates back to 1916.

<sup>414</sup> The UK regime started in 1921. However, the UK regime has now been subsumed under that of the European Union (EU).

<sup>415</sup> Its legislation dates back to 1920.

<sup>416</sup> The Indian legislation is traced to 1985.

<sup>417</sup> Brown CP 'Global anti-dumping database' available at <http://econ.worldbank.org/tbd/gad/> (accessed 28 November 2016).

The chapter concludes by making recommendations on the way forward. First and foremost, the history of the anti-dumping regime is discussed.

## 4.2 HISTORY OF ANTI-DUMPING LEGISLATION AND INITIATION

The Customs Tariff Act 26 of 1914, was the foundation legislation of South Africa's anti-dumping legislation. It empowered the then government to impose a special or dumping duty on goods if the export or actual selling price to an importer in the then Union of South Africa was less than the true current value of the same goods when sold for home consumption in the country from which they were exported.<sup>418</sup> The provision that enabled the imposition of an anti-dumping duty also gave government the power to impose a countervailing duty on goods in respect of a 'bounty' that had been granted in the exporting country.<sup>419</sup> There was therefore no clear distinction between anti-dumping and countervailing duties.

Dumping was a new concept then. Its introduction in legislation did not necessarily mean it would be implemented. It was seven years later before the first anti-dumping initiation was recorded.<sup>420</sup> Between its first investigations in 1921 and 1947 when serious talks on global regulation of anti-dumping became an issue, South Africa initiated about 95 anti-dumping and/or countervailing investigations.<sup>421</sup>

As the issues of anti-dumping and countervailing investigations became central to South African foreign trade, the Board of Trade and Industries (BTI) was established in 1921 to deal with investigations.<sup>422</sup> The BTI existed till 1992 when it was renamed the Board on Tariffs and Trade (BTT).<sup>423</sup> However, Customs conducted investigations to establish dumping while the BTI and BTT investigated injury and causality.<sup>424</sup>

There was a series of efforts to regulate anti-dumping practices at the global level during these years. Key among these efforts and those akin to this discussion was the inclusion of Article

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<sup>418</sup> Matthews EL, Swift GM, Tatham FS, Beck CA and Hartog G 'South Africa: Union of South Africa' (1916) 16 *Journal of the Society of Comparative Legislation* 140 155.

<sup>419</sup> Mathews *et al* (1916) 155.

<sup>420</sup> 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) 3.

<sup>421</sup> Brink G (2002) 3.

<sup>422</sup> Brink G *A Theoretical Framework for South African Anti-Dumping Law* (unpublished LLD thesis, University of Pretoria, 2004) 19-20.

<sup>423</sup> Brink G (2004) 689-90.

<sup>424</sup> Brink G 'Anti-dumping in South Africa' *Tralac Working Paper no D12WP07* (2012) 2.

VI in the GATT 1947. South Africa was a contracting party to the GATT from 1947 until it was replaced by the WTO; and has since the inception of the WTO on 1 January 1995 been a Member thereof.<sup>425</sup> The inclusion of Article VI however did not make much difference in the use of anti-dumping measures because the said provision merely condemned dumping ‘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>426</sup> No guidance was given on how anti-dumping legislation could be used.

As a result, countries continued with their anti-dumping legislation as before. Between 1947 and 1958, South Africa initiated 211 anti-dumping cases.<sup>427</sup> Thus at the time the GATT Secretariat released its report on anti-dumping, South Africa was the single largest user of the anti-dumping remedy across the globe.<sup>428</sup>

In 1967 when the Kennedy Round Anti-Dumping Code came into force, South Africa was not a signatory thereto.<sup>429</sup> It was also not a signatory to the 1979 Tokyo Round Anti-Dumping Code.<sup>430</sup> This meant it could still initiate and/or impose anti-dumping measures without resort to the GATT Secretariat. Between 1958 when the GATT Report on Anti-dumping was published and 1978, when the Kenney Round Anti-Dumping Code was due for review, South Africa had initiated a further 265 anti-dumping cases.<sup>431</sup>

The Tokyo Round Anti-Dumping Code, which came into force in 1980,<sup>432</sup> came at a time when South Africa had withdrawn most of its anti-dumping duties because it was of the opinion that its high tariffs were enough to protect its domestic industry.<sup>433</sup> Despite the withdrawal, a further

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<sup>425</sup> WTO ‘Member information: South Africa and the WTO’ available at [https://www.wto.org/english/thewto\\_e/countries\\_e/south\\_africa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm) (accessed 03 June 2017).

<sup>426</sup> Article VI of the GATT 1994 (then 1947).

<sup>427</sup> Brink G ‘One hundred years of anti-dumping in South Africa’ (2015) 49 2 *Journal of World Trade* 325 332.

<sup>428</sup> GATT *Report on Anti-dumping and Countervailing Duties August, 1958* GMT/77/58.

<sup>429</sup> Joubert N ‘The reform of South Africa’s anti-dumping regime’ available at [https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm) (accessed 05 April 2017).

<sup>430</sup> Joubert N ‘The reform of South Africa’s anti-dumping regime’ available at [https://www.wto.org/english/res\\_e/booksp\\_e/casestudies\\_e/case38\\_e.htm](https://www.wto.org/english/res_e/booksp_e/casestudies_e/case38_e.htm) (accessed 05 April 2017).

<sup>431</sup> Brink G (2015) 332.

<sup>432</sup> WTO ‘Technical information on anti-dumping’ available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_info\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm) (accessed 21 Feb. 17).

<sup>433</sup> Brink G (2015) 332.

270 cases were initiated between 1978 and the end of 1994 when the GATT gave way to the WTO.<sup>434</sup>

Between 1921 when the first anti-dumping initiation was recorded and 1994 when the GATT made way for the WTO Agreements including the ADA, South Africa had initiated not less than 800 anti-dumping and/or countervailing initiations.<sup>435</sup> These initiations were done under the Customs Act 1914 which was later replaced by the Customs and Excise Act 91 of 1964, and the Board of Trade and Industries Act of 1924; later replaced by the Board on Tariffs and Trade Act 107 of 1986 (BTT Act).<sup>436</sup>

With the experience of South Africa in anti-dumping initiation, the introduction of the ADA in 1995 did little to abate its anti-dumping initiation. In the first 10 years of the ADA, it had initiated 229 investigations putting it among the top 10 initiators of anti-dumping investigations across the globe.<sup>437</sup> As of June 2016, it is still among the top 20 initiators of anti-dumping investigations the world over.<sup>438</sup>

The country is a founding Member of the WTO and a signatory to the ADA, but its manner of initiation and investigation could not continue after 1 January 1995 when the WTO Agreements became effective.<sup>439</sup> Its laws therefore needed to be streamlined in order to be WTO and ADA compliant. A number of amendments were made to its laws. Notable amongst these amendments was the Board on Tariffs and Trade Amendment Act, 1995.<sup>440</sup> It redefined concepts, such as, dumping, export price and normal value, to bring them in line with WTO/ADA requirements.<sup>441</sup>

These amendments appeared not to be enough in the ADA era, leaving South Africa with no option but to repeal the entire Board on Tariffs and Trade Act; replacing it with the International

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<sup>434</sup> Brink G (2015) 332.

<sup>435</sup> Brink G (2015) 332-3.

<sup>436</sup> Sibanda OS 'The South African anti-dumping law: Consistency with the GATT Anti-Dumping Code' (2001) 34 2 *The Comparative and International Law Journal of Southern Africa* 242 243-4.

<sup>437</sup> Brink G (2015) 333.

<sup>438</sup> WTO 'Anti-dumping' available at [https://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](https://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (accessed 11 May 2017).

<sup>439</sup> WTO 'WTO' available at [https://www.wto.org/english/thewto\\_e/thewto\\_e.htm](https://www.wto.org/english/thewto_e/thewto_e.htm) (accessed 03 June 2017).

<sup>440</sup> Board on Tariffs and Trade Amendment Act 39 of 1995.

<sup>441</sup> Section 1 of Act 39.

Trade Administration Act 71 of 2002 (ITAA) and an anti-dumping regulation.<sup>442</sup> However, South Africa was still taken to the DSB by some countries for ADA violations.

