

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**EXPLORING THE ADOPTION AND IMPLEMENTATION OF NATIONAL
ANTI-DUMPING MEASURES IN UGANDA IN THE LIGHT OF REGIONAL
AND INTERNATIONAL TRADE OBLIGATIONS**



Mini-thesis submitted in partial fulfilment of the requirements for the award of the LLM
International Trade, Business and Investment law degree

UNIVERSITY of the
WESTERN CAPE

By

ESTHER M ASIMWE

(Student Number: 3618666)

SUPERVISOR: Professor P Lenaghan

DATE: 23 November 2017

DECLARATION


I declare that 'Exploring the adoption and implementation of national anti-dumping measures in Uganda in the light of regional and international trade obligations' 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.

Esther M Asiimwe.

Signature:



Supervisor: Prof. Patricia Lenaghan



Signature:

Date 23 November 2017

ACKNOWLEDGEMENTS

I would especially like to extend my gratitude and appreciation to my mother for her tireless effort, support, assistance, guidance, patience and sacrifice, all of which have enabled me to undertake and achieve this study. I am eternally grateful for you and it is for you that I do and dedicate this thesis.

I would also like to thank Prof Riekie Wandrag for affording me the opportunity to partake in this LLM program and for her relentless support and effort in assisting and guiding me through this process. I would also like to thank you for the hospitality you have shown our class.

I would also like to thank the lecturers who were apart of this programme and who took time out of their schedules to teach and guide our class. Many thanks also go to my supervisor Prof Patricia Lenaghan for her patience and guidance throughout the process of writing this mini-thesis.

I would also like to convey my gratitude to Dr Gustav Brink who tirelessly assisted me with the writing of this thesis, patiently providing me with feedback and whose comments and contributions to this mini-thesis made all the difference in my ability to grasp the topic of this thesis. I also thank Mr Robert Nanima and Prof Israel Leeman for taking the time to assist me with the editing of this mini thesis and ensuring that it was structured properly and readable.

My deepest gratitude also goes out to my brothers, sisters, relatives and friends for their support and encouragement through this process, which was at times challenging and daunting. Thank you for being understanding, supportive and patient throughout this process. I do not know how I would have done this without you.

I thank you all from the bottom of my heart and may God bless you all.

Lastly, I would like to thank the almighty God whose love and grace gave me strength and resilience that enabled me to complete this mini-thesis.

ABBREVIATIONS AND ACRONYMS

AD	Anti-dumping
ADA	Anti-Dumping Agreement
BTI	Board of Trade and Industry
BTT	Board of Tariffs and Trade
BTTA	Board on Tariffs and Trade Act
CEP	Constructed export price
CNV	Constructed normal value
COMESA	Common Market for Eastern and Southern Africa
CVM	Countervailing Measures
EAC	East African Community
EACCU	East African Community Customs Union
EC	European Community
FTA	Free Trade Agreements
GATT	The General Agreement on Tariffs and Trade
GDP	Growth Domestic Product
ITAC	International Trade Administration Commission
MFN	Most Favoured Nation principle
MTIC	Minister of Trade, Industry and Cooperatives
PAIA	Promotion of Information Act 2 OF 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000
PTC	Permanent Tripartite Commission of the East African Commission
RTA	Regional Trade Agreements
SACU	Southern African Customs Union
SGM	Safeguard Measures
The Protocol	The Protocol on the Establishment of the East African Community Customs Union
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation
WTR	World Trade Report

TABLE OF CONTENTS

INTRODUCTION	1
1.1 RESEARCH BACKGROUND	7
1.2 HISTORICAL OVERVIEW OF ANTI-DUMPING	8
1.3 PROBLEM STATEMENT	12
1.4 RESEARCH QUESTIONS AND OBJECTIVES	16
1.5 METHODOLOGY	17
1.6 CHAPTER OUTLINE	18
<u>THE INTERNATIONAL REGULATION OF DUMPING UNDER THE WTO: RULES AND PROCEDURES</u>	<u>19</u>
2.1 INTRODUCTION	19
2.2 AN EXAMINATION OF THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR ANTI-DUMPING MEASURES	20
2.2.1 SUBSTANTIVE REQUIREMENTS	21
2.2.1.1 THE MEANING OF DUMPING	21
2.2.1.2 DETERMINATION OF DUMPING	22
2.2.1.3 DETERMINATION OF CAUSAL LINK AND INJURY	31
2.2.2 PROCEDURE FOR ENACTING ANTI-DUMPING MEASURES	37
2.2.2.1 PRE-INITIATION AND APPLICATION PROCESS	37
2.2.2.2 INITIATION	40
2.2.2.3 PROVISIONAL ANTI-DUMPING MEASURES	42
2.2.2.4 FINAL DETERMINATION OF ANTI-DUMPING MEASURES	43
2.2.2.5 PUBLIC NOTICE	45
2.2.2.6 REVIEWS	46
2.3 NOTIFICATION REQUIREMENTS OF LAWS AND REGULATIONS	48
2.4 SHORTCOMINGS OF THE WTO ANTI-DUMPING PROVISIONS	49
2.4.1 DISCRETION	49
2.4.2 NON-DISCLOSURE OF CONFIDENTIAL INFORMATION	50
2.4.3 CUMULATION	50
2.4.4 CALCULATION OF CONSTRUCTED NORMAL VALUE	50
2.4.5 DEVELOPING COUNTRIES	51
2.5 CONCLUSION	51
<u>THE REGULATION OF ANTI-DUMPING UNDER THE PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN CUSTOMS UNION: RULES AND PROCEDURES</u>	<u>53</u>
3.1 INTRODUCTION	53
3.2 BACKGROUND TO THE FORMATION OF THE EAST AFRICAN COMMUNITY CUSTOMS UNION	54
3.3 ANTI-DUMPING AND THE EAST AFRICAN COMMUNITY CUSTOMS UNION	57
3.4 SUBSTANTIVE REQUIREMENTS	61
3.4.1 THE MEANING OF DUMPING	61
3.4.2 DETERMINATION OF DUMPING	62
3.4.3 DETERMINATION OF INJURY AND CAUSAL LINK	66
3.5 PROCEDURE FOR ENACTING ANTI-DUMPING MEASURES	70

3.5.1	PRE-INITIATION AND APPLICATION PROCESS	71
3.5.2	INITIATION	72
3.5.3	CONFIDENTIAL INFORMATION	74
3.5.4	PROVISIONAL ANTI-DUMPING MEASURES	75
3.5.5	FINAL DETERMINATION OF ANTI-DUMPING MEASURES	76
3.5.6	PUBLIC NOTICE	78
3.5.7	REVIEWS	79
3.6	CONCLUSION	79
A STUDY ON THE USE OF ANTI-DUMPING MEASURES IN SOUTH AFRICA		81
4.1	INTRODUCTION	81
4.2	A BRIEF HISTORY OF ANTI-DUMPING IN SOUTH AFRICA	81
4.3	THE LEGISLATIVE AND INSTITUTIONAL STRUCTURE	85
4.3.1	LEGISLATIVE STRUCTURE	85
	INSTITUTIONAL STRUCTURE	86
4.4	SUBSTANTIVE STRUCTURE	87
4.4.1	NORMAL VALUE	88
4.4.2	EXPORT PRICE	89
4.4.3	LIKE PRODUCT	90
4.4.4	DOMESTIC INDUSTRY	90
4.4.5	FAIR COMPARISON	91
4.4.6	MARGIN OF DUMPING	91
4.4.7	INJURY	92
4.4.8	CAUSAL LINK BETWEEN DUMPED IMPORTS AND INJURY	95
4.4.9	LESSER DUTY RULE	95
4.4.10	PUBLIC INTEREST	96
4.5	PROCEDURAL REQUIREMENTS	97
4.5.1	PRE-INITIATION PHASE	98
4.5.2	INITIATION AND PRELIMINARY PHASE	99
4.5.3	FINAL PHASE	100
4.6	REVIEWS	101
4.6.1	INTERIM REVIEWS	101
4.6.2	SUNSET REVIEWS	102
4.6.3	ANTI-CIRCUMVENTION REVIEWS	103
4.6.4	JUDICIAL REVIEWS	104
4.6.5	NEW SHIPPER REVIEWS	105
4.7	CONCLUSION	105
RECOMMENDATIONS AND CONCLUSIONS		107
5.1	CONCLUSIONS	107
5.2	RECOMMENDATIONS FOR UGANDA	109
5.2.1	EXISTENCE OF A NATIONAL LEGISLATIVE FRAMEWORK	109
5.2.2	INSTITUTIONAL STRUCTURE AND INVESTIGATING AUTHORITIES	112
5.2.3	DEVELOPING SKILLS AND EXPERTISE	113
5.2.4	CREATING AWARENESS	114
5.2.5	POLITICAL FACTORS	115
5.3	FINAL CONCLUSION	116

CHAPTER 1

INTRODUCTION

A tariff on imports (or customs duty) is a government imposed financial charge or tax on imported goods.¹ It can be levied as a percentage of the import's value or as a specified tax per unit cost.² Countries have debated the issue of tariffs in international trade for a long time. On one hand, tariffs are considered to be barriers to trade as they restrict market access,³ whereas there is also argument that they are necessary to protect or promote domestic industries against foreign competition.⁴

Tariffs have been the preferred method used by countries to restrict market access of imported goods from other countries.⁵ Compared to other taxes (e.g. income and sales tax), tariffs or customs duties are easier to gather because imports are easier to monitor, while collection points can be concentrated at a few areas of entry.⁶

For developing countries, such as Uganda, tariffs are used as an economic development policy tool providing government revenue.⁷ They are also used to restrict market access for foreign exports in an effort to protect the infant domestic industry.⁸ Developed countries have used tariffs for the same reasons in the past but due to their advanced industrialisation and sophisticated direct and indirect tax system, tariffs are now mostly used to protect small industries or industries on the decline.⁹

In essence therefore, tariffs have been the preferred arsenal for both developed and developing countries to protect domestic industries against fair and sometimes unfair

¹ Van den Bossche P & Prévost D *Essentials of WTO Law* (2016) 50; Gottheil FM *Principles of Economics* 7 ed (2013) 772.

² Gottheil (2013) 772.

³ Van den Bossche & Prévost (2016) 49; Ferreira D & van Eyk M *Exploring Contemporary Barriers to International Trade in South Africa* (2017) 6.

⁴ Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* 3 ed (2013) 425.

⁵ Van den Bossche & Zdouc (2013) 420.

⁶ Van den Bossche & Zdouc (2013) 425.

⁷ Van den Bossche & Zdouc (2013) 425; Ferreira & van Eyk (2017) 2.

⁸ Van den Bossche & Zdouc (2013) 425.

⁹ Van den Bossche & Zdouc (2013) 425.

trade. Their increased popularity is also owed to the fact that tariffs fall within the rules of the World Trade Organisation (WTO). The WTO was established by the Marrakesh Agreement,¹⁰ which was signed in 1994. This Agreement is constitution-like and governs the entire WTO system.¹¹ In its preamble, it urges Members to promote WTO objectives for higher standards of living, full employment, growth and economic development by entering into arrangements that aim to substantially reduce tariffs and other barriers to trade.¹²

From the outset, the Marrakesh Agreement preamble indicates that the ultimate goal of Members acceding to the WTO should be an international rules based trading system aimed at the reduction and eventual elimination of tariffs on trade despite the fact that they are sanctioned by the WTO. In order to achieve this objective, the General Agreement on Tariffs and Trade 1994 (GATT 1994) was enacted by the WTO.

The GATT 1994 is a multilateral agreement, which regulates the international trade of goods (as opposed to services) and has to be accepted by all countries joining the WTO as a 'single undertaking'.¹³ This means that it applies to all Members of the WTO. The GATT 1994 provides the basis upon which Members can conduct international trade in accordance with their WTO obligations.

Increased trade liberalisation means that the GATT 1994 has to attempt to strike a balance between the commitments under taken by Members and autonomy, by engaging an optimal degree of flexibility.¹⁴ Too much flexibility could undermine the value of the commitments undertaken, whereas too little would render the rules politically unstable.¹⁵

¹⁰ WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation, April 15 1994, 33 I.L.M 1144, 1867 UNTS 154, (1994).

¹¹ Zhuang W *Intellectual Property Rights and Climate Change: Interpreting the TRIPS Agreement for Environmentally Sound Technologies* (2017) 192.

¹² Van den Bossche & Zdouc (2013) 420.

¹³ WTO E-Learning *The WTO Multilateral Trade Agreements* (2014) 46.

¹⁴ Mangeni F 'Customized trade remedies in Africa – the case of the COMESA-EAC-SADC Tripartite Free Trade Agreement' *tralac* 15 August 2017; Erasmus G 'Are African Trade Arrangements rediscovering Trade Remedies?' *tralac* 16 August 2017.

¹⁵ WTO *World Trade Report 2009: Trade Policy Commitments and Contingency Measures* 19.

To resolve the conundrum, various escape clauses can and have been woven into trade agreements, in accordance with WTO rules which allow countries to manage circumstances that could not be anticipated at the time of concluding the agreements.¹⁶ These escape clauses can take the form of *inter alia*, tariff concessions and trade remedies as provided by the WTO.

A *tariff concession* is a commitment not to raise the customs duty for a certain product above the agreed negotiated level.¹⁷ Tariff concessions give a country the flexibility to increase their applied tariff rates¹⁸ when an influx of goods becomes a threat to its domestic industry. While this threat may be as a result of trade liberalisation, Member countries must not increase tariffs above the negotiated levels in their respective tariff concessions.¹⁹ This would go against WTO obligations.

Irrespective of the fact that the WTO makes provision for the use of tariff concessions to restrict trade and protect domestic industries, there is increasing pressure on WTO Members to reduce tariffs in general and liberalise trade even further. One method developing countries have utilised to this effect is through the establishment of Regional Trade Agreements (RTAs) and/or free trade agreements (FTAs). They are reciprocal trade agreements between two or more countries.

Regional and free trade agreements are recognised under Article XXIV of GATT 1994.²⁰ This Article provides that in order for these trade agreements to be recognised and accepted by the WTO, they must ensure to eliminate all trade barriers within the region.²¹ Consequently, RTAs/ FTAs often lead to more far-reaching liberalisation than WTO Agreements. They open up trade between the relevant Members with the aim of simplifying trade amongst them through a general reduction of tariffs on goods produced or emanating from those countries.

¹⁶ WTR (2009) 19.

¹⁷ Van den Bossche & Prevoost (2016) 52.

¹⁸ Applied tariffs are normally lower than their bound levels and can allow countries to import goods at such low tariff rates, which may have high bound rates.

¹⁹ Lissel E *Safeguard Measures in Multilateral and Regional Trade Agreements* (2015) 2.

²⁰ 'Regional Trade Agreements and Preferential Trade Agreements' available at https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 12 March 2017).

²¹ Lissel (2015) 5.

Uganda is party to two such communities namely, the East African Community Customs Union (EACCU) and the Common Market for Eastern and Southern Africa (COMESA).

The pressure exerted on developing countries to eliminate tariffs and liberalise trade under the WTO and RTAs has generally led to the erosion of tariffs as the go-to mode of restricting imports. This has left developing country industries vulnerable to international competition and set new demands for certain domestic industries.²² Accordingly, countries like Uganda have to consider alternative ways that are WTO sanctioned to protect their domestic industries. This is where the second ‘escape clause’ comes in namely; *trade remedies*.

This mini-thesis will be looking at this second form of escape clause; trade remedies, as opposed to the traditional tariff concessions mentioned above. The WTO developed trade remedy law precisely to deal with the situation where a country might have to protect its domestic industries against unfair (and sometimes fair) trade.²³ These trade remedies form another ‘escape clause’ under the WTO to the extent that they allow countries to derogate from the GATT 1994 /WTO principles for economic reasons²⁴ in order to address unforeseen economic difficulties²⁵ often resulting from trade liberalisation.

Trade remedies are contingent remedies that countries may resort to where an influx of imports causes or threatens to cause injury to the domestic industry of the importing country.²⁶ Traditionally, trade remedies are made up of anti-dumping (AD), safeguard

²² Kruger P, Denner W & Cronje JB ‘Comparing Safeguard Measures in Regional and Bilateral Agreements’ (2009) 1.

²³ McNelis N ‘Anti-dumping Law Explained’ (2007) 23.

²⁴ WTO E-learning *Introduction to the WTO* 122 available at http://ecampus.wto.org/admin/files/Course_378/CourseContents/N-INTRO-E-Print.pdf (accessed 14 August 2016)

²⁵ WTR (2009) 19& 61; Gupta K & Choudhury V ‘Anti-dumping and Developing Countries’ (2011) 118.

²⁶ Brink G ‘Trade Remedies in the Pacific: An investigation into the advantages and disadvantages of using trade remedies in Pacific Island Countries’ (2015a) 5; Erasmus G ‘Are African Trade Arrangements rediscovering Trade Remedies?’ *tralac* 16 August 2017.

measures (SGMs) and countervailing measures (CVMs).²⁷ They aim to increase the duty on a specific import product in order to make the domestic market less attractive for foreign imports.²⁸

First, AD duties are tariffs in addition to ordinary customs duties, which are imposed to counteract unfair pricing practices regarding goods by foreign exporters, which injure or threaten to injure the competing domestic industry.²⁹ They are typically aimed at imports of a particular product from a specific exporting country, whose goods are being dumped.³⁰

Secondly, CVMs are tariffs in addition to ordinary customs duties that are imposed on goods that have been subsidised by the exporting country's government which have materially injured or threaten to cause material injury to the competing domestic industry.³¹ AD measures and CVMs may be used against unfair competition and are normally aimed at a particular product from a particular exporter.

The point of departure is in the use of the SGMs, which are imposed when there is a sudden surge in imports. In such circumstances, domestic governments will opt to temporarily safeguard themselves in an effort to protect the affected domestic industry.³² SGMs are used against fair trade in instances where unforeseen circumstances lead to a significant increase in 'fair' import volumes.³³ They are aimed at a particular product from all the countries exporting that product, which is in dispute in the importing territory.

²⁷ Omolo MWO 'Trade Remedies: Subsidies and Countervailing Measures: Its Application in Developing Countries' (2013) 1.

²⁸ Denner W 'Protectionism, Trade Remedies and Safeguards: A Quick Guide for African Countries' (2009) 1.

²⁹ Sykes AO 'Trade Remedy Laws' (2005) 2.

³⁰ WTO E-learning *Trade Remedies* 86.

³¹ Sykes (2005) 2; Guzman AT & Sykes AO *Research Handbook in International Economic Law* (eds) (2007) 62.

³² Kruger et al (2009) 1.

³³ Denner (2009) 1; It should be noted that quantitative restrictions are generally prohibited under the WTO.

An engagement with the three trade remedies is not possible in this study, due to the need for delimitation of its scope. This mini-thesis will only focus on AD measures. It engages its adoption and implementation in the light of Uganda's regional and international trade obligations with regard to AD.

Dumping occurs when a product is introduced into the commerce of another country at less than its normal value.³⁴ In other words, a product is dumped when its export price is less than its 'normal value' as compared to the price of the 'like' product during the ordinary course of business in the exporting country.³⁵

AD measures are primarily used through legislation and as a result legislation is engaged as the weapon of choice for most countries against dumped imports.³⁶ Countries that use such legislation include South Africa (SA), the United States of America (USA), Canada and Egypt. The most utilised form of trade remedy to date is AD measures, with approximately 97 countries enacting AD legislation.³⁷ This is because AD measures can be implemented more selectively than SGMs and CVMs.

The AD measures are exceptions to the Most Favoured Nation principle (MFN)³⁸ of the GATT 1994 in that they discriminate against imports of certain goods from certain countries.³⁹ Governments prefer these methods as opposed to quantitative import

³⁴ Article VI: 1 of GATT 1994; Article 2.1 of the ADA.

³⁵ Article VI: 1 of GATT 1994; Article 2.1 of the ADA.

³⁶ Sibanda O 'Are anti-dumping measures in multilateral trade justifiable or not? A call for an academic debate in Africa' (2003) 89 available at <http://hdl.handle.net/10520/EJC27402> (accessed 20 April 2017).

³⁷ Brink (2015a) 10.

³⁸ The Most Favoured Nation (MFN) principle under the WTO denotes that countries cannot normally discriminate between their trading partners. If, for example Uganda grants a special favour to one country such as a lower customs duty for one of their products, it must do the same for all other WTO Members; see also 'Principles of the Trading System' available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 17 April 2017).

³⁹ Lissel (2015) 2.

restrictions⁴⁰ to protect certain domestic sectors without deviating from the direction of their trade policy.⁴¹

1.1 RESEARCH BACKGROUND

Notably, Uganda used to have national AD legislation contained in the Customs and Excise Act of 1964. In this Act, trade remedies covered a mere three sections⁴² and did not contain sufficient procedural and substantive provisions to aid with investigations, which could ultimately result in the application of trade remedies. In other words, Uganda had no regulations highlighting *how* an AD investigation ought to be conducted. In 1993, Uganda suspended its trade remedy legislation.

Upon ratifying the Marrakesh Agreement on 29 September 1994, Uganda became an original Member of the WTO which meant that it was bound by all the WTO multilateral Agreements⁴³ including the GATT 1994 and specifically, for the purposes of this study, Article VI thereof which deals with international AD measures and the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement or ADA).

Since becoming a WTO Member, Uganda has never initiated an AD investigation, be it regionally or internationally and does not have national contingent trade remedy legislation.⁴⁴ In fact, the current legal bases for Uganda's contingency measures are Article 51 of the COMESA Treaty as notified to the WTO Committee on Anti-

⁴⁰ Quantitative restrictions are specific limits on the quantity or value of goods that can be imported (or exported) during a specific period. They are prohibited under the WTO because they are a violation of Art XI: I of the GATT 1994. In spite of this restriction, countries like Nigeria have been known to use them to restrict imports; See also WTO *Trade Remedies* 57; see also Illy O 'African Countries and the Challenges of Trade Remedy Mechanisms within the WTO' (2016) 10.

⁴¹ Denner (2009) 9.

⁴² Customs and Excise Act 1964, s 55 - 57A.

⁴³ Article II: 2 of WTO Agreement.

⁴⁴ WTO *Trade Policy Review Report by the Secretariat: East African Community* (2012) A5 -515; see also Mangeni F 'Customized trade remedies in Africa – the case of the COMESA-EAC-SADC Tripartite Free Trade Area' *tralac* 15 August 2017.

Dumping Practices⁴⁵ and the Protocol on the Establishment of the East African Community Customs Union (the Protocol).⁴⁶

On 17 August 2012, the Minister of Trade, Industry and Cooperatives (MTIC), Hon. Amelia Kyambadde, held a meeting in Jinja, Uganda, to discuss the possibility of adopting national trade remedy laws for Uganda. She stated that the Ministry's main objective was to ensure that Uganda became an export hub and in order to achieve this, it needed to 'carefully draft domestic legislation in order to ensure that the infant industries were cushioned from the injurious effects of imports from the international market.'⁴⁷ Uganda also has to tailor its local AD legislation 'in tandem with the multilateral system'.⁴⁸

In light of the Minister's speech, there is a possibility that Uganda might adopt national trade remedy legislation to protect its domestic industries, thus allowing them to become efficient producers, thereby increasing its exporting capacity. This study comes at a point when Uganda has voiced its intention to adopt national trade remedy legislation and is inspired by that intent.

As mentioned above, this mini-thesis will only look at the possibility of adopting national AD legislation for Uganda that is not only functional in light of its developmental needs but also in 'tandem' with the WTO and the Protocol, in as much as those provisions are not in conflict with those of the WTO rules.

1.2 HISTORICAL OVERVIEW OF ANTI-DUMPING

⁴⁵ WTO: Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements, Uganda - G/ADP/N/1/UGA/2; G/SCM/N/1/UGA/2 (20 September 1996) available at [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20g/adp/n/*%20and%20uga\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20g/adp/n/*%20and%20uga)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#) (accessed 04 February 2017).

⁴⁶ WTO (2012) A5 -515.

⁴⁷ Remarks by the Honourable Minister of Trade Industry and Cooperatives at a meeting to discuss trade remedies laws for Uganda held at Nile Resort Jinja from 14 to 17 August 2012 available at www.mtic.go.ug/171-hon-mtic-speech-on-trade-remedies (accessed 23 October 2016).

⁴⁸ Remarks by MTIC Uganda (2012).

According to Beseler and Williams, dumping was the act of getting rid of something unwanted quickly; usually rubbish.⁴⁹ At the turn of the twentieth century however, dumping became associated with international trade and was known as the behaviour of foreign exporters when they sold goods in other countries at lower prices.⁵⁰

Jacob Viner first described dumping as a form of price discrimination or differential pricing of different units of the same good sold at different prices in different markets.⁵¹ Viner identified that during the sixteenth century, paper was dumped in England with the purpose of destroying the young English industry.⁵² Also, in the seventeenth century, the Dutch were reported to have dumped products in the Baltic States in order to drive French merchants out of the market.⁵³ All these cases were dealt with through the imposition of high non-discriminatory tariffs.⁵⁴

Dumping was clearly a problem even before the first AD action was taken although there were no formal solutions to deal with the problem. At the end of the nineteenth century, countries realised the need for AD as a trade remedy. Viner alleges that this was largely as a result of Germany's rise as an industrial power.⁵⁵ Germany had developed a cartel structure, particularly in the chemical industry and its companies had the power to dump excess stock internationally owing to their efficient production.⁵⁶

The first ever AD law was implemented by Canada as part of its Customs Act of 1904.⁵⁷ Interestingly, this came about as a result of the USA as opposed to Germany. Canadian

⁴⁹ Beseler J & Williams A *Anti-dumping and Anti-subsidy Law: The European Communities* (1986) 41.

⁵⁰ Young L & Wainio J 'The Anti-dumping Negotiations: Proposals, Positions and Anti-dumping Profiles' (2005) 6, 7.

⁵¹ Viner J *Dumping: A Problem in International Trade Law* (1923) 3, 35-68; Sibanda OS 'An Assessment of WTO Compliance by the South Africa Anti-dumping Regime in Respect of the Determination of Causation' (2013) 177 available at <http://ssrn.com/abstract=2363892> (accessed 12 February 2017); WTR (2009) 66.

⁵² Brink GF *A Theoretical Framework for Anti-dumping Law in South Africa* (unpublished LLD thesis, University of Pretoria, 2004) 2.

⁵³ Finger JM 'The Origins and Evolution of Antidumping Regulation' (1991) 2.

⁵⁴ Brink (2004) 2.

⁵⁵ Viner (1923) 51-66.

⁵⁶ Viner (1923) 51-66.

⁵⁷ Bagwell KW, Bermann GA & Mavroidis PC *Law and Economics of Contingent Protection in International Trade* (2010) 198; Denton R '(Why) should nations utilize antidumping measures?' (1989) 228.

steel makers alleged that USA was unfairly aggressive and dumping rails onto the Canadian market⁵⁸ causing injury to the domestic steel companies. At the time, USA steel corporations saw an opportunity to aggressively sell steel rails to the Canadian railroaders owing to the surge of railroad building in Canada that resulted in Canada's first transcontinental railroad which was completed in 1885.⁵⁹

The implementation of Canada's AD law was due to the proposals of the then Minister of Finance who was of the view that it was unscientific to meet special and temporary cases of dumping by generally and permanently raising the tariff wall.⁶⁰ He proposed that the appropriate method was to impose special duties on goods that were being dumped in Canada.⁶¹ Following Canada, New Zealand (1905), Australia (1906), SA (1914), USA (1916), Japan (1920) and the United Kingdom (1921) proceeded to adopt national AD laws.⁶²

On the international plane, engagements to deal with AD started in the early 1920s, when the League of Nations began to study dumping and differential pricing.⁶³ The League however, was unable to produce any rules relating to dumping during that time.⁶⁴

International law did not regulate AD until the adoption of the General Agreement on Tariffs and Trade 1947 (GATT 1947).⁶⁵ Article VI of the GATT 1947 provided a basic framework on how countries could respond to dumping within their territories.⁶⁶ This provision was particularly vital to enable the Contracting Parties to open their markets as contemplated by the GATT 1947. It also afforded Members the opportunity to make

⁵⁸ Finger (1991) 3.

⁵⁹ Finger (1991) 3.

⁶⁰ Viner (1923) 193; Zvidza T *Chapter 2: The History of Dumping and Antidumping Actions* 23 also available at

<http://contentpro.seals.ac.za/iii/cpro/app?id=7464469227955338&itemId=1000060&lang=eng&service=blob&suite=def> (accessed 14 February 2017).

⁶¹ Zvidza 23.

⁶² Zanardi M 'Antidumping: A Problem in International Trade' (2005) 4.

⁶³ Raslan RAA *Antidumping: A Developing Country Perspective* (2009) 4.

⁶⁴ Terrance P *The GATT Uruguay Round: A negotiating History* (1994)

⁶⁵ Krishna R 'Antidumping in Law and Practice' (1997) 16.

⁶⁶ Van den Bossche & Zdouc (2013) 675.

long term commitments, while preserving their ability to adapt to a changing trade environment.⁶⁷

The GATT 1947 would eventually prove to be inadequate in addressing AD measures in the years that followed, as it was vague and often interpreted and applied inconsistently.⁶⁸ Members also began to notice that AD measures were being used as protectionist tools by other countries thereby creating new barriers to trade.⁶⁹

In light of these challenges, the first AD Code was introduced under the Kennedy Round of negotiations, which took place from 1963 - 1967.⁷⁰ It was in this Round that the inadequacies of Article VI of the GATT 1947 were flashed out.⁷¹ Article 1 of the Kennedy Round Code provided that ‘the imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement’ and that the provisions of the Code ‘govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations.’

Despite an attempt to rectify the inadequacies of Article VI of the GATT 1947, the Kennedy Round Code resulted in further criticisms of the AD regime. One of these criticisms stemmed from the plurilateral as opposed to multilateral nature of the Agreement, which meant that not all GATT contracting parties were bound by it.⁷² Furthermore, some participants like USA and the European Community (EC) wanted to facilitate dumping while others, such as Japan and China, wanted to impose stricter disciplines.⁷³

The Tokyo Round Anti-Dumping Code followed the Kennedy Round and was negotiated in 1979. During this time, developing countries were the constant target of

⁶⁷ WTR (2009) 19, 61.

⁶⁸ Van den Bossche & Zdouc (2013) 675.

⁶⁹ Van den Bossche & Zdouc (2013) 675.

⁷⁰ International Trade Centre *Business Guide to Trade Remedies in Brazil: Anti-dumping, Countervailing and Safeguard Legislation Practices and Procedures* (2009) 2.

⁷¹ Matsushita M ‘Some International and Domestic Anti-dumping Issues’ (2010) 251.

⁷² Bagwell et al (2010) 200.