### **4.3 SOUTH AFRICA AT THE DISPUTE SETTLEMENT BODY OF THE WORLD TRADE ORGANISATION**

In spite of the 1995 amendment to Act 107 of 1986 and its subsequent repeal, Members of the WTO were still not satisfied with the South African anti-dumping regime. Five countries - India, Turkey, Indonesia, Brazil and Pakistan - have at various times hauled South Africa before the DSB for alleged violation of the provisions of the ADA.<sup>443</sup>

In South Africa's first case before the DSB<sup>444</sup> which was lodged in April 1999, India challenged the decision of South African authorities to impose definitive anti-dumping measures on ampicillin amoxicillin imported into South Africa from India. India claimed, amongst others, that the definition and calculation of normal value, determination of injury, and the facts relied upon were inconsistent with the ADA.<sup>445</sup>

Four years later, Turkey challenged South Africa's definitive anti-dumping measures that it has imposed on blankets from Turkey.<sup>446</sup> To Turkey, the BTT violated, amongst others, the ADA provisions on notification.<sup>447</sup> It alleged that the facts as established by the BTT were not proper and that the evaluation of the facts was biased.<sup>448</sup>

These two cases were principally under the BTT Act and they came about despite the 1995 amendment to align the Act with the requirements of the ADA. The case that followed these was dealt with under the BTT Act but saw the ITAA come into force when it was time for review proceedings. It involved Indonesia.

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<sup>442</sup> The Regulation was enacted pursuant to the power given to the minister in-charge of trade in section 59 of Act 71 of 2002.

<sup>443</sup> WTO 'South Africa and the WTO' available at [https://www.wto.org/english/thewto\\_e/countries\\_e/south\\_africa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm) (accessed 11 May 2017).

<sup>444</sup> *South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India* WT/DS168/1 G/L/303G/ADP/D17/1 (*South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India*).

<sup>445</sup> *South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India*.

<sup>446</sup> *South Africa - Definitive Anti-Dumping Measures on Blanketing from Turkey* WT/DS288/1/G/L/621/G/ADP/D48/1 (*South Africa - Definitive Anti-Dumping Measures on Blanketing from Turkey*).

<sup>447</sup> *South Africa - Definitive Anti-Dumping Measures on Blanketing from Turkey*.

<sup>448</sup> *South Africa - Definitive Anti-Dumping Measures on Blanketing from Turkey*.

Indonesia challenged South Africa for its continued imposition of anti-dumping measures on imports of uncoated wood-free white A4 paper from Indonesia despite a review that determined that there was no likelihood of further dumping after the expiry of the definitive anti-dumping measure.<sup>449</sup>

The case by Brazil is one that was fully under the ITAA. This is significant because the ITAA was enacted in the era of the ADA and it was expected that its provisions would be in compliance with the ADA. Brazil challenged South Africa's preliminary determination and imposition of preliminary anti-dumping duties on frozen chicken from Brazil.<sup>450</sup> Brazil alleged that the preliminary investigation and imposition of provisional measures were against ADA provisions.<sup>451</sup>

Pakistan is challenging the imposition of provisional anti-dumping measures by South Africa on Portland cement imports from Pakistan.<sup>452</sup> It alleged that South Africa had violated the principle of fair comparison between export price and normal value as contained in the ADA.<sup>453</sup> It further alleged, amongst others, that there was no clear definition of the scope of like product and product under investigation by South African authorities.<sup>454</sup>

Besides the cases that have gone to the DSB, various companies have challenged the actions of South Africa's authority before domestic courts. These cases include: *Association of Meat Importers v ITAC*,<sup>455</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,<sup>456</sup> and *Progress Office Machines v SARS*.<sup>457</sup> They call into question the legal regime upon which anti-dumping processes rest. The current South African anti-dumping legal regime is next examined.

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<sup>449</sup> *South Africa - Anti-Dumping Measures on Uncoated Woodfree Paper* WT/DS374/1G/L/850G/ADP/D73/1.

<sup>450</sup> It was about whole bird and boneless cuts of fowl species known as *Gallus Domesticus*.

<sup>451</sup> *South Africa - Anti-Dumping Duties on Frozen Meat of Fowls from Brazil* WT/DS439/1G/L/990G/ADP/D92/1 (*South Africa - Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*).

<sup>452</sup> *South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan* WT/DS500/1G/L/1139G/ADP/D112/1 (*South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan*).

<sup>453</sup> *South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan*.

<sup>454</sup> *South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan*.

<sup>455</sup> *Association of Meat Importers v ITAC* 2013 (4) All SA 253 (SCA).

<sup>456</sup> *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* (2010) 5 BCLR 457.

<sup>457</sup> *Progress Office Machines v SARS* 2008 (2) SA 13 (SCA).

#### 4.4 SOUTH AFRICA'S ANTI-DUMPING LEGAL REGIME SINCE 2003<sup>458</sup>

The municipal laws of South Africa, including its Constitution, are useful in discussing the legal regime on anti-dumping. However, for this discussion the most primary legislation, the ITAA and its Regulations and the Customs and Excise Act, are the main focus.<sup>459</sup> The institutional framework, objectives of the law, substantive law and procedural law are some of the issues to be discussed.

##### 4.4.1 Institutional framework

The International Trade Administration Commission (ITAC) is the body established by the ITAA to take over from the BTT.<sup>460</sup> Any matter pending before the BTT, whether with regard to investigations, hearing of petitions, recommendation to the Minister responsible for Trade and personnel were taken over by the ITAC.<sup>461</sup>

The ITAC is a juristic person and has jurisdiction within the borders of South Africa.<sup>462</sup> It is independent in its functions and subject only to the Constitution of South Africa and any other law, trade policy and statement or directive which has been gazetted.<sup>463</sup>

Commissioners, who must be at least four in number but not more than 12, are responsible for running the ITAC.<sup>464</sup> Though the Commissioners are appointed by the President upon the recommendation of the Minister responsible for Trade, the Minister before making such recommendation to the President 'must, by notice in the Gazette and in any national newspaper, invite nominations for appointment of persons as members of the Commission'.<sup>465</sup> This

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<sup>458</sup> It must be pointed out that though the ITAA was passed in 2002, it was gazetted in January 2003; see GG 24287 of 22 January 2003.

<sup>459</sup> These have been chosen because South Africa notified the WTO that they constituted its anti-dumping legislation; see WTO Committee on Anti-Dumping Practices and Committee on Subsidies and Countervailing Measures 'Notification of Laws and Regulations under Articles 18.5 and 32.6 of The Agreements' G/ADP/N/1/ZAF/2 G/SCM/N/1/ZAF/2 (January 2004).

<sup>460</sup> Section 7 of the ITAA.

<sup>461</sup> Schedule 2 of the ITAA.

<sup>462</sup> See s 7(1). The use of the words 'jurisdiction throughout South Africa' in this context is very problematic since, as will be discussed later in the chap, the ITAC serves the Customs Union in the sub-region.

<sup>463</sup> Sections 5 & 7 of the ITAA.

<sup>464</sup> Section 8 of the ITAA.

<sup>465</sup> Section 8 (2) of the ITAA.

requirement ensures that people with the requisite competence and qualification are appointed as Commissioners to enable the ITAC to execute its objectives.

#### **4.4.2 Objectives of the law**

The ITAA aims at establishing an efficient and effective system of international trade that promotes economic growth and development in South Africa and within the Southern African Customs Union (SACU).<sup>466</sup> It is of interest to note that the objectives of the Commission are to be carried out only within the bounds of the ITAA and the SACU Agreement.<sup>467</sup> There is no mention of the ADA or the WTO in the entire Act. There was however a mention of the WTO in the Regulations to the Act, but it did not subject the ITAA or its Regulations to the WTO or its agreements.<sup>468</sup> A discussion on the substantive law as it pertains to South Africa will help put things in perspective.

#### **4.4.3. Substantive law**

The basic concepts of the law that relate to dumping, including jurisdiction, definition, normal value, export price and injury, will be discussed.

##### **4.4.3.1 Jurisdiction**

The jurisdiction of the ITAC extends beyond industries in South Africa to include industries within the SACU. This is gleaned from scanning through the ITAA and its Regulations, though some provisions say the contrary.<sup>469</sup> The starting point is the preamble to the Act which states:

[An] Act to establish the International Trade Administration Commission; to provide for the functions of the Commission and for the regulation of its procedures; ... to provide, within the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith.

The preamble lays the foundation as far as geographical jurisdiction is concerned. The Act and the Anti-dumping Regulations are replete with the mention of common market and/or the

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<sup>466</sup> Section 2 of the ITAA.

<sup>467</sup> Section 2 of the ITAA.

<sup>468</sup> Regulations 64.3 & 64.4.

<sup>469</sup> See s 7(1) which sought to limit the jurisdiction to only South Africa.

SACU, from the definition of dumping<sup>470</sup> to the objectives of the Act, and the definition of export or exporter<sup>471</sup> or even the investigation period of an injury.<sup>472</sup> In several other provisions, reference is either being made to the Common Customs Area or the SACU.<sup>473</sup>

Besides, the ITAC currently acts as the investigative body of the SACU in relation to dumping and other trade issues.<sup>474</sup> The SACU Members also implement any approved recommendation emanating from the work of the ITAC.<sup>475</sup>

#### **4.4.3.2 Definition and determination of dumping**

The ITAA adapted the definition of dumping in the ADA and defined dumping as the introduction of goods into the commerce of South Africa or that of any Member of the SACU at an export price that is less than the normal value of the goods.<sup>476</sup>

The definition limits the determination of dumping to the difference between the normal value and the export price. It is however not that straightforward. This is so because the determination of the normal value must follow set criteria. The same applies to the determination of the export price. Even when the normal value and the export price are determined and there is a difference between them, that will not necessarily mean that there is dumping and/or actionable dumping.

India raised the entirety of Article 2 of the ADA as one of the provisions South Africa violated when it imposed anti-dumping measures on Indian pharmaceutical products.<sup>477</sup> Though it did not single out the definition of dumping adopted by South Africa, it is argued that since Article 2 of the ADA defines dumping, India's challenge to South Africa includes South Africa's definition of dumping.<sup>478</sup> Sibanda argues that Article VI of the GATT 1994 and the ADA made reference to the commerce of another country, and never to a customs union or regional body.<sup>479</sup> Since the SACU is not a country as envisaged by Article VI and the ADA, it is doubtful

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<sup>470</sup> Section 1 (1) of the ITAA.

<sup>471</sup> Section 32 of the ITAA.

<sup>472</sup> Regulation 1 of the Anti-dumping Regulations.

<sup>473</sup> 'Common Customs Area' is defined in s 1(1) to mean the combined areas of the Member States of SACU.

<sup>474</sup> WTO Trade Policy Review Body *Report by the Secretariat: Southern African Customs Union 2015* WT/TPR/S/324 para 2.1.1.

<sup>475</sup> WTO Trade Policy Review Body (2015) para 3.37.

<sup>476</sup> Section 1 of the ITAA.

<sup>477</sup> *South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India*.

<sup>478</sup> *South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India*.

<sup>479</sup> Sibanda OS (2001) 242 246.

if the extended jurisdiction will stand the test of the GATT Article VI and the ADA.<sup>480</sup> Inasmuch as this position makes legal sense, it is suggested that if a group of countries wishes to be treated as one country for the purposes of trade, nothing stops them from doing so. The ADA sanctions that in Article 4.3.<sup>481</sup> Furthermore, Article XXIV of the GATT 1994 permits customs territories to act as though they were a country. One phrase used in the definition of dumping is ‘normal value’. Normal value is a determinant of dumping in any legal regime and South Africa is no exception.

#### 4.4.3.3 Normal value

The normal value of a product in WTO terms is usually the price of the like product in an exporter’s home country during a reference period.<sup>482</sup> The ITAA, on the other hand, defines normal value in section 32(2)(b) as ‘the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin’. The Anti-Dumping Regulations add that such a sale must be by the exporter, the producer or its related party in the country of origin.<sup>483</sup> The definition offered by the ITAA is somewhat problematic because the ADA does not require that the sales must be in the ordinary course of trade, though the ADA provides that under certain conditions, sales not made in the ordinary course of trade may be excluded.<sup>484</sup>

From the definition and the interpretation offered in the Regulations, two or three sources determine normal value: exporter, producer, or related party. However, if there is no information from any of these sources, then investigating authorities may take the price at which such like products are sold in the same market by another seller or sellers in that market.<sup>485</sup> These are the conventional ways of arriving at the normal value. If it is not practical to derive the normal value from these, then other options are permitted.

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<sup>480</sup> Sibanda OS (2001) 242 246.

<sup>481</sup> The said Article 4.3 reads: ‘Where two or more countries have reached under the provisions of paragraph 8(a) of Article XXIV of GATT 1994 such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry’.

<sup>482</sup> Panel Report *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam*, WT/DS404/R para 7.14 (*US – Shrimp (Vietnam)*).

<sup>483</sup> Regulation 8.1.

<sup>484</sup> Article 2.2 of the ADA.

<sup>485</sup> Regulation 8.1(b).

Where the conventional normal value cannot be ascertained, the law makes room for the normal value to be arrived at in two ways, either of:<sup>486</sup>

(aa) The constructed 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

(bb) The highest comparable price of the like product when exported to an appropriate third or surrogate country, as long as that price is representative.

However, any sale, either in the country of export or to a third country, may be ignored in arriving at the normal value if the sale was made below the cost of production, or was made to a related party or was not made in a commercial quantity.<sup>487</sup>

The ADA provisions, ranging from Articles 2.2 to 2.5, on constructed normal value or sale to a third country are repeated almost word for word in regulation 8 of the Anti-Dumping Regulations.

India, Brazil and Pakistan took South Africa to the DSB because they disagreed with South Africa, among other things, on how to arrive at the normal value. All three challenged the fairness of not only in arriving at the normal value but also in comparing the normal value with the export price.<sup>488</sup> One writer, Khanderia, who examined the Brazil case agrees that the calculation of the normal value by the South African investigating authority in that case was invalid.<sup>489</sup> A careful examination of the law however reveals that there is not much wrong with the text of the South African law vis-à-vis the ADA. If there is anything wrong at all, then it is the application of the law. But the normal value is always compared with the export price to be able to ascertain if there is any difference.

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<sup>486</sup> Section 32(2)(b)(ii) of the ITAA.

<sup>487</sup> Regulation 8(2)(b)(c).

<sup>488</sup> *South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India; South Africa - Anti-Dumping Duties on Frozen Meat of Fowls from Brazil; and South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan.*

<sup>489</sup> Khanderia S 'The determination of injury in South African anti-dumping investigations: Recent approaches' (2016) 49 2 CILSA 247 278.

#### 4.4.3.4 Export price

The law provides for an export price in the main Act<sup>490</sup> and a constructed export price in the Regulations.<sup>491</sup> The export price is the actual price paid or payable for goods meant for export.<sup>492</sup> However, if there is no export price, or there is some relation between the manufacturer and the exporter, or the price of sale is not reliable, the ITAC is permitted to look to the sale to an independent buyer or use reasonable bases to construct the export price.<sup>493</sup>

When it comes to constructing the export price, the ITAC may do so on either of the following bases:<sup>494</sup>

- a. The basis of the selling price to the first independent buyer in the SACU less–
  - i. All actual or allocated costs incurred between the exporter's ex-factory price and the first independent resale price; and
  - ii. A reasonable profit... .
- b. Any other reasonable basis.

It is required that the reasonable profit calculation takes into account the total cost of production, total cost of the importer, and total profit realised by both the producer and the importer.<sup>495</sup>

Article 2.3 of the ADA states in part that ‘the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer’. The ADA though did not explicitly limit the geographical location of the independent buyer. It is however argued that the geographical limitation of the independent buyer is implicit in Article 2.3 of the ADA since that is how injury to an industry could be realistically determined. Any comparison however, must be a comparison of like product.

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<sup>490</sup> Section 32(2)(a).

<sup>491</sup> See reg 1.