⁷³ Van den Bossche & Zdouc (2013) 512; see also Messerlin PA ‘China in the World Trade Organisation: Antidumping and Safeguards’ (2002) 19.

AD measures by developed countries. In 1994, a compromise was reached during the Uruguay Round in the form of the ADA, which, together with Article VI of the GATT 1994, set out the current international rules on dumping and AD measures.⁷⁴ The Uruguay Round also formed the WTO.

1.3 PROBLEM STATEMENT

Increased globalisation and pressure on African countries to lower and eventually eliminate their tariffs especially in RTAs⁷⁵ has created a need for such countries to seek feasible alternative methods to protect their infant domestic industries from the effects of globalisation, such as dumping.

Illy argues that even developed countries industrialised behind high tariff walls and state interventionism⁷⁶ and that Africa would be the only continent to achieve economic development without these instruments.⁷⁷ He recommends that mastering smart protection tools is critical for the continent if it were to develop a genuine and viable industrial policy.⁷⁸ In other words, these tools could assist in the further development of African countries.⁷⁹

On the contrary, some scholars have argued that Africa is plagued by so many problems and priorities that it should use its scarce resources to invest in much more needed sectors like health care, rather than spend those resources building up trade remedy systems.⁸⁰ The reality is that lack of expertise, financial capacities and technical equipment makes it difficult for companies in developing countries to defend their interests in an AD investigation.⁸¹

⁷⁴ Van den Bossche & Zdouc (2013) 676.

⁷⁵ See Mangeni (15 August 2017).

⁷⁶ Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' (2012) 4 available at <http://www.princeton.edu/~pcglobal/conferences/GLF/oilly.pdf> (accessed 16 July 2016) 4.

⁷⁷ Illy (2012) 4.

⁷⁸ Illy (2012) 4.

⁷⁹ Illy O 'African Countries and the Challenges of Trade Remedy Mechanisms within the WTO' (2016) 2-6.

⁸⁰ Illy (2016) 12.

⁸¹ Neufeld (2001) 14.

Regardless of the arguments of whether to or not to utilise trade remedies in Africa, African countries have generally not been very visible in the realm of AD actions and have not played a major role in adopting, implementing or using trade remedies. In fact, at the time of writing this mini-thesis, only four African countries; Egypt, Morocco, Tunisia and SA, have *functioning* national AD legislations.⁸² Of these, SA has been the most prolific user with 229 AD initiations and 137 AD measures, followed by Egypt with 84 AD initiations and 56 AD measures.⁸³

In recent years however, African and other developing⁸⁴ countries have shown an increasing trend to adopt national AD measures. Mauritius, Kenya and Ghana are some examples of African countries that are currently in the process of drafting their first AD legislation and setting up investigation authorities.⁸⁵ Uganda is no exception to this trend.

Uganda has indicated its intention to adopt national AD legislation in order to protect its vulnerable domestic industries.⁸⁶ This, according to the MTIC could enable the domestic industries to become more efficient producers, thereby transforming Uganda into an 'export hub'.⁸⁷ It is worth noting that the Uganda Law Reform Commission (ULRC) has had a draft Bill for detailed WTO-consistent AD law and Regulations for about ten years, without much success in it being passed by the Parliament into law.⁸⁸

To enable development, one of the ways Uganda has attempted to further liberalise trade between it and other countries is through its membership to the EAC and consequently the EACCU. The EACCU has seen to the gradual elimination of intra-EAC trade tariffs over a five-year period, since its establishment. The tariff reduction transfer period lapsed in January 2010 and as a result, all intra-EAC trade of goods is

⁸² Illy (2012) 4.

⁸³ WTO 'Statistics on Anti-dumping' available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (for the period of 1995-2015) (accessed 06 March 2017).

⁸⁴ See Messerlin PA 'China in the World Trade Organization: Antidumping and Safeguards' (2004) 107.

⁸⁵ Illy (2016) 6.

⁸⁶ Remarks by the MTIC Uganda (2012).

⁸⁷ Remarks by the MTIC Uganda (2012).

⁸⁸ Mangeni (15 August 2017).

conducted on a zero per cent tariff rate for goods emanating from and produced within the EACCU region.⁸⁹

Regional and international trade liberalisation commitments have not come without consequences. This can be seen as a result of the quantitative restrictions imposed by Uganda, Kenya, Rwanda and Tanzania on second-hand clothing from the USA in order to protect its textile industry.⁹⁰ Kenya has since retreated from its proposed ban on used clothes after USA threatened to retract the African Growth and Opportunity Act (AGOA) under which exports from the said countries have duty-free access to the US market.⁹¹

Quantitative restrictions are a violation of WTO rules but because Uganda lacks trade remedy legislation, it has had to opt for crude methods to protect its domestic industry. Uganda will have to find new solutions to deal with foreign unfair trade practices such as dumping, but which are not as grotesque as the quantitative restrictions currently being applied to the importation of second-hand clothes from the US.⁹²

Additionally, in sub-Saharan Africa, manufacturing capacity fell from 17.5 per cent in 1965 to 13.1 per cent in 2005.⁹³ Much of this can be attributed to the increase of foreign exports to the African continent. Few African producers can compete with such exports owing to the efficient production of foreign producers who can usually afford to sell their goods at cheap prices in order to gain market access importing countries.

⁸⁹ East African Community 'Customs - Internal Tariffs' available at https://customs.eac.int/index.php?option=com_content&view=article&id=11&Itemid=107 (accessed 16 May 2017).

⁹⁰ Kelley K 'East Africa: Revisit Ban on Second-hand Clothes, 3 EAC States Urged' *The Citizen* August 2017.

⁹¹ Olingo A 'East Africa: Secondhand Clothes Ban Shelved to Save Agoa Trade Agreement' *The EastAfrican* 25 June 2017.

⁹² Muchira N 'Africa: United States Assures Africa AGOA Pact Is Here to Stay' *The Monitor* 23 August 2017 available at <http://allafrica.com/stories/201708230132.html> (accessed 25 August 2017).

⁹³ Aryeetey E & Moyo N 'Industrialisation for Structural Transformation in Africa: Appropriate Roles for the State' (2012) ii64 available at https://academic.oup.com/jae/article/21/suppl_2/ii55/691493/Industrialisation-for-Structural-Transformation-in (accessed 25 August 2017).

Like many African countries, Uganda is not yet in a position to satisfy the demand for key commodities within its borders and relies on imported goods to satisfy demand. As a matter of fact, during 2014, much of Uganda's trade accounted for imports while exports decreased during the same year.⁹⁴ Subsequently, it has experienced a deteriorating trade balance due to the continued export of primary products such as coffee and tea and the import of high valued manufactured consumer goods like pharmaceuticals and petroleum products.⁹⁵

An equal trade balance is a symptom of economic growth and development. It has therefore become apparent that in order to improve trade, Uganda has to enable its domestic industries to grow and thrive to the extent that they can become efficient producers and eventually exporters of finished goods to ensure an equal trade balance between imports and exports. In order to do this, methods have to be implemented to protect Uganda's domestic industries to ensure that they have an ample opportunity to grow.

The question here is therefore: how can Uganda protect its domestic industries thereby allowing them to grow and develop into efficient producers, while remaining within the ambit of its WTO and EACCU obligations? This study seeks to examine national AD legislation as an alternative option for protecting Uganda's infant and vulnerable domestic industries. It will therefore examine the procedural and substantive AD provisions of both the WTO and the Protocol. It will also examine SA's national AD laws and institutions as SA has successfully used AD measures to protect its domestic industries.

As for regional AD provisions, this study will only focus on the AD provisions as provided under the Protocol, as opposed to those under COMESA. This is because in recent years, Uganda's trade flow to the COMESA has declined, dropping from 71.2

⁹⁴ East African Community *Trade Report 2014* 59.

⁹⁵ East African Community *Trade Report 2014* 60.

per cent of Uganda's total global exports in 2003 to 37.6 per cent in 2010.⁹⁶ Conversely, Uganda's export flows to the EAC grew 7.6 per cent between 2001 and 2010.⁹⁷ By 2014, statistics show that the EAC was the major regional destination for Uganda's exports, accounting for 31 per cent of its total exports.⁹⁸

South Africa's AD policies will also be examined owing to its prolific use of trade remedies. It has had national AD legislation for the longest time in Africa (since 1914). It is also the biggest utiliser of AD measures on the African continent, accounting for 75 per cent of AD initiations and 70 per cent of applied measures reported by African countries between 1995 and 2011.⁹⁹ Additionally, it has clear and transparent laws and enforcement mechanisms.¹⁰⁰

South Africa also has some characteristics similar to those of Uganda: like Uganda, SA is also an original Member of the WTO, is an African country and is also party to regional blocs including the South African Customs Union (SACU) and the Southern African Development Community (SADC). The International Trade Administration Act 2002 (ITAA), in conjunction with South Africa's Anti-Dumping Regulations (ADR), which regulate AD investigations, will be the primary legislative sources of study with regards to the study of the SA AD regime.

1.4 RESEARCH QUESTIONS AND OBJECTIVES

The purpose of this study is twofold:

1. Examine how Uganda can adopt national AD legislation that is in accordance with its WTO obligations.

⁹⁶ Brookings Africa Growth Initiative *Accelerating Growth through Improved Intra-African Trade* (January 2012) 24 available at <https://www.brookings.edu/research/accelerating-growth-through-improved-intra-africa-trade/> (accessed 31 January 2017).

⁹⁷ Brookings Africa Growth Initiative (2012) 24.

⁹⁸ East African Community Trade Report 2014.

⁹⁹ Illy O 'Trade Remedies in Africa: Experiences, Challenges and Prospects' in *Can Global Issues Have a Regional Solution?* Volume 3, Issue 3 (2015) 16.

¹⁰⁰ Murigi WC *The Development of a Successful Anti-dumping Regime in Kenya* (2013) 6.

2. Examine how Uganda can adopt national AD legislation that is in accordance with its EACCU Protocol obligations.

Central to achieving this dual purpose, the study:

1. Examines the international rules on AD in accordance with the WTO under Article VI of the GATT 1994 and the ADA.
2. Analyses the relevant regional rules on AD in accordance with Article 16 of the Protocol as well as Annex IV of the same Protocol, known as the East African Community Customs Union Anti-Dumping Measures Regulations (ADM Regulation).
3. Drawing on SA's experiences, it analyses SA's national AD measures paying attention to its institutional and legislative framework and its consistency with the WTO rules.
4. Offers recommendations on how Uganda could go about adopting AD measures that are tailored for its specific economic developmental needs but still in tandem with the WTO and EACCU rules on AD.

1.5 METHODOLOGY

This research is mainly a desktop study based on the review and analysis of available literature. The primary sources are the GATT 1994, the ADA of the WTO and Article 16 of the Protocol and the ADM Regulations. With regards to SA, the ITAA and the ADR are the primary sources used.

Secondary sources include journal article, reports, textbooks, working papers, databases, electronic and Internet sources and other scholarly material.

1.6 CHAPTER OUTLINE

In addition to this chapter, this mini-thesis consists of a further four chapters.

Chapter 2

Chapter 2 examines the procedural and substantial elements of international AD rules under the WTO through the examination of the ADA and Article VI of the GATT 1994. This Article is instructive in so far as it presents the framework, which WTO Members must follow with regard to dumped goods.

Chapter 3

Chapter 3 focuses on the obligations that Uganda has in the light of its membership of the EACCU, in accordance with the Protocol. It examines the substantive and procedural AD rules as provided in Article 16 of the Protocol as well as Annex IV (Anti-Dumping Measures Regulations or ADM Regulations) of the same Protocol.

Chapter 4

Chapter 4 critically analyses the legislative and institutional frameworks of the South African AD system as well as the substantive and procedural processes that are followed throughout the AD investigation. The ITA Act 2002 of South Africa and the ADRs, are the primary sources of AD legislation will be examined in this regard. This chapter analyses the manner in which SA has adopted and utilised its AD regime thus providing Uganda with guidance on how it could do the same.

Chapter 5

The final chapter consists of conclusions and recommendations on how Uganda could go about adopting AD policies.

CHAPTER 2

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

2.1 INTRODUCTION

This chapter reviews the procedural and substantive elements of anti-dumping (AD) under the World Trade Organisation (WTO) by examining the AD measures of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement or ADA) and Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

Internationally, AD investigations are regulated and conducted in accordance with the rules and procedures of the WTO.¹⁰¹ The provisions regulate trade between *countries* as opposed to the practices of individual companies. Article VI of the GATT 1994 and the ADA provide a framework of substantive and procedural rules to govern counteractions against dumping by Member countries through the imposition of AD measures.¹⁰²

Governments can impose AD duties to offset the effects of dumping if it is causing injury to the domestic industry. In other words, the WTO provides ways countries may or may not react to dumping,¹⁰³ by prescribing specific actions countries can take, should injurious dumping be found to exist.

It is important to note that the Agreements do not prohibit dumping as such¹⁰⁴ and are hardly concerned with why it happens at all.¹⁰⁵ The WTO only intervenes if dumping causes injury to the domestic industry of the importing country. It is at this point that

¹⁰¹ Brink G 'X-Raying Injury Findings in South Africa's Anti-dumping Investigations' (2015b) 144.

¹⁰² Gupta & Choudhury (2011) 120.

¹⁰³ Ndlovu L 'South Africa and the World Trade Organisation Anti-dumping Agreement' (2012) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088333 (accessed 12 February 2017); Lesguillons H 'E.E.C. Anti dumping and Anti Subsidy Law' (1988) 511.

¹⁰⁴ Gupta & Choudhury (2011) 124; also see Van den Bossche & Zdouc (2013) 677.

¹⁰⁵ Hoekman BM & Kostecki MM *The Political Economy of the World Trading System: The WTO and Beyond* (2003) 318-320.

Member countries of the WTO are allowed to take AD action against foreign exporters.¹⁰⁶

Members are obligated to follow the ADA rules and procedures from the initiation of an AD investigation to the imposition of final AD duties. Be that as it may, countries like Rwanda, Uganda and Tanzania,¹⁰⁷ have resorted to measures, such as quantitative import bans, to protect their domestic industries, even though these measures are inconsistent with WTO rules. Since there are no explicit sanctions for countries acting outside WTO rules, Members affected by actions inconsistent with the WTO rules may take proactive or retaliatory action against the relevant Member.¹⁰⁸

To understand AD action, it is essential to understand the AD terminology of the WTO Agreements, as no action can be taken until it is established that dumping is, in fact, taking place.¹⁰⁹ This Chapter will briefly examine the substantive and procedural requirements for AD measures as contained in the Article VI of the GATT 1994 and the ADA. It will also identify some shortcomings identified in these Agreements since their enactment.

2.2 AN EXAMINATION OF THE SUBSTANTIVE AND PROCEDURAL REQUIREMENTS FOR ANTI-DUMPING MEASURES

This section consecutively engages the substantive and procedural requirements for the use of AD measures. An examination of the substantive requirements involves unpacking the concept of dumping and when it occurs and establishing injury and casual link. A subsequent examination of the procedural requirements looks at various

¹⁰⁶ McNelis (2007) 23- 24.

¹⁰⁷ In 2016, these countries agreed to ban the importation on second-hand clothes and leather products in order to safeguard and develop their textile industries – see Esiara K ‘EAC divided on ban on used clothes, shoes as US lobbies exert pressure’ *Daily Nation* 1 June 2017 available at <http://www.google.co.za/amp/www.theeastfrican.co.ke/business/EAC-divided-on-ban-on-used-clothes/2560-3951256-view-asAMP-g94n8fz/index.html> (accessed 2 September 2017).

¹⁰⁸ Appellate Body Report, *US-Anti-Dumping Act of 1916* WT/DS136/AB/R, WT/DS34/AB/R, adopted September 2000 par 79.

¹⁰⁹ Brink GF ‘A Nutshell Guide to Anti-dumping Action’ (2008) 257.

concepts including pre-initiation and application, initiation, provisional and final AD measures and their determination.

2.2.1 SUBSTANTIVE REQUIREMENTS

2.2.1.1 The Meaning of Dumping

Article VI of the GATT 1994 allows countries to take action against dumping, and the ADA, clarifies and expands on Article VI. These two Agreements are interpreted and operate together.¹¹⁰ This was confirmed in Panel Report *US-1916 Act*, where the Panel held that Article VI of GATT 1994 and the ADA are part of an inseparable package of rights and obligations and require an interpretation of both rights and obligations to apply to AD measures.¹¹¹

Jacob Viner first described ‘dumping’ as ‘price discrimination between national markets’.¹¹² Currently, however, dumping occurs when a product is sold in the importing country at a price that is less than its normal value.¹¹³ Viner’s definition of dumping compared prices with variable costs, whereas the latter definition is a comparison of prices with the *normal value*.¹¹⁴

It is submitted that virtually all international trade takes place at dumped prices. An efficient producer has to absorb both the freight charges and the customs duties in the importing country in order to be competitive in that country.¹¹⁵ An AD measure is a unilateral remedy for the importing country in instances where dumping materially

¹¹⁰ WTO E-Learning *Trade Remedies* 93 available at https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf (accessed 14 August 2016).

¹¹¹ Panel Report *US – Anti-dumping Act of 1916*, para 6.92-6.94.

¹¹² Viner (1923) 3; Viner (1923) 35-68; Sibanda (2013) 177 available at <http://ssrn.com/abstract=2363892> (accessed 12 February 2017).

¹¹³ Article 2.1 of the ADA; Osode PC ‘An Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice’ (2003) 19; Satapathy C ‘Review of WTO Rules on Antidumping and Countervailing Measures’ (2006) 263.

¹¹⁴ Normal Value is discussed in detail below; see Sibanda (2013) 177.

¹¹⁵ Brink (2008) 257; Brink GF *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) 27.

injures or threatens to injure the domestic industry or the establishment of one.¹¹⁶ It is thereby a countermeasure for the importing country against the actions of foreign exporters.¹¹⁷

An illustration of dumping would be where a product, which sells for US\$20 in Germany, is exported to Uganda for US\$12. This product is *prima facie* 'dumped' in Uganda because it is sold at less than its normal value (US\$20). Evidently, the price of goods is used to determine whether dumping is indeed taking place.

2.2.1.2 Determination of Dumping

An AD investigation has to be conducted before AD measures can be imposed. One of the most critical elements of this investigation is to determine whether dumping is in fact, taking place.¹¹⁸ The GATT 1994 only confers power on Members to levy AD duties, leaving it up to the Investigating Authorities to determine the amount of AD duty that should be imposed.¹¹⁹

Governments are only permitted to take action against injurious dumping to protect their domestic and/or infant industries; therefore, Investigating Authorities must investigate and contemplate substantial evidence before imposing definitive AD measures that restrict imports, under the ADA.¹²⁰ The ADA sets out the basic principles for the determination of dumping. Some of these include how the margin of dumping, export price and normal value should be calculated. The ADA also has provisions on how the 'like product' and 'domestic industry' should be determined.

¹¹⁶ Footnote 9 of the ADA.

¹¹⁷ Viktoriia K *Public Interest Consideration in Domestic and International Anti-dumping Disciplines* (2011) 8.

¹¹⁸ Brink (2002) 25; Brink (2008) 257

¹¹⁹ Osode (2003) 23.

¹²⁰ Bown P 'The WTO and Anti-dumping in Developing Countries' (2008) 7.

Investigating Authorities have to undertake a series of complex analytical steps in order to determine the appropriate price in the market of the exporting country (normal value) and the relevant price in the market of the importing country (export price) so as to enable a fitting comparison¹²¹ and establish a dumping margin according to which AD duties may be imposed. These determinations shall be considered below.

2.2.1.2.1 Normal Value

The ADA restricts how a Member can calculate whether a product has been dumped. The Investigating Authorities have to first ascertain the normal value in order to determine whether dumping is, in fact, taking place. It is this normal value that will be compared to the export price in order to determine whether a product is being dumped.

Normal value can be established in three ways: the ‘standard’ method,¹²² ‘third country export’ method, and the constructed normal value (CNV). The standard method is based on the price in the exporter’s domestic market.¹²³ It is therefore the price of a like product in the ordinary course of trade, destined for consumption in the exporting Member’s home market.¹²⁴ This definition presupposes that the exporting country sells the product under consideration in the ordinary course of trade within its domestic market.¹²⁵

When, for example, a car battery produced and sold in Germany costs US\$75 while its export price to Uganda is US\$45, the car battery is dumped in Uganda by US\$30 (US\$75 - US\$45 = US\$30). Here, sales of the car battery will be considered as sufficient for comparison when they constitute five per cent or more of the export sales

¹²¹ WTO: Technical Information on Anti-dumping available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017).

¹²² UNCTAD *World Trade Organisation: Anti-dumping Measures* (2003) 8.

¹²³ Brink GF ‘Proposed Amendments to the anti-dumping Regulations: Are the Amendments in Order?’ (2006) 3.

¹²⁴ Article 2.1 of the ADA; Denner (2009) 10; Raslan (2009) 22.

¹²⁵ Brink (2002) 33.

in Uganda.¹²⁶ A lower ratio should be acceptable where evidence demonstrates that domestic sales at such lower ratios are enough to provide for a proper comparison.¹²⁷

Situations may arise where normal value cannot be established using the ‘standard method’. The ADA proposes two alternative methods: the ‘third country exports’ method and the CNV method.¹²⁸ These methods shall be considered below.

2.2.1.2.1.1 Third Country Exports Method

According to the ADA, normal value may be determined by looking at sales of the like product to an appropriate third country, (provided that the price is representative) when it cannot be established through sales of the product in the exporting country.¹²⁹ Investigating Authorities thereby look at the price an exporter charges for exports of the like product to a third country.

Three conditions have to be met to establish normal value using this method. The *third country* by reference to which the normal value is going to be determined has to be *appropriate, representative*¹³⁰ and *comparable*.¹³¹ This method is used when there are no sufficient sales of the like product in the exporting country or, because of the particular market situation or the low volume of sales in the domestic market of the exporting country, such sales do not permit a proper comparison.¹³²

This test generally comprises of testing the volume of exports to the chosen third country against the volume of exports to the importing Member.¹³³ If the volume of

¹²⁶ Footnote 2 of the ADA.

¹²⁷ Footnote 2 of the ADA.

¹²⁸ UNCTAD (2003) 9; WTO E-Learning *Trade Remedies* 107 available at https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf (accessed 14 August 2016).

¹²⁹ Article 2.2 of the ADA.

¹³⁰ Article 2.2 of the ADA; Murigi (2013) 13.

¹³¹ Article VI: 1 of GATT 1994; Art 2.2 of the ADA.

¹³² Article 2.2 of the ADA.

¹³³ WTO E-learning *Trade Remedies* 108 available at https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf (accessed 14 August 2016).

exports sold to a third country is significantly less than the volume of exports to the importing country (the investigating country), such sales may be disregarded for the purposes of determining normal value. The importing country then proceeds to ‘construct’ an appropriate normal value.

2.2.1.2.1.2 Constructed Normal Value

The CNV is a ‘value’ (not a *price*), provided by the exporter at the request of the Investigating Authority and is normally based on the records and actual data kept and obtained by the exporter.¹³⁴ These records must be in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.¹³⁵

Investigating Authorities must establish and sum up the cost of production in the country of origin plus a reasonable amount of administrative, selling and general costs, and a reasonable amount for profits in order to determine the CNV.¹³⁶ It has been observed that Investigating Authorities tend to prefer the CNV rather than the price of export sales to third countries because of the presumption that the products are likely to be dumped in the third country as well.¹³⁷

2.2.1.2.2 Export Price

In order to establish dumping, Investigating Authorities have to determine whether the goods sold domestically can be compared to the exported ones.¹³⁸ If these two products

¹³⁴ Article 2.2.1.1 of the ADA; Art 2.2.2 of the ADA; WTO E-Learning *Trade Remedies* 108 available at https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf (accessed 14 August 2016).

¹³⁵ Article 2.2.1.1 of the ADA.

¹³⁶ Article 2.2 of the ADA; UNCTAD (2003) 9.

¹³⁷ Stanbrook C & Bentley P *Dumping and Subsidies: The Law and Procedures Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community* (1996) 39.

¹³⁸ Brink (2002) 25.

are comparable, an export price must be determined. This is because the exported product is the one under investigation.¹³⁹

The ADA does not expressly define *export price*; however, it is understood to be the price at which the product is exported from one country to another.¹⁴⁰ In other words, it is the price at which the producer or exporter sells a product to the importing country. The export price is normally reflected in export documentation, like the bill of lading, and it is with this price that dumping is alleged.

As is the case with normal value, there are situations where the export transaction price may not be appropriate for comparison purposes. Where there is no export price, or where the export price is unreliable due to ‘association’ or a compensatory arrangement between the exporter and the importer or a third party, it may be constructed on the basis of the price at which the imported product was first resold to an independent buyer.¹⁴¹ This price is known as the ‘constructed export price’ (CEP).

Similarly to the CNV, allowances for costs, duties and taxes incurred between importation and resale, and profits accruing, have to make in accordance with Article 2.4 of the ADA so as to ensure a fair comparison of export price with normal value. If the imported product is not re-sold to an independent buyer or in its original imported condition, the authorities have the discretion to determine a reasonable basis upon which to calculate the export price.¹⁴²

2.2.1.2.3 Fair Comparison of Normal Value and Export Price

The first sentence of Article 2.4 of the ADA provides that a fair comparison be made between the export price and the normal value.¹⁴³ The second sentence on the other hand, requires that the comparison be made at the same level of trade, normally the ex-

¹³⁹ Brink (2002) 25.

¹⁴⁰ Article 2.1 of the ADA; Andersen H *EU Dumping Determinations and WTO Law* (2009) 187.

¹⁴¹ Article 2.3 of the ADA.

¹⁴² Article 2.3 of the ADA.

¹⁴³ Article 2.4 of the ADA.

factory level,¹⁴⁴ and in respect of sales made, as nearly as possible, at the same time.¹⁴⁵ The fairness principle contained in the first sentence informs the entire ADA¹⁴⁶ while the second sentence provides two requirements that have to be met in order to ensure a fair comparison.

First, the prices should be compared at the same level of trade.¹⁴⁷ This can include the price paid by the first independent buyer¹⁴⁸ or the price of the product when it leaves the factory in which it is made (ex-factory level). Secondly, there is a time requirement which provides that the comparison be made at nearly the same time as that when the good was first sold. This is important where the product under consideration is seasonal and becomes more expensive out of season than it would be in season.¹⁴⁹

Allowances for any difference demonstrated to affect price comparability, including but not limited to differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics etc., must also be made when constructing the normal value and export price.¹⁵⁰ This was confirmed in *US - Hot-Rolled Steel*, when the Appellate Body advised that these allowances be made with extra care in order to effectively calculate the normal value at the ex-factory level and ensure a fair comparison.¹⁵¹

UNIVERSITY of the
WESTERN CAPE

¹⁴⁴ Article 2.4 of the ADA; Ex-factory level is usually the level when the product leaves its place of manufacture or the price at which the product is sold to the first independent buyer – also see Mavroids PC, Messerlin PA and Wauters JM *The Law and Economics of Contingent Protection in the WTO* (2008) 56.

¹⁴⁵ Article 2.4 of the ADA; McCarthy C, Cronje JB, Denner W, Fundira T, Mwanza W & Bursvik E *Supporting Regional Integration in East and Southern Africa* (2010) 1; WTO: 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017)

¹⁴⁶ Andersen (2009) 208.

¹⁴⁷ Article 2.4 of the ADA.

¹⁴⁸ Andersen (2009) 209.

¹⁴⁹ Andersen (2009) 209.

¹⁵⁰ See Art 2.4 of the ADA for more allowances; Rao PK *WTO: Text & Cases* (2005) 61.

¹⁵¹ Panel Report, *US – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan* (2001) para 7.117; Appellate Body Report *US – Hot-Rolled Steel* para 167.

Investigating Authorities are also required to inform parties of the information needed to ensure a fair comparison in order to promote transparency and participation.¹⁵² This includes information regarding adjustments, allowances, and currency conversion.¹⁵³

2.2.1.2.4. Margin of Dumping

The margin of dumping is the difference between the export price and the normal value of the product in question. However, obtaining this margin is seldom that straightforward. Calculating the dumping margin either compares the weighted-average normal value to the weighted-average of all comparable export prices, or involves a transaction-to-transaction comparison of normal value and export price.¹⁵⁴ The dumping margin is usually expressed as a percentage of the export price on which duties will be levied.¹⁵⁵

The dumping margin is either positive or negative.¹⁵⁶ In other words, a positive finding of dumping is either found or it is not, or it is found to be *de minimis*¹⁵⁷ (that is, less than two per cent of the export price), in which case no AD measures may be imposed.

The basic formula for calculating the dumping margin is therefore:¹⁵⁸

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

Using the earlier example¹⁵⁹ of car battery imports to Uganda from Germany, the ANV in Germany is US\$75 whereas the AEP to Uganda is US\$45. The dumping margin

¹⁵² Article 2.4 of the ADA.

¹⁵³ Article 2.4 of the ADA.

¹⁵⁴ Article 2.4.2 of the ADA.

¹⁵⁵ That is to say, on the Cost, Insurance and Freight (CIF) price in the case of exports to the EU and on a Free on board (FOB) basis in the case of exports to countries, such as, Australia, New Zealand and USA.

¹⁵⁶ UNCTAD (2003) 28; see para 2.2.1.6.1. below on 'negative dumping'.

¹⁵⁷ See footnote 165 below.

¹⁵⁸ Article 3.4 of the ADA; WTO E-learning: *Trade Remedies* 115.

would therefore be $(US\$75 - US\$45)/45 \times 100 = 66.7\%$. The car battery is, therefore, being dumped in Uganda at a dumping margin of 66 per cent.

Article 2.4.2 of the ADA also provides an exception where there is ‘targeted dumping.’¹⁶⁰ It occurs when there is a pattern of export prices that differ significantly among different purchasers, regions or time periods.¹⁶¹ In this case, Investigating Authorities will compare the weighted-average normal value with the export prices of individual transactions instead.¹⁶² Reasons must be provided as to why the differences cannot be taken into account in weighted-average-to-weighted-average or transaction-to-transaction comparisons.¹⁶³

The Investigating Authority may also limit the number of exporters, importers, or products individually considered for the determination of a dumping margin when it has been determined that a dumping margin cannot be calculated for each individual exporter.¹⁶⁴ It can then impose AD duties on the uninvestigated sources on the basis of the weighted-average dumping margin actually established from the examination of the exporters or producers selected if it is not possible to calculate dumping margins for each exporter.¹⁶⁵

When there are several exporters and the Investigating Authority limits its investigation to only some of them, it is not allowed to include any dumping margins that are *de minimis*,¹⁶⁶ zero, or based on the facts available.¹⁶⁶ A full investigation to determine the

¹⁵⁹ See para 2.2.1.3 above.