<sup>492</sup> This must take into account taxes, discounts and rebates actually granted and directly related to that sale; s 32(2)(a).

<sup>493</sup> Sections 32(2)(a) & (5) and reg 10.

<sup>494</sup> Sections 32(2)(a) & (5) and regs 1 & 10.

<sup>495</sup> Regulation 10.3.

#### 4.4.3.5 Like product and dumping margin

Like product, according to the Anti-dumping Regulations, refers to a product which is in all respects identical to the product under consideration or another product with characteristics closely resembling the product under consideration.<sup>496</sup> However, the ITAC can only resort to the latter if there is no identical product.<sup>497</sup>

Factors the Commission can consider in determining whether a product has characteristics closely resembling the product under consideration include the raw materials and other inputs used in producing the products, the production process, physical characteristics and appearance of the product, the end-use of the product, tariff classification, and other factors.<sup>498</sup>

These factors conform to the requirements of Article 2.6 of the ADA. But these comparisons are not made for comparison sake but to be able to ascertain the margin of dumping.

The Regulations provide that if there is only one product under investigation, the margin of dumping is the amount by which the normal value of the exporter exceeds their export price.<sup>499</sup> Thus, if such a difference exists, and all allowable allowances have been taken into account, then there is dumping.

In cases where more than one product is under investigation, the ITAC shall normally determine the margin of dumping as follows:<sup>500</sup>

- a. In the case of products that can be separately identified by the South African Revenue Services, a separate margin of dumping shall be calculated for each product;
- b. In the case of products that cannot be separately identified by the South African Revenue Services, the Commission shall normally
  - i. calculate the margin of dumping for each product separately; and
  - ii. determine the weighted average margin of dumping for all products on the basis of the individual export volume of each product.

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<sup>496</sup> Regulation 1.

<sup>497</sup> Regulation 1.

<sup>498</sup> Regulation 1.

<sup>499</sup> Regulation 12.1.

<sup>500</sup> Regulation 12.2.

Determination of the weighted average on the basis of volume is inconsistent with the ADA since the ADA refers to price, and not volume.<sup>501</sup> The weighted average calculation should rather be on the basis of the individual export price of each product, and not volume, as the Regulations seek to suggest.<sup>502</sup>

A careful consideration of the normal value, export price, like product and dumping margin will help an investigating authority to determine if there is any injury to warrant the imposition of an anti-dumping measure.

#### **4.4.3.6 Injury determination**

The law refers to material injury, not injury.<sup>503</sup> It defines material injury as ‘actual material injury, a threat of material injury or the material retardation of the establishment of an industry’.<sup>504</sup> This definition basically repeats the definition of injury in footnote nine of the ADA which defined injury ‘to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry’. Thus injury as used in South African legislation is the same as injury as used in the ADA.

The Regulations provides some criteria to be used in determining whether or not there is material injury to a SACU industry, viz:<sup>505</sup>

- a. A significant depression of a SACU industry’s prices;- and
- b. A significant suppression of a SACU industry’s prices.

Whereas price depression is seen to take place where the SACU industry's ex-factory selling price decreases during the investigation period, price suppression is seen to take place where the cost-to-price-ratio of the SACU industry increases, or where the SACU industry sells at a loss during the investigation period or part thereof.<sup>506</sup> Any of these constitutes material injury to a SACU industry.

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<sup>501</sup> Brink G (2012) 21.

<sup>502</sup> Article 2.4.2 of the ADA.

<sup>503</sup> Regulation 1.

<sup>504</sup> Regulation 1.

<sup>505</sup> Regulation 13.1.

<sup>506</sup> Regulation 1.

Merely having a price depression or suppression is not enough. The law requires the ITAC to further ‘consider’ whether there is a significant change in the domestic performance of the SACU industry in terms of sales volume; profit and loss; output; market share; productivity; return on investments; capacity utilisation; cash flow; inventories; employment; wages; growth; ability to raise capital or investments; and any other relevant factors placed before the ITAC.<sup>507</sup>

These factors are a repetition of some 15 factors that the ADA mandates (as held in *Thailand-H-Beams*<sup>508</sup> and Article 3.4 of the ADA) investigating authorities to examine in order to establish injury to a domestic industry. The factors are required to be examined in an unbiased manner by the investigating authority, not favouring one group against another and not favouring one interest against another interest;<sup>509</sup> Such examination must be based on positive evidence and objective examination of both the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products.<sup>510</sup> Thus there must be a causal link between dumping and injury to the domestic industry in order to give rise to a cause of action.<sup>511</sup>

The use of the word ‘consider’ in the South African Regulations has become the subject of commentary.<sup>512</sup> This is so because the words used in the ADA in material injury determination are positive evidence, objective examination, assess, examination and evaluation.<sup>513</sup> None of these words was used in regulation 13 in respect of material injury. Brink, arguably the leading writer on South Africa’s anti-dumping measures, opines that merely listing the factors to consider without providing for the evaluation of the factors, as held in *Mexico – HFCS*, is a violation of the ADA.<sup>514</sup>

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<sup>507</sup> Regulation 13.2.

<sup>508</sup> Appellate Body Report *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and Beams from Poland* WT/DS122/AB/R para 121-125 (*Thailand-H-Beams*).

<sup>509</sup> Appellate Body Report *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* WT/DS184/AB/R para 193 (*US – Hot-Rolled Steel*).

<sup>510</sup> *US – Hot-Rolled Steel* para 193 and Art 3.1 of the ADA.

<sup>511</sup> Article 3.5 of the ADA.

<sup>512</sup> Khanderia S (2016) 259-60.

<sup>513</sup> Article 3 of the ADA.

<sup>514</sup> Brink G (2012) 23.

The criticism of the material injury provision of the Regulations appears to be shared by others beyond the academic field. Brazil and Pakistan, for instance, were emphatic in their request for consultation with South Africa before the DSB, in that South Africa failed to make an objective examination based on positive evidence before imposing preliminary anti-dumping duties on chicken and Portland cement, respectively, from the two countries.<sup>515</sup>

These criticisms tend to suggest that injury provisions (that is, material injury) or the application thereof in the context of South Africa is not WTO and/or ADA compliant. Material injury as defined in the Regulations also includes threat of material injury which will be discussed next.

#### **4.4.3.7 Threat of material injury**

In addition to the factors to consider in determining material injury, the Regulations adds that a threat of material injury should further take into account; where relevant information is available:<sup>516</sup>

- a. A significant rate of increase of dumped imports into the domestic market of the SACU;
- b. Sufficiently freely available, or an imminent substantial increase in, capacity of the exporter;
- c. The availability of other export markets to absorb additional export volumes;
- d. Whether products are entering or will be entering the SACU market at prices that will have a significant depressing or suppressing effect on SACU prices; and
- e. The exporter's inventories of the product under investigation.

There is a caveat in the Regulations which says that a threat of material injury shall not be based on mere allegation, conjecture or remote possibilities.<sup>517</sup> The caveat brings the law in

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<sup>515</sup> *South Africa - Anti-Dumping Duties on Frozen Meat of Fowls from Brazil; South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan.*

<sup>516</sup> Regulation 14.2.

<sup>517</sup> Regulation 14.1.

conformity with Article 3.7 of the ADA and the holding of the Appellate Body in *US - Softwood Lumber VI (Article 21.5 – Canada)*.<sup>518</sup>

The Act and the Regulations appear to be silent on what to do when there is no relevant information available. It stands to reason that the ITAC can act, with regard to a threat of injury, only when relevant information is available.

#### **4.4.3.8 Material retardation of the establishment of an industry**

The ADA is silent on what constitutes ‘materially retards the establishment of a domestic industry’.<sup>519</sup> South African law, however, provides for it. An investigation can be carried out if the domestic industry provides a comprehensive business plan to indicate that it is about to establish such an industry.<sup>520</sup>

The ITAC may request an anti-dumping measure following receipt of such an application backed by a comprehensive business plan, except that it will recommend the removal of such a measure if significant progress is not made in a year.<sup>521</sup>

It is highly doubtful if this provision will survive a DSB test. This is so because business plans, no matter how comprehensive, remain plans. To rely on them to impose an anti-dumping duty is a bit problematic.