¹⁶⁰ Appellate body Report, *US – Softwood Lumber V (Article 21.5 – Canada 2005)* para 97; WTO ‘Technical Information on Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017)

¹⁶¹ Article 2.4.2 of the ADA.

¹⁶² Article 2.4.2 of the ADA; Appellate Body Report, *US – Residential Washers*, para 5.24-5.36.

¹⁶³ Article 2.4.2 of the ADA.

¹⁶⁴ Article 3.3 of the ADA; WTO ‘Technical Information on Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017).

¹⁶⁵ Article 3.3 of the ADA; WTO ‘Technical Information on Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017)

¹⁶⁶ According to Art 5.8 of the ADA, it is *de minimis* is when dumping margins constitute less than two per cent or where volume of dumped goods is negligible i.e. if such volume from a particular country is less than three per cent of imports unless countries which individually account for less than three per cent of imports collectively account for more than seven per cent of imports of the like product; Guzman & Sykes (2007) 95.

margin of dumping for exporters not included in the sample¹⁶⁷ must be conducted, as well as an individual margin for any exporter or producer, who provides the necessary information during the course of the investigation.¹⁶⁸

2.2.1.2.4.1 Zeroing

Generally, a positive dumping margin shows that there is dumping whereas a negative dumping margin shows that there is no dumping. Negative dumping therefore occurs when the export price exceeds the normal value.¹⁶⁹ Technically, the latter conclusion should not result in the imposition of AD duties; however, negative dumping is used to offset the positive dumping amount.

When a negative dumping determination is not allowed to offset positive dumping and a 'zero' is assigned where there would otherwise have been a negative dumping value, it is said that zeroing has been used. Use of this method implies that if just one transaction is dumped, dumping will be found; therefore, zeroing often facilitates dumping findings.¹⁷⁰

Article 2.4.2 was adopted to address the issue of zeroing and the WTO Members generally resorted to using the weighted-average method. However, within the weighted-average method, some WTO Members applied a new type of zeroing known as 'inter-model zeroing'.¹⁷¹ If for example, model A was dumped while model B was not dumped, the Members would not allow the negative dumping of model B to offset the positive dumping of model A.¹⁷²

¹⁶⁷ Article 6.10 of the ADA.

¹⁶⁸ WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017)

¹⁶⁹ Horn H and Mavroidis *The WTO Case Law of 2004-2005: Legal and Economic Analysis* (2008) 123.

¹⁷⁰ UNCTAD (2003) 16.

¹⁷¹ Appellate Body Report, *EC – Bed Linen*.

¹⁷² UNCTAD (2003) 16.

In *EC - Bed Linen*, this form of zeroing was successfully challenged by India and the Appellate Body upheld the Panel's finding that zeroing was inconsistent with Article 2.4.2.¹⁷³ The Panel held:

'...by "zeroing" the 'negative dumping margins', the European Communities (EC), did not fully take into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, those export prices were treated as if they were less than what they were, which in turn, inflated the result from the calculation of the margin of dumping. The Panel therefore concluded that the EC had not established the existence of dumping margins on the basis of a comparison of the weighted average normal value with the weighted average of all comparable export transactions as required by article 2 of the ADA'.¹⁷⁴

Zeroing is also not permitted where the transaction-to-transaction methodology is applied.¹⁷⁵

2.2.1.3 Determination of Causal Link and Injury

After dumping has been established, the Investigating Authorities have to establish that the domestic industry producing the 'like product' is suffering material injury as a result of it. The determination of injury is based on positive evidence and involves an objective examination of both the volume of dumped imports and the effect of the dumped imports on prices in the domestic market.¹⁷⁶ During this process, the impact of these imports on the domestic producers will also be evaluated.¹⁷⁷

¹⁷³ Appellate Body, *EC – Bed Linen* (2001) para 66; *US - Shrimp (Ecuador)* 2007 para 7.40.

¹⁷⁴ Appellate Body, *EC – Bed Linen* (2001) para 51 – 66.

¹⁷⁵ Appellate Body Report, *US – Softwood Lumber V*.

¹⁷⁶ Appellate Body Report, *US – Softwood Lumber V*.

¹⁷⁷ Article 3.1 of the ADA.

An objective examination requires that an Investigating Authority's 'analysis conform to the dictates of the basic principles of good faith and fundamental fairness'.¹⁷⁸ It further requires this examination to be conducted 'in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation'.¹⁷⁹

2.2.1.3.1 Like Product

A 'like product' is a product which is 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 investigation.¹⁸⁰

For example, where a domestic industry brings a dumping complaint against fresh *green* bananas but data only exists for 'fresh bananas'. Article 3.6 of the ADA permits the Investigating Authorities to examine the production of the narrowest group or range of products including the like product. Data will then be taken with respect to 'fresh bananas' where data on fresh *green* bananas specifically, is unavailable.

Before a Member can decide whether to impose AD duties on imports coming from another country, that Member must determine that there is dumping which is affecting the domestic industry producing a *like* product to the one in question.¹⁸¹ This process involves inspecting the product that is allegedly being dumped and establishing which domestically produced products qualify as the appropriate 'like product' for comparison.¹⁸²

¹⁷⁸ Appellate Body Report, *China – GOES*, para 126; Appellate Body Report, *US – Hot-Rolled Steel*, para 193.

¹⁷⁹ Appellate Body Report, *China – GOES* para. 126; Appellate Body Report, *US – Hot-Rolled Steel*, para 193; Appellate Body Report, *EC – Fasteners (China)*, para 414.

¹⁸⁰ Article 2.6 of the ADA.

¹⁸¹ Article 2.6 of the ADA; Brink (2002) 28.

¹⁸² WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017).

The issue of ascertaining whether two or more products were *alike* was dealt with in *EC - Footwear from China and Indonesia*.¹⁸³ The Panel had to determine whether slippers and out-door shoes were ‘like products’ in accordance with the ADA. The EC stated that a two-way interchangeable test was necessary, based on physical characteristics, end use and consumer perceptions in order to consider slippers and outdoor shoes as the same product.¹⁸⁴ In this case, the test was only partially satisfied: although it could be established that outdoor shoes could substitute for slippers, the reverse could not be established, thereby making the two products incomparable.¹⁸⁵

The term ‘like product’ is relevant for determining both dumping and injury and identifying which domestic industries can initiate an AD investigation with regard to the imported product. It is the basis upon which a relevant domestic industry will be identified and it governs the scope of the investigation, and the determination of injury and causal link.¹⁸⁶

2.2.1.3.2 Domestic Industry

The domestic industry consists of the domestic producers as a whole of the like products or those of them whose collective output of such like products constitutes a major proportion of the total domestic production of those products.¹⁸⁷ Neither the ADA nor the GATT 1994 explain the meaning of ‘major proportion’ and leave its determination to the importing country’s authorities.¹⁸⁸

It is important to establish which producers constitute the domestic industry before an investigation can be initiated. In fact, there has to be a certain number of domestic producers supporting the AD application before an investigation can be initiated. Anti-

¹⁸³ See Council Regulation No. 2155/97, O.J. L298/1 (1997) 8.

¹⁸⁴ See Council Regulation No. 2155/97, O.J. L298/1 (1997) 8.

¹⁸⁵ Adamantopoulos K & De Notaris D ‘The future of the WTO and the reform of the Anti-Dumping Agreement: A legal Perspective’ (2000) 37.

¹⁸⁶ WTO ‘Technical Information on Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017)

¹⁸⁷ Article 4.1 of the ADA.

¹⁸⁸ See Panel Report, *Argentina – Poultry Panel*, para 7.341 on the determination of ‘a major proportion’.

dumping investigations and measures are adopted for the protection of the domestic industry, as it is in respect of this industry that injury is established.

Domestic producers who are themselves importers of the dumped goods¹⁸⁹ or who are related to the exporters of the dumped products¹⁹⁰ may be excluded from the definition of ‘domestic industry’ in accordance with Article 4.1 of the ADA based on the assumption that such producers may misrepresent the injury analysis.¹⁹¹ A producer is *related* to the exporter if a relationship of control exists between them and there is reason to believe that the relationship makes the domestic producer behave differently from non-related producers.¹⁹² The discretion is with the importing country to exclude those domestic producers.

Special circumstances may arise where the domestic industry only comprises of producers within a certain area that produce and sell all or almost all of their production within that area. In such circumstances, other producers of the product located elsewhere in the country do not, to any substantial degree, supply the demand in that area.¹⁹³ Consequently, the domestic industry may be interpreted, as only referring to producers within that regional market. Any AD measures would therefore only be applied with respect of imported products destined for that market area.¹⁹⁴

2.2.1.3.3 Injury

Investigating Authorities not only have to prove that there is dumping, but that it is also causing material injury to the domestic industry. The ADA does not define ‘material injury’¹⁹⁵ but does provide that it comprises of present material injury, future injury

¹⁸⁹ Article 4.1 (ii) of the ADA.

¹⁹⁰ Article 4.1 (i) of the ADA.

¹⁹¹ Article 4.1 (i-ii) of ADA.

¹⁹² Footnote 11 of the ADA.

¹⁹³ Article 4.1(ii) and 4.2 of the ADA.

¹⁹⁴ Article 4.2 of the ADA.

¹⁹⁵ Pangratis A & Vermulst E ‘Injury in Anti-dumping proceedings: The Need to Look Beyond the Uruguay Round Results’ (2013) 73.

(threat of material injury) and material retardation of the establishment of a domestic industry.¹⁹⁶

The determination of material injury must be based on positive evidence.¹⁹⁷ It must also involve an objective examination of the volume of dumped imports, their effect on domestic prices in the importing Member's market, and their consequent impact on the domestic industry.¹⁹⁸ The investigating authorities must evaluate all relevant economic factors that have a bearing on the state of the industry in question in order to determine injury. In *Thailand – H – Beams*, the Appellate Body held:

‘...An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the Anti-Dumping Agreement, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the Anti-Dumping Agreement must be based on the totality of that evidence. We see nothing in Article 3.1, which limits an investigating authority to base, an injury determination only upon non-confidential information.’¹⁹⁹

The Panel also held that confidential and non-confidential information was necessary for the thorough determination of injury, and that the 15 factors²⁰⁰ provided in Article 3.4 were mandatory and had to be investigated by the authorities. It should be noted that this list is not exhaustive and that no single or several of these factors can necessarily provide decisive guidance.²⁰¹

¹⁹⁶ Footnote 9 of the ADA.

¹⁹⁷ Article 3.1 of the ADA.

¹⁹⁸ Article 3.1 of the ADA.

¹⁹⁹ Appellate Body Report, *Thailand – H-Beams* (WT/DS122/AB/R) para 107.

²⁰⁰ Article 3.4 of the ADA - these 15 factors include: 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 and ability to raise capital or investments.

²⁰¹ Article 3.4 of the ADA.

In relation to the volume and price analysis, the relevance of a significant increase in dumped imports is either absolute or relative to production or consumption in the importing country.²⁰² An Investigating Authority must therefore consider whether the dumped imports have caused significant price undercutting, substantially depressed prices or prevented price increases, which would otherwise have occurred, but for the dumped products.²⁰³

2.2.1.3.4 Cumulation

Investigators may also aggregate the dumped products of more than one country and collectively assess whether those dumped products are causing material injury to the domestic industry of the importing country, instead of calculating the injury caused by each individual exporting country.²⁰⁴ This method is known as cumulation. When cumulation is applied, the imports under consideration must concurrently be subject to AD investigations.²⁰⁵

2.2.1.3.5 Causal Link between Dumped Imports and Injury

There must be a nexus between the dumped goods and the injury suffered by the domestic industry. AD actions may only be taken when it has been established that the dumped products are the ones *causing* material injury or threat of material injury or retarding the establishment of a domestic industry which manufactures the *like* product in the importing country.²⁰⁶

A demonstration of causal link must be based on an examination of all relevant evidence before the Investigating Authorities.²⁰⁷ The ADA does not specify which factors should be considered or give guidance on how relevant evidence should be

²⁰² Article 3.2 of the ADA.

²⁰³ Article 3.2 of the ADA.

²⁰⁴ Article 3.3 of the ADA; WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 March 2017)

²⁰⁵ Article 3.3 of the ADA.

²⁰⁶ Brink (2002) 2.

²⁰⁷ Article 3.5 of the ADA.

evaluated. Authorities must however, examine any known factors as well as a non-exhaustive list of other factors provided in Article 3.5 of the ADA,²⁰⁸ which apart from dumped imports, could be causing injury to the domestic industry.²⁰⁹ Injury caused by such other factors must not be attributed to the dumped imports,²¹⁰ as it would be unfairly prejudicial to exporters who might not actually be injuring the domestic industry.

2.2.2 PROCEDURE FOR ENACTING ANTI-DUMPING MEASURES

An AD measure can only be imposed after an investigation consistent with the ADA has been conducted.²¹¹ The AD investigation is a quasi-judicial administrative proceeding.²¹² Investigating Authorities are therefore expected to follow the rules of natural justice in its course when applying these measures.²¹³ Investigating Authorities also have to comply with the principle of 'due process', which 'broadly requires administrative and judicial proceedings to be fair'.²¹⁴

2.2.2.1 Pre-Initiation and Application Process

Anti-dumping proceedings under the ADA are initiated in one of two ways; through a written submission by or on behalf of the domestic industry²¹⁵ or by the Investigating

²⁰⁸ Article 3.5 of the ADA provides that additional factors which should be investigated include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

²⁰⁹ Article 3.5 of the ADA.

²¹⁰ Article 3.5 of the ADA.

²¹¹ WTO E-learning 127 available at

https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf (accessed 14 March 2017).

²¹² Viktoriia (2011) 10.

²¹³ Viktoriia (2011) 10.

²¹⁴ Viktoriia (2011) 10.

²¹⁵ Article 5.1 of the ADA.

Authority itself,²¹⁶ to the relevant Ministry or investigating Authority.²¹⁷ These submissions constitute ‘the application’.

The application must be sufficiently supported by the domestic producers within that industry, before the Investigating Authorities can accept the application and initiate an AD investigation.²¹⁸ This is known as ‘standing.’ Standing requires that the application be ‘supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing their support for or opposition to the application’.²¹⁹

It is worth noting that Investigating Authorities can only initiate AD investigations acting on their own accord, in special circumstances.²²⁰ The ADA does not specify what these ‘special circumstances’ entail;²²¹ however, they might arise where domestic industries do not have an adequate understanding of the legal, substantive and procedural requirements necessary for initiating the investigation.²²² Domestic producers may also be unable to co-ordinate their actions in order to fulfil the standing requirement for the initiation of an AD investigation due to lack of co-operation among them.²²³

Be that as it may, in both circumstances (application by the domestic producers or the concerned government), an investigation cannot be initiated until the Investigating Authorities have sufficient evidence regarding dumping, injury and a causal link between the dumped goods and the injury suffered.

Authorities do not need to have evidence of the quality and quantity that would be necessary to support a preliminary or final AD determination at the stage of initiating an

²¹⁶ Article 5.6 of the ADA.

²¹⁷ Czako J, Human J & Miranda J *A Handbook on Anti-dumping Investigations* (2003) 23.

²¹⁸ WTO ‘Technical Information on Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 March 2017).

²¹⁹ Article 5.4 of the ADA.

²²⁰ Article 5.6 of the ADA.

²²¹ Czako et al (2003) 22.

²²² Czako et al (2003) 22.

²²³ Czako et al (2003) 22-23.

AD investigation.²²⁴ An investigation is an on going process where certainty regarding the existence of all the elements necessary to adopt an AD measure can only be reached at a later stage.²²⁵ This was confirmed in *Mexico - Corn Syrup* where the Panel held;

...the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation. In our view, Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of all underlying issues considered in making that determination'.²²⁶

Additionally, the investigation cannot be initiated if the domestic producers in support of the application account for less than 25 per cent of the total production of the like product produced in the domestic industry.²²⁷

The application should contain, *inter alia*, the identity of the applicant(s), the characteristics of the allegedly dumped product, the names of exporters and importers, and specific information supporting the allegations of dumping and causality.²²⁸ When the applicant has provided all the relevant information in writing, it will be accepted as being 'properly documented'.²²⁹ This procedure does not involve an examination of the accuracy and adequacy of the information provided. It is merely an acknowledgement that all the relevant information and documents required have been submitted.²³⁰

²²⁴ Panel Report, *Argentina – Poultry*, para 7.62; Panel Report, *Mexico – Corn Syrup*, para 7.74; GATT U.S. – *Softwood Lumber*, para. 331.

²²⁵ Czako et al (2003) 30.

²²⁶ Panel Report, *Mexico – Corn Syrup* para 7.94.

²²⁷ Article 5.4 of the ADA; UNCTAD (2003) 34.

²²⁸ Article 5.2 (i-iv) of the ADA; Czako et al (2003) 24.

²²⁹ Article 5.5 of the ADA.

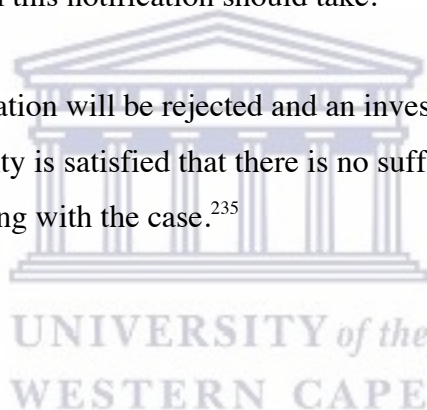
²³⁰ Panel Report, *Guatemala – Cement I*, para 7.49; Czako et al (2003) 29.

Investigating Authorities have to objectively examine the accuracy and adequacy of evidence in the application before an investigation can be initiated.²³¹ Evidence should therefore be of such a nature that an unbiased and objective Investigating Authority could have determined that there was sufficient evidence to justify initiation of an investigation.²³² The ADA does not provide any details of the nature of this examination, making it difficult for Panels to judge whether an importing Member's authorities have complied with this requirement.²³³

The ADA expresses a preference for the confidential treatment of applications during the application phase however, before initiating the AD investigation, importing Member authorities must notify the government of the exporting Member²³⁴ that an AD investigation on products emanating from that country is under way. The ADA does not contain rules on which form this notification should take.

As a general rule, an application will be rejected and an investigation terminated as soon as the Investigating Authority is satisfied that there is no sufficient evidence of dumping or injury to justify proceeding with the case.²³⁵

2.2.2.2 Initiation



An AD investigation will be initiated when the applicants have standing in accordance with Article 5.4; the application contains information required by Article 5.2; Investigating Authorities conclude that there is 'sufficient evidence' to justify initiation as set out in Article 5.3; the calculated dumping margin is not *de minimis*; and the imports to be investigated and the injury are not negligible in accordance with Article 5.8 of the ADA.

²³¹ Article 5.3 of the ADA.

²³² Czako (2003) 30.

²³³ UNCTAD (2003) 33.

²³⁴ Article 5.5 of the ADA.

²³⁵ Article 5.8 of the ADA.

An investigating period of normally a year is selected in order to calculate dumping and injury margins.²³⁶ The ADA requires that Members provide a number of procedural rights in order to ensure that all interested parties have the opportunity, *inter alia*, to present all evidence in writing and access non-confidential information.²³⁷

2.2.2.2.1 Confidential Information

All AD investigations involve immense amounts of confidential and sensitive business information, as they require companies to submit pricing and costing information of various markets to Investigating Authorities in exquisite detail. Parties are normally reluctant to provide their confidential information to their competitors²³⁸ therefore, to ensure fairness, a balance has to be struck between these competing interests and the equal levels of access to information which must be given to opposing parties.²³⁹

The ADA thus provides that confidential information should, upon good cause shown, be treated as confidential by the Investigating Authorities and not be disclosed without the specific permission of the party submitting it.²⁴⁰ Subsequently, interested parties submitting confidential information should provide meaningful non-confidential summaries thereof.²⁴¹

Interested parties can include other domestic or foreign parties.²⁴² Where an interested party refuses access to, or does not provide the necessary information within a reasonable period, or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may still be made on the basis of the facts available.²⁴³

²³⁶ UNCTAD (2003) 6.

²³⁷ Viktoriia (2011) 10; WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 March 2017)

²³⁸ UNCTAD (2003) 38.

²³⁹ UNCTAD (2003) 38.

²⁴⁰ Article 6.5 of the ADA.

²⁴¹ Article 6.5.1 of the ADA.

²⁴² Article 6.11 of the ADA.

²⁴³ Article 6.8 of the ADA.

Investigations should normally be concluded within one year but not more than 18 months, after their initiation.²⁴⁴ The 18 months deadline is absolute.²⁴⁵

2.2.2.3 Provisional Anti-dumping Measures

Under the ADA, provisional measures may only be applied after an investigation in accordance with Article 5, a public notice has been given to that effect, and interested parties have been given the opportunity to submit information and make comments.²⁴⁶ Investigating Authorities must make an initial or preliminary finding of dumping in the domestic industry and a determination that such dumping is causing injury to the domestic industry (causal link).²⁴⁷

Provisional AD measures may be imposed during an investigation, to mitigate the injury suffered by the domestic industry during the course of an investigation.²⁴⁸ It is important to note that Article 7 uses the term ‘measures’ and not ‘duties’ with regard to provisional measures. They may take the form of security (cash deposit or bond) equal to but not more than the amount of the AD duty provisionally estimated.²⁴⁹ Actual AD duties may be applied retroactively from the date provisional measures were imposed if dumping is found to cause material injury.²⁵⁰

Provisional AD measures may not be applied before 60 days from the date of initiating the investigation.²⁵¹ These measures may not last longer than four months.²⁵² Upon request by exporters representing a significant percentage of the trade involved, this time period can be extended to a maximum of six months.²⁵³

²⁴⁴ Article 5.10 of the ADA.

²⁴⁵ Panel Report, *Mexico – Olive Oil*, para 7.121.

²⁴⁶ Article 7.1 (i) of the ADA.

²⁴⁷ Article 7.1 (ii) of the ADA.

²⁴⁸ Article 7.1 (iii) of the ADA.

²⁴⁹ Article 7.2 of the ADA.

²⁵⁰ Article 10.2 of the ADA.

²⁵¹ Article 7.3 of the ADA.

²⁵² Article 7.4 of the ADA,

²⁵³ Article 7.4 of the ADA.

2.2.2.4 Final Determination of Anti-dumping Measures

After the comments of interested parties have been analysed by the Investigating Authorities and an AD investigation is finalised, AD measures may be imposed in the form of price undertakings or AD duties.

2.2.2.4.1 Price Undertakings

Anti-dumping proceedings *may* be suspended or terminated without imposing AD duties.²⁵⁴ This happens when exporters offer to revise prices or cease exports to the area in question at dumped prices so that authorities are satisfied that the injurious effect of dumping is eliminated.²⁵⁵ The use of the word ‘may’ indicates that the authorities have complete discretion with regards to ending or suspending the investigation. As a matter of fact, Article 8.4 of the ADA provides that even upon the acceptance of price undertakings by Investigating Authorities, the AD investigation can still be finalised upon the exporter’s or Investigating Authorities’ request.

Investigating Authorities must be satisfied that the price undertaking will eliminate the injurious effect of dumping before it’s accepted.²⁵⁶ Some authorities have been known to be reluctant, as a matter of policy, in accepting price undertakings from foreign exporters.²⁵⁷

In *EC - Bed Linen*, the Panel ruled that acceptance of price undertakings may qualify as a constructive remedy in cases involving developing countries.²⁵⁸ Here, as opposed to imposing AD duties that might be detrimental to a country’s economy, Members are urged to consider price undertakings when dealing with cases that involve developing countries as the dumping exporters.

²⁵⁴ Article 8.1 of the ADA.

²⁵⁵ Article 8.1 of the ADA.

²⁵⁶ Article 8.1 of the ADA.

²⁵⁷ UNCTAD (2003) 40.

²⁵⁸ Panel Report *EC – Bed linen* para 238.

2.2.2.4.2 Anti-dumping Duties

Article 9 of the ADA governs the imposition and collection of AD duties. It gives Members the discretion to impose AD duties where all the requirements for their imposition as set out in the ADA have been fulfilled.²⁵⁹ The AD duties should be collected in appropriate amounts in each case, on a non-discriminatory basis, from all sources found to be dumping or causing injury, except for imports that have been subject to price undertakings.²⁶⁰

According to the ADA, importing Members should prefer applying a duty, which is less than the dumping margin, if such lesser duty is sufficient to remove the injury to the domestic industry.²⁶¹ This is known as the 'lesser duty rule'.²⁶² Members have discretion whether or not to apply the lesser duty rule.

Recognising that injury may have occurred during the period of investigation, or that exporters may have taken action to avoid the imposition of an AD duty, Article 10 contains rules for the retroactive imposition of dumping duties in specified circumstances.²⁶³ These circumstances can include the retroactive levy of AD duties for the period that provisional measures were imposed. Such retroactivity can only be imposed once it has been established that dumping was causing material injury (as opposed to threat of injury or material retardation of the establishment of an industry).²⁶⁴

AD duties shall be levied retroactively for the period which provisional measures have been applied, if the imposition of those duties is based on a finding of material injury or threat thereof.²⁶⁵ If the provisional duties were collected in an amount that exceeded that imposed in the final AD measures or if the imposition of duties is based on a finding of

²⁵⁹ Article 9.1 of the ADA.

²⁶⁰ Article 9.2 of the ADA.

²⁶¹ Article 9.1 of the ADA.

²⁶² Viktoriia (2011) 16.

²⁶³ WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 April 2017); UNCTAD (2003) 40.

²⁶⁴ Article 10.2 of the ADA.

²⁶⁵ Article 10.2 of the ADA.

threat of material injury or material retardation, a (partial) refund of provisional duties will be required.²⁶⁶

Retroactive application of final duties can occur in exceptional circumstances, to a date not exceeding 90 days prior to the application of provisional measures.²⁶⁷ This can happen where history of dumping, massively dumped imports, and potential undermining of the remedial effects of the final duty have been established.²⁶⁸ No such duty may be imposed on a date prior to that of initiating the investigation.²⁶⁹

2.2.2.5 Public Notice

An importing Member's authorities must publish public notices of initiation, preliminary and final determinations, with increasing degrees of specificity, as the AD investigation progresses.²⁷⁰ They must disclose non-confidential information concerning the parties, the product, the margins of dumping, the facts revealed during the investigation, and the reasons for the determinations made by the authorities, including the reasons for accepting and rejecting relevant arguments or claims made by exporters or importers.²⁷¹

Public notice requirements are intended to increase the transparency of determinations, with the hope that this will increase the extent to which determinations are based on fact and solid reasoning.²⁷² Such determinations must also refer to matters of fact and law, which contributed to arguments being accepted or rejected.²⁷³

²⁶⁶ Article 10.3 and 10.4 of the ADA; WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 April 2017)

²⁶⁷ Article 10.6 of the ADA.

²⁶⁸ Article 10.8 of the ADA.

²⁶⁹ Article 10.6 (i – ii) of the ADA; WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 April 2017).

²⁷⁰ Article 12 of the ADA.

²⁷¹ See Art 12.1.1 of the ADA.

²⁷² WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm#top (accessed 10 April 2017).

²⁷³ Article 12.2.2 of the ADA; Authorities may publish a separate report rather than include all information in a public notice.

2.2.2.6 Reviews

Article 11 of the ADA provides rules for the duration of AD duties as well as requirements for the periodic review of the continuing need, if any, of the imposing of AD duties or price undertakings. Disputes in respect of AD are subject to binding dispute settlement before the Dispute Settlement Body of the WTO, in accordance with the provisions of the Dispute Settlement Understanding (DSU).²⁷⁴ Members may challenge the imposition of AD measures and the imposition of preliminary AD measures, and raise all issues regarding compliance with the requirements of the ADA before a Panel established under the DSU.²⁷⁵

2.2.2.6.1 Sunset or Expiry Reviews

According to the ADA, definitive AD measures must be terminated no later than five years from their imposition.²⁷⁶ If the authorities determine that the expiry of the duty would lead to a continuation of dumping and therefore injury, they may extend this five-year period at their discretion or upon the request of the domestic industry.²⁷⁷ This is known as the ‘sunset requirement’ and responds to the concern raised by the past practice of some countries, such as the USA,²⁷⁸ in leaving AD duties in place indefinitely. This five-year ‘sunset’ provision also applies to price undertakings.

2.2.2.6.2 New Shipper Review

A ‘new shipper’ is a newcomer to the domestic industry importing a ‘like product’ as the one that is subject to AD duties. The new shipper enters the domestic market after AD duties have been imposed on the imports. The new exporter may then request that a

²⁷⁴ Article 17 of the ADA.

²⁷⁵ WTO ‘Technical Information on Anti-dumping’ available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 April 2017).

²⁷⁶ Article 11.3 of the ADA.

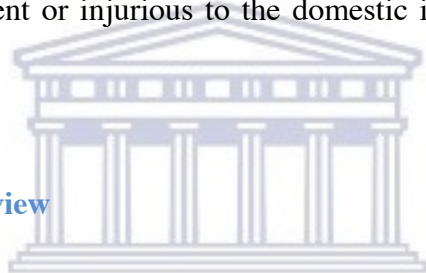
²⁷⁷ Article 11.2 of the ADA.

²⁷⁸ For example, the USA has applied an AD measure on China’s waterproof rubber footwear for more than 30 years; See Murigi (2013) 28.

separate dumping margin be calculated specifically for it, otherwise the rate imposed in the original investigation will also be applicable to the new shipper.²⁷⁹

2.2.2.6.3 Change of Circumstances Review

Circumstances that led to the imposition of AD measures may change after their imposition, for example, where the normal value decreases, leading to an increase or a reduction of the dumping margin.²⁸⁰ The ADA stipulates that in these circumstances, interested parties can request the Investigating Authorities to review whether the further imposition of AD measures is still necessary to offset dumping. To determine this, Investigating Authorities have to determine whether injury to the domestic industry would continue if such duties were removed.²⁸¹ If the importing Member establishes that dumping is no longer present or injurious to the domestic industry, it must repeal the measure.²⁸²



2.2.2.6.4 Judicial Review

The ADA obliges Members whose national legislation contains AD measures, to maintain judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia* of prompt review of administrative actions relating to final AD determinations and review of a determination within the context of Article 11.²⁸³

Countries with national AD legislation are thereby required to contain, within those policies, provisions for parties to be able to seek judicial review concerning AD decisions or procedures. These judicial reviews should be available in the national

²⁷⁹ UNCTAD (2003) 43.

²⁸⁰ WTO - E-learning (2010) 30

²⁸¹ Article 11.2 of the ADA.

²⁸² Article 11.2 of the ADA.

²⁸³ Article 13 of the ADA.

courts of importing countries. The domestic trade remedy legislation of the importing country will therefore be applied when resolving disputes within its territory.²⁸⁴

Judicial review supplements the WTO dispute settlement and any other regional dispute settlement mechanisms in terms of the objective to ensure the rule of law in the application of trade remedy measures.²⁸⁵

2.3 NOTIFICATION REQUIREMENTS OF LAWS AND REGULATIONS

According to the ADA, Member countries must inform the Committee on Anti-Dumping Practices about all preliminary and final AD actions promptly and in detail, including certain minimum information required by Guidelines agreed to by the Committee.²⁸⁶ Such reports are available for inspection by other Members in the Secretariat and are also subject to review by the Committee.²⁸⁷ The Committee comprises representatives from each of the Members²⁸⁸ and is responsible for affording Members the opportunity to consult on any matter relating to the operation of the ADA and the furtherance of its objectives.²⁸⁹

Except where a notifying Member specifically requests the contrary, all notifications are issued as unrestricted documents and are fully accessible by the public.²⁹⁰ The Committee must also be notified of the authorities competent to initiate and conduct AD investigations as well as any relevant national AD rules governing those investigations.²⁹¹

²⁸⁴ Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) 5.

²⁸⁵ Yilmaz (2013) 5.

²⁸⁶ See art 16.4 of the ADA.

²⁸⁷ WTO 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 April 2017).

²⁸⁸ Article 16.1 of the ADA.

²⁸⁹ Article 16.1 of the ADA.

²⁹⁰ Notifications under the Agreement on implementation of Article VI of GATT 1994 available at https://www.wto.org/english/tratop_e/adp_e/antidum3_e.htm (accessed 10 April 2017).

²⁹¹ Article 16.5 of the ADA; Murigi (2013) 32.

2.4 SHORTCOMINGS OF THE WTO ANTI-DUMPING PROVISIONS

Although the WTO Agreements on AD are an improvement to the pre-Uruguay Round regulations in terms of predictability and transparency, they are still plagued by many issues. There are also allegations of misuse²⁹² as the provisions tend to be broad and enable various interpretations by Members.

2.4.1 Discretion

There are a number of practical problems with AD laws and *discretion* is one of the main ones. The discretion involved in an AD case is subtle, intricate and considerable²⁹³ and has been known to affect, the calculation of normal value, export prices, causation, confidentiality provisions and CNV, to say the least.²⁹⁴

Currently, the ADA is vague on too many key issues giving Investigating Authorities too much leeway to determine factors that play a major role in AD investigations, in an unduly protectionist manner.²⁹⁵ Investigating Authorities have been known to find grounds to adjust prices (and thereby establish just about any dumping margin they wish), when products are found to be comparable.²⁹⁶

Consequently, most AD investigations conducted by developed countries over the last two decades have found a serious protectionist bias in the administration of AD investigations.²⁹⁷ This can be detrimental to developing countries that depend on developed country markets for their exports.

²⁹² Sibanda OS *South African Anti-dumping and Practice: A Judicial and Comparative Analysis of Procedural and Substantive Issues* (2015) 24.

²⁹³ Prusa (2005) 696.

²⁹⁴ Horlick G and Vermulst E 'The 10 Major Problems with the Anti-dumping Instrument: An Attempt at Synthesis' (2005) 70.

²⁹⁵ Adamantopoulos & De Notaris (2000) 34.

²⁹⁶ Prusa TJ 'Anti-dumping: A Growing Problem in International Trade' (2005) 696.

²⁹⁷ Reich A 'Institutional and Substantive Reform of the Anti-Dumping and Subsidy Agreements – Lessons from Israeli Experience' (2003) Working Paper No. 4-04 *Bar-Illan University Public Law* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=437220 (accessed 15 July 2017).

2.4.2 Non-disclosure of confidential information

According to Horlick and Vermulst, one of the most prolific problems of the WTO AD regime concerns the non-disclosure of confidential information. They argue that the relevant WTO provisions deprive interested parties of a meaningful way to defend their interests and also impinge on their due process rights.²⁹⁸ This is mainly so because too much information is treated as confidential.²⁹⁹

Additionally, although the ADA provides that parties submitting confidential information must make non-confidential summaries, there is no mention of what would happen if such non-confidential summaries were insufficient to permit authorities to properly calculate normal value, export price and margin of dumping. There is therefore no obligation on Members to provide sufficient non-confidential information.

2.4.3 Cumulation

When determining injury, Article 3.3 of the ADA allows investigators to consider exports from more than one country. This is one of the most widely criticised provisions in injury determination.³⁰⁰ This is so because exports from countries with small volumes tend to be swept into the investigation, which consequently leads such exports to be subject to AD duties despite the fact that they have no material impact on the domestic industry.³⁰¹ Unfortunately, in actual practice countries tend to cumulate without considering the conditions of competition.³⁰²

2.4.4 Calculation of Constructed Normal Value

There is increasing resort to CNV as the basis of normal value. The CNV calculations tend to be too artificial and discretionary and offer Investigating Authorities too much

²⁹⁸ Horlick & Vermulst (2005) 68 – 71.

²⁹⁹ Horlick & Vermulst (2005) 68.

³⁰⁰ Aggarwal A 'Anti Dumping and Practice: An Indian Perspective' (2002) 50.

³⁰¹ Sykes AO (2005) 40.

³⁰² Aggarwal (2002) 50.

freedom in their determination.³⁰³ CNV is based on formalistic rules that are not always justified in competition friendly trade defence measures and do not consider particular economic situations, like cyclical industries.³⁰⁴

The ADA provides that ‘any other reasonable method’³⁰⁵ may be employed to determine profits, administrative and selling costs if actual data pertaining to such sales is not available from exporters or in the ordinary course of trade.³⁰⁶ These ‘other reasonable’ methods give countries a great deal of flexibility and opportunity to construct a suitable normal value in their interests.³⁰⁷

2.4.5 Developing Countries

It is also the common opinion that the ADA does not contain satisfactorily clear and effective provisions to protect developing country Members of the WTO.³⁰⁸ For example the ADA does not take into consideration the heavy burden AD investigations impose on developing countries, whether duties are imposed or not.³⁰⁹

Additionally, the ADA does not mandate developed country Members to consider other alternatives to AD duties. It simply gives them the discretion whether or not to seek other AD remedies as opposed to imposing AD duties. Developed countries are therefore not obligated to use other methods and have been increasingly applying AD duties on exports coming from developing countries.

2.5 CONCLUSION

³⁰³ Horlick & Vermulst (2005) 70.

³⁰⁴ Horlick & Vermulst (2005) 70.

³⁰⁵ Article 2.2.2 (iii) of the ADA.

³⁰⁶ McGee (2016) 9.

³⁰⁷ See McGee (2016) 9.

³⁰⁸ Adamantopoulos & De Notaris (2000) 35.

³⁰⁹ Adamantopoulos & De Notaris (2000) 35.

This chapter examined the substantive and procedural requirements of the WTO AD rules as contained in Article VI of the GATT 1994 and the ADA. This was done in an effort to provide clarity of the international AD rules in an effort to determine how Member countries can adopt national AD legislation that is in tandem with WTO rules and obligations.

From the onset, it is evident that in order to utilise AD remedies, Members must have national AD legislation that outlines the procedure to be followed during an investigation. The rules contained in the ADA and Article VI of GATT 1994 provides the blue print upon which Members may base their national AD laws. These rules therefore inform Members of the ways in which they can adopt national AD legislation that is consistent with the WTO rules. This is because WTO rules govern the use of AD measures by national authorities.

Given the various issues identified in the WTO AD regime, countries are free to add to the provisions of the WTO in an effort to provide greater clarity however; they may not do so in a manner that is inconsistent with the WTO rules. Failure, by a Member, to abide by the WTO rules could lead to retaliation by affected Member countries, review processes or the failure of the entire AD measure. These reasons reinforce the need for Members to adopt national legislation that is consistent with the WTO rules.

The next chapter will look at the substantive and procedural AD provisions of the Protocol on the Establishment of the East African Customs Union (the Protocol). It will also identify some similarities and differences of these provisions to those of the WTO and to which extent these provisions are consistent with the WTO rules.

CHAPTER 3

THE REGULATION OF ANTI-DUMPING UNDER THE PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN CUSTOMS UNION: RULES AND PROCEDURES

3.1 INTRODUCTION

The previous chapter concluded that if Members opted to adopt national anti-dumping (AD) rules, these rules had to comply with the rules and procedures of 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). This requirement also applies to AD rules in Regional Trade Agreements (RTAs), Customs Unions (CU) and Free Trade Areas (FTAs) which opt to adopt AD rules.

This chapter starts by giving a brief history on the establishment of the East African Community Customs Union (EACCU). It is one such CU that was established in accordance with Article XXIV of the GATT 1994. It has also opted to include AD rules in its founding Agreement. Accordingly, this chapter proceeds to analyse the substantive and procedural requirements that inform the regulation of the AD practices as provided under Article 16 of the Protocol for the Establishment of the East African Customs Union (the Protocol), and the East African Community Customs Union (Anti-dumping Measures) Regulations (ADM Regulations) specified in Annex IV of the same Protocol.

Under the substantive requirement, it engages the meaning and determination of dumping. Thereafter it analyses the determination of injury and causal link under the Protocol. Finally, it considers the procedural requirements, such as, pre-initiation and application, initiation of an AD investigation, provisional and final AD measures. The emphasis of this analysis is on Uganda.

It should be noted that because RTA AD measures have to be consistent with the WTO rules, Article 16 of the Protocol and the ADM Regulations bare many similarities to

Article VI of the GATT 1994 and the ADA respectively. This could be indicative of the CU's effort to remain as consistent as possible with the WTO rules.

3.2 BACKGROUND TO THE FORMATION OF THE EAST AFRICAN COMMUNITY CUSTOMS UNION

There has been a relatively long tradition of attempts to integrate the economies of East Africa.³¹⁰ Integration began with three East African States (Kenya, Uganda and Tanzania), which enjoyed historical, commercial and cultural ties. They also share a number of similarities resulting from their common location, climate and history making trade among them almost inevitable.³¹¹ Uganda, for example, depends on Kenya and Tanzania for importing and exporting goods owing to its landlocked nature.

The first attempt at co-operation started with Kenya and Uganda for the construction of the Kenya-Uganda railway from 1897 to 1901.³¹² This partnership was motivated by the need for both countries to improve trade. It linked Uganda's and Kenya's interiors to the Indian Ocean, effectively easing Uganda's trade with the World and vice versa. Formal economic and social integration continued, through the establishment of a Customs Collection Centre in 1900, followed by the East African Currency Board in 1905 and the Court of Appeal for Eastern Africa in 1909.³¹³

In 1917, Kenya and Uganda proceeded to conclude a CU, which was eventually established in 1922.³¹⁴ They were later joined by the then Tanganyika in 1927³¹⁵ and went on to establish the East African Income Tax Board in 1940, and the Joint

³¹⁰ Busse M & Shams R *Trade Effects of the East African Community: Do We Need a Transitional Fund?* (2003) 1.

³¹¹ McIntyre MA 'Trade Integration in the East African Community: An Assessment for Kenya' (2005) 3.

³¹² 'History of the East African Legislative Assembly' available at <http://www.eala.org/assembly/category/history> (accessed 18 November 2016).

³¹³ Mugisa E, Onyango C, Mugoya P 'An Evaluation of the Implementation and Impact of the East African Community Customs Union' (March 2009) 1.

³¹⁴ Mwapachu JV 'EAC: Past, Present and Future' *FIRST Magazine* 10

³¹⁵ 'History of the EAC' available at <http://www.eac.int/about/EAC-history>; Tanganyika is now known as Tanzania. For more information see <https://www.britannica.com/place/Tanzania> (accessed 10 July 2017).

Economic Council in the same year.³¹⁶ The East African High Commission³¹⁷ followed from 1947 to 1961 and was responsible for all co-operation activities.³¹⁸ Subsequently, the East African Common Services Organisation was formed and only lasted five years, from 1961 to 1966.³¹⁹

These organisations were set up to control and administer certain matters of common interest and regulate the commercial and industrial relations and transactions between Kenya, Uganda and Tanzania.³²⁰ This was achieved by means of a central legislature whose main function was to enact laws relevant for the purposes of the joint organisations on behalf of the three countries.³²¹

In 1967, the three countries established the East African Community (EAC or Community) for the first time,³²² and enjoyed joint ownership of common facilities, which included harbours and an airline.³²³ From the outset, the most important problem threatening the existence of the *first* EAC was the industrial dominance of Kenya in the Community. Kenya's dominance had led to growing deficits for Tanzania's and Uganda's trade with it.³²⁴

Tanzania in particular complained and made a proposal to mitigate the trade imbalances problem; however, attempts to improve the competitiveness of Tanzania and Uganda failed.³²⁵ This was one of the main reasons that would eventually contribute to the

³¹⁶ Mugisa et al (2009) 1.

³¹⁷ Busse & Shams (2003) 4.

³¹⁸ Preamble of the Treaty for the Establishment of the East African Community.

³¹⁹ Mugisa et al (2009) 1.

³²⁰ Kanyadudi CJO 'From the wings to the mainstream: The role of political parties youth leagues in democratization and regional integration in East Africa' (September 2010) 5.

³²¹ 'History of the East African Legislative Assembly' available at <http://www.eala.org/assembly/category/history> (accessed 18 November 2016).

³²² EAC 'East African Community' available at <http://www.uneca.org/oria/pages/eac-%E2%80%93-east-african-community> (accessed 20 March 2017).

³²³ Mugisa et al (2009) 1.

³²⁴ Busse & Shams (2003) 4.

³²⁵ Busse & Shams (2003) 4.

collapse of the Community barely ten years after its establishment,³²⁶ coupled with the lack of strong political will and participation from the private sector.³²⁷

Following the dissolution of the *first* EAC, Member States negotiated a Mediation Agreement for the division of Assets and Liabilities of the East African Community (Mediation Agreement).³²⁸ Although this Agreement was signed in 1984, full co-operation under it only commenced in March 1996 when the Secretariat of the Permanent Tripartite Commission of the East African Commission (PTC) was launched at the EAC headquarters in Arusha, Tanzania.³²⁹

At the request of the East African Heads of State, the PTC was directed to start the process of upgrading the Mediation Agreement into a Treaty. This process lasted three years and resulted in the Establishment of the East African Community Treaty (EAC Treaty), which was signed in Arusha on 30 November 1999 and entered into force on 7 July 2000, forming the *second* EAC.³³⁰

Following the establishment of the *second* EAC, Partner States agreed to an ambitious and comprehensive agenda, which consisted of the establishment of a CU, a common market, followed by a monetary union and finally, a political federation.³³¹ The CU was established through the enactment of the Protocol on 2 March 2004.³³² It was signed by the three Partner States and became operational on 1 January 2005.³³³

Three years after its formation, the Republic of Rwanda and Burundi acceded to the EAC Treaty on 18 June 2007 and became fully pledged Members on 1 July 2007. They

³²⁶ 'East African Community, the, 1967-1977' available <http://www.worldhistory.biz/sundries/31706-east-african-community-the-1967-1977.html> (accessed on 20 March 2017).

³²⁷ Kanyadudi (2010) 5.

³²⁸ 'History of the EAC' available at <http://www.eac.int/about/EAC-history> (accessed 20 March 2017).

³²⁹ 'History of the EAC' available at <http://www.eac.int/about/EAC-history> (accessed 20 March 2017).

³³⁰ 'History of the EAC' available at <http://www.eac.int/about/EAC-history> (accessed 20 March 2017).

³³¹ Charalambides NA 'Legal and Economic Assessment of South Sudan's Possible Accession to the EAC' (2017) 6.

³³² Chande R, Matambalya FAST, Turya-Muhika S *Deepening East African Community (EAC) Integration* (2007) 25; Dabbah MM *International and Comparative Competition Law* (2010) 390.

³³³ See Firew S 'East African Community (EAC) Regional Economic Integration and its Impact on Trade Flows: A Study on Intra-Regional Trade, Trade Creation and Trade Barriers' (2014) 1; Stahl HM 'Tariff Liberalisation Impacts of the EAC Customs Union in Perspective' (2005) 1.

then joined the EACCU on 1 July 2009.³³⁴ They were recently joined by South Sudan on 2 March 2016.³³⁵

Additionally, Kenya, Tanzania and Uganda have been original WTO Members since its creation on 1 January 1995,³³⁶ while Burundi became a WTO Member on 23 July 1995³³⁷ and Rwanda on 22 May 1996.³³⁸ As a result, their trade policies have to be in line with the WTO rules. Currently however, South Sudan is not a Member of the WTO. It resumed negotiations to join the WTO in January 2017 when their Work Party³³⁹ met for a third time in Kuwana, Japan to discuss its accession.³⁴⁰

It can be assumed, at least for now, that in order for South Sudan to initiate AD action against other EACCU Partner States and WTO Members, it would have to do so in accordance with its own national AD legislation, if such legislation exists, and the AD provisions in the Protocol.

3.3 ANTI-DUMPING AND THE EAST AFRICAN COMMUNITY CUSTOMS UNION

The EAC has attained considerable levels of liberalisation, in a process that is underpinned by a robust legal framework.³⁴¹ One such framework is the Protocol. It is central to the Community's common trade regime and aims to further liberalise the

³³⁴ Khadka R *The East African Tax System* (2015) 110.

³³⁵ Trade Mark East Africa 'The Accession of South Sudan to the EAC' available at <https://www.trademarka.com/news/lets-embrace-the-accession-of-south-sudan-to-the-eac/> (accessed 12 August 2017).

³³⁶ WTO Trade Policy Review Body 'Trade Policy Review Report by the Secretariat: East African Community' (20 September 2006) (WT/TPR/S/171) 6.

³³⁷ WTO 'Burundi and the WTO' available at https://www.wto.org/english/thewto_e/countries_e/burundi_e.htm (accessed 10 March 2017).

³³⁸ WTO 'Rwanda and the WTO' available at https://www.wto.org/english/thewto_e/countries_e/rwanda_e.htm (accessed 10 March 2017).

³³⁹ Sudan's Working Party was established on 25th October 1994 to carry out negotiations for Sudan's accession to the WTO.

³⁴⁰ 'WTO Accessions: Sudan' available at https://www.wto.org/english/thewto_e/acc_e/a1_soudan_e.htm (accessed 10 March 2017).

³⁴¹ Mwanza W 'Optimising the dispute resolution process for trade remedies in the EAC' 01 April 2015 *tralac*.

intra-regional trade of goods, on the basis of mutually beneficial trade arrangements among Partner States.³⁴²

The EACCU was established to promote efficiency in the production of goods within the EAC, enhance domestic, cross-border and foreign investment, promote economic development, and diversify industrialisation within the Community.³⁴³ Accordingly, the Protocol is based on the principles of Common External Tariffs (CET) and free internal trade.³⁴⁴

First, the *Common External Tariff* principle provides for the creation of a three-band CET with a maximum rate of 25 per cent, a middle rate of 10 per cent and a minimum rate of 0 per cent.³⁴⁵ These tariffs operate with respect to all products imported into the Community³⁴⁶ from foreign exporters (producers outside the EAC). Unlike Kenya and Tanzania, Uganda was actually projected to become more protective against non-EAC imports under the EACCU CET provisions than it had originally been.³⁴⁷

Accordingly, Uganda's average tariff rate increased from 7.8 per cent to 11.2 per cent and the weighted average tariff rate from 6.3 per cent to 9.2 per cent in 2003.³⁴⁸ Nevertheless, Partner States set CETs with provisions allowing flexibilities and exceptions. These include 'stay applications' which allow a country to disregard a given CET rate and apply a different one, and 'duty remissions,' which list specific items and amounts.³⁴⁹

Secondly, the principle of *free internal trade* involves dismantling internal tariffs within the EAC, and prevents Partner States from levying tariffs on imports produced and sold

³⁴² Article 3 of the Protocol.

³⁴³ Article 3 of the Protocol.

³⁴⁴ IMF *Uganda: Poverty Reduction Strategy Paper Annual Progress Report* (2003) 19.

³⁴⁵ Article 12 of the Protocol.

³⁴⁶ Article 12 of the Protocol.

³⁴⁷ Mshomba RE *Economic Integration in Africa: The East African Community in Comparative Perspective* (2017) 77.

³⁴⁸ Mshomba (2017) 78.

³⁴⁹ Mshomba (2017) 78.

within the Community.³⁵⁰ To enable the process of tariff elimination within the Community, a five-year transitional period was established.³⁵¹ The purpose of this transitional period was to enable the progressive elimination of tariffs on imports emanating from and/or produced within the Community.³⁵² This period has since lapsed, as of 1 January 2010, making the intra-EAC trade of goods emanating or produced within the EAC, zero per cent tariff rate;³⁵³ at least in principle.

In further pursuance of the Protocol's objectives, Partner States also agreed to include AD measures in the Protocol.³⁵⁴ Anti-dumping measures are particularly dealt with in Article 16 of the Protocol and are implemented in accordance with the ADM Regulations contained in Annex IV of the Protocol.³⁵⁵

Article 16 of the Protocol allows Partner States to take action against dumping, while the ADM Regulations clarify and expand on the provisions contained therein. They also ensure that there is uniformity among Partner States in the application of AD measures³⁵⁶ and that to the extent possible, the process is transparent, accountable, fair, predictable and consistent with the provisions of the Protocol.³⁵⁷

The provisions on AD under the Protocol apply to investigations or reviews initiated under the national legislation of a Partner State concerning trade among them.³⁵⁸ Members are therefore required to form national AD rules to enable the investigation of

³⁵⁰ Khadka (2015) 112.

³⁵¹ The transitional period – Art 11.1 of the Protocol provide that the establishment of the Customs Union had to be progressive in the course of a transitional period of five years from the coming into force of the Protocol. This period lapsed on the 1 January 2010.

³⁵² Mehler A, Melber H, van Walraven *Africa Yearbook Volume 7: Politics, Economy and Society South of the Sahara in 2010* (2010) 290.

³⁵³ See Peters WC *The Quest for an African Economic Community: Regional Integration and its Role in Achieving African Unity – The Case of SADC* (2010) 116; Khadka (2015) 114.

³⁵⁴ Khadka (2015) 111.

³⁵⁵ Article 16 (3) of the Protocol; Gathii JT *African Regional Trade Agreements as Legal Regimes* (2011) 314.

³⁵⁶ Regulation 2 of the ADM Regulations.

³⁵⁷ Regulation 2 of the ADM Regulations; East African Legislative Assembly 'Anti-dumping and Quality Assurance to Take Centre Focus in EALA's Meeting in Nairobi' 14 October 2011 available at <http://www.eala.org/new/index.php/media-centre/press-releases/284-anti-dumping-and-quality-assurance-to-take-centre-focus-in-ealas-meeting-in-nairobi> (accessed 10 July 2017).

³⁵⁸ Regulation 4 of the ADM Regulations.

dumping in their countries³⁵⁹ and to co-operate with each other during the process of AD investigations.³⁶⁰

The Protocol's AD rules regulate the conduct of AD investigations as well as the measures that are applicable when dumping is found to be injuring the domestic industry of Partner States. They encompass details on how normal value, export price and dumping margin should be calculated for comparison purposes. They also outline the procedure which should be followed by investigating authorities during the investigation process; all of which correlate with the ADA.³⁶¹

Since the majority of Members have acceded to the WTO, enacting their respective AD laws, whether regional or national, has to be in accordance with the ADA and Article VI of the GATT 1994.³⁶² Additionally, the EACCU was established in accordance with Article XXIV of the GATT 1994 and as such, its trade rules have to be consistent with those of the WTO. Be that as it may, Partner States are required to maintain strict adherence to the provisions of the Protocol.³⁶³

It should be noted that despite the fact that these rules were enacted in 2005, at the time of writing this mini-thesis, no EACCU Partner State has instituted an AD application under the Protocol. As a result, there are no cases against which the application of these rules can be evaluated.

As mentioned above, Article 16 of the Protocol and the ADM Regulations bear many similarities to Article VI of the GATT 1994 and the ADA respectively and correspond verbatim in many parts. As a result, such verbatim provisions will not be repeated in detail in this chapter but will refer the reader to chapter 2 of this study as these rules were formulated in accordance with those of the WTO.

³⁵⁹ Regulation 4 (2) of the ADM Regulations.

³⁶⁰ Article 20 of the Protocol; see also Papadopoulos (2010) 296.

³⁶¹ Mosoti V and Gobena *A International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007) 342.

³⁶² Regulation 4 (4) of the ADM Regulations.

³⁶³ See Regulation 4 of the ADM Regulations.

The following sections will proceed to analyse the substantive and procedural requirements of the AD rules as provided under the Protocol.

3.4 SUBSTANTIVE REQUIREMENTS

3.4.1 The Meaning of Dumping

Similarly to the ADA, ‘dumping’ under the Protocol is defined as a situation where the export price of goods imported or *intended* to be imported into the Community is less than the normal value of the *like* goods in the market of a country of origin, as determined in accordance with the provisions of the ADM Regulations.³⁶⁴

Generally, the definition of dumping relates to goods that have already been exported into a particular country at an export price that is less than the normal value.³⁶⁵ The Protocol’s definition, however, differs from that of the ADA³⁶⁶ to the extent that the former refers to the export price of goods *already* imported or goods *intended* to be imported into the EACCU.³⁶⁷ The latter only refers to goods that *have been* imported into a Member country. In this respect, the Protocol’s definition of dumping could be challenged for inconsistency with the WTO rules to the extent that goods may be discriminated against before they reach the EAC and before it is determined whether those goods, despite their low export price, will injure the domestic industries of Partner States.

Like in the ADA, dumping is only prohibited if it causes or threatens to cause material injury to an established industry in any of the Partner States or materially retards the establishment of those industries.³⁶⁸ With regards to the definition of dumping, it would

³⁶⁴ Regulation 3 of the ADM Regulations; Mutai HK ‘Assessing the Implementation of the East African Community Common Market: A Preliminary Scoping Study’ (2015) 14; Gathii (2011) 32; Mutai HK ‘Regional trade integration strategies under SADC and the EAC: A comparative analysis’ (2011) (2011) 90.

³⁶⁵ See generally Art 2 of the ADA.

³⁶⁶ Article 2.1 of the ADA.

³⁶⁷ Regulation 3 of the ADM Regulations.

³⁶⁸ Article 16 of the ADM Regulations; Gathii (2011) 320; Mutai (2015) 14; see also footnote 9 of the ADA.

be hard to prove that goods ‘intended to be imported’ into the EACCU threaten material injury to its domestic industries before that impact has actually been assessed. Conversely, it can also be argued that goods *intended* to be imported into the EAC can be proved to cause a threat to the domestic industry if they were to arrive in the importing country. However, one could argue that the effect of such imports should already be felt by the domestic industry and not merely anticipated.

The Protocol also provides that dumping is prohibited if it frustrates the benefits expected from the removal of duties and quantitative restrictions on trade between the Partner States.³⁶⁹ This last ground is neither expressed in the GATT 1994 nor the ADA. Probably owing to the lessons learnt from the failure of the *first* EAC, this provision demonstrates an attempt by the Protocol, to accommodate issues that are bound to arise as a result of increased trade liberalisation within the EACCU especially because some Partner States are ahead of others economically. Countries, especially developing countries like those in the EACCU often need time to adjust to the liberal trade environment, a process that cannot occur overnight.

3.4.2 Determination of Dumping

The determination of dumping under the Protocol is similar to that of the ADA and will not be repeated here.³⁷⁰ Like the ADA, it has to be established that dumping is in fact taking place and that it is causing material injury, threat of material injury to or material retardation of the establishment of, the domestic industry of a Partner State.³⁷¹

Regulation 7 of the ADM Regulations provides that a product is dumped when it is imported into a Partner State at less than its normal value, where the export price of such product exported from *another Partner* or a *foreign country* is less than the

³⁶⁹ Article 16 (1) of the Protocol; Gathii (2011) 320; Mutai (2011) 90.

³⁷⁰ See para 2.2.1.2 above.

³⁷¹ Gathii (2011) 320.

comparable price, in the ordinary course of business, for the like product in the exporting country.³⁷²

The Protocol compares the export price of goods coming in from foreign or Partner States with the normal value of the product in the importing country. This provision is a bit problematic to the extent that it insinuates that AD measures could be imposed by a Partner State against another Partner State. This could be inconsistent with WTO rules. Under Article XXIV of the GATT 1994, customs unions cannot apply quantitative restrictions, such as AD measures, against each other.³⁷³ It remains to be seen what effect such an initiation would have if an attempt were ever made by a Partner State to apply AD measures against another Partner State.³⁷⁴

3.4.2.1 Normal Value

Like in the ADA, normal value of a product in the Protocol is determined by establishing the price of the 'like product' in the exporter's domestic market.³⁷⁵ This definition presupposes that there are sufficient sales of the like product in the domestic market of the exporting country. This is known as the 'standard method'³⁷⁶ of determining normal value.³⁷⁷ Like the ADA, the Protocol provides alternative methods; Constructed Normal Value (CNV) and third country exports, which can be used to establish the normal value of an imported product if it cannot be established using the standard method.³⁷⁸

³⁷² Regulation 7 of the ADM Regulations; Gathii (2011) 320; East African Legislative Assembly 'Anti-dumping and Quality Assurance to Take Centre Focus in EALA's Meeting in Nairobi' 14 October 2011 available at <http://www.eala.org/new/index.php/media-centre/press-releases/284-anti-dumping-and-quality-assurance-to-take-centre-focus-in-ealas-meeting-in-nairobi> (accessed 10 July 2017).

³⁷³ Article XXIV: 8(a) of the GATT 1994; Letsoalo MA 'The Implication of a COMESA-EAC-SADC Tripartite Free Trade Agreement, Part 1: Regional Integration in the Multilateral Trading System' (2011) 8-9.

³⁷⁴ Mutai (2011) 91.

³⁷⁵ See generally Art 2 of the ADA and Regulation 7 of the ADM Regulations.

³⁷⁶ WTO - Understanding the WTO: The Agreements on Anti-dumping, Subsidies, Safeguards: Contingencies, etc. available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed 10 March 2017).

³⁷⁷ For more on normal value, see para 2.2.1.2.1 above.

³⁷⁸ See para 2.2.1.2.1.1 and para 2.2.1.2.1.2 above.

Circumstances may also arise where the sales to a third or foreign country are treated as not being in ‘the ordinary course of trade’ because they are below per unit costs of production.³⁷⁹ These sales may be disregarded when determining normal value, if the Investigating Authority concludes that the sales were made within an extended period of time exceeding six months but not more than one year.³⁸⁰ They must also be of substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable period of time.³⁸¹

Investigating Authorities must consider all available evidence, including that provided by the exporter, on the proper allocation of costs, in the course of the investigation provided that the exporter has historically used those allocations to establish appropriate amortisation and depreciation periods and allowances for capital expenditures and other development costs.³⁸²

These amounts have to be based on the actual data of the exporter under investigation and relate to the production and sale of the like product in the ordinary course of business.³⁸³ Where such amounts cannot be determined on the basis of the data provided, the amounts may be determined on the basis of costs or average amounts incurred for the production of like products in the exporter’s domestic market,³⁸⁴ or any other reasonable method provided ‘that the profit amount so established does not exceed the profit normally realised by other exporters on sales of products of the same general category in the domestic market of the country of origin’.³⁸⁵

3.4.2.2 Export Price

In order to calculate the margin of dumping, an export price has to be determined and compared to the normal value. As in the ADA, the Protocol does not define ‘export

³⁷⁹ Regulation 7 (2) (2) of the ADM Regulations.