#### **4.4.3.9 Domestic industry**

The scope of domestic industry is found in the definition of dumping which extended dumping to include dumping not only in South Africa, but any Member of the SACU.<sup>522</sup> Further, the scope of injury is not only injury to the South Africa industry, but injury to the industry of the SACU.<sup>523</sup> Both the Act and its Regulations refer to the SACU industry and not the traditional domestic industry known in WTO language; confirming thereby that the SACU industry is the domestic industry as far as the ITAA is concerned. This is in accordance with Article 4.3 of

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<sup>518</sup> Appellate Body Report *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* WT/DS277/AB/RW para 96 (*US – Softwood Lumber VI (Article 21.5 – Canada)*).

<sup>519</sup> See its usage in Article VI of the GATT and footnote 9 of the ADA.

<sup>520</sup> Regulation 15.1.

<sup>521</sup> Regulations 15.2 & 15.3.

<sup>522</sup> Section 1 of the ITAA.

<sup>523</sup> Regulations 1 & 13 read together.

the ADA which states that ‘where two or more countries have reached ... such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the domestic industry’.

The substantive law does not operate in isolation. There are procedural requirements that must be followed in order to put the substance of the law into effect. These procedures are examined next.

#### **4.4.4 Procedural law**

The law lays down procedures to follow in order to arrive at its substance. These procedures ensure that interested parties are given ample opportunity to defend their interests. The foremost procedure to consider is how to initiate an investigation.

##### **4.4.4.1 Initiation of investigation and proceedings**

An investigation can be initiated by an application from the domestic industry or the Commission itself.<sup>524</sup> Where the investigation is at the instance of the latter, it can only initiate an investigation if it has sufficient evidence of, or of a significant change in the circumstances relating to, dumping, material injury and a causal link to justify the initiation of such investigation.<sup>525</sup>

If the investigation is at the instance of the SACU industry, then there are at least two requirements that must be fulfilled to ensure that the application is truly for and on behalf of the industry, viz:<sup>526</sup>

- a. At least 25 per cent of the SACU producers by domestic production volume support the application; and
- b. Of those producers that express an opinion on the application, at least 50 per cent by domestic production volume support such application.

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<sup>524</sup> Regulation 3.1 & 3.3.

<sup>525</sup> Regulation 3.3.

<sup>526</sup> Regulation 7.3.

One important step which the Regulations provides for, which is not in the ADA, is what happens to investigations already started if a domestic producer withdraws its support for the application. Two options have been given to the Commission in that respect:<sup>527</sup>

- a. The Commission may terminate investigations;- or,
- b. It may continue with investigations even though the percentage requirement to initiate an investigation has been affected.

The provision is an innovative and forward-looking one since many factors affect investigations once they are initiated.

One thing missing from the law is the content of the application by the domestic industry. Juxtaposing the provisions of the ADA<sup>528</sup> and the Panel Report in *Mexico - Steel Pipes and Tubes*<sup>529</sup> it is clear that an application by an industry must contain evidence of dumping, injury and a causal link between dumping and injury. An investigating authority like the ITAC must, as a requirement, 'examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation'.<sup>530</sup>

The mandatory requirement to furnish an investigating authority with some form of evidence, including a causal link, and for the investigating authority to examine such evidence is missing in the South Africa legislation. This might give room for frivolous and non-meritorious applications to be filed.

When it comes to conduct of the proceedings, the ITAC can do so in three ways.<sup>531</sup> These can be gleaned from the regulations and they are as follows:<sup>532</sup>

1. Written submissions only;-
2. Written submissions and oral hearing ;- and,

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<sup>527</sup> Regulation 7.5.

<sup>528</sup> Article 5.2.

<sup>529</sup> Panel Report *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala* WT/DS331/R para 7.21.

<sup>530</sup> Article 5.3.

<sup>531</sup> Regulations 5 & 6 read together.

<sup>532</sup> Regulations 5 & 6 read together.

### 3. Written submissions and adverse party meetings.

Oral hearings and adverse party meetings are not granted as of right; a party must request them and give reasons why they are not relying solely on written submissions.<sup>533</sup>

There is however some information which cannot be shared with interested parties at all; or can be shared but not in their original state. They border on confidentiality.

#### 4.4.4.2 Confidentiality

There is a limit of the extent to which interested parties are entitled to information. The interpretation rendered by the Panel in *Guatemala - Cement II*<sup>534</sup> about the need to protect confidential information has been carried into the Regulations. Article 6.5 of the ADA recognised two classes of confidential information: information that is by nature confidential and information otherwise provided on a confidential basis. These have been reproduced in the Act.<sup>535</sup>

However, the ITAA and its Regulations go further: a party providing confidential information must not only provide a non-confidential summary, but also indicate why the information is confidential.<sup>536</sup> The Regulations identify the following as information that should be regarded as confidential by nature: information on accounts and sales; trade, business or industrial information; information that will give a competitor a significant advantage; and information the release of which will cause trouble for the person releasing it.<sup>537</sup>

There is a provision in the Regulations which *prima facie* appears to be inconsistent with the ADA. Regulation 2.5 states that the ‘Commission may disregard any information indicated to be confidential that is not accompanied by a proper non-confidential version and will return such information to the party submitting same’. The ADA permits the use of confidential information which is not susceptible to summary if it is demonstrated that the information is correct.<sup>538</sup> It is thus suggested that regulation 2.5 be read together with section 34 of the ITAA

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<sup>533</sup> Regulations 5.1 & 6.1.

<sup>534</sup> Panel Report Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R para 8.219.

<sup>535</sup> See ss 1 (1) & 33 (1) of the ITAA.

<sup>536</sup> Regulation 2.1.

<sup>537</sup> Section 1(1) & reg 2.3 read together.

<sup>538</sup> Articles 6.5.1 & 6.5.2 of the ADA.

for any such information to be evaluated before the Commission may disregard the information, else an injustice will be done to interested parties.

#### **4.4.4.3 Interested parties' right to know and be heard**

Interested parties, as far as the product under investigation or a like product is concerned, have been defined in the Regulations to include SACU producers, exporters, foreign producers, importers, trade or business associations whose members are SACU or foreign producers, exporters or importers, and the governments of the countries of origin and of export.<sup>539</sup>

The right to be heard of these interested parties starts from when the ITAC takes a decision to conduct investigations. The ITAC is required by the Regulations to notify all known interested parties of any investigations once it has taken a decision to initiate same.<sup>540</sup> A second mode of informing interested parties is the requirement in the Regulations that requires all decisions to initiate investigations to be published in the Gazette.<sup>541</sup> This ensures that interested parties who for one or other reason were not contacted are informed about the ITAC's decision to initiate investigations.

The Regulations mandate that the initiation notice contain the basis of the alleged dumping, material injury and causality, and shall also indicate at least the following:<sup>542</sup>

- a. The identity of the applicant;
- b. A detailed description of the product under investigation, including the tariff subheading applicable to the product;
- c. The country or countries under investigation;
- d. The basis of the allegation of dumping;
- e. A summary of the factors on which the allegation of injury is based;
- f. The address to which representations by interested parties should be directed; and
- g. The timeframe for responses by interested parties.

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<sup>539</sup> Regulation 1.

<sup>540</sup> Regulation 27.3.

<sup>541</sup> Regulation 28.1.

<sup>542</sup> Regulation 28.2.

All relevant information that is non-confidential is to be given to the interested parties to enable them to know the scope and scale of the investigations.<sup>543</sup>

Interested parties are directly given the opportunity to defend their interests in every phase of the process. The first is the notification given to them at the preliminary investigation phase and the opportunity to respond to any allegations therein.<sup>544</sup> This right is further extended to when the Commission issues its preliminary report. Interested parties still have the opportunity to comment on the report before it is finalised.<sup>545</sup>

Another opportunity the Regulations make provision for, is the right of interested parties to appoint representatives to represent them before the Commission in any proceedings.<sup>546</sup> Though the provision does not state clearly whether legal representation is allowed, that cannot be ruled out.