³⁸⁰ Regulation 7 (2) (2) of the ADM Regulations.

³⁸¹ Regulation 7 (2) (2) of the ADM Regulations; see generally para 2.2.1.2.1 above.

³⁸² Regulation 7 (2) (3) (b) of the ADM Regulations.

³⁸³ See Regulation 7 (2) (4) of the ADM Regulations

³⁸⁴ Regulation 7 (2) (4) (a) – (b) of the ADM Regulations.

³⁸⁵ Regulation 7 (2) (4) (c) of the ADM Regulations.

value', however the export price is usually the price at which the like product is sold by the exporter or foreign producer in the importing country's domestic market.³⁸⁶

Where the export price cannot be determined in this way, for example, where the export price is unreliable because of the foreign producer's association or compensatory arrangement with the importer, it may be constructed based on the price that the imported goods are first resold to an independent buyer.³⁸⁷ This is known as the constructed export price (CEP).³⁸⁸

3.4.2.3 Fair Comparison of Normal Value and Export Price

Fair comparison is required for the calculation of both the export price and the normal value during the investigation.³⁸⁹ For a fair comparison, Investigating Authorities must establish normal value at a level of trade equivalent to that of the constructed price, which is usually at the ex-factory level under the WTO AD rules.³⁹⁰

3.4.2.4 Margin of Dumping

Like the ADA, the Protocol provides that dumping margins can be established by comparing the weighted-average normal value and the weighted-average prices of all comparable export transactions.³⁹¹ The margin of dumping can also be established by comparing the normal value and export price on a transaction-to-transaction basis.³⁹²

³⁸⁶ ITAC 'Dumping Margin Calculations' available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 12 September 2017); Tao M *Dumping and antidumping regulations with specific reference to the legal framework in South Africa and China* (2006) 75.

³⁸⁷ Regulation 7 (3) of the ADM Regulations; see further para 2.2.1.2.2 above on 'export price' under the ADA as the two provisions are similar.

³⁸⁸ Para 2.2.1.2.2 above.

³⁸⁹ Regulation 7 (4) (3) of the ADM Regulations.

³⁹⁰ Para 2.2.1.2.3 above.

³⁹¹ Regulation 3 of the ADM Regulations; see also Art 2.4.2 of the ADA; para 2.2.1.2.4 above.

³⁹² Regulation 7 (4) (3) of the ADM Regulations; this is similar to the ADA provisions – para 2.2.1.2.4 above.

The Investigating Authority must determine the individual margin of dumping for each known exporter of the product under investigation unless the number of exporters is so large that making such a determination becomes impracticable. Here the ADM Regulations recognise that the Investigating Authority may have limited resources to conduct individual dumping margins for each exporter.³⁹³ Like in the ADA, Investigating Authorities may therefore limit the examination either to a reasonable number of interested parties or products.³⁹⁴

If an individual investigation would be burdensome on the Investigating Authority and prevent the timely completion thereof, it need not be conducted.³⁹⁵ The ADM Regulations do not emphasize as to which circumstances would be considered 'burdensome' to the Investigating Authorities.

3.4.3 Determination of Injury and Causal Link

Dumping only becomes actionable by governments once it is established that it is causing injury to the domestic industry.³⁹⁶ Where evidence of dumping exists, the affected Partner State may request the Partner State in whose territory dumping is occurring to impose AD duties on such goods.³⁹⁷ If the Partner State to whom the request is made does not act within 30 days of the request, the requesting Partner State can report to the appropriate customs union authority, which must take the necessary actions.³⁹⁸

3.4.3.1 'Like Product'

According to the Protocol, a 'like product' is a product that is like the product under consideration in all respects or, in the absence of such a product, another product that

³⁹³ Gathii (2011) 328.

³⁹⁴ Regulation 11 (12) of the ADM Regulations; see also Art 6.10 of the ADA; see para 2.2.1.2.4 above.

³⁹⁵ Regulation 11 (13) (2) of the ADM Regulations.

³⁹⁶ Pam AA 'Anti-dumping and Countervailing Measures and Developing Countries: Recent Development' (2010) 48.

³⁹⁷ Article 20 (2) of the Protocol.

³⁹⁸ Article 20 (3) of the Protocol; Gathii (2011) 336.

although not alike in all respects to the product under consideration, has characteristics closely resembling those of the product under consideration.³⁹⁹ There is no additional information for the interpretation or application of this definition under the Protocol, as there have been no AD investigations in the EAC under Article 16 of the Protocol and the ADM Regulations.⁴⁰⁰

3.4.3.2 Domestic Industry

Normally, as defined by the ADM Regulations, the ‘domestic industry’ consists of the domestic producers of the like product as a whole, or those domestic producers whose collective output of the product constitutes a major proportion of the total domestic production of the like product.⁴⁰¹ The scope of what constitutes a ‘major proportion’ is neither defined in the Protocol nor the GATT 1994.

Circumstances may also arise where producers within the competitive market sell all or almost all of their goods to a particular market, where the demand in that market is not to any substantial degree, supplied by producers elsewhere in the territory.⁴⁰² In these circumstances, the territory of the Partner States may, for the production in question, be divided into two or more competitive markets.⁴⁰³ Here, injury will be found to exist with regard to such isolated market, even where a major portion of the total domestic industry is not injured, provided the dumped imports are causing injury to the producers of all or almost all of the like product within that market.⁴⁰⁴ Like in the ADA, here, AD measures may only be levied on products whose final consumption is consigned to that market.⁴⁰⁵

³⁹⁹ Regulation 3 of the ADM Regulations.

⁴⁰⁰ See Art 2.6 of the ADA; see para 2.2.1.3.1 above.

⁴⁰¹ Regulation 9 (1) of the ADM Regulations; for more on ‘domestic industry’ see para 2.2.1.3.2 above as these provisions are similar to the ADA.

⁴⁰² Regulation 9 (1) (b) (i) and (ii) of the ADM Regulations.

⁴⁰³ Regulation 9 (1) (b) (i) and (ii) of the ADM Regulations.

⁴⁰⁴ Regulation 9 (1) (b) (ii) of the ADM Regulations.

⁴⁰⁵ Regulation 9 (2) of the ADM Regulations.

Where the law of the importing Partner State does not permit AD duties to be levied on this basis, the importing Partner State may levy the duties without limitation if the exporters are given the opportunity to cease exporting at dumped prices, or where the AD duties cannot be levied only on specific producers supplying the market in question.⁴⁰⁶

3.4.3.3 Injury

Material injury must be proven or imminently anticipated before AD measures can be imposed. This process an objective examination of the volume of dumped imports and the effect such imports have on the prices of the like goods in the domestic market.⁴⁰⁷ It also involves exploring the consequent impact of dumped imports on the producers of the 'like' product in the importing country.⁴⁰⁸

With regard to the volume of dumped imports, Investigating Authorities should consider whether there has been a significant surge of dumped imports either in absolute terms, or relative to the production or consumption of those goods in the importing Partner State.⁴⁰⁹

The effect dumped goods have on the prices of 'like' products in the domestic industry must be determined by considering whether there has been significant price undercutting, price depression or the prevention of price increases which would otherwise have occurred to a significant degree within that market, but for the dumped products.⁴¹⁰

The examination of the impact of dumped goods on the domestic industry should also include an evaluation of all relevant economic factors and indices that affect the Partner State of the industry, including, the actual and potential decline in sales, profits, output,

⁴⁰⁶ Regulation 9 (2) (a) and (b) of the ADM Regulations; Gathii (2011) 328.

⁴⁰⁷ Regulation 8 (1) (a) and (b) of the ADM Regulations.

⁴⁰⁸ Regulation 8 (1) (a) and (b) of the ADM Regulations.

⁴⁰⁹ Regulation 8 (2) of the ADM Regulations.

⁴¹⁰ Regulation 8 (2) of the ADM Regulations;

employment wages and the ability to raise capital or investments.⁴¹¹ No individual or several of these factors give decisive guidance.⁴¹²

Additionally, a *threat* of material injury should be based on facts and not allegation, conjecture or remote possibility.⁴¹³ The change in the circumstances that could cause material injury to the domestic industry should be clearly foreseeable and imminent.⁴¹⁴

Additionally, the Investigating Authorities must consider whether imports are entering at prices that will significantly depress domestic prices and likely increase demand for further imports.⁴¹⁵ This provision can be tied to the Protocol's definition of dumping with regards to goods *intended* to be imported into a Partner State.⁴¹⁶ This provision might be used however, to hinder competition by restricting market access of foreign exports as opposed to take action against dumped goods that *are* causing or threatening to cause injury to the domestic industry.

3.4.3.4 Causal Link between Dumped Imports and Injury

Like in the ADA, before a Partner State can impose provisional or definitive AD measures, it must first establish that the injury caused to the domestic industry is in fact being caused by the dumped like products. The causal link between the dumped goods and injury to the domestic industry is established by examining all the relevant evidence and any known factors other than dumped imports, which could also be causing injury to the domestic industry.⁴¹⁷

⁴¹¹ Regulation 8 (5) of the ADM Regulations.

⁴¹² Regulation 8 (5) of the ADM Regulations.

⁴¹³ Regulation 8 (5) of the ADM Regulations.

⁴¹⁴ See Reg 8 (8) of the ADM Regulations.

⁴¹⁵ Regulation 8 (8) (a), (b), (c) and (d) of the ADM Regulations.

⁴¹⁶ Regulation 3 of the ADM Regulations.

⁴¹⁷ Regulation 8 (6) of the AD Regulations states that factors which may be relevant in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry; Refer to Article 3.5 of the ADA stated in para 2.2.1.3.5 above.

Cumulation may also be used to determine a causal link between dumped goods and injury. It occurs where imports originating from more than one country are simultaneously subject to AD investigations.⁴¹⁸

3.5 PROCEDURE FOR ENACTING ANTI-DUMPING MEASURES

Partner States are required to set up Investigating Authorities, which will conduct AD investigations in EACCU on behalf of the East African Community Committee on Trade Remedies.⁴¹⁹ Setting up these institutions has proved difficult for some countries, as they are expensive. In fact, it took Egypt six years and ten million USD to set up their trade remedy institution.⁴²⁰ Other countries like Mauritius have opted to establish ad hoc investigating bodies, which are only called upon to conduct investigations when applications have been filed.⁴²¹

In Uganda, the lack of trade remedy legislation makes it impossible for domestic producers to institute any kind of AD action under the WTO and the Protocol. In fact, the reality is that given the fact that most of Uganda's producers are small-scale farmers, the notion of trade remedies is hardly known. However, as it stands, Uganda has no contingent AD legislation and as a result, it has no use for AD institutions yet.

According to the Protocol, before provisional or definitive measures can be applied against dumped products; a detailed investigation must be conducted establishing that the dumping of goods is causing injury to the domestic market. During the investigation, Partner States are obligated to co-operate with one another.⁴²²

Like the WTO, individual producers or a collection of them have to approach governmental institutions and request for the initiation of AD investigations. The ADM Regulations provide that the East African Community Committee on Trade Remedies

⁴¹⁸ See further para 2.2.1.3.5 above.

⁴¹⁹ Regulation 3 of the ADM Regulations.

⁴²⁰ Illy (2012) 20.

⁴²¹ Illy (2012) 20.

⁴²² Papadopoulos AS *International Dimension of EU Competition Law and Policy* (2010) 291.

(Committee) will carry out AD investigations and deal with other matters pertaining to disputes about AD measures provided under the Protocol.⁴²³

This Committee is yet to be set up by the EACCU; however, in 2013, the Sectoral Council directed the Secretariat to prepare criteria to facilitate the composition of this body.⁴²⁴ This body will consist of a selection of three members per Partner State; however, the Secretariat is still awaiting nominations from each Partner State.

3.5.1 Pre-initiation and Application Process

An AD investigation under the ADM Regulations is initiated upon a written application by or on behalf of the domestic industry.⁴²⁵ An application for the initiation of an AD investigation should include evidence of dumping, injury and a causal link between the dumped imports and the alleged injury. A mere assertion unsubstantiated by relevant evidence is not considered sufficient to meet the requirements for an application to initiate AD investigations.⁴²⁶

In special circumstances the Investigation Authorities can initiate an AD investigation without receiving a written application by or on behalf of the domestic industry, when there is sufficient evidence of dumping, injury and causal link to justify the initiation.⁴²⁷ This is could happen in developing country situations where producers lack the resources, are not organised enough, or knowledgeable of AD remedies let alone the procedures to follow, in order to apply for the initiation of AD investigation.⁴²⁸

Upon receiving an application in writing from the domestic industry, the investigation authority must examine the accuracy and adequacy of the evidence provided therein,

⁴²³ Herrmann C, Terhechte JP *European Yearbook of International Economic Law* (2012) 536.

⁴²⁴ 10th EAC Regional Forum on Non-Tariff barriers 6th - 9th March 2013 Bujumbura, Burundi: Report of the Meeting (REF: EAC/01/2013) 4.

⁴²⁵ Regulation 10 (1) of the ADM Regulations.

⁴²⁶ Regulation 10 (2) of the ADM Regulations.

⁴²⁷ Regulation 10 (6) of the ADM Regulations.

⁴²⁸ See Illy (2016); Illy (2012).

and determine whether that evidence justifies the initiation of an investigation.⁴²⁹ The Investigating Authority in this case, is the Authority charged with conducting AD investigations on behalf of the Committee for the purposes of the ADM Regulations.⁴³⁰ These must be set up in each of the Partner States that have opted to adopt AD measures.

An AD investigation cannot commence unless Investigation Authorities have determined, on the basis of an examination, that the application is made by or on behalf of the domestic industry.⁴³¹ An application is made by or on behalf of the domestic industry if a sufficient number of domestic producers support it.⁴³²

During application proceedings, the Investigating Authority is prohibited from publicising an application for the initiation of an investigation unless a decision has been made to initiate the AD investigation.⁴³³ Upon receipt of proper documentation for the application, the Investigation Authority must then notify its decision to initiate an AD investigation to the government of the exporting country concerned.⁴³⁴

3.5.2 Initiation

After the requirements of Regulation 10 of the ADM Regulations have been fulfilled to the satisfaction of the Investigating Authority, an AD investigation may be initiated. It should be noted that evidence of dumping and injury is considered simultaneously in the decision of whether to or not to initiate an AD investigation, and the decision whether or not to apply provisional measures during the course of the investigation.⁴³⁵

All interested parties in the AD investigation have to be given notice of the information required by the Investigation Authority, and afforded timely opportunity to present the

⁴²⁹ Regulation 10 (3) of the ADM Regulations.

⁴³⁰ Regulation 3 of the ADM Regulations.

⁴³¹ Regulation 10 (4) of the ADM Regulations.

⁴³² Regulation 10 (4) of the ADM Regulations; see further para 2.2.2.1 above.

⁴³³ Regulation 10 (5) of the ADM Regulations.

⁴³⁴ Regulation 10 (5) of the ADM Regulations.

⁴³⁵ Regulation 7 (a) and (b) of the ADM Regulations.

relevant evidence in writing.⁴³⁶ They must also provide a full text of the written application to any known exporters, the Investigation Authorities of the exporting countries and other interested parties as soon as the investigation begins.⁴³⁷ Where it appears that the number of exporters involved in the AD investigation is high, the application text may be provided to the Investigating Authority of the exporting country *only* or the relevant trade association.⁴³⁸

The ADM Regulations provide all interested parties the full opportunity to defend their interests throughout the AD investigation process, and Investigating Authorities must, upon request, provide parties, including foreign exporters⁴³⁹ with an opportunity to fill questionnaires, meet and present their views to each other, taking into consideration the need to preserve confidentiality and the convenience of parties.⁴⁴⁰

Upon prior consent from the firms concerned and where the representatives of the governments of the Partner States and foreign countries do not object, the Investigating Authority may also carry out investigations in the territory of the other Partner States or foreign countries in accordance with the First Schedule of these Regulations.⁴⁴¹

Affirmative or negative preliminary and final determinations may still be made where the interested party refuses access to or does not provide the necessary information within a reasonable period of time and/or significantly impedes the investigation.⁴⁴² The Regulations do however recognise that parties, such as small companies, may face difficulties in supplying the requested information. Accordingly, they must take such difficulties into consideration and provide assistance to those parties where practicable.⁴⁴³

⁴³⁶ Regulation 11 (1) of the ADM Regulations.

⁴³⁷ Regulation 11 (2) (3) of the ADM Regulations.

⁴³⁸ Regulation 11 (2) (3) of the ADM Regulations.

⁴³⁹ Regulation 11 (2) (1) of the ADM Regulations; Foreign exporters should be given at least 30 days to complete questionnaires, subject to extension if due cause is shown.

⁴⁴⁰ Regulation 11 (4) of the ADM Regulations.

⁴⁴¹ Regulation 11 (9) (1) of the ADM Regulations.

⁴⁴² Regulation 11 (10) of the ADM Regulations.

⁴⁴³ Regulation 11 (15) of the ADM Regulations.

Regulation 11 (15) is another provision that is unique to the ADM Regulations as there is no equivalent in the WTO AD rules. Again, it recognises the difficulties that might be faced by developing countries in providing information to the Investigating Authorities because more often than not, dumping affects small-scale businesses and farmers, who do not have collective organisations to back their industries and collect data on their behalf.⁴⁴⁴

An AD investigation must be terminated once it is concluded that there is no sufficient evidence of dumping or injury to justify the continuation of that investigation. The investigation must also be terminated where it is found that the margin of dumping is *de minimis*⁴⁴⁵ or the volume of dumped goods is negligible.⁴⁴⁶ AD investigations should normally be concluded within one year except in special circumstances, but should not exceed 18 months after initiation.⁴⁴⁷

3.5.3 Confidential Information

The Investigating Authority should keep confidential information confidential where good cause is shown that the disclosure of that information would be of significant competitive advantage to the competitor, or result in adverse effects upon the person supplying that information.⁴⁴⁸ Confidential information must only be disclosed with the specific permission of the party submitting it.⁴⁴⁹ The Investigating Authority cannot arbitrarily reject confidentiality requests.⁴⁵⁰

⁴⁴⁴ See generally Illy (2013) and Illy (2016).

⁴⁴⁵ Regulation 8 (1), (2) and (3) of the ADM Regulations; The margin of dumped goods is *de minimis* where it is less than two per cent, expressed as a percentage of the export price.

⁴⁴⁶ Regulation 8 (1), (2) and (3) of the ADM Regulations; The volume of dumped goods is negligible where it is found that the volume of imports from a particular country accounts for less than three per cent of imports of the like product in the importing Partner State unless countries which contribute less than three per cent of the imports into the Partner State collectively account for more than seven per cent of the imports of the like product in the importing Partner State.

⁴⁴⁷ Regulation 10 (10) of the ADM Regulations.

⁴⁴⁸ Regulation 11 (6) of the ADM Regulations.

⁴⁴⁹ Regulation 11 (6) of the ADM Regulations.

⁴⁵⁰ Regulation 11 (7) (2) of the ADM Regulations.

Parties submitting confidential information are required to furnish non-confidential summaries of that information.⁴⁵¹ However, in exceptional circumstances, parties can submit that the confidential information is incapable of being summarised, but should provide reasons as to why this is the case.⁴⁵² Parties may also attend meetings on AD investigations, failure of which must not be prejudicial to a party's case. Interested parties can also present other information orally upon good cause,⁴⁵³ only where such oral information is subsequently reproduced in writing and made available to other interested parties.⁴⁵⁴

3.5.4 Provisional Anti-dumping Measures

Similarly to the ADA, provisional measures may be imposed where it is concluded that a delay would cause injury to the domestic industry, provided that a preliminary determination of dumping and consequent injury or threat of serious injury has been made.⁴⁵⁵ Once an investigation has been conducted and a public notice published to that effect⁴⁵⁶ and a preliminary finding of dumping and consequent injury to the domestic industry has been found,⁴⁵⁷ the Investigating Authority must determine whether provisional measures are necessary to prevent injury from being caused to the domestic industry during the course of the investigation.⁴⁵⁸

Provisional measures under the Protocol take the same form as those in the ADA, and like the ADA,⁴⁵⁹ provisional measures may not be applied before 60 days from the date on which the investigation was initiated,⁴⁶⁰ and may not exceed four months unless the Investigating Authority decides, upon the request of exporters, to a period not exceeding

⁴⁵¹ Regulation 11 (7) (1) of the ADM Regulations.

⁴⁵² Regulation 11 (7) (1) of the ADM Regulations.

⁴⁵³ Regulation 11 (3) of the ADM Regulations.

⁴⁵⁴ Regulation 11 (4) of the ADM Regulations.

⁴⁵⁵ Regulation 12 (1) of the ADM Regulations

⁴⁵⁶ Regulation 12 (2) (a) of the ADM Regulations.

⁴⁵⁷ Regulation 12 (2) (b) of the ADM Regulations.

⁴⁵⁸ Regulation 12 (2) (c) of the ADM Regulations.

⁴⁵⁹ See Regulation 12 (3) (a) of the ADM Regulations; see Art 7.2 of the ADA; see para 2.2.2.3 above.

⁴⁶⁰ Regulation 12 (4) of the ADM Regulations; see Art 7.3 of the ADA; see generally para 2.2.2.3 above.

six months.⁴⁶¹ Where a duty lower than the margin of dumping would be sufficient to remove injury in the course of an investigation, these periods can extend from six to nine months respectively.⁴⁶²

3.5.5 Final Determination of Anti-dumping Measures

After all the requirements have been fulfilled and an analysis of comments from interested parties has taken place, AD measures may be imposed in the form of price undertakings or AD duties.⁴⁶³

3.5.5.1 Price Undertakings

AD proceedings may be suspended or terminated without the imposition of provisional or definitive AD duties.⁴⁶⁴ This would occur where exporters offer to revise their prices or offer to cease exports to the area in question.⁴⁶⁵ Price undertakings can only be sought once it has been established that there is dumping, which is causing injury to the domestic industry.⁴⁶⁶

A price undertaking may be rejected where Investigating Authorities determine that accepting it would be impracticable,⁴⁶⁷ for example where the number of actual or potential exporters is high.⁴⁶⁸ In this instance, the Investigating Authorities must give reasons to the exporters highlighting why they deem the acceptance of a price undertaking inappropriate.⁴⁶⁹

⁴⁶¹ Regulation 12 (5) of the ADM Regulations.

⁴⁶² Regulation 12 (5) of the ADM Regulations.

⁴⁶³ See further para 2.2.2.4 above.

⁴⁶⁴ Regulation 13 (1) of the ADM Regulations.

⁴⁶⁵ Regulation 13 (1) of the ADM Regulations; see further Art 8.1 of the ADA and para 2.2.2.4.1 above.

⁴⁶⁶ Regulation 13 (2) of the ADM Regulations.

⁴⁶⁷ Regulation 13 (3) of the ADM Regulations.

⁴⁶⁸ Regulation 13 (3) of the ADM Regulations.

⁴⁶⁹ Regulation 13 (3) of the ADM Regulations.

When a price undertaking is accepted, the AD investigation may still proceed provided that the exporters or the Investigating Authority so agree.⁴⁷⁰ If dumping is not found (negative dumping), the price undertaking lapses automatically unless such negative dumping is as a result of the price undertaking.⁴⁷¹ In this case, the price undertaking will be maintained for a reasonable period of time.⁴⁷²

Investigating Authorities can also suggest price undertakings as an option to exporters, however, exporters are not compelled to enter into them.⁴⁷³ Exporters who consent to price undertakings are required to provide information relevant to the fulfilment of the price undertaking and permit periodic verification of pertinent data.⁴⁷⁴ Where a price undertaking is violated, Investigating Authorities may, using the best information available, take action against the exporter, by imposing provisional measures or levying definitive duties on products imported for consumption within 90 days before the application of provisional measures.⁴⁷⁵

3.5.5.2 Anti-dumping Duties

After all the requirements have been fulfilled in accordance with Article 16 of the Protocol and the ADM Regulations, the Committee may impose AD duties.⁴⁷⁶ The provision for the collection of AD duties in the ADM Regulations is the same as that in the ADA and provides that AD duties be collected, on a non-discriminatory basis in each case, on products from all sources found to be dumping.⁴⁷⁷ The AD duties may also not exceed the margin of dumping as determined under Regulation 7.⁴⁷⁸

⁴⁷⁰ Regulation 13 (4) of the ADM Regulations.

⁴⁷¹ Regulation 13 (4) of the ADM Regulations.

⁴⁷² Regulation 13 (4) of the ADM Regulations.

⁴⁷³ Regulation 13 (5) of the ADM Regulations.

⁴⁷⁴ Regulation 13 (6) of the ADM Regulations.

⁴⁷⁵ Regulation 13 (7) (a) and (b) of the ADM Regulations.

⁴⁷⁶ Regulation 14 (1) of the ADM Regulations.

⁴⁷⁷ Regulation 14 (2) of the ADM Regulations; see further Art 9.2 of the ADA and para 2.2.2.4.2 above.

⁴⁷⁸ Regulation 14 (3) of the ADM Regulations.

The amount of AD duties can be assessed on a retrospective or prospective basis. In the former case, determination of the final liability for payment should take place as soon as possible, within 12 months, and not beyond 18 months, after the date on which a request for a final assessment of the amount of AD duty has been made.⁴⁷⁹ In the latter case, provision for a prompt refund should be made, upon request, of any duty that has been paid in excess of the dumping margin.⁴⁸⁰

Where a product is subject to AD duties in an importing Partner State, Investigating Authorities may carry out a review to determine individual dumping margins for any exporters or foreign producers who did not export the product upon which AD duties apply during the period of investigation, provided that such exporters can show that they are not related to any exporters in the exporting country on whom AD duties were imposed.⁴⁸¹

3.5.6 Public Notice

Where there is sufficient evidence to justify the initiation of an AD investigation, the country whose products are subject to such investigation and other interested parties known to the Investigating Authority must be notified and a public notice issued in this regard.⁴⁸² Such public notice should contain the relevant information as needed under the AD Regulations including *inter alia* the name of the exporting country, the definition of the product in dispute, and the basis upon which dumping is being alleged.⁴⁸³

A public notice must also be given in the case of any preliminary or final AD determinations.⁴⁸⁴ A public notice must also be published with regards to reviews and

⁴⁷⁹ Regulation 14 (4) (1) of the ADM Regulations.

⁴⁸⁰ Regulation 14 (4) (2) of the ADM Regulations.

⁴⁸¹ Regulation 14 (7) of the ADM Regulations.

⁴⁸² Regulation 17 (1) of the AD Regulations.

⁴⁸³ Regulation 17 (2) of the ADM Regulations.

⁴⁸⁴ Regulation 17 (3) of the ADM Regulations.

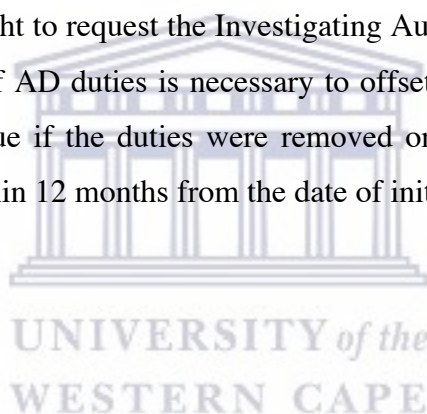
set out, in sufficient detail, the findings and conclusions reached on all issues of law and fact considered material to the investigating authority.⁴⁸⁵

3.5.7 Reviews

Investigating Authorities can review, on their own initiative and where warranted, the need for the continued imposition of AD duties. Any interested party who submits positive information substantiating the need for a review can do so upon request, provided that a reasonable time has lapsed since the imposition of the definitive AD duties.⁴⁸⁶

Interested parties have a right to request the Investigating Authority to examine whether the continued imposition of AD duties is necessary to offset dumping and whether the injury would likely continue if the duties were removed or varied.⁴⁸⁷ Reviews should normally be concluded within 12 months from the date of initiating the review.⁴⁸⁸

3.6 CONCLUSION



This chapter has identified that although the Protocol's AD provisions are well detailed, there are still many loose ends that might give rise to practical difficulties if Partner States were ever to utilise AD investigations under the Protocol. There is also concern that Partner States can initiate AD applications against each other because regional agreements aim to eliminate trade barriers between Partner States. This may be inconsistent with the WTO, however, given the unequal economic status of the EAC Partner States, there is no doubt that AD remedies might be necessary to prolong and promote trade, and serve as a better alternative to export bans.

⁴⁸⁵ Regulation 17 (3) (2) of the ADM Regulations.

⁴⁸⁶ Regulation 16 (2) of the ADM Regulations.

⁴⁸⁷ Regulation 16 (2) of the ADM Regulations.

⁴⁸⁸ Regulation 16 (4) of the ADM Regulations.

The lack of an institutional structure to implement AD proceedings in the EACCU i.e. the fact that the Trade Remedies Committee is yet to be formed, adds to the further uncertainty in the application of these provisions. It remains to be seen how and to what extent Partner States utilise defensive measures and how the EAC Council of Ministers and EAC Committee on Trade Remedies react once protective measures are introduced and brought to their attention.

The next chapter is going to analyse the South African (SA) AD regime including its institutional and legislative structure. The aim of this assessment is to examine how SA has adopted AD measures and which institutions have been set up to administer the application of its AD laws.



CHAPTER 4

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

4.1 INTRODUCTION

This chapter will briefly look at the history of anti-dumping (AD) in South Africa (SA). It will also engage the legislative and institutional framework on AD in SA as well as the substantive and procedural process that must be followed by the International Trade Administration Commission of South Africa (ITAC) when conducting AD investigations in accordance with the International Trade Administration Act (ITAA)⁴⁸⁹ and the South African International Trade Administration Anti-Dumping Regulations (ADR).

4.2 A BRIEF HISTORY OF ANTI-DUMPING IN SOUTH AFRICA

South Africa is not only the most developed and diverse economy on the African continent, but it is also the most industrialised.⁴⁹⁰ It accounts for 24 per cent of Africa's Growth Domestic Product (GDP).⁴⁹¹ Much of this development can be attributed to SA's use of trade remedies for a century to protect its domestic industries. It is one of the earliest users of AD policies and was the fourth country after Canada (1904), New Zealand (1905) and Australia (1906) to promulgate AD legislation in 1914.⁴⁹²

South Africa has been one of the most prolific users of AD remedies in the world.⁴⁹³ In fact, SA was the biggest user of AD remedies in the first ten years of the General Agreement on Tariffs and Trade 1947 (GATT 1947) and the first 15 years of the

⁴⁸⁹ International Trade Administration Act, no. 71 of 2002.