Ample opportunity has been provided in the law to afford parties who desire to protect their interests to so do. Thus the requirements of Article 6 of the ADA,<sup>547</sup> as discussed under 'Evidence' in chapter 2 of this study have been fulfilled.

However, there appears to be a lacuna between the law and its application. As a result some of the cases against South Africa raised serious issues with regard to notification to, and the right to defend by, interested parties.<sup>548</sup> Turkey claimed there was no proper notification in the investigations that resulted in an anti-dumping duty being imposed on blanketing from Turkey.<sup>549</sup> Brazil and Pakistan did not only base their challenge on notification from the South African authorities, but also contended that interested parties were not afforded full opportunity to defend themselves.<sup>550</sup>

Although these cases did not go beyond the consultation stage, the fact that these countries raised these issues means that something could be fundamentally wrong with the notification

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<sup>543</sup> Regulations 3 & 28.

<sup>544</sup> Regulations 27, 28 & 29 read together.

<sup>545</sup> Regulations 34 & 35 together.

<sup>546</sup> Regulation 4.

<sup>547</sup> See Articles 6.1, 6.2, 6.3 & 6.4 of the ADA.

<sup>548</sup> For information on South Africa and the cases brought against it, see WTO 'South Africa and the WTO' available at [https://www.wto.org/english/thewto\\_e/countries\\_e/south\\_africa\\_e.htm](https://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm) (accessed 11 May 2017).

<sup>549</sup> *South Africa - Definitive Anti-Dumping Measures on Blanketing from Turkey*.

<sup>550</sup> *South Africa - Anti-Dumping Duties on Frozen Meat of Fowls from Brazil; South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan*.

and defence system in the South African anti-dumping regime. Juxtaposing Article 5.5 of the ADA and the Panel decision in *US - 1916 Act (EC)*,<sup>551</sup> it follows that failure to notify especially the government of the exporting country is a violation of the ADA.

Not all cases of dumping may give rise to an anti-dumping measure. Some cases are just so small that they are not considered to cause any injury to the domestic industry. These fall under *de minimis* margin and negligible dumped imports.

#### **4.4.4.4 *De minimis* dumping margin and negligible dumped imports**

The ADA provides some pre-initiation and during investigation guidelines to determine whether or not an investigation is worth initiating; and if already initiated, whether or not it must be continued.<sup>552</sup> If there is not sufficient evidence of dumping in an application, and of injury to justify initiation, investigating authorities are required by the ADA to reject such application.<sup>553</sup>

South African legislation appropriately captures the ADA's pre-initiation requirement in its Regulations.<sup>554</sup> The ITAC is mandated by law to assess the merits of each application made before it to first establish whether or not there is sufficient information in the application to establish dumping and injury, before proceeding to initiate investigation.<sup>555</sup>

The Regulations maintained the ADA threshold and declared that if the margin of dumping with regards to a product under investigation is 'less than two per cent when expressed as a percentage of the export price', it should be regarded as *de minimis*.<sup>556</sup> The Appellate Body ruled in *Mexico - Anti-Dumping Measures on Rice*<sup>557</sup> that if the outcome of an investigation with regard to an individual exporter records a zero or *de minimis* dumping margin, the investigation must be terminated. The ITAA and its Regulations are not clear on the termination

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<sup>551</sup> Panel Report *United States – Anti-Dumping Act of 1916, Complaint by the European Communities* WT/DS136/R para 6.216 (*US — 1916 Act (EC)*).

<sup>552</sup> Articles 5.3 & 5.8 of the ADA.

<sup>553</sup> Articles 5.3 & 5.8 of the ADA.

<sup>554</sup> Regulation 26.

<sup>555</sup> Regulation 26.1.

<sup>556</sup> Regulation 12.3 and Art 5.8 of the ADA for *de minimis* dumping margin.

<sup>557</sup> Appellate Body Report *Mexico – Anti-Dumping Measures on Rice* paras 208.

of an investigation. However, this should not be a challenge since the Regulations at least provides that any margin less than two per cent should be regarded as *de minimis*.

In voluminous term, the Regulations state as follows:

[The] volume of exports from a country shall normally be regarded as negligible if the volume of imports for the like product from that country is found to account for less than three per cent of the total imports of the like product into the SACU market, unless countries which individually account for less than three per cent of the total imports of the like product into the SACU market for the like product collectively account for more than seven per cent of the total imports of the like product into the SACU market.

The provision is more or less a re-wording of the last sentence of Article 5.8 of the ADA. It is in accordance with the ADA provision on negligible dumped imports as required in Article 5.8.

If, however, any investigation appears positive, viz: it is above the *de minimis* dumping margin threshold and it is not negligible, an anti-dumping measure could be imposed to counteract the effects dumping is causing to the SACU industry.

#### **4.4.5 Dumping remedies**

South African law sanctions the imposition of the three main dumping remedies known to the WTO and the ADA: provisional anti-dumping duties; price undertakings; and definitive anti-dumping duties.<sup>558</sup> A point to note is that the South African Revenue Services (SARS) is the body in charge of duty collection.<sup>559</sup> Provisional anti-dumping duties are normally the first set of anti-dumping measures adopted by investigating authorities.

##### **4.4.5.1 Provisional anti-dumping duties**

Provisional anti-dumping duties are one of the two measures that the ITAC may, on its own, impose; the other being price undertakings.<sup>560</sup> The ITAC may only impose a provisional anti-dumping duty 60 days after initiating an investigation<sup>561</sup> or when an exporter from whom a

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<sup>558</sup> See especially Chap VI of the Customs and Excise Act 1964.

<sup>559</sup> Chapter VI of the Customs and Excise Act.

<sup>560</sup> Regulation 33 & s 57A of the Customs and Excise Act.

<sup>561</sup> Regulation 33.1 of the Anti-dumping Regulations.

price undertaking has been accepted violates the terms of the undertaking.<sup>562</sup> The Commission must however satisfy two conditions:<sup>563</sup>

1. There must be a notice in the Gazette from the Commission to the effect that anti-dumping investigations have commenced in respect of a particular good;- and
2. There must be request from the Commission to the SARS for a provisional anti-dumping duty to be imposed on the product(s) under investigation stating the amount to be imposed and their duration.

The SARS is mandated to follow such a request except that it must publish the provisional anti-dumping duty to be imposed in the Gazette before proceeding to collect.<sup>564</sup> The duration of the duty may be extended; or the duty reduced or withdrawn with retrospective effect upon further request from the Commission but subject to the SARS again publishing the review in the Gazette.<sup>565</sup>

Provisional duties have an initial six months' duration but may extend for up to nine months upon request from any 'interested exporter'.<sup>566</sup> This seems to violate the ADA because the ADA makes provision for four months' duration and that six months' duration shall only be imposed if a significant percentage of domestic producers make such a request.<sup>567</sup> The only way a provisional anti-dumping duty may have a nine-month duration is when a lesser duty rule is adopted in imposing the provisional anti-dumping duties.<sup>568</sup> These deadlines have been held to be mandatory in *Mexico – HFCS*.<sup>569</sup> The South African regulation falls short of these deadlines.

The anti-dumping Regulations stipulate however that; if the duration of the provisional anti-dumping duty expires without review; and if no definitive anti-dumping is imposed before such

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<sup>562</sup> Regulation 39.4.

<sup>563</sup> Section 57A (1) of Act 91.

<sup>564</sup> See s 57A (1) of Act 91.

<sup>565</sup> Section 57A (2).

<sup>566</sup> Regulation 33.2 & 33.3.

<sup>567</sup> Articles 7.3 & 7.4 of the ADA.

<sup>568</sup> Article 7.4 of the ADA.

<sup>569</sup> Panel Report *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R para 82.3 (*Mexico- Corn Syrup*).

expiration, whatever an exporter or importer, as the case may be, has paid as provisional anti-dumping duty shall be refunded.<sup>570</sup>

Looking at the provisions of the ADA, there must first of all be a preliminary finding of dumping, injury and a causal link between the dumping and the injury before provisional anti-dumping duties can be imposed.<sup>571</sup> There must also be the fear that injury to the domestic industry will continue during the period of investigation if such duty is not imposed.<sup>572</sup> The South African legislation is however silent on these provisions of the ADA. The legislation needs to be clear on this requirement. Price undertakings are other anti-dumping measures sanctioned by the ADA which the South Africa legislation caters for.