⁴⁹⁰ Illy O 'Trade Remedies in Africa: Experiences, Challenges and Prospects' Working Paper available at <https://www.princeton.edu/~pcglobal/conferences/GLF/oilly.pdf> (accessed 13 June 2017).

⁴⁹¹ Ferreira & van Eyk (2017) 2.

⁴⁹² Section 8 (1) of the Customs Tariff Act 26 of 1914; see also Brink (2008) 256.

⁴⁹³ Joubert N 'Managing the Challenges of WTO Participation: 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#remedies (accessed 13 June 2017).

WTO.⁴⁹⁴ It has one of the most widespread and documented histories on applying AD measures.⁴⁹⁵

The first AD measures in SA came in the form of the Customs and Tariffs Act.⁴⁹⁶ The Act guided the imposition of the first AD measure in 1921.⁴⁹⁷ At the time, AD remedies were administered by the Customs Department, which would go on to conduct the *dumping* part of investigations until 1992.⁴⁹⁸ The Customs Department later became the South African Revenue Service (SARS).⁴⁹⁹

In September 1923, the Board of Trade and Industry (BTI) was permanently established and took over the responsibility of administering AD remedies.⁵⁰⁰ It was responsible for investigating dumping and enforcing AD regulations.⁵⁰¹ The BTI followed a protectionist economic policy approach, which included the promotion of import replacement industries, quotas and the selective application of tariffs.⁵⁰² It was also entrusted with the maintenance and development of SA industries.⁵⁰³

In the 1970s, SA's trade policy shifted amidst concerns of the continued dependence on gold as a source of foreign currency and the diminishing contribution of import substitution towards growth.⁵⁰⁴ This led to a relaxation of quantitative restrictions on trade followed by significant liberalisation, which resulted in simplified tariff structures

⁴⁹⁴ Brink G 'Anti-Dumping in South Africa' (2012) 1.

⁴⁹⁵ Ndlovu L 'South Africa and the World Trade Organisation Anti-Dumping Agreement Nineteen years Into Democracy' (2013) 280; Ndlovu (2012) 2; Macroy PFJ, Appleton AE & Plummer MG *The World Trade Organisation: Legal, Economic and Political Analysis* (2005) 45.

⁴⁹⁶ Customs Tariff Act 26 of 1914.

⁴⁹⁷ Brink (2012) 1; Brink G 'One Hundred Years of Anti-Dumping in South Africa' (2015c) 325; Ndlovu (2012) 2; Board Report No. 42 (dumping or unfair competition - 18 November 1924) makes reference to an AD duty imposed on flour from Australia in 1921.

⁴⁹⁸ Brink (2015c) 327.

⁴⁹⁹ Joubert N 'Managing the Challenges of WTO Participation: 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#remedies (accessed 13 June 2017).

⁵⁰⁰ ITAC 'An Overview of ITAC' available at <http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed 10 April 2017).

⁵⁰¹ Section 4 of the Board of Trade and Industry Amendment Act 1992.

⁵⁰² Brink (2015c) 325.

⁵⁰³ Brink (2015c) 326.

⁵⁰⁴ Edwards L 'Anti-dumping in South Africa: From Proliferation to Moderation' (2011) 4 available at <http://ssrn.com/abstract=1871948> (accessed 10 May 2017).

and bold reductions of tariff rates.⁵⁰⁵ Numerous AD duties were removed in 1978 and disruptive competition was resolved through the use of formula duties that maintained import prices at set floors.⁵⁰⁶

In September 1986, 63 years after the establishment of the BTI, the Board of Tariffs and Trade (BTT or Board) replaced it, through the enactment of the Board on Tariffs and Trade Act (BTTA).⁵⁰⁷ The functions and structure of the Board remained the same, as they were when it was still the BTI.⁵⁰⁸ The Board maintained its independence, reporting to and obtaining its budget from the Department of Trade and Industry.⁵⁰⁹ At this time the BTTA and chapter VI of the Customs Excise Act were the only contingent legislations that could be used to conduct AD investigations in SA.⁵¹⁰

In 1995, SA became an original member of the WTO. This meant that SA accepted the rules of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Implementation of Article VI of GATT 1994 (the Anti-Dumping Agreement or ADA). These Agreements would go on to define how subsequent AD investigations would be conducted in SA. As a result of its succession to the WTO, SA drastically reduced its import duties in line with the undertakings normal for a developed country, despite the fact that it is a developing country.⁵¹¹ Increased liberalisation resulted in increased activities on AD with SA being a major user of AD remedies in the first 15 years of the WTO.⁵¹²

During this time, the government promised its domestic producers an efficient national AD system that would protect their interests⁵¹³ against injurious and unfair trade practices from foreign exporters, especially because these exporters had enjoyed

⁵⁰⁵ Gupta & Choudhury (2011) 130.

⁵⁰⁶ Edwards (2011) 4.

⁵⁰⁷ Board on Tariffs and Trade Act, 1986.

⁵⁰⁸ Brink (2015a) 3.

⁵⁰⁹ Brink (2015a) 3.

⁵¹⁰ Brink (2008) 256.

⁵¹¹ Brink (2002) Vii.

⁵¹² Brink (2012) 1.

⁵¹³ Brink (2002) vii.

significant economies of scale advantages.⁵¹⁴ The SA government thereby promulgated the Board on Tariffs and Trade Amendment Act⁵¹⁵ and the Customs and Excise Amendment Act,⁵¹⁶ which changed the existing AD laws.⁵¹⁷ This change also occurred amidst pressure from WTO Members for SA to align its AD legislation with WTO international standards.⁵¹⁸

Consequently, the BTTA was repealed and replaced with the ITAA in 2003. The ITAA also effected the creation of a new body called the International Trade Administration Commission (ITAC or the Commission), which assumed the responsibility of managing the administration of trade remedies and tariff changes in SA.⁵¹⁹ ITAC therefore replaced the Board in the performance of its functions. The ITAA also gave effect to the promulgation of the ADRs⁵²⁰ on 14 November 2003,⁵²¹ which would stand to guide ITAC in the performance of their duties notably; AD investigations.

It should be noted that although the GATT 1994 and the ADA are binding on SA,⁵²² they do not form part of its national laws. This is because the Agreements, although ratified by Parliament, have not been promulgated into law by national legislation⁵²³ in accordance with section 231 (4) of the Constitution.⁵²⁴ Section 231 (4) provides that any international agreement becomes law in the Republic when it is enacted into law by national legislation. According to section 233 of the Constitution, such Agreements serve to aid in the interpretation of the domestic legislation.⁵²⁵

⁵¹⁴ Brink (2002) 4.

⁵¹⁵ Board on Tariffs and Trade Amendment Act, 1995.

⁵¹⁶ Customs and Excise Amendment Act, 1995.

⁵¹⁷ Brink (2004) 24.

⁵¹⁸ Edwards (2011) 5.

⁵¹⁹ Gupta (2011) 130.

⁵²⁰ Section 59 of the ITAA.

⁵²¹ Brink (2004) 712; Ndlovu (2012) 7; The Regulations were published in Government Gazette No. 25684 on 14 November 2003 as General Notice 3197 of 2003.

⁵²² Brink (2012) 5.

⁵²³ Ndlovu L 'An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's Dumping and Anti-dumping Law' (2010) 32.

⁵²⁴ Constitution of the Republic of South Africa, 1996.

⁵²⁵ ITAC 'Trade Remedies' available at <http://www.itac.org.za/pages/services/trade-remedies> (accessed 10 July 2017).

4.3 THE LEGISLATIVE AND INSTITUTIONAL STRUCTURE

4.3.1 Legislative Structure

South Africa's national legislative regime on AD is sheathed in the WTO rules, specifically Article VI of the GATT 1994 and the ADA, the SA Constitution,⁵²⁶ the Customs and Excise Act,⁵²⁷ the ITAA and the ADR.⁵²⁸ The Promotion of Access to Information Act⁵²⁹ (PAIA) and the Promotion of Administrative Justice Act⁵³⁰ (PAJA) also play a key role in AD investigations.

The salient AD legislations in SA are mainly the ITAA and the ADRs; which were enacted in accordance with section 59 of the ITAA.⁵³¹ The SA government promulgated the ITAA in an attempt to align its national AD legislation with WTO rules. The ADRs set out the substantive and procedural issues relating to dumping in SA.⁵³² They contain detailed provisions on AD investigation and review processes⁵³³ including but not limited to normal value methodology, constructed export price, judicial and sunset reviews, margin of dumping, material injury and causality.⁵³⁴ The ADR cardinally guides the conduction of AD investigations by ITAC.

ITAC determinations may be reviewed not only on the basis of the ITAA and the ADRs, but also on the basis of its failure to provide interested parties with access to information according to PAIA, and on the basis of unfair administrative action in accordance with PAJA.⁵³⁵ Additionally, the ITAA must be read and interpreted together

⁵²⁶ The Constitution of the Republic of South Africa 1996.

⁵²⁷ Customs and Excise Act 91 of 1964.

⁵²⁸ Section 59 of ITAA; Ndlovu (2013) 286; Ndlovu (2012) 7.

⁵²⁹ Promotion of Access to Information Act, 2 of 2000.

⁵³⁰ Promotion of Administrative Justice Act, 3 of 2000.

⁵³¹ Brink G 'Dumping and Injury Margin Calculation Methods: Ten Major Problems in South Africa' (2007) 59.

⁵³² Brink (2006) 1; Brink (2012) 5.

⁵³³ Brink (2006) 4.

⁵³⁴ Brink (2015) 331.

⁵³⁵ Brink G 'Anti-dumping and Judicial Review in South Africa: An Urgent Need for Change' (2012b) 275.

with the Customs and Excise Act of 1964, a supplementary legislation,⁵³⁶ as AD duties are imposed in terms of this Act.⁵³⁷

Institutional Structure

Prior to the promulgation of the ITAA, the BTI, which was established in 1921, was an independent statutory body responsible for *inter alia* AD investigations.⁵³⁸ The Board later replaced it in September 1986.⁵³⁹ The Board was later replaced by ITAC on 1 June 2003.⁵⁴⁰ ITAC is established under section 7 of the ITAA and is mainly responsible for fostering economic growth and development in order to raise incomes and promote investment and employment in SA.⁵⁴¹

The ITAC is a public body performing administrative functions and is required to promote and give effect to the parties' constitutionally enshrined rights to administrative justice as well as access to information when it considers AD cases.⁵⁴² It is therefore required to act in accordance with not only ITAA and the Constitution, but also PAJA and PAIA when performing its functions. ITAC has jurisdiction throughout the Republic,⁵⁴³ is a juristic person⁵⁴⁴ and must exercise its functions in accordance with all relevant laws.⁵⁴⁵

⁵³⁶ Sibanda OS 'Public Interest Considerations In The South African Anti-dumping and Competition Law and Practice' (2015) 24.

⁵³⁷ Brink (2012a) 3.

⁵³⁸ Section 2 (1) (g) of the Board of Trade and Industries Act 1924; Brink (2012) 7.

⁵³⁹ WTO: edited by Gallagher P, Low P & Stoler AL *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) 519.

⁵⁴⁰ 'An Overview of ITAC' available at <http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed on 18 June 2017).

⁵⁴¹ Section 2 of the ITAA.

⁵⁴² *SCAW v The International Trade Administration Commission* unreported case 18829/ 2006 (T) para 44.

⁵⁴³ Section 7 (1) (a) of the ITAA.

⁵⁴⁴ Section 7 (1) (b) of the ITAA.

⁵⁴⁵ Section 7 (1) (c) of the ITAA.

The ITAC bears the responsibility of investigating and evaluating dumping,⁵⁴⁶ not only for SA, but also the Southern Africa Customs Union (SACU) Members.⁵⁴⁷ ITAC therefore investigates and evaluates dumping on behalf of Botswana, Lesotho, Namibia, and Swaziland. It was appointed to act as the regional trade remedy investigating authority for SACU until such time that a regional body is created.⁵⁴⁸

Presently, ITAC is comprised of four divisions one of which is responsible for AD investigations.⁵⁴⁹ The divisions consist of two directorates; Trade Remedy Investigations I and II, which are both equally responsible for investigations.⁵⁵⁰ Investigations are allocated to the respective directorates on the basis of available capacity.⁵⁵¹ Each directorate is responsible for the full investigation, i.e. it will conduct the dumping, injury and causal link investigations.⁵⁵²

4.4 SUBSTANTIVE STRUCTURE

‘Dumping’ is defined in much the same way in the ITAA as it is in the GATT 1994 and the ADA. It is the introduction of goods into the commerce of the Republic or the Common Customs Area (Southern African Customs Union or SACU) at an export price that is less than the normal value, of those goods.⁵⁵³ As mentioned earlier, GATT 1994 allows countries to act against dumping when there is genuine injury to the competing domestic industry.⁵⁵⁴ Injury and causation must both be proved before AD duties or measures can be imposed.

⁵⁴⁶ Sibanda OS ‘The effects of the South African anti-dumping and competition measures upon foreign direct investment’ (2014) 129; Vlinti C ‘A Spring Without Water: The Conundrum of Anti-Dumping Duties in South African Law’ (2016) 3 available at <http://dx.doi.org/10.17159/1727-3781/2016/v19n0a723> (accessed January 16 2017).

⁵⁴⁷ Section 16 (1) (a) of the ITAA; Gupta (2011) 131.

⁵⁴⁸ Murigi (2013) 57.

⁵⁴⁹ Section 16 (1) (a) of the ITAA; ADR 8.1 (a).

⁵⁵⁰ Brink (2012a) 8; Nedumpara JJ *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (2016) 159.

⁵⁵¹ Nedumpara (2016) 159; Brink (2012a) 8.

⁵⁵² Brink (2012a) 8.

⁵⁵³ Section 1 of the ITAA.

⁵⁵⁴ WTO *Understanding the WTO* 5 ed (2015) 44.

4.4.1 Normal Value

The Board on Tariffs and Trade Amendment Act 1995 first described ‘normal value’, in spite of the fact that the Board had been using the domestic price of the exporting country to calculate dumping since 1923.⁵⁵⁵ In accordance with the WTO rules, ‘normal value’ is the selling price of a product in the country of export.⁵⁵⁶ This includes the price paid for the products in the domestic market of the exporter or,⁵⁵⁷ the price at which other sellers, within the same market, sell the like product.⁵⁵⁸

The ITAA, like the ADA and the ADM Regulations, provides two alternative methods for calculating normal value, in the absence of such selling price.⁵⁵⁹ They include the ‘constructed normal value’ (CNV) and ‘third country export’ methods.⁵⁶⁰

In SA, ITAC usually constructs the cost and price build up to establish normal value if the exporter co-operates.⁵⁶¹ *Third country exports* may also be used in the absence of a domestic sales price, with reference to the *highest* comparable export price the product is sold for in a third country.⁵⁶²

Third country exports have never favoured for calculating normal value in SA. This is based on the presumption that if exports are being dumped in SA, they also being dumped in other countries.⁵⁶³ In fact, the Board has applied this method only once in the *Roller Bearings (USA)*⁵⁶⁴ investigation. In this case, the Board, acting in accordance with the BTTA as amended in 1992, determined normal value with regards to both the domestic selling price and the export price to a third country.

⁵⁵⁵ Board Report No. 30 (*Dumping of Cement*); also see Brink (2002) 33.

⁵⁵⁶ Section 32 (2) (b) (i) of the ITAA.; Brink (2006) 1; Ndlovu (2012) 3; see further para 2.2.1.2.1 above.

⁵⁵⁷ ADR 8.1 (a).

⁵⁵⁸ ADR 8.1 (b).

⁵⁵⁹ See also Chapter 2 and 3 above under the heading ‘normal value’ for more on these alternative methods.

⁵⁶⁰ See further para 2.2.1.2.1, para 2.2.1.2.1.1 & para 2.2.1.2.1.2 above.

⁵⁶¹ Section 3.4.7 of the ITAA lists circumstances in which the exporter might be unwilling to cooperate; see also Brink (2002) 48.

⁵⁶² Section 32 (2) (b) (ii) (bb) of the ITAA.

⁵⁶³ Brink (2002) 47.

⁵⁶⁴ Brink (2002) 47 (Board Report No. 3329 (*Roller Bearings – USA* 1992)).

4.4.2 Export Price

The export price of a product must be determined because it is against this price that the importing country alleges dumping. Up to 1995, the Board defined ‘export price’ as the ‘free on board’ (FOB) price.⁵⁶⁵ This definition later changed to mean the ‘price actually paid or payable for goods sold for export, net of all taxes, discounts and rebates actually granted and directly related to that sale.’⁵⁶⁶

The ITAC must, when evaluating an application concerning dumping that meets the criteria set out in 32 (6), determine (or construct) the export price for the goods in question, on the basis of the price at which the imported goods are first resold to an independent buyer, or on any reasonable basis.⁵⁶⁷ This is known as the ‘constructed export price’ (CEP).⁵⁶⁸

In practice, the CEP will be determined by deducting all costs incurred between the exporter’s ex-factory price and the price to the first independent buyer, plus a deduction for the profit realised by the importer.⁵⁶⁹ The Commission has the discretion to disregard a transaction price between related parties⁵⁷⁰ as sales not in the ‘ordinary course of trade’⁵⁷¹ without further inquiry into whether or not those prices were at arm’s length.⁵⁷²

It is also notable that ITAC has to determine the export price separately for each model of the product that is allegedly being dumped. For example, if the investigation is into the alleged dumping of mobile phones, a separate export price has to be calculated for each model of mobile phone imported into the region.

⁵⁶⁵ Brink (2002) 63.

⁵⁶⁶ Section 32 (2) (a) of the ITAA; Brink (2008) 258.

⁵⁶⁷ Section 32 (5) of the ITAA.

⁵⁶⁸ ADR 1; see further para 2.2.1.2.2 above.

⁵⁶⁹ ADR 10.2 (a) and (b); Brink (2012) 15.

⁵⁷⁰ ADR 1.

⁵⁷¹ ADR 8.2 (b).

⁵⁷² Brink (2012) 15; Arm’s length transactions are normally those where the buyers and sellers of a product act independently and have no relationship to each other - ‘Arm’s Length Transaction’ available at www.investopedia.com/terms/a/armlength.asp accessed 20 September 2017).

4.4.3 Like Product

The definition of ‘like product’ under the ADR is exactly the same as that under the ADA.⁵⁷³ Accordingly, a like product is a product, which is identical or alike in all respects to the product under consideration.⁵⁷⁴ In the absence of such a product, the *like* product will be any other product, which although not alike in all respects, has characteristics that closely resemble those of the product under consideration.⁵⁷⁵

Unlike the ADA however, the ADR goes into depth by providing seven characteristics that may give better guidance to ITAC when considering whether or not a product ‘closely resembles’ the one under consideration. To this extent, the ADR provides more clarity on the determination of a *product closely resembling the like product* than the ADA and ADM Regulations do.

These characteristics include 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, the substitutability of the product with the product under investigation, tariff classification, and any other factor proven to the satisfaction of ITAC to be relevant.⁵⁷⁶

4.4.4 Domestic Industry

The ‘domestic industry’ consists of all the domestic producers of the like product or those producers whose output constitutes a major proportion of the SACU industry.⁵⁷⁷

The ADR defines ‘domestic industry’ in accordance with Article 4.1 and 5.4 of the ADA.⁵⁷⁸

⁵⁷³ Article 2.6 of the ADA; see further para 2.2.1.3.1 above.

⁵⁷⁴ ADR 1.

⁵⁷⁵ ADR 1; Brink (2008) 258; *US – Softwood Lumber V*, para 18.

⁵⁷⁶ ADR 1.

⁵⁷⁷ ADR 1.

⁵⁷⁸ See further para 2.2.1.3.2 above.

Usually, SA and not SACU report investigations to the WTO on behalf of SACU, similar to the European Commission (EC), which can notify the WTO on behalf of its members.⁵⁷⁹ Often, AD investigations are in actual fact concerned with protecting SA's domestic market, despite the fact that the market concerned in an investigation conducted by ITAC is one of the Customs Union.⁵⁸⁰ This can also have the effect of minimising the competition of foreign exports to SACU as a whole, thereby increasing the market share of SA's exports to those markets, with little or no competition from the SACU domestic industry especially given that SA is the more dominant producer in the region.

4.4.5 Fair Comparison

The ITAA, the ADR and the ADA all require that a fair comparison be made between the domestic selling price and the export price of a like product.⁵⁸¹ Nevertheless, there have been many inconsistencies with ITAC's application of the adjustments methods when calculating export price and normal value.⁵⁸² In the *Tyres (China)* investigation,⁵⁸³ ITAC granted adjustments for differences in advertising, general, selling and administrative costs but refused to make the same adjustments in subsequent investigations.⁵⁸⁴

4.4.6 Margin of Dumping

The margin of dumping is the extent to which the normal value is higher than the export price after adjustments are made for comparative purposes.⁵⁸⁵ Where only one product is

⁵⁷⁹ Brink (2012) 12.

⁵⁸⁰ Kommerskollegium/National Board of Trade, Sweden Report *The Use of Anti-dumping in Brazil, China, India and South Africa Rules, Trends and Causes* (2005) 59.

⁵⁸¹ Brink (2008) 261; see further para 2.2.1.5 above; ADR 11.1; see also s 32(3) of the ITAA; Brink (2008) 256.

⁵⁸² See ADR 11.1.

⁵⁸³ *ITAC v SA Tyre Manufacturer's Conference ZASCA* 137.

⁵⁸⁴ See for example ITAC Report 306 *Colour coated steel products - Australia* (sunset review).

⁵⁸⁵ ADR 1.

under investigation, the margin of dumping will be the amount by which the normal value exceeds the export price.⁵⁸⁶ When there is more than one product under investigation however, ITAC will determine the margin of dumping by calculating a separate margin of dumping for each product provided that products can be separately identified by SARS.⁵⁸⁷

If the products cannot be separately identified by SARS, ITAC has to calculate the margin of dumping for each product separately⁵⁸⁸ and determine the weighted-average margin of dumping for all these products on the basis of the individual export volume of each product.⁵⁸⁹ Like in the ADA, the margin of dumping is regarded *de minimis* if it is less than two per cent of the export price percentage.⁵⁹⁰

4.4.7 Injury

Material injury under the ADR refers to the actual material injury, threat of injury or material retardation of the establishment of an industry.⁵⁹¹ Material injury is neither defined in the ITAA, the ADR, the ADA nor the Article VI of GATT 1994.⁵⁹² Nevertheless, the ADR, ADA⁵⁹³ and the ADM Regulations⁵⁹⁴ prescribe that it must be shown that the domestic industry is suffering *material* injury as a result of dumping.⁵⁹⁵ It is also worth noting that the ADR provides more clarity for the determination of the three injury factors in a way that WTO rules do not.

4.4.7.1 Material Injury

⁵⁸⁶ ADR 12.1; see also UNCTAD Training Module on the WTO Agreement on Anti-Dumping (2006) 25.

⁵⁸⁷ ADR 12.2 (a).

⁵⁸⁸ ADR 12.2 (b) (i).

⁵⁸⁹ ADR 12.2 (b) (ii).

⁵⁹⁰ ADR 12.3; see also Art 5.1 of the ADA.

⁵⁹¹ ADR 13.1.

⁵⁹² Brink (2008) 258.

⁵⁹³ See footnote 9 of Art 3 of the ADA.

⁵⁹⁴ ADR 3.

⁵⁹⁵ See generally Art VI (6) (a) of the GATT 1994.

To establish material injury to the domestic industry, ITAC has to consider whether there has been a 'significant suppression or depression of SACU's industry prices.'⁵⁹⁶

ITAC must consider up to 19 injury factors provided in Regulation 13.2 of the ADR in order to establish material injury. These, among others, include the volume of the goods that are being dumped as well as the domestic industry's prices; sales and production volumes; employment; wages; inventories and market share in order to determine whether there is injury to the domestic industry.⁵⁹⁷ There is no similar provision to that of Regulation 13.2 of the ADR in the WTO rules. To this extent, the ADR provides more clarity in the determination of material injury than the WTO rules do.

Information for material injury must be considered with respect to the specific product under investigation only or, where that is not possible, with reference to the narrowest group of products for which information is possible.⁵⁹⁸ It is still not provided however, that injury is a requirement for the imposition of AD duties on such products.⁵⁹⁹

4.4.7.2 Threat of Material Injury

According to the ADR, the determination of a threat to the domestic industry must be based on fact, be clearly foreseeable and be imminent, and not merely based on allegation, conjecture or remote possibility.⁶⁰⁰ In this case, there should be reason to believe that there will be a substantial increase of imports at dumped prices in the near future, which will cause injury to the domestic industry.⁶⁰¹

⁵⁹⁶ ADR 1.

⁵⁹⁷ Brink (2008) 258.

⁵⁹⁸ ADR 13.4.

⁵⁹⁹ Brink (2004) 715; also see the same LLD thesis at 714, 716, 756, 757, 760, 765, 768, 786, 790, 791, 807 for further inconsistencies between the ADA and the ADR.

⁶⁰⁰ ADR 14.1.

⁶⁰¹ ADR 14.2 (a); WTO Analytical Index: Anti-Dumping Agreement available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm (accessed 4 May 2017).

Additionally, ITAC is required to consider whether there has been an imminent substantial increase in the capacity of the exporter;⁶⁰² whether there are other export markets that can absorb the additional export volumes;⁶⁰³ ‘whether products are entering or will be entering the SACU market at prices that will have a significant depressing or suppressing effect on...prices’;⁶⁰⁴ and ‘the exporter's inventories of the product under investigation’.⁶⁰⁵

4.4.7.3 Material Retardation of the Establishment of an Industry

Section 15 of the ADR provides that an investigation shall not be initiated on the basis of material retardation unless the industry-to-be has submitted a detailed business plan indicating how it intends to establish itself in the absence of dumping.⁶⁰⁶

Upon establishing that dumped products have materially retarded the establishment of an industry, ITAC can request a provisional payment or recommend an AD duty.⁶⁰⁷ AD duties imposed may be withdrawn if the industry has not made significant progress towards establishing itself within a reasonable period of time (usually within one year).⁶⁰⁸

The sources of injury should be distinguished and separated as such distinction and separation can assist in determining whether the effects of the imports concerned have a ‘genuine and substantial’ nexus to the injury suffered by the domestic industry.⁶⁰⁹ This distinction and separation must not be understood to mean that injury from other sources should be excluded from the determination of injury.⁶¹⁰

⁶⁰² ADR 14.2 (b).

⁶⁰³ ADR 14.2 (c).

⁶⁰⁴ ADR 14.2 (d).

⁶⁰⁵ ADR 14.2 (e).

⁶⁰⁶ ADR 15.1; Brink (2004) 715.

⁶⁰⁷ ADR 15.2.

⁶⁰⁸ ADR 15.3.

⁶⁰⁹ *US – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities Safeguards* WT/DS166/AB/R 22 December 2000 para 168.

⁶¹⁰ *US – EC Wheat Gluten* (2000) para 70-72.

4.4.8 Causal Link between Dumped Imports and Injury

Causation, as an important requirement in AD investigations in SA, can be traced back to the Customs and Tariffs Act of 1924, which provided for the imposition of AD duties only when a sale of imported goods in the Union of SA was at less than the wholesale price in the exporter's country and threatened the Union's industry.⁶¹¹

Several factors must be considered to establish causality. These include the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SACU market,⁶¹² the market share of the dumped imports,⁶¹³ the magnitude of the margin of dumping⁶¹⁴ and the price of undumped imports in the market.⁶¹⁵

Article 3(2) of the ADA only requires an authority consider the price effects of dumping and then indicates that this can be done with reference to price undercutting, depression *or* suppression. ITAC on the other hand, investigates all three price factors.⁶¹⁶ In this regard, SA's provisions more than meet the WTO requirements.⁶¹⁷

4.4.9 Lesser Duty Rule

The lesser duty rule is an imposed provisional AD duty, which is less than the margin of dumping or margin of injury, but is deemed sufficient to remove the injury caused by dumping.⁶¹⁸ ITAC is only obliged to consider applying the lesser duty rule if both the corresponding importer and exporter have fully co-operated.⁶¹⁹

⁶¹¹ Sibanda (2013) 191.

⁶¹² ADR 16.1 (a).

⁶¹³ ADR 16.1 (c).

⁶¹⁴ ADR 16.1 (d).

⁶¹⁵ ADR 16.1 (e).

⁶¹⁶ Brink (2015b) 159.

⁶¹⁷ Brink (2015b) 159.

⁶¹⁸ ADR 1.

⁶¹⁹ ADR 17.

ITAC will investigate the ‘price disadvantage’ that dumped products cause to domestic goods when determining whether to apply the lesser duty rule.⁶²⁰ There is no express provision for ‘price disadvantage’ in the WTO rules but it is described in the ADR. Price disadvantage is determined by analysing the extent to which the price of the imported product is lower than the unsuppressed selling price of the like product in the SACU industry, as measured,⁶²¹ normally at the ex-factory level.⁶²²

4.4.10 Public Interest

Neither the WTO nor the Protocol AD rules contain an explicit public interest clause, except for Article 6.12 of the ADA which compels national authorities to give consumers and intermediate the opportunity to provide information pertinent to the investigation and determination of dumping.⁶²³ Additionally, the AD law in most countries does not define or elaborate on public interest and leaves the matter at the discretion of the investigating authorities.⁶²⁴

According to Brink, public interest is the impact that the imposition of AD duties may have on interested parties, being the domestic industry producing the like product, upstream producers of inputs for the domestic industry, the downstream users of the product and consumers.⁶²⁵ It can also be understood to mean ‘impersonality, and as the opposite of giving privilege to private interest.’⁶²⁶

The ADA neither precludes national authorities from considering public interest in their AD determinations⁶²⁷ nor imposes a substantive obligation on Members to consider

⁶²⁰ Brink (2015b) 148.

⁶²¹ ADR 1.

⁶²² For more on ex-factory level, see footnote 142 and para 2.2.1.2.3. above.

⁶²³ Article 6.12 of ADA; see also Sibanda (2015) 737.

⁶²⁴ Aggarwal A ‘Patterns and Determinants of Anti-Dumping: A Worldwide Perspective (2003) 27.

⁶²⁵ Brink G ‘National Interest in Anti-Dumping Investigations’ (2009) 327.

⁶²⁶ International Trade Centre (2009) 31.

⁶²⁷ Sibanda (2015) 32.

public interest before they impose AD measures.⁶²⁸ This is mostly because AD investigations are mainly initiated at the request of producers.

In the past, the Board was required to consider public interest before the imposing AD duties.⁶²⁹ During this time, the Board cited public interest as a reason not to impose AD duties only once and did not provide a reason for its finding.⁶³⁰ Consequently, the public interest provision was omitted from AD legislation in 1992 and deleted from the BTT's AD guide in 1995.⁶³¹

Currently, there is no explicit public interest clause in SA's AD legislation; however, it has been given some consideration in AD disputes in SA. In the *Italie – Ansoek Pasta* case for example, it was held that public interests are important in deciding if the AD action should be instituted.⁶³²

In 2006 ITAC published draft amendments to the ADR, which included provisions on public interest.⁶³³ Sibanda argues that it is prudent that section 4(2) of the ITAA and the ADR be amended to contain a clear provision on 'public interest'. This is in light of the impact that the imposition of AD measures may have on the general public, who are end-users of the product in question. It would also require ITAC to consider the applicability or not, of public interests, without having to rely on the directive of the Minister of Finance.⁶³⁴

4.5 PROCEDURAL REQUIREMENTS

Procedural AD law deals with the authorities and parties involved in an investigation, time frames, the procedures and/or methodology used, the determinations made and

⁶²⁸ Aggarwal A 'The WTO Anti-Dumping Agreement: Possible Reform Through the Inclusion of a Public Interest Clause' (2004) 1-2.

⁶²⁹ S 15 (1) of the Customs Tariff and Excise Duties Amendment Act 36 of 1925.

⁶³⁰ Brink (2009) 331.

⁶³¹ Brink (2009) 331.

⁶³² Sibanda (2015) 26.

⁶³³ Notice 1606 in *Government Gazette* No 29382 of 10 November 2006.

⁶³⁴ Sibanda (2015) 27.

whether or not, and to which extent, reviews may be sought against decisions.⁶³⁵ This is therefore the process through which the determination of whether to impose provisional or definitive AD duties is realised as well as the procedure to be followed for the review of those decisions.

4.5.1 Pre-initiation Phase

Any AD investigation process begins with a complaint. It can be lodged with ITAC by or on behalf of the SACU industry using the relevant questionnaire.⁶³⁶ At least 25 per cent of the domestic producers by production volume must support the application.⁶³⁷ Of these, at least 50 per cent must support of the application.⁶³⁸

When the complaints have been received, the trade unit of ITAC collaborates with the SACU industry to ensure that all the required information has been submitted in the required format.⁶³⁹ ITAC must then indicate a *prima facie* case of material injury to the SACU industry before it can initiate an AD investigation.⁶⁴⁰ It must also satisfy itself that the information provided in the application is accurate and adequate to initiate an investigation.⁶⁴¹

When ITAC is satisfied with the AD application, it is required to notify the representative of the country of origin and of export where applicable, that it has received a properly documented application in terms of section 22 of the ADR. ITAC is required to do this after verifying the SACU's industry injury information, but prior to initiating the AD investigation.⁶⁴² ITAC may not publicise the application before the investigation has been initiated.⁶⁴³

⁶³⁵ Brink (2004) 13.

⁶³⁶ ADR 21.1.

⁶³⁷ ADR 7.3 (a)

⁶³⁸ see ADR 7.3 (b); Murigi (2013) 68.

⁶³⁹ ADR 21.2.

⁶⁴⁰ ADR 24.

⁶⁴¹ ADR 25.

⁶⁴² ADR 27.1.

⁶⁴³ ADR 27.2.

4.5.2 Initiation and Preliminary Phase

An AD investigation in SA is initiated through the publication of an initiation notice in the Government Gazette.⁶⁴⁴ ITAC is also required to inform all known interested parties directly, by supplying them with a copy of the initiation notice, the non-confidential version of the application and the relevant questionnaire to be completed.⁶⁴⁵ Interested parties receive 37 days from the date of the letter to complete the questionnaires and submit any comments on the application⁶⁴⁶ in both hard, and electronic copies unless ITAC agrees otherwise in writing.⁶⁴⁷

After exporters' and importers' submissions have been received, they are studied to determine whether there are any deficiencies in the responses. Such deficiencies can include a failure to provide proper non-confidential versions of all submissions, failure to answer all questions or failure to attach the necessary supporting documents.⁶⁴⁸ Parties receive only seven days from the date of ITAC's deficiency letter to address any deficiencies.⁶⁴⁹

When ITAC is satisfied that all the relevant information has been received from the parties, it will proceed to verify the importers' and the exporters' information *in situ* to determine the accuracy and completeness of that information.⁶⁵⁰ In practice, most verification reports are meaningless and only indicate that domestic sales, export sales and costs were verified, without providing any indication as to how the process was conducted or which documents were scrutinised.⁶⁵¹

Upon verification, investigating officers prepare another submission to ITAC, where it must make a preliminary decision on whether to impose provisional payments or not.⁶⁵²

Once a preliminary decision is reached and dumping is found to be causing material

⁶⁴⁴ ADR 28.1.

⁶⁴⁵ ADR 27.3.

⁶⁴⁶ ADR 29.2 and 29.3.

⁶⁴⁷ ADR 29.5.

⁶⁴⁸ Brink (2008) 266; See also ADR 31.1.

⁶⁴⁹ ADR 31.2 – 31.3.

⁶⁵⁰ Brink (2008) 266.

⁶⁵¹ Brink (2008) 266.

⁶⁵² Brink (2008) 266.

injury, ITAC will request SARS to impose provisional payments in the amount and for the period requested by them.⁶⁵³ These provisional measures may not be imposed within 60 days after the initiation of an investigation⁶⁵⁴ and should normally only be imposed for a period of six months.⁶⁵⁵

4.5.3 Final Phase

Like in the ADA, ITAA provides that measures can be imposed in the form of provisional AD duties, definitive AD duties or price undertakings. AD duties are imposed in terms of the Customs and Excise Act, a supplementary legislation.⁶⁵⁶ Once a decision to impose AD duties is reached, all interested parties are granted 14 days to comment on the report.⁶⁵⁷

Once comments have been received and addressed, ITAC issues a report to the Minister of Trade and Industry recommending that AD duties be imposed on the goods under investigation.⁶⁵⁸ The Minister of Trade and Industry then requests the Minister of Finance to impose an applicable AD duty. The Minister of Finance ultimately has the power to not only impose but also remove or modify AD duties in accordance with the ADR.⁶⁵⁹

With regard to SACU, all final recommendations should be made to the SACU Tariff Board, which will then make a recommendation to the SACU Council of Ministers.⁶⁶⁰ As it stands, no such recommendations have been made to the SACU Tariff Board

⁶⁵³ Brink (2008) 257.

⁶⁵⁴ ADR 33.1.

⁶⁵⁵ ADR 33.2

⁶⁵⁶ Customs and Excise Act of 1964; Brink (2012a) 3; Sibanda (2015) 24.

⁶⁵⁷ ADR 35.1

⁶⁵⁸ Gomez LHB 'Is South Africa Using Trade Remedies as a Protectionist Measure? Reflections on a Court Case: International Trade Administration Commission v SCAW South Africa (2010) ZACC 6 (9 March 2010)' 66 available at <http://ssrn.com/abstract=1963218> (accessed 10 March 2017); Brink (2008) 257.

⁶⁵⁹ Gomez (2010) 66.

⁶⁶⁰ Brink (2008) 257.

because the SACU Council of Ministers requested that ITAC continue taking all AD decisions on behalf of all its Members.⁶⁶¹

Definitive AD measures have a life span of five years from the date of publication of ITAC's final recommendation unless otherwise specified or unless reviewed prior to the lapse of the five-year period.⁶⁶² These duties can also be imposed retroactively in accordance with the Customs and Excise Act.⁶⁶³ Proceedings may be terminated or suspended if a satisfactory price undertaking has been received from any exporter to the satisfaction of ITAC that the dumping or its injurious effect is thereof eliminated.⁶⁶⁴

4.6 REVIEWS

Anti-dumping duties cannot remain in place indefinitely and parties may utilise various types of review, being interim (or changed circumstances) reviews, sunset (or expiry) reviews, anti-circumvention reviews and new shipper reviews in an attempt to challenge ITAC's decisions.

4.6.1 Interim Reviews

The ITAC will only initiate an interim review if the party requesting such interim review has proven that circumstances have changed significantly.⁶⁶⁵ Where an importer, exporter or foreign producer did not cooperate during the investigation that eventually led to the imposition of AD duties and they eventually become willing to supply that information, such willingness will not qualify as 'significantly changed circumstances'.⁶⁶⁶

⁶⁶¹ Brink (2008) 257.

⁶⁶² ADR 38.1.

⁶⁶³ Customs and Excise Act No 91 of 1964.

⁶⁶⁴ ADR 39.1; see further para 2.2.2.4.1 above.

⁶⁶⁵ ADR 45.1; see also ITAC 'Trade Remedies' 5 available at www.itac.org.za/upload/Trade_Remedies.pdf (accessed 20 September 2017).

⁶⁶⁶ ADR 45.2.

4.6.2 Sunset Reviews

Similarly to the ADA⁶⁶⁷ and the ADM Regulations,⁶⁶⁸ AD duties in SA have a life span of five years unless it is established that removing these duties will have the effect of continuing the material injury experienced by the domestic industry.⁶⁶⁹ A duty remains in place if a sunset review is initiated before it expires until the review has been finalized.⁶⁷⁰

Sunset reviews can be simultaneously requested with interim reviews so as to expand or limit the scope of application or amend the level of any AD duties.⁶⁷¹ SA has conducted more than 64 sunset reviews.⁶⁷² They are not self-initiating and must be requested by the domestic industry.⁶⁷³ They serve to extend the duration of definitive AD duties.

Although the ADR provides that a notice of impending sunset reviews be published six months prior to the expiration of the AD duty, ITAC tends to disregard its own regulations by publishing a list in May of every year indicating the AD duties that will lapse in the following year.⁶⁷⁴

One major difference between an interim review and a sunset review is that an interim review considers the effect of changed circumstances on the existing duties, while a sunset review seeks to predict what the effect on the industry would be if the duty were to be removed.⁶⁷⁵ This foreseeability element is similar to that used when determining whether there is a 'threat of material injury' to the domestic industry.⁶⁷⁶

⁶⁶⁷ Article 11.3 of the ADA.

⁶⁶⁸ Regulation 16 (3) of the EACU ADR.

⁶⁶⁹ ADR 53.1; see also Brink (2008) 268.

⁶⁷⁰ ADR 53.2.

⁶⁷¹ ADR 45.3.

⁶⁷² Brink G 'Sunset Reviews in South Africa: New Direction Given by the High Court' *tralac* Trade Brief No.7 available at <https://www.tralac.org/publications/article/4582-sunset-reviews-in-south-africa-new-direction-given-by-the-high-court.html> (accessed 21 June 2017).

⁶⁷³ ADR 54.4 and 57.2.

⁶⁷⁴ Nakagawa J *Anti-Dumping laws and Practices of the New Users* (2007) 221.

⁶⁷⁵ Brink (2008) 269.

⁶⁷⁶ See para 4.4.7.2 above.

4.6.3 Anti-circumvention Reviews

The ADRs provide for anti-circumvention reviews whereas the ADA and the ADM Regulations do not. ‘Circumvention’ takes place when there is a change in the pattern of trade between third countries and SA or the common customs area of SACU. This change usually results from a practice, process or work⁶⁷⁷ for which there is no or insufficient cause or economic justification other than the imposition of an AD duty.⁶⁷⁸

Circumvention is also be deemed to have taken place if the remedial effects of the AD measures are being undermined in terms of the volumes or prices of the products under investigation⁶⁷⁹ or where dumping can be found in relation to normal values previously established for the like or similar products.⁶⁸⁰ The types of circumvention in the ADR are very detailed and include minor modifications to the product subject to the AD duty,⁶⁸¹ country hopping,⁶⁸² declaration under a different tariff heading⁶⁸³ and the export of parts, components and sub-assemblies with assembly in a third country or a customs area within SACU.⁶⁸⁴

Any finding of circumvention leads to the extension of existing measures,⁶⁸⁵ the extension of the scope of AD duties which can apply to parts, components or substitute like products⁶⁸⁶ or an increase of AD duties to compensate for the absorption of AD duties.⁶⁸⁷ It should be emphasized that there is no similar provision for anti-circumvention reviews in the ADA and as such, these reviews could be inconsistent with the ADA.

⁶⁷⁷ ADR 60 (a) (i).

⁶⁷⁸ ADR 60 (a) (ii).

⁶⁷⁹ ADR 60 (b).

⁶⁸⁰ ADR 60 (c).

⁶⁸¹ ADR 60.2 (b).

⁶⁸² ADR 60.2 (e); Country hopping is where supply is moved to a related party in another country. Here the industry is not required to submit normal value information if it can show that dumping is taking place when a comparison is made between the export price from the new supplier and the normal value established for the original supplier; See also Brink (2008) 270.

⁶⁸³ ADR 60.2 (f).

⁶⁸⁴ ADR 60.2 (c).

⁶⁸⁵ ADR 63 (c).

⁶⁸⁶ ADR 63 (b).

⁶⁸⁷ ADR 63 (a).

4.6.4 Judicial Reviews

Parties that are not satisfied with the ITAC's final or preliminary decision have the option to bring those determinations on review before a High Court and further an appeal to the Supreme Court of Appeal.⁶⁸⁸ This emphasises more accountability on ITAC and promotes rational, effective and responsive decision-making on its part.⁶⁸⁹ These grounds of review may reflect an Investigating Authority's improper consideration of the facts before it and also allows the courts to consider the substance of the administrative conduct of such organs of state.⁶⁹⁰

In *Roman v Williams*⁶⁹¹ the court held that the role of the courts in judicial reviews extends to its substance and merits. Therefore, a court does not need to refer a matter back to the authority for reconsideration (although it may do this).⁶⁹² It may make any order that it deems just and equitable under the circumstances.⁶⁹³

Judicial review of AD decisions is still in its infancy in SA and comes with many problems. It is cumbersome, lengthy and expensive, with no guarantee of success, as few judges understand the technical economic and accounting issues in these investigations.⁶⁹⁴ Only about 10 cases have been brought to the courts for judicial review however, be that as it may, statistics show that there is a high chance of successfully challenging ITAC in this regard.⁶⁹⁵

Courts generally refuse to consider the merit of investigations and opt to focus exclusively on whether the correct procedures were followed in investigations, despite

⁶⁸⁸ Nakagawa (2007) 221.

⁶⁸⁹ Nakagawa (2007) 222.

⁶⁹⁰ Nakagawa (2007) 222.

⁶⁹¹ *Roman v Williams* NO 1998 (1) SA 270 (CPD) 284I-285A.

⁶⁹² Nakagawa (2007) 223.

⁶⁹³ Nakagawa (2007) 223.

⁶⁹⁴ Brink (2015) 341.

⁶⁹⁵ Yilmaz (2013) 265.

explicitly being requested to rule on technical issues such as whether or not adjustments should be made.⁶⁹⁶

4.6.5 New Shipper Reviews

New shippers are exporters or producers that did not export the product upon which AD duties are subject, or did not export those goods in sufficient volumes at the time the AD investigation was carried out, provided that they are not related to any producer or exporter in the exporting country whose goods are subject to AD duties.⁶⁹⁷ The onus lies on the exporter to prove that his company is not and was not related to any other party that had exported to SA at the time that the AD investigation was carried out.⁶⁹⁸

A new shipper review consists of a single investigation phase as opposed to an original AD investigation, which normally consists of several phases. ITAC cannot consider this review until AD duties have actually been imposed.⁶⁹⁹ The new importer must provide ITAC with full information of normal value, export price and any other information that is considered necessary.⁷⁰⁰

When a new shipper review is initiated, AD duties in respect of the new shipper are withdrawn simultaneously.⁷⁰¹ Thereafter, ITAC can request SARS to simultaneously impose provisional payments at the same level as the AD duties, which will remain in force for the duration of the review.⁷⁰²

4.7 CONCLUSION

⁶⁹⁶ Brink (2015) 342.

⁶⁹⁷ ADR 48.2; Sibanda (2011) 222.

⁶⁹⁸ Murigi (2013) 81; see also ADR 51.2.

⁶⁹⁹ ADR 48.3.

⁷⁰⁰ ADR 49.1.

⁷⁰¹ ADR 50.1.

⁷⁰² ADR 50.2.

South Africa has utilised AD measures since 1914 and has the longest experience with these measures on the African continent. The ITAA and ADRs are generally in line with the provisions of the GATT 1994 and the ADA. In some instances these provisions provide greater clarity than that of the ADA and the GATT 1994.⁷⁰³ In other aspects however, they are in violation of the WTO Agreements.⁷⁰⁴ Be that as it may, South Africa offers the best practical example for the use of AD measures by developing countries on the African continent and serves as a great guide as to the steps that can be adopted by Uganda in the adoption and implementation of their own AD regime.



⁷⁰³ Brink (2015) 331 – 332.

⁷⁰⁴ Brink (2015) 331 – 332.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSIONS

5.1 CONCLUSIONS

In this study, the researcher set out to examine the World Trade Organisation (WTO) rules on anti-dumping (AD) as well as the Protocol on the Establishment of the East African Community Customs Union's (the Protocol) on AD in an effort to gain an understanding of the international and regional rules and procedures that must be followed for the adoption of a national AD regime in Uganda.

The scope of the discussion was limited to two major areas. First, an examination of the substantive and procedural requirements of the WTO AD rules under Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Implementation of Article VI of the General Agreement on Tariffs and Trade (ADA). Secondly, an examination of the substantive and procedural AD requirements of Article 16 of the Protocol and the East African Community Customs Union (Anti-dumping Measures) Regulations (ADM Regulations). It concluded with the study of the institutional and legislative framework of South Africa's (SA) national AD policy.

The study was based on two research questions:

1. How Uganda can adopt national AD legislation that is in line with its WTO obligations.
2. How Uganda can adopt national AD legislation that is in line with its Protocol's obligations.

The first research question was discussed in Chapter two. In this chapter, it was established that consistency with the WTO rules is paramount for any country that intends to draft national anti-dumping (AD) rules. These rules provide the blue print, which governs how Partner States may draft national AD policies. Therein, countries

are free to adopt additional provisions that compliment and expand those already provided under the WTO in an attempt to improve on the provisions already provided under the WTO rules. They may not however, deviate from the basic principles of those rules.

The second research question was discussed in Chapter three. In this chapter, it was established that the ADM Regulations apply to investigations or reviews initiated under the national legislation of a Partner State. Partner States therefore have to have national legislation or enact it if they do not already have it, in order to invoke the AD provisions of the Protocol. Where an investigation is initiated by a Partner State against a foreign country, the WTO rules will apply.

Political reality suggests that any country opting to establish or maintain an open import regime must have handy some sort of pressure valve to curb or manage occasional pressures for exceptional or sector specific protection.⁷⁰⁵ AD policies can be helpful in protecting some of these domestic industries thus giving them time to grow and expand their production abilities amidst pressures of liberalisation. Countries use trade remedies more frequently during their initial stages of development⁷⁰⁶ for precisely this reason. Accordingly, the aim of this study was to ascertain the international and regional requirements and obligations Uganda has to abide by in order to enact AD legislation that is not only consistent with WTO rules but also those of the Protocol.

This study revealed that both national and regional AD provisions have to be consistent with the WTO rules. National AD laws also have to be consistent with the provisions of the Protocol despite the fact that they are yet to be used by Partner States. An analysis of South Africa's (SA) national AD policy provided a practical illustration of how these rules can be adopted and applied by an African developing country that has many similarities to Uganda.⁷⁰⁷ In that sense, the study aimed to apprehend how these rules could guide Uganda into adopting a national policy that is simple, efficient and effective in protecting its infant and domestic industries.

⁷⁰⁵ See chapter 1 – Introduction above.

⁷⁰⁶ See para 1.1 above; para 1.3 above.

⁷⁰⁷ See para 1.3 above.

Summarily, this research has identified that WTO consistency is paramount not only in the adoption but also the implementation of national and regional AD rules. Inconsistency with these rules may lead to retaliatory action from affected country Members or the failure of the adoption of AD measures as a whole. Inconsistency with WTO rules may also lead to inapplicable national AD provisions and give rise to situations where these provisions cannot effectively be used to address genuine concerns of injurious dumping in Partner States.

This chapter will discuss some ways Uganda can adopt national AD measures that are not only in tandem with the WTO rules, but also cater for the unique developmental needs of Uganda, consequently aiding its development.

5.2 RECOMMENDATIONS FOR UGANDA

5.2.1 Existence of a National Legislative Framework

Uganda should adopt a national legal and institutional framework to engage the basic requirements for trade remedy action. This is true for both the WTO and the Protocol. The ADA specifies that each WTO Member must notify the Committee on Anti-Dumping Practices as to which of its authorities are competent to initiate and conduct investigations, as well as the domestic procedures governing the initiation and conduct of those investigations.⁷⁰⁸

The ADM Regulations are also applicable in conjunction with the existing national legislation of each Partner State for the conduct of AD investigations and reviews.⁷⁰⁹ This means that in order to use AD remedies on both an international and regional basis, it is necessary to have national legislation that is consistent with both the WTO and EACCU rules on AD.

⁷⁰⁸ See para 2.3 above.

⁷⁰⁹ See para 3.3 above.

Evidently, in order for local producers to apply for protection, they must have enabling national legislation prescribing the conditions and process that should be adhered to during an AD investigation, as well as an authority that can handle the case.⁷¹⁰ Uganda's national AD legislation should provide, in considerable detail, how and when dumping is established, how to calculate normal value and export price and constructed normal value and export price to make them comparable, how the dumping margin should be determined and so forth. They must also set a standard to determine when dumped imports have caused injury to the local industry.⁷¹¹ The current legal regime falls short of this perspective.

5.2.1.1 Public Interest

Once the process of enacting national AD rules ensues, it might be necessary to consider the addition of a public policy clause in these provisions. This is because AD measures may in actual fact tend to do more harm than good to consumers and producers who use imports as inputs in the production of their goods. Generally, public interest can be understood to mean 'impersonality, and as the opposite of giving privilege to private interest.'⁷¹² It appreciates all the various interests by analysing the likely economic impact of the imposition or non-imposition of measures on economic operators within the country.⁷¹³

Admittedly, AD duties are supposed to protect the domestic industry from injurious dumping. An AD investigation should technically not be conducted if the likelihood of imposing AD duties is remote. However, in a country such as Uganda which depends a lot on imports, the imposition of AD duties might not only affect the livelihood of the population in terms of access to basic needs such as medicine, baby food etc. but also the very industries they are trying to protect.

⁷¹⁰ See para 3.3 above; See para 2.3 above.

⁷¹¹ See para 4.4.10 above.

⁷¹² See para 4.4.10 above.

⁷¹³ See para 4.4.10 above

The conflict between the interests of the domestic producers and those of other parties such as consumers and industrial users should be fairly considered so as to make a policy that benefits all and not just one sector of the population. Accordingly, reasonable policy-making should give due regard to not only the effect dumped goods have on domestic producers producing the like product, but also the effect AD duties might have on other interested parties. A one sided approach to policy making can often lead to an injustice suffered by the other side, therefore given the adverse effect AD duties can have on a developing economy and public sectors such as health care, Uganda would be advised to include a mandatory public interest in their national AD legislation to cater for those necessities.

5.2.1.2 Judicial Review

Trade remedy legislation without judicial review is a contradiction. If there is no reliable judicial review system in the national legislation of a country, unjustified protectionist measures may follow and Investigating Authorities may be more tempted to act *ultra vires*.⁷¹⁴ Judicial remedies must be available through domestic tribunals, where private parties can bring their applications. They must also be available through inter-state dispute settlement mechanisms as provided under the Protocol.⁷¹⁵

In conclusion, it is important to set up independent judicial or tribunal bodies that can review not only AD decisions but also the process, which led to those decisions in an effort to ensure fair and just administrative action. Parties affected by AD measures should have recourse to these bodies as necessitated by Article 13 of the ADA, which provides that Member countries maintain judicial or administrative procedures for review purposes.

⁷¹⁴ See para 3.5.7 above and para 4.6.4 above.

⁷¹⁵ See para 2.2.2.6.4 above.

5.2.2 Institutional Structure and Investigating Authorities

For the application of any AD legislation, it is important to have in place properly functioning institutions that can implement the provisions therein. This is especially so because the Protocol does not make provision for an EAC investigating authority but leaves it up to the Partner States to investigate dumping in their countries on behalf of the East African Community Committee on Trade Remedies.⁷¹⁶ The ADA also requests Members to submit information about their AD investigating authorities once they have been established.⁷¹⁷

South Africa's AD regime experience may also be used to guide Uganda as to the structural form it should employ in establishing an AD institution. In SA, AD investigations are carried out by the International Trade Administration Commission of South Africa (ITAC), which also investigates dumping on behalf of Southern African Customs Union (SACU) Members. As SA is a frequent user of trade remedies, they have a permanent body that initiates and investigates dumping complaints.

Uganda on the other hand is not a frequent user of AD remedies at all. It may therefore start by establishing an ad hoc body to investigate AD until such time that it becomes a frequent user of the AD instrument, since setting up a permanent investigation body might prove expensive. As practiced by Mauritius, the ad hoc body would only be called in to conduct an investigation once a case has been filed.⁷¹⁸

The private sectors need to be involved in the investigatory process so as to enhance accountability by players in the AD proceedings. Since the imposition of AD duties mainly affects the private sector, their involvement should be emphasized so as to ensure that AD is not entirely a government-controlled process. The application of AD duties is a government controlled process and could be entirely in the government's interest to impose such duty. Adding to internal issues such as corruption, it would be

⁷¹⁶ See para 3.4 above.

⁷¹⁷ see para 2.3 above.

⁷¹⁸ See para 3.5 above.

wise to involve the private sector at large to oversee the decisions concerning AD so as to ensure balance and fairness in the implementation of AD policies in Uganda.

5.2.3 Developing Skills and Expertise

The reality is that lack of expertise, financial capacities and technical equipment makes it difficult for companies in developing countries to defend their interests in an AD investigation.⁷¹⁹ AD is a highly complex field of law that deals with *inter alia*, issues of economics, law and accountancy. The determination of normal value, export price and the margin of dumping for example, require technical expertise of a high level in both the accountancy and law fields, while the determination of injury requires economic skills.

Investigating officers must be trained in order to perform their functions properly. In this regard, workshops and specialised training units could be set up to train staff on the conduct and administration of trade remedy issues. Often the problem with African developing countries is not a lack of professionals, but rather a lack of incentives to retain such experts to work within the continent. Many times, the government officials who receive training in these fields opt to leave and work for international organisations and the private sector as opposed to their own countries.

To remedy such situations, countries can create incentives to encourage trainees to work in their countries upon completion of their training. Such incentives can include provisions such as mandatory work for the government for at least five years upon completion of training.

Uganda can also utilise some of the programs offered by organisations such as the WTO technical assistance for poor countries and the Anti-dumping Legislation Training Workshop provided by the Centre for International law, to train its officers for the purpose of conducting AD administration and investigations. These programs are easily

⁷¹⁹ See para 1.3 above.

accessible and could be very beneficial for a country attempting to adopt AD rules and gain experience to enable their implementation on a budget.

Having a skilled Investigating Authority with a high level of expertise is fundamental once the regulatory framework is laid out. AD investigations are often directed at countries that do not have the legal capacity to defend themselves. Countries with low-capabilities tend to forego challenges to AD duties due to the complexity of these disputes.

Uganda is also advised to seek knowledge of the AD investigation process by joining international AD disputes as interested parties merely to see how these rules are applied internationally. Uganda should also look to the already established national AD models of countries like SA and Kenya when drafting its legislation. Regard should be taken of SA's proposed amendments to the ADRs which were published on 10 November 2006, so as to determine how these changes might improve the SA AD regime, and perhaps influence the adoption of a better AD policy for Uganda.⁷²⁰

Local and foreign experts, private business persons and other interested parties such as lawyers, academics and economists can be consulted during the process of drafting Uganda's national AD policy because their input could be crucial in gaining an educated and perhaps practical understanding on the way AD investigations are conducted. The use of workshops, consultations, briefings and public hearings can also assist Uganda in its drafting process before the adoption of final AD rules. A series of briefings and public hearings can also be held to explain the rationale behind the Act to stakeholders and address their concerns.

5.2.4 Creating Awareness

The lack of capacity and awareness of AD remedies in most African countries is not only confined to the State but the private sector as well. Normally the private sector

⁷²⁰ See para 4.4.10 above.

comprises of individuals such as business people, farmers and small companies. It is overwhelmed by technical and organisational constraints, which prevent it from taking full advantage of international trade agreements signed by the government.

Setting up frameworks that can assist local producers as well as the private sector in Uganda is important especially where the notion of trade remedies is still very new, limited and hardly discussed. Additionally, creating awareness establishes a great platform upon which concerns from the general public can be identified and resolved. It is also a good way to educate the public about the use of AD as a trade remedy and affords all spheres of society a chance to get involved in the decision making process of policies that could inevitably affect their wellbeing.

Incorporation of capacity building programs for the private sector in setting up the trade remedy framework could prove to be advantageous in the functioning of an AD policy in Uganda. This has been done by countries such as SA through centres like the Trade Law Centre (Tralac), which contain law experts and economists that advise and educate the public at large about the purpose of national AD laws and how the process of AD initiations may be carried out through capacity building projects.

Organising individual domestic producers to co-operate and initiate an AD investigation may prove somewhat of a challenge in Uganda. This is because some producers such as farmers and small-scale industries are illiterate, poor or unaware of the possibility of initiating AD action against dumped products. Sectorial committees or bodies representing the industries at large could be helpful in relaying concerns to the AD authorities for consideration.⁷²¹ This way, individual producers could mitigate the costs involved in initiating AD proceedings.

5.2.5 Political Factors

⁷²¹ See para 3.5 above.

There is plenty of political influence in trade remedies. Even in situations where the imposition of AD duties can reasonably be justified, countries against whose products AD duties have been applied can and normally do retaliate. As African countries depend on aid and investment from foreign countries, the decision to resort to trade remedies against their trade partners especially if they are the main donors to such a country, becomes a challenge in fear of the termination or reduction of such aid or investment as a retaliatory act to adopting AD measures

This was evident recently when the USA threatened to cancel AGOA in reaction to the EAC's ban of second-hand clothes. In fact, Kenya had to rescind its ban on second hand clothes in fear of losing out on AGOA.⁷²²

It should be remembered that AD remedies aim to rectify the injury caused by dumping as opposed to penalise the act of dumping itself. Dumping alone is neither penalised by the WTO nor the Protocol unless it causes material injury to the domestic industry. With that in mind, it is important to remember that the essential function of trade remedies is to assist and contribute to the development of country economies. This can in turn improve trade between countries who are inevitably dependent upon each other for international trade.

UNIVERSITY of the
WESTERN CAPE

Accordingly, the mandatory inclusion of the lesser duty rule in Uganda's national AD legislation could mitigate the amount of AD duties imposed on a particular product. Price undertakings could also be used as opposed to imposing AD duties where exporters are given the option to either seize exporting goods at dumped prices or raise their prices. These options could discourage retaliation.