#### **4.4.5.2 Price undertakings**

Price undertakings are other anti-dumping measures that are within the powers of the Commission.<sup>573</sup> The ITAC may accept a price undertaking from an exporter if the exporter guarantees to revise its prices or undertakes to cease exports to the SACU at dumped prices.<sup>574</sup> Where an undertaking is accepted, the ITAC suspends or terminates the anti-dumping investigation in question.<sup>575</sup>

The Commission has discretion to accept or not to accept a price undertaking and where it has elected to accept it, it may decide on the terms of such undertaking.<sup>576</sup> If the exporter from whom an undertaking has been accepted breaks the terms of such undertaking, the ITAC may terminate the undertaking and request the SARS to impose a provisional anti-dumping duty on the products of the exporter concerned.<sup>577</sup>

The last anti-dumping measure, which is imposed only after full successful investigations, is definitive anti-dumping duties, and this is discussed next.

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<sup>570</sup> Section 57A (4) of the Customs and Excise Act.

<sup>571</sup> Article 7 of the ADA and the section on provisional anti-dumping duties in chap 2.

<sup>572</sup> Article 7 of the ADA.

<sup>573</sup> Regulation 39.

<sup>574</sup> Regulation 39.1.

<sup>575</sup> Regulation 39.1.

<sup>576</sup> Regulations 39.2 & 39.3.

<sup>577</sup> Regulation 3.94.

#### **4.4.5.3 Definitive anti-dumping duties**

Definitive anti-dumping duties are imposed at the request of the Minister regulating Trade, not the ITAC.<sup>578</sup> The ITAC conducts investigations into any allegations of dumping and thereafter informs the Minister of the outcome of the investigations, recommending a definitive anti-dumping duty to be imposed on the imports in question.<sup>579</sup>

The Minister, acting on the recommendation from the ITAC, may then request the Minister of Finance to impose a definitive anti-dumping duty.<sup>580</sup> The Finance Minister will have to publish such imposition in the Gazette.<sup>581</sup>

The duties may be imposed with retrospective effect, and may later be reduced or withdrawn altogether.<sup>582</sup> The normal duration for a definitive anti-dumping duty is five years from the date of publication of the ITAC's final recommendation, but may be reviewed before the five years elapse.<sup>583</sup> The duration is in accordance with the duration stated in Article 11 of the ADA.

The imposition of a definitive anti-dumping duty does not end an anti-dumping investigation. There are other issues such as judicial review of the decision of an investigating authority.

#### **4.4.6 Judicial review**

An interested party may challenge a determination, recommendation or decision of the ITAC in the High Court.<sup>584</sup> If the challenge is based on any preliminary action or inaction, it must relate to three things:

- a. That there is a violation of the law;-
- b. That the party complaining has suffered as a result of the ITAC action or inaction;- and
- c. That the action or inaction by ITAC cannot be undone if investigations are finalised.

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<sup>578</sup> See s 16 of the ITAA & ss 55 & 56 of the Customs and Excise Act read together.

<sup>579</sup> Section 16(3) of the ITAA.

<sup>580</sup> See ss 55 (2) & 56 (1)(2).

<sup>581</sup> See ss 55(2) & 55(6).

<sup>582</sup> Regulation 38.2 & ss 55(2) & 56 (1)(2) of the Customs and Excise Act.

<sup>583</sup> Regulation 38.2.

<sup>584</sup> See s 46(1) of the ITAA.

However, a party who wishes to challenge an action of the Commission, be it preliminary or final, is first of all required to give the Commission, at least, a 30-day notice ‘prior to filing any judicial review relating to preliminary or final determinations’.<sup>585</sup>

Of utmost importance here is the fact that the High Court is independent of the ITAC and that is what is required by the ADA.<sup>586</sup>

#### **4.5 CONCLUSION**

The South African anti-dumping regime has indeed evolved; from its earliest beginning in 1914 with the Customs Tariff Act to the International Trade Administration Act of 2003. As a country that has initiated more than 1 000 investigations since its first initiation in 1921,<sup>587</sup> there are more things to learn from it.

The primary pieces of legislation as far as anti-dumping is concerned are the International Trade Administration Act and its Regulations and the Customs and Excise Act. But the Customs and Excise Act comes into play when it is time for the collection of an anti-dumping duty, be it provisional or definitive.

Though the ITAA is a South African law, its jurisdiction extends to other SACU Members.<sup>588</sup> It therefore defined dumping as the introduction of goods into the commerce of South Africa or that of any Member of the SACU at an export price that is less than the normal value of the goods.<sup>589</sup>

Its definition and/or application of the normal value is one of the reasons why it was cited before the DSB of the WTO.<sup>590</sup> India, Brazil and Pakistan challenged the fairness of not only in arriving at the normal value but also in comparing the normal value with the export price.<sup>591</sup>

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<sup>585</sup> Regulation 64.2 of the Anti-dumping Regulations.

<sup>586</sup> Article 13.

<sup>587</sup> Brink G (2015) 332-3, see also Brink G (2002) 3.

<sup>588</sup> See the preamble to the ITAA.

<sup>589</sup> Section 1 of the ITAA.

<sup>590</sup> See the cases by India, Brazil and Pakistan.

<sup>591</sup> See *South Africa - Anti-Dumping Duties on Certain Pharmaceutical Products from India*; *South Africa - Anti-Dumping Duties on Frozen Meat of Fowls from Brazil*; and *South Africa - Provisional Anti-Dumping Duties on Portland Cement from Pakistan*.

Writer Khanderia,<sup>592</sup> who examined the Brazil case, agrees that the calculation of the normal value by the South African investigating authority in that case was invalid.

Another challenge, which Brink<sup>593</sup> raised, is the calculation of the weighted average when it comes to establishing dumping margin.<sup>594</sup> The Regulations based the calculation on the individual export volume of each product which is contrary to the requirements of the ADA which based it on the individual export price (not volume) of each product.<sup>595</sup>

There are other challenges in the law which have been raised in the discussion above. However, analysing the law holistically, one can say that, save for the few observations made, the South African legislation on anti-dumping is generally ADA compliant. Gleaning from the cases that went to the DSB, there needs to be reform especially in the application of the law, though some textual amendments may be necessary.

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<sup>592</sup> Khanderia S (2016) 247 278.

<sup>593</sup> Brink G (2012) 21.

<sup>594</sup> Regulations 12.2.

<sup>595</sup> Article 2.4.2.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

The research question which the study sought to answer is whether or not Ghana's anti-dumping regime as it currently stands, meets the requirements of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994 and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA).<sup>596</sup> The research therefore set the following objectives in a bid to answer the research question:<sup>597</sup>

- a) To examine and analyse the law on anti-dumping as contained in the ADA.
- b) To examine and analyse the laws and regulations on anti-dumping in Ghana.
- c) To examine the compatibility of these laws and regulations with the ADA.
- d) To examine and analyse the laws and regulations on anti-dumping in South Africa.
- e) To examine the compatibility of South African laws and regulations with the ADA.
- f) To suggest possible ways/solutions with a view to improve the anti-dumping regime in Ghana.

Though the study is on Ghana, there was the need to refer to another country with more experience in order to put the study in perspective; South Africa was chosen. Secondly, Ghana was informed by South Africa's International Trade Administration Commission (ITAC) and the International Trade Administration Commission Act (ITAA) as views were being collated to draft and pass the Ghana International Trade Commission Act, 2016 (Act 926), and establish the Ghana International Trade Commission (GITC).<sup>598</sup> The study was divided into five chapters. However, there are three main chapters: chapters 2, 3 and 4. The current chapter sums up the main chapters, makes conclusions, and recommendations. The focus of the study is on Ghana, much of this chapter will, therefore, tilt towards Ghana. The global law on anti-dumping was discussed in chapter 2 of the study and the summary part of this chapter starts with it.

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<sup>596</sup> See chap 1; s 1.4.

<sup>597</sup> Chapter 1; s 1.5.

<sup>598</sup> See chap 1; s 1.7.