5.3 FINAL CONCLUSION

This mini thesis aimed to examine the international and regional rules on AD as provided by the WTO and the Protocol, as well as analyse the structural and

⁷²² See para 1.3 above.

institutional framework of SA's AD regime in an effort to provide some clarity on how Uganda could go about adopting a national AD regime that is not only functional but consistent with its international and regional obligations. This study uncovered that SA as well as the Protocol were in violation of the ADA in some aspects while they provided greater clarity in others. Despite these challenges, it is indisputable that Uganda, as a developing country, is in need of AD if it wishes to continue liberalising its trade and promote the development of its industries in the same breath. The essence of trade is to have tradable products and in order to facilitate and improve the trade of such products; countries are obliged to protect their domestic producers so that they may be able to trade products.



BIBLIOGRAPHY

BOOKS

Andersen H *EU Dumping Determinations and WTO Law* (2009) Kluwer Law International, Netherlands.

Bagwell KW, Bermann GA & Mavroidis PC *Law and Economics of Contingent Protection in International Trade* (2010) Cambridge University Press, USA.

Beseler J & Williams A *Anti-dumping and Anti-subsidy Law: The European Communities* (1986) The University of Michigan Press, Michigan.

Brink GF *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) Gosh Trading CC, South Africa.

Brookings Africa Growth Initiative *Accelerating Growth through Improved Intra-African Trade* (2012) Brookings Africa Growth Initiative available at <https://www.brookings.edu/research/accelerating-growth-through-improved-intra-africa-trade/> (accessed 31 January 2017).

Chande R, Matambalya FAST, Turya-Muhika S *Deepening East African Community (EAC) Integration* (2007) German Technical Cooperation; East African Business Council, Tanzania.

Czako J, Human J & Miranda J *A Handbook on Anti-dumping Investigations* (2003) Cambridge University Press, United Kingdom.

Dabbah MM *International and Comparative Competition Law* (2010) Cambridge University Press, United Kingdom.

Ferreira D & van Eyk M *Exploring Contemporary Barriers to International Trade in South Africa* (2017) Proceedings of Annual South African Business Research Conference 4 – 5 May 2017, South Africa.

Gallagher P, Low P & Stoler AL *Managing the Challenges of WTO Participation: 45 Case Studies* (2005) Cambridge University Press, United Kingdom.

Gathii JT *African Regional Trade Agreements as Legal Regimes* (2011) Cambridge University Press, United Kingdom.

Gottheil FM *Principles of Economics* (2013) Cengage Learning, USA.

Guzman AT & Sykes AO *Research Handbook in International Economic Law* (eds) (2007) Edward Elgar Publishing Limited, United Kingdom.

Herrmann C, Terhechte JP *European Yearbook of International Economic Law* (2012) Springer, Germany.

Horn H and Mavroidis *The WTO Case Law of 2004-2005: Legal and Economic Analysis* (2008) Cambridge University Press, USA.

Hoekman BM & Kostecki MM *The Political Economy of the World Trading System: The WTO and Beyond* 3rd ed (2013) Oxford University Press, United Kingdom.

Illy O 'Trade Remedies in Africa: Experiences, Challenges and Prospects' in *Can Global Issues Have a Regional Solution?* Volume 3, Issue 3 (2015) Bridges Africa (ICTSD).

International Trade Centre *Business Guide to Trade Remedies in Brazil: Anti-dumping, Countervailing and Safeguard Legislation Practices and Procedures* (2009) International Trade Centre, Switzerland.

Khadka R *The East African Tax System* (2015) Mkuki Ya Nyota, Dar es Salaam.

Kruger P, Denner W & Cronje JB *Comparing Safeguard Measures in Regional and Bilateral Agreements* (2009) Issue 22, *Tralac, International Centre for Trade and Sustainable Development* (ICTSD).

Lissel E *Safeguard Measures in Multilateral and Regional Trade Agreements* (2015) *tralac*, South Africa.

Macroy PFJ, Appleton AE & Plummer MG *The World Trade Organisation: Legal, Economic and Political Analysis* (2005) Springer, USA.

Mavroids PC, Messerlin PA and Wauters JM *The Law and Economics of Contingent Protection in the WTO* (2008) Edward Elgar Publishing, United Kingdom.

McCarthy C, Cronjé JB, Denner W, Fundira T, Mwanza W & Bursvik E *Supporting Regional Integration in East and Southern Africa: Review of Selected Issues* (2010) *Tralac*, South Africa.

Mehler A, Melber H, van Walraven *Africa Yearbook Volume 7: Politics, Economy and Society South of the Sahara in 2010* (2010) Koninklijke Brill NV, Netherlands.

Mshomba RE *Economic Integration in Africa: The East African Community in Comparative Perspective* (2017) Cambridge University Press, United Kingdom.

Mosoti V and Gobena A *International Trade Rules and the Agriculture Sector: Selected Implementation Issues* (2007) Food and Agriculture Organisation of the United Nations, Rome.

Nakagawa J *Anti-Dumping laws and Practices of the New Users* (2007) Cameron May, London.

Nedumpara JJ *Injury and Causation in Trade Remedy Law: A Study of WTO Law and Country Practices* (2016) Springer, Singapore.

Papadopoulos AS *International Dimension of EU Competition Law and Policy* (2010) Cambridge University Press, USA.

Peters WC *The Quest for an African Economic Community: Regional Integration and its Role in Achieving African Unity – The Case of SADC* (2010) European University Studies, Peter Lang, Hamburg.

Rao PK *WTO: Text & Cases* (2005) Excel Books, New Delhi.

Raslan RAA *Antidumping: A Developing Country Perspective* (2009) Kluwer Law International, Marburg.

Stanbrook C & Bentley P *Dumping and Subsidies: The Law and Procedures Governing the Imposition of Anti-Dumping and Countervailing Duties in the European Community* 3 ed (1996) Kluwer Law International, United Kingdom.

Terrance P *The GATT Uruguay Round: A negotiating History 1986 – 1994* (1993) Springer, Netherlands.

United Nations Conference on Trade and Development *Dispute Settlement: World Trade Organisation – 3.6 Anti-dumping Measures* (2003) United Nations, Geneva available at http://unctad.org/en/docs/edmmisc232add14_en.pdf (accessed at 10 October 2016).

United Nations Conference on Trade and Development *Training Module on the WTO Agreement on Anti-Dumping* (2006) United Nations, Geneva.

Van den Bossche P & Prevoost D *Essentials of WTO Law* (2016) Cambridge University Press, United Kingdom.

Van den Bossche P & Zdouc W *The Law and Policy of the World Trade Organisation: Text, Cases and Materials* 3 ed (2013) Cambridge University Press, United Kingdom.

Viner J *Dumping: A Problem in International Trade Law* (1923) University of Chicago Press, USA.

World Trade Organisation *Understanding the WTO* 5 ed (2015) World Trade Organisation.

Yilmaz M *Domestic Judicial Review of Trade Remedies: Experiences of the Most Active WTO Members* (2013) Cambridge University Press, USA.

Zhuang W *Intellectual Property Rights and Climate Change: Interpreting the TRIPS Agreement for Environmentally Sound Technologies* (2017) Cambridge University Press, United Kingdom.



CASES

South Africa

ITAC v SA Tyre Manufacturer's Conference ZASCA.

Roman v Williams NO 1998 (1) SA 270 (CPD).

SCAW v The International Trade Administration Commission unreported case 18829/2006 (T).

World Trade Organisation

Appellate Body Report, *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (GOES)*, WT/DS141/AB/R, adopted 31 August 2015.

Appellate Body Report, *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/AB/19, adopted 1 March 2001.

Appellate Body Report, *European Communities – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/25, adopted 15 February 2016.

Appellate Body Report, *Thailand – H-Beams*, WT/DS122/AB/R, adopted 12 March 2001.

Appellate Body Report, *United States–Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted September 2000.

Appellate Body Report *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 24 July 2001.

Appellate Body report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten From the European Communities Safeguards*, WT/DS166/AB/R, adopted 22 December 2000.

Appellate body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, adopted 11 August 2004.

Appellate body Report, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS264/AB/RW, adopted 15 August 2006.

Appellate Body Report, *United States – Anti-dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016.

Panel Report, *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil*, WT/DS241/R., adopted 19 May 2003.

Panel Report, *European Communities – Anti-dumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/R, adopted 12 March 2001.

Panel Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, adopted 25 November 1998.

Panel Report, *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 21 November 2001.

Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 11 December 2008.

Panel Report *United States – Anti-dumping Act of 1916*, WT/DS136/R, adopted 31 March 2000.

Panel Report *United States – Anti-dumping Act of 1916*, WT/DS162/R, adopted 29 May 2000.

Panel Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001.

INTERNET SOURCES

‘An Overview of ITAC’ available at <http://www.itac.org.za/pages/about-itac/an-overview-of> (accessed on 18 June 2017).

Investopedia 'Arm's Length Transaction' available at www.investopedia.com/terms/a/armslength.asp (accessed 20 September 2017).

East African Community 'Customs - Internal Tariffs' available at https://customs.eac.int/index.php?option=com_content&view=article&id=11&Itemid=107 (accessed 16 May 2017).

East African Community 'East African Community' available at <http://www.uneca.org/oria/pages/eac-%E2%80%93-east-african-community> (accessed 20 March 2017).

'East African Community, the, 1967-1977' available at <http://www.worldhistory.biz/sundries/31706-east-african-community-the-1967-1977.html> (accessed on 20 March 2017).

East African Legislative Assembly 'Anti-dumping and Quality Assurance to Take Centre Focus in EALA's Meeting in Nairobi' 14 October 2011 available at <http://www.eala.org/new/index.php/media-centre/press-releases/284-anti-dumping-and-quality-assurance-to-take-centre-focus-in-ealas-meeting-in-nairobi> (accessed 10 July 2017).

'History of the EAC' available at <http://www.eac.int/about/EAC-history>; Tanganyika is now known as Tanzania. For more information see <https://www.britannica.com/place/Tanzania> (accessed 10 July 2017).

'History of the East African Legislative Assembly' available at <http://www.eala.org/assembly/category/history> (accessed 18 November 2016).

Illy O 'Trade Remedies in Africa: Experience, Challenges, and Prospects' (2012) available at <http://www.princeton.edu/~pcglobal/conferences/GLF/oilly.pdf> (accessed 16 July 2016).

International Trade Administration Commission ‘Dumping Margin Calculations’ available at <http://www.itac.org.za/upload/Dumping%20Margins%20Calculations.pdf> (accessed 12 September 2017).

International Trade Administration Commission ‘Trade Remedies’ available at www.itac.org.za/upload/Trade_Remedies.pdf (accessed 20 September 2017)

Joubert N ‘Managing the Challenges of WTO Participation: The Reform of South Africa’s Anti-Dumping Regime’ available at http://www.wto.org/English/res_e/booksp_e/casestudies_e/case38_e.htm#remedies (accessed 11 June 2017).

Messerlin PA ‘China in the World Trade Organization: Antidumping and Safeguards’ (2004) available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.203.2110&rep=rep1&type=pdf> (accessed 10 February 2017).

Mwapachu JV ‘EAC: Past, Present and Future’ *FIRST Magazine* available at <http://www.firstmagazine.com/DownloadSpecialistPublicationDetail.480.aspx> (accessed 03 April 2017).

Trade Mark East Africa ‘The Accession of South Sudan to the EAC’ available at <https://www.trademarka.com/news/lets-embrace-the-accession-of-south-sudan-to-the-eac/> (accessed 12 August 2017).

World Trade Organisation ‘Burundi and the WTO’ available at https://www.wto.org/english/thewto_e/countries_e/burundi_e.htm (accessed 10 March 2017).

World Trade Organisation E-learning *Introduction to the WTO* available at http://ecampus.wto.org/admin/files/Course_378/CourseContents/N-INTRO-E-Print.pdf (accessed 14 August 2016).

World Trade Organisation E-learning *Trade Remedies* available at https://ecampus.wto.org/admin/files/Course_628/CourseContents/TR-R3-E-Print.pdf (accessed 14 August 2016).

World Trade Organisation: Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements, Uganda - G/ADP/N/1/UGA/2; G/SCM/N/1/UGA/2 (20 September 1996) available at [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=\(%20@Symbol=%20g/adp/n/*%20and%20uga\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20g/adp/n/*%20and%20uga)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#) (accessed 04 February 2017).

World Trade Organisation 'Regional Trade Agreements and Preferential Trade Agreements' available at https://www.wto.org/english/tratop_e/region_e/rta_pta_e.htm (accessed 12 March 2017).

World Trade Organisation 'Rwanda and the WTO' available at https://www.wto.org/english/thewto_e/countries_e/rwanda_e.htm (accessed 10 March 2017).

World Trade Organisation 'Statistics on anti-dumping' available at http://www.wto.org/english/tratop_e/adp_e/adp_e.htm (accessed 06 March 2017).

World Trade Organisation 'Technical Information on Anti-dumping' available at https://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (accessed 10 March 2017).

World Trade Organisation 'Understanding the WTO: Basics - Principles of the Trading System' available at

http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 17 April 2017).

World Trade Organisation ‘Understanding the WTO: The Agreements on Anti-dumping, Subsidies, Safeguards: Contingencies, etc’ available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (accessed 10 March 2017).

‘WTO Accessions: Sudan’ available at https://www.wto.org/english/thewto_e/acc_e/a1_soudan_e.htm (accessed 10 March 2017).

WTO Analytical Index: Anti-Dumping Agreement available at http://www.wto.org/english/res_e/booksp_e/analytic_index_e/anti_dumping_02_e.htm (accessed 4 May 2017).

Zvidza T *Chapter 2: The History of Dumping and Antidumping Actions* 23 also available at <http://contentpro.seals.ac.za/iii/cpro/app?id=7464469227955338&itemId=1000060&lang=eng&service=blob&suite=def> (accessed 14 February 2017).

JOURNAL ARTICLES

Adamantopoulos K & De Notaris D ‘The future of the WTO and the reform of the Anti-Dumping Agreement: A legal Perspective’ (2000) Vol 24, Issue 1 *Fordham International Law Journal* 30, 61.

Aryeetey E & Moyo N ‘Industrialisation for Structural Transformation in Africa: Appropriate Roles for the State’ (2012) Vol 21, Issue 2, *Journal of African Economics* ii55, ii85 available at

https://academic.oup.com/jae/article/21/suppl_2/ii55/691493/Industrialisation-for-Structural-Transformation-in (accessed 25 August 2017).

Bown P 'The WTO and Anti-dumping in Developing Countries' (2008) Vol 20, No.2 *Economics and Politics* 255, 288.

Bridges Africa 'Can Global Issues Have a Regional Solution?' (2015) Vol 3, Issue 3, *International Centre for Trade and Sustainable Development*, Geneva.

Brink G 'A Nutshell Guide to Anti-dumping Action' (2008) Vol 71 *Journal for Contemporary Roman Dutch Law* 255, 271.

Brink G 'Dumping and Injury Margin Calculation Methods: Ten Major Problems in South Africa' (2007) Vol 2, Issue 1, *Global Trade and Customs Journal* 59, 65.

Brink G 'National Interest in Anti-Dumping Investigations' (2009) Vol 126 *South African Law Journal* 316, 359.

Brink G 'One Hundred Years of Anti-Dumping in South Africa' (2015) Vol 49 *Journal of World Trade* 325, 350.

Brink G 'X-Raying Injury Findings in South Africa's Anti-dumping Investigations' (2015) Vol 23, Issue 1 *African Journal of International and Comparative Law* 144, 173.

Denton R '(Why) Should Nations Utilize Antidumping Measures?' (1989) Vol 11, Issue 1 *Michigan Journal of International Law* 224, 272.

Edwards L 'Anti-dumping in South Africa: From Proliferation to Moderation' (2011) *SSRN Electronic Journal* available at <http://ssrn.com/abstract=1871948> (accessed 10 May 2017).

Gomez LHB 'Is South Africa Using Trade Remedies as a Protectionist Measure? Reflections on a Court Case: International Trade Administration Commission v SCAW South Africa (2010) ZACC 6 (9 March 2010)' (2010) No. 34 *Revista de Derecho Y Economia* 63, 71 available at <http://ssrn.com/abstract=1963218> (accessed 10 November 2016)

Gupta K & Choudhury V 'Anti-Dumping & Developing Countries' (2011) Vol 11, *Korea University Law Review* 117, 134.

Horlick G and Vermulst E 'The 10 Major Problems with the Anti-dumping Instrument: An Attempt at Synthesis' (2005) Vol 39 *Journal of World Trade* 67, 73.

Lesguillons H 'E.E.C. Anti dumping and Anti Subsidy Law' (1988) *Droit Économique International* 511, 536.

Matsushita M 'Some International and Domestic Anti-dumping Issues' (2010) *Asian Journal of WTO & International Health Law and Policy* 249, 268.

McNelis N 'Anti-dumping Law Explained' (2002) Vol 3, Issue 2 *In-House Perspective* 23, 27.

Messerlin PA 'China in the World Trade Organization: Antidumping and Safeguards' (2004) Vol 18, issue 1 *The World Bank Economic Review* 105, 130.

Mutai HK 'Regional Trade Integration Strategies Under SADC and the EAC: A Comparative Analysis' (2011) Vol 1, *Southern African Development Community Law Journal* 81, 97.

Ndlovu L 'An Assessment of the WTO Compliance of the Recent Regulatory Regime of South Africa's Dumping and Anti-dumping Law' (2010) Vol 5, Issue 1 *Journal of International Commercial Law and Technology* 29, 40.

Ndlovu L 'South Africa and the World Trade Organisation Anti-Dumping Agreement Nineteen years Into Democracy' (2013) Vol 28, Issue 2 *Southern African Public Law* 279, 307.

Osode PC 'An Assessment of the WTO-Consistency of the Procedural Aspects of South African Anti-Dumping Law and Practice' (2003 – 2004) *Penn State International Law Review* 22, 32.

Pangratis A & Vermulst E 'Injury in Anti-dumping proceedings: The Need to Look Beyond the Uruguay Round Results' (2013) *Journal of World Trade* 61, 96.

Pam AA 'Anti-dumping and Countervailing Measures and Developing Countries: Recent Development' *Nigerian Current Law Review* 2007-2010, 43, 83.

Prusa TJ 'Anti-dumping: A Growing Problem in International Trade' (2005) Vol 28, Issue 5 *The World Economy* 683, 700.

Satapathy C 'Review of WTO Rules on Antidumping and Countervailing Measures' (2006) *Economics and Political Weekly* 263, 269.

Sibanda O 'Are anti-dumping measures in multilateral trade justifiable or not? A call for an academic debate in Africa' (2003) Vol 44, Issue 2, *Codicillus* 86, 91 available at <http://hdl.handle.net/10520/EJC27402> (accessed 20 April 2017)

Sibanda OS 'An Assessment of WTO Compliance by the South Africa Anti-dumping Regime in Respect of the Determination of Causation' (2013) Vol 76 *Journal of Contemporary Roman-Dutch Law* 173, 196 available at <http://ssrn.com/abstract=2363892> (accessed 12 February 2017)

Sibanda OS 'Public Interest Considerations in the South African Anti-Dumping and Competition Law, Policy and Practice' (2015) Vol 14, *International Business & Economics Research Journal* 735, 744.

Sibanda OS 'The effects of the South African anti-dumping and competition measures upon foreign direct investment' (2014) Vol 9, Issue 1 *Journal of Business and Retail Management Research* 128, 134

Vinti C 'A Spring Without Water: The Conundrum of Anti-Dumping Duties in South African Law' (2016) *PEL/PELJ* 41 available at <http://www.saflii.org/za/journals/PER/2016/41.html> (accessed on 02 November 2016)

Young L & Wainio J 'The Anti-dumping Negotiations: Proposals, Positions and Anti-dumping Profiles' (2005) Vol 6, *Estey Centre Journal of International Law and Trade Policy* 7, 46.

LEGISLATION

Board on Tariffs and Trade Act, 1986.

Board of Trade and Industries Act 1924.

Board of Trade and Industry Amendment Act 1992.

Board on Tariffs and Trade Amendment Act, 1995.

Customs Tariff Act 26 of 1914.

Customs and Excise Duty Act 1964.

Customs and Excise Act 91 of 1964.

Customs and Excise Amendment Act, 1995.

Customs Tariff and Excise Duties Amendment Act 36 of 1925.

International Trade Administration Act, 71 of 2002.

Promotion of Access to Information Act, 2 of 2000.

Promotion of Administrative Justice Act, 3 of 2000

AGREEMENTS

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

Treaty for the establishment of the East African Community

The General Agreement on Tariffs and Trade 1994

The General Agreement on Tariffs and Trade 1947

The Protocol for the Establishment of the East African Community Customs Union

WTO Agreement: Marrakesh Agreement Establishing the World Trade Organisation, April 15 1994, 33 I.L.M 1144, 1867 UNTS 154, (1994).

NEWS ARTICLES

Erasmus G 'Are African Trade Arrangements rediscovering Trade Remedies?' *tralac* 16 August 2017 available at <https://www.tralac.org/discussions/article/12011-are-african-trade-arrangements-rediscovering-trade-remedies.html> (accessed 20 August 2017)

Esiara K 'EAC divided on ban on used clothes, shoes as US lobbies exert pressure' *Daily Nation* 1 June 2017 available at <http://www.google.co.za/amp/www.theeastafrican.co.ke/business/EAC-divided-on-ban-on-used-clothes/2560-3951256-view-asAMP-g94n8fz/index.html> (accessed 2 September 2017)

Kelley K 'East Africa: Revisit Ban on Secondhand Clothes, 3 EAC States Urged' *The Citizen* August 2017 available at <http://www.thecitizen.co.tz/News/Revisit-ban-on-secondhand-clothes--3-EAC-states-urged/1840340-4050456-71hy8qz/index.html> (accessed 20 August 2017)

Mangeni F 'Customized trade remedies in Africa – the case of the COMESA-EAC-SADC Tripartite Free Trade Agreement' *tralac* 15 August 2017 available at <https://www.tralac.org/news/article/12001-customized-trade-remedies-in-africa-the-case-of-the-comesa-eac-sadc-tripartite-free-trade-area.html> (accessed 16 August 2017)

Mwai C 'Trade experts fault US over AGOA review' *The New Times* 24 July 2017 available at <https://www.tralac.org/news/article/11925-trade-experts-fault-us-over-agoa-review.html> (accessed 10 August 2017)

Mwanza W 'Optimising the dispute resolution process for trade remedies in the EAC' *tralac* 01 April 2015 available at <https://www.tralac.org/discussions/article/7222-optimising-the-dispute-resolution-process-for-trade-remedies-in-the-eac.html> (accessed 12 June 2017)

Muchira N 'Africa: United States Assures Africa AGOA Pact Is Here to Stay' *The Monitor* 23 August 2017 available at <http://allafrica.com/stories/201708230132.html> (accessed 25 August 2017).

Olingo A 'East Africa: Secondhand Clothes Ban Shelved to Save Agoa Trade Agreement' *The EastAfrican* 25 June 2017 <http://allafrica.com/stories/201706270446.html> (accessed 10 August 2017).

SEATINI ‘Uganda and the EAC should stand firm on the decision to phase out second hand clothes’ 13 July 2017 *Strengthening Africa in World Trade* available at <http://www.seatiniuganda.org/media-center/news-highlights/103-uganda-and-the-eac-should-stand-firm-on-the-decision-to-progressively-phase-out-second-hand-clothes-2.html> (accessed 10 August 2017).

NOTICES

Notice 1606 of 2006 in *Government Gazette* No. 29382 of 10 November 2006.

REPORTS

10th EAC Regional Forum on Non-Tariff barriers 6th - 9th March 2013 Bujumbura, Burundi: Report of the Meeting (REF: EAC/01/2013).

Board Report No. 30 *Dumping of Cement*.

Board Report No. 42 *Dumping or unfair competition*, 18 November 1924.

Board Report No. 3329 *Roller Bearings – USA*, 1992.

Brink G ‘Sunset Reviews in South Africa: New Direction Given by the High Court’ *Tralac* Trade Brief No.7 available at <https://www.tralac.org/publications/article/4582-sunset-reviews-in-south-africa-new-direction-given-by-the-high-court.html> (accessed 21 June 2017).

East African Community *Trade Report 2014* (2014) East African Community

International Monetary Fund *Uganda: Poverty Reduction Strategy Paper Annual Progress Report* (2003) International Monetary Fund.

International Trade Administration of South Africa Report No. 306 *Sunset Review of the Anti-dumping Duties on Colour Coated Steel Products Originating in or Imported from Australia: Final Determination*.

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

Mugisa E, Onyango C, Mugoya P *An Evaluation of the Implementation and Impact of the East African Community Customs Union* (Final Report March 2009) East African Community.

Omolo MWO *Trade Remedies: Subsidies and Countervailing Measures: Its Application in Developing Countries* (2013) Institute of Economic Affairs.

World Trade Organisation *Trade Policy Review Report by the Secretariat East African Community* WT/TPR/S/271, adopted 17 October 2012.

WTO Trade Policy Review Body 'Trade Policy Review Report by the Secretariat: East African Community' WT/TPR/S/171, adopted 20 September 2006.

World Trade Organisation *World Trade Report 2009: Trade Policy Commitments and Contingency Measures* (2009) World Trade Organisation.

SPEECHES

Remarks by the Honourable Minister of Trade Industry and Cooperatives at a meeting to discuss trade remedies laws for Uganda held at Nile Resort Jinja from 14 to 17 August 2012 available at www.mtic.go.ug/171-hon-mtic-speech-on-trade-remedies (accessed 23 October 2016).

THESES

Brink G *A Theoretical Framework for Anti-dumping in South Africa* (unpublished LLD thesis, University of Pretoria, 2004).

Murigi WC *The Development of a Successful Anti-dumping Regime in Kenya* (unpublished LLM thesis, University of the Western Cape, 2013).

Sibanda OS *South African Anti-dumping and Practice: A Judicial and Comparative Analysis of Procedural and Substantive Issues* (unpublished LLD thesis, North-West University, 2015).

Tao M *Dumping and Antidumping Regulations with Specific Reference to the Legal Framework in South Africa and China* (unpublished LLM thesis, University of the Free State, 2006).

Viktoriia K *Public Interest Consideration in Domestic and International Anti-dumping Disciplines* (Published LLM Thesis, World Trade Institute, 2011).

WORKING PAPERS

Aggarwal A 'Anti dumping Law and Practice: An Indian Perspective' (2002) Working Paper No. 85 *Indian Council for Research on International Economics Relations*.

Aggarwal A 'Patterns and Determinants of Anti-Dumping: A Worldwide Perspective (2003) Working Paper No. 113 *Indian Council for Research on International Economic Relations*.

Aggarwal A 'The WTO Anti-Dumping Agreement: Possible Reform Through the Inclusion of a Public Interest Clause' (2004) Working Paper No. 142 *Indian Council for Research on International Economic Relations*.

Brink G 'Anti-Dumping in South Africa' (2012) Working Paper D12WP07/2012 *Tralac*.

Brink GF 'Proposed Amendments to the anti-dumping Regulations: Are the Amendments in Order?' (2006) Working Paper No. 21/2006 *Tralac*.

Busse M & Shams R *Trade Effects of the East African Community: Do We Need a Transitional Fund?* (2003) Working Paper No. 240 *Hamburg Institute of International Economics*.

Charalambides NA 'Legal and Economic Assessment of South Sudan's Possible Accession to the EAC' (2017) Working Paper T17WP01/2017 *Tralac*.

Denner W 'Protectionism, Trade Remedies and Safeguards: A Quick Guide for African Countries' (2009) Working Paper No. 6/2009 *Tralac*.

Finger JM 'The Origins and Evolution of Antidumping Regulation' (1991) Policy Research Working Paper WPS83 *Country Economics Department, The World Bank*.

Illy O 'African Countries and the Challenges of Trade Remedy Mechanisms Within the WTO' (2016) Working Paper No. 2016/03 *Society of International Economic Law*.

Illy O 'Trade Remedies in Africa: Experience, Challenges and Prospects' (2012) 4th *Global Leaders Fellowship Program Annual Colloquium*, Princeton available at <https://www.princeton.edu/~pcglobal/conferences/GLF/oilly.pdf> (accessed 13 June 2017).

Krishna R 'Antidumping in Law and Practice' (1997) Policy Research Working Paper WPS1823 *Legal Department, The World Bank*.

Letsoalo MA 'The Implication of a COMESA-EAC-SADC Tripartite Free Trade Agreement, Part 1: Regional Integration in the Multilateral Trading System' (2011) *tralac*.

McIntyre MA 'Trade Integration in the East African Community: An Assessment for Kenya' (2005) Working Paper No.05/143 *International Monetary Fund*.

Mutai HK 'Assessing the Implementation of the East African Community Common Market: A Preliminary Scoping Study' (2015) Working Paper S15WP04/2015 *tralac*.

Ndlovu L 'South Africa and the World Trade Organisation Anti-dumping Agreement' (2012) Working Paper No. 2012/17 *Society of International Economic Law (SIEL)* available at <http://www.ssrn.com/link/SIEL-2012-Singapore-Conference.html> (accessed 12 February 2017).

Reich A 'Institutional and Substantive Reform of the Anti-Dumping and Subsidy Agreements – Lessons from Israeli Experience' (2003) Working Paper No. 4-04 *Bar-Illan University Public Law* available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=437220 (accessed 15 July 2017).

Stahl HM 'Tariff Liberalisation Impacts of the EAC Customs Union in Perspective' (2005) Working Paper No. 4/2005 *Tralac*.

Sykes AO 'Trade Remedy Laws' (2005) Working Paper No. 240 *John M Online Program in Law and Economics*.

Viljoen W 'AGOA deliberations – removal of anti-dumping duties or loss of duty free access?' (08 April 2015) discussion paper *Tralac* available at

<https://www.tralac.org/discussions/article/7245-agoa-deliberations-removal-of-anti-dumping-duties-or-a-loss-of-duty-free-access.html> (accessed 10 April 2017).

Zanardi M 'Antidumping: A Problem in International Trade' (2005) Discussion Paper No. 2005-85 *Tilburg University & CentER*.

OTHER SOURCES

Brink G 'Trade Remedies in the Pacific: An investigation into the advantages and disadvantages of using trade remedies in Pacific Island Countries' (2015).

Firew S 'East African Community (EAC) Regional Economic Integration and its Impact on Trade Flows: A Study on Intra-Regional Trade, Trade Creation and Trade Barriers' (2014) Australian National University.

Replies of the European Communities to the List of Questions Posed by Members on the Application of the Lesser Duty Rule and Consideration of Public Interest, G/ADP/AHG/W/114, 11 April 2001.

UNIVERSITY of the
WESTERN CAPE