## 5.2 CHAPTER SUMMARY

Chapter 2 sought to achieve the first objective of the study. It traced the evolution of dumping in world trade and the efforts made to combat the effects of dumping at the global level. It emerged that global efforts to tackle dumping did not start with the inclusion of Article VI in the GATT. It did not also start with the ADA. There were efforts, though failed efforts, first by the League of Nations to study the legislation of countries on anti-dumping before the inclusion of Article VI in the GATT in 1947. After Article VI was included in the GATT, there were other efforts, such as, the 1958 GATT Report, and the Kennedy and Tokyo Rounds Anti-Dumping Codes, before the ADA came into operation in January 1995.<sup>599</sup> According to Article VI and the ADA, dumping is the introduction of a product into the commerce of another country at less than its normal value; the export price of the product is less than the comparable like product sold in the domestic market of the exporting country; and the sale is in the ordinary course of trade. However, Article VI and the ADA do not condemn dumping except when it causes injury; that is, material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of a domestic industry.<sup>600</sup> If there is injury, a country is at liberty to impose an anti-dumping measure on the products being dumped but must follow due process as outlined in the ADA and discussed in chapter 2. A country's laws on anti-dumping must also conform to the ADA.<sup>601</sup> Thus the global law on anti-dumping is Article VI of the GATT 1994 and the ADA. Any Member of the World Trade Organisation (WTO), including Ghana, is required to abide by them.

The second and third objectives were the focus of chapter 3. The chapter examined how Ghana used import substitution measures, combined with tariffs, taxes and an import licence system, among others, to protect its domestic industry.<sup>602</sup> The country however opened up its economy in 1983 under the World Bank's Structural Adjustment Programme (SAP) and the International Monetary Fund's (IMF) Economic Recovery Programme (ERP) as a result of economic shocks. The SAP and the ERP changed the face of domestic industry protection in Ghana. From 1990 onwards, more direct moves aimed at protecting the domestic industry were embarked upon.<sup>603</sup> The enactment of the Export and Import Act, 1995 (Act 503), the establishment of the Tariff

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<sup>599</sup> Chapter 2; s 2.5.

<sup>600</sup> Chapter 2; ss 2.2 & 2.6.

<sup>601</sup> See chap 2; s 2.6.

<sup>602</sup> Chapter 3; s 3.1.

<sup>603</sup> Chapter 3; s 3.1.

Advisory Board (TAB) in 2009, and the subsequent enactment of the GITC Act are among the direct moves aimed at protecting the domestic industry after 1990.<sup>604</sup> The GITC Act, however, is the most direct of the legislation on anti-dumping. It established the GITC which was not only supposed to take over from the TAB, but also to protect the domestic market from the impact of unfair trade practices in the course of international trade.<sup>605</sup> The definition of dumping in the GITC Act is the same as that of the ADA as stated above. However, when it comes to injury, the Act recognises injury to a domestic producer, not necessarily domestic industry, as actionable injury. The recognition of injury to a domestic producer and the Act's silence on the content of an application for initiation of an investigation are among the ADA infractions noted in the Act.<sup>606</sup> However, since the Act makes provision for a legislative instrument (LI), there is still room for these infractions to be catered for in the yet to be drafted and/or passed LI. The Act was drafted after a study of the South African ITAA. The ITAA and the South African anti-dumping regime were discussed in chapter 4.

Chapter 4 examined the primary pieces of South African anti-dumping legislation: the ITAA and its Regulations and the Customs and Excise Act 91 of 1964. The fourth and fifth objectives of the study were the focus of chapter 4. It emerged that South Africa has had anti-dumping legislation since 1914 and has since initiated more than 1 000 investigations and imposed anti-dumping measures at various times.<sup>607</sup> Its use of anti-dumping measures has resulted in five cases at the WTO level where India, Turkey, Indonesia, Brazil and Pakistan challenged various aspects of the South African legislation.<sup>608</sup> It emerged that the ITAA of South Africa also covers Southern African Customs Union (SACU) Members and injury to any SACU industry can give rise to initiation of an investigation under the ITAA and its Regulations. There were a few textual observations such as those regarding dumping margin, which have been discussed in the chapter, which appear to be contrary to the ADA.<sup>609</sup> The majority of the challenge facing the legislation however has to do with its application and not the text of the law. This leads one to some conclusions between the Ghana regime and the South African regime.

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<sup>604</sup> See chap 3 generally.

<sup>605</sup> Chapter 3; s 3.8.

<sup>606</sup> Chapter 3; s 3.8.

<sup>607</sup> Chapter 4; s 4.2.

<sup>608</sup> Chapter 4; s 4.3.

<sup>609</sup> See chap 4; s 4.4 generally.

### 5.3 CONCLUSIONS

The study established that though Ghana studied the South African regime, it departs therefrom as regard the text of the law in certain respects. Under the Ghana law, the GITC has the power to itself impose an anti-dumping duty and other anti-dumping measures without reference to any person or body.<sup>610</sup> But the South African law does not give the ITAC such powers. The ITAC may only request the South African Revenue Service (SARS) to impose a provisional anti-dumping duty or recommend to the Minister regulating Trade for a definitive anti-dumping duty to be imposed. The only remedies that the ITAC can impose on its own are price undertakings.<sup>611</sup>

The second of the three key conclusions one made is that, the GITC has power under the GITC Act to undertake an administrative review of its findings and determinations especially when it comes to anti-dumping duties.<sup>612</sup> There is no such system in the ITAA of South Africa. Interested parties may only apply to the court for review of the administrative actions of the ITAA.<sup>613</sup>

The last conclusion has to do with the regional grouping of which Ghana is a Member – the Economic Community of West African States (ECOWAS). The GITC Act is silent on ECOWAS. This is worrying because ECOWAS already has a legal framework on anti-dumping.<sup>614</sup> These conclusions now lead one to the last objective of the study: the recommendations.

### 5.4 RECOMMENDATIONS

Some ADA infractions have been noted in the discussion on the GITC Act. It was suggested in chapter 3 that since the Act makes provision for an LI there is no need for wholesale amendment of the Act. It is suggested that the enactment of the LI be hastened because the Act alone may result in numerous actions against Ghana at the WTO level.

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<sup>610</sup> Chapter 3; s 3.8.

<sup>611</sup> See chap 4; s 4.4.

<sup>612</sup> Chapter 3; s 3.8.

<sup>613</sup> Chapter 4; s 4.4.

<sup>614</sup> Chapter 3; s 3.8.

Reading Articles 13 and 17 of the ADA together, it appears that the independent body envisaged in Article 13 should be able to do three things:

- a. Assess and establish facts;-
- b. Examine whether or not the facts as established were unbiased and objective;- and
- c. Whether the procedures followed were correct.

These three criteria were not clarified in the GITC Act. The law must either be amended to empower the court to undertake these three functions in its review process or the yet to be passed LI be made to cater for them.

In addition to improving the law there is the need to build capacity. Three main sectors which one sees as the firstline stakeholders need serious capacity building. The first group is the GITC and its staff. As a new set-up and a novel experiment altogether, the GITC lacks institutional memory. It is not also likely that there is enough expertise in the Commission. This means that the capacity of the GITC and its staff needs to be built for them to deliver on their objectives. The second group consists of businesses, especially domestic industry. As is common knowledge, businesses, and not governments, suffer the effect of dumping. It is business that will benefit directly from any anti-dumping regime imposed by a country. The capacity of the domestic industry must be built to enable it to understand the law and how to access it. The last category is the courts who are in charge of reviews under the GITC Act. After these three main sectors have been improved, can one talk about building the capacity of lawyers and journalists.

The last recommendation is how to deal with the ECOWAS and its anti-dumping regulation. Given the fact that regional integration has become paramount in world trade and that even the WTO recognises it in almost all its agreements, including the ADA, it is necessary that countries that belong to regional economic bodies always refer to such bodies in devising legislation on matters that have already been catered for by the regional body. To this end, Ghana must not be seen as thwarting the efforts of the ECOWAS at economic integration. It is therefore recommended that Ghana put in place a road map aimed at aligning its laws and institutions on dumping with those of the ECOWAS.

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